BETTER MARKETS

May 19, 2021

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

Re: Debt Collection Practices (Regulation F); Delay of Effective Date, Docket No. CFPB-2021-0007, RIN 3170-AA41

Dear Consumer Financial Protection Bureau:

Better Markets Inc.[1] appreciates the opportunity to comment on the above-captioned proposal ("Proposal" or "Release"), issued by the Consumer Financial Protection Bureau ("CFPB" or "Bureau").[2] The Proposal concerns two flawed debt collection rules implementing the Fair Debt Collection Practices Act ("FDCPA"). They were issued under then-Director Kathleen Kraninger in the latter half of 2020 (just months before former Director Kraninger resigned at the request of President Biden). One dealt with debt collection practices more generally ("Final Debt Collection Rule"),[3] and one dealt more specifically with time-barred debt ("Stale Debt Rule") (collectively "2020 Debt Collection Rules").[4] The Proposal would delay the effective date of the 2020 Debt Collection Rules by 60 days, from November 30, 2021, to January 29, 2022.

Better Markets supports the proposed short delay of the effective date of the 2020 Debt Collection Rules, but only inasmuch as the delay is for the purpose of preventing harmful provisions from going into effect and giving the Bureau time to revisit these flawed rules. The Bureau must use this opportunity to repropose and strengthen both rules so that they fulfill the CFPB's mission of **consumer protection instead of predator protection.**

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1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.

2 86 Fed. Reg. 20,334 (Apr. 19, 2021).

3 Debt Collection Practices (Regulation F), 85 Fed. Reg. 76,734 (Nov. 20, 2020).

4 Debt Collection Practices (Regulation F), 86 Fed. Reg. 5766 (Jan. 19, 2021).

BACKGROUND

Debtor's prisons, at least those with concrete walls, were gone from America by the turn of the twentieth century. However, those who struggled to pay their bills were often subject to a different form of confinement, frequently becoming trapped in an endless storm of harassment by debt collectors. And those practices have continued into the modern era, largely because of the powerful incentives motivating debt collectors coupled with the vulnerabilities of the debtors who are targeted in the process.

Once a debt reaches an advanced stage of delinquency, the original creditor (or their assignee) will often turn over attempts to recover the debt to a third-party debt collector.[5] That debt collector may earn a fee or commission for every dollar of the debt recovered, or the debt collector may purchase the debt outright, at a steep discount to the face value, and then attempt to collect the debt, with every dollar above the purchase price (and cost of collection efforts) representing profit. In any event, third-party debt collectors' compensation is tied exclusively to recovering as much delinquent debt as possible, and accordingly debt collectors have historically been motivated to go to extreme lengths to collect debts. Indeed, prior to the passage of the FDCPA, the common practices of debt collectors were brazen and at times cruel. Debt collectors called consumers for hours on end; called in the middle of the night; contacted friends and neighbors in an attempt to publicly shame the debtor; contacted employers and attempted to have the debtor fired; threatened debtors with criminal prosecution; and taking a page from Mafia loan sharks, even threatened debtors with physical violence.[6]

And while the tactics that debt collectors deploy have been extreme, they are the natural consequence of the incentives in play. Because debt collectors' profits are in direct proportion to how much debt they are able to collect, and because debt collectors are not selected by debtors themselves, but by the creditors, they have every incentive to engage in ruthless collection practices. They have no need to temper their collection practices, either to maintain an individual customer relationship or to protect their reputation and ensure that they will be able to attract and keep future customers[7]—indeed, from a reputational standpoint, it could be said that the more aggressive a debt collector, the better their reputation among creditor clients.[8] In other words, only

5 "First-party creditors," i.e. the original creditor, are generally not subject to the FDCPA.

6 Logan Kraus, *A Forgotten Past Creates A Fractured Present: Why Courts Should Utilize Historical Context When Interpreting Ambiguous Provisions of the 1977 Fair Debt Collection Practices Act*, 102 IOWA L. REV. 1789, 1796 (2017).

7 S. REP. 95-382, at 2 (1977).

8 *See* Viktar Fedaseyeu & Robert Hunt, *The Economics of Debt Collection: Enforcement of Consumer Credit Contracts*, FRB Working Paper No. 15-43 at 8n.9 (Nov. 2015) ("Therefore, it is

strong protective legal rules and the credible threat of liability for violation of those rules can reasonably prevent abusive conduct by debt collectors.

Moreover, by the time collection of a debt is turned over to a debt collector, it is likely that the debt is seriously delinquent, which in turn means it is likely the debtor is facing serious, unexpected, and typically inescapable financial hardship.[9] That serious financial hardship means not only that the debtor is likely struggling just to meet their basic needs such as food, housing, and medical care, but also that they are dealing with many of the documented deleterious health effects associated with the stress of financial hardship, up to and including increased mortality.[10] And debtors typically lack the means to afford their own legal counsel to fend off the debt collectors. In other words, the victims of debt collectors' abuse are often among the most vulnerable members of society most in need of legal protections. Thus, debt collection involves an industry with every incentive to abuse and exploit consumers to the fullest extent possible, targeting a subset of consumers likely to be especially vulnerable to that exploitation and abuse.

Recognizing the "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors"[11] and the resulting urgent need for a corrective to this inherently toxic environment, Congress passed the FDCPA in 1977 to reign in the worst practices of debt collectors. Broadly speaking, the FDCPA sought to protect consumers by prohibiting harassment and abuse by debt collectors, such as threats of physical violence or use of public shaming lists; regulating permissible communications between debt collectors, including prohibiting communications with consumers at inconvenient times or places; generally prohibiting debt collectors from discussing debts with third-parties; and prohibiting deceptive, unfair, or unconscionable practices in the collection of debt.[12] The FDCPA also subjected debt collectors to civil liability for violations, either through private civil lawsuits or through administrative enforcement by the Federal Trade Commission.[13]

While the FDCPA has been relatively successful "in curbing some of the abuse and harassment stemming from collection companies," it has not been uniformly successful in protecting consumers from abuse and harassment.[14] Part of the problem is that, prior to the 2010 passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[15] which gave the

likely that lenders allocate debt collection of charged-off accounts to third-party agencies because those agencies can use harsher debt collection practices.").

9 *See id.* (noting that when "default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce.").

10 Reginald D. Tucker-Seeley, et al., *Financial Hardship and Mortality among Older Adults Using the 1996–2004 Health and Retirement Study*, 19 ANN. EPIDEMIOLOGY 850 (2009).

11 15 U.S.C. § 1692(a).

12 15 U.S.C. § 1692, *et seq.*

13 15 U.S.C. §§ 1692k, 1692l(a).

14 Lauren Goldberg, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 723-24 (2006).

15 Public Law No. 111-203, 124 Stat. 1376 (July 21, 2010) ("Dodd-Frank Act").

Bureau the rulemaking authority it is now exercising, no federal agency had the authority to prescribe rules implementing the FDCPA.[16] Accordingly, interpretation of some of the more purposefully broad and ambiguous provisions—such as what constitutes an "unconscionable" or "unfair" collection practice—was left primarily to courts adjudicating issues on a case-by-case basis. The result has been often conflicting interpretations of the same FDCPA provisions, potentially leaving significant gaps in consumer protection.[17] This problem is especially acute when courts are confronted with evolving technologies that did not exist when the FDCPA was passed,[18] and with evolving debt collector practices, often designed to evade the specific restrictions of the FDCPA.[19] And of course, because of the prohibitive expense of a lawsuit, many consumers cannot or will not go to court to vindicate even a clear violation of the FDCPA, let alone take on the litigation risk where recovery is less certain because it involves an ambiguous provision in the law.

In the Dodd-Frank Act, Congress gave the Bureau authority to implement FDCPA rules primarily because of the shortcomings evident in mere reliance on the statutory text and private lawsuits in curbing abusive debt collection practices.[20] After a lengthy rulemaking process, which began in 2013 under then-Director Richard Cordray, the CFPB issued a proposed debt collection rule in 2019, under then-Director Kraninger, and a supplemental proposal on the collection of time-barred or stale debt in 2020.[21] The CFPB finalized the Final Debt Collection Rule in September 2020 and the Stale Debt Rule in December 2020. Each rule was the subject of criticism by consumer advocates,[22] including Better Markets.[23]

<u>SUMMARY OF FINAL RULES</u>

Generally speaking, the 2020 Debt Collection Rules focused on interpreting various ambiguous aspects of the FDCPA, particularly those related to permissible communications with

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16 Release at 23,278.

17 Lauren Goldberg, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 723 (2006) (explaining criticism of the FDCPA's "many ambiguities, which are illustrated by the fact that courts have been unsuccessful in interpreting the statute in a predictable manner.").

18 *See* Release at 23,278.

19 Lauren Goldberg, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 724 (2006) (explaining that the debt collection industry "adapted and started to implement new technology-based strategies" that are "unfair to the average consumer.").

20 Release at 23,310; S. REP. 111-176, at 19 (2010).

21 84 Fed. Reg. 23,274 (May 21, 2019); 85 Fed. Reg. 12,672 (Mar. 3, 2020).

22 National Consumer Law Center, *Changes Needed to Prevent New Debt Collection Rules from Hurting Consumers* (Jan. 2021), https://www.nclc.org/images/pdf/debt_collection/IB_Top_Fix_Debt_Coll_2021.pdf.

23 Better Markets Press Release, *CFPB Issues "Heartless" Rule that Benefits Predatory Debt Collectors* (Oct. 20, 2020), https://bettermarkets.com/newsroom/statement-cfpb-issues-heartless-rule-benefits-predatory-debt-collectors.

consumers, communications with third parties, and the provision of information about the debt. The following summarizes the elements of the 2020 Final Rules most relevant to our comments.

Facilitating Electronic Communications

The Proposal includes several provisions that facilitate the use of electronic communications, such as email and text messages. Under the current FDCPA regime, those modes of communication may entail a relatively high risk of FDCPA violations, especially unlawful communication with a third party regarding a debt. For these reasons, according to the Bureau, debt collectors rarely use email or text messages to communicate with consumers, even though many consumers generally prefer to communicate by email or text.[24] The Final Debt Collection Rule seeks to facilitate greater use of emails and text messages by debt collectors by establishing a safe harbor from civil liability for text message or email communications that inadvertently violate the prohibition on third-party communications.[25] To qualify for the safe harbor, the debt collector would have to maintain "procedures that include steps to reasonably confirm and document" that the debt collector communicated with the consumer using:

- An email address the consumer used to contact the debt collector, or a phone number the consumer used to contact the debt collector, either within the past 60 days, or after the debt collector confirms that the number has not been reassigned (and in either case has not opted out of receiving email or text messages from the debt collector, as the case may be);
- An email address provided by the consumer, if the debt collector notified the consumer it might use that contact information and gave the consumer a chance to opt out (and the consumer did not opt out); or
- A phone number provided to the debt collector by the consumer, if the consumer has renewed consent to such communication within the past 60 days, or the debt collector confirms the number has not been reassigned.[26]

Frequency of Communications

The FDCPA generally prohibits a debt collector from engaging "in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection

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24 Debt Collection Practices (Regulation F), 84 Fed. Reg. 23,274, 23,299-300 (May 21, 2019) ("Debt Collection Proposal"). It should be noted that, even if a consumer generally prefers to communicate by email or text, including with financial services providers, that does not mean they prefer to communicate by email or text **with debt collectors**, since many consumers may consider revelation that they have a debt in collection a more significant invasion of privacy than, for example, revelation that they have a deposit account or credit card.

25 The safe harbor was proposed pursuant to 15 U.S.C. § 1692k(c), which provides that debt collectors cannot be held liable for violations of the FDCPA if "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."

26 Final Debt Collection Rule at 76,889.

of debt." It includes a specific prohibition on "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number."[27] The Final Debt Collection Rule establishes a rebuttable presumption that a debt collector violates this provision if it places a call to a particular person regarding a particular debt more than seven times within a seven day period, or places a call to a particular person regarding a particular debt within seven days after having a telephone conversation with that particular person about that particular debt.[28] A debt collector who complied with call frequency limits would be entitled to a rebuttable presumption they complied with this provision of the FDCPA.[29]

Because the frequency limits would be with regard to a **particular** debt, a debt collector could place more than seven calls to consumers within a week, or engage in more than one conversation with a consumer within a week, if those calls were related to different debts. In addition, the Final Debt Collection Rule does not contain frequency limitations with respect to electronic communications.

<u>Prohibiting Suits or Threats to Sue on Time-Barred Debt Only if the Debt Collector Knew or Had Reason to Know the Debt was Time-Barred</u>

The FDCPA generally prohibits a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt."[30] Courts have routinely held that a debt collector violates this provision by suing, or threatening to sue, on a debt that is time-barred.[31] The Stale Debt Rule codifies these court decisions by prohibiting debt collectors from suing or threatening to sue on a debt that is time-barred.[32]

<u>COMMENTS</u>

As Better Markets stated in its comment letter on the proposal that became the Final Debt Collection Rule, there is certainly a critical need for the CFPB to implement a rule that addresses debt collection practices. For too long, consumers have had to rely primarily on expensive lawsuits, to vindicate their rights under the FDCPA, often mired in litigation over the meaning of ambiguous and vague FDCPA provisions. However, the need for a debt collection rule to fill a

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27 15 U.S.C. § 1692d.
28 Final Debt Collection Rule at 76,814.
29 Final Debt Collection Rule at 76,814.
30 15 U.S.C. § 1692e.
31 E.g. *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1488-89 (M.D. Ala. 1987) ("by threatening to sue Kimber on her alleged debt, FFC violated [the FDCPA]; by threatening to sue her, FFC implicitly represented that it could recover in a lawsuit, when in fact it cannot properly do so.").
32 Stale Debt Rule at 5854. This represented an improvement from the proposal, which would have imposed liability only if the debt collector knew or should have known the debt was time-barred. The CFPB proposed, but did not finalize, certain disclosures relating to time-barred debt. Stale Debt Rule at 5775.

regulatory void cannot justify tolerance for a severely flawed rule that protects abusive debt collectors at the expense of vulnerable consumers. It is unfortunate that in adopting the weak 2020 Debt Collection Rules, the Bureau's prior leadership's in effect abandoned the CFPB's statutory duty to protect consumers, and it is unfortunate that this abandonment now necessitates a delay in implementation while the current leadership revisits those flawed rules. However, such a short delay is appropriate inasmuch as it will allow the CFPB to address the myriad flaws in those rules, and to adopt debt collection rules that truly protect vulnerable consumers, rather than opening them up to more abuse for which they will have little, or no, legal recourse. The corollary, of course, is that this delay can only be justified if the CFPB uses it to enact debt collection rules that provide strong, meaningful protection for consumers. If the end result of this process is a debt collection rule that still prioritizes industry interests or concerns at the expense of consumers, it will have been for naught.

In Section I, we provide some general principles that must guide the Bureau as it revisits the debt collection rules. Specifically:

- An inability to pay a debt is not a moral failing, and it does not deserve to be punished—vanishingly few consumers willingly "shirk" their debts. In fact, Congress, in passing the FDCPA to rein in abusive collection practices, and protect vulnerable debtors, recognized that consumers have a **right to make an informed decision not to pay a debt;**
- Similarly, consumers already face real and tangible consequences as a result of not paying debts (such as lower credit scores and a resulting decreased access to credit) that they must take into account when deciding whether to pay a validly owed debt;
- The CFPB must not engage in a costly and deceptive cost-benefit analysis, and it must recognize that its statutory mission is to protect consumers, not to reduce costs for the debt collection industry;
- Increased availability of credit is not uniformly beneficial for consumers; and
- The CFPB must be wary of claims by the debt collection industry that protective debt collection rules would raise the cost of credit; in fact evidence shows that strong debt collection rules that protect consumers have, at most, a negligible effect on the cost of credit.

In Section II, we provide a non-exhaustive list of some of the specific flaws in the Final Rule and Stale Debt Rule. Specifically:

- The Final Rule, ignoring evidence of consumer harm, would allow debt collectors to harass consumers by allowing them to call consumers up to 7 times per week per debt; and
- Both the Final Rule and the Stale Debt Rule fail to protect consumers from the harmful consequences of attempts by debt collectors to collect time-barred debt.

Finally, the Bureau must carefully distinguish between regulatory clarity and substance. Providing additional clarity for various provisions of the FDCPA does not, in and of itself, fulfill the Bureau's duty under the FDCPA and Dodd-Frank. The FDCPA is an especially important consumer protection statute, as it seeks to regulate an industry with an especially dark history of consumer abuse. It is an industry that, absent strong rules, oversight, and enforcement, lacks any meaningful incentive to check its abusive behavior. "Clarity" that in fact operates to remove the threat of liability for conduct that is abusive, deceptive, harassing, or otherwise in violation of the FDCPA, runs directly counter to the purposes of the FDCPA. Thus, the Bureau's primary focus must be on the substance of the debt collection rules, and to the extent it also seeks to promote clarity, it must do so in a way that furthers rather than undermines consumer protection.

I. GENERAL PRINCIPLES TO GUIDE THE REVISION OF THE 2020 DEBT COLLECTION RULES

Because the law must guide all that the Bureau does, it bears repeating that the FDCPA is a consumer protection statute, explicitly passed because Congress recognized the need to protect consumers from abusive, unfair, and deceptive debt collection practices.[33] In passing the FDCPA, Congress was **not** concerned with providing debt collectors with the most efficient or effective means of collecting debts—this is obviously so, since the statute bans some of the most effective ways of collecting a debt, i.e. through harassment, threats, abuse, and deception.[34] Therefore, each and every provision of the final rule must be reasonably designed to advance consumer protection; a provision that benefits the debt collection industry by making it easier to collect debts, without credibly and demonstrably increasing consumer protection, would be a violation of the statute and arbitrary and capricious because the Bureau would have "relied on factors which Congress has not intended it" to rely on.[35]

Below, we identify some important considerations the Bureau must take into account as it determines whether particular aspects of the rule properly advance consumer protection.

A. The FDCPA protects consumers' right to make an informed decision not to pay a debt, even one that is valid.

In many ways, the FDCPA reflects a paradigmatic shift in how society views those who struggle to pay their bills. It rejected the notion that simple failure to pay a debt reflects a moral failure warranting punishment. And it should dispel any inclination to dilute the protections for debtors under the FDCPA based on the outdated conviction that those in debt deserve what they get at the hands of debt collectors.

[33] 15 U.S.C. § 1692 ("It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors.").

[34] *Foti v. NCO Fin. Sys., Inc.*, 424 F. Supp. 2d 643, 659 (S.D.N.Y. 2006) ("However, just because a debt collector is permitted to continue to attempt to collect the debt does not entitle the collector to use *any* means, even if those means are the most economical or efficient.").

[35] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

This evolution is apparent in the Senate Committee on Banking, Housing, and Urban Affairs' report on the FCPA:

> One of the most frequent fallacies concerning debt collection legislation is the contention that the primary beneficiaries are 'deadbeats.' In fact, however, there is universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay just debts is miniscule. Prof. David Caplovitz, the foremost authority on debtors in default, testified that after years of research he has found that only 4 percent of all defaulting debtors fit the description of 'deadbeat.' This conclusion is supported by the National Commission on Consumer Finance which found that creditors list the willful refusal to pay as an extremely infrequent reason for default.[36]

This view is also apparent throughout the FDCPA itself, perhaps most clearly in 15 U.S.C. § 1692c(c), which provides that if "a consumer notifies a debt collector in writing that the consumer **refuses to pay a debt**," (emphasis added) then the debt collector must generally cease communications with regard to that debt, **even if the consumer does not dispute the validity of the debt.**

Functionally, this is a recognition that a decision by a consumer not to pay a debt, even one that is validly owed by the consumer, **can be legitimate, and a consumer who makes such a decision does not deserve to be abused, harassed, or otherwise coerced into paying the debt.** Indeed, the FDCPA can be fairly viewed as protecting a consumer's right to decide whether or not to pay a particular debt without facing undue coercion from a debt collector—to decide that a particular debt, though validly owed, is not a priority for payment:

> Debt collectors routinely urge consumers to skip paying one bill to pay another. Often the bill the debt collector is encouraging the consumer to skip is the most important bill, and the collector is seeking payment on a bill that is not a priority for the consumer.[37]

The purposes of the FDCPA are advanced by rules that require debt collectors to provide consumers with full and accurate information about the debt itself, available means of settling the debt, and the potential consequences of choosing not to pay the debt, and that allow the consumer to make a decision about whether or not to pay the debt on the basis of those considerations alone. A rule that allows debt collectors to pressure consumers to pay a particular debt based on factors other than those **does not** advance the purposes of the FDCPA.

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36 S. REP. 95-382, at 3 (1977).

37 NATIONAL CONSUMER LAW CENTER, FAIR DEBT COLLECTION 5 (2014 ed.).

B. Consumers who do not pay their debts face real, tangible consequences.

In the FDCPA, Congress expressly observed that "[m]eans other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts."[38] This remains as true today as it was in 1977. It highlights the fundamental distinction between legitimate means that creditors may use to collect debts, and those that Congress has determined are unacceptable as set forth in the FDCPA. And those legitimate means are formidable. The reality is that consumers who choose not to pay a debt cannot simply walk away from that debt scot-free, which is presumably one reason why so few consumers assume debts without intending to repay them.[39] Consumers face the potential threat of a lawsuit for failing to pay their debts, which can result in the seizure of property, wage garnishment, and reputational harm, among other undesirable outcomes. That the debt is in collection will also be reflected on consumers' credit reports, which will impact their ability to obtain credit in the future. These are real and tangible consequences that encourage consumers to pay what debts they can.[40]

It is essential that the Bureau keep this in mind. Debt collectors can inform consumers of the potential consequences (in a non-threatening, non-harassing way) that flow from not paying their debts. The Bureau must ensure that it does not give debt collectors the freedom and means to do more than that, by harassing consumers, threatening them with consequences that do not apply, or employing other unfair and misleading tactics. It is also essential that debt collectors be required to provide consumers with information about their rights under the FDCPA and other applicable law, so that consumers can make fully informed decisions about whether to pay a debt.

C. Increased availability of credit is not inherently beneficial to consumers, and in many instances may be harmful.

The Dodd-Frank Act requires the Bureau, when formulating rules, to "consider…the potential reduction of access by consumers to consumer financial products or services resulting from such rule."[41] This requirement means just what it says and no more—the Bureau must consider the effect of a rule on access to consumer credit. The Dodd-Frank Act does not purport

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38 15 U.S.C. § 1692(c).

39 Almost all consumers are responsible and intend to pay the debts they take on, even when there may be overwhelmingly good reasons not to do so. For example, as a result of the 2008 financial crash, over 30% of homes in the U.S. were underwater, as their mortgages were higher than the market value of their houses. However, virtually all of those homeowners continued to pay their debts on an asset that was worth less, often significantly less, than the debt itself. Ann Carrns, Most Underwater Homeowners Still Paying Mortgages, N.Y. TIMES (May 24, 2012), https://bucks.blogs.nytimes.com/2012/05/24/most-underwater-homeowners-still-paying-mortgages/. Relatedly, when consumers do fail to pay their debts, it is usually due to factors such as unemployment, illness, a death in the family, or other circumstances that make paying all or some of their debts impossible.

40 *Cf.* NATIONAL CONSUMER LAW CENTER, FAIR DEBT COLLECTION 5 (2014 ed.) ("Only a small fraction of a percent of consumers can afford to pay an undisputed debt but refuse to do so.").

41 12 U.S.C. § 5512(b)(2).

to dictate what role the Bureau's consideration of consumer access to credit should play in its evaluation of a potential rule.[42] That is, Congress merely directed the Bureau to consider consumer access to credit, it did not direct the Bureau to consider increased access to credit as a consumer benefit or decreased access to credit as a consumer harm. Indeed, the Dodd-Frank Act was passed in direct response to the 2007-2009 financial crisis, which was fueled in part by too much access to credit by high-risk and non-creditworthy borrowers. This context belies the notion that Congress intended the Bureau to be guided primarily by a mandate to increase access to credit as it formulates its consumer protection rules. In fact, the entire context and motivation for the statute are just the opposite.

This is essential for the Bureau to keep in mind, as the debt collection industry and their allies will surely implore the Bureau to avoid finalizing a strong rule with robust consumer protections, arguing that doing so could decrease access to consumer credit.[43] The Bureau should reject these specious arguments because access to credit is not *necessarily* a desirable outcome. In fact, more aggressive debt collection practices are associated with greater "access" to *high-risk* loans, which are more likely to default.[44] Giving consumers loans that they are highly likely to default on, and then subjecting them to a harsh debt collection regime that allows more aggressive debt collection tactics, can hardly be said to increase consumer welfare, notwithstanding the increased "access to credit" that consumers experienced.

D. <u>The Bureau must not engage in an unnecessary and biased quantitative cost-benefit analysis.</u>

The Bureau will almost certainly be inundated with comments from the debt collection industry and its allies expressing grave concern about how much a rule with robust consumer protections will cost the industry. Essentially, these comments will be an invitation for the Bureau to conduct a cost-benefit analysis that is not required by either the FDCPA or Dodd-Frank.[45] The Bureau must reject these invitations.

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42 *Sec'y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 612 (1950) ("But Congress did not think it was feasible to bind the Secretary as to the part his 'consideration' of these…factors should play in his final judgment.").

43 *See, e.g.,* Letter from Competitive Enterprise Institute to CFPB re: Debt Collection Practices (Regulation F) (Aug. 17, 2019) ("Without [debt collection], it is doubtful that consumer credit would be so widely available.").

44 *See* Lukasz A. Drozd & Ricardo Serrano-Padial, *Modeling the Revolving Revolution: The Debt Collection Channel*, 107 AM. ECON. REV. 897, 898 (observing that so-called "improvements" in debt collection practices "lead to a more prevalent use of risky loans (i.e., loans exposed to the risk of default) and hence result in a higher default rate.").

45 *See, e.g.,* Letter from Competitive Enterprise Institute to CFPB re: Debt Collection Practices (Regulation F) (Aug. 17, 2019) ("Not only should the Bureau test consumer disclosures, it should also make use of rigorous cost-benefit analysis to ensure that the policy does not have unintended consequences, such as making routine debt collection more difficult.").

The FDCPA is plainly unconcerned with the costs to debt collectors of compliance with its provisions. Nowhere in the FDCPA does Congress express an intent to reduce costs for debt collectors or make their operations more efficient. Nor does it direct the Bureau to conduct any sort of cost-benefit analysis in promulgating FDCPA rules. Similarly, while the Dodd-Frank Act requires the Bureau to "**consider…**the potential benefits and costs to consumers and covered persons" and "the impact of proposed rules on covered persons," nothing requires the Bureau to conduct a quantitative cost-benefit analysis, nor does it condition the Bureau's promulgation of a rule on a finding that the quantifiable benefits of a rule outweigh the costs.[46]

It is entirely reasonable that Congress chose not to require any sort of cost-benefit analysis. Both Dodd-Frank and the FDCPA are designed to enhance consumer protection, not to benefit industry. Yet cost-benefit analysis, too often perceived as reasonable and objective, is almost always biased against regulation and more aptly described as "industry cost-only analysis," in which industry focuses exclusively on the costs of regulation while ignoring the benefits.[47] The potential pitfalls are especially acute here, since the practices the FDCPA was intended to address result in harms, such as "marital instability" and "invasions of individual privacy," that, while real and concrete, are simply impossible to reduce to a numerical dollar amount that can be weighed against increased compliance costs for debt collectors.[48]

E. <u>The Bureau Must Resist Specious Assertions that Strong Debt Collection Rules Will Have a Material Adverse Impact on Consumers.</u>

The debt collection industry will almost certainly inundate the Bureau with arguments that strong consumer protections will somehow harm consumers, in the form of higher costs or decreased access to credit. Such arguments, however, have typically proven to be groundless. For example, a century ago, when securities regulation first emerged at the state level, Wall Street railed against it as an "unwarranted" and "revolutionary" attack upon legitimate businesses that would cause nothing but harm. However, in the years following this early appearance of financial regulation, banks and their profits grew handsomely. Subsequently, when the federal securities laws were adopted, Wall Street staunchly opposed them, claiming that they would slow economic recovery by impeding the capital formation process and discouraging the issuance of new securities. In fact, in the years after the enactment of the federal securities laws, the nation's securities markets flourished. The same pattern has been repeated with each new effort to

46 55 U.S.C. § 5512(b)(2).

47 Better Markets, *Update: Recent Trends in the Law Governing Cost-Benefit Analysis by the Securities and Exchange Commission* (Dec. 2017), *available at* https://bettermarkets.com/resources/update-recent-trends-law-governing-cost-benefit-analysis-securities-and-exchange.

48 15 U.S.C. § 1692(a).

strengthen financial regulation, including deposit insurance, the Glass-Steagall Act, mutual fund reform, and the national market initiatives of the mid-1970s.[49]

In a particularly telling recent example, the mortgage lending industry fiercely opposed new mortgage underwriting standards to be administered by the Bureau. The lending industry hysterically predicted that the new rules would "cripple credit availability and spur banks, credit unions, and mortgage lenders to quit the business entirely."[50] However, the available data show that this has not happened, and that in fact, lending activity has increased. The lesson to be learned from this history is that when faced with new regulations, members of the regulated industry routinely argue that the costs and burdens are too heavy—but then they invariably adapt and thrive, while consumers are vastly better off.

With respect to revisiting the 2020 Debt Collection Rules, the Bureau must resist evidence-free arguments that making debt collection rules stronger would decrease access to credit, increase the cost of credit, or trigger more lawsuits against consumers before limitations periods expire. Without actual, compelling supporting evidence that less robust consumer protections would enhance consumer welfare, these arguments should be seen for what they are: the desire of the debt collection industry to continue boosting their revenues by deceiving consumers into paying old, stale debts under the false belief they are still subject to suit.

For example, the industry frequently overstates the impact of the regulation of debt collection practices on the consumer credit market, arguing that making debt collection more difficult will lead to decreased access to credit and increased cost. These arguments typically rely primarily on oversimplified presentations of economic theory, hypothesizing that if collection efforts are more difficult and therefore debt collectors recover less on delinquent accounts, creditors will respond by tightening access to credit and/or raising interest rates.

However, these assertions are typically unsupported by credible and robust empirical evidence, which are necessary to debunk superficially appealing claims about the supposedly harmful impact that regulation will have not only on the industry but also on consumers themselves. And in fact, as the Bureau recognized in the Debt Collection Proposal, what empirical studies have been done regarding the impact of stricter debt collection regulations have found that the impact of such regulation on the availability and cost of revolving lines of credit is minimal. One study found no impact on credit availability from stricter debt collection laws; one found that stricter debt collection laws resulted in new revolving credit accounts decreasing by only 2.2 per

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49 *See generally* Marcus Baram, *The Bankers Who Cried Wolf: Wall Street's History of Hyperbole About Regulation*, THE HUFFINGTON POST (Jun. 21, 2011), http://www.huffingtonpost.com/2011/06/21/wall-street-historyhyperbole-regulation_n_881775.html.

50 John Heltman, *Mortgage Rules Not Chilling Market as Feared, Data Shows,* AMERICAN BANKER (Sep. 24, 2015), http://www.americanbanker.com/news/law-regulation/mortgage-rules-not-chilling-market-as-feared-data-shows-1076899-1.html (emphasis added).

thousand consumers; the other found a reduction of successful credit inquiries of 0.02%. Only one study has found that stricter debt collection regulation results in a higher cost of credit, but that increase was negligible and "entirely takes the form of a reduced frequency of accounts with an introductory APR of 0 percent."

The Bureau also explored the possibility that more robust protections over time-barred debt could have unintended consequences, such as making it more likely that debt collectors would sue over debt before it becomes time-barred. The Bureau correctly concluded that a material increase in litigation as a result of such protection was unlikely, based on empirical evidence showing that in states where time-barred debt disclosures are already required, they "do not lead to a material reduction in the aggregate rate at which time-barred debt is repaid."

II. SPECIFIC ISSUES THAT MUST BE ADDRESSED IN A REVISED DEBT COLLECTION RULE

A. The Final Debt Collection Rule Allows Excessive Consumer Contact.

The FDCPA includes a prohibition against "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass," found in Section 1692d(5). The Bureau implemented this provision by placing qualified limits on the number of times a debt collector may call a consumer with regard to a particular debt.[51] Specifically, under the Final Debt Collection Rule, a debt collector would get a rebuttable presumption of compliance with this provision if it contacted a consumer no more than seven times in one week with regard to a particular debt, and if it waited at least one week after a conversation with a consumer about a particular debt to attempt to place another call to that consumer with regard to that same debt.[52]

Generally speaking, we agree with the Bureau that some additional clarification limiting call frequency could benefit consumers. Section 1692d(5) is vague, and debt collectors have an incentive to test the limits of the provision, calling consumers frequently, knowing that few consumers have the resources to litigate the issue and that even when they do, the debt collector has an opportunity to convince a court that it has not violated Section 1692d(5). The result has been inconsistent court decisions about when frequent calling violates Section 1692d(5).[53]

Unfortunately, while providing clarification on call frequency could have been beneficial, the Bureau proposes a limit so high that it will serve as an invitation to legalized harassment.[54] As

51 15 U.S.C. § 1692d.
52 Final Debt Collection Rule at 76,814.
53 Final Debt Collection Rule at 76,814.
54 Instead of rebuttable presumptions, the proposal would have established a bright line, with debt collectors who violated the proposed limits being deemed *per se* in violation of Section 1692d(5), and those who do not violate the limits being deemed *per se* in compliance. In theory the shift to

the Bureau itself found, the overwhelming majority of consumers indicated that being contacted **once per week or more** by debt collectors was too often.[55] Given the Bureau's own data, it is difficult to comprehend how the Bureau can justify giving debt collectors such significant leeway to make up to **seven** calls per week, and finalizing this provision would constitute arbitrary and capricious rulemaking, since allowing that many calls would "run[] counter to the evidence before" the Bureau.[56]

Setting the call frequency limit as high as the Final Debt Collection Rule does is especially egregious when considering how this particular provision would operate. For example, technological advances, specifically the availability of predictive dialers, have increased the ability of debt collectors to place calls more frequently.[57] Moreover, the proliferation of cell phones means that frequent calls are both (1) less necessary for debt collectors and (2) more annoying for debtors to receive. Because a person with a cell phone does not physically need to be in their home (or any other particular place) to receive a call, debt collectors should need to make fewer calls to establish contact with a debtor. At the same time, because a person with a cell phone is likely to be present when their phone rings, regardless of physical location, the placement of a call is more likely to be unduly intrusive and annoying to the recipient.

In addition, the limit would only apply with regard to contacting a particular consumer regarding a **particular debt**. Thus, a consumer who happens to have two or three (or more) debts placed for collection could receive two or three (or more) times the nominal "limit" on calls, i.e. fourteen or twenty-one (or more) calls in a single week.

Moreover, given that other aspects of the Final Debt Collection Rule make contacting consumers much easier, it is unclear **why** debt collectors would have a legitimate need to contact consumers so frequently. For example, the Final Debt Collection Proposal allows debt collectors to leave "limited content messages" with a consumer. This would alleviate the liability concerns that debt collectors have about leaving voicemails requesting a callback, and so would improve the ability of debt collectors to facilitate a response from consumers regarding the debt in

a rebuttable presumption is a mixed bag for consumers and debt collectors alike—it gives consumers the opportunity to argue that a debt collector that has not breached the Final Debt Collection Rules frequency limits has nonetheless violated 1692d(5), and in turn gives debt collectors the opportunity to argue that they have not violated 1692d(5) despite breaching the frequency limits. In practice, it will most likely work to the advantage of debt collectors, who will have more resources to devote to rebutting the presumption of non-compliance, and upholding the presumption of compliance, as the case may be.

55 Debt Collection Proposal at 23,311-12. Ninety percent of consumers stated that being called more than three times per week was too often, and 74 percent said that being called one to three times per week was too often.

56 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

57 Debt Collection Proposal at 23,310.

collection.[58] Likewise, the Final Debt Collection Rule would alleviate the liability concerns stemming from electronic communications such as text messages and emails (neither of which would be subject to the limits on contact frequency). These provisions significantly reduce the need for debt collectors to repeatedly call consumers.

In summary, the limit on call frequency should be significantly lower, given (1) the data available to the Bureau about consumer preferences; (2) the fact that any limits on call frequency could lead to the same consumer, with multiple debts in collection, being contacted much more often than the nominal limits; and (3) the fact that debt collectors under the Final Debt Collection Rule would have a significantly greater ability to contact consumers through a variety of channels, making repeated calls less necessary in any legitimate collection effort. The Bureau is appropriately proposing to delay the effective date of the rule governing contacts with debtors, and it should commence a new rulemaking to address its serious defects.

B. The Bureau Should Outright Ban Collection of Time-Barred Debt.

Collection of time-barred debt presents serious consumer protection issues. As explained below, the FDCPA, in part, is intended to allow consumers to make a reasonable, informed decision **not to pay a debt**. As the CFPB has previously explained, consumers who think they can be sued over a debt, and accordingly may worry they will face legal fees, court costs, judgment liens, and other encumbrances as a result of not paying the debt, are likely to prioritize that debt over other expenses, specifically to avoid the collateral consequences of a lawsuit.[59] Conversely, a consumer who knows they cannot be sued over a debt is likely to prioritize other, more pressing expenses, over paying that debt.[60] Put in a more concrete way, a consumer's impression about whether they can still be sued over a particular debt is likely to influence whether they go without prescriptions and groceries, whether they fall behind on rent and utility payments, or whether they forego critical repairs to their homes or vehicles, so that they can put money towards a particular debt that is being collected, hoping to stave off a lawsuit.

Moreover, the collection of time-barred debt contains a counterintuitive trap for the unwary consumer—paying, or signaling an intent to pay, a time-barred debt may risk reviving the debt, allowing the owner of the debt to sue again over the debt. For these reasons, it has long been the case that threatening to sue over a time-barred debt has been considered by courts a deceptive act that is prohibited by the FDCPA, an interpretation the CFPB correctly codified, with a strict liability standard, in the Stale Debt Rule.[61]

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58 Among other reasons, debt collectors may have been hesitant to leave voicemails because of concerns about improper disclosure to third parties. Debt Collection Proposal at 23,289-90.

59 Debt Collection Practices (Regulation F), 85 Fed. Reg. 12,672, 12,675 (Mar. 3, 2020) ("Supplemental Proposal").

60 Supplemental Proposal at 12,675.

61 Stale Debt Rule at 5854.

However, while it has long been considered unlawful to threaten to sue over a time-barred debt, courts had previously been hesitant to declare it *per se* unlawful to attempt to collect a time-barred debt that had not been extinguished by state law. Evidence developed by the CFPB shows that hesitancy has been misplaced, as the **mere attempt at collection of a time-barred debt is likely to give the misimpression that the consumer faces a potential lawsuit over the debt.** In conjunction with its Supplemental Proposal addressing time-barred debt, the CFPB conducted a study assessing various disclosures related to time-barred debt.[62] Presented with a scenario where a debt collector is attempting to collect a time-barred debt, approximately two-thirds of study participants **incorrectly thought that the debt collector could sue over the debt,** with another 30% feeling uncertain or thinking "it depends."[63] Fewer than 10% understood they could not be sued over the debt.[64] In other words, over 90% of participants did not understand that they could not be sued over a time-barred debt that was being collected.

This is not surprising. There are, of course, the confusing doctrines surrounding statutes of limitations, choice-of-law, and other legal concepts necessary for determining whether a debt is time-barred, issues which can vex even experienced litigators. More basically, however, is the reality that consumers are unlikely to grasp the concept that a debt can be **legally owed** but simultaneously the debt collector has **no legal recourse to enforce the debt.** In other words, the mere assertion that a debt is owed, even without an explicit threat to sue, is going to convey an impression to most consumers that the debt could be enforced in court, because, frankly, there is no real reason for any person without legal training to understand this counterintuitive concept. Even more counterintuitive is the concept of revival—that a debtor can "revive" the ability of a debt collector to sue over a previously time-barred debt by making payments toward the debt. And again, the CFPB Stale Debt Study found real consumer confusion—less than 20% of participants realized that putting $100 towards a time-barred debt, or acknowledging the debt, revived the ability to sue over that debt, while approximately 40% incorrectly thought that those actions would not revive the debt, with another 40% (understandably) expressing confusion.[65]

For that reason, the CFPB proposed to require certain disclosures in connection with the collection of time-barred debt. However, the same CFPB Stale Debt Study revealed that disclosure was insufficient to protect consumers. While disclosures corrected the misimpressions surrounding lawsuits over time-barred debt for a majority of consumers, a significant minority, around 30-40%, were still confused, both about the ability of the debt collector to sue over the debt and the concept of revival.[66] This is unsurprising—there is a growing consensus among experts

[62] CFPB, DISCLOSURE OF TIME-BARRED DEBT AND REVIVAL: FINDINGS FROM THE CFPB'S QUANTITATIVE DISCLOSURE TESTING (Feb. 2020), https://files.consumerfinance.gov/f/documents/ cfpb_debt-collection-quantitative-disclosuretesting_report.pdf ("CFPB Stale Debt Study").

[63] CFPB Stale Debt Study at 17.

[64] CFPB Stale Debt Study at 17.

[65] CFPB Stale Debt Study at 18-19.

[66] CFPB Stale Debt Study at 17-20.

that, in general, disclosure regimes are insufficient to protect consumers and investors from harm.[67] This can be expected to be exacerbated where, as here, disclosures concern such confusing, counterintuitive subject matter. The upshot of all of this is that merely attempting to collect a time-barred debt is unfair and deceptive and robs the consumer of their right, under the FDCPA, to make an informed decision about whether to pay a debt. Moreover, disclosure, while it provides some protection for some consumers, leaves an unacceptably high number of consumers—one-third or more—unprotected from paying a debt they would not otherwise pay, likely leading them to prioritize the stale debt over other critical expenses, a significant consumer harm. This should have led the CFPB to ban the collection of time-barred debts, as called for by Better Markets and other consumer advocates.[68]

Instead, the Kraninger-led Bureau, citing losses the industry would suffer if it banned collection of time-barred debts,[69] refused to ban collection of time-barred debts. It reasoned that disclosure would be sufficient to cure any confusion related to time-barred debts (despite evidence that a significant portion of consumers would still be confused, even with disclosures). But at the same time, the Bureau **refused to require any such disclosures related to time-barred debt.**[70] In refusing to adopt required disclosures, the CFPB purported to be responding to both industry concerns about disclosures (namely that it would be too burdensome to determine when to provide the different disclosures) and consumer advocate concerns about the documented ineffectiveness of the proposed disclosures and of disclosures more generally.[71] That approach was indefensible, , as consumer advocates were not pointing out that the proposed disclosures were insufficiently effective in the hopes that the Bureau would provide consumers with **no protection at all**.[72] In

67 Better Markets Letter on Debt Collection Supplemental Proposal at 8-10 (Aug. 4, 2020), https://bettermarkets.com/sites/default/files/Better_Markets_Comment_Letter_on_Debt_Collection_Time-Barred_Debt.pdf.

68 Better Markets Letter on Debt Collection Supplemental Proposal at 8-10 (Aug. 4, 2020), https://bettermarkets.com/sites/default/files/Better_Markets_Comment_Letter_on_Debt_Collection_Time-Barred_Debt.pdf; National Consumer Law Center Letter on Debt Collection Supplemental Proposal at 5-9 (Aug. 4, 2020), https://www.nclc.org/images/pdf/debt_collection/NCLC-Comments-for-Supplemental-Debt-Rule.pdf.

69 The Bureau noted that such a ban "would decrease the value of time-barred debts to little or nothing." Stale Debt Rule at 5778. This is almost certainly true, but $0 would, in fact, seem to be about the correct value of an unenforceable debt.

70 Stale Debt Rule at 5777-78, 5782-83..

71 Stale Debt Rule at 5782.

72 *Cf.* Better Markets Letter on Debt Collection Supplemental Proposal at 11-14 (Aug. 4, 2020) (explaining that at the very least, the CFPB must not weaken its proposal in response to specious industry arguments), https://bettermarkets.com/sites/default/files/Better_Markets_Comment_Letter_on_Debt_Collection_Time-Barred_Debt.pdf; National Consumer Law Center Letter on Debt Collection Supplemental Proposal at 10-40 (Aug. 4, 2020) (urging the CFPB, if it insists on going forward with a disclosure regime to address deception related to time-barred debt, to at least meaningfully strengthen the disclosures), https://www.nclc.org/images/pdf/debt_collection/NCLC-Comments-for-Supplemental-Debt-Rule.pdf.

reality, this aspect of the Stale Debt Rule appears to represent nothing more than a giveaway to predatory debt collectors at the direct expense of vulnerable consumers who will, purely as a result of confusion, pay debts they would not otherwise pay and forego paying other critical expenses.

And this giveaway to predatory debt collectors is almost certainly in violation of bedrock principles of law governing the rulemaking process. It is difficult to imagine a more clear cut (in fact, absurd) case of an agency relying "on factors which Congress has not intended it to consider" and "offering an explanation for its decision that runs counter to the evidence before the agency." The Bureau, charged with robustly regulating predators and protecting consumers, adopted a rule which the evidence in the record showed was the **option most harmful to consumers;** it did so for the purpose of alleviating burdens on predatory debt collectors; it justified that rule by pointing to disclosures it claimed (erroneously) would sufficiently protect consumers; and yet, at the same time, it declined to require those disclosures.[73]

Under these circumstances, it is highly appropriate and indeed necessary for the Bureau to postpone the effective date of the Stale Debt Rule. It must revise the rule to prohibit the collection of stale debts, to better protect consumers, and to protect itself from litigation over this plainly arbitrary and capricious regulation.

<u>CONCLUSION</u>

We hope these comments are helpful as you evaluate the Proposal.

Sincerely,

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[73] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

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