August 3, 2017

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

Re: Debt Collection Quantitative Disclosure Testing
Docket No. CFPB-2017-0013
OMB Control Number: 3170-XXXX

To Whom It May Concern:

The American Financial Services Association (AFSA)[1] appreciates the opportunity to comment on the Consumer Financial Protection Bureau's (CFPB) plan to survey individuals as part of the CFPB's research on debt collection disclosures. The CFPB intends on using the information gathered as part of this research study to help assess whether it can improve the clarity of forms used during debt collection in a potential debt collection rulemaking. The survey questions generally focus on debt collectors. AFSA commends the CFPB for keeping research on third-party debt collectors and creditors separate.

Our purpose in sending this letter is to reiterate the important distinction between creditors and debt collectors. Because the CFPB's survey is focused on debt collectors for the most part, and AFSA's members are creditors, AFSA is going to assume the survey does not apply to creditor practices. Thus, AFSA will only comment on one substantive issue in the survey.

AFSA has emphasized in previous responses to CFPB requests for comments and information on debt collection issues that there is a fundamental distinction between creditors and debt collectors. AFSA strongly advocates that the CFPB continue to treat creditors differently from debt collectors as it assesses collection practices.

Creditors are motivated to maintain the customer relationship. They originate, service, and collect a customer's account. Creditors benefit from a strong relationship with customers built on transparency and trust which helps to maintain a loyal customer base, as well as attract new customers. A free flow of information between creditors and customers keeps the customers informed and out of default.

On the other hand, debt collectors have not cultivated a relationship with a customer. They collect accounts that are usually in default at the time they receive them, and from customers with whom they have no prior or ongoing relationship because debt collectors collect on behalf of others or they buy customers' debts from others. Debt collectors have little incentive to maintain or improve customer satisfaction since their customers cannot "vote with their feet" and choose different debt collectors to collect their accounts. Indeed, Congress passed the Fair Debt Collection Practices Act (FDCPA) in 1977 to protect customers from debt collectors: "Unlike creditors, who generally are restrained by the desire to protect their goodwill when collecting past due accounts, independent

[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.

collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them."[2] (See the appendix for an excerpt of AFSA's response to a previous CFPB survey explaining the difference between creditors and debt collectors.)

Although our letter is focused on the difference between creditors and debt collectors – differences the CFPB recognizes – we do have a substantive point regarding how the CFPB presents the scenarios in the survey. In "Supporting Statement Part A," the CFPB states that:

> "[It] is considering whether consumers should receive disclosures in validation notices or subsequent communications regarding time-barred debts (i.e., debts that are older than the applicable state statute of limitations) or obsolete debts (i.e., debts that fall outside the generally 7-year reporting window included in the Fair Credit Reporting Act) or if other disclosures should be provided."[3]

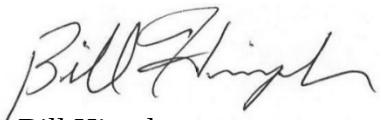
We do not believe that the scenarios set out in the survey accurately reflect the purpose for which the questions were created. If the purpose of the survey questions is to determine whether a consumer would *know* the debt was "time-barred" or "obsolete," the eight-year-old debt referenced in the survey scenarios may not provide an accurate measure. A person could still be sued (Q04, Q05), and the debt may still appear on the person's credit report (Q06, Q07, Q08, Q09) eight years from the date of contract, depending on the length of the contract and the date of first delinquency on the contract. Both the statute of limitations and the credit reporting date of first delinquency are based on default, which are moving targets. (There are statute of limitations exceptions.)

For example, if a creditor charges off a borrower's account after the borrower defaults in the third year of the contract, and never brings the account current, the borrower could still be sued in states with statutes of limitations of, say, six years or more (e.g., Colorado, Iowa, etc.). In this example, the customer could still be sued until the ninth year. Likewise, the charge off will report on the borrower's credit report for seven more years from the date of first delinquency, which would be year ten in the scenario.

We do not know the CFPB's purpose in using a time period where the debt could still affect the customer's credit report or suit status. The CFPB should be aware that using a time period so close to the statute of limitations in many states and the credit reporting bar date could distort the results of the information the CFPB is trying to learn.

AFSA hopes that the CFPB will keep creditors separate from debt collectors and consider revising the survey for more accurate results. Please contact me by phone, 202-466-8616, or e-mail, bhimpler@afsamail.org, with any questions.

Sincerely,



Bill Himpler
Executive Vice President
American Financial Services Association

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[2] S. REP. 95-382, S. Rep. No. 382, 95TH Cong., 1ST Sess. 1977, 1977 U.S.C.C.A.N. 1695, 1977 WL 16047 (Leg.Hist.)
[3] The Consumer Financial Protection Bureau. *Debt Collection Quantitative Disclosure Testing*. June 5, 2017. Available at https://www.regulations.gov/document?D=CFPB-2017-0013-0002.

APPENDIX

May 6, 2014

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

Re: Debt Collection Survey from the Consumer Credit Panel
Docket No.: CFPB-2014-0005

To whom it may concern:

The American Financial Services Association ("AFSA")[1] welcomes the opportunity to comment on the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") debt collection survey ("Survey") to learn about consumers' experiences with debt collectors. With the exception of one major problem, this Survey is much better designed than the CFPB's previous survey on arbitration.

The significant problem is that that CFPB treats creditors and debt collectors as though there is no difference between them. The Survey questions do not distinguish between "debt collectors" as defined by the Fair Debt Collection Practices Act ("FDCPA") and those exempt from the FDCPA, such as creditors. This distinction is important for two reasons. First, creditors and those exempt under the FDPCA conduct business in a different manner than debt collectors. Second, the CFPB's FDCPA rulemaking will not extend to creditors, while its rulemaking on unlawful unfair, deceptive, or abusive acts or practices ("UDAAP") may apply to both debt collectors and creditors. Because there will be some differences in the rules applied to debt collectors and creditors, the Survey questions should be created to obtain separate lines of information relating to debt collector and creditor concerns. This will allow the CFPB to promulgate more appropriate rules relating to the laws that affect each.

AFSA also offers some suggestions to the Survey sample, design, and some specific questions in the Survey.

I. Debt Collectors and Creditors

For the Survey results to accurately portray consumers' experiences with the debt collection industry, the Survey should distinguish between debt collectors and those exempt under the FDCPA. The Survey incorrectly defines "debt collector" as "any person or company trying to collect on a debt." The definition of "debt collector" in the Survey goes on to state that a debt collector could be "the collections department of the original creditor (the person or company you

[1] AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its more than 350 members include a broad spectrum of consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers.

got the loan from or originally owed the debt to), an attorney, a collection firm, or others trying to get you to pay the debt."

It is important to recognize and keep distinct the differences between a creditor and a debt collector. That was the intent of Congress when it passed the FDCPA. The Bureau should not paint all entities that collect amounts due with a broad brush under a premise that all of these entities should have to adhere to the same practices when attempting to collect debts. The amorphous use of the terms "debt collector" and "debt collection" without regard to the origination of the debt and the financial interest of the participant makes it appear that the Bureau believes there is no difference between creditors and debt collectors, which is simply not the case in practice or under federal law and many state laws.

Congress realized when it passed the FDCPA in 1977 that creditors do not operate like debt collectors. While much has changed since 1977 in the credit industry, creditors are still restrained by their inherent motivation to protect their goodwill when collecting overdue accounts – just like they were in 1977.[2] While consumers cannot choose their debt collectors, they usually make conscious decisions regarding which creditor to use. The Senate Report on the FDCPA states, "Unlike creditors, who generally are restrained by the desire to protect their goodwill when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them."[3]

The Government Accountability Office affirmed Congress' distinction, stating, "Because first-party collectors use the issuers' name and are collecting from current customers, there is an emphasis on preserving the relationship with the consumer and mitigating the negative perception that consumers can have about their accounts being forwarded to collection."[4]

If the debt collection system includes the full universe of efforts to collect debts, then creditors are part of that system, although collection of debts is not their principal function. If the customer fails to pay, the first effort to collect on that debt is made by the creditor, typically by using its own employees or those of an affiliate or servicer that collects in the name of the creditor. As Congress realized when it enacted the FDCPA, creditors stand in a different place along the continuum of collecting what is due.

As defined by the FDCPA, the term "creditor" refers to, "any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." For the purposes of analyzing the applicability of the Survey to "debt collectors" as defined under the FDCPA and those excluded from the definition of "debt

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[2] U.S. House. Subcommittee on Consumer Affairs of the Committee on Banking, Finance and Urban Affairs. Statement re: H.R. 29, A Bill to Amend the Consumer Credit Protection Act To Prohibit Abusive Practices by Debt Collectors. March 9, 1977.

[3] S. REP. 95-382, S. Rep. No. 382, 95TH Cong., 1ST Sess. 1977, 1977 U.S.C.C.A.N. 1695, 1977 WL 16047 (Leg.Hist.)

[4] U.S. Gov't Accountability Office, GAO-09-748, *Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology* (2009), available at http://www.gao.gov/assets/300/295588.pdf

collector" under the FDCPA, we will refer to those excluded from the definition as "creditors." This definition does not include buyers of delinquent debt.

As defined by the FDCPA, the term "debt collector" refers to, "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."[5] The term "debt collector" does not include:

> "(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;
> (B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;
> (C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;
> (D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;
> (E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and
> (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor."[6]

Most AFSA members originate their own accounts or acquire accounts shortly after origination, and usually well before default. They service these accounts, accept agreed upon payments, and provide assistance throughout the life of an obligation. Accounts that go into default or do not pay timely ultimately affect a company's costs and risks. There is an incentive to maintain a customer in a "paying" relationship as the creditor assumes the risk of extending credit in the first place. As a report from the Tower Group states, "The cost to replace one bank card customer ranges from $160 to over $200, and issuers that work with their customers through this difficult period will retain customer for life."[7] In other words, creditors use debt collection as a customer retention strategy and are incentivized by avoiding costs to acquire new customers.

Unlike debt collectors, who usually collect only mature, static balances from consumers with whom they have no prior or ongoing relationship, creditors collect the money owed from their own customers with whom they have a long-term and continuous relationship and who may carry other balances with the creditor that are not delinquent. Unlike debt collectors, whose business is

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[5] 15 U.S.C. §1692a(6)
[6] *Ibid.*
[7] Moroney, Dennis, "*Revitalize the Credit Card Pre-Charge-off Collection Process and Improve the Bottom Line*." TowerGroup. April 2009. Quoted in "*Leveraging Collections as a Customer Retention Tool*," by Julie Austin and Vytas Kisielius of Collections & Recovery, TSYS, Jan. 2010. Available at: http://www.ftc.gov/sites/default/files/documents/public_comments/ftc-workshop-debt-collection-2.0-protecting-consumers-technology-changes-project-no.p114802-00007%C2%A0/00007-58348.pdf

collecting on defaulted loans or accounts, creditors' primary business is selling goods on credit or making new loans, not collecting on defaulted loans or accounts. Unlike debt collectors, who do not have any incentive or desire to establish relationships with consumers for repeat business, creditors, such as indirect auto lenders, want to sell more cars for their parent companies – they desire repeat business.

Unlike debt collectors, whose sole mission is to collect defaulted debt without regard to any future relationship, creditors are interested in collecting what may be due, but they are also very interested in maintaining a continuing relationship with their customers. Creditors do not want or need charged-off or uncollectible debt precisely because that type of debt will not give creditors access to new customers to whom credit may be extended in the future. Creditors stand to lose the entire balance owed if they cannot collect the debt and salvage the relationship with their customer. Therefore, unlike creditors, the amount the debt collector must collect to recover its initial investment is quite small and its profit potential is very significant, as long as it collects more than it is paid for the accounts.

All of this means that debt collectors do not have substantial "skin in the game." They have little to lose. That accounts for some of the practices the FDCPA was designed to guard against. Creditors are at the opposite end of that spectrum. They have all of their "skin in the game," both their money and their valuable customers – customers they very much want to keep. Because Congress recognized that creditors have so much "skin in the game," Congress already decided that creditors should not be subject to the same debt collection restrictions as debt collectors.

If the Survey does not clearly distinguish between creditors and debt collectors, the Survey results will be misleading. The Survey will not inform the CFPB if a problem the Survey identifies from the data emanates from debt collectors or from creditors collecting their own debt. As stated in the Notice, the CFPB intends to use information collected through the Survey in its rulemaking concerning debt collection. If the CFPB cannot distinguish between problems consumers may experience with debt collectors and problems consumers experience with creditors collecting their own debt, it may create rules in areas where rules are not necessary, thereby creating unintended consequences such as additional red-tape for consumers, difficulty in getting future credit, customers feeling that they are not appreciated or trusted because of the nature of the disclosures, and higher costs to creditors (which will inevitably be passed along to consumers).

As explained above, it is not appropriate for debt collectors and creditors to be regulated identically because they are in very different businesses. Regulation in this space on creditors is unnecessary and would unnecessarily create difficult compliance burdens, cost of doing business, and credit risk issues for creditors. These issues could predictably lead to serious disruptions in the extension of consumer credit and increase the costs of credit to consumers. Congress did not intend that creditors be regulated like debt collectors, and the CFPB should follow Congress' intent as it seeks to regulate collection practices under the FDCPA. Congress realized when it passed the FDCPA and transferred the authority of the Federal Trade Commission to "prescribe rules, issue guidelines, or conduct a study or issue a report mandated under" under Section 1061 of the Consumer Financial Protection Act of 2010, that creditors operate differently than debt collectors, that creditors are different from debt collectors because their financial interests in debt differ radically,

and that their motivations have different sources. Therefore rules applicable to debt collectors may be appropriate, but those rules would not be applicable to creditors.

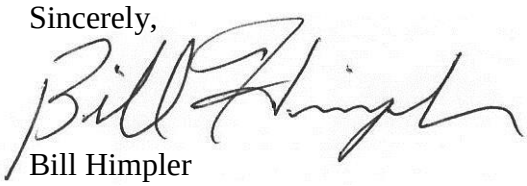
If the CFPB determines to write rules regulating the debt collection practices of creditors and debt collectors, the Bureau should write two separate sets of rules. Rules that apply specifically to debt collectors should not apply to creditors and vice versa. The creditor rules should be carefully crafted to solve the problems (if any) that the CFPB determines exist in the creditor collection process. The CFPB should not presume that the problems it determines are caused by debt collectors necessarily apply equally to creditors.

The failure to distinguish between creditors and debt collectors also makes the survey difficult to answer. For example, Question #9 asks, "In the past two years, since [September 2012], have you been contacted (whether in person, by phone, mail or some other means) by a debt collector trying to recover a debt from you?" There are then 40 follow-up questions about the debt. It is unclear, since a debt collector can also mean a creditor in the survey, and debt is defined as "any money you owe," whether a monthly statement from a creditor constitutes being "contacted by a debt collector."

The CFPB should either: (1) Shorten the Survey and ask questions about debt collectors collecting debt and creditors collecting their own debt; or (2) Send one survey to half the sample asking questions about creditors collecting their own debt and another survey to the other half of the sample asking questions about debt collectors collecting debt. The surveys could ask questions more focused on the type of business involved, e.g., the creditor survey would not have a question about the creditor leaving a message stating it is attempting to collect a debt, as asked in Question #55.

… [Remainder of letter omitted for brevity.]

Sincerely,



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