August 4, 2020

Kathleen Kraninger, Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Supplemental Notice of Proposed Rulemaking for Time-Barred Debts (Docket No. CFPB-2020-0100)

Dear Director Kraninger:

The Consumer Relations Consortium (CRC) is an organization comprised of more than 60 national companies representing the diverse ecosystem of debt collection including creditors, data/technology providers and compliance-oriented debt collectors that are larger market participants. Established in 2013, CRC is evolving the debt collection paradigm by engaging stakeholders—including consumer advocates, Federal and State regulators, academic and industry thought leaders, creditors and debt collectors—and challenging them to move beyond talking points and focus on fashioning real world solutions that actually improve the consumer experience. CRC's collaborative and candid approach is unique in the market.

CRC members exert substantial positive impact in the consumer debt space, servicing the largest U.S. financial institutions and consumer lenders, major healthcare organizations, telecom providers, government entities, utilities and other creditors. CRC members engage in millions of compliant and consumer-centric interactions every month.[1] Our members subscribe to the following core principle:

"Collect the Right Debt, from the Right Person, in the Right Way."

We appreciate the opportunity to comment on the Supplemental Notice of Proposed Rulemaking regarding time-barred debts. The comments contained herein go in-tandem to CRC's comment to the original Notice of Proposed Rulemaking for debt collection.[2]

Sincerely,

Stephanie Eidelman
Executive Director, Consumer Relations Consortium

[1] The roster of current CRC members is available at https://www.crconsortium.org/. These comments generally reflect the positions of the CRC collection agency members.
[2] Docket No. CFPB-2019-0022-9633.

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Right to Cure

The Consumer Relations Consortium (CRC) concurs with the concerns of the Consumer Financial Protection Bureau (CFPB) that calculating the statute of limitations for time-barred debts is complicated, made even more so by the fact that consumers regularly move across state lines. For this reason, CRC reiterates its suggestion for the establishment of a right to cure similar to those codified in California and West Virginia.[3] Details of this discussion can be found in CRC's comment to Notice of Proposed Rulemaking (NRPM) for debt collection.[4]

Overarching Themes and Considerations

As stated in CRC's comment to the Notice of Proposed Rulemaking in September of last year, rules that exceed the scope of the CFPB's authority will not be enforceable. When Congress has not spoken, an agency's rulemaking must not be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" or it will be set aside. [5]

In the case of time-barred debt, nothing in the Fair Debt Collection Practices Act (FDCPA) requires a debt collector to provide any disclosure to a consumer regarding a time-barred debt. The lack of any statutory text further suggests that by providing consumers with information regarding whether the debt is time-barred is equivalent to providing legal advice and the CFPB has no authority to require debt collectors to legally counsel consumers. Statutes of limitations are generally governed by state law and nothing in the FDCPA requires a debt collector to interpret state law for a consumer in order for the consumer to determine their rights.

<u>The CFPB Does Not Have Authority to Require Debt Collectors to Provide Legal Advice to Consumers</u>

Disclosures in consumer protection law are meant to inform and not to counsel. The common element of the federal government's consumer-protection measures for financial services in the United States is the requirement that institutions disclose designated information to consumers in specified formats at required times.[6] Disclosures are so central to the purpose of some financial consumer protections that we might properly call them "information protections."[7] Providing consumers with disclosures as to whether the statute of limitations has lapsed on a claim and whether a debt collector may proceed with legal action crosses the lines well beyond informational. The disclosures provided under the Truth-in-Lending Act (TILA) provide specific information to the consumer about the price of credit; nothing in those disclosures speaks to the legal rights of the consumer or what actions a lender may or may not take. For example, TILA

[3] Calif. Civ. Code § 1788.30(d); W.V. Code §46A-5-108.

[4] Docket No. CFPB-2019-0022-9633.

[5] Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 842-44 (1984). 18 5 U.S.C. § 706(2)(A);

[6] Durkin T.A., Elliehausen G. (2002) Disclosure as a Consumer Protection. p. 109 In: Durkin T.A., Staten M.E. (eds) The Impact of Public Policy on Consumer Credit. Springer, Boston, MA

[7] *Id*.

disclosures do not tell the consumer how and in what manner the lender arrived at the cost of credit.

Here, whether a claim is time-barred involves a legal determination. A non-lawyer debt collector who makes a representation to a consumer that a debt is beyond the period prescribed by applicable law for bringing an action to collect a debt, may be accused of engaging in the unauthorized practice of law under state law.[8] Section 1692e(3) of the FDCPA prohibits the false representation or implication that the debt collector is an attorney or that the communication is from an attorney. If a non-attorney debt collector advises a consumer about the law and whether a statute of limitations has expired, that would not only be legal advice but a false representation that the debt collector was an attorney. The CFPB's proposal thus imposes a requirement on lay debt collectors to make a legal determination that would violate the FDCPA.

The CFPB's proposal that a time-barred debt disclosure may be made orally further imposes a risk that a debt collector could inadvertently provide legal advice. A consumer will more than likely engage in a discussion with the debt collector once the disclosure is made, especially if the consumer does not understand the significance of the legal ramifications of a time barred debt. The debt collector will either be forced to further explain the legal significance of the statute of limitations—thus getting into the grey area of legal advice or abandon the conversation altogether which is of no benefit to the consumer—or appear as if they are stonewalling the consumer's requests for more information about this topic. There is simply no justification for a debt collector to have to choose between engaging in the unauthorized practice of law or not otherwise assisting the consumer.

<u>The Statute of Limitations is an Affirmative Defense, Not a Cause of Action</u>

The expiration of a statute of limitations is an affirmative defense in every state but Mississippi and Wisconsin.[9] It is not a cause of action.[10] Rather, in the ordinary course of civil litigation, the plaintiff is not required to plead the applicable statute of limitations; rather, the statute of

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[8] *Am. Auto. Ass'n v. Merrick*, 117 F.2d 23, 25 (D.C. Cir. 1940) ("giving of advice prior to collection of a claim and the urging of legal propositions in discussions with the person from whom collection is attempted does involve the practice of law and may be performed only by lawyers...."); *In re Shoe Mfrs. Protective Ass'n*, 295 Mass. 369, 372–73, 3 N.E.2d 746, 748 (1936) (concluding that collection agency engaged in the unauthorized practice of law because in part, it "determined whether or not legal proceedings should be instituted ...."); *McMillen v. McCahan*, 14 O.O.2d 221, 167 N.E.2d 541, 551 (Ohio Com. Pl. 1960) ("The Court is clearly of the opinion that the giving of advice as to whether a claim is good or not is the giving of advice as to legal rights. This is essentially the character of the service that is performed by an attorney in the practice of law.").

[9] Wis. Stat. 893.05, Miss Code 15-1-3.

[10] *See*, *Guild v. Meredith Village Sav. Bank*, 639 F.2d 25, 27 (1st Cir 1980). *See* also 1 C. CORMAN, LIMITATION OF ACTIONS § 1.1, p. 10 (1999)("Statutes of limitations are defensive by nature and are not intended to be used when affirmative relief is sought.")(citing *Gould; Lackner v. La Crois*, 25 Cal. 3d 747, 602 P.2d 393, 396 (1979)(same); *Bellevue School Dist. No. 405 v. Brazier Constr*., 100 Wash. 2d 776, 675 P.2d 232 (1984)(same)); *City of Saint Paul, Alaska v. Evans,* 344 F.3d 1029, 1033 (9th Cir. 2003); *In re Estate of Jotham*, 722 N.W.2d 447, 456 (Minn. 2006); *Redwing v. Catholic Bishop for Diocese of Memphis,* 363 S.W.3d 436, 456 (Tenn. 2012); *Bernoskie v. Zarinsky*, 383 N.J. Super. 127, 135, 890 A.2d 1013, 1018 (App. Div. 2006).

limitations is an affirmative defense that must be asserted in an answer, otherwise it is waived.[11] States have jurisdiction over their procedural and substantive laws. In fact, numerous states have already enacted statutes and/or regulations that specifically address how and in what manner debt collectors should inform consumers about state law and the statute of limitations.[12]

Statutory Interpretation of the FDCPA Prohibits the Requirement of Extra-Statutory Disclosures

The FDCPA is a proscriptive statute; the explicit text of the FDCPA tells debt collectors what they cannot do, with the exception of (1) mandating that debt collectors provide a written validation notice within five (5) days of the initial communication with the consumer and (2) providing a mini-Miranda disclosure in subsequent communications. Had Congress wanted debt collectors to provide additional disclosures it would have so stated in the text of the FDCPA, presumably somewhere in 1692g. Congress has not done so and the CFPB has gone beyond the authority of Congress' intent with this proposal.

A Clear Safe Harbor Provision is Needed

It is critical that the CFPB provide clear guidance as to how debt collectors should calculate the limitations period to take advantage of that safe harbor.[13]

CRC proposes that the calculation be based on the last payment date and last known physical address for the consumer, which will be determined using the consumer's zip code only. Such guidance is essential to implementing the intent of the Supplemental Notice of Proposed Rulemaking for time-barred debts (SNPRM) in a way that is reliable and provides certainty to debt collectors, creditors, and consumers alike when faced with determining the applicable statute of limitations. It also will help to reduce the burden and costs associated with the amount of information that must be maintained to make the statute of limitations determination.

[11] See e.g., *Abbas v. Dixon*, 480 F.3d 636, 640 (2d Cir. 2007) ("The pleading requirements in the Federal Rules of Civil Procedure, however, do not compel a litigant to anticipate potential affirmative defenses, such as the statute of limitations, and to affirmatively plead facts in avoidance of such defenses.").

[12] See,, Conn. Gen Stat 36a-805(a)(14); Mass Regs Code 940 7.07; NM Admin Code, 12.2.12.9; 23 NYCRR 1; NY City Rules 2-191; WV St 46A-2-128; Cal Civ. Code 1788.52(d)(2)-(3); NC Gen Stat 58-70-115(4); and TX FIN 392. 307.

[13] While the SNPRM specifically recognizes the various complexities involved in making the statute of limitations determination, it fails to offer any guidance to help simplify the statute of limitations determination. For instance, the SNPRM does not endorse the use of the debtor's last know zip code, area code (or both) when deciding which jurisdiction's statute of limitation should be applied to the debt. Nor does the SNPRM provide default rules to resolve conflicts between statutes of limitation within a single state or choice of law issues between states. Furthermore, the SNPRM fails to provide any safe harbor with regard to the statute of limitations determination such as allowing debt collectors to calculate the statute of limitations period beginning from the debtor's last payment.

The Proposed Disclosure Conflicts with Certain State Laws

CRC proposes an exemption to the SNPRM's recommended disclosure in jurisdictions where state law or other regulations already mandate a verbatim time-barred debt disclosure.

Presently there are eight jurisdictions that mandate debt collectors provide a specific, verbatim disclosure to a consumer when seeking to collect a debt time-barred by the applicable statute of limitations.[14] Further, four jurisdictions—California, Connecticut, Texas and West Virginia (collectively the "conflicting disclosure jurisdictions")—mandate a time-barred debt disclosure that directly conflicts with the disclosure proposed by the CFPB.

The CFPB's proposed disclosure requires a debt collector to state that it "will not" pursue legal action on accounts that are beyond the statute of limitations. However, the conflicting disclosure jurisdictions require a debt collector to state that it "cannot" pursue legal action on such accounts. While the SNPRM notes that consumer understanding of the time-barred debt disclosure does not hinge on the "will not" versus "cannot" issue, the courts disagree. Predictably, consumer attorneys have pursued FDCPA litigation to establish the difference between such disclosures and court decisions go both ways.[15]

In *United States v. Asset Acceptance, LLC*[16], the Federal Trade Commission (FTC) and the federal district court, in accepting a consent decree, agreed that a time-barred debt disclosure that informs the consumer that a debt collector "will not" sue sufficiently prevents an alleged misleading communication under the FDCPA.

The Seventh Circuit Court of Appeals interpreted the consent decree from the *Asset Acceptance* matter as follows:

> That decree requires the company to disclose to consumers whether it knows or believes that a debt was incurred outside the limitations period, using this language: 'The law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it.'[17]

The Sixth Circuit, which cited favorably to the Seventh Circuit decision referenced above, also indicated its approval of the following language when used by a third-party debt collector:

[14] California, Connecticut, Massachusetts, New Mexico, New York, New York City, Texas and West Virginia.
[15] *See infra*.
[16] No. 8:12-cv-00182, ECF No. 5 (M.D. Fla. 2012).
[17] *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1016 (7th Cir. 2014).

> The law limits how long you can be sued on a debt. Because of the age of your debt, LVNV Funding LLC will not sue you for it.[18]

Several other jurisdictions examining the *Asset Acceptance* consent decree likewise held that the disclosures with the "will not sue" language comply with the law.[19]

The CFPB and the FTC both previously rejected a mandatory disclosure requirement for the statute of limitations. The Plaintiffs in *McMahon* and *Buchanan* argued that the FDCPA imposed a duty of mandatory disclosure of the statute of limitations, but both the CFPB and the FTC disagreed in their joint amicus brief filed in connection with the *McMahon* case:

> The Commission disagrees with Ms. Delgado's contention that the Commission's complaint in *Asset Acceptance* stands for the proposition that every effort to collect a time-barred debt without a disclosure is deceptive.

Similarly, the CFPB and FTC stated in their join amicus brief filed in *Buchanan*:

> [I]n some circumstances "a debt collector may seek voluntary payment of a time barred debt" without violating the FDCPA, even if the communication is silent as to the statute of limitations.

Please note that the only mandatory disclosure of a debtor's rights[20] the FDCPA imposes upon debt collectors is found in 15 U.S.C. § 1692g which states:

> (a) Notice of debt; contents
>
> Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial

[18] *Buchanan v. Northland Group, Inc*., 776 F.3d 393, 400 (6th Cir. 2015).

[19] *Sorenson v. Rozlin Fin. Grp.*, No. 15 C 50088, 2015 WL 6955494, at *2 (N.D. Ill. Nov. 10, 2015) (stating that a letter which included the Asset Acceptance consent decree language explicitly states the issue of a time bar and that the recipient will not be sued and the obligation will not be reported to credit agencies). *Miran v. Convergent Outsourcing, Inc.*, 2016 WL 7210382 at *5 ("Convergent's incorporation of its waiver of its right to sue, further supports a finding that the Offer letter did not violate the FDCPA").

[20] The notice required by §1692e(11) relates to disclosure of the attempt to collect a debt and the debt collector's intent to use any information provided by the debtor for the collection of the debt. It is not a disclosure of rights the debtor may invoke when communicating with a debt collector.

> communication or the consumer has paid the debt, send the consumer a written notice containing—
>
> (1) the amount of the debt;
>
> (2) the name of the creditor to whom the debt is owed;
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
>
> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.[21]

Since the jurisdiction-required disclosures are more descriptive and tailored to state law issues, CRC recommends an exemption for the CFPB's time-barred debt disclosure when a jurisdiction in which the consumer resides already provides one. This approach of using the CFPB recommended disclosure only in jurisdictions that have not mandated a specific time-barred debt disclosure is supported by § 1692n, which provides that state laws that are more restrictive than the FDCPA are not inconsistent:

> This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of

[21] See 15 U.S.C. § 1692g.

> this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

Further, the FDCPA specifically allows the CFPB to exempt from the FDCPA any class of debt collection practices (such as practices related to the collection of time-barred debts) as follows:

> The Bureau shall by regulation exempt from the requirements of this subchapter any class of debt collection practices within any State if the Bureau determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement.[22]

Concerns with Disclosure Language

Most of the jurisdictional-mandated time-barred debt disclosures—and even the disclosure proposed by the CFPB—suffer from the same two limitations:

1. The disclosure requires a parsing of "will not sue" and "cannot sue"[23]; and
2. The disclosure is unclear about whether the party that is prohibited from suing the consumer is the debt collector, the creditor, and/or a future owner of the account.

The disclosure required by the State of New York thoughtfully avoids the deficiencies described above:

> Your creditor or debt collector believes that the legal time limit (statute of limitations) for suing you to collect this debt may have expired. It is a violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*., to sue to collect on a debt for which the statute of limitations has expired. However, if the creditor sues you to collect on this debt, you

[22] 15 U.S.C. 1692o.

[23] There is a split in judicial opinions about whether "will not sue" or "cannot sue" is appropriate for time-barred debt disclosures. For cases that find "will not sue" language is problematic, *see Rueda v. Midland Credit Mgmt., Inc.*, No. 19-cv-1739 (N.D. Ill. Aug. 21, 2019); *Barnett v. Midland Credit Mgmt., Inc.*, No. 19-cv-1839 (N.D. Ill. Aug 15, 2019); *Gunther v. Midland Credit Mgmt., Inc.*, No. 2:17-cv-704 (D. Utah Sept 26, 2018). For cases that fine "will not sue" is fine, *see Stimpson v. Midland Credit Mgmt., Inc*., No. 18-35833 (9th Cir. Dec. 18, 2019); *Goodman v. Asset Acceptance LLC*, No. 18-cv-01667 (D. Colo. Dec. 20, 2019); *Tillman v. Midland Credit Mgmt., Inc.*, No. 4:19-cv-4030 (W.D. Ark. Dec. 1, 2019).

> may be able to prevent the creditor from obtaining a judgment against you. To do so, you must tell the court that the statute of limitations has expired.

This language purposefully avoids the "will not" versus "cannot" distinction. Further, this language is truthful because it states what the creditor or debt collector believes, not what is truly the statute of limitations status on the account.

The Testing Conducted by the CFPB Did Not Test the Full Proposed Disclosure

The CFPB's consumer survey did not encompass the full proposed disclosure for when a revival statute applies, and the CFPB's additional—untested—language renders the disclosure confusing. CRC proposes a modification to the proposed disclosure to remedy this issue.

A portion of the revival disclosure as proposed by the CFPB reads, "If you do nothing or call us, we will not sue you." This phrase was notably absent from the disclosures tested by the CFPB. By placing the negative first—"do nothing"—it could confuse a consumer into thinking that the negative also applies to the latter action ("call us"). In other words, a consumer might think that if he or she does *not* contact the debt collector, then they will not sue. While that may technically be true, it goes against the CFPB's intent in adding this phrase.

As mentioned *supra*, CRC recommends that the CFPB adopt a less-problematic time-barred debt disclosure, such as the one mandated by the State of New York. However, if the CFPB chooses to continue with its proposed disclosure, CRC recommends a minor modification to the revival disclosure in order to address the above-referenced issue. The proposal flips the order of "do nothing" and "speak to us about this debt," while also qualifies that simply speaking to the debt collector does not restart the statute of limitations. CRC's proposed changes are in red:

> *The law limits how long you can be sued for a debt. If you* ***simply speak to us about this debt or do nothing****, we will not sue you to collect it. This is because the debt is too old. BUT if you acknowledge in writing that you owe this debt, then we can sue you to collect it.*

Insufficient Number of Respondents Tested

The CFPB's sample testing population was small compared to the size of the time-barred debt market. The CFPB tested only 8,001 people.[24] Overall, the CFPB tested a control sample and ten different versions of the time-barred debt disclosure. That group of 8,001 respondents was split

[24] *Disclosure of Time-Barred Debt and Revival: Findings from the CFPB's Quantitative Disclosure Testing* (Feb. 2020), p. 5.

up among these eleven sub-grooups.[25] Based on the breakdown provided by the CFPB, the respondents were divided into groups ranging between 425 and 909 people.[26]

Statistically speaking, the number of respondents that viewed and answered questions about each of the CFPB's proposed disclosures—without the CFPB's additional phrase as discussed *supra*—is significantly dwarfed by the size of the time-barred debt market.

In-Market Testing of Proposed Disclosure Through CFPB's Own Program

CRC recommends that the CFPB conduct in-market testing of the time-barred debt disclosure through its Trial Disclosure Testing Program in collaboration with industry groups, such as CRC.

The CFPB's time-barred debt disclosure testing was done in a vacuum. While the testing methodology used attempted to get a sample population of people who have dealt with debt collectors, the disclosures themselves were tested in what can be described as a lab environment where the respondents were paid for their participation.

In contrast, in-market testing can provide the CFPB with real-world feedback from consumers who are actually dealing with time-barred debts. This can give the CFPB information about whether the disclosures are actually doing what the CFPB intends them to do. This is especially vital in the context of oral time-barred debt disclosures. In-market testing can provide the CFPB with data about whether consumers request clarification or more information from the debt collector during such conversation, which would put the debt collector in the precarious position of choosing between providing legal advice to the consumer, as discussed *supra*, or appear to the consumer as if they are trying to stonewall information.

[25] *Ibid.* ("[E]ach respondent viewed *one* of several versions of a validation notice before responding to questions.")
[26] *Id*. at pp. 7-9 (Table 1).