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Via Electronic Mail and Electronic Submission to: www.regulations.gov

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Bureau of Consumer Financial Protection
1700 G St., N.W.
Washington, DC 20552

Re: Debt Collection Practices (Regulation F) [Docket No. CFPB-2020-0010]

Dear Director Kraninger:

The UC Berkeley Center for Consumer Law & Economic Justice submits these comments on the Supplemental Notice of Proposed Rulemaking (SNPRM or Proposed Rule) on Regulation F. The draft rule would, if finalized, require debt collectors to provide important disclosures to consumers. However, those disclosures need to be strengthened in order to achieve the goals the Bureau has identified.

Berkeley Law's Center for Consumer Law & Economic Justice works to ensure safe, equal, and fair access to the marketplace. Through research, advocacy, policy, and teaching, the Center acts to create a society where economic security and opportunity are available to all.

Prior to the Center's founding, its current staff and affiliates were among the principal architects of California's sweeping debt collection reform legislation, the Fair Debt Buying Practices Act of 2013. The Center and its affiliated professors and clinicians are frequently consulted on regulatory and statutory issues involving debt collection.

I. INTRODUCTION AND OVERVIEW

A. The Purpose of the FDCPA.

The Fair Debt Collection Practices Act aims, above all, to protect consumers from "abusive debt collection practices."[1] That is the first and foremost stated purpose of the statute.

Further, unusually — even uniquely — among federal statutes, the focus of the FDCPA is specifically the *unsophisticated* consumer. To an extent different from other regulations, then, an agency conducting a rulemaking pursuant to the FDCPA must do so with the goal of protecting the least savvy consumers. The most effective means of protecting consumers with time-barred debts would be to prevent the collection of those debts entirely.[2] Short of that step, the required provision of clear, easy-to-read disclosures could help to provide limited but significant safeguards as well.

The SNPRM frequently, and correctly, states that the purpose of the FDCPA (and any portion of the Rule promulgated under the Bureau's separate UDAAP authority) is to benefit *borrowers*, the recipients of communications that will influence decisions about what to do about a particular debt. The SNPRM is correct that the focus of any rulemaking must be the effect of the Rule on consumers.

II. RESPONSES TO SPECIFIC PROVISIONS OF THE PROPOSED RULE

Comments on particular provisions of the Proposed Rule appear below, in order of proposed section number.

A. <u>The Effective Date</u> of the Final Rule Should Be 90 Days After the Rule is Published in the Federal Register.

The Bureau proposes that the effective date of the final rule will be one year after the final rule is published in the Federal Register. However, debt collectors would not need a full year to comply with this rule. Instead, the Bureau should require that collectors comply within 90 days of the issuance of the Rule, which would allow some time for collectors to make necessary changes while prioritizing getting the information to consumers. This rule provides critical information to consumers and clarifies debt collectors' responsibilities, and as such should be effected without delay.

[1] 15 USC § 1692(e).
[2] *See* Comment on Regulation F, Docket ID CFPB-2019-0022, UC Berkeley Center for Consumer Law & Economic Justice, East Bay Community Law Center, and Public Counsel, submitted Sept. 18, 2019.

The debt collection industry can and should respond to this rule quickly. The SNPRM provides language and model forms that the industry can use, so they do not have to develop their own materials. All that would be required would be for debt collectors to determine whether the debts they are collecting are time-barred. As explained below in Section II.B.1, debt collectors have the information needed to do this the vast majority of the time. In circumstances where they do not, they can simply issue the disclosures and not attempt to sue on the debt.

After the Bureau investigated Encore Capital Group (Encore) and Portfolio Recovery Associates (PRA) in 2015 for violations of consumer protection statutes, Encore and PRA were ordered to make disclosures about time-barred debts almost identical to those proposed in the SNPRM.[3] They were each given 90 days from the date of the order to comply with that disclosure requirement.[4]

Since the Bureau believed that 90 days was an adequate time frame for that pair of major debt collectors to comply with the time-barred debt disclosure requirements, it would be reasonable for the Bureau to give the same amount of time to the rest of the debt collection industry to comply. Additionally, the SNPRM provides not only the language, but the model forms for compliance with this rule, so the debt collection industry should have adequate resources to achieve compliance quickly.

B. 1006.26(c)(1): Strict Liability for Failure to Provide the Disclosures, Rather Than a Negligence Standard, Will Provide Clarity and Certainty to Consumers, Debt Collectors, and Courts.

The Proposed Rule's current language—requiring debt collectors to provide the disclosures if they "know or should know" that a debt is time-barred—would create confusion for consumers and for the debt collection industry. Rather than a negligence standard, strict liability will provide the most clarity for all parties and will better serve the aims of the Fair Debt Collection Practices Act.

Statutes of limitations protect consumers from lawsuits that they would have difficulty defending against because of the age of the debt. The older a debt is, the harder it becomes for an ordinary consumer to keep track of records and evidence related to that debt, or even to remember where the debt originated and for what purpose it was incurred. However, most consumers are unaware

[3] *In the Matter of Encore Capital Group, Inc., Midland Funding, LLC, Midland Credit Management, Inc. and Asset Acceptance Capital Corp.*, CFPB Consent Order, File No. 2015-CFPB-0022 (Sept. 9, 2015), https://files.consumerfinance.gov/f/201509_cfpb_consent-order-encore-capital-group.pdf ["Encore Consent Order"], p. 39; *In the Matter of Portfolio Recovery Associates,* CFPB Consent Order, File No. 2015-CFPB-0023 (Sept. 9, 2015), https://files.consumerfinance.gov/f/201509_cfpb_consent-order-portfolio-recovery-associates-llc.pdf ["PRA Consent Order], pp. 38-39.

[4] Encore Consent Order, *supra* note 3*,* p. 44; PRA Consent Order, *supra* note 3, p. 43.

that protections against court-based collection of time-barred debt exist, let alone that in most states they must affirmatively raise the statute of limitations as a defense if a collector sues them.[5]

Debt collectors, on the other hand, know the date of a consumer's last payment on an account in almost all cases, a date which can be used to easily figure out whether a debt is time-barred. An analysis conducted by the Federal Trade Commission of over 5 million consumer accounts in collections found that 90% of those accounts indicated the date when a debtor made his or her last payment.[6]

Many statutes use strict liability standards for disclosure requirements. For example, the Truth in Lending Act is a strict liability statute, requiring strict compliance with its various disclosure requirements.[7] The Credit Card Accountability, Responsibility, and Disclosure Act added additional disclosure requirements to TILA that also use a strict liability standard.[8] Additionally, several states with time-barred debt disclosure requirements use strict liability standards in their disclosure statutes.[9] Strict liability is commonly used and easy to apply.

Additionally, the FTC recommends "that states change their laws to require collectors to prove that debts are not time-barred, rather than placing on consumers the burden of raising the defense of the running of the statute of limitations."[10] Applying a strict liability standard would align debt collectors' practices with the FTC's recommendation and with the Fair Debt Collection Practices Act by allocating the risks of a lawsuit for time-barred debt to collectors instead of consumers.[11]

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[5] *See* East Bay Community Law Center, Comment Letter on Advance Notice of Proposed Rulemaking on Debt Collection, Docket No. CFPB-2013-0033, at 79.
[6] *See* Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry (2013), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf, at 35.
[7] *See* National Consumer Law Center, Truth in Lending (10th ed. 2019), updated at www.nclc.org/library, Section 1.5.2.3 Statutory Construction Principles: Liberal Construction and Strict Liability.
[8] *See, e.g.,* 15 U.S.C.A. § 1637 ("Before opening any account under an open end consumer credit plan, the creditor shall disclose to the person to whom credit is to be extended each of the following items, to the extent applicable:...")
[9] *See infra* Part II.F. *See also* Cal. Civ. Code § 1788.52(d); Tex. Fin. Code Ann. § 392.307; Conn. Gen. Stat. § 36a-805; W. Va. Code § 46A-2-128.
[10] *See* Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry, *supra* note 6, at 35.
[11] *See* 15 U.S.C. 1692(e) (stating that a purpose of the Fair Debt Collection Practices Act is "to promote consistent State action to protect consumers against debt collection abuses").

1. **The Rule should reflect the reality that debt collectors are aware if the statute of limitations has run for most debts.**

The SNPRM recognizes the reality that collectors can readily determine whether the statute of limitations on most debts has run.[12] The final rule should reflect this recognition by applying a strict liability standard instead of a negligence-based, "knows or should know" standard to debt collectors who sue or threaten to sue on time-barred debt.

While under current practices debt collectors (and especially debt buyers) often receive incomplete or inaccurate information when a debt is placed for collections,[13] one piece of data that collectors do receive for the overwhelming majority of accounts is the date of last payment.[14] Debt collectors that have this information cannot claim that they did not know (or had no reason to know) that a debt was time-barred. It would strain credulity for them to argue that determining whether the statute of limitations has expired is too complex for them to bother investigating before suing a consumer.

Additionally, debt collection lawsuits have grown to dominate the courts: from 1993 to 2013, debt collection lawsuits grew from 1 in 9 civil cases to 1 in 4.[15] Not only are debt collectors suing at higher rates, but consumers are not appearing in court, so collectors are winning by default at least 70-90% of the time.[16] Default judgments can have huge consequences on consumers' lives.[17] In these cases, the creditors should not be awarded a judgment because the suits are time-barred; however, that is precisely what happens when consumers are not there to raise the argument—and they are not present the great majority of the time. The interests of justice demand that the burden be on debt collectors to provide this basic information to consumers, and to courts.

Further, the stress, anxiety, and frustration felt by a consumer who is threatened with a lawsuit on a time-barred debt are too high a price to pay for sparing debt collectors the inconvenience of

[12] Debt Collection Practices (Regulation F) 85 Fed. Reg. 42,12672, 12676 (proposed Mar. 3, 2020) (to be codified at 12 C.F.R. pt. 1006).
[13] *See* Bureau of Consumer Fin. Protection, Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered (July 2016), https://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf, at 6.
[14] *See* Fed. Trade Comm'n, *supra* note 6, at 35.
[15] Pew Trusts, How Debt Collectors Are Transforming the Business of State Courts (May 6, 2020), https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts.
[16] *See* Fed. Trade Comm'n, *supra* note 6, at 45 (90% or more of consumers sued in these actions do not appear in court to defend); Pew Trusts, *supra* note 15 ("Over the past decade in the jurisdictions for which data are available, courts have resolved more than 70 percent of debt collection lawsuits with default judgments for the plaintiff."). According to East Bay Community Law Center attorneys, debt collectors always have the date of last payment of the debt, unless the debt is very old. If debt collectors truly cannot determine the statute of limitations, they are unlikely to attempt to collect the debt.
[17] Pew Trusts, *supra* note 15.

utilizing data that they already have at their fingertips.[18] Getting communications from a debt collector can be scary and worrisome to begin with, and for some consumers, like seniors, the stress can be devastating.[19] As the SNPRM acknowledges, most consumers do not know the statute of limitations on their debts.[20] These disclosures can make a difference in consumers' understanding and peace of mind and help them make better decisions.

As such, debt collectors should be required to use tools already in their possession to give consumers this important information. In the small percentage of cases in which debt collectors do not have the information they need, they should simply provide a disclosure to the consumer that they will not sue on the debt.

2. **The "knows or should know" language in Proposed Rule 1006.26(c)(1) will create confusion.**

The SNPRM acknowledges that "it could be difficult to determine whether a 'know or should know' standard has been met."[21] Indeed, this is likely to prove to be a burdensome issue that may confuse collectors and cause unnecessary litigation.

A strict liability standard will help courts, collectors, and agencies like the Bureau avoid confusion over whether and at what point a debt collector knew or should have known that the statute of limitations had run. This way, consumers will have peace of mind knowing they will not be sued on the time-barred debt. Collectors will understand their obligations to consumers, and consumers will have more of the information that they need to make informed decisions about their debts.

[18] Bureau of Consumer Fin. Protection, Debt Collection Practices (Regulation F), 84 Fed. Reg. 98, 23328 (May 21, 2019) (noting that "the information that debt buyers . . . [and] other debt collectors generally receive at placement, should allow them to determine whether the applicable statute of limitations has expired."). *See also United States v. Kubrick* 444 U.S. 111, 117 (1979) (". . . it is unjust to fail to put the adversary on notice to defend within a specified period of time.")

[19] Bureau of Consumer Fin. Protection, Consumer Experiences with Debt Collection (January 2017), p. 5, available at https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf ("Forty-two percent of consumers with collection experience in the past year said they had asked at least one creditor or collector to stop contacting them. One-in-four consumers who made this request reported that the contact stopped."); *see also* Harvard Health Publishing, Harvard Medical School, "Does stress management become more difficult as you age?" (April 2018) https://www.health.harvard.edu/newsletter_article/does-stress-management-become-more-difficult-as-you-age.

[20] Debt Collection Practices (Regulation F), 85 Fed. Reg. at 42,12689 ("The Bureau believes that many consumers are unaware of the statute of limitations or may not know whether it has expired for their debt.")

[21] Debt Collection Practices (Regulation F), 85 Fed. Reg. at 42,12676.

Clarity and predictability are, of course, features of rules almost universally advocated by industry advocates – including in comments filed in earlier phases of the Regulation F rulemaking.[22]

3. The "safe harbor" makes sense only if the collector is barred from suing on debts where it mistakenly provides disclosures.

As discussed above, a strict liability standard is the simplest and clearest way to get the disclosures to the consumers who need them, and is more effective than a negligence standard. But the SNPRM also proposes a third option: a strict liability standard with a safe harbor protection for debt collectors who neither knew nor should have known that the debt was time-barred.

It is unclear precisely what the Bureau means by a "strict liability standard with a safe harbor." A small percentage of debt collectors may not have the information needed to calculate the statute of limitations, and so may be unsure whether to provide the disclosures (though modern digital recordkeeping makes this increasingly unlikely). If the safe harbor proposal means to protect collectors who mistakenly give the disclosure to a consumer whose debt was within the statute of limitations, that would be acceptable as long as the collector is barred from suing the consumer based on its own misstatement. Indeed, if a collector mistakenly provides the disclosure, the FDCPA prohibits suit even if it is still within the statute of limitations, since the disclosure would be considered misleading.[23]

If the "safe harbor" were to provide a liability shield to collectors that mistakenly fail to issue time-barred debt disclosures, then that would be the equivalent of a negligence standard – which, as explained above, is a less effective and fair choice than strict liability.

It is worth noting again that most states that have time-barred debt disclosures—like Texas and California—have strict liability standards with no "safe harbor" provision.[24] The debt collection industry in those states does not appear to have been unduly hampered as a result of being strictly liable for providing a disclosure on time-barred debts. As such, the simplest, clearest rule

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[22] *See, e.g.*, Comment of California Creditors Bar Ass'n, ID no. CFPB-2019-0022-9514 (requesting clarity on several aspects of Regulation F) (Sept. 19, 2019); Comment of National Creditors Bar Ass'n, ID no. CFPB-2019-0022-9603 (Sept. 19, 2019) (requesting clarity on several aspects of Regulation F); Comment of Consumer Relations Consortium, ID no. CFPB-2019-0022-9633 (Sept. 19, 2019) (requesting clarity on Regulation F); Comment of Select Portfolio Servicing, ID no. CFPB-2019-0022-12078 (Sept. 18, 2019) ("We believe that the debt collection market works best with clear and unambiguous regulatory expectations and requirements."), p. 1; Comment of PDCFlow, ID no. CFPB-2019-0022-9162 (Sept. 16, 2019) (thanking the CFPB for its "efforts to update, clarify and modernize the Fair Debt Collection Practices Act."); Comment of PRA Group, ID no. CFPB-2019-0022-12092 (Sept. 30, 2019) (requesting clarity on several aspects of Regulation F).

[23] *See* 15 U.S.C. 1692e*; see also, e.g., Daugherty v. Convergent Outsourcing, Inc.*, 836 F.3d 507, 511 (5th Cir. 2016)*; McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1021 (7th Cir. 2014)*; Pantoja v. Portfolio Recovery Assocs., LLC*, 852 F.3d 679, 685 (7th Cir. 2017)*; Manuel v. Merchants & Prof'l Bureau, Inc.*, 956 F.3d 822, 831 (5th Cir. 2020).

[24] *See infra* Part II.F.

is to mandate that debt collectors provide the disclosures on time-barred debts. If they mistakenly issue a disclosure on a debt that turns out not to be not time-barred, they simply should not sue on that debt.

4. **Knowing a debt is time-barred will help consumers make more informed choices about their debts.**

Having more information will help consumers make more informed choices; indeed, consumers can't make choices if they don't know that they have any. As the SNPRM acknowledges, most consumers do not know that a debt may be barred by a statute of limitations.[25] Moreover, most consumers – and particularly unsophisticated consumers – do not understand exactly what a "statute of limitations" is, much less how to calculate it in their case.

The Bureau's research supports the conclusion that consumers do not know how to calculate a statute of limitations.[26] In the controlled research study, 65% of participants understood the time-barred disclosure;[27] however, more research on how disclosures function in the real world would be useful. A disclosure that leaves 35% of people unable to understand the status of their debts is far from ideal, especially since the Rule must use the "least sophisticated consumer" or "unsophisticated consumer" as its standard. At the very least, after implementing the Rule, the Bureau should evaluate its performance in the field.

5. **The disclosures should be required in all communications to the consumer.**

The SNPRM would require disclosures in the initial communication to the consumer and on any validation notice required under § 1006.34(a)(1)(i)(B). This requirement should be extended to all communications that the consumer receives about a time-barred debt.

Consumers may have multiple debts from multiple debt collectors, or their debt may have been sold multiple times. As such, it can be difficult for consumers — in particular low-income consumers, elderly consumers, or consumers with disabilities (i.e., unsophisticated consumers) — to keep track of all of their debts and which ones may be time-barred.

Debt collectors have multiple ways to communicate with consumers. Each of their communications about a particular debt could include a brief disclosure that the debt they are trying to collect is time-barred. Some states, like West Virginia, already require that the time-barred debt disclosure be included on all communications to the consumer.[28]

[25] Debt Collection Practices (Regulation F), 85 Fed. Reg. at 42,12689 ("The Bureau believes that many consumers are unaware of the statute of limitations or may not know whether it has expired for their debt.")
[26] Debt Collection Practices (Regulation F), 85 Fed. Reg. at 42,12687.
[27] Consumer Fin. Protection Bureau, Disclosure of Time-Barred Debt and Revival (Feb. 2020), p. 20, https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-quantitative-disclosure-testing_report.pdf.
[28] W. Va. Code § 46A-2-128(f).

Consumers should be alerted that they will not be sued on a particular debt every time the subject of the debt is raised by a collector. Otherwise, a single disclosure at the onset of communications may be overshadowed by later threatening communications.

6. **To address situations in which a validation notice might be re-issued voluntarily, the simple solution is to require debt collectors to put the disclosure on all communications made to the consumer.**

If the validation notice is reissued, the disclosures should be on the reissued notice as well. The disclosure should be on all communications to the consumer. Debt collectors should calculate the statute of limitations on a client's debt, put it in the consumer's file, and then communicate that to the consumer. Every time. That is the clearest and most predictable way to resolve any possible ambiguities and to allocate risk.[29]

7. **Because debt collectors often trick consumers into reviving debts, and frequently sue to collect debts when the right to sue has been revived, collectors should inform consumers about potential revival.**

The problem of consumers being tricked into reviving debts after the statute of limitations has run is a serious one.

> Adam Watson was contacted by a debt collector for a debt he hadn't paid on in over seven years. Because he believed that he could be sued on the debt, at the collector's suggestion he made a small payment of $10. He was then sued on the debt. Mr. Watson's story is not unique. We have seen it happen many times, and we have never seen a disclosure notifying consumers of the consequence of making even a small payment.[30]

The practice of "duping" is widespread, and the threat to consumers is acute.[31] While there may be reluctance to dissuade those who are willing and able to pay their bills—even partially—from doing so, the greater danger lies in permitting unscrupulous collectors to trick people into reviving time-barred debt they otherwise could not be sued on. The moral hazard for consumers is qualitatively less acute than the moral hazard for collectors.

Given the burdens placed on consumers when they are not properly informed of revival statutes, it is essential to require an effective notice of the consequences of partial payment. Without the disclosure, consumers do not have the information they need to choose the option that will best promote their welfare.

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[29] See *supra*, Part II.B.2.
[30] Comment on Regulation F, Docket ID CFPB-2019-0022 (Sept. 18, 2019), UC Berkeley Center for Consumer Law & Economic Justice, East Bay Community Law Center, and Public Counsel.
[31] Renea Merle, *Zombie debt: how collectors trick consumers into reviving dead debts*, Seattle Times, (Aug. 17, 2019), https://www.seattletimes.com/business/zombie-debt-how-collectors-trick-consumers-into-reviving-dead-debts/.

C. 1006.26(c)(1)(i): The Burden on Debt Collectors to Determine Whether a Debt Is Time-Barred Is Minimal.

As discussed in section B.1, *supra*, debt collectors already have the information that they need in order to make a determination about whether or not a debt is time-barred. Therefore, the burden on debt collectors to determine the statute of limitations is minimal.

As the SNPRM explains, several states already require disclosures that a debt is time-barred.[32] Debt collectors still conduct business in those states. Requiring the disclosures does not put such a debilitating burden on debt collectors — a 12.7 billion industry[33] — that they can no longer collect debts. In California, which has a time-barred debt disclosure law, collection efforts continue unabated. There is plenty to collect: in 2019, Californians incurred 3.7% more credit card debt than the previous year.[34] And, in Southern California, one debt collector filed *more* debt collection lawsuits in the month of April 2020 — in the throes of the COVID-19 pandemic — than the previous April.[35]

The harm to consumers is greater than the minimal burdens on debt collectors. First off, the percentage of Americans with delinquent and defaulted debt is growing rapidly. In one Bureau study, one in four consumers had a third-party collections tradeline on their file.[36] Even before the COVID-19 pandemic hit the United States, Americans reached an all-time high of more than $1 trillion in credit card debt.[37] Additionally, between 1999 and 2016, Americans' household debt nearly tripled $4.6 trillion to $12.29 trillion."[38] From 2018 to 2019, the 90+ day credit card delinquency rate rose from 7.77% to 8.36%.[39]

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[32] Debt Collection Practices (Regulation F), 85 Fed. Reg. at 42,12688.
[33] Bureau of Consumer Fin. Protection, Fair Debt Collection Practices Act: CFPB Annual Report 2020 (March 2020), p. 2, available at https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2020.pdf.
[34] Matt Tatham, *A Look at U.S. Consumer Credit Card Debt*, Experian (Nov. 4, 2019), https://www.experian.com/blogs/ask-experian/state-of-credit-cards/.
[35] Electronic communication from Leigh Ferrin, Public Law Center [May 7, 2020] (on file).
[36] Bureau of Consumer Fin. Protection, Third Party Debt Collections Report (2019), https://files.consumerfinance.gov/f/documents/201907_cfpb_third-party-debt-collections_report.pdf.
[37] *See* NPR, *U.S. Credit Card Debt Hits All-Time High, And Overdue Payments Rise For Young People* (Feb. 13, 2020), https://www.npr.org/2020/02/13/805760560/u-s-credit-card-debt-hits-all-time-high-and-overdue-payments-rise-for-young-peop.
[38] Federal Reserve Bank of New York, Quarterly Report on Household Debt and Credit (2010), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/DistrictReport_Q22010.pdf; Federal Reserve Bank of New York, Quarterly Report on Household Debt and Credit (2016), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2016Q2.pdf.
[39] Bureau of Consumer Fin. Protection, Fair Debt Collection Practices Act: CFPB Annual Report 2020, (March 2020), p. 11, available at https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2020.pdf.

Second, as the SNPRM points out, consumers do not know about the statute of limitations,[40] and the burden on unsophisticated consumers to determine the statute of limitations on their debt is far greater than the burden on professional debt collectors to make that determination and inform consumers about it.

Third, not informing consumers that their debt is time-barred can lead to a variety of unjust outcomes. Consumers may be induced to try to pay a debt that is time-barred, which could lead to revival in some jurisdictions, putting them at risk of a lawsuit. When consumers are sued on their debts, a large percentage of those lawsuits end in default.[41] When a debt collector wins by default on a time-barred case, it has no legitimate basis for winning — justice is not done.

D. 1006.26(c)(1)(ii): The Burden on Debt Collectors to Determine the State Law and Revival Statutes for a Consumer Debt Is Minimal While the Risk to Consumers Is High, and Strict Liability Will Clarify the Responsibilities of Debt Collectors and Protect Consumers.

This Rule imposes minimal burdens on debt collectors. As explained below, debt collectors already have the information needed in most cases to determine the state law and revival statutes in states where they practice. Further, strict liability is the appropriate standard to clarify collector responsibilities and maximize consumer protection.

1. The burden on debt collectors to determine the applicable state laws and revival statutes is minimal, especially compared with the significant burdens otherwise placed on consumers.

Any concern that the disclosure requirements would place an unfair burden on debt collectors is unwarranted. The burden placed on debt collectors of having to determine the statute of limitations and revival statutes is minimal. As discussed above in sections B.1 and C., most debt collectors have readily available the information that they need to determine if a debt is time-barred. They then simply need to determine what the statute of limitations is in the states in which they work—which they could get from some research or a quick consultation with an attorney—and in the great majority of cases they would be able to comply with the proposed rule.

First, debt collectors who file lawsuits against consumers should already be investigating which state's law applies and whether the debt is time-barred. Collectors who sue already know what the revival statutes are in the state in which they work. The burden is therefore minimal since debt collectors already have, use, and benefit from the information that this regulation would require them to obtain.

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[40] Debt Collection Practices (Regulation F), 85 Fed. Reg. at 42,12689 ("The Bureau believes that many consumers are unaware of the statute of limitations or may not know whether it has expired for their debt.")
[41] Pew Trusts, *supra* note 15.

Second, debt collectors who do not sue on consumer debts should not have any problem with including a disclosure that the consumer will not be sued on the debt. In fact, the FDCPA explicitly restricts debt collectors from making misleading representations in the collection of any debt.[42] Additionally, case law in several circuits explains that it is considered "misleading" under the FDCPA to allow consumers to believe they may be sued on a time-barred debt.[43] Moreover, courts have found it misleading to "dupe" consumers into reviving their debts.[44]

Third, these relatively minimal burdens on debt collectors must be weighed against the significant risks to consumers. Unfortunately, most consumers do not have a clear understanding of their rights and responsibilities when it comes to old debt. And, as the SNPRM points out, there is a great danger in not giving consumers the information about potential revival of debts. As discussed in Section B.7, *supra*, the practice of collectors "duping" consumers into reviving old debts is widespread. As such, these revival disclosures are an important part of the disclosure rules and should be included in the final Rule.

2. Strict liability is the appropriate standard for ensuring the provision of disclosures about the particular revival statutes that may apply.

Holding debt collectors strictly liable for making the disclosures about revival is the clearest, simplest way for consumers to have access to the information they need. And it will make clear the responsibilities that debt collectors have. The same logic applies here as in Section B: anything other than a strict liability standard will confuse consumers, collectors, and courts. Consumers deserve to know that there may be consequences to making payments on or admitting they owe a time-barred debt, and collectors should be responsible for providing that information to them.

E. 1006.26(c)(2): Debt Collectors Should Be Required to Provide Disclosures in All Communications After a Debt Becomes Time-Barred, and Should Be Held Strictly Liable for Failure to Comply with This Straightforward Rule.

As discussed *supra* in Section B.2, debt collectors should be required to provide the disclosures regarding time-barred debts in every communication that they have with a consumer after they discover the debt is time-barred. This would simplify the Rule, and consumers would have a better chance of obtaining the needed disclosures.

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[42] 15 U.S.C. § 1692e.
[43] *See, e.g.*, *Daugherty v. Convergent Outsourcing, Inc*., 836 F.3d 507, 511 (5th Cir. 2016); *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1021 (7th Cir. 2014); *Pantoja v. Portfolio Recovery Assocs., LLC*, 852 F.3d 679, 685 (7th Cir. 2017); *Manuel v. Merchants & Prof'l Bureau, Inc.*, 956 F.3d 822, 831 (5th Cir. 2020).
[44] *See, e.g.*, *Daugherty v. Convergent Outsourcing, Inc*., 836 F.3d 507, 511 (5th Cir. 2016); *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1021 (7th Cir. 2014); *Pantoja v. Portfolio Recovery Assocs., LLC*, 852 F.3d 679, 685 (7th Cir. 2017); *Manuel v. Merchants & Prof'l Bureau, Inc.*, 956 F.3d 822, 831 (5th Cir. 2020).

The SNPRM also requested comment on whether, if the first disclosure is oral, it should be followed by a written disclosure. It would be to the detriment of consumers and to debt collectors to allow oral disclosure alone. A consumer may not understand a single oral disclosure or be able to remember what was said in a single conversation with a debt collector, which would undermine the point of the Rule. Industry advocates would not have the proof of providing the disclosure if it were only oral. We support oral disclosures *in addition to* written disclosures.

Further, strict liability is the appropriate standard under which debt collectors should be liable for providing the disclosures after a debt becomes time-barred. As discussed in Sections B and D.2, strict liability provides the most clarity to debt collectors and protection for consumers.

F. 1006.26(c)(3): The SNPRM Proposed Model Forms and State Law Time-Barred Debt Disclosures Do Not Conflict.

The Proposed Rule and model forms do not conflict with other states' disclosure rules on time-barred debts. California, Texas, Connecticut, West Virginia, and New York all have enacted statutes to require disclosures that a debt is time-barred and the consumer cannot be sued. There is no reason that debt collectors cannot comply with the requirements of the SNPRM and the individual state statutes.

1. California

California law requires that the disclosure be made "with [the collector's] first written communication with the debtor in no smaller than 12-point type, a separate prominent notice…." (Cal. Civ. Code § 1788.52(d)(1).) California law also requires that the disclosure include information about whether the debt can be reported to credit reporting agencies. (Cal. Civ. Code § 1788.52(d)(2), (3).) The text of the statute is substantially similar to the SNPRM. ("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." (Cal. Civ. Code § 1788.52(d)(2), (3).) California's law is a strict liability statute.

Debt collectors in California can simply include the notice required by California on a separate prominent notice and include the Proposed Rule's notice as outlined by the Bureau. The disclosures required by California and the Proposed Rule are largely the same, but include some different information. California requires information about reporting to credit reporting agencies, while the Proposed Rule requires information about potential revival. The disclosures do not conflict. There is no reason that a collector could not comply with both requirements.

2. Texas

Texas Financial Code section 392.307(e) mandates that debt buyers include the disclosure to the consumer that the debt is past the statute of limitations in the initial written communication, and also includes information about whether it will be reported to the credit reporting agency. The text of the disclosure is substantially similar to the SNPRM. ("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. THIS NOTICE IS REQUIRED BY LAW." (Tex. Fin. Code § 392.307(e)(2)-(3).)) Texas does not allow revival of debt, so the revival disclosures would not apply. (Tex. Fin. Code § 392.307(d).) Texas's disclosure law is a strict liability statute.

Debt collectors in Texas can easily include the information required by the state and by the SNPRM.

3. **Connecticut**

Connecticut law prohibits "consumer collection agencies or control persons" from failing to include a time-barred debt disclosure in the first written communication with the consumer. (Conn. Gen. Stat. § 36a-805(a)(14).) Connecticut law also mandates disclosures about whether the debt collector will report to the credit reporting agencies. The text of the disclosure is substantially similar to the SNPRM ("The law limits how long you can be sued on a debt. Because of the age of your debt, (INSERT OWNER NAME) will not sue you for it." (Conn. Gen. Stat. § 36a-805(a)(14).)) Connecticut's is a strict liability statute.

Collectors in Connecticut can easily comply with both the state requirements and the SNPRM.

4. **West Virginia**

In West Virginia, it is considered an "unfair or unconscionable means" of collection to fail to provide the time-barred debt disclosure in *all* written communication with the consumer. (W. Va. Code § 46A-2-128.) The text of the disclosure is very similar to the SNPRM ("The law limits how long you can be sued on a debt. Because of the age of your debt, (INSERT OWNER NAME) cannot sue you for it." (W. Va. Code § 46A-2-128(f).) West Virginia also requires information about whether the debt can be reported to the credit reporting agencies. West Virginia's statute uses a strict liability standard.

Collectors working in West Virginia can easily comply with both requirements.

5. **New York**

New York's disclosure statute requires that collectors "maintain reasonable procedures for determining the statute of limitations applicable to a debt it is collecting and whether such statute of limitations has expired." (23 NYCRR § 1.3(a).) If a collector "knows or has reason to know that the statute of limitations for a debt may be expired, before accepting payment on the debt, the debt collector must provide the consumer with clear and conspicuous notice, in the same medium (such as via telephone or electronic communication) by which the debt collector will accept payment." (23 NYCRR § 1.3(b).) New York also requires revival language, similar to that in the SNPRM.

The text of the disclosures is different from those in the SNPRM. The information is largely the same, but the wording is different.[45] However, collectors in New York could comply with both the state disclosure requirements and the requirements of the SNPRM by simply including both sets of disclosures.

G. 1006.26(c)(3)(iv): The Rule Should Require That the Disclosures Be Presented in the Same Language Used for Other Communications with the Consumer.

A debt collector should be required to translate the disclosures into any foreign language that the collector uses with a given consumer. It would be nonsensical to have the debt collector communicate with the consumer in a non-English language — for the purpose of effectively relaying whatever message the collector wants to convey — but then have the disclosures (which the collector might not want to convey) in English. Furthermore, debt collectors should be required to make all of the letters and materials available to the consumers in the language in which they are communicating orally.

It makes sense for the Bureau to provide standard language for the disclosures on its website, though the website should include a disclaimer that although the Bureau believes that in most cases this language will suffice to meet the requirements of the Rule, the facts of each case ultimately determine whether a given disclosure was sufficient.[46] It also makes sense for the Bureau to provide standard disclosures in languages other than English. Finally, collectors should be able to use other wording and other translations as long as that wording and those translations are complete and accurate.

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[45] "We are required by regulation of the New York State Department of Financial Services to notify you of the following information. This information is NOT legal advice:

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 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.

Even if the statute of limitations has expired, you may choose to make payments on the debt. However, be aware: if you make a payment on the debt, admit to owing the debt, promise to pay the debt, or waive the statute of limitations on the debt, the time period in which the debt is enforceable in court may start again.

If you would like to learn more about your legal rights and options, you can consult an attorney or a legal assistance or legal aid organization." ((23 NYCRR § 1.3(c).)

[46] *Boucher v. Fin. Sys. of Green Bay, Inc.*, 880 F.3d 362, 368 (7th Cir. 2018) (finding that a debt collector was not immune from liability under the FDCPA for using the language suggested by the 7th Circuit in a prior case).

H. 1006.34(c)(2)(xi): The Bureau Should Add the Proposed Disclosure to the Validation Notice and Should Prohibit Suit If the Disclosure is Mistakenly Given.

The Bureau proposes to modify section 1006.34(c)(2)(xi) to refer to section 1006.26(c)'s disclosures to add to the validation notice. This makes sense and helps add consistency to the Bureau's validation and disclosure rules.

The proposed rule here provides a safe harbor for debt collectors who make the disclosure even if it is later determined that the disclosure was not required. This should not be an issue as long as a debt collector is prohibited from suing on a debt that turns out not to be time-barred if it has made the disclosure based on its own mistake. As discussed in part B.3, debt collectors do not have the right to sue a consumer after telling them that they will not be sued, since that would violate the FDCPA.

I. Benefits, Costs, & Impacts: The Disclosures Would Have a Minimal Negative Financial Impact on Debt Collectors, and Would Empower Consumers By Providing More Information to Help Them Make Choices About Their Finances.

Requiring debt collectors to make the disclosures to consumers will have minimal negative financial impacts on debt collectors. Debt collectors already have the information that they need to calculate the statute of limitations on debts, and would simply have to include the disclosure required by the Rule.

With the Rule in place, consumers would be able to make informed choices about which debts to prioritize to pay now, even though they still want to pay all their debts. As the Bureau's research suggests, requiring time-barred disclosures does not reduce the number of people who pay their debts.[47] It also would not impact consumers' ability to access credit in a significant way.[48]

Consumers with delinquent or defaulted debt are generally not looking for ways to not pay their debts — they simply do not have the means to pay all of their debts at a particular time. Consumers will still want to pay old debts to improve their credit, to stop communications from debt collectors, or to be relieved from the burden of having the debt hanging over their heads.

The Bureau's own research finds no evidence of a substantial drop in consumer repayment, after the statute of limitations has expired, in states that have adopted time-barred debt disclosures.

J. The Rule Text or Commentary Should Indicate That Suing or Threatening to Sue to Collect a Debt After Providing the Disclosures Is a Violation of the FDCPA.

The Rule should include text explaining that providing the disclosures and then suing or threatening to sue on the debt is a violation of the FDCPA. The Bureau points out that a "debt

[47] Debt Collection Practices (Regulation F), 85 Fed. Reg. at 42,12690.
[48] Debt Collection Practices (Regulation F), 85 Fed. Reg. at 42,12691.

collector would violate FDCPA section 807's prohibition on deception and, if finalized, § 1006.18 in the May 2019 Proposed Rule, by providing the § 1006.26(c)(1) disclosures if the debt collector later sues or threatens to sue to collect the debt."[49] The text of the FDCPA and the case law in several circuits makes it clear that it is misleading and deceptive to tell consumers that they would not be sued on a debt, and then sue or threaten to sue them later — whether or not the collector acted intentionally.[50] Including this information in the text would make it all the more clear to debt collectors and consumer advocates.

III. CONCLUSION

The SNPRM would make available a valuable piece of information that consumers in some states already have available to them: the fact that they cannot be sued on a debt because it is time-barred. Because of the positive impact that these time-barred debt disclosures could have, they should be required in every communication to the consumer. And debt collectors should be strictly liable for providing the disclosure. Anything less would undermine the point of the rule.

If the debt collector cannot obtain the information about whether the debt is time-barred, it should inform the consumer that it will not sue on the debt. That will easily resolve the issue.

For ten years and more, the Center's staff and affiliates have experienced daily the human face of abusive debt collection practices, and the huge power disparity between low-income consumers and sophisticated debt collectors. Our clients have been duped into reviving their debts, and have gone hungry because their bank accounts were garnished for debts on which they should not even have been sued. If we can convey one thing more than any other to the Bureau, it is the financial and emotional toll of current debt collection practices on low-income consumers.

The SNPRM includes an important safeguard in providing these time-barred debt disclosures. However, we also believe that the best practice would be to ban the collection of time-barred debts altogether. Short of that, the Bureau should ensure that the time-barred debt disclosures be included in every communication to consumers.

We urge the Bureau to hold to the central purpose of the FDCPA: to protect unsophisticated consumers. These consumers do not know about the statute of limitations and how it can help them, while debt collectors do. Debt collectors should be required to give them that information in every attempt they make to collect a time-barred debt.

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[49] Debt Collection Practices (Regulation F), 85 Fed. Reg. at 42,12680, fn 104.

[50] *See, e.g.*, *Daugherty v. Convergent Outsourcing, Inc*., 836 F.3d 507, 511 (5th Cir. 2016); *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1021 (7th Cir. 2014); *Pantoja v. Portfolio Recovery Assocs., LLC*, 852 F.3d 679, 685 (7th Cir. 2017); *Manuel v. Merchants & Prof'l Bureau, Inc.*, 956 F.3d 822, 831 (5th Cir. 2020).

Respectfully submitted,

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