CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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Comment Intake
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Debt Collection Practices (Regulation F): Supplemental Notice of Proposed Rulemaking (Docket No. CFPB–2020–0010)

Dear Sir or Madam:

The U.S. Chamber of Commerce's ("Chamber") Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity to comment on the supplemental notice of proposed rulemaking ("Proposal") issued by the Consumer Financial Protection Bureau ("Bureau") regarding time-barred debt—i.e., a debt that a court no longer will compel a consumer to repay.[1]

As we explained in our response to the Bureau's broader proposal,[2] debt collection is a critical component of the consumer credit system. Enabling effective collections is essential to maintaining consumers' access to affordable credit. At the same time, collections often occur at moments of significant stress in consumers' lives, making it important for debt collectors to act in a respectful and professional manner. Any debt collection policy thus must simultaneously allow debt collectors to serve their important function in the credit system while ensuring that consumers are treated with dignity and respect.

As the Bureau explains, state law establishes time limits for judicial enforcement of debts.[3] When a debt owner brings suit after this time limit has expired, a consumer may invoke the governing statute of limitations as an affirmative defense and the court will dismiss the case. With the exception of two states,

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[1] *See* Supplemental Notice of Proposed Rulemaking, Debt Collection Practices (Regulation F), 85 Fed. Reg. 12672 (Mar. 3, 2020) ("Proposal").
[2] *See* Proposed Rule, Debt Collection Practices (Regulation F), 84 Fed. Reg. 23274 (May 21, 2019).
[3] Proposal, 85 Fed. Reg. at 12672.

however, the expiration of the statute of limitation does not extinguish the debt itself.[4] In other words, a debt collector may continue to ask the consumer to repay the debt regardless of its age, even if a court would not compel repayment. Moreover, as the Bureau also notes, acknowledgement or payment of a portion of the debt may lead to the "revival" of the debt in many states, rendering it enforceable in court once more.[5]

As the Bureau highlights, the intricacies of statutes of limitations, revival laws, and other statutes, along with the possibility of consumer confusion, has led to the development of a complex web of case law governing collection of time-barred debt. Thus, for example, the Bureau notes that "debt collectors may be unclear about their disclosure obligations when collecting time-barred debt through non-litigation means."[6] "Even in jurisdictions with State-law disclosure requirements, debt collectors may not know whether such disclosure is sufficient to comply with the [Fair Debt Collection Practices Act] FDCPA."[7]

The Bureau proposes to clarify this area of uncertainty. In particular, it would require debt collectors to inform a consumer about the expiration of the statute of limitations and about the possibility of revival whenever they are collecting on a debt that they "know or should know" is no longer enforceable in court.

We are glad, as an initial matter, that the Bureau rejected calls to prohibit the collection of valid (but time-barred) debt, to ban revival of time-barred debts, or to impose a strict liability standard.[8] Those alternatives would not advance the goals of the FDCPA or the policies underlying statutes of limitations. They instead would have significant negative consequences for consumers, including increased litigation prior to the expiration of the statute of limitations and, ultimately, negative impacts on the availability and cost of credit, particularly for lower-income consumers.

We are concerned nonetheless that the Proposal will be unworkable in practice. It is unreasonable to subject a debt collector to liability under the FDCPA based on the notion that—notwithstanding the enormous uncertainty in governing law—the debt collector "should know" that a debt was no longer enforceable in court. Likewise, we are concerned that the Proposal could subject debt collectors to unnecessary litigation and liability because of minor, technical flaws in disclosures provided to consumers. We accordingly write to emphasize two points:

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[4] *See id.* (explaining the rules of Mississippi and Wisconsin).
[5] *See id.* at 12673.
[6] *Id.* at 12674.
[7] *Id.*
[8] *See id.* at 12680.

- The proposed "know or should know" standard for disclosing that a debt is time-barred is unworkable in its current form and will chill legitimate collections activities; and

- The Bureau should avoid imposing liability based on minor technical flaws in collector communications.

Analysis

1. The proposed "know or should know" standard for disclosing that a debt is time-barred is unworkable in its current form and will chill legitimate collections activities.

The Bureau acknowledges the many complexities associated with determining whether a debt is time-barred.

First, the law in this area is unclear. Statutes of limitations are often ambiguous, for example, as are the rules around accrual of actions, tolling of statutes of limitations, and revival of debts. Choice of law rules likewise often are uncertain, throwing doubt over the entire legal framework for a time-barred debt. Consequently, even lawyers often cannot agree when debts are time barred. And to be clear, the vast majority of debt collectors are not lawyers. Nor should they be required to act as lawyers or to employ or retain lawyers in order to perform their jobs.

Second, the relevant facts also are frequently unclear, making it very difficult to determine whether a particular debt is time barred—even if the collector and consumer agree on what the law requires. Without knowing the entire payment history of a debt, as well as every discussion of payment options, for example, a debt collector will not know whether the statute of limitations was tolled for a debt or whether it was revived after becoming time-barred.

For many older debts, these complexities will make it very difficult, if not impossible, for a debt collector to know with any confidence whether they are time-barred. Courts likewise will not be able to determine whether a collector knew or should have known that such debts were time-barred when pursuing collection activities. Relatedly, it is not clear whether the Bureau intends to require a debt collector to investigate the status of a debt, including in the frequent case when a consumer has more information about a debt (e.g., whether the consumer and the creditor ever agreed to toll the statute of limitations) or when the cost of performing such an investigation would substantially exceed any recovery the debt collector can expect, even if the debt is paid in full. Nor is it clear what duty a debt collector would have to accurately predict how a court would resolve uncertain legal questions.

Moreover, the Proposal would put debt collectors in the untenable position of having to advise consumers about the governing statute of limitations and other applicable laws, subjecting them to the risk of engaging in the unlicensed practice of law.

The Proposal nonetheless would subject debt collectors to liability under the FDCPA if they fail to include a required disclosure under this uncertain standard. Practically speaking, this is certain to lead to increased litigation under the FDCPA and to increased pressure on debt collectors to settle even meritless claims. This is not only unfair to debt collectors, but also will have distortive effects in the marketplace. Rather than run the risk of litigation, debt collectors are certain to become far more hesitant before seeking to collect upon older debts, notwithstanding that they remain valid obligations. This will further reduce the value of these older debts in a manner that will have two negative consequences. *First*, debt collectors are likely to bring suits to enforce debts earlier in the process in order to improve the chance of collection and avoid being accused of seeking to enforce time-barred debt. *Second*, the reduced value of older debts will ultimately feed back into the cost and availability of credit, particularly for consumers with higher-risk lending profiles.

It is no answer to say that a collector should err on the side of including a disclosure relating to time-barred debt. Such an unnecessary disclosure may itself confuse a consumer and lead in turn to litigation against a debt collector. (Only a small percentage of collections activities relate to potentially time-barred debts, meaning that any generally applicable disclosure is far more likely to confuse consumers than inform them.)

The Bureau consequently should revise the Proposal so that disclosure requirements relating to time-barred debt are no longer triggered by this "know or should know" standard, at least without the addition of significant safeguards. Any final rule should impose reasonable requirements upon debt collectors that are easily understood and that can be met through objectively determinable compliance activities. In addition, the Bureau should provide debt collectors with clear safe harbors that remove any ambiguity as to legal liability under the FDCPA and thereby discourage counterproductive and costly litigation that unsettles the meaning of any final rule and makes compliance more unpredictable and harder for a debt collector to manage. The Bureau thereby should encourage debt collectors to continue to maintain reasonable and repeatable processes, based on objective criteria that allow them to meet their compliance obligations, confident in their knowledge of what the law requires.

2. The Bureau should avoid imposing liability based on minor technical flaws in collector communications.

The Proposal provides a model disclosure that includes a visually-distinct, colored box with a warning icon, in addition to particular text. The Proposal requires that the disclosure ultimately provided to a consumer be "substantially similar" to this model.[9] While debt collectors are familiar with this "substantially similar" standard, we have heard concerns that it may be unclear how it applies to disclosure styles in this context, particularly with respect to the use of various fonts and icons, as well as with respect to the use of bold text and different colors. Likewise, the Proposal would provide for four alternative disclosure options that the debt collector would be required to choose between, raising questions about which option should be used in various circumstances. Moreover, the Proposal leaves open the possibility that a debt collector may be sued for unnecessarily including a time-barred debt disclosure.

These and other elements of the Proposal's disclosure requirement create significant risk of litigation over minor technical compliance issues. We understand that the Bureau did not intend to encourage such litigation, which we believe would distract debt collectors from more meaningful compliance obligations under the FDCPA, thus jeopardizing rather than advancing the statute's important goals. The Bureau nonetheless can do more to prevent this harmful outcome. We consequently would urge the Bureau to ensure that any final rule does not unleash a wave of litigation over technical compliance issues relating to the contemplated disclosures. In particular, the Bureau should appropriately clarify any obligations under any final rule through appropriate commentary and provide meaningful safe harbors that can be efficiently and reliably asserted in response to unjustified litigation.

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We thank you for your consideration of these comments and would be happy to discuss these issues further.

Sincerely,

Julie Stitzel

[9] Proposal §1006.26(c)(3)(i).