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National Association of Federally-Insured Credit Unions

August 3, 2020

Comment Intake
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

RE: Debt Collection Practices Supplemental Rule (Regulation F) (RIN 3170-AA41)

Dear Sir or Madam:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in response to the Bureau of Consumer Financial Protection's (Bureau or CFPB) supplemental notice of proposed rulemaking regarding debt collection practices pertaining to time-barred debt. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 120 million consumers with personal and small business financial service products. Credit unions are not debt collectors as defined in the *Fair Debt Collection Practices Act* (FDCPA), nor do they participate in abusive and harassing debt collection practices. Although credit unions are not debt collectors as defined in the FDCPA, they are indirectly affected as creditors resulting from this supplemental proposed rule. NAFCU reiterates that the Bureau should only exercise their rulemaking authority under the FDCPA to alleviate any ambiguities regarding its application to creditors. In addition, the Bureau should not use a strict liability standard given that the statute of limitations is rooted in state law. Lastly, the Bureau should ensure that any time-barred disclosure does not increase costs or liability for creditors who utilize a third-party debt collector.

General Comments

The proposed rule applies to "debt collectors" as defined by the FDCPA, or "any person who uses an instrumentality of interstate commerce or mail in any business the principle purpose of which is the collection of debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due, or asserted to be owed or due, to another." This definition excludes creditors collecting debts in their own name, and applies only to third-party debt collectors, or those collectors utilizing any name other than its own to collect debts owed. Credit unions do not act as third-party debt collectors, meaning they do not collect debts utilizing any name other than their own. Credit unions are not the type of institution the FDCPA sought to curtail.

Credit unions assist their members in becoming current with outstanding balances by offering payment plans and financial education assistance, and often times discharge outstanding debts. Despite the proposed rule applying only to third-party debt collectors, creditors are indirectly impacted by this proposed rule in many ways. Credit unions do not seek to bring claims or threaten

to bring claims against consumers in instances of a time-barred debt. However, when the circumstance arises that a creditor seeks to bring a valid claim against a consumer, it is imperative that a creditor's rights are not impeded.

The Bureau Should Only Use its FDCPA Rulemaking Authority and Exclude Credit Unions from Any Rulemaking

In crafting the proposed and supplemental proposed rules, the Bureau is utilizing its rulemaking authority under the FDCPA and the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank), specifically its authority under section 1031. Section 1031 of Dodd-Frank allows the Bureau to “prescribe rules applicable to a covered person or service provider identifying as unlawful, unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.” Additionally, section 1031 allows the Bureau “prevention authority,” meaning the Bureau may promulgate rules under section 1031 for preventing such acts or practices. By utilizing its UDAAP authority, the Bureau includes first-party debt collectors or creditors in a rulemaking that is tailored to address third-party debt collection practices.

This use of this UDAAP authority creates confusion and ambiguity for credit unions regarding potential compliance with the proposed rules. Additional clarification from the Bureau on the proposed rules application to first-party debt collectors and creditors is necessary. NAFCU reiterates its recommendation that the Bureau keep first- and third-party rulemakings separate instead of overlapping obligations utilizing UDAAP authority. Additionally, NAFCU reiterates its long-standing position that credit unions should be exempt from any potential first-party rulemaking. Credit unions are not the nefarious, bad actors that the Bureau intends to target with this rulemaking thus, NAFCU requests the Bureau utilize its exemption authority under section 1022 of Dodd-Frank to exempt credit unions from any first-party rulemaking.

The Bureau's Time-Barred Debt Standard Creates Uncertainty

This proposed rule maintains a vague standard that creates uncertainty prohibiting third-party debt collectors from bringing a lawsuit. Section 1006.26 of the proposed rule prohibits a debt collector from bringing or threatening to bring a lawsuit on a time barred debt if they "knew or should have known" that the debt was time-barred. The Bureau again recognizes the difficulty in determining whether a debt is time-barred. This determination involves analyzing which statute of limitations applies, when the statute of limitations began to run, whether the statute of limitations has been tolled, and the applicability of revival statutes.

However, there may be situations where state law is unclear. Section 1006.26(a)(1) defines the statute of limitations to mean the period prescribed by applicable law for bringing a legal action against the consumer to collect a debt. State laws determine the applicable statute of limitations and they can vary by State and County. Generally, a defendant raises the statute of limitations as an affirmative defense to a suit; however, the proposal would altogether bar bringing a suit based on the statute of limitations, potentially inhibiting a creditor's right to legal recourse.

In a debt collection case, the statute of limitations may begin as of the date of the account's last activity, last payment, or default date. In addition, the statute of limitations may be revived with a partial payment or a written promise to repay the debt, depending on state law. Additionally, there are sometimes complicated choice of law issues involved where one court may opt to "borrow" the statute of limitations from another jurisdiction if it is shorter. In those situations, the court may choose a shorter statute of limitations than the plaintiff-creditor had anticipated would be applied to the matter at hand.

Although the Bureau has determined that the "knew or should know" standard is a better alternative to strict liability, the proposed rule is treating this standard as such. The Bureau should not use a strict liability standard given the difficult nature of determining what statute of limitations applies.

The Bureau Should Ensure That Time-Barred Debt Notices Do Not Increase Costs and Liability for Creditors

NAFCU appreciates the Bureau's efforts to inform consumers of debts where the statute of limitations has expired; however, the proposed notice requirement may impose additional costs and burdens on the responsible party, which could indirectly affect credit unions as creditors. The proposal requires notices of time-barred debt to be included in the initial communication or validation notices of debt. Anytime an additional disclosure is required there are additional costs and burden on the responsible party. Although credit unions are not debt collectors, and presumably not the party required to make these notices, additional costs may be passed onto them as the original creditor by their third-party debt collectors. The Bureau should ensure that costs are not passed onto creditors.

In addition to increased costs, NAFCU reiterates its concerns over increased liability for creditors. Although the model forms reduce some legal risk, it is unclear whether the Bureau will extend liability to the original creditor through the use of their UDAAP authority for incorrect time-barred debt notices, or notices not provided in a timely fashion. Creditors that utilize third-party debt collectors are concerned of where liability is cut off. The Bureau should ensure that they only use their authority under the FDCPA to mitigate ambiguities regarding liability.

As the Bureau noted in this proposal, many states require disclosures regarding time-barred debt. This proposal creates parallel requirements to that of state laws that may cause confusion for consumers. State disclosures appear to be more specific than the proposed disclosure. Duplicative disclosures where one makes a general statement about the time-barred debt does seem to fulfill the intent of the proposed rule, which is to diminish any misleading impression of the debts enforceable.

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Conclusion

NAFCU appreciates the opportunity to share its members' concerns about the proposed rule's indirect effects on credit unions. The Bureau should limit the scope of its rulemaking authority to that of the FDCPA, to eliminate confusion and ambiguity for creditors. Moreover, application of FDCPA rulemaking authority reduces the chance of any increased costs or liability being passed onto creditors. Should you have any questions or require additional information, please do not hesitate to contact me at (703) 842-2249 or kschafer@nafcu.org.

Sincerely,



Kaley Schafer
Senior Regulatory Affairs Counsel