



August 4, 2020

Consumer Financial Protection Bureau
1700 G St NW
Washington, DC 20552

Via: <http://www.regulations.gov>

Re: Docket ID CFPB-2020-0010 (supplemental notice), CFPB-2020-0010-0022 (time extension), Debt Collection Practices (Regulation F)

The National Association of Consumer Advocates (NACA) submits these comments in response to the Consumer Financial Protection Bureau's (CFPB or Bureau) supplemental notice of proposed rulemaking that would mandate written disclosures during the collection of time-barred debts.

Time-barred debt collection is an unsettling practice. It relies on continuous deception of a consumer about their rights. Disclosures that the Bureau is currently proposing, which are meant to make consumers aware of their rights concerning old, expired debt, are inadequate to combat the pervasive harms caused by collectors' deceptive practices in this area. Additionally, the Bureau's previous proposal to prohibit debt collectors from suing or threatening to sue a consumer on a time-barred debt only when the collector knows or should know the debt to be time-barred creates unnecessary burdens on consumers and perverse incentives for collectors.

We strongly recommend that the Bureau prohibit all collection of time-barred debt.

Data shows time-barred debt collection is a widespread problem

In 2019, NACA conducted a survey of consumer attorneys to get a snapshot of consumers' experiences with debt collection. The survey received 134 responses from consumer attorneys, representing 34 states and Washington, D.C., from private law firms, legal services organizations, and non-profit organizations.¹

According to the survey report, 85% of respondents, an overwhelming majority, had represented clients in cases involving an attempt to collect a time-barred debt in the two-year period between

¹ Christine Hines, *Advocates Mull the New and Old in Debt Collection*, Sept. 2019, https://www.consumeradvocates.org/sites/default/files/naca2_report_survey_debtcollectionpractices092019.pdf.

2017 and 2019. Collectively, these attorneys represented at least 653 consumers on time-barred debt matters. During the same period of time, 71% of respondents assisted consumers in cases where a debt collector threatened to sue on a time-barred debt and 64% worked on cases where the debt collector did sue to collect a time-barred debt.

It is apparent that attempts to collect time-barred debt are common and likely impact a significant number of consumers each year. Additionally, many consumers are already facing impermissible lawsuits or threats of suit on time-barred debt. Courts have repeatedly affirmed that such practices violate the Fair Debt Collection Practices Act (FDCPA), but debt collectors have continued to employ aggressive tactics to try to collect on time-barred debt.² It should be noted that the survey only covers consumers who have obtained legal assistance from consumer attorneys. There are likely many other consumers impacted by time-barred debt who do not have legal representation.

The Bureau's 2017 report on Online Debt Sales³ also indicates that time-barred debt is a prevalent issue in the debt collection marketplace. The report, which analyzes the online marketplace for charged-off debt, found that most of the 298 examined portfolios were advertised as being at least five years past charge-off while some were nine or more years past. In the report, the Bureau acknowledged that "a substantial portion" of the debts were likely to be time-barred.

While the online debt marketplace represents only a small slice of the debt collection industry, the Bureau noted certain trends that were consistent with the industry at large. In particular, it was found that the price of a debt decreased exponentially with each year past charge-off. This means that time-barred debts are typically the cheapest to purchase, with many being sold for fractions of a penny per dollar of debt. With aggressive debt buyers and collectors in both the online and traditional spheres churning through massive portfolios, it is highly likely that consumers are frequently targeted with time-barred debt collections.

At present, time-barred debt disclosures are confusing and deceptive

Debt collectors benefit by inducing unaware consumers to make partial payments on old, expired debt, so as to revive the debt's statute of limitations period and permit the collector to once again sue on the debt. Collector letters with time-barred debt disclosures often deliberately confuse consumers about the status of old debt and their legal obligations to pay. For example, disclosures in collection letters are usually hidden in small, non-bolded sentences at the bottom of the letter. In addition, a disclosure on a time-barred debt is often overshadowed by other text or graphics in a collection letter.

² See e.g. *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1488 (M.D. Ala. 1987); *Larsen v. JBC Legal Group, P.C.*, 533 F. Supp. 2d 290 (E.D.N.Y. 2008).

³ Consumer Financial Protection Bureau, *Market Snapshot: Online Debt Sales 6*, January 2017, https://files.consumerfinance.gov/f/documents/201701_cfpb_Online-Debt-Sales-Report.pdf

Further, the disclosures are deliberately vague and regularly misstate the law and consumers obligations. For example, collectors will state in letters that they “will not” pursue remedies against consumers in collection of time-barred debt, when in fact collectors “cannot” pursue any other remedies because the statute of limitations has expired. Consumers are unaware that payment can revive the statute of limitations on an expired debt.

“Collectors use this vagueness and “will not” versus “cannot” language to scare consumers into calling them and making a small voluntary payment, thereby bringing the debt out of time-barred status, [also known as “reviving the debt”].” – Victor Wandres, consumer attorney, Oklahoma

Debt collectors trick consumers into reviving expired debt

The negative effects of time-barred debt collection are exacerbated in states where partial payments can revive the statute of limitations period. As long as time-barred debts can be revived, disclosures will be inherently confusing because collectors are motivated to deceive consumers into paying. Many consumers, and even some attorneys, do not understand the intricacies of how statutes of limitation may restart. This highlights the point that disclosure language often exists in ways in which everyday consumers may not notice or benefit from it.

Disclosures do not protect the least sophisticated consumers

“In my experience, clients rarely read and understand these notices, unless they are very straight forward and clear. For debt collectors/debt buyers, they are used mainly to disguise debt as collectable when, in reality, they have no legally enforceable way to collect the debt.” – Angie Robertson, consumer attorney, Illinois

As part of NACA’s 2019 survey, consumer attorneys also responded to questions about their clients’ experiences with disclosures about time-barred debt. Based on their responses, it was found that disclosures about time-barred debt tended to be difficult to understand and were of little help to consumers.

Out of the 134 respondents, 65% indicated that they had represented clients who received disclosures about a time-barred debt. While the practice of including a disclosure is by no means universal, it is somewhat common. Out of those respondents, over half reported that their clients “rarely” understood the disclosures. Notably 85% of legal services attorneys, who serve low-income clients, reported that their clients “rarely” or “never” understood disclosures. Only 7 attorneys in total said that their clients “usually” or “always” understood time-barred debt disclosures.

This data calls into question whether disclosures are an adequate measure against abusive collection of time-barred debt. The Bureau reports that consumer focus groups have indicated that consumers do not have a good understanding of what time-barred debt is or what their rights are with relation to time-barred debt. While reading randomly-assigned disclosures did correct

misunderstandings for some consumers, the Bureau reported that 35% of consumers still did not comprehend the disclosures. Additionally, consumers with lower incomes and less education were found to have notably lower levels of comprehension. This is consistent with NACA's survey findings that clients of legal services attorneys, who are low-income and more likely to have less education, had the most difficulty understanding disclosures.

“I think informing consumers that a debt is time-barred is useful and empowering for consumers, but only if the information is conveyed clearly.” – Carolyn E. Coffey, consumer attorney, New York.

Unsophisticated consumers are at greater risk of harm from abusive debt collection. According to a 2017 report by the Bureau, low- and moderate-income consumers were much more likely to be contacted by a debt collector and more likely to be sued on a debt.⁴ Vulnerable consumers are additionally less likely to have attorney help when sued on a debt. It was reported that 95% of default debt collection judgments in New York City were entered against consumers living in low- or moderate-income neighborhoods.⁵ If the Bureau intends to protect the most at-risk consumers, it must further refine the model disclosures to be comprehensible to the least sophisticated consumer.

CFPB's model disclosures will not protect consumers from unfair time-barred debt collection

We asked a group of consumer attorneys, with substantial experience representing working families including older Americans against debt collection abuses, for their views on the model disclosures presented in the supplemental rulemaking. They identified a number of issues with the disclosures' form, substance, and expected practical effect.⁶

- These model disclosures are similar to others that consumer attorneys have read and have experience with on behalf of consumers.
- The information in the model disclosure is inconsistent with the options for responding, and it is unclear how the disclosure language interfaces with state and local law disclosures.
- The protections in the disclosure likely will get lost in the sea of information being provided to consumers in the document. Very often, consumers do not read the letters past the amount claimed as owed.

⁴ Consumer Financial Protection Bureau, Consumer Experiences with Debt Collection, January 2017, https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

⁵ Pew Charitable Trusts, How Debt Collectors Are Transforming the Business of State Courts (May 2020) 11, <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts>.

⁶ Separate responses may have been consolidated in the same bullet point.

- The models all state that the consumer owes the debt, stated as if it is a fact. When in reality, a time-barred debt is legally unenforceable in a court of law, and that information should be clearly stated. There should be more of an emphasis to the consumer that payments are voluntary.
- The model disclosures should be more prominent and less wordy. For example, the sentence in a model disclosure: “If you do nothing or speak to us about this debt, we will not sue you to collect it” is unclear and confusing. Most consumers communicate in a straightforward manner. Clearer and more direct information to the consumer would be more helpful.
- Putting the disclosure in a separate box, off to the side, away from the “options” presented in the collection letter, as these model disclosures all do, makes it less likely that a consumer will read them.
- An added issue with the model disclosures is whether debt collectors will structure the layout of their collection letters in a similar format as the models. Disclosures are often not so prominently displayed in collection letters. And even if they are displayed in a central location, they are often overshadowed by the debt collector’s offers or demands meant to induce a consumer to make partial payments, and lead a consumer to overlook disclosure language about their rights or the limits on the debt collector to pursue the debt.
- The potential impact of partial payments is critical, but the disclosures that contain information about partial payments are confusing. The B4 form does not address at all whether or not a partial payment will revive the debt. This information is crucial.
- Disclosure language ends up being jurisdictional-specific. These forms cannot address it all. Some states do not allow revival of debt, while others do.

According to the CFPB’s own study, overall comprehension was below 50% for consumers given a Time Barred Debt with Revival disclosure.⁷ Consumers are likely to understand less when receiving the disclosure in real life.⁸ Consumers’ understanding may be hampered by feelings of shame and stress. The evidence is clear that disclosures do not go far enough to avoid consumers’ misunderstanding.

Further opportunities for consumer confusion and abusive tactics will arise even with well-crafted disclosures

The FDCPA was written to protect the “least sophisticated consumer.” If the Bureau refines its model disclosures to be understandable by the least-sophisticated consumer and carries out extensive real-world testing, multiple avenues still exist to enable confusion and burden consumers with other wrongful collector conduct.

⁷ CFPB, *Disclosure of Time-Barred Debt and Revival: Findings from the CFPB’s Quantitative Disclosure Testing*, 26 (2020), https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-quantitative-disclosure-testing_report.pdf.

⁸ *Id.* at 12.

First, disclosures do not prevent collectors from using aggressive tactics on consumers. Even if consumers fully comprehend disclosures, they may still be pressured into making a payment and reviving a time-barred debt in order to avoid harassment or other consequences. Second, several states already have their own time-barred debt disclosure requirements. Multiple disclosures that make different points may cause confusion for consumers.

The systematic nature of the collection efforts of larger debt buyers and debt collectors can also deprive consumers of their rights. If one factor is not coded correctly or if key information about a debt is omitted, then debt collection activities will still occur even when a statute of limitation period is expired or when the debt has been otherwise satisfied.

The proposed new standard on “knows or should know” protects collectors’ deceptions

As part of the Bureau’s 2019 proposed rulemaking on debt collection practices, a collector is prohibited from suing or threatening to sue to collect a time-barred debt only if the collector “knows or should know” the debt is time-barred. This approach goes against the strict liability reading of the FDCPA which has been previously upheld by multiple courts. As a result, debt collectors would no longer be responsible for knowing when the statute of limitations on a debt has passed, despite being the best position to keep track of such information.

Relaxing the standards on debt collectors in this way creates burdensome challenges for consumers and impedes their ability to effectively access justice. Consumers who have been unlawfully sued over a time-barred debt will have great difficulty showing what a debt collector knew or should have known. Such hurdles are unacceptable barriers to consumer justice in what should be clear-cut cases of accountability for impermissible behavior.

Further, the proliferation of civil debt collection suits and the mass filing of default judgments against consumers show that the Bureau should not hold debt collectors to a lower standard when collecting time-barred debts. Prohibiting suits or threats of suit on time-barred debt only when the collector “knows or should know” incentivizes collectors to file suits when there is inadequate documentation and will likely lead to default judgments against consumers and further negative consequences, such as wage garnishment. Additionally, it enables debt collectors to maintain abusive practices and provides incentives for careless recordkeeping.

The Bureau is also proposing to extend the relaxed standard for time-barred debt suits to the disclosure requirements. Debt collectors would only be required to provide a disclosure if they “know or should know” that the debt is time-barred. Regardless of how well-crafted a disclosure is, it cannot protect a consumer if the collector does not actually use it. Again, such a standard would release collectors from the responsibility of knowing a debt’s status even though they are in the best position to keep track of such information and incentivize abusive collections activity.

Conclusion

The least-sophisticated consumer, who the FDCPA was designed to protect, does not understand the complexities around time-barred debt, and they should not have to. Collectors trap consumers with tricky, sometimes threatening language in letters and pressure them into making small payments on expired debts with the goal of reviving the statute of limitations for that debt. The pervasiveness of time-barred debt collection is a severe flaw in the debt collection system. Therefore, it is ill-advised for the CFPB to not only weaken existing protections, but we also urge it to refrain from providing safe harbors for collectors that will exploit these circumstances and prey on consumers in these vulnerable situations.

While the CFPB may seek to use disclosures to address the issue, it is clear that disclosures will not solve the fundamental issue of collectors using aggressive tactics to collect old, legally unenforceable debt. Given the challenges in crafting adequate disclosures and the complications that could still arise even with well-crafted disclosures, it is in consumers' best interest for the Bureau to prohibit time-barred debt collection completely.