August 4, 2020

VIA ELECTRONIC SUBMISSION

Kathleen Kraninger
Director
Consumer Financial Protection Bureau
1700 G Street N.W.
Washington, D.C. 20552

Re: Proposed Rule Concerning Debt Collection Practices (Regulation F) (Docket No. CFPB-2020-0010)

Dear Director Kraninger:

On behalf of the 24 undersigned State Attorneys General (the "States"), we write in response to the Consumer Financial Protection Bureau's (the "CFPB") request for comments on its proposed supplemental debt collection rule (the "Proposed Rule").[1] For the reasons discussed below, the States do not believe the Proposed Rule adequately protects consumers' rights and we urge the CFPB to reconsider the Proposed Rule.

I. Summary of the Proposed Rule

On May 21, 2019, the CFPB issued a proposed debt collection rule pursuant to the CFPB's rulemaking authority under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* (the "FDCPA"), and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 11-203, 124 Stat. 1376 (2010) ("Dodd-Frank").[2] This 2019 proposal addressed certain issues related to time-barred debt and indicated that a supplemental proposal on the subject would follow. On September 18, 2019, a bipartisan coalition of 28 State Attorneys General submitted a comment letter to the CFPB urging the CFPB to fundamentally reconsider the approach to debt collection reflected in the proposal.[3] Unfortunately, in the States' view the Proposed Rule suffers from many of the same defects as the proposal it is supplementing.

The Proposed Rule addresses time-barred debt, or debt as to which the statute of limitations has expired.[4] The Proposed Rule would prohibit a debt collector from suing or threatening to sue on a debt if the debt collector "knows or should know" that the applicable

---

[1] *See Debt Collection Practices (Regulation F)*, 85 Fed. Reg. 12,672 (proposed March 3, 2020) (to be codified at 12 C.F.R. pt. 1006). The CFPB extended the comment period twice due to the COVID-19 pandemic.

[2] *See Debt Collection Practices (Regulation F)*, 84 Fed. Reg. 23,274 (proposed May 21, 2019) (to be codified at 12 C.F.R. pt. 1006).

[3] *See* Press Release, *AG James Leads Bipartisan Coalition Urging CFPB To Place Consumers' Interests Over Debt Collectors*, Sept. 18, 2019, *available at* https://ag.ny.gov/press-release/2019/ag-james-leads-bipartisan-coalition-urging-cfpb-place-consumers-interests-over. All websites cited herein were last visited on August 4, 2020.

[4] *See* Proposed Rule, 85 Fed. Reg. at 12,672. As the CFPB notes, the statute of limitations for suit on a debt varies by state but generally ranges from three to six years. *See id.*

statute of limitations has expired.[5] As the Proposed Rule acknowledges, consumers are fundamentally confused about their rights and obligations vis-à-vis time-barred debts, with real consequences: "A consumer with the misimpression that a time-barred debt is enforceable in court may pay or prioritize that debt over another debt or expense, in the mistaken belief that doing so is necessary to avoid litigation. The consumer may, in turn, have less money to pay another debt on which the consumer can be sued, or to pay other expenses, such as household necessities."[6]

The Proposed Rule also addresses a related legal doctrine known as "revival." In most states, the expiration of the statute of limitations does not extinguish the debt; it precludes the debt collector from filing a lawsuit to collect on the debt, but it does not preclude the debt collector from trying to collect the debt by non-judicial means such as letters and phone calls.[7] In some states, the statute of limitations on a debt can be "revived" if the consumer takes certain actions, such as making a partial payment or acknowledging the debt in writing.[8] Under the Proposed Rule, "debt collectors would be required to disclose the fact that revival can occur and the circumstances in which it can occur," which will require debt collectors to determine what state law applies, and the circumstances under which revival could occur under that state's law.[9] Like time-barred debt generally, consumers consistently express confusion at the doctrine of revival, with many finding it counterintuitive that taking actions to pay a debt could place the consumer in a worse position than doing nothing.[10]

The Proposed Rule includes model language and forms to make the required disclosures (the "Proposed Model Disclosures").[11] The Proposed Model Disclosures include three separate disclosures depending on whether state law permits revival based on payment, written acknowledgement, or both. The language regarding time-barred debt that appears in all of the Proposed Model Disclosures reads as follows: "The law limits how long you can be sued for a debt. Because of the age of this debt, we will not sue you for it."[12] The following is the required disclosure for states that permit revival by acknowledgment or payment: "The law limits how long you can be sued for a debt. If you do nothing or speak to us about this debt, we will not sue you to collect it. This is because the debt is too old. BUT if you make a payment or acknowledge in writing that you owe this debt, then we can sue you to collect it."[13]

---

[5] *See* Proposed Rule at 12,680.

[6] *Id.* at 12,673.

[7] *See* Proposed Rule at 12,673.

[8] *See id.*

[9] *See id.* at 12,681.

[10] *See id.* at 12,687.

[11] *See id.* at 12,697-12,700.

[12] *Id.* at 12,697.

[13] *Id.* at 12,698.

All of the Proposed Model Disclosures contain the following "tear-off" portion at the bottom that a consumer can use to respond to the debt collector:

Mail this form to:
North South Group
P.O. Box 123456
Pasadena, CA 91111-1234

Person A
2323 Park Street
Apartment 123
Bethesda, MD 20800

How do you want to respond?

Check all that apply:

- ☐ **I want to dispute the debt because I think:**
  - ☐ This is not my debt.
  - ☐ The amount is wrong.
  - ☐ Other (please describe on reverse or attach additional information).
- ☐ **I want you to send me the name and address of the original creditor.**
- ☐ **I enclosed this amount:** $

Make your check payable to *Bank of Rockville*.
Include the reference number 584-345.

☐ **Quiero esta formulario en español.**

[14]

The Proposed Rule would require debt collectors to make the Proposed Model Disclosures in initial communications with consumers and in validation notices.[15] When made orally, the disclosure would need to be "substantially similar" to the language in the Proposed Model Disclosures.[16] Debt collectors who use the Proposed Model Disclosures would have a safe harbor from liability under the FDCPA and Dodd-Frank.[17]

In the Proposed Rule, the CFPB relies heavily on a quantitative study conducted in 2019, the results of which were published in a February 2020 report (the "Testing Report").[18] The CFPB engaged a research company to conduct consumer testing "[t]o obtain additional information about consumer comprehension and decision-making in response to sample debt collection disclosures relating to time-barred debt."[19] The CFPB's vendor conducted a survey of approximately 8,000 "individuals possessing a broad range of demographic characteristics."[20] The individuals were told a "vignette" about a consumer who incurred a debt to purchase a couch years ago, had not paid off the debt, and had received a validation notice from a debt collector.[21]

---

[14] *Id.* at 12,699.

[15] *See id.* at 12,680.

[16] *See id.* at 12,683.

[17] *See id.*

[18] *See* CFPB, *Disclosure of Time-Barred Debt and Revival: Findings from the CFPB's Quantitative Disclosure Testing*, Feb. 2020, 5-9, *available at* https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-quantitative-disclosure-testing_report.pdf (the "Testing Report").

[19] Proposed Rule, 85 Fed. Reg. at 12,676. The CFPB has published the methodology and results of the testing. *See id.* at nn. 64-65.

[20] *See id.* at 12,676.

[21] The vignette read as follows:

> Person A bought a couch from Main Street Department Store years ago using a Main Street Department Store credit card. The credit card company contacted

Survey participants were then shown 11 different versions of a validation notice and asked a series of 33 questions designed to gauge their comprehension of time-barred debt and revival.[22]

The results of the CFPB's survey demonstrate the confusion that exists about time-barred debt and revival. For example, 60% of participants who were not shown any time-barred debt notice incorrectly thought they could be sued for the debt.[23] The survey found that a time-barred debt notice "tended to correct the misimpression" but led to consumer confusion as to revival.[24] Ultimately, the CFPB found that survey participants who were shown a time-barred debt and revival disclosure showed modest improvement in correctly answering questions about their rights and obligations.[25]

II. The States' Objections to the Proposed Rule

A. The Proposed Rule's "Knows or Should Know" Standard Conflicts with the Plain Meaning of the FDCPA

The Proposed Rule would prohibit a debt collector from suing or threatening to sue on a debt if the debt collector "knows or should know" that the applicable statute of limitations has expired.[26] Traditionally, the FDCPA has been a strict-liability statute, and importing an intent element into it is problematic.[27] Section 1692(e)(2)(A) of the FDCPA forbids the false representation of the legal status of any debt without qualifying that standard of whether the debt collector "knew or should know" a debt could be collected legally within a statute of limitations. Federal Circuit and District Courts have uniformly held that a debt collector's threatening to sue on a time-barred debt and/or filing a time-barred suit in court to recover that debt violates §§1692(e) and 1692(f).[28]

> Person A several times about the bill over the years, but Person A has not paid it off. Person A receives a notice about the debt from North South Group, a debt collector. It says that he or she still owes some of the balance from the card. Person A knows that he or she does still owe some money, and thinks the amount on the notice looks about right. It would not be easy, but Person A probably could find a way to come up with money to pay the debt.

Testing Report at 5.

[22] *See* Testing Report at 5-6.

[23] *See* Proposed Rule at 12,678.

[24] *See id.* at 12,679.

[25] *See id.*

[26] *See id.* at 12,680.

[27] *See* 20 ALR Fed 3d Art, 5 ("The FDCPA is a strict-liability statute that is subject to the affirmative defense of a debt collector's bona fide error"); *Ellis v. Solomon & Solomon, P.C.*, 591 F.3d 130, 135 (2d Cir. 2010) ("To recover damages under the FDCPA, a consumer does not need to show intentional conduct on the part of the debt collector. The [FDCPA] is a strict liability statute, and the degree of a defendant's culpability may only be considered in computing damages.") (internal citation and quotation marks omitted).

[28] *See Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1417 (2017) (Sotomayor, J., dissenting) ("Every court to have considered the question has held that a debt collector that knowingly files suit in court to collect a time-barred debt violates the FDCPA."); *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013) (explaining that a debt collector's filing of a time-barred lawsuit to

The Proposed Rule relies on self-reporting for the proposition that debt collectors do not knowingly sue on time-barred debt.[29] This opens the door for collectors to plead ignorance if they so wish, and completely removes any teeth from the intent standard of "know or should have known." Additionally, the States maintain it will likely be unknown how often debt collectors file suit on time-barred debts because most lawsuits end in default judgments, and complaints filed in those cases are typically form complaints with no statute of limitations information.

The States recommend that the CFPB adopt a strict-liability standard, which would be in line with what the FDCPA intends to accomplish. This will better protect consumers, not only due to the reasons listed above, but also as few consumers alone would have the legal wherewithal to understand how to prove that a debt-collector "knew or should have known" a debt was time-barred. Further, the rate at which debts are bought and sold between collectors with incomplete or inaccurate information will increase the likelihood that a debt collector can claim ignorance in regards to statutes of limitations and pass the new standard.

B. The Proposed Model Disclosures Were Not Adequately Tested

The CFPB relies heavily on the quantitative survey it conducted, but the survey is inadequate for at least the following reasons.

First, the CFPB acknowledges that the survey was conducted in a laboratory-like setting that did not mimic real-life circumstances, including the extent to which consumers even read disclosures.[30] Moreover, the survey prompted participants where to look in the validation notice to find information about time-barred debt and revival, and this coaching almost certainly influenced the survey participants' comprehension.[31]

Second, each of the Proposed Model Disclosures for revival jurisdictions includes the following sentence: "If you do nothing or speak to us about this debt, we will not sue you to collect it."[32] As the CFPB acknowledges, however, the phrase "or speak to us about this debt" was never tested on consumers, and was added by the CFPB after the quantitative testing upon which the CFPB so heavily relies "[t]o clarify that communicating with a debt collector by telephone would not revive the debt collector's right to sue."[33]

---

recover a debt violates the FDCPA); *see also Huertas v. Galaxy Asset Mgmt.,* 641 F.3d 28, 32-33 (3d Cir. 2011) (indicating that threatened or actual litigation to collect on a time-barred debt violates the FDCPA). Courts have also held that seeking to collect debts that are barred by the statute of limitations violates state UDAP laws. *See, e.g., Armbrister v. Pushpin Holdings, LLC*, 896 F. Supp. 2d 746, 756 (N.D. Ill. 2012); *Taylor v. Unifund,* 1999 U.S. Dist. LEXIS 13651 (N.D. Ill. May 3, 1999); *Commonwealth v.* Cole, 709 A.2d 994 (Pa. Commw. Ct. 1998).

[29] *See* Proposed Rule at 12,692-694.

[30] *See* Testing Report at 12 ("Whether consumers read the disclosure in real life is an important issue for disclosure policy, but the testing was not designed to address this question.").

[31] *See id.* at 10.

[32] Proposed Rule at 12,698-12,700.

[33] *See id.* at 12,683. Pages 8 and 9 of the CFPB's Testing Report identify the text of the disclosures used in the survey, and none include the language "or speak to us about this debt."

Finally, the CFPB did not test at all consumers' comprehension of oral disclosures. The Proposed Rule would permit oral disclosures provided they are "substantially similar" to the Proposed Model Disclosures.[34]

C. The Proposed Model Disclosures Do Not Adequately Account for Variations Among State Laws As to Revival

The Proposed Rule requires debt collectors to determine what state law applies to a particular borrower, the circumstances under which revival could occur under the state laws, and disclose these facts to the borrower.[35] In states that permit revival by acknowledgment or payment, the Proposed Model Disclosures include the following: "The law limits how long you can be sued for a debt. If you do nothing or speak to us about this debt, we will not sue you to collect it. This is because the debt is too old. BUT if you make a payment or acknowledge in writing that you owe this debt, then we can sue you to collect it."[36] And, as noted above, all of the Proposed Model Disclosures contain a tear-off portion at the bottom that a consumer can use to respond to the debt collector.

In the States' view, this disclosure fails to account for potential variations in how strictly states apply the revival doctrine. For example, under New York law, the statute of limitations to sue on a debt can be revived only by a written acknowledgement that "must recognize [the] existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it."[37] It may be that other states have laws that are less strict, and which may even permit revival by oral acknowledgment, in which case the Proposed Model Disclosures are wrong to advise consumers that calling the debt collector cannot revive the statute of limitations.

In addition, the States are concerned that some consumers could unwittingly revive the statute of limitations on their debt by using the tear-off in the Proposed Model Disclosures. The tear-off permits consumers to contact the debt collector to dispute the debt, ask for more information about the debt, and/or enclose a payment:

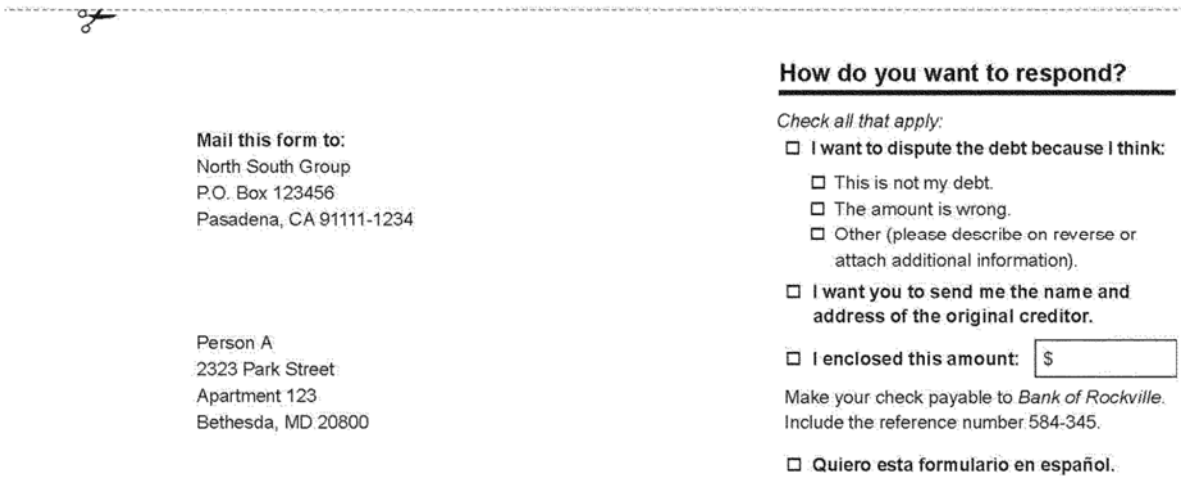
---

[34] *See* Proposed Rule at 12,683.

[35] *See id.* at 12,681.

[36] *See id.* at 12,698.

[37] *Pugni v. Giannini*, 163 A.D.3d 1018, 1019-20 (2d Dep't 2018) (internal citation and quotation marks omitted).



How do you want to respond?

Check all that apply:

☐ **I want to dispute the debt because I think:**
- ☐ This is not my debt.
- ☐ The amount is wrong.
- ☐ Other (please describe on reverse or attach additional information).

☐ **I want you to send me the name and address of the original creditor.**

☐ **I enclosed this amount:** $

Make your check payable to *Bank of Rockville*.
Include the reference number 584-345.

☐ **Quiero esta formulario en español.**

Mail this form to:
North South Group
P.O. Box 123456
Pasadena, CA 91111-1234

Person A
2323 Park Street
Apartment 123
Bethesda, MD 20800

[38]

In some jurisdictions, it is possible that merely asking for information about a debt could constitute acknowledgment, in which case the state of limitations to sue on the debt could be revived. A similar problem exists with consumers who may respond to dispute the debt, but only as to the amount. The Proposed Rule fails to account for these possibilities.

The States are also concerned because consumers could misunderstand the tear-off to imply that consumers are required to respond using the provided options, when in fact many consumers may choose to do nothing in response to the notice, as is their right. The States believe that "Do Nothing" should be added as an option to the tear-off, or the Proposed Model Disclosures should be otherwise amended to advise consumers of their right to do nothing.

D. The Proposed Rule's Safe Harbor Is Inconsistent with the FDCPA and Dodd-Frank

The Proposed Rule would provide a safe harbor from liability under the FDCPA or Dodd-Frank for any debt collector who uses one of the Proposed Model Disclosures.[39] In so doing the CFPB has exceeded its authority under both statutes.

Under the FDCPA, a debt collector has an affirmative defense to liability if it can show "by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."[40] The Proposed Rule would unlawfully expand what is a narrow defense into a blanket exemption inconsistent with the purpose of the FDCPA.

Under Dodd-Frank, the CFPB can only authorize a model form if it is "validated through consumer testing."[41] As discussed above, however, it is undisputed that key elements of the Proposed Model Disclosures were never tested on consumers, and the CFPB therefore lacks authority under Dodd-Frank to issue the models.

---

[38] Proposed Rule at 12,699.

[39] *See id.* at 12,683-64.

[40] 15 U.S.C. § 1692k(c).

[41] 12 U.S.C. § 5532(b)(3).

E. It Is Not Clear How the Proposed Rule Would Impact State-Mandated Disclosures

As the Proposed Rule acknowledges, many states and cities have laws requiring certain disclosures for the collection of time-barred debt.[42] The Proposed Rule would require debt collectors to include any state-mandated disclosure on the reverse side of any of the Proposed Model Disclosures.[43] In some states, however, the state-mandated disclosure is required to be on the front side of the notice.[44] It is not clear how the Proposed Rule would apply in such circumstances, but the States do not believe the Proposed Rule should preempt state-mandated disclosures, particularly if those disclosures are more protective of consumers than the Proposed Rule.

F. The Proposed Rule Fails to Address Obsolete Debt

The Proposed Rule fails to address obsolete debt, or debt that cannot be reported to a consumer reporting agency due to its age (usually seven years).[45] The CFPB has previously recognized the potential for consumer harm in collecting obsolete debt, because debt collectors may state or imply that paying a debt would impact a consumer's credit score, when in fact the debt no longer appears on the consumer's credit report.[46]

According to the report published by the CFPB's vendor, the initial version of the survey included questions about obsolete debt, but then the CFPB "eliminat[ed] obsolete debt as a priority research objective."[47] The Proposed Rule does not explain what caused the CFPB to reverse course. The States believe the CFPB should address obsolete debt in any final rule.

---

[42] *See, e.g.*, 23 N.Y.C.R.R. § 1.3(c) (time-barred debt disclosures required by New York law).

[43] Proposed Rule at 12,683.

[44] For example, New York City requires debt collectors to include a time-barred debt disclosure that is "placed *adjacent* to the identifying information about the amount claimed to be due or owed on such debt," 6 R.C.N.Y. § 2-191(b) (emphasis added), which suggests that the disclosure needs to be on the front page. Massachusetts law explicitly requires a time-barred debt disclosure to appear on the front of a written communication. *See* 940 C.M.R. § 7.07(24)(b) (providing that the disclosure "shall be placed on the front page of the communication").

[45] *See* CFPB Bulletin 2013-08 (Fair Debt Collection Practices Act and the Dodd-Frank Act), Representations Regarding Effect of Debt Payments on Credit Reports and Scores, July 10, 2013, at 2, *available at* https://files.consumerfinance.gov/f/201307_cfpb_bulletin_collections-consumer-credit.pdf (defining obsolete debt as "debt that the Fair Credit Reporting Act (FCRA) prohibits consumer reporting agencies from including on credit reports for most purposes due to the length of time that has passed since a consumer initially defaulted").

[46] *See id.*

[47] *See* ICF, *Quantitative Survey Testing of Model Disclosure Clauses and Forms for Debt Collection Methodology Report*, Jan. 2020, 3, *available at* https://files.consumerfinance.gov/f/documents/cfpb_icf_debt-survey_methodology-report.pdf.

* * * * *

While we appreciate the CFPB's efforts to bring clarity to this area of the law, ultimately the Proposed Rule does not adequately protect consumers from harm and we urge the CFPB to reconsider the Proposed Rule.

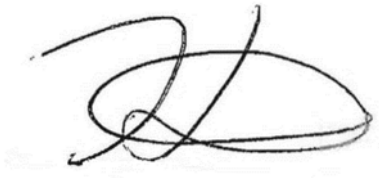
Respectfully submitted,

XAVIER BECERRA
California Attorney General

PHIL WEISER
Colorado Attorney General

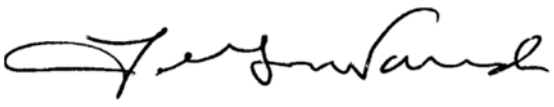
WILLIAM TONG
Connecticut Attorney General

KATHLEEN JENNINGS
Delaware Attorney General



KARL A. RACINE
District of Columbia Attorney General

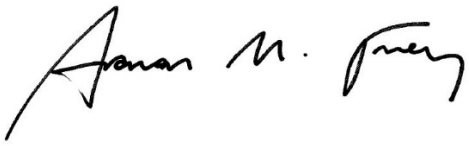
STEPHEN H. LEVINS
Executive Director, Hawaii Office of Consumer Protection



LAWRENCE G. WASDEN
Idaho Attorney General

KWAME RAOUL
Illinois Attorney General

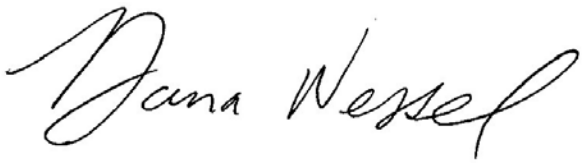
TOM MILLER
Iowa Attorney General



AARON M. FREY
Maine Attorney General

BRIAN E. FROSH
Maryland Attorney General

MAURA HEALEY
Massachusetts Attorney General



DANA NESSEL
Michigan Attorney General

KEITH ELLISON
Minnesota Attorney General

AARON D. FORD
Nevada Attorney General

GURBIR S. GREWAL
New Jersey Attorney General

HECTOR BALDERAS
New Mexico Attorney General

LETITIA JAMES
New York Attorney General

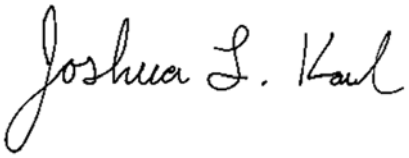
JOSHUA H. STEIN
North Carolina Attorney General

ELLEN F. ROSENBLUM
Oregon Attorney General

JOSH SHAPIRO
Pennsylvania Attorney General

MARK R. HERRING
Virginia Attorney General

BOB FERGUSON
Washington Attorney General



JOSHUA L. KAUL
Wisconsin Attorney General