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Via electronic submission

July 30, 2020

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

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

Dear Director Kraninger:

The Independent Community Bankers of America ("ICBA") welcomes the opportunity to comment on the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") supplemental proposal ("supplemental proposal") to its May 2019 proposed rule ("2019 proposal").[1] As similarly stated in response to the Bureau's 2019 proposal, ICBA supports the Bureau's overall effort to revise Regulation F, which implements the Fair Debt Collection Practices Act ("FDCPA"), to account for new technology and to provide greater clarity.

While ICBA continues to be concerned about the Bureau's reliance on section 1031 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or "DFA")[2] to implement the 2019 proposal, we are pleased to see that the supplemental proposal does not similarly rely on that authority, and explicitly makes clear that community banks are not covered under this rule. ICBA believes that with slight revisions, this supplemental proposal would be a prudent measure to help consumers make informed decisions.

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[1] *The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ nearly 750,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than $5 trillion in assets, nearly $4 trillion in deposits, and more than $3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.*

[2] Section 1031 of Dodd-Frank authorizes the Bureau, among other things, to prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices ("UDAAP") 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.

Background

The FDCPA is designed to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumers against debt collection abuses. Given that the FDCPA was enacted in 1977, before current technology, the Bureau issued the 2019 proposal in response to how debt collectors may employ newer communication technologies in compliance with the FDCPA. The 2019 proposal addressed other communications-related practices that may pose a risk of harm to consumers and create legal uncertainty for the industry.

The 2019 proposal sought to address (1) communications in connection with debt collection; (2) prohibitions on harassment or abuse, false or misleading representations, and unfair practices in debt collection; and (3) requirements for certain consumer-facing debt collection disclosures. As a partial continuation of the May 2019 effort, the Bureau is now proposing to require debt collectors to make certain disclosures when collecting time-barred debts, which is debt for which the applicable statute of limitations has expired, typically stipulated by state law. Among other requirements, the proposed rule would prescribe regulations that would set requirements for timing, content and format of disclosures related to time-barred debt.

ICBA Comments

Non-reliance on Section 1031 Authority

ICBA supports the Bureau's decision to not rely on or reference its authority under DFA section 1031 to promulgate this supplemental proposal. We reiterate our recommendation that the Bureau rely solely upon its wide-sweeping authority granted under FDCPA and exclude references to section 1031.

As stated in ICBA's letter in response to the 2019 proposal, the FDCPA is not intended to apply to creditors, such as community banks. While creditors and other first-party debt collectors are not "covered persons" under FDCPA, they are covered persons under section 1031, and as such, the 2019 proposal's reliance on section 1031 raises the potential to unintentionally ensnare first-party debt collectors. This would exceed Congress' intent of tailoring FDCPA to exclude first-party debt collectors by only covering third-party debt collectors. ICBA continues to be concerned that the CFPB's reliance on DFA authority will serve as a hook upon which the Bureau could push third-party debt collector standards onto first-party debt collectors. Or

alternatively, allow state attorneys general to enforce such standards under their DFA 1042 authority.[3] Currently, there is no such reliance or reference in this supplemental proposal.

Additional Information in Disclosures Can Help Protect Consumers

To bring clarity and help avoid situations that might give rise to split-circuit decisions finding unfair or deceptive practices under the FDCPA, the Bureau's supplemental proposal would explicitly require debt collectors to include specified information when trying to collect on time-barred debt. ICBA believes that this additional information will better equip consumers with the requisite knowledge to make informed decisions that are in their own best interest.

As discussed in the May 2019 Proposed Rule, the Bureau's qualitative testing found that consumers often are uncertain about their rights concerning time-barred debt, including whether the debt can be revived, which often depends on a state-by-state case. In some states, a consumer's partial payment on a time-barred debt revives the debt collector's right to sue, while in other states, a consumer's written acknowledgement of a time-barred debt revives the debt collector's right to sue. Additionally, in states where time-barred disclosures are required, debt collectors may be uncertain whether the state-required disclosures sufficiently comply with the FDCPA.

ICBA believes that the supplemental proposal would help mitigate these uncertainties. The required disclosure can be an effective tool in eliminating information gaps, particularly for consumers that might have several outstanding debts and have to prioritize which will be repaid. As ICBA has long maintained, a well-tailored disclosure can result in a more educated consumer, benefiting both bank and customer.

Section-by-Section Comments

The Bureau proposes section 1006.26(c) to require debt collectors who are collecting debts that they know or should know are time barred to provide time-barred debt disclosures and, if applicable, revival disclosures to consumers. Section 1006.26(c)(1) sets forth content requirements, 26(c)(2) sets forth requirements upon changes in circumstances, and 26(c)(3) sets forth formatting requirements and a safe harbor for making the disclosures.

[3] Section 1042 of DFA permits a state attorney general to bring a civil action against a bank to enforce a regulation prescribed by the Bureau.

Content Requirements Under Proposed Section 1006.26(c)(1)

Proposed section 1006.26(c)(1) would provide that a debt collector who knows or should know that a debt is time barred when the debt collector makes the initial communication, to clearly and conspicuously provide time-barred debt and revival disclosures, if applicable, to consumers in the initial communication and validation notices. The proposed disclosures would be required to be substantially similar to the disclosures shown on proposed Model Forms B–4 and -5 through -7 in appendix B, which disclose that (1) the law limits how long the consumer can be sued for a debt, (2) the debt collector "will not" sue the consumer to collect it, and (3) that revival can occur in certain circumstances.

As the preamble to the Bureau's supplemental proposal notes, a validation notice without a time-barred debt disclosure can leave consumers with the misleading impression that debt collectors would be legally allowed to sue to collect the debt. Time-barred debt disclosures, whether alone or with a revival disclosure, generally appear to correct this misimpression. Yet, revival disclosures generally appear to clarify the circumstances in which the debt collector's right to sue can be revived.

ICBA supports the Bureau's attempt to better inform the consumer about limitations of collecting time-barred debt and whether the debt can be revived, but the disclosures might more appropriately use conditional language that alerts the consumer to these potential outcomes rather than placing the burden (and legal liability) on the debt collector to make absolute statements that are more rightly a matter of law, subject to interpretation. Indeed, the Bureau has already recognized that it can be difficult to determine whether debt is time barred. As such, ICBA encourages the Bureau to revise the model form disclosures to include more conditional language. Debt collectors may fear potential lawsuits if good faith determinations about a debt's time-barred status proved wrong. (Further discussion on the substance of the disclosure on model forms is below.)

Disclosures for Additional Circumstances Under Proposed Section 1006.26(c)(2)

Proposed section 1006.26(c)(2) would specify additional circumstances in which debt collectors would be required to provide time-barred debt and, if applicable, revival disclosures. Specifically, proposed section 1006.26(c)(2)(i) and (ii) addresses situations when the debt becomes time-barred after initial communication or if the debt collector's knowledge changes after initial communication. In either case, the debt collector is required to submit the disclosures proscribed in section (c)(1).

The provisions proposed in section 1006.26(c)(2)(i) and (ii) are prudent. Information is only of use so long as it is accurate. Failure to notify consumers of changed circumstances, or awareness of circumstances, would result in a less than fully informed consumer, unfairly disadvantaging them.

Additionally, the proposed language would not appear to hold the debt collector liable for failing to provide a time-barred debt disclosure if the debt collector made a good-faith determination, after appropriate consideration, that the statute of limitations for that debt had not yet expired. ICBA recommends that the Bureau make this interpretation explicit. Additionally, ICBA suggests that the Bureau provide illustrative examples in the official comments to inform debt collectors as to when the ‘‘know or should know’’ standard has been met.

Model Disclosures Under Proposed Section 1006.26(c)(3)

The Bureau proposes section 1006.26(c)(3)(i) to require that, when debt collectors provide the disclosures required by section 1006.26(c)(1) on a validation notice, the content, format, and placement of the disclosures must be substantially similar to such disclosures on Model Forms B–4 through B–7 in appendix B, as applicable. Proposed section 1006.26(c)(3)(i) also would require that, when the disclosures required by section 1006.26(c)(1) are provided orally or in a written communication that is not a validation notice, the content must be substantially similar to such disclosures on Model Forms B–4 through B–7 in appendix B, as applicable. Under proposed section 1006.26(c)(3)(ii) a debt collector who uses Model Forms B–4 through B–7 in appendix B, as applicable, to provide the disclosures required by section 1006.26(c)(1) in a validation notice would receive a safe harbor for compliance with the requirements of section 1006.26(c)(1) and (3)(i).

While providing model notices is certainly helpful, especially when considering the safe harbor aspects through their usage, ICBA recommends that the Bureau consider revising the language to be more conditional.

Rather than require the debt collector to use “cannot” or “will not” in the model disclosures, ICBA recommends that the disclosure language use qualifying language on the status of the debt rather than the potential actions of the debt collector. For example, rather than including language that states the debt collector “will not” collect on this time-barred debt, the disclosure should state that this debt “may be time-barred,” and that further information can be provided or discussed. This would obviate the need for debt collectors to provide information about the time-barred status of particular debts (which can be difficult to calculate) or make absolute assertions of what they will or will not do, while still providing consumers with relevant information that protect their interests.

Conclusion

As stated above, ICBA appreciates the CFPB's efforts to recognize modern technology and practices in debt collection and the attempt to harmonize those advancements with the FDCPA. While ICBA strenuously urges the Bureau to remove the authority given in section 1031 of the DFA that is relied upon in the 2019 proposal, we appreciate the such authority is not relied upon for the current supplemental proposal. This will help ensure that FDCPA regulations are limited to third-party debt collectors, as Congress intended.

As the Bureau considers these comments, please do not hesitate to contact me at Michael.Emancipator@icba.org or 1-800-422-8439 with any questions.

Sincerely,

/s/

Michael Emancipator
Vice President, Regulatory Counsel