August 4, 2020

Hon. Kathleen L. Kraninger
Comment Intake
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Supplemental Notice of Proposed Rulemaking
Docket No. CFPB-2020-0010, RIN 3170-AA41

Dear Director Kraninger:

The American Financial Services Association (AFSA)[1] appreciates the opportunity to comment on the supplemental notice of proposed rulemaking on time-barred debt disclosures (Proposed Rule).

The Consumer Financial Protection Bureau (CFPB) is proposing to require a debt collector collecting a debt that the debt collector knows or should know is time-barred to disclose: (1) that the law limits how long the consumer can be sued for a debt and that, because of the age of the debt, the debt collector will not sue the consumer to collect; and (2) if the debt collector's right to bring a legal action against the consumer to collect the debt can be revived under applicable law, the fact that revival can occur and the circumstances in which it can occur. The Proposed Rule includes model language and forms that debt collectors could use to comply with the proposed disclosure requirements.

AFSA is commenting on the Proposed Rule because while it applies to debt collectors, it will affect creditors and their customers. AFSA is concerned that some of the requirements in the Proposed Rule could result in consumer confusion. AFSA's comments address the conflict between state statutes of limitations and the Proposed Rule. AFSA's comments also address the proposed "know or should know" standard and the form and content of the proposed disclosures. Finally, AFSA recommends that the CFPB consider an additional disclosure, one that could be provided earlier than the model disclosures in the Proposed Rule.

I. Statement of Interest

AFSA members are creditors, not debt collectors. Nonetheless, our members are invested in the outcome of this rulemaking. While the Proposed Rule focuses on debt collectors as defined in the FDCPA, it will directly affect creditors and their customers in at least two ways.

[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

First, creditors retain third-party debt collectors, particularly collection attorneys, to collect on their behalf. As our vendors, any rulemaking that affects debt collectors will also affect the creditors whose debts are being collected by their vendors.

Second, as the Bureau acknowledges, the Proposed Rule could have an indirect impact on consumers and the credit markets. "This is because, if the proposal were to increase costs for debt collectors or reduce repayment of time-barred debt, it would reduce the expected return to lending. This could lead lenders to increase interest rates and other costs to borrowers and to restrict availability of credit, particularly to higher-risk borrowers."[2]

In light of the above, we commend the CFPB for clearly distinguishing between creditors and debt collectors in the Proposed Rule. The Proposed Rule states explicitly that it would apply to debt collectors as defined in the Fair Debt Collection Practices Act (FDCPA). The CFPB statement is clear: "Creditors that collect on debts they own generally would not be affected directly by the proposal because they typically are not debt collectors for purposes of the FDCPA."[3] Moreover, the first footnote also makes the distinction between creditors and debt collectors, stating, "The proposal would cover the same universe of debt collectors as the May 2019 Proposed Rule, *i.e.*, only FDCPA-covered debt collectors. 15 U.S.C. 1692a(6). Creditors therefore would only have to comply to the extent they are FDCPA-covered debt collectors."[4]

This distinction, as thoroughly explained in AFSA's Sept. 18, 2019 letter to the CFPB on the May 2019 proposed debt collection rule, is critical for consumers and creditors and we are pleased that the CFPB has recognized it. Third-party debt collectors and debt buyers differ greatly from creditors collecting their own debt. The two have entirely different business models with very different incentives. Efficient, expeditious resolution by creditors benefits their customers. Notwithstanding the Proposed Rule's clear distinction, we have some concerns about the Proposed Rule.

II. State Law and Statute of Limitations

Statutes of limitations relating to debt collection predate the Common Law that is the basis of our legal system.[5] They have traditionally been an affirmative defense to legal action. Affirmative defenses simply allow the defendant to dispose of the litigation as time-barred. They have never been interpreted to mean that the debt does not exist or cannot be collected through means other than legal action. The Proposed Rule will effectively change substantive state law dating back hundreds of years. This is a slippery slope that may lead to additional rules or interpretations that further ignore state law, such as a debt being considered "barred" and thus not allowed to be reported to a credit reporting agency. Nowhere does the statutory language of the FDCPA preempt substantive or procedural state law relating to debt collection, access to courts to prosecute

[2] 85 Fed. Reg. 12,685
[3] 85 Fed. Reg. 12,686
[4] 85 Fed. Reg. 12, 672
[5] Deuteronomy 15:1-2; 31:10.

collections and obtain judgments, or interpose a federal role in undermining state law defenses.[6] As such, the Proposed Rule represents a significant shift in the federal government's role in dealing with substantive state law.

Being in the best position to represent their constituents, elected state legislatures have enacted a wide variety of laws relating to matters, such as collection activities after a statute of limitations has expired,[7] mandatory notices to debtors,[8] and specific requirements for debt buyers.[9] Additionally, state regulations and court rules also cover this subject.[10] Collection attorneys are fully versed in what they can and cannot do in terms of their states respective laws (not to mention that the CFPB has already weighed in and added rules on some collection attorney practices).

Several states already require either the exact or similar language to the Proposed Rule's model disclosures. This will likely result in consumer confusion. For example, in instances where the language is slightly different, a consumer will receive similar, but not exact, repetitive disclosures. Also, some states, such as New York and New Mexico, require these same disclosures to be placed on the front of the communication, as does the CFPB. The Proposed Rule will create additional burdens on collection attorneys and have the unintended consequence of increasing unnecessary collection defense litigation, which is often designed to "leverage" the case on behalf of the debtor, even if there is no actual violation. There are firms that focus on this type of litigation. The leverage is often in the form of suits against debt collectors alleging Fair Debt Collections Practice Act (FDCPA), Telephone Consumer Protections Act (TCPA) or state Unfair and Deceptive Trade Practices Acts (UDAP) violations.

Because of these varying state laws, determining the statute of limitations and identifying when accounts switch from valid to expired debt is operationally complex. For example:

- Customers who move between states present two potential statute of limitations regimes that could lead to differing conclusions on the applicable statute of limitations;
- In Ohio, courts have categorized credit card accounts in multiple ways for purposes of the statute of limitations, resulting in inconsistent application of either the 6-year limitations period applicable to open accounts or the 8-year limitations period applicable to written contracts;[11]

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[6] The only federal role is found in 15 U.S.C. § 1692i relating to proper venue.

[7] *See*, for example, Cal. Civ. Code §§ 1788.50, *et seq.*

[8] *See*, for example: New Mexico Admin. Code § 12.2.12.9(b)

[9] *See*, for example: Cal. Civ. Code §§ 1788.50, *et seq.*

[10] *See*, for example: 23 N.Y. Comp. Codes & Regs. § 1.3 (2014).

[11] *See* Ohio Rev. Code Ann. §§ 2305.06, 2305.07. Importantly, Ohio "courts have not consistently categorized credit card accounts" and, therefore, no clear guidance exists on the applicable statute of limitations for credit card agreements. *Midland Funding, L.L.C. v. Hottenroth*, 2014-Ohio-5680, ¶ 21 (Ohio Ct. App.). However, the applicable statute of limitations could be either six years or eight years, depending on how the court characterizes a credit card agreement. *Unifund CCR Partners Assignee of Palisades Collection, L.L.C. v. Hemm*, 2009-Ohio-3522, ¶ 24 (Ct. of Appeals, 2d Dist.) (reasoning that, without a signed agreement, it was unclear that the statute of limitations for written contracts would apply); *Jarvis v. First Resolution Mgt. Corp*., 2012-Ohio-5653, ¶ 33, 983 N.E.2d 380, 389 (Ohio Ct. App.) (reasoning that "credit card accounts are more properly categorized as open accounts");Thirty-Four *Corp. v.*

- Mississippi and Wisconsin are the only two states where the running of the limitations period actually extinguishes the debt, barring collection of any kind; and
- States have varying standards on whether a payment can restart the statute of limitations, and even when a payment can, it is unsettled in some states whether a full or partial payment is sufficient to restart the statute of limitations.

In the case of a retail installment contract there are potentially several different statutory periods that could apply. For instance, a state's UCC Article 2 has its own limitations period for sales, a state may have a general contractual limitations period that applies to agreements to pay money, and a state credit statute may have a limitations period that applies to credit sales specifically. Often, these are resolved through litigation.

Correctly calculating the applicable statute of limitations is complex because of unsettled legal requirements and because a consumer's individual facts and circumstances can alter the conclusion. For example, some states treat statutes of limitations as substantive as opposed to procedural requirements. As a result, calculating the applicable statute of limitations requires a robust analysis of each consumer's situation. As mentioned above, consumers who move between states present two potential statutes of limitation regimes that could lead to differing conclusions on the applicable statute. Some states have unsettled law on the statute of limitations for certain types of debt. States have varying standards on whether a payment can restart the statute of limitations, and even when a payment can, it is unsettled in some states whether a full or partial payment is sufficient to restart the statute of limitations.

The CFPB should address these inconsistencies between the Proposed Rule and state laws. A lack of clarification would very likely lead to increased litigation.

III. Section-by-section Analysis

AFSA understands that there are consumer protection concerns associated with time-barred debts. Overall, disclosures can help consumers make informed decisions about prioritizing when and which debts to pay and we appreciate the opportunity to comment on the Bureau's proposed disclosures. The Proposed Rule would require third-party debt collectors to provide one of four potential disclosures to a consumer in the first communication after the statute of limitations has expired. Because of the difficulty in determining whether a debt is outside the statute of limitations, the Bureau's proposed "know or should know" standard is appropriate but concerning. The proposed disclosures themselves present numerous challenges.

Hussey, No. 84AP-337, 1985 WL 10275, at *5 (Ohio Ct. App. May 7, 1985) (holding that open account causes of action fall under the six-year statute of limitations period for unwritten contracts). Thus, the conservative approach dictates a six-year statute of limitations in Ohio because the law is unclear as to the requirements for a written contract and some courts have held that credit card agreements are best characterized as open accounts.

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§ 1006.26(c)(1) "Know or Should Know"

AFSA appreciates that the standard is what debt collectors "know or should know." As the Bureau has recognized, the area of time-barred debt is not black and white. Different states deal with time-barred debt in different ways and recognizing which state law applies can be challenging. Is it the law in the state in which the consumer resides? The law in the state where the consumer opened the account? The law in the state in which the creditor is headquartered? Or the law in the state included in the agreement?

Because of these complications, a "know or should know" standard is appropriate—but hardly clear. The standard evolved from the world of liability and negligence to describe constructive notice of a fact imputed to a party. The determination as to whether, in reality, a party is presumed to have constructive knowledge about specific facts or conditions is usually decided at the trial level. In the context of debt collection, it will invariably lead to increased litigation. Since the "know or should know" standard is inherently subjective, we believe additional clarification is necessary. Perhaps the Bureau could advance a standard of reasonable inquiry. The Bureau could also specify that a debt collector could meet that standard if it has reasonable procedures for calculating the statute of limitations.

Further, different statutes of limitations in a particular state may have different rules addressing revival depending on the limitations rule that applies. If the Proposed Rule is finalized largely as proposed, it will effectively require a debt collector to undertake this labor-intensive analysis for every single debt it collects.

§ 1006.26(c)(3) Form and Delivery of Disclosures

As the Bureau acknowledges in the Proposed Rule, it can be difficult to determine whether a debt is outside the statute of limitations.

The proposed disclosures may be confusing to consumers because it is not the debt collector but, rather, it is the owner of the debt who decides to sue. The phrase "do nothing or speak to us" is very broad and ambiguous, and therefore, does not help consumers know what the result of any action on their part will be. The phrase "make a payment" is misleading because some states allow partial payments to restart the statute of limitations, but others require a full payment. Similarly, the phrase "acknowledge in writing" may raise the same issues. Many states that permit statutes of limitations to restart upon writing or acknowledgment may have different standards for what qualifies as a "written acknowledgement." The proposed disclosures do not clearly explain to consumers statutes of limitations for certain installment loans where separate limitation periods can apply for each missed payment.

In addition, the CFPB should include a statement in the disclosure explaining that consumers may be able to improve their credit scores by either paying a time-barred debt or coming to a mutual settlement with the creditor/collector regarding the time-barred debt.

IV. Alternative Disclosure

AFSA proposes that one way to meet the CFPB's goal of additional consumer protection and, at the same time, address the challenge in preemptively calculating when a debt exceeds the statute of limitations would be to permit debt collectors to provide an early statute of limitations disclosure. In other words, a debt collector would be permitted to send a disclosure before the statute of limitations has expired if the creditor commits not to sue to collect the debt. In doing so, the creditor provides clarity to the consumer earlier.

The proposed disclosure content should be simple and accurate to permit compliance with multiple and varying state laws. AFSA proposes that the disclosure state, "The law limits the time in which you can be sued on a debt. Because of the age of this debt, we will not sue you for it." If a debt collector were to make this disclosure, it would be required to designate the debt as ineligible for debt collection litigation in any sale of that debt.

If the decision is made to provide an early statute of limitations disclosure, the creditor's debt collector vendors would not be required to provide different disclosures in the future. Moreover, this would be binding on all future owners of the debt, *i.e.*, it would sell as "legal ineligible." This simplified procedure would help lessen potential consumer confusion.

Simply put, this optional disclosure would allow for conservative guardrails with minimal variation in each state for providing a statute of limitations disclosure, while providing consumers the earliest notice possible that they will not be sued for nonpayment of the debt.

V. Conclusion

Since they have been implemented, statutes of limitations have been a matter of state law. The Proposed Rule would mandate disclosures that conflict with several of these state laws. The Bureau should address these conflicts before it finalizes the Proposed Rule. One way to do that would be to allow for additional, early disclosure.

AFSA appreciates the CFPB's attention to these issues. Please do not hesitate to contact me at 202-776-7300 or cwinslow@afsamail.org with any questions.

Sincerely,

Celia Winslow

Celia Winslow
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American Financial Services Association