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

Re: Debt Collection Practices (Regulation F), Docket No. CFPB-2020-0010, RIN 3170-AA41, 85 Fed. Reg. 12,672 (March 3, 2020)

Dear Consumer Financial Protection Bureau:

Better Markets Inc.[1] appreciates the opportunity to comment on the above-captioned supplemental notice of proposed rulemaking ("Proposal" or "Release"), issued by the Consumer Financial Protection Bureau ("CFPB" or "Bureau").

The Proposal would amend Regulation F, which implements the Fair Debt Collection Practices Act ("FDCPA"), to require certain disclosures when debt collectors attempt to collect time-barred debt, i.e. debt for which the applicable statute of limitations has run. Specifically, the Proposal would require that, when attempting to collect a time-barred debt, a debt collector disclose to a consumer that (1) the law limits how long the consumer can be sued for a debt, and because of the age of the debt, the debt collector will not sue to collect it; and (2) if the debt collector's right to sue the consumer can be revived under state law (through partial payment or acknowledgment of the debt), the fact that revival can occur and the circumstances under which that is possible. The Proposal includes model disclosures and forms.

Unfortunately, rather than protecting consumers effectively by banning attempts to collect on time-barred debt, the Bureau has opted instead for an ineffective disclosure regime, despite the fact that the Bureau's own evidence shows that disclosure will still leave a huge swath of consumers—representing millions of vulnerable Americans—confused about the legal status of their debt. Yet again, the Bureau is catering to the financial services industry, not protecting vulnerable consumers from predatory tactics.

[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.

SUMMARY OF COMMENTS

One of the overriding purposes of Congress in enacting the FDCPA was to ensure that consumers—typically those already facing financial hardship—would be protected from fraud, harassment, and unfair practices in the debt collection process, ultimately so they can make independent decisions about whether and when to pay debts in collection.

The Proposal does not fulfill these statutory purposes, as it falls far short of what is necessary to adequately protect consumers against attempts to collect on debt that is time-barred under the law. The Bureau can and should flatly prohibit any attempts to collect on debt that has past the appliable statute of limitations. By failing to do so, the Bureau is once again subordinating the interests of consumers to the financial services industry—in this case, the infamously abusive debt collection industry. Indeed, the Bureau is essentially announcing that upon making a few simple disclosures about complex legal questions, debt collectors are free to go after consumers even on debts that are so old and stale that they cannot be recovered in court.

In the Proposal, the Bureau has chosen to establish a disclosure regime that will supposedly give consumers a clear understanding of their rights and vulnerabilities with respect to time-barred debt. But a mountain of evidence developed over the years shows that disclosure is a woefully inadequate regulatory mechanism for protecting consumers from fraud and other misleading and abusive tactics in the financial marketplace. And in fact, according to the Bureau's own data, the rule would still leave a huge number of consumers—millions of Americans—in a state of confusion and vulnerable to the coercive impression that they are subject to suit on their debt when in fact they are not. These estimates are undoubtedly understated, as the Bureau's testing and resulting data have not been independently vetted. Nor do those tests account for the many tactics that can be used to downplay or even negate the impact of mandatory disclosures.

As a direct result of the Bureau's failure to establish the clearly necessary and appropriate regulatory safeguards, consumers will be making critically important financial decisions based on confusion, fear, and lack of understanding. They will often be prioritizing time-barred debt over debts that are not time-barred and even allocating scarce funds to time-barred debt at the expense of necessities, including food, shelter, and medicine. And those who will suffer the most under this Proposal are those of limited means, already struggling to make ends meet, and now facing even greater hardship as the pandemic unfolds and people are losing their jobs and incomes in droves.

At minimum., the Bureau must strengthen the Proposal, which further accommodates debt collectors at the expense of consumers through a weak intent standard. Specifically, the Proposal only requires debt collectors to make the applicable disclosures where the debt collector "knows or should know" that the statute of limitations has run on a debt. The Bureau premises this lenient standard on the concern that determining whether a debt is time-barred can be a difficult and burdensome task. However, if making that determination is difficult for a debt collector, it will be impossible for a consumer in dire economic straits and without access to affordable counsel. Consumers should not lose the protections of the FDCPA because determining whether the statute of limitations has run is difficult; in fact, that is when consumers need those protections the most. Debt collectors, not consumers, should bear the burden of determining when the statute of limitations on a debt has run, and should bear the legal risk of a mistake. In short, if the Bureau insists on going forward with a flawed disclosure regime, at the very least it should impose a strict liability test for the disclosure requirement.

Finally, the Bureau must resist pressure from the debt collection industry to further weaken or abandon the Proposal. The Bureau must especially be wary of arguments that the Proposal could somehow hurt consumers by increasing costs or reducing access to credit. The data in the record show that these are unfounded claims. Unless such arguments, and any others the industry or others advance in opposition to the rule, are based on credible, independent evidence, the Bureau must reject them outright. And even if opponents of the Proposal can somehow substantiate these claims, the Bureau must determine if these effects are sufficient to override the benefits that the Proposal would confer on many—albeit far from all—consumers.

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 and deception 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.[2] 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 willing to go to extreme lengths to collect debts. The tactics of debt collectors became varied and shocking. They included harassment by calling consumers incessantly, calling in the middle of the night, and notifying friends and families in an attempt to publicly shame the debtor. Threats of physical violence were also deployed. And debt collectors engaged in coercion and deception—threats to get the debtor fired, baseless threats to have the debtor arrested, and, relevant to the Proposal, threats to bring suit even when the claim was past the statute of limitations and therefore unenforceable in court.[3]

These extreme tactics are the natural consequence of the incentives in play. Because debt collectors' profits are tied exclusively 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

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

[3] 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).

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[4]—indeed, from a reputational standpoint, it could be said that the more aggressive a debt collector, the better its reputation among creditor clients.[5] In other words, only strong protective legal rules and the credible threat of liability for violation of those rules can 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.[6] 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.[7] And debtors typically lack the means to afford their own legal counsel to fend off the debt collectors or to protect their legal rights with regard to the debt. In other words, the victims of of abuse by debt collectors are often among the most vulnerable members of society most in need of legal protections.

Thus, debt collection involves an industry with powerful incentives to abuse, exploit, and deceive consumers to the fullest extent possible, and a set 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"[8] and the resulting urgent need for corrective measures in this inherently toxic environment, Congress passed the FDCPA in 1977 to rein 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 the 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.[9] 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.[10]

[4] S. REP. 95-382, at 2 (1977).

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

[6] *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.").

[7] 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).

[8] 15 U.S.C. § 1692(a).

[9] 15 U.S.C. § 1692, *et seq.*

[10] 15 U.S.C. §§ 1692k, 1692l(a).

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 justifying deception as a means to recoup the debt. This evolution is apparent in the report of the Senate Committee on Banking, Housing, and Urban Affairs 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.[11]

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 in fact owed by the consumer, can be legitimate, and a consumer who makes such a decision does not deserve to be deceived 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 coercion or deception 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.[12]

Unfortunately, it is evident that many in the debt collection industry subscribe to the antiquated notion that consumers who struggle to pay their debts are engaging in some sort of immoral or dishonest conduct—one industry group's comment letter regarding the CFPB's Debt Collection Proposal urged the CFPB to "not incentivize consumers to shirk legal and valid debts at the expense of honest businesses and other consumers."[13] There is, of course, no basis for casting such broad aspersions on consumers whose debts are in collection. By and large, consumers who take out a debt fully intend to pay it back, and in fact they do so when they can, even when there may be justifications for withholding payment. For example, during the financial crisis when home values plummeted and homeowners were left paying off mortgages that were

[11] S. REP. 95-382, at 3 (1977).

[12] NATIONAL CONSUMER LAW CENTER, FAIR DEBT COLLECTION 5 (2014 ed.).

[13] Comment Letter from ACA International regarding Debt Collection Proposal (Sept. 18, 2019).

significantly higher than the value of their homes, the overwhelming majority continued making their mortgage payments nonetheless.[14]

A failure to pay debts almost never reflects opportunistic "shirking" of responsibilities on the part of consumer, but instead is the result of some sort of traumatic, unexpected shock in the consumer's life—death, divorce, major illness, loss of job, or other tragic circumstance that makes paying debts difficult or impossible. As Congress did when it passed the FDCPA, the CFPB must see through the baseless rhetoric that casts unfair judgment on consumers who might choose not to pay a debt because it is time-barred, and recognize that, in fact, the FDCPA appropriately grants consumers the right to make that legitimate choice.

However, consumers cannot meaningfully exercise that judgment regarding time-barred debt if they are confused and misled about the legal status of their debt. Consumers in that state of mind are likely to base decisions about whether to pay a debt on false impressions, to their detriment.[15] This undoubtedly results in consumer harm—consumers with debts in collection are highly likely to be in significant financial distress, for whom the allocation of every dollar matters; a dollar that goes to paying a stale debt because the consumer mistakenly believes they can still be hauled into court over it, is one less dollar that the consumer has for food, rent, prescriptions, child care, or other critical expenses.

Additional protections are necessary not just to protect consumers from being explicitly or implicitly misled, but also to promote uniformity and certainty in the area of debt collection regulation. Courts have routinely held that a debt collector violates the FDCPA's prohibition on the use of any false, deceptive, or misleading representation or means in connection with the collection of any debt[16] if they sue, or threaten to sue, on a debt that is time-barred.[17] In its broader debt collection proposal issued in 2019,[18] the Bureau proposed to codify this longstanding judicial interpretation by implementing a rule prohibiting a debt collector from suing or threatening to sue on debt that they know, or have reason to know, is time-barred.[19]

[14] 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/.

[15] Release at 12,678-80.

[16] 15 U.S.C. § 1692e.

[17] *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.").

[18] Prior to 2010, no federal agency had authority to prescribe rules implementing the FDCPA. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, 124 Stat. 1376 (July 21, 2010), granted the Bureau rulemaking authority with respect to the FDCPA.

[19] Debt Collection Practices (Regulation F), 84 Fed. Reg. 23,274 (May 21, 2019) ("Debt Collection Proposal"); Better Markets, Comment Letter to CFPB on Debt Collection Practices proposal (Sept. 18, 2019), available at https://bettermarkets.com/sites/default/files/Better%20Markets%2C%20Inc.%20%20Comment%20Letter%20on%20RIN%203170-AA41%2C%20Debt%20Collection%20Practices%20%28Regulation%20F%29%20dated%20September%2018%2C%202019.pdf.

However, a separate legal question arises when a debt collector attempts to collect a debt without resorting to litigation but by failing to disclose that the debt is time-barred and leaving intact the common impression that a lawsuit is possible if not likely. While courts have recognized that attempting to collect a debt without disclosing that it is time-barred **could** be deceptive, they have generally refused to establish a *per se* rule that doing so is always deceptive; generally speaking, whether a particular collection attempt in those circumstances violates the FDCPA has been a question of fact.[20]

This ambiguity favors debt collectors at the expense of consumers. Because of the prohibitive expense of a lawsuit, many consumers cannot or will not have the resources to protect their legal rights, either by determining whether a debt is time-barred, defending against a time-barred debt in court, or suing to vindicate their rights where a collection attempt is deceptive. This is especially the case where prevailing is less certain because it involves an ambiguous situation whose resolution depends on a fact-intensive inquiry. Moreover, in many jurisdictions, a trap awaits unwary debtors regarding time-barred debt: a consumer may revive the collector's right to sue on the debt if they take action regarding the debt, such as making a partial payment or acknowledging the validity of the debt in writing.[21]

The breadth and severity of these problems surrounding debt collection is evidenced in a number of sources, in addition to the case law. As the Release indicates, the subject of debt collection, including attempts to collect on time-barred debt, has generated intense concern and interest. For example, the Bureau's 2013 ANPR drew over 23,000 comments; as referenced in the Release, there is abundant evidence showing that consumers are confused and vulnerable when it comes to time-barred debt; the Bureau convened a small business review panel on the subject, as well as focus groups; and the Bureau's 2019 proposal barring threats to sue on time-barred debt drew another 14,000 comments.

Throughout this process, many commenters, including consumer groups with expertise on the subject, have argued that attempts to collect on time-barred debt should be banned outright, not merely conditioned on disclosure. This is indeed the approach that the Bureau should have taken. The reality is that disclosure simply cannot protect consumers, especially when they are in dire financial straits and confronted with debt collection efforts. Expecting them to understand disclosures about the legally technical concepts of the statute of limitations and revival of time-barred debt is wholly unrealistic. And it is clear that while some states have passed laws addressing the problem to some degree, debtors will not be adequately protected throughout the country until a uniform federal rule is in place.

SUMMARY OF PROPOSAL

The Proposal would provide that debt collectors attempting to collect on time-barred debts, if they know or should know that a debt is time-barred, must disclose to consumers (1) that the statute of limitations has run on a debt and, accordingly, that the debt collector will not sue on the

[20] *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 396 (6th Cir. 2015).
[21] Release at 12,673.

debt, and (2) if applicable, the circumstances under which the debt may be revived.[22] Debt collectors would be required to give the disclosures in the initial communication regarding the debt, and on any subsequent required validation notice.[23]

In cases where the debt is not time-barred at the time of the initial communications with the debtor, or the debt collector did not know or have reason to know the debt was time-barred, but the debt collector subsequently knows or has reason to know the debt has become time-barred, the debt collector would be required to provide the relevant disclosures in the first communication after the date on which the debt collector knows or should know the debt has become time-barred.[24]

COMMENTS

I. The Bureau must more effectively protect consumers by banning entirely attempts to collect time-barred debt.

The Bureau is opting for a disclosure-based solution to a serious type of consumer abuse, yet we know that disclosure is a poor substitute for affirmative limits on abusive or deceptive behavior in financial services. Instead, the Bureau should ban attempts to collect on time-barred debt. This simple, uniform, and powerful safeguard is the only way to protect consumers adequately from abuses in the collection of time-barred debt.

Opponents of regulation often advance the view that disclosure is the cure-all for fraud and abuse in the financial markets, an approach that supposedly enables consumers to protect themselves. While clear, accessible, and timely disclosures for consumers can be a vital part of financial regulation, over-reliance on them at the expense of substantive rules is an enormous mistake. The norm among financial firms for decades has been an outright failure to make required disclosures or at best a formalistic approach to disclosure that often does consumers and investors little good. Firms make disclosures hard to find, hard to read, hard to understand, and ill-timed. And some financial professionals use common ploys to belittle disclosures or actually negate them with reassurances that the fine print does not actually apply to the client's product, service, or situation. Rarely do firms, or regulators for that matter, seek expert input to make the form and content of disclosures truly helpful to consumers.

In fact, there is a growing consensus among experts, especially in the area of financial advice but more generally as well, that regulation by disclosure is not only ineffective but also at times counterproductive. Evidence indicates that disclosures are capable of undermining consumer and investor protection goals by emboldening financial service providers to mislead or pressure clients once they have "checked the disclosure box;" and by the same token, disclosures can engender a false sense of trust among investors and consumers, rendering them even more

[22] Release at 12,678

[23] Release at 12,680.

[24] Release at 12,682.

vulnerable to abusive tactics once they receive disclosures.[25] All of these concerns apply to the disclosures that debt collectors would be required to make under the Proposal.

The inability of disclosure to effectively solve the specific problem of attempts to collect on time barred debt is reflected in the Bureau's very own data. It shows that a large percentage of consumers, up to 30 or 40%, remain confused about their exposure to ligation and the threat of debt revival even after they have received disclosures.[26] They still believe that collectors can sue when in fact they cannot, or conversely they still believe they are immune from suit when in fact they are not due to the consequences of revival. And this data undoubtedly understates the problem, as it was not independently vetted. Moreover, the test disclosures were developed under optimal, controlled conditions where testers had no incentive to slant or distort the disclosures in a way that would minimize their impact, nor did the testers accompany the disclosures with statements that would tend to negate their impact on confused consumers.

The Release confirms that the high percentage of consumers who do not benefit from disclosure likely represents millions of individuals. It explains that "at least 49 million consumers are contacted by a third-party debt collector each year about a debt in collection," and that even if only a small portion of those debts are time-barred, debt collectors may be contacting millions of consumers each year about time-barred debt. Further, if approximately one-third of those consumers will remain confused about the threat of litigation even after receiving a disclosure, that still represents potentially millions of still-vulnerable consumers. Given the lack of reliability in the data described above, the universe of consumers who would gain little from the proposed disclosures is undoubtedly far greater. The Bureau's willingness to establish such a disclosure regime—one that is so ineffective by its own admission—is unacceptable, representing another instance in which the agency is betraying its duty to protect consumers from abusive tactics in the financial services marketplace. We therefore join with the other consumer protection advocates

[25] *See* Angela Hung et al., Effective Disclosures in Financial Decisionmaking (2015), *available at* https://www.rand.org/pubs/research_reports/RR1270.html; George Loewenstein et al., *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest*, 101 American Economic Review: Papers and Proceedings 423 (2011); Robert Prentice, *Moral Equalibrium: Stock Brokers and the Limits of Disclosure*, 2011 WIS. L. REV. 1059 (2011) (concluding that disclosures do not give sufficient information to investors and may even cause brokers to give more biased advice); Omri Ben-Shahar & Carl Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011) (finding that disclosure as a regulatory tool has a history of being ineffective); Daylian Cain et al., *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. OF LEGAL STUDIES 1 (2005). Similar findings were presented at a 2017 meeting of the SEC's Investor Advisory Committee, where four panelists discussed the limitations and sometimes counterproductive effects of disclosures as a remedy to conflicts of interests. *See* Meeting of the Securities and Exchange Commission Investor Advisory Committee (Dec. 7, 2017), https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac120717-agenda.htm; Sunita Sah et al., *The Burden of Disclosure: Increased Compliance with Distrusted Advice*, 104 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 289 (2013) (describing 6 experiments revealing that disclosure can increase pressure to comply with advice if the advisees feel obliged to satisfy their advisors' personal interests).

[26] Release at 12,678-80.

who believe that the only effective regulatory approach is to ban efforts to collect on time-barred debt.

II. Debt collectors should be strictly liable for violating prohibition on suits or threats of suit for time-barred debt.

The Proposal falls short of the consumer protection purposes of the FDCPA and the mission of the CFPB in another important respect. It would only require that debt collectors provide the applicable disclosures if they "know or should know" that the debt is time-barred, based on the supposed challenges and burdens debt collectors would face in ascertaining the legal status of a debt.[27] Unfortunately, as it did in the Debt Collection Proposal, the CFPB mistakenly seeks to alleviate that burden for debt collectors, which thereby imposes it on consumers. Instead, debt collectors should be strictly liable for failure to provide disclosures regarding time-barred debt.

It is well-settled that the FDCPA is a strict liability statute.[28] The Bureau should only depart from this regime for a compelling reason that plausibly advances consumer protection. The Bureau's reasoning for importing a "know or should know" requirement is that "determining whether the statute of limitations has expired can be a complex undertaking."[29] This may well be the case, and no one disputes that at times determining whether a debt is time-barred may be a complex and burdensome task.[30] But that hardly justifies the Bureau's proposed knowledge standard. On the contrary, it clearly indicates that the cost, and associated risk, of determining whether the statute of limitations has run should fall on debt collectors, not consumers.

If it is difficult, in any particular situation, for a debt collector to determine whether or not the statute of limitations has run, it will be nearly impossible for consumers to make that determination. The simple fact is that debt collectors have an enormous advantage over consumers and are much better able to bear the cost of determining whether the statute of limitations has run on a debt and of bearing the risk of a mistaken determination. Debt collectors, by definition, are in the debt collection business. Accordingly, they are accustomed to navigating statutes of limitations, and they also have ready access to records that might bear on the questions involved in determining whether a debt is time-barred. Moreover, debt collectors are more likely to be able to afford competent counsel that can determine whether the statute of limitations has run. In other words, debt collectors have the resources to avoid making an erroneous determination about whether a debt is time-barred, and they should bear the burden of doing so.

[27] Release at 12,680.

[28] *E.g.*, *Kaplan v. Assetcare, Inc.*, 88 F. Supp. 2d 1355, 1362 (S.D. Fla. 2000) (listing cases holding that FDCPA is strict liability statute and analyzing statutory text to conclude that FDCPA is a strict liability statute).

[29] Release at 12,680.

[30] However, claims about the enormous burden of determining whether a debt is time-barred for debt collectors appears to be exaggerated, especially in this age of easy access to legal and other records that might bear on questions surrounding the statute of limitations.

By contrast, consumers in debt collection actions are ill-equipped to make a determination about whether a debt is time-barred. While debt collectors are likely to be conversant with the various issues bearing on time-barred debt, consumers may not even be aware of the concept of the statutes of limitations, and are unlikely to be able to grapple with choice-of-law provisions or the counterintuitive concept of revival.[31] As the Bureau found, even when a debt is clearly time-barred, consumers who did not receive a notice were likely to mistakenly think it was not time-barred, and accordingly to pay the debt when they otherwise would not.[32] This burden does not belong on consumers, who are less able to bear it; as contemplated by the FDCPA, debt collectors should bear the cost and risk of error.

III. The CFPB must at least resist industry claims that the Proposal should be weakened to protect consumers from higher costs or limited access to credit.

The Bureau must at least defend its Proposal against industry's inevitable clamor that further diluting or abandoning the Proposal is necessary to spare the industry unreasonable burdens or to enhance consumer welfare by lowering the cost of credit.

As a general matter, of course, time and time again over the last century, attempts to limit or rollback regulation based on the notion that consumers or investors will actually suffer have 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 business that would cause nothing but harm.[33] However, in the years following this early appearance of financial regulation, banks and their profits grew handsomely.[34] 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 strengthen financial regulation, including deposit insurance, the Glass-Steagall Act, mutual fund reform, and the national market initiatives of the mid-1970s.[35]

[31] Release at 12,675.

[32] Release at 12,678-79.

[33] *See* Marcus Baram, *The Bankers Who Cried Wolf: Wall Street's History of Hyperbole About Regulation*, THE HUFFINGTON POST (Jun. 21, 2011, 6:56 PM), available at http://www.huffingtonpost.com/2011/06/21/wall-street-historyhyperbole-regulation_n_881775.html.

[34] Paul G. Mahoney, *The Origins of the Blue-Sky Laws: A Test of Competing Hypotheses*, 46 J.L. & ECON. 229, 249 (2003) ("In the 5 years following adoption of a merit review statute [the most stringent type of blue-sky law statute], bank profits increased on average by nearly 5 percentage points . . .").

[35] Marcus Baram, *supra*; *see also* Nicholas Economides et al., *The Political Economy of Branching Restrictions and Deposit Insurance: A Model of Monopolistic Competition Among Small and Large Banks*, 39 J. L. & ECON. 667, 698 (1996) ("The American Bankers Association fights to the last-ditch deposit guarantee provisions of the Glass-Steagall Bill as unsound, unscientific,

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*."[36] However, the available data show that this has not happened, and that in fact, lending activity has increased.[37] 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 the Proposal, the Bureau must resist evidence-free arguments that finalizing the Proposal 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 weakening or abandoning the Proposal 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.[38] 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.[39]

unjust and dangerous. Overwhelmingly, the opinion of experienced bankers is emphatically opposed to deposit guarantee which compels strong and well-managed banks to pay losses of the weak . . .The guarantee of bank deposits has been tried in a number of states and resulted invariably in confusion and disaster . . . and would drive the stronger banks from the Federal Reserve System.") (quoting Francis H. Sisson, president of the American Bankers Association).

[36] 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).

[37] *Id.*

[38] 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.").

[39] Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, Mercatus Working Paper, Mercatus Ctr. at George Mason Univ., at 47 (Sep. 2015) ("Zywicki Paper")("In a competitive market, losses from uncollected debts are passed on to other consumers in the form of higher prices and restricted access to credit; thus, excessive forbearance from collecting debts is economically inefficient."). This references three empirical studies that ostensibly "have confirmed the observation that prohibiting creditors from using useful remedies in the event of default typically results in higher costs and less access to credit." Zywicki Paper

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.[40] 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.[41] 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 thousand consumers; the other found a reduction of successful credit inquiries of 0.02%.[42] Only one study has found that stricter debt collection regulation results in a higher cost

at 24. However, the applicability of those studies to the issue of debt collection regulation is questionable, at best. One study regards remedies such as caps on late fees and availability of garnishment, topics that are not covered by the FDCPA. *Id.* Another study is a survey providing the self-reported assessment of banks', who are not subject to the FDCPA, responses to the enactment of the Wisconsin Consumer Act, a collection of laws that is not analogous to the FDCPA. *Id.* at 25-27. Professor Zywicki did cite one study that assessed the impact of stricter debt collection laws on availability of consumer credit, but appeared to misunderstand the import of the study—Professor Zywicki asserted that the study found that restrictions on debt collectors resulted in a 2.2 percent reduction in new revolving lines of credit, *id.* at 27, but the study appears to have actually found only a reduction in new revolving lines of credit of 2.2 **per thousand** consumers as a result of credit restrictions. Viktar Fedaseyeu, *Debt Collection Agencies and the Supply of Consumer Credit* at 44 (Fed. Reserve Bank of Phila., Working Paper No. 13-38, 2013).

[40] James Kwak, *The Curse of Econ 101*, THE ATLANTIC (Jan. 14, 2017), https://www.theatlantic.com/business/archive/2017/01/economism-and-the-minimum-wage/513155/. One clear example is the minimum wage. Basic economic theory might predict that raising the minimum wage would lead to an increase in unemployment, but many empirical studies show that increases in the minimum wage do not increase unemployment. *Id.*

[41] One of these studies assessed the impact of stricter debt collection laws on access to both credit card loans and automobile loans, in both cases by measuring the differences in loan limits. Debt Collection Proposal at 23,390; *see also* 8 Julia Fonseca, Katherine Strair & Basit Zafar, *Access to Credit and Financial Health: Evaluating the Impact of Debt Collection* (Fed. Reserve Bank of N.Y. Staff Report No. 814, 2017). That study found a statistically significant impact on auto loan limits, but no impact on credit card limits. As the Bureau noted, while delinquent credit card accounts typically go into collections, "most delinquent automobile debt is resolved through repossession." Debt Collection Proposal at 23,390. This calls into question whether the methodology of this particular study was actually capturing effects from restrictions on debt collection, or other, unrelated factors. *Id.*

[42] Not only is there no evidence of a significant reduction of access to credit, it is not necessarily the case that increased access to credit necessarily constitutes a consumer benefit. While the Dodd-Frank Act requires the Bureau to consider the cost of its rules on access to credit, it does not mandate that decreased access to consumer credit constitutes consumer harm. In fact, 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 circumstances leading to its passage and its underlying purposes show that Congress did not simple-mindedly intend to expand access to all credit in all circumstances.

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.”[43]

The Bureau also explored the possibility that requiring time-barred debt disclosures could have unintended consequences, such as making it more likely that debt collectors would sue over debt before it becomes time-barred.[44] The Bureau correctly concluded that a material increase in litigation as a result of requiring such disclosures 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.”[45]

Thus, the evidence shows that consumers suffer significant harm when debt collectors are not required at least to disclose the status of time-barred debts, and it further shows that requiring such disclosures will have little adverse impact on consumers. Accordingly, the Bureau must reject any arguments from the industry that weakening the Proposal or maintaining the status quo will enhance consumer welfare.

CONCLUSION

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

Sincerely,

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[43] Debt Collection Proposal at 23,390.

[44] Release at 12,688.

[45] Release at 12,688.

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