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BEFORE THE

BUREAU OF CONSUMER FINANCIAL PROTECTION

WASHINGTON D.C. 20552

In the Matter of Proposed Rule on Debt Collection Practices	Docket No. CFPB-2019-0022

COMMENTS OF

THE COMPETITIVE ENTERPRISE INSTITUTE

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Introduction

On behalf of the Competitive Enterprise Institute ("CEI"), we are pleased to provide the following comment letter on the Bureau of Consumer Financial Protection's ("Bureau" or "CFPB") Proposed Rule on Debt Collection Practices ("the proposed rule").

Founded in 1984, CEI is a non-profit research and advocacy organization that focuses on regulatory policy from a pro-market perspective. A strong focus of CEI is on removing regulatory barriers that inhibit consumers' access to credit and limit their choices of credit products to improve their families' lives.

Background

In a market economy that based on private property and the rule of law, the efficient and effective enforcement of contracts is indispensable. Without the ability to enforce the promises made between individuals and businesses, any form of transaction, especially concerning credit products, would be more difficult and more expensive, if possible at all.

Therefore, services and mechanisms to settle debts are a vital aspect of a market economy. They are a part of the "plumbing"—the underlying architecture—that makes our modern credit markets possible. Whether it is a bank, a local gym, or a medical facility, a creditor's ability to offer services is dependent upon enforcement mechanisms that allow them to pursue a defaulting borrower's income or assets.[1] Considering that businesses have a vested interest in customer retention, it is useful that they can outsource this process to a third-party collector, where necessary.

The Fair Debt Collection Practices Act ("FDCPA") was passed in 1977 to eliminate what were perceived to be abusive practices in the debt collection industry, establishing certain minimum consumer protections. However, over time, tension between the enabling legislation, modern technology, and the preferences of consumers has grown. For instance, it is uncertain whether the use of communications technologies that did not exist in 1977, such as email and text messaging, are permitted under the Act.

Given the advances in communications technologies in the four decades since the law's enactment, it is clear that the FDCPA and its implementation rules, known as Regulation F, need updating. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which created the Consumer Financial Protection Bureau and gave it jurisdiction over FDCPA, lists the addressing of "outdated, unnecessary, or unduly burdensome regulation" as one of the Bureau's "objectives" in "ensuring that all consumers have access to markets for consumer financial products and services."[2] Therefore, this proposed rule is fully

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[1] Viktar Fedaseyeu, "Debt Collection Agencies and the Supply of Consumer Credit, Federal Reserve Bank of Philadelphia," *Working Paper,* No. 15-23, June 19, 2015, https://www.philadelphiafed.org/-/media/research-and-data/publications/working-papers/2015/wp15-23.pdf.

[2] 12 U.S. Code § 5511

consistent with the Bureau's statutory mission of addressing regulatory barriers and helping to ensure access to consumer financial markets[3]

We now turn to a discussion of certain aspects of the proposed rule and other related issues.

Model Disclosure Notices

The proposed rule would require debt collectors to send consumers a disclosure form with certain information about the debt being collected on, including an itemization of the debt and plain-language information about how a consumer may respond to a collection attempt.[4] In effect, these requirements mean that a collector's ability to continue its collection efforts would hinge on its ability to substantiate the validity of the debt.[5]

In particular, the proposal addresses the fact that the Bureau is concerned that consumers are not given adequate information for them to discern whether the supposed debt is theirs.[6] Furthermore, many commentators have noted that consumers do not know or understand their rights under the FDCPA and are therefore unable to exercise them.[7]

Creating model disclosures to better inform consumers about contract terms and reduce frivolous litigation—which ultimately raises costs for everyone—is an important role of the Bureau. For example, collectors have been subject to litigation over such technicalities as the placement of commas.[8] These frivolous lawsuits lead to higher costs for existing firms and discourage entry of new ones, leading to less choice and competition for consumers in the credit market. Fear of litigation has also led to a proliferation of disclosures—sometimes called "information overload"[9]—that discourages consumers from reading them. Simplifying the disclosure regime, helping consumers better understand their rights, and creating clear rules of the road for industry are important goals that help all parties concerned.

Modernizing Communication Methods

The proposed rule would allow debt collectors to use modern communications technologies, such as voicemail, email, and text messaging, to communicate with consumers. It would also protect consumers who do not wish to receive such communications by, among other

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[3] Daniel Press, "Reformed Consumer Financial Protection Bureau Can Be Free Market Regulator," OpenMarket blog, Competitive Enterprise Institute, April 18, 2019, https://cei.org/blog/reformed-consumer-financial-protection-bureau-can-be-free-market-regulator.
[4] CFPB Proposed Debt Validation Notice, accessed August 16, 2019, https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-validation-notice.pdf.
[5] Christopher K. Odinet and Roederick C. White, Sr., "Regulating Debt Collection," *Review of Banking & Financial Law*, Vol. 36 (Spring 2017), https://www.bu.edu/rbfl/files/2017/09/p885.pdf.
[6] Ibid.
[7] Ibid.
[8] Katie Grzechnik Neill, "CFPB Hosts Debt Collection Town Hall; CRC Director Stephanie Eidelman Highlights Consumer Authentication Conundrum", insideARM.com, May 9, 2019, https://www.insidearm.com/news/00045024-cfpb-hosts-debt-collection-town-hall-crc-/.
[9] Paul Hemp, "Death by Information Overload," *Harvard Business Review*, September 2009, https://hbr.org/2009/09/death-by-information-overload.

things, allowing them to unsubscribe to future communications and limit the ways debt collectors contact them.

Updating communication methods is a commonsense reform. Indeed, the concerns that motivated the passage of the FDCPA—invasive collection methods such as repeated phone calls and knocking on doors—have been greatly reduced today, thanks to the evolution of communications technology. Modern technologies enable a debtor to screen communications from collectors much more easily, such as by silencing a phone or controlling certain alerts.

Collectors should be able to communicate in accordance with the preferences of consumers. Young adults, in particular, appreciate the ability to communicate electronically, and the updated rule would accommodate that preference. Furthermore, many first-party creditors, such as utility companies or gyms, commonly employ modern communication methods to remind consumers of upcoming or overdue bill payments, to customers' benefit.[10]

No doubt there are bad actors who engage in abusive and harassing behavior. But these actions are already illegal and have been so for almost half a century. Punishing wrongdoers is a chief purpose of the Bureau, and it should pursue, to the full extent of the law, penalties against collectors who engage in genuinely abusive and harassing behavior.

Clarifying that modern communications technologies can be used to inform debtors of a collection against them is a commonsense reform aimed at facilitating a more effective and efficient process for all parties. For instance, many forms of electronic communications, as opposed to phone calls or in-person meetings, create a paper trail that can better protect consumers against potential rights violations. Allowing collectors to communicate with debtors via the methods they prefer would be an improvement over the current system. As one industry represented described it:

> This is very likely to result in better consumer experiences, facilitate communication between agencies and consumers, and most important, expedited resolution of many more accounts.[11]

Enforcing Time Barred Debts

The proposed rule would prohibit a debt collector from suing or threatening to sue a consumer to collect a debt if the debt collector knows or should know that the statute of limitations has expired. This limitation has some justification. The FDCPA's purpose is to prohibit fraudulent or deceptive conduct by debt collectors, while the Bureau also maintains powers to prevent "unfair, deceptive, or abusive acts or practices."[12] To lead a debtor to believe that she can be sued for a loan that collectors know is unenforceable—as opposed to simply making her aware of an outstanding debt—is deceptive conduct.

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[10] Daniel Press, "The Good and the Bad of the Governments Debt Collection Proposal," *OpenMarket*, May 16, 2019, https://cei.org/blog/good-and-bad-governments-debt-collection-proposal.

[11] Katie Grzechnik Neill, "Agency, Outside Counsel, and Vendor Perspectives on the CFPB's Proposed Rules," *insideARM.com*, 13 May 2019, https://www.insidearm.com/news/00045028-agency-outside-counsel-and-vendor-perspec/.

[12] 12 U.S. Code § 5531.

However, the proposed rule must take account of the complexities in this area of law. Statutes of limitations for debt repayment are governed by various laws of the states. In numerous states, time-barred debt can be as short as three years.[13] The statute of limitations is, in part, designed to prevent fraudulent litigation and avoid the deterioration of evidence. It is not designed to act as a loophole for customers to avoid paying their bills—which a short time period, such as three years, could potentially allow. In addition, curtailing attempts at debt collection after statutes of limitations expire may have the perverse effect of incentivizing collectors to ramp up collection procedures more quickly, including filing lawsuits immediately before the expiration date—a much more expensive and disruptive process for everyone.[14]

Fortunately, it appears that the Bureau has not yet proposed going so far as to require the disclosure of a consumer's right to not pay their debts when they are time barred. Instead, the proposed rule notes:

> The Bureau plans to test consumer disclosures related to time-barred debt and, after testing, will assess whether a debt collector who collects a time barred debt must disclose that the debt collector cannot sue to collect the debt because of its age.

Not only should the Bureau test consumer disclosures, it should also make use of rigorous cost-benefit analysis to ensure that the policy does not have unintended consequences, such as making routine debt collection more difficult.

Provide Robust Evidence for 'Bright Line' Call Limit

The proposed rule generally would limit collectors to seven attempts by phone per week to reach a consumer about a debt. Once a conversation takes place, the collector must wait another seven days before calling. Further, the Bureau would provide a safe harbor for a "limited content voicemail message," resolving legal uncertainty on the topic.

Establishing a bright-line rule limiting call attempts is not unreasonable. Surely dozens of calls per week could amount to harassment—which is already prohibited by law. But a bright-line limit of seven attempts per week sets a low bar. On the one hand, it is useful to establish some form of clarity. However, imposing a one-size-fits-all approach on the entire collection industry seems unwise, given that different consumers and debts are related to different behaviors and might require different collection techniques.

Perhaps these concerns could have been resolved had the Bureau conducted and provided empirical evidence to justify the limit, but it does not appear to have done so. Instead, it picked an arbitrary number that was greater than what consumer advocates supported but lesser than that proposed by the industry. Therefore, it is unclear how empirically justified the precise call limit is, which opens the possibility of legal challenges to the rule for being "arbitrary and capricious."[15]

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[13] Fred O. Williams, "State statutes of limitation for credit card debt," creditcards.com, November 13, 2017, https://www.creditcards.com/credit-card-news/credit-card-state-statute-limitations-1282.php.
[14] Todd Zywicki, "The Law and Economics of Consumer Debt Collection and Its Regulation," Mercatus Working Paper, Mercatus Center, September 2015, https://www.mercatus.org/system/files/Zywicki-Debt-Collection.pdf.
[15] 5 U.S. Code § 706 (2) (A).

On the other hand, the creation of a safe harbor for a "limited-content message"—a text or voice mail providing limited information to the debtor that wouldn't alert a third party to the existence of a debt—is beneficial for consumers. By attempting to establish contact, collectors are trying to inform debtors of their options for resolving the debt, including repayment plans or debt restructuring. If these options cannot be communicated, it will result in more debts being resolved through litigation—a worse option for both collectors and debtors. While the bright line call limit potentially works against consumer contact, the limited content message will likely be beneficial for all parties.

The Negative Impact of Strict Debt Collection Regulation

Debt collection plays a vital role in consumer credit markets. Without it, it is doubtful that consumer credit would be so widely available. Given the relationship between the willingness of a lender to offer unsecured credit and the ability to collect on debt, it would make sense that consequences of regulating the collection of debt to be similar to the regulation of debt itself.

Credit is priced according to risk. If the restrictions on collections are too great, the risk of loss is higher, as creditors will recover less from borrowers and borrowers will have an incentive to default more often. In this case, a lender will respond in some predictable ways: charging more, lending less, requiring higher collateral, restricting access to credit altogether, or engaging in more aggressive collection tactics, such as litigation, more quickly. The result for consumers are higher prices and fewer choices in credit products.

The economic literature on the topic confirms a loss in consumer welfare from overly stringent restrictions on debt collection. For example, the Federal Reserve Bank of Philadelphia published a study in 2015 that found that "stricter debt collection regulations appear to reduce the number of third-party debt collectors and to lower recovery rates on delinquent credit card loans. This, in turn, leads to fewer openings of credit cards."[16] Further, the paper found that "one additional restriction on debt collection activity reduces the number of debt collectors per capita by 15.9% of the sample mean and lowers the number of new revolving lines of credit by 2.2% of the sample mean."[17]

Similarly, a 2017 study from the Federal Reserve Bank of New York that looked at the effect of state-level debt collection restrictions concluded that "restricting collection activities leads to a decrease in access to credit and to a deterioration in indicators of financial health," particularly for those with poor credit scores.[18]

The Bureau's own study found that debt collection restrictions "reduce access to credit card accounts and raise prices for credit cards," with negative effects concentrated on sub-prime consumers. [19]

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[16] Fedaseyeu.
[17] Ibid.
[18] Julia Fonseca, Katherine Strair and Basit Zafar, Access to Credit and Financial Health: Evaluating the Impact of Debt Collection*, Federal Reserve Bank of New York Staff Report*, No. 814, May 2017, https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr814.pdf?la=en.%2525205.
[19] Charles Romeo and Ryan Sandler, " Effect of Debt Collection Laws on Access to Credit,"Consumer Financial Protection Bureau Office of Research Working Paper*,* No. 2018-01, February 12, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3124954.

Given the consensus of the economic literature, the Bureau should proceed carefully in its efforts to regulate debt collection. Adding excessive new regulations on top of an already heavily regulated industry will likely lead to a net loss for consumer welfare, as gains by some debtors will be offset by higher prices and less choice for all consumers.

Unreliability of the Complaints Database

The CFPB often reports that the most common claims submitted to its Consumer Complaint Database are related to debt collection. For example, a cursory search of the CFPB's database on June 11, 2019, showed that 248,732 complaints, out of a total of 1,304,413, are related to debt collection, accounting for around about 19 percent of all complaints.[20] Yet, while it may be technically true that debt collection is the most complained about category in the database, this simple fact masks over a much more complex picture.

To start with, debt collection can be easily misunderstood. Because debts are sold by creditors to third parties, and sometimes multiple third parties, some consumers may not recognize a debt that is validly theirs. [21] They further might not understand the terms of certain debts, such as medical debt collection, as they might not understand certain provisions of their particular insurance coverage.[22]

Second, the Bureau reports raw complaint numbers that are not averaged out by consumers using specific products. This greatly exaggerates the supposed problem. For example, as Gerard Scimeca, vice president of Consumer Action for a Strong Economy, wrote for Inside Sources:

> There are approximately 77 million debts in collection every year, and the collection industry makes an estimated 1 billion contacts to those consumers each year. Of those 77 million consumers and 1 billion contacts, there are only roughly 48,000 CFPB complaints annually, a complaint rate of just 0.06 percent. However, the CFPB's reporting methods paint a different picture, one that describes the debt collection industry as the worst of the financial services industries with the highest complaint numbers without ever putting the numbers in context.[23]

Third, the CFPB's complaints database is notoriously unreliable. Research from prominent economists has shown that the database has severe statistical and economic problems.[24] An investigation from *American Banker* detailed how the "consumer complaint database is

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[20] Consumer Complaint Database: Search "Debt Collection", accessed June 11, 2019, https://www.consumerfinance.gov/data-research/consumer-complaints/ .
[21] Zywicki.
[22] Ibid.
[23] Gerard Scimeca, "CFPB Complaint Database Offers Lots to Complain About," Inside Sources, March 26, 2019, https://www.insidesources.com/cfpb-complaint-database-offers-lots-to-complain-about/.
[24] Dr. Faten Sabry, Dr. Ignacio Franceschelli, and David Cen, "What Does the CFPB Complaint Database Tell Us About the Quality of Servicing of Student Loans?" NERA Consulting, February 14, 2018, https://www.nera.com/publications/archive/2018/what-does-the-cfpb-complaint-database-tell-us-about-the-quality-.html.

riddled with errors and distrusted by some of its own employees."[25] According to the investigation, in one instance a single complaint was counted 35 times. Further, some supposed complaints are not complaints at all, but comments and inquiries. For example, a complaint under "payday loans" may not be about being inappropriately provided a loan, but the fact that a consumer cannot get access to a loan.[26]

One particularly poor example of the consumer complaints database's reliability was revealed in discovery for the court case *CFPB v. Navient*.[27] The Bureau alleged that Navient, a firm that services and collects on private and government-backed student loans, had harmed "hundreds of thousands" of borrowers by steering them into loans with terms that were inadequate for their economic situation. In the litigation, Navient asked the Bureau to identify specific borrowers who were harmed by in these loans. The Bureau called 15 witnesses, who identified themselves as harmed by the practice in the Bureau consumer complaint database. In response to the witnesses, Navient produced its own records on each borrower, including phone call recordings and customer notifications, demonstrating that Navient had not inappropriately steered any of the 15 witnesses, thus proving all of the complaints to be false.[28]

Such severe problems should give anyone pause in reading too much into the database's statistics.

Conclusion

CEI applauds the Bureau for attempting to bring greater legal certainty to the use of modern communication methods by collectors, to provide model disclosure notices for consumers, and to create reasonable safe harbors for industry. However, the Bureau should proceed carefully with other parts of the proposed rule, such as strict call limits and time-barred debt disclosure notices. As described above, these proposals may have unintended consequences that outweigh any perceived benefits. Solid empirical evidence is needed before the Bureau proceeds with these provisions of the proposed rule.

Therefore, the Bureau should direct its recently established Office of Cost Benefit Analysis to rigorously analyze the proposed rule's impact on competition and consumer welfare before proceeding with it. This is necessary both in developing good public policy and in meeting a statutory requirement of the Bureau mandated by Dodd-Frank.[29] Furthermore, proceeding with the rule without sufficient empirical evidence would open the rule to legal challenge under the Administrative Procedure Act.[30]

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[25] Rachel Witkowski, "Errors Abound in CFPB's Complaint Portal," *American Banker*, November 17, 2015, https://www.americanbanker.com/news/errors-abound-in-cfpbs-complaint-portal.

[26] CFPB Complaint Database: Complaint No. 3270151, accessed June 10, 2019, https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/3270151.

[27] *Consumer Fin. Protec. Bureau v. Navient Corp.*, 3:17-CV-101, 2017 WL 3380530 (M.D. Pa. August 4, 2017).

[28] Daniel Press, "Consumer Financial Protection Bureau Should Drop Flawed Enforcement Actions," Open Market blog, Competitive Enterprise Institute, May 29, 2019, https://cei.org/blog/consumer-financial-protection-bureau-should-drop-flawed-enforcement-actions.

[29] 12 U.S. Code § 5512 (b) (2) (A) (i).

[30] 5 U.S. Code § 706.

Overall, the Bureau should be commended for its fresh look at the vital role of debt collection in fulfilling a robust consumer credit market in the 21st century. Thank you for providing the Competitive Enterprise Institute this opportunity to present our views on improving consumer welfare and protecting consumer choices. Please feel free to contact us to discuss these issues further.

Sincerely,

John Berlau

Competitive Enterprise Institute