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August 4, 2020

Office of Regulations  
Consumer Financial Protection Bureau  
1700 G Street, NW  
Washington, DC 20552

Re: Debt Collection Practices (Regulation F); Docket No. CFPB-2020-0010; RIN 3170-AA41.

Dear Sir or Madam:

The Credit Union National Association (CUNA) represents America's credit unions and their 115 million members. On behalf of our members, we are writing regarding the Consumer Financial Protection Bureau's (CFPB or Bureau) supplemental notice of proposed rulemaking amending Regulation F, which implements the Fair Debt Collection Practices Act (FDCPA).<sup>1</sup>

## Background

In its supplemental rulemaking, the Bureau proposes to amend Regulation F to require debt collectors to make certain disclosures when collecting time-barred debts. Time-barred debts are debts for which the applicable statute of limitations has expired. The rule specifies that a covered debt collector for purposes of this rulemaking would be a "debt collector" as that term is defined in the FDCPA. The FDCPA defines a debt collector as any person who regularly collects, or attempts to collect, consumer debts for another person or institution or uses some name other than its own when collecting its own consumer debts. An entity is not considered a debt collector under the FDCPA when it collects its own debts under its own name or collects debts it originated and then sold but continues to service.<sup>2</sup>

The proposal would require a debt collector collecting a debt that the debt collector "knows or should know" is time barred to disclose: (1) That the law limits how long the consumer can be sued for a debt and that, because of the age of the debt, the debt collector will not sue the consumer to collect it; and (2) if the debt collector's right to bring a legal action against the consumer to collect the debt can be revived under applicable law, the fact that a revival can occur and the circumstances in which it can occur. The Bureau also proposes to establish model language and forms that debt collectors could use to comply with the disclosure requirement. Debt collectors using the model forms in a validation notice would be provided a compliance safe harbor. In addition, a debt collector using the relevant content of the model forms to provide a required disclosure orally or in a written communication that is not a validation notice would also receive a safe harbor for compliance.

## General Comments

Credit unions, as financial cooperatives, collect debts from their member-owners and, in certain circumstances, retain third-party collectors for this purpose. Therefore, credit unions' interest in the CFPB's rules on debt collection are two-fold: as first-party collectors that are not subject to the FDCPA and as institutions that may, in some circumstances, retain third-party collectors that are.

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<sup>1</sup> Debt Collection Practices (Regulation F), 85 Fed. Reg. 12672 (March 3, 2020).

<sup>2</sup> 15 U.S.C. 1692 et seq.

Congress specifically defined a “debt collector” for the purposes of the FDCPA in a manner that exempted first-party debt collectors because it acknowledged these collectors have a “desire to protect their good will when collecting past due accounts.”<sup>3</sup> In contrast, third-party collectors exist solely to collect payments from debtors and maintain no ongoing relationship after the collections process has concluded. The distinction carries added significance for credit unions as not-for-profit, financial cooperatives. Unlike other entities, at a credit union, the other members of the credit union are the ultimate stakeholders in the collections process and have a strong interest in ensuring their credit union can take appropriate, reasonable steps to collect debts owed by their fellow members. As we stated in response to the May 2019 Notice of Proposed Rulemaking on Regulation F, CUNA strongly opposes any debt collection rulemaking that would extend the requirements of the FDCPA to first-party collectors, either directly or indirectly; and we urge the Bureau, as it works to finalize its FDCPA rulemakings, to carefully consider the broader impact these rules could have on the collections ecosystem.

Regarding the present supplementary proposal, the treatment of time-barred debts, and even what is considered a time-barred debt, is a highly complex state-by-state determination based on state law, the type of debt, borrowing statutes, and the debtors residence. While we support the Bureau’s attempt to establish disclosures that provide clarity to consumers and bright lines to debt collectors collecting time-barred debts, the supplemental proposal falls short in both of those categories. That said, we appreciate that the Bureau’s proposal includes neither a complete prohibition of the collection of time-barred debts nor binds subsequent debt buyers to a status determination made by a prior collector.

**The CFPB should ensure its debt collection rulemakings do not extend unwarranted regulatory requirements to first-party debt collectors, which were not intended to be subject to the FDCPA.**

Under prior CFPB leadership, the practice of “regulation through enforcement” created substantial uncertainty in the financial services market. The CFPB has recently undergone extensive efforts to end that practice and establishing clear “rules of the road” for financial institutions to follow. CUNA has been supportive of this sea of change at the Bureau. However, the May 2019 proposed rule on debt collection inadvertently created an open question as to whether activities prohibited under the FDCPA proposed rule would also be prohibited pursuant to the Bureau’s unfair, deceptive, or abusive acts or practices (UDAAP) authority.<sup>4</sup> Specifically, the May 2019 proposal inferred that some of the rule’s prohibited third-party collection activities could also constitute unfair, deceptive, or abusive acts or practices (UDAAP) under section 1031 of the Dodd-Frank Act. The Dodd-Frank Act’s UDAAP provisions apply to a broader subset of financial service providers than the FDCPA. While we acknowledged the CFPB’s intent to establish debt collection rules that exclusively apply to FDCPA-covered debt collectors, the May 2019 rule’s seemingly broad scope created significant concern for first-party collecting credit unions. The May 2019 rulemaking is still pending.

CUNA appreciates that this supplemental proposal does not similarly rely on or reference the Bureau’s Section 1031 authority. We respectfully recommend the Bureau continue to rely exclusively on its FDCPA authority when promulgating any rules governing the practice of debt collection. The FDCPA provides the Bureau with ample ability to achieve its desired limitations on third-party collections without exposing credit unions that collect their own debts to expanded regulatory compliance and litigation risk.

**The CFPB should acknowledge the complex patchwork of state debt collection laws governing time-barred debts and adopt a “knowledge” standard for determining prohibited communications.**

The supplemental proposal builds on the May 2019 proposal’s “know or should know” standard for determining the trigger for the required disclosures. Specifically, the supplemental rule’s requirements would apply if the debt collector “know[s] or should know that the applicable statute of limitations has

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<sup>3</sup> S. Rep. No. 95-382, at 2 (1977).

<sup>4</sup> Debt Collection Practices (Regulation F), 84 Fed. Reg. 23274 (May 21, 2019).

expired.” However, the treatment of time-barred debt is highly dependent on the relevant state laws as well as a complex and growing body of case law. This patchwork of standards has created a complex landscape that debt collectors must parse through in order to determine whether the debt is time-barred and, if so, what legal remedies are still available on a long-outstanding debt. As the Bureau acknowledged in its May 2019 proposal: “In some instances, . . . a debt collector may be genuinely uncertain even after undertaking a reasonable investigation; this could occur, for example, when the case law in a State is unclear as to which statute of limitations applies to a particular type of debt.”<sup>5</sup> It should be noted here that credit unions do not sue their members frivolously and use litigation only as a tool of last resort due to its high cost, inefficiency, and potential for needless disruption in the member-credit union relationship.

Credit unions are concerned with the supplemental rule’s proposed standard for determining when a debt collector is required to provide specified disclosures. The “know or should know” standard does not sufficiently recognize the complexity of determining the law governing what is a highly fact-based analysis. As a result, CUNA recommends the Bureau consider adopting a “knowledge” standard for disclosures related to time-barred debt. Under such a standard, a debt collector would only be in violation of the FDCPA if the collector has knowledge that the debt is time-barred when neglecting to provide accurate disclosures. This standard would expressly prohibit collectors from intentionally misleading a consumer as to the legal status of their debt or conducting activities intended to coax the debtor into incidentally reviving the debt. The “knowledge” standard would also focus the regulation on limiting the behavior of bad actors that intentionally provide misinformation to debtors while still providing a safe harbor for debt collectors that may be unable to easily determine the debt’s status or the legal options available to the collector and debtor.

**The CFPB should avoid mandating disclosures that assert legal interpretations or provide legal advice, which may ultimately confuse consumers, and instead establish disclosures that provide information on time-barred debts in a general manner so the consumer can pursue additional information regarding their specific situation.**

The proposal 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.<sup>6</sup> The proposed disclosures would be required to be substantially similar to the disclosures shown on proposed Model Forms 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.

The Model Forms proposed by the Bureau are concerning because they are drafted in a manner that may limit consumer understanding and create the potential for litigation. In particular, the Bureau has proposed four model forms with specific statements related to the debtor’s rights intended to cover the entire gamut of state laws. This multi-option approach increases the likelihood that erroneous disclosures could accidentally be provided to a consumer because, as we stated previously, determining the law that applies to the debt can be open to interpretation and reasonable legal professionals may come to different conclusions.

CUNA supports the Bureau’s effort to inform consumers about the complex patchwork of rights and responsibilities of time-barred debts and whether those debts can be revived. However, the proposed disclosures may be more appropriate if they were streamlined to provide general information about time-barred debt and what rights *may* exist for the consumer rather mandating a debt collector make absolute statements that could be interpreted as providing legal advice. As such, CUNA recommends the Bureau revise the model form disclosures to provide clear, general statements of information rather than absolute statements of legal rights. Debt collectors may fear potential lawsuits if good faith determinations about a debt’s time-barred status is inaccurate.

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<sup>5</sup> May 2019 Debt Collection Proposal at p. 23329.

<sup>6</sup> Proposed Section 1006.26(c)(1).

**The CFPB should provide a safe harbor for debt collectors making a good faith attempt to accurately determine the status of a debt and provide the relevant disclosure to a debtor.**

The proposed rule would also specify additional circumstances in which debt collectors would be required to provide time-barred debt and, if applicable, revival disclosures.<sup>7</sup> The proposal also contemplates 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 would be required to provide the relevant disclosures.

The proposal does 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. In fact, the CFPB seems to contemplate a "reasonableness" standard for this inadvertent error, requiring the collector to have conducted a "reasonable investigation." However, the Bureau's proposal does not currently define or provide examples of what it considers to be reasonable. While this is likely intended to provide flexibility, CUNA cautions the Bureau against leaving too much room for interpretation as, without a general framework for determining what is reasonable, lawsuits brought by plaintiffs' attorneys will ultimately fill the void and create a confusing and often contradictory patchwork of judicial interpretations. To prevent this situation, CUNA suggests the Bureau provide a framework in the official commentary to guide debt collectors as to when the "reasonable investigation" standard has been met and a broad safe harbor from liability for debt collectors that meet that standard.

**The CFPB should clarify compliance expectations for required disclosures in states where there are already time-barred debt disclosure requirements in place.**

As the proposed rule acknowledges, several states already require some form of disclosure for time-barred debts. The proposal states the proposed CFPB disclosure should be provided on the front with the state disclosure on the reverse side of the letter in order to comply with the rule.<sup>8</sup> However, some states already require their time-barred debt disclosure to be on the front page of the letter to the consumer. Without even mentioning the obvious page space issue, the CFPB, if it pursues the rulemaking unamended, would effectively be creating a requirement that conflicts with state laws already in place.

In addition, the CFPB's proposed disclosures are often materially similar to the disclosures already required under the relevant states' law. This "double disclosure" regime would run the risk of being redundant, unnecessary, and extremely confusing for the consumer. CUNA recommends the Bureau create an exemption from the time-barred debt disclosure requirement for time-barred debts that are already subject to state-mandated disclosures.

**Conclusion**

We look forward to working with the Bureau to ensure third-party debt collectors have clear rules and credit unions collecting their own debts are not unjustifiably subject to the FDCPA. On behalf of America's credit unions and their 115 million members, thank you for your consideration. If you have questions or require additional information related to our feedback, please do not hesitate to contact me at (202) 508-3629 or amonterrubio@cuna.coop.

Sincerely,



Alexander Monterrubio  
Senior Director of Advocacy & Counsel

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<sup>7</sup> Proposed Section 1006.26(c)(2).

<sup>8</sup> Proposed Section 1006.26(c)(3)(i).