March 6, 2019

OMB Desk Officer for the Bureau of Consumer Financial Protection
Office of Management and Budget
New Executive Office Building
Room 10235
Washington, DC 20503

Re: Debt Collection Quantitative Disclosure Testing
Docket No. CFPB-2019-0003
OMB Control Number: 3170-XXXX

To Whom It May Concern:

The Consumer Financial Protection Bureau (CFPB) is requesting approval from the Office of Management and Budget (OMB) to conduct a web survey of 8,000 individuals as part of the CFPB's research on debt collection (the "survey"). The survey asks for consumers' experience with debt collection and feedback on proposed disclosure forms. The CFPB first issued its request for approval in June 2017, then again in November 2017, but withdrew the latter request. The CFPB is now re-publishing the survey for comment.

While the American Financial Services Association,[1] supports the CFPB's intent to begin a debt collection rulemaking, we ask that OMB deny approval to conduct the survey. Our concerns with the survey are twofold.

First, while we recognize the CFPB's need to inform its debt collection rulemaking with data, conducting this survey is premature. Before testing disclosure forms with consumers, the CFPB should release the forms for notice and comment. After gathering comments and making changes to the forms based on those comments, then the CFPB could test the forms with consumers.

Second, we believe substantial changes need to be made to the survey itself. As former Federal Reserve economist Dr. Tom Durkin wrote in his response to the June 2017 request for approval, he "…does not expect that this project will prove to be a worthwhile expenditure of the taxpayers' resources." We agree; therefore, we are attaching Dr. Durkin's letter as an appendix. Moreover, the proposed forms the Bureau is testing in the survey exceed the limitations of the Fair Debt Collection Practices Act (FDCPA). The former Acting Director of the CFPB, Mick Mulvaney, said that the Bureau should not regulate by enforcement. We believe that the Bureau should not legislate by regulation either.

If the CFPB does decide to conduct the survey, we ask that it take the comments below into consideration. These comments are in response to four of the attachments that the CFPB included with the notice requesting OMB approval of the survey: Supporting Statement Part B; survey instructions, items, and questions; disclosure language to be tested, and sample disclosure forms.

[1] Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

I. Supporting Statement Part B

At the outset, the survey needs to clearly differentiate between debts collected by third-party debt collectors and by creditors. The target sample size is 8,000 completed surveys, approximately 5,330 (two-thirds) of which will be completed by panelists who have experienced debt collection in the past 24 months.

The survey should specify what criteria are used to determine whether a participant has experienced debt collection. Is it the answer to Q8 in the screening questions? If so, we applaud the CFPB in trying to distinguish between debts being collected by third-party debt collectors and creditors. However, we suggest that the CFPB add additional questions to help ensure that the responses being solicited do refer to debt collected by a debt collectors and not a creditor. Perhaps the CFPB could include a question asking how sure the participant is about the answer to Q8. Alternatively, the CFPB could include an option such as "I'm not sure." If the participant selected that response, she would be directed to the subsample.

The survey should also take into account whether the debt was actually owed as opposed to incorrectly believed to be owed. This difference could result in bias as to the effectiveness of current communication methods versus the contemplated forms, as well as with respect to willingness to participate in the survey.

In addition, the CFPB should publish the results of all its testing. Supporting Statement Part B refers to qualitative testing conducted and the difference in reaction by those engaged in the testing who had "experienced" debt collection. We ask that the CFPB publish the results of that testing and explain how it informs this current request. Absent that information, one cannot determine whether there is a particular bias built into the sample forms.

Along those same lines, Supporting Statement Part B is unclear in what will occur with respect to the 200 pilot test results, particularly if questions in the survey require deletion, replacement, modification or some other change. We ask that the CFPB publicize those results, regardless of outcome. Those results should also be considered separately from the final results. If considered with the final results, particularly if changes were required, it might result in misleading conclusions. The survey, when finalized, will re-open to an additional 7,000 participants. This suggests the original 1,000 participants engaged in the survey validation process will also be included, and therefore presents potential for inaccurate or misleading conclusions. A similar issue exists to the extent a re-test is required.

II. Survey Instructions, Items, and Questions Document

At the outset, AFSA objects to the style of many of the questions. They do not appear related to the particular communications at issue and the effectiveness of those communications. Rather, they appear to collect attitudinal data of consumers, which is not relevant to the effectiveness of the communications the CFPB seeks to sample. For example, Q06 asks about the likelihood of a debt appearing on a credit report. This does not help identify effective communications. As such, it should be removed from the survey.

Similarly, the questions around electronic disclosures uses phrases such as "not okay," which may lead to a conclusion that consumers believe such a method is wrong, as opposed to simply being less preferred by that individual. Whether sending electronically is "okay" (*i.e.,* legally permissible) is not a function of consumer attitude. Therefore, the responses should be modified to assist in identifying preferences as opposed to permissibility (note that Version 2 at page 13 appears to more directly do this than Version 1 at pages 12 – 13).

In addition to our objections as to the tone of the questions, we provide specific comments on a few of the questions:

- Pre_Q11 asks the consumer to consider the legal permissibility of bringing suit on a debt. In the absence of reference to the particular document reviewed, it is impossible to determine whether the consumer has any basis to have any such opinion. If a notice that does not contain a statement as to the collector's right is used, any response is irrelevant as to a typical consumer without legal training and does not inform regarding a communication.

- In Pre_Q08 and Q08, it is unclear whether the survey participant is seeing a new notice from the new collector.

- Q35(2) at page 15 has an inherent bias within the question. It asks whether the details of the debt were correct. While the details may have been correct, the consumer may not have believed them to be so. As such, this should be modified to capture the belief of the consumer as opposed to being used as an objective statement of fact.

III. Disclosure Language to be Tested

Contrary to how the information is presented in this document, it is not always the case that a payment or acknowledgement will revive the statute of limitations. That is a function of state law. Similarly, we assume that where a disclosure states the debt will not be reported to a credit reporting agency, the period for credit reporting has expired.

IV. Sample Disclosure Forms

Before commenting on the specific sections of the forms, we have four overarching objections to the forms themselves and the manner in which they have been proposed.

First, some of the disclosures appear designed to suggest that consumers should not pay their debts, particularly those that are out of statute. If consumers do not pay their debts, the overall cost of credit to everyone—both those who do pay their debts and those who do not—necessarily increases to account for those who do not.

Second, without a strong safe harbor at both the federal and state level (which, of course, the CFPB cannot give), mandatory disclosures can give rise to excessive litigation and unnecessarily increase expenses. The manner in which the language is set forth in the proposed disclosure forms is far less concise than the standard debt validation notice seen today. Because the language used today has already resulted in untold litigation, it seems likely that the language in the new forms will also result in litigation. Moreover, a number of states have implemented debt collection laws that track to the FDCPA. While some of the softer language in the CFPB's proposed disclosure forms may result in a safe harbor at the federal level, having to go through the establishment of standards all over again at the state level through litigation is going to drive up the cost of collections.

Third, some of the disclosures on the proposed forms are basically new requirements that differ from what is set out in the FDCPA. For example, on the validation notice, the consumer can just check a box instead of taking the time to consider the debt and sent a written dispute. This modification seems to change the intent of the FDCPA.

Fourth, if the CFPB does believe that change is needed, we suggest that the Bureau should work with stakeholders, including consumer advocates and industry representatives, to develop forms before testing them.

In addition to those overarching objections to the forms, AFSA has some specific comments on the forms themselves.

For all forms:

Providing a set date by which the consumer must send a written dispute does not comply with the FDCPA ("Write to us by November 12, 2019. . . ."). The time for a consumer to dispute is 30-days from the date of receipt by the debtor and not related to the time of sending (15 U.S.C. § 1692g(a)). Absent a change in the law, or a safe harbor number of days after the date of mailing that a collector may assume receipt by rule, the form may in some instances result in a *per se* violation of the FDCPA.

"Our Information Shows" box:

The relevance of the date at issue and the information presented is unclear. There is no obligation under the FDCPA to identify the amount of debt as of a particular prior date, and instead the notice is required to disclose the amount of the debt at the time of sending (15 U.S.C. § 1692g(a)(1)). If the goal is to determine whether the additional information is helpful, then samples without it are the only way to do that.

"How can you dispute the debt?" box:

- Claiming that the collector must send information "that shows you owe the debt" is not an accurate statement of law. Rather, the collector is required to obtain verification of the debt and provide that to the consumer (15 U.S.C. § 1692g(b)). That is not the same as having to provide information that shows they owe the debt.

- Statements like "Contact us about your payment options" in the debt validation notice require a safe harbor or some other protection from liability in the event a plaintiff claims that inclusion of such language without a qualifier that doing so does not affect their right to dispute the debt. There is case law stating that demanding payment without something further constitutes a violation under a theory of overshadowing.

"What else can you do?" box:

- This section again provides a "Write by" date, which is incorrect and may result in a violation that needs to be addressed.

- If the collector includes the name and address of the original creditor in the initial letter, as some do, it is inappropriate to require the collector cease communication when that has occurred.

    - Statements such as "Contact us about your payment options" without a qualifier that the consumer retains their right to dispute and this is not intended to affect that right presents a risk that a civil litigant may allege this is a demand for payment that overshadows the debt validation notice. There

is case law that supports exactly this. A similar potential risk may exist with "I enclosed this amount."

- Requiring inclusion of another document (*i.e.*, "Know your debt collection rights") places a further and unnecessary burden and cost on debt collectors and may lead to confusion with consumers who believe the overall package of information to be informative as opposed to an effort to collect a debt. Inclusion of a link should be sufficient.

Letter Code CC1 and CC2:

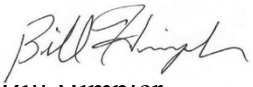
These letters imply that the consumer "may use the form below" to dispute the debt (language is found under the heading "How can you dispute the debt?") but the form is misleading. Telling a debt collector to cease communication, while permissible under the FDCPA at 15 U.S.C. § 1692c(c), is not a dispute of the debt and does not trigger any action by the collector to provide verification under 15 U.S.C. § 1692g(b).

V. Conclusion

We encourage OMB to deny its approval for this survey. Again, we support the CFPB's efforts to gather data, but to approve the survey now would be premature. We encourage the CFPB to put out its proposed disclosure forms for comment before testing them with consumers.

If you have any questions, please do not hesitate to contact me by phone at 202-466-8616 or e-mail at bhimpler@afsamail.org.

Sincerely,



Bill Himpler
President-elect
American Financial Services Association

APPENDIX

Thomas A. Durkin
1949 Barton Hill Road
Reston, VA 20191

August 3, 2017

Consumer Financial Protection Bureau
Attention PRA Office
1700 G Street NW
Washington, DC 20552

By electronic mail.

Re: Debt Collection Quantitative Disclosure Testing,

Office of Management and Budget (OMB), Control Number 3170-XXXX,

Docket No: CFPB–2017–0013

To Whom It May Concern:

This letter responds to CFPB's proposed Agency Information Collection Activity titled "*Debt Collection Quantitative Disclosure Testing*" (82 *Federal Register*, p. 25779, June 5, 2017) and its supporting documentation hereinafter the "Supporting Documents"). The comments that follow arise from many years of research experience in the academic, public, and private sectors concerning consumer financial services. This includes survey research on consumers' awareness, use of, and attitudes toward financial services published by the Federal Reserve Board in five different decades (1970s through the current decade). My comments below reflect my views and not those of the Federal Reserve Board, its staff, or other individuals or organizations.

As a general rule, I am very supportive of research by government agencies that improves the rulemaking process. Underlying research is generally very low in cost compared to the regulatory burdens of rules imposed on the public. This argues for undertaking effective research that contributes to improving regulatory effectiveness and reducing regulatory burdens.

I have never been convinced that hypothetical questioning is an effective research method, however, especially in cases like this one where the hypothetical questioning is lengthy, complex, and by its general nature likely not related to specific experience of respondents. It seems self-evident that when any government agency has legislatively received reduced budgetary oversight that the agency has a special internal responsibility to examine its expenditures carefully. This responsibility should include special care with hypothetical, lengthy, complex, and expensive side projects that do not have much likelihood of useful outcome for the taxpayers.

Besides its length and complexity, the most obvious difficulty with the questionnaire proposed for this project is its hypothetical nature. What individuals will do or not do in actual situations can vary substantially from what they say they will do in a hypothetical situation suggested to them. Again this seems so obvious that further discussion should be unnecessary. At a minimum, no truly useful data are likely to result from this kind of questioning.

The CFPB might better address the matter of consumers and debt collection dispute resolution procedures through experimental, rather than survey, design involving actual participants in the sorts of situations of interest. With correct subjects and a careful experimental design, tradeoffs among aspects of debt collection information and other features and costs of debt collection could be explored. Redesigning this project this way would involve a considerable professional undertaking, but it would be more likely to provide useful results to the agency in any exploration of debt collection than extensively examining false hypotheticals.

The "Survey"

Supporting Documents indicate that the survey project under consideration will begin with lengthy Privacy Act and Paperwork Reduction Act Statements. They may be needed under current law and agency procedures, but they will require attention to multiple computer screens of generally unhelpful information at the outset of respondents' experience with this survey.

After this off-putting introduction, the difficulties with the proposed hypothetical questioning become apparent (pp. 4-5 of its Supporting Document):

SCEN1. Please read the following scenario about someone named Person A. After you read the scenario, click "Next" to read a financial notice that relates to the scenario. Please read the notice and respond to the questions that follow. We are interested in your perceptions and understanding of what you read, so please answer the questions from your own perspective.
Scenario: Person A purchased a couch from Main Street Store [3 years ago/ 8 years ago] using a Main Street Store credit card. Person A has not yet paid off the bill and is being contacted by North South Group, a debt collector, on behalf of Main Street Store. Person A receives an envelope from North South Group in the mail and it looks important. Person A opens the envelope and sees a notice about the debt. Click "Next" to read a financial notice

01 CONTINUE

PreQ1. Person A is not sure exactly how much of the debt is still owed, but the amount indicated on the notice looks about right. While it would not be easy, Person A probably could find a way to come up with money to pay the debt. Given the scenario you read earlier and the notice you just saw, please answer the following questions.

Please note that at any time during this survey, you can look at the notice again by clicking the image on the right of the screen.
01 Continue

Q01. If you were in Person A's situation, which of the following describes what you would do in response to the notice you just saw?
01 Pay the full amount listed in the notice
02 Ignore the notice
03 Contact the debt collector
04 Pay part of the amount listed in the notice
05 Other _____

Q01A. How would you contact the debt collector?
01 By sending a letter to the debt collector
02 By telephone
03 By mailing in the tear-off form at the bottom of the notice
04 Through the debt collector's website
05 Other: _____

Q01B. Which of the following would be your primary reason for contacting the debt collector?
01 To ask additional questions about the debt
02 To dispute the debt
03 To pay or set up a payment plan
04 Other _____
97 Not sure/don't know

Three reasons suggest the most reasonable true answers to this series of questions are something like "I have no idea":

1. Although a percentage of respondents might conceivably find themselves in a situation of this sort, many would never have done so and in some cases might even be mildly or strongly contemptuous of those who do. Answers might be forced from them by giving them no option to respond "this would not happen," but it gives pause to the idea that their possible responses to any forced selection are reasonably meaningful.

2. Actions of individuals reasonably depend upon the costs and benefits of the contemplated action at the time of its undertaking. But hypothetical questioning implies no cost to respondents at time of its administration, and so there is little reason to have confidence in the answers. Again it is not possible to argue reasonably that responses provided accurately reflect outcomes of possible real situations.

3. There is not enough information given about the scenarios even to contemplate costs and benefits of actions. Potential action taken in an actual situations would depend on form, clarity, and tone of the notice, experience of the respondent with various possible methods of response in other situations (e.g. telephone, web site, etc.), perception whether such a situation could even happen, degree of anger, advice of spouses and others, and possibly many other factors. For a third time, it is not possible to argue reasonably that responses would accurately reflect outcomes of real situations.

All of these concerns continue with the additional lines of questioning:

Q02. Think about the answer you just gave about what you would do in response to the notice. What are the most important reasons that led you to this decision? Please feel free to list as many reasons as you'd like.

Q03. Thinking again about the answer you gave about what you would do in response to the notice, how important was each of the following reasons in leading you to this decision?

Q0301. **Whether or not I expect to be sued.**

Q0302. **Whether or not I expect the debt to appear on my credit report.**

Q0303. **Whether or not I expect the debt to affect my current or future employment status.**

Q0304. **Whether or not I expect my family or friends to find out about the debt.**

Q0305. **Whether or not I expect the debt collector to continue contacting me until I pay off the debt.**

While potential for each or any of these contingencies might be predictable to an individual in some actual situations, often it would be unpredictable even there. At a minimum, understanding likelihood depends on the actual situation and does not extend to questioning about no-cost hypothetical events.

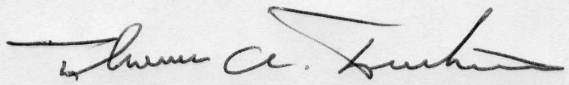
Suffice it to say that it is not necessary to comment on the remaining areas of questioning, because the concerns there are similar. Many to most respondents likely would have no realistic idea of the likelihood of such events and, again, it is hard to argue that their responses forced into pigeon holes would have much research meaning or truly useful policy implications. Ultimately, if results of a project are to be hypothetical (basically, made up), then it is not necessary to undertake substantial expenditures of the taxpayers' resources to make them up. Just because budgetary resources are available does not mean that they should be expended in this way.

Finally, it is difficult to imagine that careful reading and response to this large questionnaire, its preliminary notices, internal examples, "financial notices," and its range of questioning which may in many cases be contrary to experience and have little or no real meaning will take only 33 minutes for the average respondent. Even so, its contemplated $5 payment is close to minimum wage (or below in some jurisdictions) likely obviating much of the discussion on Supporting Document p. 7 concerning effectiveness of incentives to respondents. Many people, likely including many of those involved with generating this project, might well find this insulting rather than an incentive to participate.

In sum, this lifetime researcher does not expect that this project will prove to be a worthwhile expenditure of the taxpayers' resources.

Thank you for the opportunity to comment on this proposal.

Sincerely yours,



Thomas A. Durkin, Ph.D.