Comments of Consumer Law Scholars on the CFPB's Supplemental Notice of Proposed Rulemaking on Debt Collection Practices (Regulation F)

Docket No. CFPB-2020-0010/RIN 3170-AA41

We, the undersigned consumer law professors, write in response to the Consumer Financial Protection Bureau's (CFPB or Bureau) Supplemental Notice of Proposed Rulemaking on Debt Collection Practices (Regulation F), Docket No. CFPB-2020-0010/RIN 3170-AA41, 85 Fed. Reg. 12,672 (Mar. 3, 2020) (Proposed Rule). We are all legal academics who regularly teach, research, practice, and advocate for policy reforms in the area of consumer law and consumer debt collection. Some of us teach consumer law clinics or work with legal services providers, where we and our students have direct contact with low-income consumers, debt collectors, and debt collection law firms, often in the context of court litigation.

We appreciate the opportunity to submit these comments for your consideration and are at your disposal should you wish to discuss any of these comments further.

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I. Introduction

The CFPB has identified a significant problem. Consumers falsely believe that they can be sued lawfully on time-barred debt, and they do not understand that making partial payments or acknowledging the debt in writing can restart the statute of limitations, thereby subjecting them to new legal liability for old debt.

Billions of dollars in time-barred debt is sold annually. Debt collectors have limited options for seeking the repayment of these debts. Suing or threatening to sue can increase collections—usually at the expense of other creditors seeking repayment—but collectors of time-barred debt basically are limited to asking that consumers pay these old debts voluntarily. The volume of time-barred debt in the market, therefore, creates perverse incentives for collectors to deceive consumers. If a collector can trick a consumer into restarting the statute of limitations, the collector then can sue, receive a judgment, and use more coercive collection methods like garnishment. Despite the fact that suing or threating to sue on time-barred debt is illegal, the benefits of so doing entice many collectors and encourage others to try to shade as close to the line of threatening litigation as they can. Because collectors receive default judgments in approximately 70% of the cases and consumers have representation in less than 10%, there is little to check these practices in most jurisdictions. Nor are these risks hypothetical as attested by the thousands of complaints received by the CFPB and the many cases in which courts have found these practices unlawful.

The CFPB must take action to end the deception and harm resulting from the collection of time-barred debt. Unfortunately, the CFPB's proposed action—allowing the collection and revival of time-barred debt but requiring disclosures—is not supported by its own data. While disclosures would be better than the status quo, too many people will be deceived by the proposed disclosures. Instead, the CFPB should strike at the root of the problem and ban collection of any debt once it becomes time barred and that ban should continue to apply even if subsequent events restart the statute of limitations for that debt under applicable state law.

II. To Prevent Consumer Deception, the CFPB Should Ban the Collection of Debt Once It Has Become Time Barred.

A. Consumers do not understand time-barred debt.

The CFPB's own data demonstrates that consumers will be deceived if the CFPB allows the collection of time-barred debt or of debt for which the statute of limitations has revived.[1] "[T]he Bureau's quantitative testing results indicate that, without disclosure, few consumers are likely to recognize that a debt collector is not legally allowed to sue to collect a time-barred debt." Supplemental Notice of Proposed Rulemaking on Debt Collection Practices (Regulation F), Docket No. CFPB-2020-0010/RIN 3170-AA41, 85 Fed. Reg. 12,672, 12,682 (Mar. 3, 2020) (Proposed Rule). However, the CFPB's proposed disclosures do not adequately cure this deception. CFPB, DISCLOSURE OF TIME-BARRED DEBT AND REVIVAL: FINDINGS FROM THE

[1] As discussed in detail *infra* Section IV, due to problems with the CFPB's methodology, its data likely *overestimates* how well consumers will understand the proposed disclosures under actual conditions.

CFPB'S QUANTITATIVE DISCLOSURE TESTING 24-25 & fig.11 (Feb. 2020) (CFPB Disclosure Survey) (finding that at least two of every ten consumers reviewing the most effective disclosure tested will not understand that a partial payment or a statement as simple as "I know I owe the debt" will expose them to new legal liability by restarting the statute of limitations on the debt).

Absent a required disclosure, the CFPB's data demonstrates that substantial numbers of consumers (approximately 65%) will believe falsely that debt collectors may sue them for the debt. CFPB Disclosure Survey at 18. Moreover, less than 10% of the people tested actually understood that debt collectors could not sue on time-barred debt while the remainder were unsure or thought the answer depended on the circumstances. *Id.*

Courts also have recognized that consumers do not understand that taking certain actions can lead to a revival of the statute of limitations. *See Pantoja v. Portfolio Recovery Assocs., LLC*, 852 F.3d 679, 684 (7th Cir. 2017) (noting that "[o]nly the rarest consumer-debtor will recognize [the] danger" of reviving the statute of limitations); *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 399 (6th Cir. 2015) ("This point [that partial payment can restart the statute of limitations] is almost assuredly not within the ken of most people, whether sophisticated, whether reasonably unsophisticated, or whether unreasonably unsophisticated. It this is not hard to imagine how attempts to collect time-barred debt might mislead consumers trying their best to repay.").

Thus, under the status quo where most consumers do not receive disclosures about time-barred debt or its possible revival, a majority of consumers likely falsely believe that they can be sued lawfully for time-barred debt and do not understand that making a partial payment or acknowledging the debt in writing may restart the statutes of limitations.

Unfortunately, the CFPB's own data demonstrates that providing disclosures does not adequately address this deception. Under the laboratory conditions of its survey, wherein the participants were paid and prompted to read the disclosures, at least two of every ten consumers viewing the most effective disclosure did not understand that a partial payment or a written statement as simple as "I know I owe the debt" will expose them to new legal liability by restarting the statutes of limitations on the debt. CFPB Disclosure Survey at 24-25 & fig.11.

Moreover, the CFPB's data generally demonstrated that even with disclosures, consumers simply did not understand the legal ramifications related to time-barred debt. The CFPB broke down its data by three consumer characteristics (prior experience with debt collection, education level, and income) and the four types of notice received (two types of notice with no time-barred disclosure notice at all, time-barred notices with no revival notice, and time-barred notices with revival notices). CFPB Disclosure Survey at 25-28.

All of the subgroups of consumers misunderstood when debt collectors could sue consumers on debts. *Id.* The CFPB asked five questions about when debt collectors could sue consumers. On average consumers in ***none*** of the sub-groups answered a majority of the questions correctly. *Id.* Consumers who received revival notices and either had high incomes ($75,000 or above) or a bachelor's degree or higher performed the best, but even those subgroups averaged only slightly higher than 50%. In other words, they answered on average only somewhere between 2 and 3 questions correctly. All other groups performed worse. The consumers who received no time-barred disclosure at all consistently performed the worst. *Id.* at 25-28. In all but one instance, the groups who received no time-barred notice averaged less than one correct answer. *Id.* And, the overall average consumer answered only somewhere between 1 and 2 questions correctly. CFPB Disclosure Survey at 26.

B. Given the significant problems with time-barred debt, the CFPB should ban its collection rather than provide disclosures that do not work.

Due to the widespread deception resulting both from the lack of any notice and from the provision of the proposed notice, the CFPB should issue a simple, bright-line rule forever banning the collection of a debt once it becomes time barred as a more workable and equitable solution to this problem. Allowing the collection of these debts—especially in states where the statute of limitations can revive—in light of the demonstrated lack of understanding of their legal rights by substantial numbers of consumers creates a potent threat both to consumers and to collectors that follow the law. Although "many courts have held that suing or threatening to sue on time-barred debts is an unfair or deceptive practice under the FDCPA," Proposed Rule at 12,672 n.9, and the CFPB proposes prohibiting such actions, Debt Collection Practices (Regulation F), 84 Fed. Reg. 23,274, 23,275 (May 21, 2019), prohibiting only suing or threatening to sue on time-barred debt—while welcome—is not sufficient to protect consumers and lawful collectors for several reasons.

First, collection of old debt for which the statute of limitations has run (at least initially) flies in the face of the purposes of statutes of limitation and repose and of the Fair Debt Collection Practices Act, *see, e.g.*, *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1194 (11th Cir. 2010) (stating, *inter alia*, the court's "'belie[f] that the FDCPA's purpose of protecting consumers is best served by a definition of "deceive" that looks to the tendency of language to mislead the least sophisticated recipients of a debt collector's letters'") (quoting *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1175 (11th Cir. 1985)). By definition, time-barred debts are at least several years old, and they are often much older. Proposed Rule, 85 Fed. Reg. at 12,672 ("Most statutes of limitations applicable to debt collection claims are between three and six years, although some are as long as 15 years.") (footnote omitted); *id.* at 12,687. The debt buying market is huge—an estimated $98 billion annually in 2013, THE PEW CHARITABLE TRUSTS, HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 11 (May 2020) (Pew Report)—and a significant percentage of the debt purchased is many years old, *see* Proposed Rule at 12,687 (noting that a 2013 FTC study found that, of the debt purchases reported to the FTC for the study, 12% were at least six years old); FTC, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 43 (Jan. 2013) (finding that of the debt purchases reported to the FTC as part of the study, approximately 30% of the debt purchased from debt buyers was six or more years old and that 2.6% was older than 15 years) (FTC Debt Buying Report). Thus, as of 2013, debt buyers were purchasing somewhere between approximately $11.8 billion and $29.4 billion in debt that was six years or older and therefore likely time barred. In addition to concerns about repose, the age of time-barred debt raises concerns as to whether proper documentation of the ownership and the validity of the debt will be available.

Second, collection of this debt exposes consumers in revival states and competitors to risk because it creates an incentive for collectors to trick consumers into reviving the statute of limitations on their debt. As noted herein,[2] consumers do not understand how revival works and the proposed disclosures are not sufficient to protect them. Currently, lawful collection of time-barred debt is limited to asking consumers to pay old debts. If a collector can trick a consumer into restarting the statute of limitations, however, the collector then lawfully may sue the consumer over the debt (assuming all other requirements are met), and the consumer will have lost any defense based on the age of the debt. Unfortunately, consumers are unrepresented in approximately 90% of debt collection cases. Pew Report at 13. Indeed, "[t]he problem [of lack of representation] has become sufficiently widespread that in 2016, the Conference of Chief Justices (CCJ) and Conference of State Court Administrators' (COSCA) Civil Justice Improvement Committee declared that lack of representation among defendants is 'creating an asymmetry in legal expertise that, without effective court oversight, can easily result in unjust case outcomes.'" Pew Report at 15 & nn.11, 41 (quoting NATIONAL CENTER FOR STATE COURTS, CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL (2016)). Absent representation, a typical consumer likely will not understand whether any defenses to the suit exist. Once a collector has a judgment on the debt, it can use more coercive collection methods like garnishment. Even if they ultimately do not file suit, a collector may increase its collections on debt where the statute of limitations has revived by threatening to sue. *Cf.* Proposed Rule at 12,673 ("A consumer with the misimpression that a time-barred debt is enforceable in court may pay or prioritize that debt over another debt or expense, in the mistaken belief that doing so is necessary to avoid litigation."). Thus, if a collector tricks a consumer into restarting the statute of limitations, it can gain a competitive advantage over other collectors who do not trick the consumer.

Third, even in states where the statute of limitations cannot restart, the collection of time-barred debt presents risks to consumers and lawful competitors because it creates a perverse incentive for collectors to threaten to sue or sue unlawfully on time-barred debt. As noted above, threats to sue can increase collections, and receiving judgments allows collectors to use more coercive—and effective—methods to take money from consumers, even when the suit was unlawfully filed. Given the results, even a debt collector trying to follow the law has an incentive to shade its communications as close to a threat as it can in order to persuade a consumer to pay its debt over any others. Ideally, such unlawful practices would be curbed by the adversary system, but in reality, consumers do not understand their rights with respect to this debt and rarely have representation in debt collection suits. Pew Report at 13, 15. Indeed, more than 70% of debt collection suits result in default judgments. Pew Report at 2. Thus, filing, or threatening to file, can increase collections significantly with effectively little risk. In those limited situations in which a consumer timely raises an affirmative defense based on the fact that the debt is time barred, the collector simply can dismiss the suit, as often happens.

The risk from suits, or threats, on time-barred debt is not hypothetical. The fact that "many courts have held that suing or threatening to sue on time-barred debts is an unfair or deceptive practice under the FDCPA," Proposed Rule, 85 Fed. Reg. at 12,672 n.9, itself demonstrates the problem. *See also, e.g.*, Encore Capital Grp., Inc., CFPB No. 2015-CFPB-0022, 22-23, 28 (Sept. 9, 2015) (finding that representing explicitly or implicitly that consumers had a legally enforceable obligation to pay time-barred debt was deceptive and violated the FDCPA); Cash Express, LLC, CFPB No. 2018-BCFP-0007, 5-7 (Oct. 24, 2018) (finding that threatening to sue

[2] *See* discussion *supra* in Section II.A and *infra* in Section III.

on time-barred debt was deceptive when respondent typically did not sue on time-barred debt); (stating).

In addition, the CFPB gets thousands of complaints per year where the consumers specifically chose the best description of their problem as being that someone "[t]hreatened to sue [them] for very old debt." CFPB, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2020 13-15 (Mar. 2020); CFPB, FAIR DEBT COLLECTION PRACTICES ACT: BCFP ANNUAL REPORT 2019 15-17 (Mar. 2019); CFPB, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2018 14-16 (Mar. 2018). Furthermore, studies indicate that debt buyers increasingly rely on litigation to collect debts, Pew Report at 12 & nn.31-32 (citing studies), and between 1993 and 2013, the volume of debt collection cases more than doubled, *id.* at 1, 11. In addition, third-party debt collectors are often paid more when they collect on older debt and do not have a continuing relationship with consumers, which can lead to the use of more aggressive collection tactics. Given the lack of understanding regarding the fact that consumers cannot be sued on time-barred debts, CFPB Disclosure Survey at 18, the size of market for time-barred debt, and the increased collections that result from threats and litigation, these complaints likely represent only the tip of the proverbial iceberg.

Nor is the harm of these practices limited to consumers. One of the purposes of the FDCPA was to protect lawful collectors from the illegal practices of other collectors. 15 U.S.C. §1692(e). As the CFPB itself notes, a problem of filing, or threatening to file, lawsuits on time-barred debt is that it can cause consumers to pay the time-barred debt rather than paying other debts. Proposed Rule at 12,673. Thus, when collectors trick consumers into restarting the statute of limitations or unlawfully threaten to file or file suit on time-barred debt, they put their lawful competitors at a competitive disadvantage.

These facts combine to create a potent threat to consumers and lawful collectors from litigation, or threats to litigate, on time-barred debt, a threat that the CFPB should not now pretend does not exist. As demonstrated above, only banning threats to sue and suits on time-barred debt while allowing its collection with the proposed disclosures does not address the harm adequately. Banning all collection of debt once it becomes time barred would eliminate this threat, as collectors would no longer have an incentive to purchase the debt in the first place. In addition, to best address the issue of default judgments on time-barred debts, the CFPB should require collectors affirmatively to prove that the limitations period for collection has not expired as part of filing suit. *See, e.g.,* N.Y. Ct. R. 208.14-a (requiring counsel to execute an affirmation of non-expiration of statute of limitations for default judgments arising from consumer credit transactions). By contrast, the CFPB's proposal leaves the burden on policing these practices on the very people that the FDCPA was drafted to protect even though its own data shows that at best its disclosures would not help a significant percentage of those consumers to understand the legal implications of time-barred debt. Moreover, the CFPB's proposal leaves in place a system that incentivizes and rewards collectors who violate the law at the expense of those collectors who follow it.[3] Given the existing harm to consumers and to lawful collectors right now from

[3] Assuming *arguendo* there were any evidence that banning the collection of time-barred debt might lead to increased lawsuits, and it is not at all clear that there is, that effect would not be a reason to continue to allow the collection of time-barred debt because the demonstrated confusion and deception caused by allowing the collection

these practices, the CFPB should ban collection of time-barred debt in the interim even if it intends to study other possible responses in the future.

III. The CFPB Should Prohibit the Collection of Debt for which the Statute of Limitations Has Revived, as Its Own Data Demonstrates that Significant Numbers of Consumers Will Be Deceived by even the Most Effective Disclosure.

Debts for which the limitation periods have been restarted or extended after the expiration of limitation periods have been identified as "Zombie Debts." *See generally,* Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. REV. 327 (2014). The CFPB should ban the collection of debts that have been re-animated or revived for three reasons. First, consumers do not understand revival, even under laboratory conditions with the most effective disclosures. Second, revival creates perverse incentives for both consumers and collectors. Lastly, given observed consumer behavior, revival is not necessary to allow collectors to collect on stale debt.

First, the CFPB admits that revival is "counterintuitive" to consumers. Proposed Rule, 85 Fed. Reg. at 12,675 & n.45. And the proposed disclosures do not correct the consumer deception. Even when consumers were paid and prompted to review the disclosures, *see* discussion *infra* at Section IV, approximately 20% of the consumers who received the most effective disclosure did not understand that making a partial payment could revive the statute of limitations on a debt. CFPB Disclosure Survey at 19. The number increased to over 20% when assessing whether consumers understood that acknowledging the debt by writing something as simple as "I know that I owe the debt" could revive the debt. *Id.* In other words, *between 2 and 3 out of every 10 people* who live in a revival state and received the most effective notice would be deceived about the effects of making a partial payment or acknowledging the debt in writing. The other disclosures fared even worse. *See id.* Indeed, the time-barred disclosures without a revival notice fared the worst, but as noted above, those disclosures are necessary to prevent the majority of consumers from being deceived about whether they could be sued for time-barred debt.

Revival also creates perverse incentives for both consumers and collectors. Those consumers who wish to pay on time-barred debt for other reasons, *see, e.g.*, Proposed Rule, 85 Fed. Reg. at 12,673, are punished for doing so because they expose themselves to increased legal liability. Thus, the consumers' economic incentives are out of alignment with their expectations that they will not be punished for making payments, *see id.* at 12,687 & n.141, or for their desire to pay down their debts, *see id.* at 12,673. Revival also creates an incentive for collectors to trick consumers into reviving the debt. Prohibiting revival eliminates these perverse incentives for both consumers and collectors.

of time-barred debt, even with the most effective disclosures, outweighs any hypothetical risk from lawful lawsuits. First, assuming they own a valid debt that the consumer owes, collectors would be within their rights to file such suits. Second, because they would be legal, such suits would not disadvantage other lawful competitors. Third, because the suits would be closer in time to the debt, consumers might be in a better position to negotiate the lawsuit, *e.g.* because they may remember the debt or still have documents related to the debt, and because there will have been fewer fees and less interest added to the original debt at the time of judgment.

Second, revival runs contrary to the purposes behind limitations periods. "Statutes of limitation . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348–49 (1944). Permitting revival re-starts the limitations clock, making it more likely that witnesses and documentation will become unavailable. Furthermore, the concerns regarding stale claims are even greater where holders of debt are debt buyers rather than original creditors and may not have access to the underlying documentation supporting claims. Often debts are re-sold several times thereby exacerbating the problems related to whether witnesses and documentation will be available.

Finally, the CFPB's data suggests that time-barred disclosures required in some states "have not resulted in a large drop in the aggregate likelihood that consumers pay time-barred debts." Proposed Rule, 85 Fed. Reg. at 12,690. In other words, in the aggregate, consumers continue to pay time-barred debts at roughly the same rates regardless of whether they receive a disclosure indicating that they cannot be sued. If that is accurate, prohibiting the revival of debt also should not lead to a reduction in voluntary payments by consumers, although it would have the benefit of eliminating surprise, stale lawsuits. And to the extent that the industry claims that collectors already do not file suits to collect on revived debts, Proposed Rule, 85 Fed. Reg. at 12,691, they will have no harm whatsoever from a prohibition on revival.

For these reasons, a number of states have enacted legislation to restrict the restarting or revival of expired limitation periods. *See, e.g.*, CONN. GEN. STAT. ANN. § 36a-814 (Connecticut); MD. CTS. & JUD. PROC. CODE ANN. § 5-1202 (Maryland); ME. REV. STAT. ANN. TIT. 32 § 11013 (Maine); MINN. STAT. ANN. § 541.053 (Minnesota); TEX. FIN. CODE ANN. § 392.307 (Texas – applies only to debt buyers); WASH. REV. CODE ANN. § 4.16.270 (Washington).

For all the reasons stated above,[4] the CFPB's proposal to cure deception related to the revival of time-barred debt through disclosures is not an adequate response. Instead, the CFPB should prohibit entirely the collection of debt for which the statute of limitations has restarted in order to align the consumers' incentives with their expectations and to remove collectors' incentives to deceive consumers in order to achieve a competitive advantage over lawful collectors.[5] Given the levels of deception demonstrated by the CFPB's survey from notices typical of those in use today, if the CFPB wishes to test further disclosures to see whether others may be more effective than the ones already tested, it should prohibit the collection of debt for which the statute of limitations has revived until such a time that valid testing supports a much more effective disclosure.

[4] Also, as noted *infra* at Section IV, methodological problems with the CFPB's survey suggest that the CFPB's proposed disclosures will be less effective in the real world than even the CFPB's data indicate.

[5] Any hypothetical risk of additional lawful lawsuits does not outweigh the demonstrated harm to consumers from the status quo wherein consumers are deceived into taking actions that can cause their stale debt to spring back to life, subjecting them to surprising, new legal liability. *See* discussion *supra* note 3.

IV. Because of Methodological Problems with the CFPB's Survey, the Results Likely Overstate the Proposed Disclosures' Effectiveness and Shed No Light on Whether Consumers Receiving the Notices Will Read Them.

The CFPB's survey results demonstrate that significant numbers of consumers—well beyond the least sophisticated consumers—will be deceived even if the most effective disclosure is used. *See* discussion *supra* in Sections II, III. However, methodological problems with the survey means that the results actually overstate how effective the disclosures will be and understate the number of consumers who will be deceived by even the most effective disclosures. Moreover, methodological issues prevent the CFPB Disclosure Survey from providing a basis for concluding that consumers will benefit from the notice at all. For the notices to help, consumers must both read them and understand them. The CFPB Disclosure Survey leaves substantial doubt as to both of these.

The CFPB conducted this survey in proverbial "laboratory" conditions. The CFPB paid participants in the survey, and it prompted the participants at various times to refer to the specific disclosures in question. CFPB Disclosure Survey at 12. The CFPB showed the participants the relevant disclosure twice during the survey and told participants that they could review the disclosure again at any time. CFPB Disclosure Survey at 9. The CFPB did so expressly to "increase the likelihood that respondents would use the information from the disclosures when responding to the comprehension questions designed to measure the effectiveness of those disclosures." *Id.* Indeed, the CFPB itself admits that the survey participants might have a better understanding of the disclosures than recipients would in the real world. *Id.* at 12.

The Bureau also candidly admits its test was not designed to determine whether consumers receiving the notices would read them. CFPB Disclosure Survey at 12. It is unfortunate that the Bureau did not test for consumer reading because ample evidence indicates that consumers ignore disclosures. *See, generally, e.g.*, Omri Ben-Shahar & Carl E. Schneider, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014)**;** Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1 (2014). Thus, consumers have unwittingly agreed to contract terms obliging them to give up their first-born child, *see* Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757465 (2016), surrender their souls, *see* Catharine Smith, *7,500 Online Shoppers Accidentally Sold Their Souls To Gamestation*, HUFFPOST (May 25, 2011) https://www.huffpost.com/entry/gamestation-grabs-souls-o_n_541549, and administer electric shocks to others and do pushups, *see* Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Psychological Realities*, 5 N.Y.U. J. L. & BUS. 617 (2009). Even if consumers would understand the notices, they will not benefit from them if they overlook them. In light of the evidence that consumers ignore disclosures, the likelihood is that they **will not** read them, and this issue is exacerbated by the fact that the CFPB's proposal requires the disclosures be made only in limited communications. *See* Proposed Rule, 85 Fed. Reg. at 12,680. That makes the notices a slender reed upon which to permit collectors to seek payment of time-barred debt.

Assuming, *arguendo*, that consumers read the notices, the CFPB's methodology almost guarantees that more consumers will be confused by the notices than the CFPB's findings indicate. Consumers receiving the notices in real life will not be prompted, as the surveyed respondents were, to refer to the notices. CFPB Disclosure Survey at 12. Similarly, unlike the survey respondents, actual consumers will not be paid to read the notices. *Id*. In short, the CFPB Disclosure Study does not provide adequate assurances as to the efficacy of the notices.

Moreover, consumers receiving genuine debt collection notices are unlikely to react to them the same way respondents in a laboratory setting do. Demands for payment elicit feelings of anxiety, guilt, fear, and even shock that respondents in a lab probably are not experiencing when reading the notices. In stressful situations, such as receiving a collection letter, people are less likely to take in information. *See* Barrie R. Cassileth, Robert V. Zupkis, Katherine Sutton-Smith, & Vicki March, *Informed Consent—Why Are Its Goals Imperfectly Realized?*, 302 NEW ENG. J. MED. 896, 896, 898 (1980) (reporting that many patients cannot recall disclosed information and reporting that "previous studies have shown that patients remain inadequately informed, even when extraordinary efforts are made to provide complete information and to ensure their understanding. This appears to be true regardless of the amount of information delivered, the manner in which it is presented, or the type of medical procedure involved."). As the CFPB itself notes "effects observed in a controlled setting, such as that employed in this testing, may be larger than those that might be observed in practice." CFPB Disclosure Survey at 12. Without tests that explore the effectiveness of debt collection notices on consumers in a realistic setting, it is impossible to determine whether consumers will actually read or understand the notices.

Before the CFPB relies on notices to protect consumers, it should verify that the notices actually confer protection by testing them in real-life scenarios. Fortunately, that option exists. Some states already require time-barred debt notices. Instead of depending on laboratory simulations, the CFPB should determine if the existing notices are effective in actual debt collection attempts. Similarly, the CFPB should test the notices it proposes to use in genuine debt collection situations. For ways the CFPB could do so, see Jeff Sovern, *One reason the CFPB's proposed time-barred debt disclosures might not help consumers despite the study showing they help consumers understand their rights and what the Bureau should do about it*, CONSUMER L. & POL'Y BLOG (March 11, 2020), https://pubcit.typepad.com/clpblog/2020/03/one-reason-the-cfpbs-proposed-time-barred-debt-disclosures-might-not-help-consumers-despite-the-stud.html. Without proof that the notices actually aid consumers, the CFPB is merely guessing that its proposed notices will accomplish their goals.

V. If the CFPB Allows the Collection of Time-Barred Debt or of Debt for Which the Statute of Limitations Has Revived—And the CFPB Should Not—It Must Require that All Persons Collecting Such Debt Provide the Required Disclosures Or Prohibit Suits to Collect Any Debt For Which the Required Disclosures Were Not Made.

The CFPB has suggested that it is considering exempting collectors that "do not sue to collect any debts (including revived debts)" or collectors collecting "clearly" time-barred debt from making the required disclosures regarding the possibility that consumers' actions would revive the debt. Proposed Rule, 85 Fed. Reg. at 12,681. Exempting these collectors from making the required disclosures will lead to consumer deception. Therefore, the CFPB should not exempt them. If it does nonetheless, the CFPB must take action to prevent the inevitable consumer harm that will result.

First, if the CFPB exempts these collectors from making the revival disclosures without taking additional steps to protect consumers, it will condone—and even require—the collectors to make deceptive disclosures. As the CFPB itself notes, “If a debt collector makes an unqualified time-barred debt disclosure to a consumer in a revival jurisdiction, that disclosure would be false for a consumer whose conduct revived the debt.” Proposed Rule, 85 Fed. Reg. at 12,679 n.98. More importantly, such disclosures (in a revival state) would be deceptive because they would mislead materially consumers acting reasonably. Namely, as the CFPB’s own data demonstrates, a reasonable consumer will not realize that partially paying or acknowledging the debt will restart the statute of limitations, thereby exposing the consumer to new legal liability for the old debt. The CFPB’s data clearly shows that the vast majority of consumers who receive a time-barred disclosure notice without a revival notice do not understand that a debt collector can sue them if they make a partial payment or acknowledge the debt in writing. CFPB Disclosure Survey at 19-20. More than 80% of consumers did not understand that they could be sued if they made a partial payment on the debt, *id.* at 19, and even more (90%) did not understand that they could be sued if they acknowledged the debt in writing, *id.* at 20. This misleading disclosure clearly is material as well, because a consumer relying on the representation that they will not be sued then may take action that will expose them to additional legal liability.

Second, nothing prevents a subsequent debt buyer from suing the consumers on the debt for which only the deceptive disclosures were provided. Assuming *arguendo* that the exempted collectors were to make a disclosure to the effect of “we will not sue you for [this debt]” and did not, in fact, sue on the debt, the voluntary refusal to sue by the exempted collectors would not alter the legal impact the consumers’ subsequent actions would have on restarting the statutes of limitations under governing state law. If, for example, the consumer made a partial payment in a state where doing so revives the statute of limitations, the debt in question would no longer be time barred. The collector’s initial disclosure that it would not sue the consumer for the debt does not alter the legal fact that the debt is no longer time barred. Obviously, it would be deceptive and unfair (and arguably abusive) for an exempted collector to then file suit on that debt after having stated that “we will not sue you,” *see* Proposed Rule, 85 Fed. Reg. at 12,680 n.104 (“A debt 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) disclosure if the debt collector later sues or threatens to sue to collect the debt.”), but nothing currently prohibits a second collector—who has made no such promises to the consumer in question—from buying the debt from the exempted collector and then suing the consumer on the debt.[6]

Thus, absent additional action to protect consumers, the CFPB would create a trap for consumers by exempting certain collectors from making the required disclosures. Furthermore, by requiring

[6] The exempted collectors’ actions in this example likely would be unfair, deceptive, and/or abusive, as the consumer would be tricked into restarting the statute of limitations while the collector profited by selling the no longer time-barred debt, but that would not provide the consumer with a defense to the suit on the debt. At best, the consumer would have to have the wherewithal to identify and sue the exempted collector after the second buyer sues the consumer, and any CFPB rule that allowed the exempted collector not to make the revival disclosure would undermine such a case significantly.

the deceptive disclosures, the CFPB would enable, and even incentivize, the development of a new cottage industry: tricking consumers into restarting the statutes of limitations on their debts and then selling those debts to collectors who may sue lawfully to collect on those debts. So-called "exempt" collectors would forego suing on debt to allow them to make only the time-barred disclosures. Once the consumers took actions that revived the debt, the exempt collectors could sell the debt to another collector. That sale likely would be at a higher price because the debt would no longer be time barred. *See* Proposed Rule at 12,673 (noting that time-barred debt is sold "at a discount off face value").

For the above reasons, the CFPB should not exempt any collectors from making the required disclosures (assuming that the CFPB allows collection and revival of time-barred debt). If the CFPB does exempt some collectors, it must prevent consumers from being harmed by the deceptive disclosures. In other words, it must prohibit all future suits, or threats to sue, on the debt.

First, the CFPB must prohibit expressly any collector who either does not make the required revival disclosures or does not determine whether such disclosures are required from suing the affected consumers to collect the debt in question. Although such sales clearly would be unlawful given the collectors' prior statement that—without caveat—it would not sue, *see* Proposed Rule, 85 Fed. Reg. at 12,680 n.104, the CFPB should expressly prohibit such suits and threats to remove all argument.

Second, the CFPB must protect consumers from suits, and threats, by future collectors as well—collectors who have not stated to the consumer that they would not sue based on the age of the debt. It can do so in a number of ways. The simplest solution would be to prohibit the exempted collector from selling the debt. To be clear, any such prohibition would have to apply to sales of all debt for which the exempted collector either did not make the required revival disclosures or did not determine whether such disclosures are necessary, not only the sales of that debt that has been revived or that is subject to revival. This complete prohibition is necessary because the apparent concern underlying the exemption is the burden in determining whether the debt is subject to revival at all (including determining which state law governs) to collectors who will not sue regardless. Prohibiting only the sale of revived debt (or debt subject to revival) would require the exempted collectors to make the very determination that the exemption is designed to avoid. If the collector can make the determination before selling the burden would not appear to be so great that it would warrant an exemption from the disclosure in the first place.

If the CFPB does not prohibit the sale of this debt, it must prohibit future buyers from suing on the debt. Allowing those future buyers to sue on now-revived debt would punish consumers who were tricked into reviving their debt by the exempted collectors' promises not to sue and allow both the exempted collectors and the future buyers to profit from the exempted collectors' deception. This solution presents risks, however, if there are multiple sales of the debt, as the prohibition on suing on the debt may get lost over time. This solution also presents risks to the future debt buyers in that they could purchase debt without realizing that the prohibition applied to the debt.

In order to ensure that debt buyers know the true value of the debt they are purchasing and to protect consumers from suits after they have been told they would not be sued on a debt, the

CFPB must mandate (1) that collectors document their compliance with the disclosures required under proposed §1006.26(c), including specifically whether they determined as required by §1006.26(c)(1)(ii) whether the statute of limitations applicable to the debt may be revived and whether they disclosed this fact to the consumer; (2) that they maintain that documentation while they own the debt; and (3) that they provide that documentation to any person who purchases the debt from them. The CFPB also must mandate that debt buyers maintain the documentation that they receive from debt sellers and provide said documentation to any future buyers as well as maintaining and providing documentation of their own compliance with proposed §1006.26(c). The CFPB also should require collectors to produce documentation as part of their affirmative case on any debt for which §1006.26(c) disclosures have been required[7] that is sufficient to show that all disclosures required by §1006.26(c) have been made and that no collector has told the consumer in question that it would not sue on the debt without also making the revival disclosures.

If the CFPB fails to require the maintenance and production of this documentation for all time-barred debt, it will create two problems. First, if it requires only documentation of the exemption to proposed §1006.26(c)(1)(ii), it will incentivize future buyers simply to "lose" the documentation of the exemption and then sue on the debt despite the deceptive disclosures. Given that 70% of debt collection cases result in default judgments and consumers have counsel in less than 10% of the cases, it is not realistic to place the burden of policing this unlawful behavior (because the debt revived after no revival notice was provided) on the least sophisticated consumer. *See generally* discussion *supra* in Sections II & III. Second, if it does not require the documentation for any cases, it will create a trap for future buyers and consumers wherein they will not know, or will not be able to prove, that a prior collector had not made the determinations and disclosures required by proposed §1006.26(c)(1)(ii).

VI. The CFPB Has Not Demonstrated Why a "Knows or Should Know" Standard Is Appropriate or Necessary Given the Existence of the Bona Fide Error Exception to Liability in 15 U.S.C. §1692k(c) and the Facts Surrounding Debt Collection.

The CFPB has not shown why it is necessary to layer the additional protection of a "knows or should know" standard on top of the existing bona fide error exception. The CFPB's proposal notes that "while debt collectors often will know, or can readily determine, whether the statute of limitations has expired, there may be some instances in which debt collectors may be uncertain whether it has expired even after undertaking a reasonable investigation." Proposed Rule, 85 Fed. Reg. at 12,676. To the extent that the collector makes a bona fide error regarding a fact relevant to the determination of the governing statute of limitations, the FDCPA already provides relief, and there is no justification for protecting collectors from erroneous legal conclusions when they have superior knowledge and resources, are determining the statutes of limitations for numerous debts, and are the ones who will profit from the errors.

The FDCPA generally is a strict liability statute with a narrow exception for bona fide errors. *See, e.g.*, *Arias v. Gutman, Mintz, Baker & Sonnenfeldt LLP*, 875 F.3d 128, 134 (2d. Cir. 2017)

[7] Namely any debt that is old enough that it may have been time barred at any point previously regardless of whether that debt has been revived.

("The FDCPA is a strict liability statute: The plaintiff 'does not need to show intentional conduct on the part of the debt collector.'") (citation omitted); *Stratton v. Portfolio Recovery Assocs., LLC*, 770 F.3d 443, 448-49 (6th Cir. 2014) ("The FDCPA is a strict liability statute: A plaintiff does not need to prove knowledge or intent . . . .") (citation omitted); *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 948, 952 (9th Cir. 2011) ("Although the FDCPA is a strict liability statute, it excepts from liability those debt collectors who satisfy the 'narrow' bona fide error defense. . . . The FDCPA imposes strict liability on creditors, including liability 'for violations that are not knowing or intentional.'") (citations omitted). To the extent that a debt collector believes that its failure to provide the required disclosures was the result of an unintentional, bona fide error, the FDCPA already provides a mechanism for avoiding liability. *See* 15 U.S.C. §1692k(c) ("A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.").

Indeed, it would be strange not to hold collectors strictly liable for making the required disclosures given the other types of conduct for which they are held strictly liable. *See, e.g.*, Encore Capital Grp., Inc., CFPB No. 2015-CFPB-0022, 22-23, 28 (Sept. 9, 2015) (finding that representing explicitly or implicitly that consumers had a legally enforceable obligation to pay time-barred debt was deceptive and violated the FDCPA without assessing whether the respondents knew or should have known that the debt was time barred); *cf. also* Cash Express, LLC, CFPB No. 2018-BCFP-0007, 5-7 (Oct. 24, 2018) (finding that threatening to sue on time-barred debt was deceptive when respondent typically did not sue on time-barred debt without analyzing whether respondent knew or should have known that any particular debt was time barred). The FDCPA prohibits the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt, 15 U.S.C. §1692e, and under federal law—both the Consumer Financial Protection Act of 2010, 12 U.S.C. §§5531(a), 5536(a)(1)(B), and the FTC Act, 15 U.S.C. §45(a)(1)—deception does not require proof of intent, *see, e.g.*, *FTC v. Moses*, 913 F.3d 297, 306 (2d Cir. 2019) (citing *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006)); *CFPB v. Mortgage Law Grp., LLP*, 196 F.Supp.3d 920, 939 (W.D. Wis. 2016).

Furthermore, holding collectors strictly liable, subject of course to the bona fide error exception, is sensible. As the CFPB admits, debt collectors have superior knowledge regarding the implications of time-barred debt than consumers. "Debt collectors generally are familiar with the concept of time-barred debt . . . . ¶ Many debt collectors already determine whether the statute of limitations applicable to a debt has expired." Debt Collection Practices (Regulation F), 84 Fed. Reg. 23,274, 23,328 (May 21, 2019). The CFPB itself "believes that many consumers are unaware of the statute of limitations or may not know whether it has expired for their debt," Proposed Rule, 85 Fed. Reg. at 12,689, and its data shows that even very sophisticated consumers (those with a bachelor's degree or higher) do not understand when they can be sued by debt collectors, CFPB Disclosure Survey at 25, 27. Those survey participants who received a revival notice answered correctly, on average, approximately 50% of the five questions related to when a debt collector could sue them for a debt; those who received only a time-barred disclosure notice averaged between 1 and 2 correct answers; and those who received no disclosure answered on average less than 1 question correct. CFPB Disclosure Survey at 27. Also data indicates that cases against consumers are more likely to be dismissed or won when consumers have counsel, Pew Report at 14-15, suggesting that the lack of consumers' legal expertise results in judgments that would not be obtained if consumers had counsel (*e.g.*, in cases where consumers had an affirmative defense like statutes of limitations). *See also id.* at 13 (noting that consumers are represented in less than 10% of debt collection cases); *id.* at 15 & nn.11 & 41 (stating that "the Conference of Chief Justices (CCJ) and Conference of State Court Administrators' (COSCA) Civil Justice Improvement Committee declared that lack of representation among defendants is 'creating an asymmetry in legal expertise that, without effective court oversight, can easily result in unjust case outcomes'") (quoting NAT'L CTR, FOR STATE CTS., CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL (2016)).

Debt collectors, unlike consumers, also make these types of determinations for numerous debts. They also are often repeat players in debt collection suits. *See, e.g.*, Pew Report at 12 & n.33 (noting that nine debt buyers in Massachusetts accounted for 43% of civil cases in 2015 and six debt buyers represented 25% of civil cases in Oregon between 2012 and 2016). As such, they can amortize the cost of knowing the applicable law across many debts.

Lastly, in the case of time-barred debt, it is the collector who will profit from the mistake. Absent some mechanism to prevent future suits,[8] the collector will be allowed to make a disclosure that deceives consumers, *see* discussion *supra* in Sections II and III, and then sue the consumers who take subsequent actions that revive the debts or sell the debt to others who will do so. The debt collector who mistakenly makes deceptive disclosures should be held accountable for doing so unless it can prove that the error qualifies as a bona fide error under the FDCPA. *See Stratton v. Portfolio Recovery Assocs., LLC,* 770 F.3d 443, 449 (6th Cir. 2014) ("Strict liability places the risk of penalties on the debt collector that engages in activities which are not entirely lawful, rather than exposing consumers to unlawful debt-collector behavior without a possibility for relief.").

In the alternative, if—despite all the concerns raised above—the CFPB only requires disclosures when the collector "knows or should have known" that the debt was time barred, the CFPB should require that the collector have the burden of demonstrating both that it did not know and that it should not have known that the disclosures were required as part of any affirmative case involving debt that allegedly revived after a collector failed to disclose that it could revive.

[8] A prohibition on filing suits on time-barred debt for which no revival disclosure was provided, *see* discussion *supra* in Section V, may eliminate that unjust profit. If a collector may not file suit unless it can document to the court that the disclosures required by proposed §1006.26(c)(1)(ii) were given, the failure to provide those disclosures would not result in any harm to the consumer, because the failure to disclose would bar any future suit on the debt. In this context, it does not seem necessary to hold the collector strictly liable for providing the required disclosures, as the consequences from failing to do so will remediate any harm from the failure to disclose.