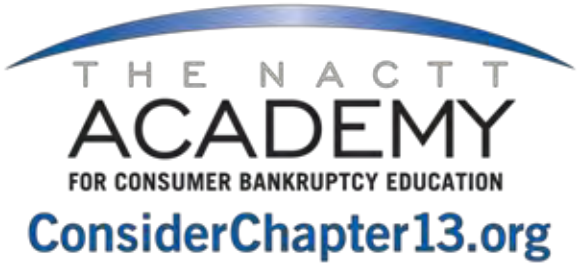
NACTT 57th Annual Seminar
San Francisco, CA
Educational Materials



4:00-5:00 Breakout Session

CFPB Enforcements: What is Happening This Year and What is Expected Going Forward

Moderator: Beverly M. Burden, Chapter 13 Standing Trustee for the Eastern District of Kentucky (Lexington)

Alice Whitten, Managing Counsel - Senior Vice President, Consumer Lending Division, Wells Fargo (Irving, TX)

Heather M. Giannino, Managing Attorney, Heavner, Beyers & Mihlar, LLC (Chicago, IL)

MATERIALS INDEX

CFPB ENFORCEMENTS -
WHAT IS HAPPENING THIS YEAR AND
WHAT IS EXPECTED GOING FORWARD

NACTT Annual Seminar
San Francisco, CA
July 5-9, 2022

CFPB OVERVIEW

Articles Included:

CFPB, *The Bureau*.

CFPB, *Life Cycle of an Enforcement Action*.

Online or Other Resources:

https://www.consumerfinance.gov/

CFPB, *Task Force on Federal Consumer Financial Law Report*, https://www.consumerfinance.gov/data-research/research-reports/taskforce-on-federal-consumer-financial-law-report/ (Jan. 2021).

The Bureau | Consumer Financial Protection Bureau

We aim to make consumer financial markets work for consumers, responsible providers, and the economy as a whole. We protect consumers from unfair, deceptive, or abusive practices and take action against companies that break the law. We arm people with the information, steps, and tools that they need to make smart financial decisions.

In a market that works, the prices, risks, and terms of the deal are clear upfront so that consumers can understand their options and comparison shop. Companies all play by the same consumer protection rules and compete fairly on providing quality and service. To achieve this vision, the CFPB works to:

Empower

We create tools, answer common questions, and provide tips that help consumers navigate their financial choices and shop for the deal that works best for them.

Enforce

We take action against predatory companies and practices that violate the law and have already returned billions of dollars to harmed consumers.

Educate

We encourage financial education and capability from childhood through retirement, publish research, and educate financial companies about their responsibilities.

Our core functions

The CFPB was created to provide a single point of accountability for enforcing federal consumer financial laws and protecting consumers in the financial marketplace. Before, that responsibility was divided among several agencies. Today, it's our primary focus.

Our work includes:

- Rooting out unfair, deceptive, or abusive acts or practices by writing rules, supervising companies, and enforcing the law
- Enforcing laws that outlaw discrimination in consumer finance
- Taking consumer complaints
- Enhancing financial education
- Researching the consumer experience of using financial products
- Monitoring financial markets for new risks to consumers

Life Cycle of an Enforcement Action | Consumer Financial Protection Bureau

Congress provided the Consumer Financial Protection Bureau with four important tools to carry out the mission of protecting consumers: rulemaking, supervision, enforcement, and education.

When a depository institution, company, individual, or other entity subject to our enforcement authority breaks the law, we may take enforcement action against them. In many cases, we will partner with other federal regulators or state agencies to investigate the wrongdoing and coordinate the enforcement action.

Commencing enforcement investigations

Enforcement relies on a number of sources of information to identify potential issues that may warrant opening an investigation, including:

- Consumer complaints
- The Bureau's whistleblower hotline
- Referrals from federal regulators and other local, state, and federal agencies
- Market intelligence, and
- The results of supervisory exams

The Bureau's Enforcement Director or one of his or her deputies approves opening a Bureau investigation. In assessing whether to open an investigation, Enforcement weighs a number of factors, including, but not limited to, whether:

- There is a plausible set of facts that, if proven, would amount to a violation of one or more federal consumer financial laws
- There is reason to believe that one or more specific entities may be engaging in the conduct described in those facts
- There is evidence of a magnitude of harm that justifies investment of resources
- There are sufficient resources available to properly address the matter, and
- The devotion of those resources is consistent with the strategic planning and articulated priorities or warrants a conscious departure from those plans and priorities

The existence of an investigation does not mean that the subject has violated the law.

Fact gathering

We are authorized to conduct investigations before instituting judicial or administrative adjudicatory proceedings under Federal consumer financial law. Enforcement uses investigations to gather facts and identify violations of federal consumer financial law to determine whether a public enforcement action is necessary. Specifically, the Consumer Financial Protection Act authorizes us to issue investigational subpoenas known as civil investigative demands (CIDs) when looking into potential violations of law. A CID may demand, among other things, documents,

emails, reports, answers to written questions, and oral testimony. Each CID is required to state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation. CIDs issued by us set out this information in a section known as the "notification of purpose." CID recipients have a statutory right to petition the Bureau's Director for an order modifying or setting aside a CID. If necessary, we may seek to enforce a CID in federal court.

Hearing from subjects of investigation

The Notice and Opportunity to Respond and Advise (NORA) process is used by Enforcement, at its discretion, to afford individuals and entities under investigation an opportunity to present their positions to Bureau staff before a lawsuit is filed against them. The NORA process strikes a balance between fairness to those under investigation and protection of the public interest. The discretionary framework of the NORA process allows us to retain our ability to respond to unlawful conduct in a timely fashion.

The primary objectives of the NORA process are to:

- Allow Persons under investigation the opportunity to be heard before the filing of a lawsuit in situations where delay will not unduly harm consumers
- Help ensure that enforcement actions are based on sound policy, and that they effectively further our priorities
- Alert us to potential unintended and undesirable consequences of enforcement actions, and
- Help ensure that we are aware of any material facts relevant to both its investigations and contemplated enforcement actions

Public enforcement actions

When warranted by the investigation, Enforcement may seek authority from the Director to take a public enforcement action. Alternatively, Enforcement may close the investigation without taking public action or refer the matter to the Office of Supervision Examinations to resolve the matter through our supervisory process.

If the Director authorizes a public enforcement action, we may bring the action in state or federal court or institute an administrative adjudication proceeding. Administrative adjudication proceedings are formal adversarial proceedings conducted by an administrative law judge, who issues a recommended decision to the Bureau's Director. The Director issues a final decision, either adopting or modifying the administrative law judge's recommended decision.

When we enforce the law, we or a court may order the defendant to take action to remedy the harm it caused consumers. This can include requiring the person or company to compensate its victims for this harm by providing consumer redress. Obtaining consumer redress is a top priority in any Enforcement action. In addition, we also have obtained a wide range of injunctive relief designed to stop unlawful conduct and prevent future violations. In some instances that relief has included banning individuals and companies from future participation in the marketplace.

TRUE COST OF CREDIT OR PRICE FOR SERVICES (FEES)

Articles Included:

CFPB, *Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services*, Docket No. CFPB-2022-0003 (Feb. 2, 2022).

Valenti, *Overdraft Fees Can Price People Out of Bankruptcy* (CFPB Mar. 30, 2022).

Borne and Vasan, *Consumers On Course to Save $1 Billion in NSF Fees Annually, But Some Banks Continue to Charge These Fees* (CFPB Apr 13, 2022).

CFPB Finds Credit Card Companies Charged $12 Billion in Late Fee Penalties in 2020 (CFPB Mar. 29, 2022).

Online or Other Resources:

CFPB Report, *Credit Card Late Fees* (Mar. 29, 2022), https://www.consumerfinance.gov/data-research/research-reports/credit-card-late-fees/

CFPB Report, *Data Point: Overdraft/NSF Fee Reliance Since 2015 – Evidence from Bank Call Reports* (Dec. 1, 2021), https://www.consumerfinance.gov/data-research/research-reports/data-point-overdraft-nsf-fee-reliance-since-2015-evidence-from-bank-call-reports/

Hirsch, *The Evolving Landscape of Bank Overdraft Fee Practices*, 28 No. 03 Westlaw J. Bank and Lender Liab. 02 (April 11, 2022).

BILLING CODE: 4810-AM-P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No.: CFPB-2022-0003]

Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Request for public comment.

SUMMARY: The Consumer Financial Protection Bureau (Bureau or CFPB) is seeking comments from the public related to fees that are not subject to competitive processes that ensure fair pricing. The submissions to this request for information will serve to assist the CFPB and policymakers in exercising its enforcement, supervision, regulatory, and other authorities to create fairer, more transparent, and competitive consumer financial markets.

DATES: Comments must be received on or before March 31, 2022.

ADDRESSES: You may submit comments, identified by Docket No. CFPB-2022-0003, by any of the following methods:

- *Electronic: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Email*: FederalRegisterComments@cfpb.gov. Include Docket No. CFPB-2022-00 in the subject line of the message.
- *Mail/Hand Delivery/Courier:* Comment Intake —Fee Assessment, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552. Please note that due to circumstances associated with the COVID-19 pandemic, the CFPB discourages the submission of comments by hand delivery, mail, or courier.

Instructions: The CFPB encourages the early submission of comments. All submissions should include document title and docket number. Because paper mail in the Washington, DC

area and at the CFPB is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to https://www.regulations.gov. In addition, once the CFPB's headquarters reopens, comments will be available for public inspection and copying at 1700 G Street NW, Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. At that time, you can make an appointment to inspect the documents by telephoning 202-435-7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Brian Shearer, Senior Advisor; Grace Bouwer, Advisor, Public Engagement, Director's Front Office, Office of the Director at 202-435-7700. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Consumers can only realize the benefits of competition if companies transparently advertise the true price of their products or services, and the full price is subject to the competitive process. Both empirical studies and theoretical models suggest that when companies use hidden back-end fees – which are mandatory or quasi-mandatory fees added at some point in the transaction after a consumer has chosen the product or service based on a front-end price – it can lure consumers into making purchasing decisions based on a perceived lower price.[1] In addition, when a company

[1] https://www.ucl.ac.uk/~uctpbwa/papers/price-framing.pdf; https://pages.stern.nyu.edu/~xgabaix/papers/shrouded.pdf.

charges for individual activities that are typical attributes of a product or service, it can give the company the power to substantially overcharge for those activities because consumers are not choosing a provider at the time they choose to engage in the activity. Well-known examples of such "junk fees" include resort fees added to hotel bills and service fees added to concert ticket prices. Government agencies and economists have raised concerns about the ways in which America's growing "fee economy" undermines competition.[2]

The Consumer Financial Protection Act (CFPA) directs the CFPB to enforce Federal consumer law for the purpose of ensuring consumer financial markets are fair, transparent, and competitive.[3] The CFPB has grown increasingly concerned that consumer finance has become part of this "fee economy." Exploitative junk fees charged by banks and non-bank financial institutions have become widespread, with the potential effect of shielding substantial portions of the true price of consumer financial products and services from competition. The CFPB is concerned about fees that far exceed the marginal cost of the service they purport to cover, implying that companies are not just shifting costs to consumers, but rather, taking advantage of a captive relationship with the consumer to drive excess profits. Excessive and exploitative fees, whether predictable and transparent to the customer or not, can add up and pose significant costs to people, especially those with low wealth and income.

Many Americans have experienced inflated or surprise fees that, however nominally voluntary, are not meaningfully avoidable or negotiable in the moment. These fees in consumer finance can take many forms: penalty fees such as late fees, overdraft fees, non-sufficient funds (NSF) fees, convenience fees for processing payments, minimum balance fees, return item fees, stop payment fees, check image fees, fees for paper statements, fees to replace a card, fees for

[2] https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/hiddenfeesreport_12282016.pdf.
[3] 12 U.S.C. 5511(a).

out-of-network ATMs, foreign transaction fees, ACH transfer fees, wire transfer fees, account closure fees, inactivity fees, fees to investigate fraudulent activity, ancillary fees in the mortgage closing process, and more. These fees have become the norm among financial services that Americans rely on every day, and a substantial amount of the revenue earned by financial services companies comes from these fees. The following are a few examples from select products and markets:

Deposit Accounts. The price of a deposit account is made up of, among other fees, account maintenance fees, minimum balance fees, savings transfer fees, NSF fees, overdraft fees, and ATM fees. Overdraft and NSF fees are back-end fees that make up the majority of total revenue banks derive from deposit accounts. Overdraft and NSF fees exceeded $15.4 billion in 2019.[4] By comparison, banks make only about $1 billion annually in account maintenance fees. Since the back-end fees are the bulk of the price, there is effectively no price competition amongst the major banks for deposit accounts. Only recently have companies started to substantially vary their overdraft practices. This is of course a positive development, but these changes will not reverse the trend of pricing deposit accounts primarily through back-end fees.

Credit Cards. Fees represent about 20% of the total cost of credit cards. Card issuers charged $23.6 billion in fees in 2019 alone and nearly $14 billion of those fees were late fees not subject to competitive pricing pressure.[5] Nearly every bank charges the same for late fees – the maximum allowed by law of $30 for the first late payment and $41 for subsequent late payments – and the average late fee has increased to $31, nearing the average of $33 before the Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009.[6]

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[4] https://www.consumerfinance.gov/about-us/newsroom/cfpb-research-shows-banks-deep-dependence-on-overdraft-fees/.
[5] https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf, at 46.
[6] https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf, at 54-57.

Remittances and Payments. Financial institutions charge "convenience" fees on payment transfers, return item fees, stop payment fees, check image fees, online or telephone bill pay fees, ACH transfer fees, and wire transfer fees. International transfers are subject to a significant number of fees as well. In 2017, after observing many abuses, the CFPB issued a Compliance Bulletin on unfair, deceptive, and abusive acts or practices relating to fees for making payments over the telephone, and potential violations of the Fair Debt Collection Practices Act (FDCPA).[7] These kinds of convenience fees are still common.

Prepaid Accounts. Prepaid cards represent a way for many unbanked consumers and individuals with limited resources to have access to basic financial services—yet many accounts carry fee structures that make it challenging for consumers to pick the right product based on their needs. Consumers frequently select a product based on a monthly rate only to find out that the "add-on" fees for regular activities such as transaction fees, cash reload fees, balance-inquiry fees, inactivity fees, monthly service fees, and card cancellation fees, among others, overshadow the quoted monthly charge.

Mortgages. Mortgages facilitate homeownership for millions of people, and, through homeownership, allow millions of families to build and maintain intergenerational wealth. But priced into most mortgages are thousands of dollars in application fees and closing costs, which few people are well-positioned to shop on. These fees can act as a barrier to homeownership, strip wealth from homeowners accessing their equity through refinancing or home sales, and deter some homeowners from refinancing when doing so would lower total housing costs and be financially advantageous. Advocates and reporters have noted that many closing costs, like title

[7] CFPB Compliance Bulletin 2017-01, Phone Pay Fees (July 31, 2017), *available at* https://files.consumerfinance.gov/f/documents/201707_cfpb_compliance-bulletin-phone-pay-fee.pdf.

insurance,[8] may not always be subject to standard or appropriate competitive forces. Even aside from inflated and padded fees rolled into the mortgage at closing, homeowners can find themselves forced to pay fees for making payments over the phone or online or even for the servicer's bill pay service. Borrowers who face financial hardship and struggle to make mortgage payments can find themselves unable to catch up due to the snowballing of a plethora of fees related to the mortgage delinquency. Monthly property inspection fees, new title fees, legal fees, appraisals and valuations, broker price opinions, force-placed insurance, foreclosure fees, and miscellaneous, unspecified "corporate advances" can all price a homeowner out of a home.

Other Loans. The CFPB is interested in other loan origination and loan servicing fees, including for student loans, auto loans, installment loans, payday loans, and other types of loans. For example, some servicers charge fees to reschedule payment dates or make online or phone payments. Loan originators often charge application fees and some even charge to receive loan proceeds in an expedited manner.

II. Request for Comment

This request for information seeks information from the public on how junk fees—exploitative, back-end, hidden, or excessive fees—have impacted peoples' lives. The CFPB is particularly interested in hearing from individuals (including older consumers, students, servicemembers, consumers of color, and lower-income consumers), social services organizations, consumer rights and advocacy organizations, legal aid attorneys, academics and researchers, small businesses, financial institutions, and state and local government officials.

The CFPB welcomes stakeholders to submit stories, data, and information about fees. To assist commenters in developing responses, the CFPB has crafted the below questions that

[8] https://www.nclc.org/images/pdf/foreclosure_mortgage/archive/title_insurance_testimony042606.pdf; https://www.texasobserver.org/entitled-to-profit-in-texas-title-insurance-is-a-total-scam/.

commenters may answer. However, the CFPB is interested in receiving any comments relating to fees in consumer finance.

1. If you are a consumer, please tell us about your experiences with fees associated with your bank, credit union, prepaid or credit card account, credit card, mortgage, loan, or payment transfers, including:
    a. Fees for things you believed were covered by the baseline price of a product or service.
    b. Unexpected fees for a product or service.
    c. Fees that seemed too high for the purported service.
    d. Fees where it was unclear why they were charged.
2. What types of fees for financial products or services obscure the true cost of the product or service by not being built into the upfront price?
3. What fees exceed the cost to the entity that the fee purports to cover? For example, is the amount charged for NSF fees necessary to cover the cost of processing a returned check and associated losses to the depository institution?
4. What companies or markets are obtaining significant revenue from back-end fees, or consumer costs that are not incorporated into the sticker price?
5. What obstacles, if any, are there to building fees into up-front prices consumers shop for? How might this vary based on the type of fee?
6. What data and evidence exist with respect to how consumers consider back-end fees, both inside and outside of financial services?
7. What data and evidence exist that suggest that consumers do, or do not, understand fee structures disclosed in fine-print or boilerplate contracts?
8. What data and evidence exist that suggest that consumers do or do not make decisions

based on fees, even if well disclosed and understood?

9. What oversight and/or policy tools should the CFPB use to address the escalation of excessive fees or fees that shift revenue away from the front-end price?

Rohit Chopra

Director, Consumer Financial Protection Bureau.

cfpb Consumer Financial Protection Bureau (cfpb.gov/)

Overdraft fees can price people out of banking

By Joe Valenti – MAR 30, 2022

In 2019, banks and credit unions collected an estimated $15.5 billion (https://files.consumerfinance.gov/f/documents/cfpb_overdraft-call_report_2021-12.pdf) from their customers through overdraft and non-sufficient funds fees. These fees are charged when the financial institution determines that a customer's checking account does not have the funds to cover an expense. They are often assessed for reasons people do not expect or understand, chip away at needed income including public benefits, and take a heavy toll on families living paycheck to paycheck. And, overdraft fees can ultimately drive people out of banking altogether.

While a number of banks have started to lower these fees (https://www.consumerfinance.gov/about-us/blog/comparing-overdraft-fees-and-policies-across-banks/)—and the total volume of fees has started to go down overall—overdraft practices still penalize customers with limited resources and create financial obstacles for them. CFPB research (https://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf) has found that people who pay more than 10 overdraft fees per year end up paying nearly three-quarters of all overdraft fees, and on average, these frequent overdrafters paid $380 in overdraft fees during the year. Similarly, CFPB interviews with consumers (https://files.consumerfinance.gov/f/documents/cfpb_consumer-voices-on-overdraft-programs_report_112017.pdf) have shown that people were concerned that overdraft fees would make it more difficult to catch up and cover future expenses. In the words of one interview participant (https://files.consumerfinance.gov/f/documents/cfpb_consumer-voices-on-overdraft-programs_report_112017.pdf), the typical overdraft fee of $35 "is a lot of money for a person that doesn't have any."

These fees, in turn, can lead to real financial losses for families and turn setbacks into crises. For a low-wage worker, overdraft fees could take up an entire week of take-home pay, or more, over the course of a year. For many families, banking fees could strip away money better spent elsewhere. Indeed, many frequent overdrafters' budgets already have little room for unexpected

charges to begin with. Ninety percent of frequent overdrafters (https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf) (defined as consumers who incurred more than 10 combined overdraft and non-sufficient funds fees in a year) typically had, at the median, no more than a few hundred dollars in their accounts at the end of any given day. Dipping below a zero balance can lead to hundreds of dollars in cascading fees, which the bank will collect from the customer's next deposit. As one interview participant noted, "If you are overdrafting, the risk is that you are going to end up with your whole entire deposit being eaten up by overdraft fees."

Ultimately, people dealing with frequent overdraft fees face a difficult and expensive uphill climb. Across the CFPB, our offices dedicated to servicemembers, older adults, students and young consumers, and low-income people all regularly hear from stakeholders about how these fees not only make it more difficult for people to get by, but affect their overall perceptions of whether the banking system is fair, transparent, and competitive. Here are some of the key themes we have heard from people who contact us.

Overdraft fees exploit payment timing and processing issues

Some people are saddled with fees when they have several pending transactions and a low balance. Indeed, many overdrafts happen soon before someone receives a paycheck or benefits payment—times when account balances are likely to be low. Bank processing and fee assessment practices can dramatically affect the number of overdraft fees an account holder is charged. Many consumers' experience goes something like this:

> *On XX/XX/2021 my checking account was overdrawn about {$8.00} and change, I transferred the amount to cover that and bring my account up to XXXX cents by XXXX which I was told by a representative is the cut off time. On XX/XX/2021 I noticed I was assessed a {$35.00} overdraft fee and that my online banking transactions had been ordered in a different way than the night before, making my account negative {$4.00}. I called [financial institution] twice to resolve the issue and they said that the overdraft fee was valid and that they can not reverse it. Spoke with manager XXXX ID # XXXX who stated that she can not reverse overdraft fee as per computer system not allowing her to.*

Uncertainties around when payments will be processed and when deposits will be available are extremely difficult to navigate.

Overdraft fees can be expensive and excessive

In some cases, multiple fees add up very quickly, and also greatly exceed the amounts of the underlying transactions. One customer noted last September that they were charged $400 in overdraft fees in the span of just two months:

> *Since [July] 2021, [Company] has charged me nearly $400.00 in overdraft fees and despite asking to reverse some, I've been told they cannot offer any "courtesy" refunds at this time. … [This] is my primary banking relationship, where I have my paycheck deposited and pay my bills. However, it is becoming increasingly difficult to maintain as the fees are very high, often more than the cost of the paid item. And they are very frequent, being assessed multiple times per week and even per day. It makes it hard to get by when deposits go straight to covering outrageous fees. I understand the Bank needs to make a profit, but this is ridiculous.*

This places overdraft fees among the kinds of **junk fees** (https://www.consumerfinance.gov/about-us/blog/hidden-cost-junk-fees/) that far exceed what it costs the institution to provide the associated product or service and often do not appear to be subject to competitive market forces.

Overdraft fees can lead to account closures

Especially for people living paycheck to paycheck, good-faith efforts to manage their accounts and keep balances positive often aren't enough. In some cases, beyond posing an unmanageable financial burden, overdraft fees can eject people out of the banking system altogether. Some people, frustrated by their bad banking experiences, close accounts on their own and drop banks and credit unions entirely. The FDIC estimates there are roughly **3.5 million** (https://www.fdic.gov/analysis/household-survey/2019report.pdf) households in the U.S. where people once had a bank account, but no longer do—and of these, 68 percent report being uninterested in coming back. For some, overdraft fees were clearly a motivator. In the words of one interviewee, "I got tired of my checks being gone before I can spend them." In turn, living without a checking or savings account can make everyday transactions riskier and more difficult.

For others, an unpaid overdraft may lead to a financial institution closing the customer's account and reporting to a specialty credit reporting agency (CRA) that provides bank account screening. Having a negative report with one of these account screening CRAs typically makes it harder to open an account at another bank in the future.

All Americans deserve a safe and affordable place to keep and manage their money, without fearing that their funds will be depleted through overdraft and

other junk fees. In the coming months, the CFPB will continue to explore the range of our tools to tackle these and other financial practices that penalize customers and erode trust.

If you have encountered problems with overdrafts or other bank fees or practices, you can **submit a complaint to the CFPB** (http://www.consumerfinance.gov/complaint).

For more information on the CFPB's effort to address junk fees and to submit a comment through April 11, visit the **Federal Register** (https://www.regulations.gov/document/CFPB-2022-0003-0001).

FURTHER READING

Blog

Helping borrowers hold mortgage servicers accountable (cfpb.gov/about-us/blog/helping-borrowers-hold-mortgage-servicers-accountable/)

APR 04, 2022

New effort focused on financial issues facing rural communities (cfpb.gov/about-us/blog/new-effort-focused-on-financial-issues-facing-rural-communities/)

MAR 10, 2022

Using special purpose credit programs to serve unmet credit needs (cfpb.gov/about-us/blog/using-special-purpose-credit-programs-to-serve-unmet-credit-needs/)

FEB 22, 2022

Newsroom

Consumer Financial Protection Bureau Launches Initiative to Save Americans Billions in Junk Fees (cfpb.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-initiative-to-save-americans-billions-in-junk-fees/)

JAN 26, 2022

Prepared Remarks of CFPB Director Rohit Chopra on the Junk Fees RFI Press Call (cfpb.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-on-the-junk-fees-rfi-press-call/)

JAN 26, 2022

Consumers on course to save $1 billion in NSF fees annually, but some banks continue to charge these fees

By Rebecca Borné and Ashwin Vasan – APR 13, 2022

In recent months, a number of large banks have announced that they are eliminating non-sufficient fund (NSF) fees on their checking accounts. This is a positive development. We estimate that these changes mean that consumers will pay about 50% less in these fees each year, an annual savings of about $1 billion.

But many banks are continuing to charge these fees, which consumers incur when the bank returns a check or electronic payment unpaid after determining that the account lacks sufficient funds. Consumers receive no service at all in exchange for this fee. Indeed, NSF fees intensify financial distress for consumers, who often are already at their financial edge and who will often also be hit by the fee merchants charge when a consumer's payment bounces. NSF fees average $34 each, even as any marginal cost to the institution to return a payment is likely exceedingly low. The Bureau is closely scrutinizing whether and when charging these fees may be unlawful.

The chart below shows the 25 banks reporting the most overdraft/NSF revenue in 2021. Based on publicly available information, the left-hand side of the chart identifies the banks that do not charge NSF fees or have publicly announced their elimination, while the right-hand side identifies the banks that have not publicly announced elimination of NSF fees.

Banks that do not charge NSF fees, or have publicly announced eliminating them*	Banks that have not publicly announced elimination of NSF fees, as of April 1, 2022**
Bank of America	Arvest
Capital One	Bank of the West
Citibank	Citizens
Fifth Third	First Horizon
First Citizens	First National Bank Texas/First Convenience Bank
Green Dot	KeyBank
JPMorgan Chase	Huntington
M&T	Santander
PNC	SouthState
Regions	TD Bank
Truist	USAA
U.S. Bank	Woodforest
Wells Fargo	

* Implementation dates vary; check with bank for details on timing.

** Some banks may be enacting changes that have not been publicly announced.

NOTE: The chart reflects a snapshot of the CFPB's review of press releases, publicly available account disclosures, and news reports. We will continue to assess bank practices and update the chart periodically. Information on this chart has not been independently verified by the CFPB, and the inclusion of an institution on this list does not reflect a CFPB endorsement of the institution.

Meanwhile, as we noted **previously** (https://www.consumerfinance.gov/about-us/blog/comparing-overdraft-fees-and-policies-across-banks/), a number of banks are making changes to their overdraft practices as well. We've updated our **table tracking these changes** (https://files.consumerfinance.gov/f/documents/cfpb_overdraft-chart_2022-04.pdf) to reflect overdraft/NSF revenues for the full year of 2021 and to reflect additional bank changes made since our February 2022 blog post. The banks reflected in the table earned over 80% of the total $8.8 billion in overdraft/NSF fees reported by banks with assets over $1 billion in 2021. You can use **our table** (https://files.consumerfinance.gov/f/documents/cfpb_overdraft-chart_2022-04.pdf) to see how your bank compares to others.

We are continuing to monitor these developments to better understand the effects of these changes, and to work to ensure that banks continue to evolve their businesses to reduce the impacts of overdraft and NSF fees. Our work on overdraft/NSF fees is part of a larger **CFPB initiative** (cfpb.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-initiative-to-save-americans-billions-in-junk-fees/) to save Americans billions of dollars by promoting competition and reducing junk fees.

See our guides, advice, and answers to common questions about bank accounts (https://www.consumerfinance.gov/consumer-tools/bank-accounts/).

If you're having an issue with a consumer financial product or service, you can **submit a complaint with the CFPB online** (https://www.consumerfinance.gov/complaint/) or by calling (855) 411-CFPB (2372).

Consumer Financial Protection Bureau (cfpb.gov/)

CFPB Finds Credit Card Companies Charged $12 Billion in Late Fee Penalties in 2020

Largest credit card issuers expected to hike fees further

MAR 29, 2022

WASHINGTON, D.C. – The Consumer Financial Protection Bureau (CFPB) issued a report today showing that credit card issuers charged $12 billion in late fees in 2020. Late fee penalties are charged in addition to interest when a cardholder does not make the minimum payment by the due date.

"Many credit card issuers have made late fee penalties a core part of their profit model. Markets work best when companies compete on price and service, rather than relying on back-end fees that obscure the true cost." said CFPB Director Rohit Chopra. "Given their current practices, we expect that credit card issuers will hike fees, based on inflation, as limits continue to rise."

The Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) created a range of protections for cardholders, including limiting how much credit card companies could charge for penalties such as over-the-limit fees and late fees, as well as limits on interest rate increases. Many of these protections have been effective in reducing the total cost of credit (https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-card-act-reduced-penalty-fees-and-made-credit-card-costs-clearer/) for consumers, improving competition, and creating transparency on pricing. Nevertheless, today's report highlights that late fees continue to negatively affect millions of families.

In 2010, the Federal Reserve Board of Governors (https://www.federalreserve.gov/newsevents/pressreleases/bcreg20100615a.htm) voted to implement provisions of the CARD Act that required penalties to be "reasonable and proportional." In its rule the Federal Reserve Board included an immunity provision that allowed credit card issuers to set fees at a particular level, subject to an annual inflation adjustment. Today, these limits have climbed to $30 for the first late payment and $41 for a subsequent late payment within 6

billing cycles.

Congress removed the authority of the Federal Reserve Board of Governors to adjust these provisions and transferred them to the CFPB. The CFPB expects many major card issuers to hike fees further, based on inflation, given the existing reliance on the immunity provisions in the marketplace.

Significant findings in the report include:

- **Many major issuers charge the maximum late fee allowed under the immunity provisions set by the Federal Reserve Board of Governors in 2010.** 18 of the top 20 issuers set late fees at or near the established maximum level.
- **Subprime cards and private label cards are particularly susceptible to late fee charges.** For example, the average deep subprime account gets charged $138 in late fees per year, and deep subprime accounts are more likely than super-prime accounts to carry smaller balances. As a result, deep subprime cardholders pay late fees that represent a higher percentage of their balances (11% compared to 0.8% for super-prime accounts). These late fees are in addition to accrued interest charges. For private label cards, late fees comprised the overwhelming majority—91%—of all consumer fees and 25% of total interest and fees (compared to 45% and 7%, respectively, for general purpose credit cards).
- **Late fee volume fell when stimulus checks arrived in 2020 and 2021, particularly for households with lower credit scores.** Other evidence (https://files.consumerfinance.gov/f/documents/cfbp_making-ends-meet-survey-insights_report_2021-12.pdf) has documented that stimulus checks improved household balances and liquidity. The fact that late fee charges for credit card issuers fell during the same period suggests that late fees are a penalty on households living paycheck-to-paycheck rather than a meaningful incentive to make on-time payments.
- **Low-income areas, areas with high shares of Black Americans, and areas with lower economic mobility all bear more of the late fee burden.** In 2019, credit card accounts held by cardholders living in the United States' poorest neighborhoods paid twice as much on average in total late fees than those in the richest areas. Cardholders in majority-Black areas paid more in late fees for each card they held with major credit card issuers in 2019 than majority white areas. And people in areas with the lowest rates of economic mobility paid nearly $10 more in late fee charges per account compared to people in areas with the highest rates of economic mobility.

To share how credit card late fee penalties have affected you or your family, please visit the CFPB's junk fee webpage (https://www.consumerfinance.gov/about-us/blog/hidden-cost-junk-fees/).

Read today's report, *Credit Card Late Fees* (https://files.consumerfinance.go

v/f/documents/cfpb_credit-card-late-fees_report_2022-03.pdf).

Consumers encountering a problem related to credit card fees or other consumer financial products or services can submit a complaint with the CFPB online (https://www.consumerfinance.gov/complaint/?_gl=1*cttsvs*_ga*MTM3NTE5OTM0OC4xNjAzODkxMzU3*_ga_DBYJL30CHS*MTY0ODA2MTI2OS4zOC4xLjE2NDgwNjEyOTIuMA..) or by calling (855) 411-CFPB (2372).

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Go to press resources page (cfpb.gov/about-us/newsroom/press-resources/)

CREDIT REPORTING

Articles Included:

Frotman, *Credit Reporting Companies and Furnishers Have Obligations to Assure Accuracy in Consumer Reports* (CFPB May 6, 2022).

CFPB Finds Credit Report Disputes Far More Common in Majority Black and Hispanic Neighborhoods (Nov. 2, 2021).

Online or Other Resources:

CFPB *Disputes on Consumer Credit Reports*, https://www.consumerfinance.gov/data-research/research-reports/disputes-on-consumer-credit-reports/ (October 2021).

CFPB *Annual Report of Credit and Consumer Reporting Complaints*, https://www.consumerfinance.gov/data-research/research-reports/annual-report-consumer-credit-reporting-complaints-analysis-of-complaint-responses-equifax-experian-transunion/ (January 2022).

CFPB *Fair Debt Collection Practices Act – CFPB Annual Report 2022*, https://www.consumerfinance.gov/data-research/research-reports/fair-debt-collection-practices-act-annual-report-2022/ (March 2022)

Credit reporting companies and furnishers have obligations to assure accuracy in consumer reports

By Seth Frotman – MAY 06, 2022

Even a seemingly minor inaccuracy in a credit report can lead to a consumer being denied a loan, housing, or job. However, credit reporting companies' customers are usually the lenders, landlords, and employers who purchase credit reports, not the consumers whose financial lives are affected by them. This raises a real concern that credit reporting companies won't pay enough attention to disputes or other issues that consumers raise about their reports.

Congress recognized this risk and passed the Fair Credit Reporting Act (FCRA) to protect consumers from inaccurate credit reporting. The FCRA, enacted in 1970 and amended several times since, includes a variety of important provisions to ensure that credit reporting companies report accurate information about consumers and give consumers recourse when credit reporting companies fail to live up to this obligation. The FCRA also includes requirements on furnishers – firms, such as lenders or debt collectors, that provide information to credit reporting companies.

Assuring Accuracy in Consumer Reports

In the courts, credit reporting companies have made arguments that could have a far-reaching impact on their obligations to report information accurately. Under the law, when they prepare credit reports, credit reporting companies are required to follow "reasonable procedures to assure maximum possible accuracy" of the information. Similarly, furnishers are required to

possible accuracy" of the information. Similarly, furnishers are required to investigate the accuracy of such information if it is disputed by a consumer. There is no exception for particular types of inaccuracies. Nonetheless, credit reporting companies and furnishers have been arguing in court that their duties don't apply to certain inaccuracies. They have claimed that they are not violating the law if the question of whether the information is true or false can be characterized as a "legal" issue, rather than a "factual" one. If this were true, it would be a huge loophole in the law's protection for consumers. In practice, almost any type of inaccuracy could conceivably be characterized as a "legal" issue. For example, credit reporting companies and furnishers have claimed that mistakes about whether a consumer actually owes money fall into this category.

Fortunately, there is no such loophole in the law. Congress was clear that credit reporting companies and furnishers have responsibilities with respect to accuracy – with no exceptions for legal issues. Accordingly, the Consumer Financial Protection Bureau (CFPB) recently filed two friend-of-the-court ("amicus") briefs standing up for consumers and the law as Congress wrote it.

CFPB Amicus Briefs

Yesterday, the CFPB, together with the Federal Trade Commission (FTC), filed an **amicus brief** (cfpb.gov/compliance/amicus/briefs/sessa-v-trans-union-llc/) in *Sessa v. Trans Union, LLC*, a case in which a consumer sued TransUnion, one of three nationwide credit reporting companies, for violating the FCRA. There is no dispute about the facts: TransUnion reported on a consumer's credit report that she owed nearly $20,000 on a car lease that she actually didn't owe under the plain terms of her lease.

The consumer sued TransUnion, arguing that it had violated the FCRA by failing to have reasonable procedures to assure the information on her report was accurate. TransUnion argued that it couldn't be responsible for failing to do its duty because the error was "legal" rather than "factual." TransUnion also argued that the incorrect information couldn't be "inaccurate" because it was provided to TransUnion by the company that financed the lease.

The brief filed by the CFPB and FTC points out that the FCRA does not contain an exception for "legal" inaccuracies. Rather, the law commands credit

reporting companies to follow "reasonable procedures to assure maximum possible accuracy." While TransUnion argues that the inaccuracy on the consumer's credit report was based on a legal dispute, the error was simple and straightforward: TransUnion reported that the consumer owed money that she clearly did not. The brief also points out that information isn't necessarily accurate just because the credit reporting company got it from somewhere else. The case is currently pending before the U.S. Court of Appeals for the Second Circuit.

Similarly, last month, the CFPB filed an **amicus brief** (cfpb.gov/compliance/amicus/briefs/milgram-v-jpmorgan-chase/) in *Milgram v. JPMorgan Chase*, a case which involves the duty of furnishers to reasonably investigate the accuracy of the information they furnish after it is disputed by a consumer. In that case, a consumer who was the victim of identity theft disputed information on her credit report related to a fraudulently opened Chase credit card account. A state court had found that the consumer was a victim of identity theft and even recommended that credit reporting companies stop reporting the account. But when the consumer disputed the account with Chase, Chase continued to furnish it to the credit reporting companies. The CFPB filed a friend-of-the-court brief to make clear that Chase had the same duty to reasonably investigate the disputed information, regardless of whether the underlying dispute could be characterized as "legal" or "factual." The case is now pending before the U.S. Court of Appeals for the Eleventh Circuit.

Information in credit reports has critical effects on Americans' daily lives, and the FCRA plays an important role in ensuring that credit reports are accurate and complete. The CFPB will continue to ensure that the consumer protections passed by Congress are given effect and that credit reporting companies and furnishers do their job.

The cases are Sessa v. Trans Union, LLC, No. 22-87 (2d Cir.) and Milgram v. JPMorgan Chase, No. **22-10250** (11th Cir.).

Read the CFPB's amicus brief in *Sessa v. Trans Union, LLC*. (cfpb.gov/compliance/amicus/briefs/sessa-v-trans-union-llc/)

Read the CFPB's amicus brief in *Milgram v. JPMorgan Chase*. (cfpb.gov/compliance/amicus/briefs/milgram-v-jpmorgan-chase/)

Read the FTC news release. (https://www.ftc.gov/news-events/news/press-rele

CFPB Finds Credit Report Disputes Far More Common in Majority Black and Hispanic Neighborhoods

Report Provides Additional Insight into Previously Observed Trends

NOV 02, 2021

WASHINGTON, D.C. – The Consumer Financial Protection Bureau (CFPB) today released research finding that consumers in majority Black and Hispanic neighborhoods, as well as younger consumers and those with low credit scores, are far more likely to have disputes appear on their credit reports. The new research is a part of a series of reports focusing on trends in the consumer financial marketplace, and uses data on auto loan, student loan, and credit card accounts opened between 2012 and 2019.

"Families living in majority Black and Hispanic neighborhoods are far more likely to have disputes of inaccurate information appear on their credit reports," said CFPB Director Rohit Chopra. "Error-ridden credit reports are far too prevalent and may be undermining an equitable recovery."

The report shows that majority Black and Hispanic neighborhoods continue to face significant challenges with credit records. In nearly every credit category reviewed (auto loans, student loans, credit cards, and retail cards), consumers residing in majority Black areas were more than twice as likely to have disputes appear on their credit reports compared to consumers residing in majority white areas. For auto loans, consumers in majority Black areas were more than three times as likely to have disputes appear on their credit reports (0.8% of accounts with disputes in majority white census tracts compared to 2.8% of accounts in majority Black census tracts).

Under the Fair Credit Reporting Act, people have a right to file a dispute with credit reporting companies to correct inaccuracies on their reports. The Fair Credit Reporting Act requires consumer reporting companies to process and investigate the disputes in a timely manner, and correct any inaccuracies uncovered by the investigation. According to today's report, these kinds of

disputes are common.

When credit reporting is sloppy or rife with errors, this can limit fair and equitable access to individuals and families nationwide. The CFPB is committed to further researching the root causes of credit information disputes, as well as investigating the reasons for the demographic disparities found in the report. In October, the CFPB, along with the Federal Trade Commission and the North Carolina Department of Justice, filed an amicus brief (https://www.consumerfinance.gov/compliance/amicus/briefs/henderson-v-the-source-for-public-data-et-al/) in a case regarding a technology company seeking to use Section 230 of the Communications Decency Act to gain immunity from inaccurate, misleading, and false consumer reporting.

Read the report, "Disputes on Consumer Credit Reports." (https://www.consumerfinance.gov/documents/10208/cfpb_disputes-on-consumer-credit-reports_report_2021-11.pdf)

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The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit consumerfinance.gov (cfpb.gov/).

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DEBT COLLECTION

Articles/Materials Included:

CFPB Confirms Effective Date for Debt Collection Final Rules (Jul. 30, 2021)

CFPB, *Executive Summary of the December 2020 Debt Collection Rule* (Dec. 18, 2020)

CFPB, *Executive Summary of the October 2020 Debt Collection Final Rule*.

Excerpts of Regulation F (Fair Debt Collection Practices Act), 12 CFR § 1006.1 et seq. (as amended Nov. 30, 2021) relating to the collection of time-barred debt; communication with debtors in bankruptcy.

Online or Other Resources:

Regulation F (Fair Debt Collection Practices Act), 12 CFR § 1006.1 et seq. (as amended Nov. 30, 2021), https://www.consumerfinance.gov/rules-policy/regulations/1006

CFPB Fair Debt Collection Practices Act Annual Report 2022, https://www.consumerfinance.gov/data-research/research-reports/fair-debt-collection-practices-act-annual-report-2022

CFPB Orders Bank of America to Pay $10 Million Penalty for Illegal Garnishments (CFPB May 4, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-bank-of-america-to-pay-10-million-penalty-for-illegal-garnishments

CFPB Obtains Ban Against Debt Relief CEO Daniel Crenshaw (CFPB Apr. 29, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-obtains-ban-against-debt-relief-ceo-daniel-crenshaw/ .

Filter and Oppenheim, *Transcript Withholding Holds Back Workers and Wages* (CFPB Apr. 18, 2022), https://www.consumerfinance.gov/about-us/blog/transcript-withholding-holds-back-workers-and-wages

CFPB, *CFPB Takes Action Against Student Lender for Misleading Borrowers About Income Share Agreements* (Sept. 7, 2021), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-student-lender-for-misleading-borrowers-about-income-share-agreements

CFPB Confirms Effective Date for Debt Collection Final Rules

JUL 30, 2021

WASHINGTON, D.C. – The Consumer Financial Protection Bureau (CFPB) today announced that two final rules issued under the Fair Debt Collection Practices Act (FDCPA) will take effect as planned, on November 30, 2021. The CFPB issued a proposal (https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-delay-of-effective-date-for-recent-debt-collection-rules/) in April 2021 that, if finalized, would have extended the effective dates to January 29, 2022. The CFPB has now determined that such an extension is unnecessary. Following this announcement, the CFPB will publish a formal notice in the *Federal Register* withdrawing the April 2021 proposal.

The CFPB proposed extending the final rules' effective date by 60 days to allow stakeholders affected by the COVID-19 pandemic additional time to review and implement the rules. The public comments generally did not support an extension. Most industry commenters stated that they would be prepared to comply with the final rules by November 30, 2021. Although consumer advocate commenters generally supported extending the effective date, they did not focus on whether additional time is needed to implement the rules. The alternative basis for an extension that many commenters urged, a reconsideration of the rules, was beyond the scope of the NPRM and could raise concerns under the Administrative Procedure Act. Nothing in this decision precludes the CFPB from reconsidering the debt collection rules at a later date.

Two final rules under the FDCPA will take effect in November. The first rule, issued in October 2020 (https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-issues-final-rule-implement-fair-debt-collection-practices-act/), focuses on debt collection communications and clarifies the FDCPA's prohibitions on harassment and abuse, false or misleading representations, and unfair practices by debt collectors when collecting consumer debt. The second rule, issued in December 2020 (https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-issues-final-rule-on-consumer-disclosures-related-to-debt-collection/),

clarifies disclosures debt collectors must provide to consumers at the beginning of collection communications. The second rule also prohibits debt collectors from suing or threatening to sue consumers on time-barred debt. Additionally, the second rule requires debt collectors to take specific steps to disclose the existence of a debt to consumers before reporting information about the debt to a consumer reporting agency.

The CFPB is committed to informing consumers about their rights and protections under the rules and assisting debt collectors in implementing them. **Consumer education materials** (https://www.consumerfinance.gov/consumer-tools/debt-collection/) on debt collection and **resources to help debt collectors** (https://www.consumerfinance.gov/compliance/compliance-resources/other-applicable-requirements/debt-collection/) understand, implement, and comply with the rules are available through consumerfinance.gov.

The CFPB will consider additional guidance for debt collectors, including those that service mortgage loans, as necessary. The CFPB recognizes that mortgage servicers are expected to receive a potentially historically high number of loss mitigation inquiries in the fall as large numbers of borrowers exit forbearance and that, as a result, mortgage servicers in particular may face capacity constraints. The CFPB will continue to work with all market participants to ensure a smooth and successful implementation.

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The Consumer Financial Protection Bureau (CFPB) is a 21st century agency that helps consumer finance markets work by making rules more effective, by consistently and fairly enforcing those rules, and by empowering consumers to take more control over their economic lives. For more information, visit ***www.consumerfinance.gov*** (cfpb.gov/).

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Consumer Financial Protection Bureau

1700 G Street NW, Washington, DC 20552

December 18, 2020

Executive Summary of the December 2020 Debt Collection Rule

On December 18, 2020, the Consumer Financial Protection Bureau (Bureau) issued a final rule (December 2020 Rule) amending Regulation F to provide additional requirements regarding validation information and disclosures provided at the outset of debt collection communications, prohibit suits and threats of suits regarding time-barred debt, and identify actions that must be taken before a debt collector may report information about a debt to consumer reporting agencies (CRAs).

Background

In 2019, the Bureau published a notice of proposed rulemaking (2019 Proposal) to amend Regulation F, which implements the Fair Debt Collection Practices Act (FDCPA), to prescribe federal rules governing the activities of debt collectors. In addition, the Bureau published a supplemental notice of proposed rulemaking on March 3, 2020 (2020 Supplemental Proposal) proposing disclosure requirements related to the collection of time-barred debt.

This is a Compliance Aid issued by the Consumer Financial Protection Bureau. The Bureau published a Policy Statement on Compliance Aids, available at https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/policy-statement-compliance-aids/, that explains the Bureau's approach to Compliance Aids.

On October 30, 2020,[1] the Bureau issued a final rule (October 2020 Rule) to amend Regulation F to address most of the provisions in the 2019 Proposal, including communications in connection with debt collection and the interpretation and application of the FDCPA's prohibitions on harassment or abuse, false or misleading representations, and unfair practices in debt collection.

To address the remaining issues from the 2019 Proposal and the 2020 Supplemental Proposal, the Bureau has issued the December 2020 Rule. This summary discusses that December 2020 rule, specifically, the 1) requirements to provide validation information at the outset of collection communications, 2) required actions prior to the debt collector reporting a consumer's debt to CRAs, including the three major credit reporting agencies, and 3) a prohibition on suing or threatening to sue a consumer to collect a debt for which the applicable statute of limitations has expired (a "time-barred debt").[2] The Bureau is not finalizing the time-barred debt disclosures proposed in the 2020 Supplemental Proposal.[3]

Validation Information Requirements and Disclosures

The FDCPA requires a debt collector to provide the consumer with certain information when the debt collector first communicates with the consumer to collect the debt or shortly thereafter. The December 2020 Rule implements the FDCPA's validation information requirement. The Rule requires the debt collector to provide the consumer with certain information related to the debt and the consumer's rights (the "validation information") and imposes certain timing and delivery requirements. When this validation information is provided in writing or electronically, the document containing the information is commonly referred to as a "validation notice."

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[1] The rule was issued on the Bureau's website on October 30, 2020, and it was published in the *Federal Register* on November 30, 2020. 85 FR 76734 (Nov. 30, 202o). The December 2020 Rule refers to the October 2020 Rule as the "November 2020 Final Rule." More information about the October 2020 Rule can be found in the October 2020 Rule Executive Summary.

[2] The December 2020 Rule is effective November 30, 2021.

[3] While these disclosures are not being finalized, note that the FDCPA and October 2020 Rule requirements still apply to communications about time-barred debt. For example, a debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of a time-barred debt. Additionally, a debt collector may not use unfair or unconscionable means to collect or attempt to collect a time-barred debt.

The Rule clarifies that the debt collector may provide the validation information in a validation notice delivered in writing or electronically.[4] The Rule's content requirements, the timing and delivery requirements, validation period requirements, and the model notice safe harbors are discussed below.

Required Content

Under the December 2020 Rule, the validation notice must include the following validation information:

- *Debt collector communication disclosure:* A statement that indicates the communication is from a debt collector.
- *Name*[5] *and mailing information:* The debt collector's name and mailing address, the name and mailing address of the consumer who owes the debt, and the name of the creditor to whom the debt is currently owed. Also, if the validation information is provided in connection with a debt related to a consumer financial product or service (e.g., credit card debt, mortgage-related debt), the name of the creditor as of the itemization date (see below regarding "itemization date").
- *Account number:* The account number (full or truncated) associated with the debt.
- *Itemization-related information*:[6] An itemization of the current amount of the debt reflecting interest, fees, payments, and credits since the itemization date. The "itemization date" reflects an event in the debt's history that provides a reference point that consumers may recognize. The debt collector may select one of five reference dates as the itemization date: 1) the last statement date; 2) the charge-off date; 3) the last payment date; 4) the

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[4] The Rule also allows the debt collector the option to provide the validation information orally during the initial communication. However, the Bureau notes that it might be difficult for a debt collector to convey all of the required information orally and in a way that meets the requirements of the regulation. As a result, this summary focuses on the requirements as they apply to validation notices sent by written and electronic delivery methods.

[5] The December 2020 Rule allows the debt collector to disclose the trade name or "doing business as" (d/b/a) name instead of the legal name for the debt collector, the creditor to whom the debt is currently owed, and the creditor that owned the debt as of the itemization date.

[6] If the debt is a residential mortgage debt and a periodic statement is required under Regulation Z at the time the debt collector provides a validation notice, the December 2020 Rule establishes a special rule that allows the debt collector to provide the most recent periodic statement in lieu of certain itemization-related information requirements.

transaction date; or 5) the judgment date. The debt collector may disclose the itemized information as of that itemization date on a separate page provided in the same communication with the validation notice if the debt collector includes on the validation notice, where the itemization would have appeared, a statement referring to that separate page.

- *Current amount of the debt:* The amount of the debt as of when the validation information is provided.
- *Information about consumer protections:* Statements about the consumer's right to dispute the debt and request original-creditor information, and rights that apply if the consumer completes those actions. The statements must include the date the validation period (i.e., the 30-day period, as discussed below, during which the consumer's submission of disputes and requests for original-creditor information about the debt obligates the debt collector to respond before resuming collection of the debt) will end. Additionally, for consumer financial product or service debts, a statement directing the consumer to a page on the Bureau's website with more information regarding consumer protections in debt collection.
- *Consumer-response information:* Prepared statements and prompts that the consumer may use to take certain actions, such as disputing the debt. On the model notice, the consumer-response information is formatted as a tear-off that the consumer may detach and return to the debt collector, if the consumer chooses. If the validation notice is provided electronically, the consumer-response information must include a statement explaining how the consumer can take these actions electronically.

The contents above must be "clear and conspicuous," which is defined in the December 2020 Rule to mean readily understandable. If the validation notice is provided in writing or electronically, the location and type size also must be readily noticeable and legible to consumers.

Optional Content

In addition to the required content, if a debt collector wishes to retain the safe harbor for using the model notice (discussed below), the debt collector may also include certain optional content in the validation notice, provided that the optional content is no more prominent than the required content. Optional content includes: 1) the debt collector's telephone contact information, 2) a reference code the debt collector uses to identify the consumer or the particular debt, 3) certain payment disclosures, 4) certain electronic communication information, such the debt collector's website or email address, 5) certain Spanish-language disclosures regarding how a consumer may request a Spanish-language validation notice, 6) the merchant brand, affinity brand, or facility

name associated with the debt, and 7) disclosures specifically required under (or that provide safe harbor under) other applicable law.[7]

If the validation information is provided electronically, the December 2020 Rule allows the debt collector the option to vary the format or content of the notice in certain places to accommodate the electronic delivery, such as by including hyperlinks or formatting consumer response prompts into fillable fields.

Delivery Method and Timing Requirements

The validation notice must be provided either: 1) in the debt collector's initial communication to the consumer or 2) within 5 calendar days after the initial communication.[8] For purposes of the validation information, "initial communication" means the first time the debt collector conveys information to the consumer about the debt, directly or indirectly. If the consumer pays off the debt before the validation information is required to be sent (i.e., prior to the end of the 5 calendar days after the initial communication), the debt collector is not required to provide the information.

If the debt collector provides the validation notice *in the initial communication*, the debt collector can provide the required information in whichever method the debt collector chooses for the initial communication itself. If provided in the initial communication electronically, the debt collector need not comply with E-SIGN requirements, but must comply with the general disclosure delivery requirements in the October 2020 Rule (i.e., in a manner reasonably expected to provide actual notice and in a form the consumer may keep and access later). The October 2020 Rule also contains additional requirements related to electronic disclosures.

If the debt collector does not provide the validation information in the initial communication, the debt collector generally must provide the validation notice no more than *5 calendar days after the initial communication*. If providing the validation notice during this later period, it must meet the general disclosure delivery requirements in the October 2020 Rule. If electronic, it must also meet

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[7] If the debt is *not* related to a consumer financial product or service, the debt collector also has the option to include the content required for validation information that is related to a consumer financial product or service (i.e., the name of the creditor that owned the debt as of the itemization date and specific statements about consumer protections).

[8] If providing the validation information orally, the debt collector may only provide it during the initial communication. The debt collector may not provide the validation information orally after the initial communication. As discussed above, this summary discusses the requirements for the written and electronic delivery methods.

the electronic disclosure requirements in the October 2020 Rule, and the debt collector must have E-SIGN consent.

For purposes of the validation information, the initial communication does not include formal civil action pleadings (including proof of claims filed in accordance with the United States Bankruptcy Code). Additionally, it does not include any form or notice that is not related to the collection of debt and that is expressly required by the Internal Revenue Code, Title V of the Gramm-Leach-Bliley Act, or any federal or state law or regulation mandating notice of a security breach or privacy risk.

The December 2020 Rule revises the definition of consumer used in the October 2020 Rule. "Consumer" now includes both living and deceased consumers. As a result, the debt collector must provide the validation notice either to the living consumer, or, if the debt collector knows or should know the consumer is deceased prior to providing the validation notice, to the person authorized to act on behalf of the deceased consumer's estate (e.g., an executor, administrator, or personal representative).

Validation Period Requirements

Under the December 2020 Rule, the debt collector must allow the consumer 30 calendar days from the date the consumer receives, or is assumed to have received, the validation notice, to dispute the debt or request original-creditor information about the debt.[9] This 30-day period is identified in the rule as the "validation period." A debt collector may use the date on which the consumer is assumed to receive the validation notice to calculate the end date of the validation period (even if the debt collector later learns when the consumer received the notice). A consumer is assumed to have received the validation notice 5 business days[10] after the date the debt collector sent it.

During the validation period, the debt collector must not engage in collection activities or communications that overshadow, are inconsistent with, or would interfere with the consumer's rights to dispute the debt or request original-creditor information. Additionally, if the consumer

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[9] Similarly, if the debt collector provides the validation information orally it must allow the consumer 30 calendar days from the date the consumer receives the validation information. As discussed above, the summary discusses requirements for the written and electronic delivery methods.

[10] For purposes of the December 2020 Rule, business days do not include Federal holidays, Saturdays, and Sundays.

disputes the debt or requests original-creditor information in writing[11] within the validation period, the debt collector must cease collection of the debt, or the disputed portion, until the debt collector provides the information needed to verify the debt or provides the original-creditor information.

Safe Harbor for Model Validation Notice Use

Under the December 2020 Rule, a debt collector who uses the model validation notice complies with the Rule's content requirements, including that the notice be clear and conspicuous. Use of the model validation notice also would not constitute a violation of the October 2020 Rule's prohibition on conduct that "overshadows" a consumer's rights during the validation period.

Additionally, a debt collector receives this safe harbor if it uses any of the specified variations of the model notice in Appendix B, or if it provides a notice substantially similar to the model notice in Appendix B. This includes adding any of the optional disclosures specifically identified in the rule, omitting optional disclosures that appear on the model notice, or providing certain disclosures on a separate page, as provided for in the Rule.

If a debt collector includes any additional disclosures beyond: 1) the required validation information; 2) the optional disclosures identified in the rule; or 3) any changes to the form that, if included, still leave the form substantially similar in substance, clarity, and meaningful sequence to the model notice, then the safe harbor generally *does not* apply with respect to the entirety of the validation notice.

The safe harbor *does not* cover validation notice delivery method and timing requirements.

Translation into Other Languages

Generally, the December 2020 Rule allows the debt collector the option to send the consumer a validation notice completely and accurately translated into any language. If a debt collector chooses to offer translated validation notices, the debt collector must provide the translated notice with an English-language notice in the same communication as the translated validation notice.

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[11] Note that the October 2020 Rule allows a consumer to dispute the validity of the debt or request original-creditor information electronically through any medium that the debt collector accepts electronic communications from consumers.

The debt collector may provide the translated notice separately if it previously provided the consumer an English-language notice.

Under the December 2020 Rule, the debt collector must provide a Spanish-language validation notice if it included the optional disclosure notifying the consumer of the ability to request Spanish translation (discussed above in the Optional Content section), and the consumer made that request. The debt collector must provide the consumer a validation notice completely and accurately translated into Spanish.[12]

Required Actions Before Credit Reporting

Some debt collectors have historically engaged in "passive collection," the practice of furnishing collection information about a debt to a CRA without first taking an action to notify the consumer about the debt. The December 2020 Rule prohibits this practice.

Under the December 2020 Rule, before a debt collector furnishes information to a CRA the debt collector must do one of the following:

1. Speak with the consumer in person about the debt;
2. Speak with the consumer by telephone about the debt;
3. Mail the consumer a letter about the debt and wait a reasonable period of time to receive a notice of undeliverability; or
4. Send the consumer a message about the debt by electronic communication and wait a reasonable period of time to receive a notice of undeliverability.

Each of the four actions identified above requires the debt collector to convey information "about the debt" to the consumer. Providing the validation information, discussed above, is one way to comply with this requirement, although it is not the only way.

[12] The Bureau plans to make available on its website, prior to the effective date of the December 2020 Rule, a Spanish-language translation of the validation notice. The language of a validation notice that a debt collector obtains from the Bureau's website is considered a complete and accurate translation.

In taking any of the four actions above, a debt collector must comply with the requirements and prohibitions in the October 2020 Rule, including, for example, the prohibition on communications at inconvenient or unusual times or places, as applicable.

If a debt collector chooses to comply with this requirement by mailing a letter or sending a message electronically, the debt collector cannot immediately begin furnishing information to the CRAs after doing so. In these circumstances, the December 2020 Rule requires a debt collector to wait a reasonable period of time to receive a notice of undeliverability before furnishing information to a CRA. The December 2020 Rule provides that a period of 14 calendar days after the letter or electronic message was sent is deemed a "reasonable period of time." During the "reasonable period of time," the debt collector must permit receipt of, and monitor for, notifications of undeliverability from communications providers.

If the debt collector receives a notice of undeliverability during the "reasonable period of time," the debt collector must not furnish information about the debt to a CRA until it resubmits the information about the debt to the consumer using one of the methods identified above. For example, if the debt collector receives a notice of undeliverability during the "reasonable period of time" after sending an email about the debt to the consumer, the debt collector may not furnish information to a CRA until it either 1) speaks with the consumer in person, 2) speaks with the consumer by telephone, 3) mails a letter and waits another reasonable waiting period, or 4) sends another electronic communication and waits another reasonable waiting period. However, if the debt collector *does not* receive a notice that the letter or electronic message was undeliverable during that reasonable waiting period, the debt collector may furnish information about the debt to a CRA, even if the debt collector later receives a notice of undeliverability.

The requirements under the prohibition on passive collection do not apply when furnishing information to certain specialty CRAs that compile and maintain information on check writing history.

Time-Barred Debt

Time-barred debts are debts for which the applicable statute of limitations has expired. The statute of limitations is the period during which a person can bring a legal action to collect the debt.

Under the December 2020 Rule, a debt collector is prohibited from bringing or threatening to bring a legal action against a consumer to collect a time-barred debt. Proofs of claim filed in connection with a bankruptcy proceeding are not included in this prohibition.

Additional resources and implementation support

Other implementation resources and updates on future debt collection rulemakings are available at https://www.consumerfinance.gov/policy-compliance/guidance/other-applicable-requirements/debt-collection/.

Consumer Financial Protection Bureau

1700 G Street NW, Washington, DC 20552

Executive Summary of the October 2020 Debt Collection Final Rule

On October 30, 2020, the Consumer Financial Protection Bureau (Bureau) issued a final rule (Debt Collection Rule or Rule) implementing the Fair Debt Collection Practices Act (FDCPA).[1] The Debt Collection Rule is available at https://www.consumerfinance.gov/rules-policy/final-rules/debt-collection-practices-regulation-f/. The Debt Collection Rule will become effective one year after publication in the Federal Register.

Background

In 1977, Congress passed the FDCPA to: eliminate abusive debt collection practices by debt collectors; ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged; and promote consistent action to protect consumers against debt collection abuses.

This is a Compliance Aid issued by the Consumer Financial Protection Bureau. The Bureau published a Policy Statement on Compliance Aids, available at https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/policy-statement-compliance-aids/, that explains the Bureau's approach to Compliance Aids.

This executive summary was originally posted on October 30, 2020 and was revised on February 8, 2021 to correct the knowledge standard for the prohibition on a debt collector using a consumer's employer-provided email address.

[1] The Bureau is not relying on its Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) authority under the Dodd-Frank Act for any portion of the October 2020 Debt Collection Rule.

In 2019, the Bureau issued a notice of proposed rulemaking (2019 Proposal) to amend Regulation F, which implements the FDCPA, to prescribe Federal rules governing the activities of debt collectors. In the 2019 Proposal, the Bureau proposed to, among other things, address communications in connection with debt collection; interpret and apply prohibitions on harassment or abuse, false or misleading representations, and unfair practices in debt collection; and clarify requirements for certain consumer-facing debt collection disclosures.

On March 3, 2020, the Bureau published a supplemental notice of proposed rulemaking (2020 Supplemental Proposal). If finalized as proposed, the 2020 Supplemental Proposal would require debt collectors to make certain disclosures when collecting debts for which the applicable statute of limitations has expired, known as time-barred debts.

This summary discusses the Debt Collection Rule issued on October 30, 2020. The Debt Collection Rule finalizes, as proposed or with modifications, most topics addressed in the 2019 Proposal. The Bureau intends to issue a subsequent disclosure-focused final rule in December 2020 regarding certain provisions of the 2019 Proposal as well as the disclosures proposed in the 2020 Supplemental Proposal.

Coverage and Definitions

The Debt Collection Rule implements and clarifies the FDCPA's definitions of "debt collector" and "debt." The Rule applies to "debt collectors" and "debts" as those terms are defined in the FDCPA and the Rule.

The Rule also applies to debt collector "communication" with consumers. The Rule clarifies that the FDCPA's definition of communication includes newer electronic media, such as email, text messaging, and social media.

Attempt to communicate

The Debt Collection Rule includes the term "attempt to communicate," and defines it as any act to initiate a communication or other contact about a debt with any person through any medium. An attempt to communicate includes an act to initiate a communication, or to solicit a response from a person, that is not successful (for example, a debt collector calls a consumer, but the consumer does not answer the phone). A limited-content voicemail message, discussed below, is an attempt to communicate under the Rule.

Limited-Content Message

A "limited-content message" is defined under the Rule as a *voicemail* message for a consumer that includes: (1) a business name for the debt collector (that does not indicate that the debt collector is in the debt collection business); (2) a request that the consumer reply to the message; (3) the name (or names) of one or more person(s) whom the consumer can contact to reply to the debt collector; and (4) a phone number (or numbers) that the consumer can use to reply to the debt collector. A limited-content message also may include: (1) a salutation; (2) the date and time of the message; (3) suggested dates and times for the consumer to reply to the message; and (4) a statement that if the consumer replies, the consumer may speak to any of the company's representatives or associates. An example of a limited-content voicemail message is: "This is Robin Smith calling from ABC Inc. Please contact me or Jim Johnson at 1-800-555-1212."

A limited-content message may only include the required and optional information above. Because a limited-content message must be "for a consumer," a message knowingly left for a third party is not a limited-content message.

Communications in connection with debt collection

The Debt Collection Rule generally restates the FDCPA's prohibitions on certain communications with a consumer,[2] including the prohibition on communications: at unusual times or places; at times or places that a debt collector knows or should know are inconvenient to the consumer; at the consumer's place of employment if a debt collector knows or has reason to know that the employer prohibits such communications; and if a debt collector knows the consumer is represented by an attorney. The Rule also prohibits attempts to communicate under these circumstances.

With respect to the FDCPA's prohibition on communicating or attempting to communicate with a consumer at an unusual or inconvenient time or place, the Rule clarifies that a consumer does not need to use the word "inconvenient" to designate a time or place as inconvenient, and that a debt collector may ask follow-up questions to clarify a consumer's requested designations. The Rule clarifies that calls to mobile telephones and electronic communications, such as email or text messages, are subject to the prohibition on communicating or attempting to communicate with a consumer at an unusual or inconvenient time or place. The Rule further clarifies that a debt

[2] The Rule interprets the definition of consumer in FDCPA section 805(d) for certain communications provisions to include personal representatives of a deceased consumer's estate, surviving spouses, parents of deceased minors, and confirmed successors in interest.

collector does not violate the Rule regarding unusual or inconvenient places by calling a consumer's mobile telephone or sending an electronic communication, unless the debt collector knows the consumer is at an unusual or inconvenient place.

The Rule prohibits a debt collector from communicating or attempting to communicate with a person through a specific medium of communication (for example, email or telephone calls) if the person has requested that the debt collector not use that medium. The Rule also generally prohibits a debt collector from communicating or attempting to communicate with a consumer using an email address that the debt collector knows is provided to the consumer by the consumer's employer.

The Rule generally restates the FDCPA's requirement that a debt collector cease communicating with a consumer regarding a debt after the consumer notifies a debt collector in writing that the consumer refuses to pay that debt. The Rule also provides that a consumer may submit a written cease communication request using an electronic communication medium, such as email or through a website portal where the debt collector accepts electronic communications from consumers.

The Rule generally restates and clarifies the FDCPA's prohibition on communications with third parties about a consumer's debt and restates the FDCPA's limitations and requirements on communications to acquire location information. With regard to acquiring a consumer's location information, the Rule clarifies how debt collectors can locate the executor, administrator, or personal representative of a deceased consumer's estate.

Opt-out of electronic communications

The Debt Collection Rule requires a debt collector who communicates or attempts to communicate electronically with a consumer to include in each communication or attempt to communicate a reasonable and simple method that the consumer can use to opt out of additional communications and attempts to communicate (for example, "Reply STOP to stop texts to this telephone number"). This requirement applies to a specific email address, telephone number, or other electronic-medium address (such as a social media name or account). If a consumer opts out of receiving electronic communications from a debt collector, a debt collector may respond once, confirming the consumer's request to opt out and stating that the debt collector will honor it.

Bona fide error defense when communicating by email or text message

The Debt Collection Rule establishes procedures debt collectors can follow to raise a bona fide error defense to civil liability for unintentional violations of the Rule's prohibition against third-party disclosures. The Rule has separate procedures for email messages and text messages.

When using *email*, a debt collector may raise a bona fide error defense if it maintains procedures to reasonably confirm and document that it did not communicate with the consumer by sending an email to an email address that the debt collector knows has led to a prohibited third-party disclosure and communicated with the consumer by email using one of the methods below.

- *Direct communication with the consumer.* The email address is one that the consumer used to communicate with the debt collector about the debt and the consumer has not since opted out of communications to that email address, or the email address is one for which the debt collector previously received the consumer's consent to use and the consumer has not since withdrawn consent.

- *Creditor communication with the consumer.* All of the following criteria must be met in order to use an email address based on communications by the creditor: (1) the creditor obtained the email address from the consumer; (2) the creditor used the email address to communicate with the consumer about the account and the consumer did not ask the creditor to stop using it; (3) before the debt collector used the email address to communicate with the consumer about the debt, the creditor sent the consumer a written or electronic notice that clearly and conspicuously disclosed the information required under the Rule (including the right to opt out of email communications); (4) the opt-out period has expired and the consumer has not opted out; and (5) the email address has a domain name that is available for use by the general public (*e.g.*, @gmail.com), unless the debt collector knows the address is provided by the consumer's employer.

- *Prior debt collector communication with the consumer.* All of the following criteria must be met in order to use an email based on communication by the prior debt collector: (1) any prior debt collector obtained the email address from the consumer in accordance with either of the two procedures described above; (2) the immediately prior debt collector used the email address to communicate with the consumer about the debt; and (3) the consumer did not opt out of such communications.

When using *text messaging*, a debt collector may raise a bona fide error defense if it maintains procedures to reasonably confirm and document that it: did not communicate with the consumer by sending a text message to a telephone number that the debt collector knows has led to a prohibited third-party disclosure; and communicated with the consumer by text message using a telephone number that:

- (1) The consumer used to communicate about the debt with the debt collector by text message, as long as the consumer has not since opted out; and (2) in the past 60 days, the consumer used to send a text message to the debt collector or the debt collector confirmed had not been reassigned from the consumer to another user;[3] or
- (1) The consumer gave consent to use, as long as the consumer has not since withdrawn that consent; and (2) in the past 60 days, the consumer provided or renewed their consent to use or the debt collector confirmed had not been reassigned from the consumer to another user.

Harassing, oppressive, or abusive conduct

The FDCPA prohibits conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. The Rule clarifies that this prohibition applies to telephone calls as well as other communication media, such as email and text messages. For example, if a debt collector sends a consumer numerous, unsolicited text messages per day for several consecutive days, the debt collector may violate the prohibition. The Rule also clarifies that all of a debt collector's conduct, taken together, is considered in determining whether the debt collector's conduct violates the prohibition on harassing, oppressive, or abusive conduct even if, individually, the conduct would not have violated the prohibition.

Telephone call frequency rebuttable presumption

The Rule restates the FDCPA's specific prohibition against causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. The Rule clarifies that this provision applies to a telephone call that goes directly to voicemail (*i.e.*, a ringless voicemail) but does not apply to sending an electronic message (*e.g.*, a text message or an email). The Rule also creates a

[3] The Rule requires the use of a complete and accurate database to confirm that the telephone number has not been reassigned from the consumer to another user.

rebuttable presumption of compliance with, and of a violation of, this prohibition based on telephone call frequency, as follows:

- A debt collector is presumed to *comply* with the prohibition if the debt collector places telephone calls to a particular person in connection with the collection of a particular debt[4] seven or fewer times within seven consecutive days *and* not within seven consecutive days[5] after having had a telephone conversation about the debt.
- A debt collector is presumed to *violate* the prohibition if the debt collector places telephone calls to a particular person in connection with the collection of a particular debt more than seven times within seven consecutive days *or* within seven consecutive days of having had a telephone conversation about the debt.

The Rule identifies certain telephone calls that do not count toward these telephone call frequencies, including: calls placed with the consumer's prior consent, calls not connected to the dialed number, and calls placed to certain professionals.

The Rule includes the following non-exhaustive list of factors that may *rebut* the presumption of *compliance*:

- The frequency and pattern of telephone calls the debt collector places to a person, (for example, rapid succession calling);
- The frequency and pattern of voicemails that the debt collector leaves for a person;
- The content of a person's prior communications with the debt collector (for example, a prior communication that the person did not want to be contacted again about the debt); and
- The debt collector's conduct in prior communications or attempts to communicate with the person (for example, if a debt collector previously used obscene language).

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[4] The Rule defines *particular debt* to mean each of a consumer's debts in collection. However, in the case of student loan debts, the term particular debt means all student loan debts that a consumer owes or allegedly owes that were serviced under a single account number at the time the debts were obtained by a debt collector.

[5] The date of the telephone conversation is the first day of the seven-consecutive-day period for both the presumption of compliance and the presumption of a violation.

The Rule includes the following non-exhaustive list of factors that may rebut the presumption of *a violation*:

- Whether a debt collector placed a telephone call to comply with applicable law;
- Whether a telephone call was directly related to active litigation involving the collection of a particular debt;
- Whether a debt collector placed a telephone call in response to a consumer's request for additional information (when the exclusion for telephone calls made with the consumer's prior consent given directly to the debt collector does not apply); and
- Whether a debt collector placed a telephone call to convey information giving the consumer an opportunity to avoid a demonstrably negative effect, where the negative effect is outside the debt collector's control, and where time is of the essence.

For each list of non-exhaustive factors that may rebut the presumption of compliance or a violation above, the factors may be considered either individually, in combination with one another, or with other factors not listed.

False, deceptive, or misleading representations or means and unfair or unconscionable means

The Debt Collection Rule generally restates the FDCPA's prohibitions regarding the use of false, deceptive, or misleading representations or means and unfair or unconscionable means in connection with the collection of any debt. The Rule clarifies how debt collectors can use an assumed name without violating these prohibitions.

Use of social media

The Debt Collection Rule clarifies how the FDCPA's prohibitions regarding the use of false, deceptive, or misleading representations or means apply to a debt collector's use of social media to communicate with a consumer or to obtain location information. Under the Rule, a debt collector must not post a message regarding the collection of a debt on the public part of a person's social media page, including the part that is viewable only by the person's social media contacts. A debt collector may send a private message over social media unless, for example, the consumer has requested that the debt collector not use that medium to communicate. If a debt collector chooses to send a private social media message requesting to be added as one of the consumer's contacts, a debt collector must disclose his or her identity as a debt collector. The Rule also clarifies that a

debt collector violates the FDCPA and the Rule by communicating with the wrong person through a private message.

Other prohibited practices

The Debt Collection Rule generally restates the FDCPA's requirements regarding: the application of payments across multiple debts collected by the same debt collector; where a debt collector may file lawsuits against consumers: and the FDCPA's prohibitions on furnishing certain deceptive forms.

Ban on certain debt transfers

The Debt Collection Rule generally prohibits a debt collector from selling, transferring for consideration, or placing a debt for collection if a debt collector knows or should know that the debt has been paid or settled, or discharged in bankruptcy. The Rule provides exceptions to this general ban for: (1) transfers to the debt's owner or to a previous owner (if authorized under the original contract between the debt collector and the previous owner); (2) transfers as a result of a merger, acquisition, purchase and assumption transaction, or a transfer of substantially all the debt collector's assets; (3) sales, transfers, or placements of secured debt discharged in bankruptcy if certain conditions in the Rule are met; and (4) securitization of debt or pledging of a portfolio of debt as collateral.

Disputes

Generally, the Debt Collection Rule restates the FDCPA's requirement that a debt collector must cease collection of a debt, or any disputed portion of a debt, when a debt collector receives a written dispute. A debt collector may not resume collection of that debt until the debt collector responds to the consumer's dispute in writing or electronically. If the consumer has submitted a dispute, a debt collector must provide a verification of the debt or of a judgment to the consumer. If a debt collector determines that the consumer's dispute is duplicative of an earlier dispute, as defined in the Rule, a debt collector must either: (1) provide the consumer with a brief statement of the reasons for the determination and refer the consumer to the debt collector's response to the earlier dispute; or (2) send a verification of the debt or of a judgment to the consumer.

Disclosures

The FDCPA requires that debt collectors provide consumers with certain oral and written disclosures throughout the course of their debt collection activities. The Rule generally restates

the FDCPA's requirement that a debt collector must disclose in their initial, and in each subsequent communication with the consumer, that the communication is from a debt collector (*i.e.*, the "mini-Miranda" disclosure). The Rule requires a debt collector to make these disclosures in the same language, or languages, used for the rest of the communication in which the disclosures are conveyed.

The Debt Collection Rule clarifies that all required disclosures must be sent in a manner that is reasonably expected to provide actual notice and required written disclosures must be sent in a form that the consumer may keep and access later. To meet the general standard when sending required written disclosures (*e.g.*, the validation notice described in FDCPA section 809—if that notice is not in the initial communication, responses to consumer requests for original-creditor information, and responses to consumer disputes of debts) electronically, a debt collector must send the disclosures in accordance with the Electronic Signatures in Global and National Commerce Act (E-SIGN Act)'s consumer-consent requirements.

The Rule creates a safe harbor for sending required disclosures if the debt collector mails a printed copy of the disclosure to the consumer's last known address. This safe harbor applies unless the debt collector, at the time of mailing, knows or should know that the consumer does not currently reside at, or receive mail in, that location.

Record retention

The Debt Collection Rule requires retention of evidence of compliance or noncompliance with the Rule starting on the date that the debt collector begins collection activity on a debt until three years after the debt collector's last collection activity on the debt. If a debt collector chooses to record telephone calls, a debt collector must retain those recordings for three years after the date of the telephone call.

Additional resources and implementation support

Other implementation resources and updates on future debt collection rulemakings are available at https://www.consumerfinance.gov/policy-compliance/guidance/other-applicable-requirements/debt-collection/.

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1006

[Docket No. CFPB–2019–0022]

RIN 3170–AA41

Debt Collection Practices (Regulation F)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretation.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing this final rule to revise Regulation F, which implements the Fair Debt Collection Practices Act (FDCPA). The final rule governs certain activities by debt collectors, as that term is defined in the FDCPA. Among other things, the final rule clarifies the information that a debt collector must provide to a consumer at the outset of debt collection communications, prohibits debt collectors from bringing or threatening to bring a legal action against a consumer to collect a time-barred debt, and requires debt collectors to take certain actions before furnishing information about a consumer's debt to a consumer reporting agency.

DATES: This rule is effective on November 30, 2021.

FOR FURTHER INFORMATION CONTACT: Joel Singerman, Counsel, or Dania Ayoubi, Joseph Baressi, Seth Caffrey, Brandy Hood, David Jacobs, Courtney Jean, Adam Mayle, Kristin McPartland, Michael Silver, Senior Counsels, Office of Regulations, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Summary of the Final Rule

The Bureau is finalizing amendments to Regulation F, 12 CFR part 1006, which implements the FDCPA.[1] The amendments prescribe Federal rules governing the activities of debt collectors, as that term is defined in the FDCPA (debt collectors or FDCPA debt collectors). The final rule clarifies the information that a debt collector must provide to a consumer at the outset of debt collection communications and provides a model validation notice containing such information. The final rule also addresses consumer protection concerns related to passive collections (*i.e.,* the practice of furnishing information about a debt to a consumer reporting agency before communicating with the consumer about the debt) and the collection of debt that is beyond the statute of limitations (*i.e.,* time-barred debt). On November 30, 2020, the Bureau published a final rule in the **Federal Register** that focused on debt collection communications and related practices by debt collectors (November 2020 Final Rule). The November 2020 Final Rule reserved certain sections of Regulation F in anticipation of this final rule.

As discussed in the November 2020 Final Rule, in 1977, Congress passed the FDCPA to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.[2] The statute was a response to ''abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors.'' [3] According to Congress, these practices ''contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.'' [4]

The FDCPA established specific consumer protections, enabling consumers to establish controls on when and how debt collectors contact them, establishing privacy protections surrounding the collection of debts, and protecting consumers from certain collection practices. The FDCPA also established broad consumer protections, prohibiting harassment or abuse, false or misleading representations, and unfair practices. In the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Congress provided the Bureau with authority under the FDCPA to prescribe substantive rules with respect to the collection of debts by debt collectors. The Bureau issues this final rule, like the November 2020 Final Rule, to implement and interpret the FDCPA.

A. Coverage and Organization of the Final Rule

The final rule is based primarily on the Bureau's authority to issue rules to implement the FDCPA and, consequently, covers debt collectors, as that term is defined in the FDCPA.

As revised in the November 2020 Final Rule, Regulation F contains four subparts. Subpart A contains generally applicable provisions, such as definitions that apply throughout the regulation. Subpart B contains rules for FDCPA debt collectors. Subpart C is reserved for any future debt collection rulemakings. Subpart D contains certain miscellaneous provisions. This final rule adds additional provisions in subparts A, B, and D.

B. Scope of the Final Rule

FDCPA section 809(a) requires that a debt collector send a written notice containing certain information about the debt and actions the consumer may take in response (the validation notice) to a consumer within five days of the initial communication, unless such validation information was provided in the initial communication or the consumer has paid the debt.[5] The final rule clarifies the information about the debt and the consumer's rights with respect to the debt that a debt collector must provide to a consumer at the outset of debt collection communications, including (if applicable) on a validation notice. The final rule also requires a debt collector to provide prompts that a consumer can use to dispute the debt, request information about the original creditor, or take certain other actions. The final rule provides a safe harbor for compliance with these disclosure requirements for debt collectors who use the model validation notice or certain variations of the notice.

The final rule also prohibits a debt collector from suing or threatening to sue a consumer to collect time-barred debt. In addition, the final rule prohibits a debt collector from furnishing information about a debt to a consumer reporting agency before engaging in specific outreach to the consumer about the debt. The final rule also addresses certain other disclosure-focused provisions, such as clarifying how a debt collector may respond to a consumer's request for original-creditor information if the original creditor is the same as the current creditor. Additionally, the final rule interprets the definition of consumer under the FDCPA to include deceased natural persons and, relatedly, provides that, if a debt collector knows or should know that the a consumer is deceased, and the debt collector has not previously provided the validation information to the deceased consumer, the debt collector must provide that information to a person who is authorized to act on behalf of the deceased consumer's estate.

[1] 15 U.S.C. 1692 *et seq.*

[2] 15 U.S.C. 1692(e).

[3] 15 U.S.C. 1692(a).

[4] *Id.*

[5] 15 U.S.C. 1692g(a).

memories, disappearance of documents, or otherwise.'' [94] Third, statutes of limitations provide ''certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'' [95] For debt collection claims, the length of the applicable statute of limitations often varies by State and, within each State, by debt type. Although most statutes of limitations applicable to debt collection claims are between three and six years, some are as long as 15 years.

Several commenters addressed proposed § 1006.26(a)(1). One industry commenter confirmed that the proposed definition of statute of limitations comported with debt collectors' understanding of the term. A number of other industry commenters requested that the Bureau modify the definition to account for the fact that it can be challenging to determine the applicable statute of limitations in certain circumstances. For example, two industry commenters requested that the Bureau clarify that, in determining the applicable statute of limitations, a debt collector need only conduct a reasonable investigation based on objectively ascertainable facts, and that a debt collector would only be charged with knowing that the statute of limitations has expired if the law is clearly established. The commenters also requested that the Bureau more specifically define certain elements of the term statute of limitations to lessen the burden on debt collectors of determining whether a debt is time barred. For example, they suggested defining ''applicable law'' as the law of the jurisdiction where the consumer resides or is believed to reside at the time collections begin, or the law of the jurisdiction in which the consumer signed any underlying contract. Commenters suggested that these changes would make it easier for a debt collector to determine the statute of limitations applicable to a particular debt while protecting a debt collector from liability when it is difficult determine the exact date on which a debt becomes time barred.

The Bureau is finalizing § 1006.26(a)(1) as proposed. As industry commenters confirmed, the definition of statute of limitations in § 1006.26(a)(1) is consistent with debt collectors' understanding of the term. The Bureau declines to modify the definition to identify the type of investigation a debt collector must or should undertake to ascertain the applicable statute of limitations. The Bureau also declines to define the term ''applicable law'' in the manner requested by commenters. The Bureau recognizes that, in some cases, it can be challenging and costly for a debt collector to determine what statute of limitations applies to a legal action against the consumer to collect a particular debt, and that, in some cases, the commenters' suggestions could reduce those challenges and costs. The Bureau declines, however, to address the challenges and costs associated with determining whether a debt is time barred by modifying the definition of statute of limitations, a term with a meaning widely understood by debt collectors, or by defining new terms. Comments relating to the difficulty of determining whether a debt is time barred are discussed further in the section-by-section analysis of § 1006.26(b).

26(a)(2) Time-Barred Debt

Proposed § 1006.26(a)(2) defined the term time-barred debt to mean a debt for which the applicable statute of limitations has expired.[96]

As the Bureau explained in the May 2019 proposal, many debt collectors already determine whether the statute of limitations applicable to a debt has expired. Some do so to comply with State and local disclosure laws that require them to inform consumers when debts are time barred.[97] Others do so to assess whether they can sue to collect the debt, which may affect their collection strategy. In addition, the information that debt buyers generally receive when bidding on and purchasing debts, and the information that other debt collectors generally receive at placement, may allow them to determine whether the applicable statute of limitations has expired.[98]

Several commenters addressed proposed § 1006.26(a)(2). An industry commenter confirmed that the proposed definition comported with debt collectors' understanding of the term. Two other industry commenters expressed concern that the term time-barred debt may imply that a debt collector has no right at all to collect the debt, whereas in most jurisdictions a debt's time-barred status only limits the debt collector's right to recover on the debt through a lawsuit. Several industry commenters expressed concern that the proposal seemed to contemplate that a debt is a single amount that becomes time barred at a single moment in time and noted that not all debts operate in that manner. For example, these commenters stated that an installment loan could become time barred on a rolling basis depending on when each installment was due. In addition, according to some commenters, a legal action to collect a debt may be based on more than one legal theory or involve more than one cause of action, and each theory or cause of action may be subject to a different statute of limitations. Similarly, according to some commenters, certain secured debts may be subject to more than one method of suit and more than one statute of limitations. For example, these commenters asserted, in some States a mortgagee may choose whether to pursue a remedy at law on the note, a remedy in equity on the mortgage, or both, and the statute of limitations applicable to these claims may differ. Relatedly, one industry commenter asked the Bureau to clarify that debt collectors are not prohibited from taking legal action to enforce a lien even if a claim on the underlying obligation is time barred. Alternatively, the commenter asked the Bureau to clarify that the requirements of proposed § 1006.26 would apply only when all causes of action associated with the underlying note and with the security instrument are time barred.[99]

The Bureau is finalizing § 1006.26(a)(2) as proposed. As industry commenters confirmed, the definition of time-barred debt in § 1006.26(a)(2) is consistent with debt collectors'

[94] *Id.*

[95] *Young* v. *United States,* 535 U.S. 43, 47 (2002) (quoting *Rotella,* 528 U.S. at 555).

[96] *See* 84 FR 23274, 23328 (May 21, 2019).

[97] *See, e.g.,* Cal. Civ. Code sec. 1788.52(d)(3); Conn. Gen. Stat. sec. 36a–805(a)(14); Mass. Code Regs., tit. 940, § 7.07(24); N.M. Code. R. sec. 12.2.12.9(A); N.Y. Comp. Codes R. & Regs., tit. 23, sec. 1.3; New York City, N.Y., Rules, tit. 6, sec. 2–191(a); W. Va. Code sec. 46a–2–128(f).

[98] *See* Fed. Trade Comm'n, *The Structure and Practices of the Debt Buying Industry,* at 49 (Jan. 2013), *https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf* (FTC Debt Buying Report) (''The data the Commission received from debt buyers suggests that debt buyers usually are likely to know or be able to determine whether the debts on which they are collecting are beyond the statute of limitations.''). Similarly, the majority of respondents to the Bureau's Debt Collection Operations Study reported always or often receiving certain information and documentation that may be relevant to determining whether a debt is time barred, such as debt balance at charge off, account agreement documentation, and billing statements. *See* CFPB Debt Collection Operations Study, *supra* note 37, at 23.

[99] Another commenter seeking clarification on the scope of proposed § 1006.26(b) asserted that *in rem* enforcement of a security instrument is not inherently debt collection. The Bureau notes that § 1006.26, like the rest of this final rule, applies only to FDCPA debt collectors. The Supreme Court recently held that a business engaged in no more than nonjudicial foreclosure proceedings is not an FDCPA debt collector, except for the limited purpose of FDCPA section 808(6). *See Obduskey* v. *McCarthy & Holthus LLP,* 139 S. Ct. 1029 (2019). FDCPA section 808(6) specifically prohibits taking or threatening to take any nonjudicial action in certain circumstances, such as where there is no present right to possession through an enforceable security instrument.

understanding of the term. In response to commenters' concerns that the term time-barred debt might imply that a debt collector has no right to collect the debt, the Bureau notes that, in most jurisdictions, as commenters observed and as is discussed in the section-by-section analysis of § 1006.26(b), a debt is not extinguished when the statute of limitations expires. Rather, in these jurisdictions, a debt collector still may collect the debt using non-litigation means, such as telephone calls and letters, and the Bureau's use of the term time-barred debt neither changes that fact nor is meant to imply otherwise. With respect to industry commenters' concern about debts for which multiple statutes of limitation may be relevant, the Bureau notes that a debt is a time-barred debt under § 1006.26(a)(2) if the applicable statute of limitations has expired. The applicable statute of limitations depends on the specific legal action the debt collector takes or represents that it will take. For some debts, such as certain installment loans and secured debts, it may be the case that one claim associated with a debt is time barred while another claim associated with the debt is not. In such a case, the prohibitions in § 1006.26(b) apply to the time-barred claim only.

26(b) Legal Actions and Threats of Legal Actions Prohibited

The Bureau proposed § 1006.26(b) to prohibit a debt collector from bringing or threatening to bring a legal action against a consumer to collect a debt that the debt collector knows or should know is a time-barred debt.[100] In response to comments, the Bureau is finalizing proposed § 1006.26(b) with two principal changes. First, the Bureau is not adopting the proposed knows-or-should-know standard; instead, a debt collector may violate final § 1006.26(b) even if the debt collector neither knew nor should have known that a debt was time barred. Second, consistent with the Supreme Court's decision in *Midland Funding, LLC* v. *Johnson,* the final rule clarifies that the prohibitions in § 1006.26(b) do not apply to proofs of claim filed in bankruptcy proceedings.[101]

Prohibitions

As the Bureau explained in the May 2019 proposal, in most States the expiration of the applicable statute of limitations, if raised by the consumer as an affirmative defense, precludes the debt collector from recovering on the debt using judicial processes, but it does not extinguish the debt itself.[102] In other words, in most States a debt collector may use non-litigation means to collect a time-barred debt, as long as those means do not violate the FDCPA or other laws. If a debt collector does sue to collect a time-barred debt, and if the consumer proves the expiration of the statute of limitations as an affirmative defense, the court will dismiss the suit.

Suits and threats of suit on time-barred debts can harm consumers in multiple ways. A debt collector's threat to sue on a time-barred debt may prompt some consumers to pay or prioritize that debt over others in the mistaken belief that doing so is necessary to avoid litigation. In some jurisdictions, a consumer's payment on or acknowledgement of a debt can revive the debt collector's right to sue for the entire amount, opening the consumer to new legal liability.[103] Similarly, suits on time-barred debts may lead to judgments against consumers on claims for which those consumers had meritorious defenses, including defenses based on the statute of limitations. Few consumers who are sued for allegedly unpaid debts—whether time barred or not—actually defend themselves in court, and those who do often are unrepresented. As a result, the vast majority of judgments on unpaid debts, including on time-barred debts, are default judgments, entered solely on the representations contained in the debt collector's complaint.[104]

Consumer and consumer advocate commenters generally supported the prohibitions in proposed § 1006.26(b). Many of these commenters also argued that, to prevent deception, the Bureau should prohibit the collection of time-barred debt altogether, even though the Bureau did not propose such a prohibition in the May 2019 proposal or the February 2020 proposal. The Bureau certainly supports measures to prevent deception because of the harm it causes to consumers. However, the Bureau concludes that is not necessary to ban the collection of time-barred debt to prevent potential deception. As discussed in the February 2020 proposal, the Bureau's quantitative testing generally indicates that disclosures, in certain situations, can be effective in curing the potential deception associated with the collection of time-barred debt.[105] The Bureau concludes that a prohibition on the collection of time-barred debt would impose significant burden on debt collectors to identify such debts and would decrease the value of time-barred debts to little or nothing; a debt has little or no value if the owner cannot collect the debt either in litigation or outside of litigation. The Bureau declines to impose such extraordinarily large costs because much less costly measures—namely, disclosures—can be

[100] *See* 84 FR 23274, 23328–29 (May 21, 2019).

[101] 137 S. Ct. 1407 (2017).

[102] *See generally Midland Funding, LLC* v. *Johnson,* 137 S. Ct. 1407, 1411–12 (2017) (noting that under ''the law of many States . . . a creditor has the right to payment of a debt even after the limitations period expires,'' and collecting State laws). In Mississippi and Wisconsin, however, debts are extinguished when the applicable statute of limitations expires. *See* Miss. Code Ann. sec. 15–1–3 (''The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy.''); Wis. Stat. Ann. sec. 893.05 (''When the period within which an action may be commenced on a Wisconsin cause of action has expired, the right is extinguished as well as the remedy.'').

[103] Revival extinguishes the consumer's right to raise the expiration of the statute of limitations as an affirmative defense to litigation; that is, it revives the debt collector's right to sue to collect the debt. Although State revival laws vary, there are generally several circumstances in which revival occurs. First, in some States, a consumer's partial payment on a time-barred debt revives the debt collector's right to sue. Second, in some States, a consumer's written acknowledgement of a time-barred debt revives the debt collector's right to sue. Third, a consumer's oral acknowledgement of a time-barred debt may revive the debt collector's right to sue in some States. *See, e.g., Lima* v. *Schmidt,* 595 So. 2d 624, 631 (La. 1992) (''Our courts have consistently held that renunciation must be clear, direct, and absolute and manifested by words or actions of the party in whose favor prescription has run.'') (citations omitted); 22 Tenn. Pract. Contract Law and Practice § 12:88 (rev. Aug. 2020) (''[T]he defendant may revive a plaintiff's remedy that has been barred by the statute of limitations. This event can occur either when the defendant expressly promises to pay a debt or when the defendant acknowledges the debt *and* expresses a willingness to pay it . . . . The expression of a defendant's willingness to pay might be implied from the words or action of a debtor . . . .'') (citations and internal quotation marks omitted).

[104] *See* FTC Debt Buying Report, *supra* note 98, at 45 (observing that ''90 percent or more of consumers sued in [debt collection actions] do not appear in court to defend,'' which ''creates a risk that consumer will be subject to a default judgment on a time-barred debt''); Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases,* 6 J. Bus. & Tech. L. 259, 265 (2011) (''In the majority of debt buyer cases, the courts grant the debt buyer a default judgment because the consumer has failed to appear for trial . . . . Debtors who do receive notice usually appear without legal representation.''); CFPB Debt Collection Operations Study, *supra* note 37, at 18 (observing that respondents reported obtaining default judgments in 60 to 90 percent of their filed suits); *cf. Kimber* v. *Fed. Fin. Corp.,* 668 F. Supp. 1480, 1478 (M.D. Ala. 1987) (''Because few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts, such consumers would unwittingly acquiesce to such lawsuits. And, even if the consumer realizes that she can use time as a defense, she will more than likely still give in rather than fight the lawsuit because she must still expend energy and resources and subject herself to the embarrassment of going into court to present the defense; this is particularly true in light of the costs of attorneys today.'').

[105] *See* 85 FR 12672, 12677–79 (Mar. 3, 2020).

effective in preventing potential deception.

Moreover, the Bureau emphasizes that prohibiting the collection of time-barred debt when doing so is unnecessary to prevent potential deception is inconsistent with the First Amendment limitations on the Bureau's authority to ban commercial speech. Courts have held that a debt collector who asks a consumer to pay a debt is engaging in commercial speech.[106] Prohibiting the collection of time-barred debt therefore would restrict commercial speech. The Supreme Court has held that restrictions on commercial speech are permissible when they: (1) Are supported by a substantial government interest; (2) directly advance that interest; and (3) are no more extensive than necessary to serve that interest.[107] If the potential deception associated with the collection of time-barred debt can be cured by a disclosure, then prohibiting the collection of time-barred debt would impose a restriction that is more extensive than necessary.[108] As noted above, the Bureau's quantitative testing generally indicates that, in certain situations involving the collection of time-barred debt, disclosures can be effective in curing potential deception. Therefore, the Bureau declines to finalize a prohibition on the collection of time-barred debt.

In addition to consumers and consumer advocates, several industry commenters, Federal agency staff, and one local government commenter expressed support for the proposed prohibitions. Commenters who supported the proposed prohibitions asserted that suits and threats of suit on time-barred debts may induce consumers to make payments they otherwise would not make. Some consumer advocate commenters noted that these payments can revive the debt collector's right to sue in certain jurisdictions. Additionally, consumer advocate commenters asserted that consumers often assume that the mere filing of a lawsuit means that they owe the debt, that the amount owed is accurately stated, and that the debt collector has the legal right to collect the debt, whereas in fact the debt collector may lack support for its claims. These commenters also asserted that consumers generally lack the knowledge and resources to defend their rights in court, and, as a consequence, many claims result in default judgments on debts that were not legally enforceable. Consumer advocate commenters also provided anecdotes and pointed to recent enforcement actions to show that debt collectors continue to sue and threaten to sue on time-barred debt.[109] One industry commenter who supported elements of proposed § 1006.26(b) acknowledged that proposed § 1006.26(b) is consistent with long-standing FDCPA case law.

Several industry commenters who opposed proposed § 1006.26(b) argued that the Bureau should not prohibit suits and threats of suit on time-barred debt because, in most jurisdictions, expiration of the statute of limitations does not prohibit a debt collector from bringing suit but rather provides the consumer with an affirmative defense to liability. According to these commenters, proposed § 1006.26(b) would effectively preempt State affirmative defense laws by making expiration of the statute of limitations a total bar to suit, thereby interfering with debt collectors' right to legal recourse under State law. Relatedly, an industry commenter argued that State courts are capable of addressing situations in which a debt collector sues to collect a time-barred debt, including by dismissing the debt collector's claim and awarding sanctions if appropriate. Another industry commenter asserted that consumers should be responsible for tracking the legal obligations associated with their debts, and that it would be unduly burdensome to require debt collectors to determine whether a debt is time barred, particularly for debt collectors who are small businesses.

Some industry commenters argued that the Bureau lacks the authority to prohibit suits and threats of suit on time-barred debts. For example, several industry commenters argued that proposed § 1006.26(b) exceeds the Bureau's authority because, in their view, nothing in the FDCPA permits the Bureau to preempt State laws relating to debt collection or access to courts or establishes a Federal role in determining State law defenses. Similarly, one industry commenter asserted that proposed § 1006.26(b) contradicts the Federal Rules of Civil Procedure and State-law equivalents and abridges a debt collector's right to petition the courts. The commenter pointed to Federal Rule of Civil Procedure 11, pursuant to which an attorney's claims, defenses, and other legal contentions must be warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law. According to this commenter, the proposed prohibitions conflict with Rule 11 and its equivalents by discouraging debt collectors from filing legitimate lawsuits that argue in good faith for the modification or reversal of existing law.

Final § 1006.26(b) prohibits a debt collector from bringing or threatening to bring a legal action against a consumer to collect a time-barred debt. A debt collector who sues or threatens to sue a consumer to collect a time-barred debt explicitly or implicitly misrepresents to the consumer that the debt is legally enforceable, and that misrepresentation is material to consumers because it may affect their conduct with regard to the collection of that debt, including whether to pay it.[110] The Bureau's consumer testing suggests that consumers often are uncertain about their rights concerning time-barred debt.[111] Consumers sued or threatened with suit on a time-barred debt generally do not recognize that the debt is time barred, that time-barred debts are unenforceable in court, or that they must raise the expiration of the statute of limitations as an affirmative defense.

The prohibitions in final § 1006.26(b) generally are consistent with the current state of the law. Multiple courts have held that suits and threats of suit on time-barred debt violate the FDCPA, reasoning that such practices violate FDCPA section 807's prohibition on false or misleading representations, FDCPA section 808's prohibition on unfair practices, or both.[112] The FTC

[106] *See, e.g., ACA Int'l* v. *Healey,* 457 F. Supp. 3d 17, 25–26 (D. Mass. 2020); *Stover* v. *Fingerhut Direct Mktg.,* 709 F. Supp. 2d 473, 479 (S.D. W.Va. 2009).

[107] *See Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n,* 447 U.S. 557, 566 (1980).

[108] *In re R.M.J.,* 455 U.S. 191, 203 (1982); *see also Pearson* v. *Shalala,* 164 F.3d 650 (D.C. Cir. 1999).

[109] *See, e.g.,* Consent Order ¶¶ 65–69, *In re Encore Capital Grp., Inc.,* No. 2015–CFPB–0022 (Sept. 9, 2015), *http://files.consumerfinance.gov/f/201509_cfpb_consent-order-encore-capital-group.pdf;* Consent Order ¶¶ 56–59, *In re Portfolio Recovery Assocs. LLC,* No. 2015–CFPB–0023 (Sept. 9, 2015), *http://files.consumerfinance.gov/f/201509_cfpb_consent-order-portfolio-recovery-associates-llc.pdf; see also* Complaint ¶¶ 30–35, *Bureau of Consumer Fin. Prot.* v. *Encore Capital Grp., Inc.,* No. 2020CV1750 (S.D. Cal. Sept. 8, 2020), *https://www.consumerfinance.gov/documents/9167/cfpb_encore-capital-group-et-al_complaint_2020-08.pdf.*

[110] *See, e.g., Kimber,* 668 F. Supp. at 1489 (''By threatening to sue Kimber on her alleged debt . . . FFC implicit[ly] represented that it could recover in a lawsuit, when in fact it cannot properly do so.'').

[111] *See* FMG Focus Group Report, *supra* note 26, at 9–10; FMG Cognitive Report, *supra* note 27, at 36–37; FMG Summary Report, *supra* note 29, at 35–36; *see also* Fed. Trade Comm'n, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* at iii, 26 (July 2010), *https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf* (FTC Litigation Report).

[112] *See, e.g., Pantoja* v. *Portfolio Recovery Assocs., LLC,* 852 F.3d 679, 683–84 (7th Cir. 2017); *McMahon* v. *LVNV Funding, LLC,* 744 F.3d 1010, 1020 (7th Cir. 2014); *Phillips* v. *Asset Acceptance, LLC,* 736 F.3d 1076, 1079 (7th Cir. 2013); *Huertas*

also has concluded that the FDCPA bars actual and threatened suits on time-barred debt.[113] In addition, the prohibitions in final § 1006.26(b) generally are consistent with current industry practice. For example, a number of industry commenters stated they do not sue or threaten to sue on time-barred debt as a matter of policy, and one trade group commenter stated that it requires its members to refrain from suing or threatening to sue on time-barred debts.

The Bureau recognizes that, in most jurisdictions, expiration of the statute of limitations provides the consumer with an affirmative defense to liability, but it does not bar a debt collector from bringing suit. The Bureau concludes, however, that consumers are unlikely to know whether the applicable statute of limitations has expired or that the expiration of the statute of limitations provides an affirmative defense. Suits and threats of suit on time-barred debts therefore imply to the least sophisticated consumer not simply that the debt collector may sue or has sued the consumer but also that the debt collector's claim is legally enforceable. For time-barred debts, this is misleading because expiration of the statute of limitations provides the consumer with a complete defense.[114] Accordingly, the Bureau concludes that bringing or threatening to bring a legal action to collect a time-barred debt is a deceptive practice under FDCPA section 807 even if expiration of the statute of limitations is an affirmative defense rather than a categorical bar to suit.

As explained below, the Bureau is finalizing § 1006.26(b) as an interpretation of FDCPA section 807's prohibition on deception; such an interpretation is squarely within the Bureau's authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors. Contrary to commenters' claims, § 1006.26(b) does not preempt State laws relating to when a debt collector may bring a lawsuit in State court. Rather, it provides that a debt collector who sues or threatens to sue a consumer to collect a time-barred debt violates the FDCPA even if applicable State law permits the suit. In addition, contrary to commenters' assertions, § 1006.26(b) does not exceed the Bureau's authority by regulating access to the courts or litigation activities. Debt collectors have repeatedly argued that they cannot be held liable under the FDCPA for actions taken in litigation because, for example, the United States Constitution allows debt collectors to petition the courts, or because the Federal Rules of Civil Procedure (or their State equivalents) allow debt collectors to argue for the modification or reversal of existing law. Many courts have rejected such arguments, generally reasoning that the FDCPA unquestionably applies to litigation activities.[115] The fact that expiration of a State's statute of limitations may not extinguish a debt under State law or bar a lawsuit in State court unless an affirmative defense is raised and proven does not render the FDCPA's prohibition on using deceptive or misleading representations or means in debt collection inapplicable. There is nothing unusual about the proposition that some behavior permitted by State law may nevertheless violate Federal law. Moreover, nothing in § 1006.26(b) prohibits a debt collector from bringing a legal action against a consumer in which the debt collector argues for an extension, modification, or reversal of existing law or the establishment of new law—including a legal action in which the debt collector argues that a debt is not time barred. Debt collectors remain free to do so. But a debt collector who brings such an action may violate § 1006.26(b) if a court ultimately determines that the debt was time barred.

Liability Standard

Proposed § 1006.26(b) would have prohibited a debt collector from bringing or threatening to bring a legal action against a consumer to collect a time-barred debt only if the debt collector knew or should have known the debt was time barred.

In proposing a knows-or-should-know standard, the Bureau explained that determining whether a debt is time barred may involve analyzing which State law applies, which statute of limitations applies, when the statute of limitations began to run, and whether the statute of limitations has been tolled or reset. In many cases, a debt collector will know, or will be able to readily determine, whether the statute of limitations has expired. In some instances, however, a debt collector may be genuinely uncertain even after undertaking a reasonable investigation, such as if the case law in a State is unclear as to which statute of limitations applies to a particular type of debt. The proposed knows-or-should-know standard was meant to address this concern by not imposing liability on a debt collector if it had no way of knowing that a particular debt was time barred. But the Bureau also acknowledged that it sometimes may be difficult to determine whether a knows-or-should-know standard has been met. Such uncertainty could increase litigation costs and make it difficult for consumers and government agencies to bring actions against debt collectors. To address this concern, the Bureau sought comment on an alternative strict liability standard pursuant to which a debt collector would be liable for suing or threatening to sue on a time-barred debt even if the debt collector neither knew nor should have known that the debt was time barred.

Industry commenters generally did not support a strict liability standard. These commenters generally agreed that it can be difficult for a debt collector to determine whether a debt is time barred and asserted that holding debt collectors strictly liable for good faith errors would be unduly harsh. These commenters stated, for example, that determining the applicable statute of limitations and whether it has expired may require analyzing a variety of factual and legal questions specific to the debt, and that, in many cases, a debt collector may reach the wrong conclusion even after undertaking a reasonable investigation and analysis. Industry commenters asserted that debt collectors may be unable to reliably determine the statute of limitations before filing suit because the law is unclear, because some information relevant to the analysis may be unavailable, or both. Some industry commenters also asserted that the analysis may change over time. For example, according to these commenters, a consumer's decision to move to a different State after signing a loan agreement could affect a debt collector's analysis of which State law applies and whether the statute of limitations has been tolled. As another example, an industry commenter stated that, in certain jurisdictions, the statute of limitations applicable to mortgage debt is in flux because of unprecedented access by consumers to loss mitigation and an increase in bankruptcy filings in

v. *Galaxy Asset Mgmt.,* 641 F.3d 28, 33 (3d Cir. 2011) (per curiam); *Goins* v. *JBC & Assocs., P.C.,* 352 F. Supp. 2d 262, 273 (D. Conn. 2005); *Kimber,* 668 F. Supp. at 1487–89.

[113] FTC Litigation Report, *supra* note 111, at 23.

[114] *See, e.g., Goins,* 352 F. Supp. 2d at 272 (holding that, although the statute of limitations is an affirmative defense, threatening to bring suit on time-barred debt ''can at best be described as a 'misleading' representation, in violation of § 1692e,'' because the statute of limitations is a complete defense to any suit).

[115] *See, e.g., Aguilar* v. *LVNV Funding LLC,* No. 2:19–cv–105, 2019 WL 3369706, at *3–4 (M.D. Fla. July 26, 2019); *Tobing* v. *Parker McCay, P.A.,* No. 3:17–cv–00474, 2018 WL 2002799, at *9 (D.N.J. Apr. 30, 2018); *Consumer Fin. Prot. Bureau* v. *Frederick J. Hanna & Assocs., P.C.,* 114 F. Supp. 3d 1342, 1359–61 (N.D. Ga. 2015); *Johnson* v. *Riddle,* 305 F.3d 1107, 1118 (10th Cir. 2002).

the wake of the foreclosure crisis. Several industry commenters also expressed concern that debt collectors who are not attorneys may have particular difficulty making an accurate time-barred debt determination. For these reasons, industry commenters asserted that a strict liability standard, which would leave no room for error, would expose debt collectors to liability even though it would be challenging or very costly in many circumstances to determine if a debt is time barred.

Some industry commenters supported the proposed knows-or-should-know standard. These commenters generally asserted that the proposed standard would help debt collectors avoid liability for good-faith mistakes in determining whether a debt is time barred—something industry commenters argued is important given the complexity and uncertainty of certain time-barred debt analyses. One industry commenter asserted that the proposed standard also would adequately protect consumers from harm. However, several industry commenters who expressed general support for the proposed standard also asked the Bureau to provide additional guidance, including examples of circumstances in which a debt collector neither knows nor should know that a debt is time barred.

Not all industry commenters supported the proposed knows-or-should-know standard. Some industry commenters argued that the proposed standard was vague and subjective and could increase litigation risk rather than mitigating it. Other industry commenters asked the Bureau to clarify that the knows-or-should-know standard depends on the specific understanding and sophistication of the particular debt collector. They asserted, for example, that what an attorney debt collector knows or should know about a debt's time-barred status may differ from what a non-attorney debt collector knows or should know.

Some industry commenters who opposed the proposed knows-or-should-know standard offered alternative standards. For example, several industry commenters recommended that the Bureau finalize a reasonable investigation standard such that a debt collector who sued or threatened to sue to collect a time-barred debt would not be liable if the debt collector undertook a reasonable investigation before doing so. Similarly, some industry commenters argued that a debt collector who acts in good faith should not be liable for suits and threats of suit on time-barred debts. Other industry commenters suggested that the Bureau finalize a liability standard akin to qualified immunity such that a debt collector who sued or threatened to sue to collect a time-barred debt would not be liable unless the applicable statute of limitations was clearly established. Other industry commenters suggested that the Bureau finalize an actual knowledge standard such that a debt collector who sued or threatened to sue on a time-barred debt would be liable only if the debt collector knew the debt was time barred.

Some commenters suggested that the Bureau finalize various safe harbors for debt collectors. For example, industry commenters recommended safe harbors for debt collectors collecting debts of a certain age and for debt collectors who rely on information provided by the creditor. Other industry commenters suggested that a debt collector who maintains and follows reasonable procedures for determining whether a debt is time barred should receive a safe harbor from liability in the event that the debt collector inadvertently sues or threatens to sue on a time-barred debt. One industry commenter requested that the Bureau specifically confirm that FDCPA section 813(c)'s bona fide error defense would apply to violations of § 1006.26(b).

Other commenters, including consumers, consumer advocates, academics, some members of Congress, a group of State Attorneys General, and several local governments, urged the Bureau to adopt a strict liability standard. Although some of these commenters acknowledged that determining whether a debt is time barred can be complicated,[116] others argued that determining whether a debt is time barred is relatively straightforward in most cases. One commenter suggested that, if the Bureau finalizes the proposed knows-or-should-know standard, the Bureau should clarify that in most cases a debt collector will know (or should know) whether the statute of limitations has run because in most cases debt collectors have the necessary information to make the determination.

Some consumer advocate commenters who argued for a strict liability standard stated that it would incentivize debt collectors to determine whether a debt is time barred before threatening or filing suit. Some consumer advocate commenters suggested that this would help reduce the consumer protection risks associated with the collection of time-barred debt, including the risk that consumers may be unable to adequately protect their rights in court and the risk that consumers may make a payment on the debt under the misimpression that the debt is legally enforceable, which could revive the debt collector's right to sue. Some commenters expressed concern that the proposed knows-or-should-know standard would not adequately incentivize debt collectors to determine the time-barred status of debts. Around two dozen members of Congress asserted that finalizing a knows-or-should-know standard without additional protections could encourage willful ignorance on the part of a debt collector about the time-barred status of a debt. A group of State Attorneys General and some consumer advocate commenters similarly argued that a knows-or-should-know standard would promote willful ignorance by debt collectors.

A number of commenters, including consumer advocate commenters and a group of State Attorneys General, advocated a strict liability standard because, in their view, debt collectors generally have more resources and expertise and better access to information than consumers. These commenters generally asserted that it would often be difficult for a consumer to establish that a debt was time barred and that the debt collector knew or should have known that fact.

Many of these commenters also argued that the proposed knows-or-should-know standard was inconsistent with the FDCPA (which some commenters described as a strict liability statute) and with FDCPA section 807's prohibition on deception (which does not include a knowledge element). Some commenters pointed out that, because FDCPA section 813(c) provides debt collectors with a bona fide error defense to liability in certain circumstances, a strict liability standard would not expose debt collectors to undue liability. Commenters also argued that the proposed knows-or-should-know standard was inconsistent with case law imposing or implying a strict liability standard when evaluating claims that a debt collector sued or threatened to sue to collect a time-barred debt. Several commenters agreed with the Bureau that a strict liability standard generally would reduce ambiguity and be easier to enforce than the proposed knows-or-should-know standard. Federal government agency staff encouraged the Bureau to consider

[116] A group of academic commenters challenged the Bureau's assertion that debt buyers generally receive enough information to determine whether a debt is time barred. These commenters noted that fewer than half of respondents to the Bureau's industry survey reported receiving account agreement documentation or billing statements, information that the commenters believed would help a debt collector calculate the applicable statute of limitations and whether it has expired.

further whether a knows-or-should-know standard would place an unnecessary burden on law enforcement agencies.

The Bureau is not finalizing the proposed knows-or-should-know standard and is instead finalizing a strict liability standard. Although determining whether a debt is time barred can be challenging or costly in certain circumstances, the Bureau concludes that the proposed knows-or-should-know standard is generally inconsistent with FDCPA section 807, which does not include an exception or exclusion for debt collectors whose deceptive statements are unintentional or for whom ensuring that a statement is not deceptive is burdensome.[117] The Bureau also concludes that a strict liability standard is more consistent with FDCPA section 807's prohibition on deception, as well as case law imposing or implying such a standard when evaluating claims under FDCPA section 807 generally and claims related to suits and threats of suit on time-barred debt specifically.[118]

Moreover, the Bureau notes that a knows-or-should-know standard could, in some circumstances, shift the risk that a claim is deceptive from debt collectors to consumers. As explained above, suits and threats of suit on time-barred debt can cause consumer harm. In a case in which it is difficult or costly to determine whether a debt is time barred, a knows-or-should-know standard could allow debt collectors to avoid liability for causing such harm. In other consumer protection contexts, courts and the FTC have recognized that an advertiser who makes an unsubstantiated claim may be liable for deception even if the cost of substantiating the claim is high or prohibitively expensive.[119] The Bureau's decision to finalize a strict liability standard is generally consistent with this principle.

The Bureau emphasizes that, although a strict liability standard might create some risk for debt collectors if a debt's time-barred status is unclear, debt collectors have multiple ways to manage such risk. In particular, a debt collector can avoid liability under § 1006.26(b) by confirming that the statute of limitations has not expired before bringing or threatening to bring a legal action. Similarly, a debt collector who is ultimately unable to determine with certainty whether a debt is time barred can avoid liability under § 1006.26(b) by refraining from bringing or threatening to bring a legal action while, in most States, continuing with non-litigation collection activities. Moreover, a debt collector who brings or threatens to bring a legal action against a consumer to collect a time-barred debt may, depending upon the reason for the debt collector's error, have a defense to civil liability under FDCPA section 813 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.[120] For these reasons, the Bureau concludes that finalizing a strict liability standard under § 1006.26(b) does not pose an undue risk of liability for debt collectors, even in cases in which a debt collector is unable to determine with certainty whether a debt is time barred.

Requests for Clarification

Several commenters asked the Bureau to clarify the scope of proposed § 1006.26(b)'s prohibitions.[121] Two industry commenters suggested that the term ''legal action'' is unclear and could be interpreted to encompass any action in any court of law or equity. These commenters suggested replacing ''legal action'' with ''lawsuit,'' asserting that, although ''legal action'' and ''lawsuit'' have overlapping meanings, ''lawsuit'' has a narrower connotation that excludes certain legal actions, such as bankruptcy proceedings. Alternatively, these commenters argued that, if the Bureau declines to change the term legal action, the prohibitions in proposed § 1006.26(b) should be adjusted to specifically exclude certain types of legal actions, such as garnishment actions, probate actions, and the filing of proofs of claim in bankruptcy proceedings.[122] Another commenter asked the Bureau to clarify that, for purposes of proposed § 1006.26(b), the term ''legal action'' does not include ''non-original complaints,'' such as amended complaints, supplemental complaints, complaints re-filed after a prior dismissal without prejudice, post-judgment court filings, or post-judgment communications (such as executions or garnishments).

Final § 1006.26(b) uses the term ''legal action.'' In *Midland Funding, LLC* v. *Johnson,* the Supreme Court held that filing a proof of claim on a time-barred debt in a bankruptcy proceeding does not violate the FDCPA sections 807 or 808.[123] Consistent with *Midland,* the final rule clarifies that § 1006.26(b) does not prohibit the filing of proofs of claim in a bankruptcy proceeding. The Bureau does not see a basis to categorically exclude other types of legal actions, such as garnishment and probate actions, from the prohibitions in § 1006.26(b). No other section of the FDCPA pertaining to legal actions contains a similar exclusion, and the commenters did not explain why they believe an exclusion is merited here.

At least one industry commenter asked the Bureau to clarify the types of actions and statements that qualify as a threat of legal action or that could be interpreted by a consumer as a threat of legal action. The Bureau declines to do so at this time. Whether a particular action or statement constitutes a threat of legal action depends on the facts and circumstances of the particular case. Nevertheless, the Bureau notes that § 1006.26(b) prohibits not only explicit

[117] For the same reasons, the Bureau concludes that the alternative standards proposed by industry commenters—including, for example, an actual knowledge standard, a reasonable-investigation standard, or a clearly-established-law standard—are generally inconsistent with FDCPA section 807.

[118] *See, e.g., Pantoja,* v. *Portfolio Recovery Assocs., LLC,* 852 F.3d 679, 683 (7th Cir. 2017); *Buchanan* v. *Northland Grp., Inc.,* 776 F.3d 393, 399 (6th Cir. 2015); *Phillips* v. *Asset Acceptance, LLC,* 736 F.3d 1076, 1083–84 (7th Cir. 2013); *Clark* v. *Capital Credit & Collection Servs.,* 460 F.3d 1162, 1176 (9th Cir. 2006); *Gearing* v. *Check Brokerage Corp.,* 233 F.3d 469, 472 (7th Cir. 2000).

[119] *See, e.g., POM Wonderful, LLC* v. *FTC,* 777 F.3d 478, 497 (D.C. Cir. 2015) (''We acknowledge that RCTs [*i.e.,* randomized clinical trials] may be costly. . . . Yet if the cost of an RCT proves prohibitive, petitioners can choose to specify a lower level of substantiation for their claims. As the Commission observed, the need for RCTs is driven by the claims petitioners have chosen to make.'') (internal brackets and quotation marks omitted); *In re POM Wonderful LLC,* 2013 WL 268926, at *50 (F.T.C. Jan. 16, 2013) (rejecting argument that an advertiser may ''make particular claims that go beyond the substantiation it possesses and then ask the Commission to excuse the inadequacy of its support by asserting that [the] advertiser did the best it could because the proper substantiation for the actual claim would be too expensive''); *In re Kroger Co.,* 98 F.T.C. 639, 737 (1981) (''Where the demands of the purse require such compromises, the advertiser must generally limit the claims it makes for its data or make appropriate disclosures to insure proper consumer understanding of the survey's results.'').

[120] *See Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA,* 559 U.S. 573 (2010) (holding that bona fide error defense is not available when FDCPA violation arises from a debt collector's mistaken interpretation of FDCPA's legal requirements but noting that bona fide error defense is available when FDCPA violation arises from certain other types of errors).

[121] Commenters also asked the Bureau to adopt a number of interventions that the Bureau did not propose, such as a prohibition on revival and a prohibition on perpetual tolling, which commenters asserted prevents a statute of limitations from ever expiring in certain circumstances. The Bureau did not propose these interventions and it is not finalizing them.

[122] A consumer advocate commenter argued that the rule should expressly prohibit filing a bankruptcy proof of claim to recover a time-barred debt.

[123] 137 S. Ct. 1407 (2017).

threats of legal action but also implicit ones.

For the reasons discussed above, the Bureau is finalizing § 1006.26(b), which provides that a debt collector must not bring or threaten to bring a legal action against a consumer to collect a time-barred debt. Section 1006.26(b) also states that these prohibitions do not apply to proofs of claim filed in connection with a bankruptcy proceeding. The Bureau is finalizing § 1006.26(b) as an interpretation of FDCPA section 807. FDCPA section 807 generally prohibits debt collectors from using ''any false, deceptive, or misleading representation or means in connection with the collection of any debt,'' and FDCPA section 807(2)(A) specifically prohibits falsely representing ''the character, amount, or legal status of any debt.'' The Bureau interprets FDCPA section 807 and 807(2)(A) to prohibit debt collectors from suing or threatening to sue consumers on time-barred debts because such suits and threats of suit explicitly or implicitly misrepresent, and cause consumers to believe, that the debts are legally enforceable. In addition, threats to sue consumers on time-barred debts are similar to threats to take actions that cannot legally be taken, which FDCPA section 807(5) specifically prohibits, because both involve the threat of action to which the consumer has a complete legal defense.[124] The Bureau's interpretation of FDCPA section 807 is generally consistent with well-established case law holding that suits and threats of suits on time-barred debt violate FDCPA section 807.[125]

Proposed Provision Not Finalized

In the February 2020 proposal, the Bureau proposed to require a debt collector collecting a debt that the debt collector knows or should know is a time-barred debt to provide time-barred debt disclosures and, if applicable, revival disclosures (proposed § 1006.26(c)(1) and (2)).[126] The Bureau proposed to require these disclosures in the debt collector's initial communication with the consumer, on any validation notice, and in certain situations if the debt became time barred during collections. The February 2020 proposal also included, among other things, model forms and language a debt collector could have used to comply with the proposed disclosure requirements (proposed Model Forms B–4 through B–7), and it provided a safe harbor to a debt collector who used the model forms or language (proposed § 1006.26(c)(3)). In support of proposed § 1006.26(c), the Bureau cited, among other things, the results of its quantitative testing survey.[127]

Although some commenters expressed general support for the idea of addressing the risk of deception associated with the collection of time-barred debts by requiring time-barred debt and revival disclosures, many commenters opposed the Bureau's specific proposal. According to industry commenters, the proposal would have imposed a significant burden on debt collectors by requiring them to conduct time-barred debt and revival analyses for each debt in collection. These commenters also reported that they would face a significant risk of liability given uncertainty about the statute of limitations and revival law in at least some States. Industry commenters stated that most debt collectors lack the legal training to determine whether a debt is time barred or the circumstances in which it can be revived. To comply with the disclosure requirements, these commenters asserted that debt collectors would need to engage an attorney or otherwise incur substantial costs. Industry commenters particularly objected to imposing these costs on debt collectors who never sue to collect debts, or never sue to collect revived debts. Industry commenters also raised concerns about being required to respond to legal questions from consumers as a result of providing the disclosures.

Among consumer, consumer advocate, academic, and State Attorneys General commenters who opposed the Bureau's proposal, many doubted that disclosures can effectively convey information about topics as complicated and unfamiliar to consumers as time-barred debt and revival. These commenters also raised concerns about the Bureau's proposed model disclosures, characterizing them as confusing, vague, and ineffective—particularly for the least sophisticated consumer.[128] Some consumer advocate commenters also expressed concern about the accuracy of the proposed disclosures and the frequency with which the Bureau proposed to require them. These commenters urged the Bureau to reconsider or significantly revise the proposal.

Given industry commenters' concerns about the burden on debt collectors of the Bureau's specific proposal, and consumer advocate commenters' concerns about whether the Bureau's specific proposal would effectively cure consumer deception, the Bureau has decided not to finalize proposed § 1006.26(c). In deciding not to finalize proposed § 1006.26(c), the Bureau determines only that the specific disclosure requirements described in the February 2020 proposal may not sufficiently accommodate the concerns raised by different stakeholders. However, the Bureau concludes, as discussed in the February 2020 proposal, that, in many circumstances, disclosures can effectively cure the potential deception associated with the collection of time-barred debt.

Finally, the Bureau emphasizes that the FDCPA, the November 2020 Final Rule, and this final rule nevertheless apply to debt collectors' activities involving the collection of time-barred debts, including debt collectors' communications when collecting such debts. Accordingly, a debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of a time-barred debt. Nor may a debt collector use unfair or unconscionable means to collect or attempt to collect a time-barred debt. Depending on the circumstances associated with the collection of a specific time-barred debt, a debt collector may decide that, to avoid violating the FDCPA and the final

[124] A consumer advocate commenter requested that the Bureau clarify that a debt collector who brings or threatens to bring a legal action against a consumer to collect a time-barred debt also violates the Dodd-Frank Act. The Bureau is finalizing § 1006.26(b) as an interpretation of FDCPA section 807 only.

[125] *See, e.g., Pantoja,* 852 F.3d at 683; *McMahon,* 744 F.3d at 1020; *Phillips,* 736 F.3d at 1079; *Kimber,* 668 F. Supp. at 1488–89.

[126] Specifically, proposed § 1006.26(c)(1) would have required a debt collector collecting a debt that the debt collector knows or should know is a time-barred debt to disclose (i) that the law limits how long a 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 (ii) if, under applicable law, the debt collector's right to bring a legal action against the consumer can be revived, then the fact that revival can occur and the circumstances in which it can occur. 85 FR 12672, 12696 (Mar. 3, 2020).

[127] *See id.* at 12678–79.

[128] Courts have applied an objective standard of an ''unsophisticated'' or ''least sophisticated'' consumer to claims brought under FDCPA section 807. *Jensen* v. *Pressler & Pressler,* 791 F.3d 413, 419 (3d Cir. 2015) (''The standard is an objective one, meaning that the specific plaintiff need not prove that *she* was actually confused or misled, only that the objective least sophisticated debtor would be.''); *Hartman* v. *Great Seneca Fin. Corp.,* 569 F.3d 606, 613 (6th Cir. 2009) (applying least sophisticated consumer standard to section 807 claim); *Bentley* v. *Great Lakes Collection Bureau,* 6 F.3d 60, 62 (2d Cir. 1993) (same); *Swanson* v. *S. Or. Credit Serv., Inc.,* 869 F.2d 1222, 1227 (9th Cir. 1988) (per curiam) (same). This standard ''protects the consumer who is uninformed, naive, or trusting, yet it admits an objective element of reasonableness.'' *Gammon* v. *GC Servs. Ltd. P'ship,* 27 F.3d 1254, 1257 (7th Cir. 1994). As discussed in part IV, the Bureau interprets FDCPA sections 807 to incorporate an objective, ''unsophisticated'' or ''least sophisticated'' consumer standard.

rule, the debt collector needs to disclose information to consumers about the debt collector's ability to sue and the possibility of revival and, in that case, the debt collector may do so.

Section 1006.30 Other Prohibited Practices

30(a) Required Actions Prior to Furnishing Information

The Bureau proposed in § 1006.30(a) to prohibit so-called passive collections, *i.e.*, the practice of a debt collector furnishing to a consumer reporting agency, as defined in section 603(f) of the Fair Credit Reporting Act (FCRA),[129] information regarding a debt before communicating with the consumer about the debt. The Bureau proposed § 1006.30(a) pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors; pursuant to its authority to interpret FDCPA section 806, which prohibits a debt collector from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt; and pursuant to its authority to interpret FDCPA section 808, which prohibits a debt collector from using unfair or unconscionable means to collect or attempt to collect any debt. Courts have interpreted FDCPA sections 806 and 808 to prohibit certain coercive collection methods that may cause consumers to pay debts not actually owed.[130]

For the reasons discussed below, the Bureau is: (1) Finalizing § 1006.30(a) as § 1006.30(a)(1), with changes to specify the required actions that a debt collector generally must take before furnishing information to a consumer reporting agency; and (2) finalizing in § 1006.30(a)(2) a special rule for information furnished to certain specialty consumer reporting agencies.

30(a)(1) In General

The Bureau received comments on proposed § 1006.30(a) from consumer advocates and individuals, nonprofits, industry commenters, and government agencies. Many commenters supported the proposed prohibition on passive collections. A consumer group emphasized the consumer harms identified in the proposal and agreed that, because with passive collections a consumer does not know a debt is in collection, the practice can cause a consumer's credit score to decrease, increase the cost of future credit for the consumer, make it more difficult for a consumer to obtain affordable housing, and jeopardize some job opportunities, all without the consumer's knowledge. Three government commenters also supported the proposed prohibition; one of them reported receiving consumer complaints regarding passive collections. An industry commenter supporting the proposal noted that the commenter provides consumers with a 90-day grace period before furnishing information to consumer reporting agencies.

A number of comments, primarily from industry or industry trade groups, opposed the prohibition or suggested changes or clarifications. Two industry trade groups and a law firm commenter argued that proposed § 1006.30(a) should not be finalized because it conflicts with the FCRA, including section 623(a)(7), which requires certain financial institutions to provide written notice to customers if they furnish negative information to a consumer reporting agency, and section 623(a)(5), which requires furnishers to provide certain information about a reported delinquency to the consumer reporting agency no later than 90 days after furnishing information.[131] Other industry commenters argued that the proposal would encourage consumers to ignore communications, provide inaccurate forwarding information to the creditor, or falsely mark mail as undeliverable to avoid having collection items furnished to consumer reporting agencies. In addition, several industry commenters stated that locating consumers for certain debts, such as medical debt, telecommunications debt, or rental debt, is costly and may not be justified for small amounts. If debt collectors cannot passively collect these debts, the commenters argued, then the debts are effectively uncollectible. One industry trade group similarly argued that passive collections benefits consumers who otherwise cannot be located, rather than harming them, because the collection item on their credit report will provide them contact information for the debt collector, which the consumer can then use to make payment arrangements.

A number of commenters suggested changing or clarifying the proposed requirement to ''communicate'' before furnishing information to a consumer reporting agency. Some urged the Bureau to adopt a stricter requirement, such as by requiring written notice to the consumer before reporting, mandating specific disclosure language, imposing across-the-board waiting periods before reporting, or prohibiting indirect communications. Others expressed concern that the proposal would impose more stringent communication requirements than the FDCPA otherwise requires and asked the Bureau to relax the proposal, such as by clarifying that proof of receipt of a communication is not required, by allowing debt collectors to satisfy the proposed requirement by leaving limited-content messages (as defined in § 1006.2(j) of the November 2020 Final Rule), or by permitting debt collectors to presume receipt of a communication after a waiting period expires.

After considering all of the comments, the Bureau is finalizing proposed § 1006.30(a) and its related commentary with substantial revisions, as follows.

Subject to § 1006.30(a)(2) (discussed below), final § 1006.30(a)(1) requires a debt collector to take certain actions before furnishing information about a debt to a consumer reporting agency, as defined in section 603(f) of the FCRA. Specifically, the debt collector must either: (1) Speak to the consumer about the debt in person or by telephone, or (2) place a letter in the mail or send an electronic message to the consumer about the debt and wait a reasonable period of time to receive a notice of undeliverability. During the reasonable period, the debt collector must permit receipt of, and monitor for, notifications of undeliverability from communications providers. If the debt collector receives such a notification during the reasonable period, the debt collector must not furnish information about the debt to a consumer reporting agency until the debt collector otherwise satisfies § 1006.30(a)(1). The Bureau is finalizing commentary to clarify these requirements as discussed below.

The Bureau finalizes the requirements under § 1006.30(a)(1) to address consumer harms that may arise if a debt collector furnishes information about a debt to a consumer reporting agency without first informing the consumer about the debt. As discussed in the proposal, consumers who have not been informed about the debt are likely to be unaware that they have a debt in

[129] 15 U.S.C. 1681a(f).

[130] *See, e.g., Fox* v. *Citicorp Credit Servs., Inc.,* 15 F.3d 1507, 1517 (9th Cir. 1994) (reversing grant of summary judgment to debt collector in part because ''a jury could rationally find'' that filing writ of garnishment was unfair or unconscionable under section 808 when debt was not delinquent); *Ferrell* v. *Midland Funding, LLC,* No. 2:15–cv–00126–JHE, 2015 WL 2450615, at *3–4 (N.D. Ala. May 22, 2015) (denying debt collector's motion to dismiss section 806 claim where debt collector allegedly initiated collection lawsuit even though it knew plaintiff did not owe debt); *Pittman* v. *J.J. Mac Intyre Co. of Nev., Inc.,* 969 F. Supp. 609, 612–13 (D. Nev. 1997) (denying debt collector's motion to dismiss claims under sections 807 and 808 where debt collector allegedly attempted to collect fully satisfied debt).

[131] 15 U.S.C. 1681s–2(a)(5) and (7).

§ 1006.34(d)(3)(iv), a debt collector may place disclosures specifically required under other applicable law, which includes disclosures specifically required by State law, on the reverse (or, in certain specified circumstances, on the front) of the validation notice. The Bureau believes that § 1006.34(d)(3)(iv) will permit debt collectors to provide State law disclosures in a manner that is clear and conspicuous under applicable law.

The Bureau also declines to further clarify the meaning of clear and conspicuous in the context of oral delivery of validation information. The Bureau determines that the proposed and final regulatory text is sufficiently clear and that the final rule will not impose an undue burden on debt collectors, particularly in light of the Bureau's expectation that few, if any, oral disclosures will be provided.

For the reasons discussed above, the Bureau is finalizing § 1006.34(b)(1) to provide that clear and conspicuous means readily understandable and that, in the case of written and electronic disclosures, the location and type size also must be readily noticeable and legible to consumers, although no minimum type size is mandated. Final § 1006.34(b)(1) also provides that oral disclosures must be given at a volume and speed sufficient for the consumer to hear and comprehend them.

34(b)(2) Initial Communication

FDCPA section 809(a) requires debt collectors to provide consumers with certain validation information either in the debt collector's initial communication with the consumer in connection with the collection of the debt, or within five days after that initial communication. FDCPA section 803(2) defines the term communication broadly to mean the conveying of information regarding a debt directly or indirectly to any person through any medium.[161] FDCPA section 809(d) and (e) identifies particular communications that are not initial communications for purposes of FDCPA section 809(a) and that therefore do not trigger the validation notice requirement.[162] Pursuant to FDCPA section 809(d), an initial communication excludes a communication in the form of a formal pleading in a civil action. Pursuant to FDCPA section 809(e), an initial communication also excludes the sending or delivery of any form or notice that does not relate to the collection of the debt and is expressly required by the Internal Revenue Code of 1986, title V of the Gramm-Leach-Bliley Act, or any provision of Federal or State law relating to notice of a data security breach or privacy, or any regulation prescribed under any such provision of law.

The Bureau proposed § 1006.34(b)(2) to implement FDCPA section 809(a), (d), and (e) by defining the term initial communication. The proposed definition largely restated the FDCPA and defined initial communication as the first time that, in connection with the collection of a debt, a debt collector conveys information, directly or indirectly, regarding the debt to the consumer, other than a communication in the form of a formal pleading in a civil action, or a communication in any form or notice that does not relate to the collection of the debt and is expressly required by any of the laws referenced in FDCPA section 809(e).[163]

An industry trade group recommended a bankruptcy-specific exception to the definition of initial communication for debt collectors collecting debts owed by consumers in bankruptcy. The commenter expressed concern that certain actions by a debt collector in the context of a consumer's bankruptcy proceeding, in particular filing a proof of claim, may be construed to be an initial communication and therefore trigger the FDCPA section 809(a) validation notice requirement.[164] Additionally, according to the commenter, content on the validation notice, including the debt collection communication disclosure required by FDCPA section 807(11), could be construed as a demand for payment that violates the automatic stay provisions of the United States Bankruptcy Code (Bankruptcy Code)[165] or, if the consumer has been relieved of personal liability, the discharge injunction.[166] According to the commenter, some courts have opined that a debt collector would face an irreconcilable conflict between complying with the FDCPA and the Bankruptcy Code if the debt collector were required to provide a validation notice to a consumer in bankruptcy.[167]

The Bureau has determined to interpret the term initial communication not to include proofs of claim filed in bankruptcy proceedings. Courts have reached different conclusions about whether the FDCPA conflicts with the Bankruptcy Code.[168] The Bureau is unaware of any case definitively holding that a proof of claim is an initial communication and that a debt collector therefore must provide a validation notice after filing a proof of claim. On the other hand, some courts have held that proofs of claim are not initial communications because, under FDCPA section 809(d), they are communications in the form of a formal pleading in a civil action.[169] Further, the Bureau has decided to permit a debt collector to file a proof of claim in a bankruptcy proceeding as required by the Bankruptcy Code without thereby triggering the debt collector's obligation to provide a validation notice under the FDCPA, because the Bureau finds it unlikely that consumer harm will result if a consumer does not receive a validation notice subsequent to a proof of claim in bankruptcy. The bankruptcy proof-of-claim form is filed under penalty of perjury, and a person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both.[170] Thus, the Bureau concludes that bankruptcy proof-of-claim forms generally are likely to contain accurate information about the debt.

Accordingly, to provide clarity for debt collectors while maintaining protections for consumers, the Bureau is interpreting the term initial

[161] *See* 15 U.S.C. 1692a(2). The November 2020 Final Rule implemented this definition in § 1006.2(d). 85 FR 76734, 76888 (Nov. 30, 2020).

[162] *See* 15 U.S.C. 1692g(d), (e).

[163] *See* 84 FR 23274, 23335 (May 21, 2019).

[164] To receive a distribution from a bankruptcy estate, a creditor generally must file with the bankruptcy court a proof of claim, which includes details about an alleged debt or interest. *See* Fed. R. Bankr. P. 3002.

[165] *See* 11 U.S.C. 362.

[166] A debtor's bankruptcy petition operates as an automatic stay that, among other things, prohibits ''any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case.'' 11 U.S.C. 362(a)(6). When a debtor's liability is discharged through bankruptcy, the discharge ''operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.'' 11 U.S.C. 524(a)(2).

[167] *See, e.g., In re Chaussee,* 399 B.R. 225, 238 (B.A.P. 9th Cir. 2008) (''In our opinion, the debt validation provisions required by the FDCPA clearly conflict with the claims processing procedures contemplated by the [Bankruptcy] Code and Rules.'').

[168] *See Walls* v. *Wells Fargo Bank,* 276 F.3d 502, 511 (9th Cir. 2002) (holding that the Bankruptcy Code precludes application of FDCPA requirements in bankruptcy cases); *Chaussee,* 399 B.R. at 239 (same); *contra Simon* v. *FIA Card Servs., N.A.,* 732 F.3d 259, 274 (3d Cir. 2013) (stating that when ''FDCPA claims arise from communications a debt collector sends a bankruptcy debtor in a pending bankruptcy proceeding, and the communications are alleged to violate the Bankruptcy Code or Rules, there is no categorical preclusion of the FDCPA claims'').

[169] *See Simon,* 732 F.3d at 273; *Townsend* v. *Quantum3 Grp., LLC,* 535 B.R. 415, 423 (M.D. Fla. 2015); *In re Brimmage,* 523 B.R. 134, 141–42 (Bankr. N.D. Ill. 2015).

[170] The official bankruptcy proof-of-claim form is available here: *https://www.uscourts.gov/forms/bankruptcy-forms/proof-claim-0.*

communication not to include proofs of claim filed in bankruptcy. Specifically, the Bureau is adopting new comment 34(b)(2)–1, which clarifies that a proof of claim that a debt collector files in a bankruptcy proceeding in accordance with the requirements of the Bankruptcy Code is a communication in the form of a formal pleading in a civil action and therefore is not an initial communication for purposes of § 1006.34. The Bureau adopts this comment as an interpretation of the phrase ''[a] communication in the form of a formal pleading in a civil action'' in FDCPA section 809(d). The Bureau interprets that phrase to include a proof of claim that a debt collector files in a bankruptcy proceeding in accordance with the requirements of the Bankruptcy Code.

The Bureau acknowledges that other scenarios may exist in which a debt collector communicates with a consumer in bankruptcy and subsequently may be required to provide a validation notice. To the extent that debt collectors do provide validation notices to consumers in bankruptcy, § 1006.34(a)(1) implements an existing FDCPA disclosure requirement and does not create a new tension between the FDCPA and the Bankruptcy Code. In addition, nothing in the final rule requires debt collectors to include payment requests in the validation information; instead, payment requests are optional disclosures that § 1006.34(d)(3)(iii) permits debt collectors to include along with the validation information. Consequently, a debt collector concerned that a payment request would violate the Bankruptcy Code's automatic stay or discharge injunction is not required to include a payment request and, additionally, could use the model validation notice, specified variations of the model notice, or a substantially similar form, without a payment request and receive a safe harbor under § 1006.34(d)(2).

An industry trade group recommended that the Bureau exclude from the § 1006.34(b)(2) definition of initial communication the notice of transfer of loan servicing required by Regulation X.[171] According to the commenter, after an FDCPA-covered mortgage debt is transferred and a consumer receives a servicing transfer notice, the transferee may not have received all the information necessary to send a validation notice within the five-day timeframe required by FDCPA section 809(a). For this reason, the commenter suggested that Regulation X servicing transfer notices should not trigger the validation information requirement.

The Bureau declines to interpret the term initial communication to exclude servicing transfer notices required by Regulation X. Section 1006.34(b)(2) largely mirrors existing language in FDCPA sections 803(2) and 809(a), (d), and (e) and does not impose new substantive requirements or obligations on covered entities. As discussed in the section-by-section analysis of § 1006.34(c), Regulation F will result in validation notices containing more information about the debt than they typically do today, but that information is, generally, either routine account information that owners of debts currently provide to debt collectors or that owners of debts can include without significant additional expense. Although the commenter argues that there may be timing considerations unique to mortgage servicing transfer notices, the Bureau determines that such timing concerns do not warrant an exception that would deem a mortgage servicing transfer notice, even one that does convey information, directly or indirectly, regarding the debt to the consumer to be excluded from the definition of an ''initial communication.''

Other commenters asked the Bureau to clarify whether a consumer-initiated communication, such as a consumer visiting a debt collector's website or a consumer leaving a voicemail with a debt collector, would constitute an initial communication under proposed § 1006.34(b)(2). The Bureau notes that, under § 1006.34(b)(2), for an initial communication to occur, a debt collector must ''convey[ ] information, directly or indirectly, regarding the debt. . . .'' Section 1006.34(b)(2) is clear that, if a debt collector conveys no information, directly or indirectly, regarding the debt, an initial communication has not occurred and, consequently, the validation notice requirement has not been triggered. Thus, a consumer's voicemail left with a debt collector generally would not qualify as an initial communication. Similarly, an initial communication generally would not include a consumer's visit to a debt collector's website, unless during that visit the debt collector conveyed information regarding the consumer's specific debt.[172]

For the reasons discussed above, the Bureau is finalizing § 1006.34(b)(2) largely as proposed but with a revision to clarify that proofs of claim filed in bankruptcy proceedings are not initial communications.

34(b)(3) Itemization Date

FDCPA section 809(a)(1) requires debt collectors to disclose to consumers, either in the debt collector's initial communication in connection with the collection of the debt, or within five days after that communication, the amount of the debt.[173] The Bureau proposed in § 1006.34(c)(2)(vii) through (ix) to interpret the phrase ''amount of the debt'' to mean that debt collectors must disclose the amount of the debt as of a particular ''itemization date.'' [174] To facilitate compliance with proposed § 1006.34(c)(2), the Bureau proposed § 1006.34(b)(3) to define itemization date as one of four reference dates for which a debt collector can ascertain the amount of the debt. The proposed reference dates were the last statement date, the charge-off date, the last payment date, and the transaction date.[175]

The proposed definition of itemization date was designed to allow the use of dates that debt collectors could identify with relative ease because they reflect routine and recurring events, and that correspond to notable events in the debt's history that consumers may recall or be able to verify with records. The proposed definition also was intended to include dates for which debt collectors typically may receive account information from debt owners and that, therefore, debt

[171] Generally, under Regulation X, each transferor servicer and transferee servicer of any mortgage loan shall provide to the borrower a notice of transfer for any assignment, sale, or transfer of the servicing of the mortgage loan. 12 CFR 1024.33(b)(1). Generally, the transferor servicer shall provide the notice of transfer to the borrower not less than 15 days before the effective date of the transfer of the servicing of the mortgage loan. The transferee servicer shall provide the notice of transfer to the borrower not more than 15 days after the effective date of the transfer. The transferor and transferee servicers may provide a single notice, in which case the notice shall be provided not less than 15 days before the effective date of the transfer of the servicing of the mortgage loan. 12 CFR 1024.33(b)(3)(i).

[172] For example, a debt collector potentially could convey information regarding the debt during a consumer's visit to a website through a website chat feature.

[173] *See* 15 U.S.C. 1692g(a)(1).

[174] Proposed § 1006.34(c)(2)(vii) and (viii) would have required debt collectors to disclose, respectively, the itemization date and the amount of the debt on the itemization date. Proposed § 1006.34(c)(2)(ix) would have required debt collectors to disclose an itemization of the debt reflecting interest, fees, payments, and credits since the itemization date. For additional discussion of these provisions, which have been renumbered in the final rule, see the section-by-section analysis of § 1006.34(c)(2)(vi) through (viii).

[175] *See* 84 FR 23274, 23335–37 (May 21, 2019). The reference dates were set forth in proposed § 1006.34(b)(3)(i) through (iv) and are discussed in the section-by-section analysis of those paragraphs below.

CAR LOANS

Articles Included:

CFPB Compliance Bulletin 2022-04, *Mitigating Harm From Repossessions of Automobiles*, 87 Fed. Reg. 11951 (Mar. 3, 2022)

Kelly, Kukla, and Vasan, *Rising Car Prices Means More Auto Loan Debt* (CFPB Feb. 24, 2022).

Brown, *Overcharging for Add-On Products On Auto Loans* (CFPB May 2, 2022).

Online or Other Resources:

CFPB, *Subprime Auto Loan Outcomes by Lender Type*, https://www.consumerfinance.gov/data-research/research-reports/subprime-auto-loan-outcomes-lender-type/ (Sept. 2021).

Levitan, *The Fast and The Usurious: Putting the Brakes on Auto Lending Abuses*, 108 Geo. L.J. 1257 (April 2020).

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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Bulletin 2022-04: Mitigating Harm from Repossession of Automobiles

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Compliance bulletin and policy guidance.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing this Compliance Bulletin regarding repossession of vehicles, and the potential for violations of sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act's (Dodd-Frank Act's) prohibition on engaging in unfair, deceptive, or abusive acts or practices (collectively, UDAAPs) when repossessing vehicles.

DATES: This bulletin is applicable on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. 87 Fed. Reg. 11951 (Mar. 3, 2022)

FOR FURTHER INFORMATION CONTACT: Pax Tirrell, Counsel, Office of Supervision Policy at 202-435-7097; Tara Flynn, Senior Counsel for Enforcement Policy and Strategy, Office of Enforcement at 202-435-9734. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

In recent months, there has been extremely strong demand for used automobiles. Since the start of the COVID-19 pandemic, the average list price for used automobiles has continued to climb. While there are many factors contributing to high prices, the Consumer Financial Protection Bureau is concerned that these market conditions might create incentives for risky

auto repossession practices, since repossessed automobiles can command these higher prices when resold. To mitigate harms from these risks, the Bureau is issuing this bulletin to remind market participants about certain legal obligations under federal consumer financial laws.

To secure an auto loan, lenders require borrowers to give creditors a security interest in the vehicle. If a borrower defaults, a creditor may exercise its contractual rights to repossess the secured vehicle. Servicers collect and process auto loan or lease payments from borrowers and are either creditors or act on behalf of creditors. Generally, servicers do not immediately repossess a vehicle upon default and instead attempt to contact consumers before repossession, usually by phone or mail. Servicers may give consumers in default the opportunity to avoid repossession by making additional payments or promises to pay. Servicers generally use service providers to conduct repossessions.

While some repossessions are unavoidable, the Bureau pays particular attention to servicers' repossession of automobiles. Loan holders and servicers are responsible for ensuring that their repossession-related practices, and the practices of their service providers, do not violate the law. The Bureau intends to hold loan holders and servicers accountable for UDAAPs related to the repossession of consumers' vehicles.[1]

II. Unfair and Deceptive Acts or Practices in Supervision and Enforcement Matters

This Bulletin summarizes the current law and highlights relevant examples of conduct observed during supervisory examinations or enforcement investigations that may violate Federal consumer financial law.

[1] Although the focus of this bulletin is UDAAPs, the Bureau notes that certain provisions of the Fair Debt Collection Practices Act and its implementing Regulation F may also apply to the repossession of automobiles. Fair Debt Collection Practices Act, 803(6), 15 U.S.C. 1692a(6); 12 CFR 1006.2(i)(1) (effective November 30, 2021).

Under the Dodd-Frank Act, all covered persons or service providers are prohibited from committing unfair, deceptive, or abusive acts or practices in violation of the Act. An act or practice is unfair when (i) it causes or is likely to cause substantial injury to consumers; (ii) the injury is not reasonably avoidable by consumers; and (iii) the injury is not outweighed by countervailing benefits to consumers or to competition.[2]

Whether an act or practice is deceptive is informed by decades of precedent involving Section 5 of the Federal Trade Commission Act.[3]

The Dodd-Frank Act prohibits two types of abusive practices. First, materially interfering with the ability of a consumer to understand a term or condition of a product or service is abusive. Second, taking unreasonable advantage of statutorily specified market imbalances is abusive. Those market imbalances include (1) a consumer's lack of understanding of the material risks, costs or conditions of a product or service, (2) a consumer's inability to protect their interests in selecting or using a product or service, or (3) a consumer's reasonable reliance on a covered person to act in their interests.[4]

[2] Dodd-Frank Act sections 1031, 1036, 12 U.S.C. 5531, 5536.

[3] *See* CFPB Exam Manual at UDAAP 5.

[4] 12 U.S.C. 5531(d).

a. Unfair or deceptive practices during the repossession process

In its Supervisory and Enforcement work, the Bureau has found the following conduct related to repossession of automobiles to be UDAAPs.[5]

Wrongful repossession of consumers' vehicles

Many auto servicers provide options to borrowers to avoid repossession once a loan is delinquent or in default. Failure to prevent repossession after borrowers complete one of these options, where reasonably practicable given the timing of the borrowers' action, may constitute an unfair act or practice.

For example, in a public enforcement action, the Bureau found that an entity engaged in an unfair act or practice when it wrongfully repossessed consumers' vehicles.[6] The servicer told consumers it would not repossess vehicles when they were less than 60 days past due. Additionally, the servicer maintained a policy and told consumers that it would not repossess vehicles of consumers who had entered into an agreement to extend the loan, or who had made a promise to make a payment on a specific date and that date had not passed or who successfully kept a promise to pay. Nevertheless, the servicer wrongfully repossessed vehicles from hundreds of consumers who had:

- Made and kept promises to pay that brought the account current;
- Made payments that decreased the delinquency to less than 60 days past due;
- Made promises to pay where the date had not passed; or
- Agreed to extension agreements.

[5] For convenience, this document generally refers to historical findings by "the Bureau" in both Supervision and Enforcement, even though in Supervisory matters the findings are made by the Bureau's examiners rather than by the Bureau itself.

[6] *In the Matter of Nissan Motor Acceptance Corp.*, 2020-BCFP-0017 (Oct. 13, 2020).

Each of these actions taken by consumers should have prevented repossessions of their vehicles. The Bureau found the servicer's wrongful repossessions constituted an unfair act or practice. They caused substantial injury by depriving borrowers of the use of their vehicles, and many consumers also experienced consequences such as missed work, expenses for alternative transportation, repossession-related fees, detrimental credit reporting, and vehicle damage during the repossession process. Such injury was not reasonably avoidable, and the injury was not outweighed by countervailing benefits to the consumer or to competition.

Supervision has identified similar unfair practices in numerous examinations.[7] Supervision observed that these violations frequently occurred, after consumers acted to prevent repossession, because of one of the following errors:

- Servicers incorrectly coded consumers as delinquent;
- Servicer representatives failed to cancel repossession orders that had previously been communicated to repossession agents; or
- Repossession agents failed to confirm that the repossession order was still active prior to repossessing a vehicle.

Other practices causing wrongful repossession

Supervision has also identified other practices related to repossession that resulted in unfair acts or practices. For example, the Bankruptcy Code imposes an automatic stay that bars collection activity, including repossession, from the moment a consumer has filed a bankruptcy petition. Supervision found that when servicers received notice that consumers had filed bankruptcy petitions and their accounts were subject to an automatic stay, the servicers

[7] *Supervisory Highlights*, Issue 16 – Summer 2017; *Supervisory Highlights*, Issue 17 – Summer 2018.

committed an unfair act or practice by repossessing vehicles subject to such automatic bankruptcy stays.

Additionally, Supervision has identified that servicers committed an unfair act or practice by wrongfully repossessing vehicles after communicating inaccurate information. For example, Supervision has found that some servicers sent consumers letters stating that loans would not be considered past due if the consumer paid the amount due by a specific date. Consumers reasonably expected the servicers not to repossess before the date listed in the letter. When the servicers repossessed the vehicles prior to that date, they committed an unfair act or practice.

Representations of amounts owed

Supervision has also identified that servicers committed deceptive acts or practices by failing to provide consumers with accurate information about the amount required to bring their accounts current. For example, when consumers called to determine what amount would bring their accounts current, servicing personnel erroneously represented to consumers an amount due that was less than what was actually owed. As a result of this misrepresentation consumers paid an amount insufficient to avoid delinquency and the consequences of delinquency. This later led to repossessions that would not have occurred had consumers received accurate information. This conduct was deceptive because the servicer told consumers that an amount would bring their accounts current when, in fact, that amount would not bring their account current.

b. Unfair or deceptive practices that may lead to repossession

The following are examples of practices that lead to repossession of consumers' vehicles that the Bureau has considered to be UDAAPs.

Applying payments in a different order than disclosed to consumers, resulting in repossession

Payment application for auto loans is governed by the finance agreements between servicers and consumers. Supervision has found that entities engaged in a deceptive act or practice when they made representations to consumers that payments would be applied in a specific order, and then subsequently applied payments in a different order. For example, Supervision found that servicers represented on their websites that payments would be applied to interest, then principal, then past due payments, before being applied to other charges, such as late fees. Instead, the servicers applied partial payments to late fees first, in contravention of the methodology disclosed on the website. Because servicers applied payments to late fees first, some consumers were deemed more delinquent than they would have been under the disclosed payment allocation order, and these servicers repossessed some consumers' vehicles.

Under these circumstances, servicers' websites provided inaccurate information about payment allocation order. In some instances, the underlying contract provided the servicer the right to apply payments in any order, which did not immunize the company from liability for the deceptive website content.[8]

Unlawful fees that push consumers into default and repossession

Enforcement has brought claims under the CFPB's unfairness authority where unlawful fees push consumers into default and repossession.

For example, in a public enforcement action, the Bureau found that an entity engaged in an unfair act or practice by operating its force-placed insurance (FPI) program in an unfair manner, in some instances resulting in repossession.[9] The entity purchased duplicative or

[8] *Supervisory Highlights*, Issue 24 – Summer 2021.

[9] *In re Wells Fargo Bank, N.A.*, 2018-BCFP-0001 (Apr. 20, 2018).

unnecessary FPI policies and, in some instances, maintained the policies even after consumers had obtained adequate insurance and provided adequate proof of coverage. This conduct caused the entity to charge consumers for unnecessary FPI, resulting in additional fees, and in some instances delinquency or loan default. For some consumers the additional costs of unnecessary FPI contributed to a default that resulted in the repossession of a consumer's vehicle. Charging unnecessary amounts to consumers and subjecting them to default and repossession caused or was likely to cause substantial injury. This injury was not reasonably avoidable and was not outweighed by countervailing benefits.[10]

c. Unfair practices that may result in illegal fees after repossession

The following are examples of practices that led to illegal fees after repossession of consumers' vehicles that the Bureau has considered to be UDAAPs.

Charging illegal personal property fees

The Bureau has identified an unfair practice concerning illegal personal property fees. Borrowers often keep personal property in the repossessed vehicles. These items often are not merely incidental but can be of substantial practical importance or emotional attachment to borrowers. State law typically requires auto loan servicers and repossession companies to secure and maintain borrowers' property so that it may be returned to the borrower upon request. Some companies charge borrowers for the cost of retaining the property.

In a public enforcement action, the Bureau found that an entity engaged in an unfair act or practice by withholding consumers' personal property unless the consumers paid an upfront fee to recover the property.[11] Many of the repossession agents employed by the entity imposed

[10] *See also Supervisory Highlights*, Issue 24 – Summer 2021.

[11] *In the Matter of Nissan Motor Acceptance Corp.*, 2020-BCFP-0017 (Oct. 13, 2020).

fees on consumers for holding personal property in the repossessed vehicles. The agents often refused to return consumers' personal property unless and until the consumers paid the fees. The Bureau found that the servicer was responsible for its agents withholding consumers' personal property unless the consumer paid an upfront fee to recover it and thus caused substantial injury that was not reasonably avoidable and not outweighed by countervailing benefits to consumers or competition. Supervision has also identified this unfair act or practice at other servicers where the servicers withheld consumers' personal property unless they paid an upfront fee.[12]

Charging for Collateral Protection Insurance after repossession

Supervision found that servicers engaged in unfair acts or practices by collecting or attempting to collect force-placed collateral protection insurance (FPI) premiums after repossession even though no actual insurance protection was provided for those periods. FPI automatically terminates on the date of repossession, and consumers should not be charged after this date. Despite this, servicers charged consumers for FPI after repossession in four different circumstances. First, servicers failed to communicate the date of repossession to the FPI service provider due to system errors. Second, servicers used an incorrect formula to calculate the FPI charges that needed to be removed due to the repossession. Third, servicers' employees entered the wrong repossession date into their system of record, resulting in improper termination dates. Fourth, servicers charged consumers—who had a vehicle repossessed and subsequently reinstated the loan—post-repossession FPI premiums, including for the days the vehicle was in the servicer's possession, despite the automatic termination of the policy on the date of repossession. These errors caused consumers substantial injury because they paid amounts they did not owe or were subject to collection attempts for amounts they did not owe. This injury was

[12] *Supervisory Highlights*, Issue 13 – Fall 2016.

not reasonably avoidable because consumers did not control the servicers' cancellation processes. The substantial injury to consumers was not outweighed by any countervailing benefits to consumers or competition.[13]

III. The Bureau's Expectations

As explained in greater detail above, the Bureau has held auto lenders, loan holders, and servicers accountable if they or their agents commit UDAAPs when repossessing automobiles, including when they:

- Repossessed vehicles if consumers' loan account is current, even if there was a prior delinquency.
- Repossessed vehicles if consumers entered an agreement to extend the loan.
- Repossessed vehicles if consumers followed any instructions the company said would result in avoiding repossession.
- Repossessed vehicles from consumers who have filed for bankruptcy, and thus are protected by an automatic stay of collection activity.
- Repossessed vehicles as a result of processing payments in a different order than had been communicated to consumers.
- Repossessed vehicles after unlawful fees pushed the consumer's account into default.
- Withhold personal property found in repossessed vehicles until consumers pay an upfront fee to recover the property.
- Charged for collateral protection insurance after a vehicle is repossessed.

To prevent these unfair, deceptive, or abusive acts or practices, entities should consider doing the following:

[13] *Supervisory Highlights*, Issue 24 – Summer 2021.

- Review policies and procedures, including call scripts, to ensure that they provide employees with accurate information about steps consumers can take to prevent repossession.
- Review policies and procedures regarding cancellation of repossession orders to ensure that there is an appropriate process for cancelling repossessions if consumers take steps that should result in cancellation.
- Ensure prompt communications between the servicer and repossession service provider when the servicer cancels a repossession. For example, servicers may call repossession service providers to confirm cancelation or use mobile phone applications that push cancellation updates to repossession service providers' phones.
- Monitor repossession service providers for compliance with repossession cancellations.
- Incorporate monitoring of wrongful repossession in regular monitoring and audits of communications with consumers.
- Ensure that the entity has a corrective action program to address any violations identified and to reimburse consumers for the direct and indirect costs incurred as a result of unlawful repossessions when appropriate.
- Review payment allocation policies and procedures to validate that they are consistent with the payment allocation order disclosed in contracts and other consumer facing disclosures, such as websites.
- Monitor for illegal fees charged after repossession.
- Review consumer contracts to validate that any fees charged to consumers are authorized under the terms of applicable contracts.

- Review consumer complaints regarding repossession and ensure there is an appropriate channel for receiving, investigating, and properly resolving consumer complaints relating to wrongful repossession and illegal fees after repossession.
- Perform regular reviews of service providers, including repossession vendors, as to their pertinent practices.[14]
- Monitor any FPI program to ensure that consumers are not charged for unnecessary FPI. This may include review of FPI cancellation rates.

IV. Conclusion

The Bureau will continue to review closely the practices of entities repossessing automobiles for potential UDAAPs, including the practices described above. The Bureau will use all appropriate tools to hold entities accountable if they engage in UDAAPs in connection with these practices.

V. Regulatory Requirements

The Bulletin constitutes a general statement of policy exempt from the notice and comment rulemaking requirements of the Administrative Procedure Act (APA). It is intended to provide information regarding the Bureau's general plans to exercise its supervisory and enforcement discretion for institutions under its jurisdiction and does not impose any legal requirements on external parties, nor does it create or confer any substantive rights on external parties that could be enforceable in any administrative or civil proceeding. Because no notice of proposed rulemaking is required in issuing the Bulletin, the Regulatory Flexibility Act also does not require an initial or final regulatory flexibility analysis. The Bureau has also determined that

[14] CFPB Compliance Bulletin and Policy Guidance; 2016-02, Service Providers (Oct. 31, 2016), https://www.consumerfinance.gov/documents/1385/102016_cfpb_OfficialGuidanceServiceProviderBulletin.pdf.

the issuance of the Bulletin does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

Consumer Financial Protection Bureau (cfpb.gov/)

Rising car prices means more auto loan debt

By Ryan Kelly, Chris Kukla, and Ashwin Vasan – FEB 24, 2022

Earlier this month, the Bureau of Labor Statistics released data regarding changes to the Consumer Price Index (CPI), which is one measure of inflation. The increasing cost of automobiles continues to be a major component of inflation, as many manufacturers face difficulties procuring chips that are a key component in cars and are therefore producing fewer new cars. While the chip shortage has caused new cars to grow more expensive, the price increase of used cars has been sharper. Data (https://www.bls.gov/news.release/cpi.t02.htm) show that the CPI for used cars and trucks increased 40 percent since January 2021 while the CPI for new cars increased 12 percent. As car prices continue to rise, loan amounts are rising, and loan lengths are growing to make those larger loans seem affordable.

As a result, we expect that both the total amount of debt and the average loan size will continue to increase and that larger car loans will put increased pressure on some consumers' budgets for much of the next decade. Auto loans are already the third largest consumer credit market in the United States at over $1.4 trillion outstanding (https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc_2021q4.pdf), double the amount from 10 years ago and expected to grow further. We are also concerned that current high auto prices, especially for used cars, might create incentives for lenders to repossess cars more quickly than would have occurred before.

For many, their car or truck is essential to get to work or to do their work. Therefore, as the economic recovery continues, we will focus on ensuring a fair, transparent, and competitive auto lending market in the following ways.

Ensuring affordable credit for auto loans

When loans are affordable, consumers can repay the loan and continue to use their car. When loans are made at the edge of (or beyond) a consumer's ability

to repay, any economic disruption in the consumer's life can result in repossession. Given the increase in loan amounts, the rising length of loan terms, and the uncertainty around the ongoing economic recovery, we will be closely monitoring lender practices and consumer outcomes. In particular, we continue to evaluate lending structures where lenders seem to rely on high interest rates and fees to profit even when consumers fail.

We are also concerned about loan-to-value (LTV) ratios in the auto loan market. While LTV ratios have dropped in the past year for consumers who already had cars due to high used vehicle prices, LTVs were climbing prior to the global vehicle shortage. We expect that trend to resume once price pressures abate. We will continue to monitor the market as pricing issues persist.

Monitoring practices in auto loan servicing and collections

The current economic recovery is uneven, and some consumers have been hit harder economically due to the pandemic. We want to ensure that incentives are aligned between servicers and consumers, that servicers are making accommodations available to all consumers and that servicer practices treat consumers fairly. We will also continue to work with our federal agency partners to ensure that the special protections offered to our servicemembers are followed and enforced.

Technology continues to shape auto loan servicing and collections, but with that comes questions about the effect on consumers. It is now less costly to repossess a car because many lenders require the use of some of these technologies. For example, some lenders require access to GPS locators so that they always know where a car is physically located, require the installation of technology that blocks a borrower who has missed even one payment from starting the car, or use license plate recognition (LPR) technology to find cars on repossession "hot lists".

We are concerned that the use of these technologies may disproportionally impact certain communities, and we are taking steps to better and fully understand their impact, including privacy concerns associated with them.

Fostering competition among subprime lenders

Consumers with prime credit scores typically have many financing options, including borrowing directly from lenders. This provides them more leverage to negotiate interest rates. On the other hand, consumers with subprime credit

scores often get loans indirectly through a smaller pool of lenders that operate exclusively through dealers or from buy-here-pay-here (BHPH) dealers that specialize in subprime lending. The result is less comparison shopping, fewer options, and less leverage to negotiate the interest rate.

CFPB research shows that the average subprime auto loan interest rate is between about 9 percent and 20 percent annually (https://files.consumerfinance.gov/f/documents/cfpb_subprime-auto_data-point_2021-09.pdf), depending on the type of lender. This variation has a large impact on consumers. Our report estimates that typical "shallow subprime" small BHPH borrowers would save around $894 over the life of a loan if they could reduce the interest rate from 13 percent, which is typical for such BHPH borrowers, to 9 percent, which is typical for bank borrowers with similar default rates.

We are looking to better understand potential barriers to competition in the subprime auto lending market that may drive these and related outcomes. We will continue to research auto lending policies and practices that may hinder a fair, transparent, and competitive market. And, we will work with our counterparts at the Federal Trade Commission and the Federal Reserve Bank Board of Governors to use our collective authorities to address issues in the market.

Given the steep rise in costs to purchase an automobile, it is critical that America has a well-functioning auto lending market. We will keep the public updated on changes to the market and the actions we are taking to ensure the market is working fairly for all Americans.

FURTHER READING

Blog

Tips to stay on top of your finances during the coronavirus pandemic (cfpb.gov/about-us/blog/stay-on-top-of-finances-during-coronavirus-pandemic/)

APR 03, 2020

Consejos para mantenerse al día con sus finanzas durante la pandemia del coronavirus (cfpb.gov/about-us/blog/consejos-estar-al-dia-con-sus-finanzas-coronavirus/)

APR 03, 2020

Consumer Financial Protection Bureau (cfpb.gov/)

Overcharging for add-on products on auto loans

By Allison Brown – MAY 02, 2022

The Consumer Financial Protection Bureau is committed to ensuring a fair, transparent, and competitive auto lending market, and we are taking action against sloppy servicing practices that cause harm (https://www.consumerfinance.gov/compliance/supervisory-guidance/cfpb-bulletin-2022-04-mitigating-harm-from-repossession-of-automobiles/). Some of these practices involve optional, add-on products that consumers can purchase when they purchase a car. For example, guaranteed asset protection (GAP) products offer to help pay off an auto loan if the car is totaled or stolen and the consumer owes more than the car's depreciated value.

The add-on product's potential benefits apply only for specific time periods, such as four years after purchase, and only under certain circumstances. Auto dealers and finance companies often charge consumers all payments for any add-on products as a lump sum at origination of the auto loan, and they generally include the lump sum cost as part of the total vehicle financing agreement. Consumers typically make payments on these add-on products throughout the loan term, even if the product expires years earlier.

Our examiners have focused on the way servicers handle these add-on product charges when the loan ends before the add-on product's potential benefits end. Such early termination may happen because the consumer pays the loan off early, often through refinancing, or because the consumer was delinquent in making payments and the servicer repossessed the consumer's car. As we describe in a report (https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-26_2022-04.pdf) released today, examiners found that servicers engaged in unfair practices by failing to request refunds from the third-party administrators for "unearned" fees related to one such add-on product, GAP, and failing to apply the applicable refunds to the accounts after repossession and cancellation of the contracts. At that point, the consumers did not have the cars that had been subject to the GAP product, and the product no longer offered any possible benefit to consumers. Examiners found that servicers later sent deficiency notices to consumers and

reported balances to third-party debt buyers that included these inaccurate amounts in the deficiency balances owed by consumers.

In response to these findings, the servicers remediated impacted consumers and implemented additional controls to ensure they process add-on product refunds after repossession.

Miscalculating Refunds

CFPB examiners have also cited servicers for engaging in unfair acts or practices for miscalculating ancillary auto product refunds (https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-18_032019.pdf) after repossession and attempting to collect miscalculated deficiency balances. For example, servicers incorrectly calculated refunds for extended warranty products or other products that had been financed through the consumers' auto loans. The miscalculations reduced the refunds available to certain borrowers and led to deficiency balances that were higher by hundreds of dollars. The servicers then attempted to collect the deficiency balances. In response to these findings, the servicers conducted reviews to identify and remediate affected borrowers.

The CFPB will continue to scrutinize servicer practices to make sure that borrowers aren't overcharged when their loans end early.

FURTHER READING

Blog

Seven examples of unfair practices and other violations by mortgage servicers: CFPB supervision activities uncover red flags (cfpb.gov/about-us/blog/seven-examples-unfair-practices-and-other-violations-mortgage-servicers-cfpb-supervision-activities-uncover-red-flags/)

DEC 09, 2021

Tips to stay on top of your finances during the coronavirus pandemic (cfpb.gov/about-us/blog/stay-on-top-of-finances-during-coronavirus-pandemic/)

APR 03, 2020

MEDICAL DEBT

Articles Included:

CFPB Bulletin 2022-01: *Medical Debt Collection and Consumer Reporting Requirements in Connection With the No Surprises Act*, 37 Fed. Reg. 3025 (Jan. 20, 2022).

CFPB Report Spotlights Medical Billing Challenges (CFPB Apr. 20, 2022).

CFPB Estimates $88 Billion in Medical Bills on Credit Reports (CFPB Mar. 1, 2022).

Online or Other Resources:

CFPB Report, *Medical Debt Burden in the United States*, https://www.consumerfinance.gov/data-research/research-reports/medical-debt-burden-in-the-united-states/ (February 2022).

Brobst, *Open and Unashamed in an Era of Consumer Protection: Unconscionable Hospital Billing Practices and the Chargemaster Racket*, 51 U. Mem. Law Rev. 861 (Summer 2021).

BILLING CODE: 4810-AM-P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Parts 1006 and 1022

Bulletin 2022-01: Medical Debt Collection and Consumer Reporting Requirements in Connection with the No Surprises Act

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Compliance bulletin and policy guidance.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing this compliance bulletin and policy guidance (Bulletin) to remind debt collectors of their obligation to comply with the Fair Debt Collection Practices Act's prohibition on false, deceptive, or misleading representations or means in connection with the collection of any debt and unfair or unconscionable means to collect or attempt to collect any debt, and to remind consumer reporting agencies and information furnishers to comply with the Fair Credit Reporting Act's accuracy and dispute resolution requirements, including when collecting, furnishing information about, and reporting medical debts covered by the No Surprises Act.

DATES: This Bulletin is applicable as of [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. 87 Fed. Reg. 3025 (Jan. 20, 2022).

FOR FURTHER INFORMATION CONTACT: Seth Caffrey, Courtney Jean, Kristin McPartland, or Alexandra Reimelt, Senior Counsels, Office of Regulations, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION:

I. Bulletin

The Bureau is issuing this Bulletin to emphasize the obligation of debt collectors to comply with the Fair Debt Collection Practices Act's (FDCPA)[1] prohibitions on false, deceptive, or misleading representations or means in connection with the collection of any debt and unfair or unconscionable means to collect or attempt to collect any debt, and the obligation of consumer reporting agencies and information furnishers to comply with the Fair Credit Reporting Act's (FCRA)[2] accuracy and dispute resolution requirements, including when collecting, furnishing information about, and reporting medical debts covered by the No Surprises Act. This Bulletin describes certain acts or practices related to the collection of medical debts that may violate the FDCPA or the FCRA. The examples described in this bulletin are not exhaustive of all potential violations of the FDCPA and FCRA that could arise from the collection of such debts.

Effective generally for plan years beginning on or after January 1, 2022, the No Surprises Act[3] protects participants, beneficiaries, and enrollees in group health plans and group and individual health insurance coverage from surprise medical bills when they receive, under certain circumstances, emergency services, non-emergency services from nonparticipating providers at participating health care facilities, and air ambulance services from nonparticipating providers of air ambulance services.[4] In addition, the No Surprises Act, among other things, requires certain health care facilities and providers to disclose Federal and State patient protections against

[1] 15 U.S.C. 1692 *et seq*.

[2] 15 U.S.C. 1681 *et seq*.

[3] Pub. L. 116-260, div. BB, tit. I, 134 Stat. 2758 (2020).

[4] *See* Requirements Related to Surprise Billing; Part I, 86 FR 36872 (July 13, 2021). The protections against surprise billing also apply to health benefits plans offered by carriers under the Federal Employees Health Benefits (FEHB) Act. *See* 5 U.S.C. 8901(p).

balance billing and sets forth complaint processes with respect to potential violations of the protections against balance billing and out-of-network cost sharing.[5] The No Surprises Act also includes certain protections for uninsured (or self-pay) individuals from surprise medical bills.[6] Several Federal agencies have published rules implementing the No Surprises Act.[7]

Several characteristics of medical debt pose special risks to consumers and distinguish it from other types of debt.[8] Medical debt often results from an unanticipated event, such as an accident or sudden illness, rather than from a voluntary, planned transaction. Consumers are rarely informed of the costs of medical treatment in advance (although provisions in the No Surprises Act will help to remedy this), and because of price opacity, provider availability, and the emergency nature of some medical care, consumers may have only a limited ability to "shop around." In addition, medical bills can be rife with errors, and the unique complexity of the medical billing and third-party reimbursement process exacerbates consumer confusion. A consumer faced with a bill for medical services is generally ill suited to the task of identifying billing errors, including, for example, identifying whether the billed services were actually received and whether the correct amount was billed. A consumer also may have difficulty determining whether the amount is covered by insurance (if applicable) and, if so, whether and to what extent the amount was already paid.

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[5] *See* Requirements Related to Surprise Billing; Part I, 86 FR 36872 (July 13, 2021).

[6] *See* Requirements Related to Surprise Billing; Part II, 86 FR 55980 (Oct. 7, 2021).

[7] *See, e.g.*, *id*. (interim final rule issued by Office of Personnel Management; Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare and Medicaid Services, Department of Health and Human Services); Requirements Related to Surprise Billing; Part I, 86 FR 36872 (July 13, 2021) (same).

[8] *See generally* Bureau of Consumer Fin. Prot., *Consumer credit reports: A study of medical and non-medical collections* (Dec. 2014), at 15-16, 38-42, *https://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medical-collections.pdf*.

If a medical bill remains unpaid after a certain amount of time, a medical provider may engage a third party to collect the debt.[9] To the extent the third party qualifies as a "debt collector" under the FDCPA and its implementing Regulation F, the third party is subject to the FDCPA and Regulation F.[10] The FDCPA and Regulation F prohibit the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt,"[11] including, for example, any false representation of "the character, amount, or legal status of any debt."[12] The FDCPA and Regulation F also prohibit the use of "unfair or unconscionable means to collect or attempt to collect any debt,"[13] including, for example, the "collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law."[14]

The Bureau reminds debt collectors about these FDCPA prohibitions. The prohibition on misrepresentations includes misrepresenting that a consumer must pay a debt stemming from a charge that exceeds the amount permitted by the No Surprises Act. Thus, for example, a debt collector who represents that a consumer owes a debt arising from out-of-network charges for emergency services may violate the prohibition on misrepresentations if those charges exceed the amount permitted by the No Surprises Act. Courts have also emphasized that collecting an

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[9] *See generally* Debt Collection Practices (Regulation F), 85 FR 76734, 76735-36 (Nov. 30, 2020).

[10] 15 U.S.C. 1692a(6) (defining "debt collector"); 12 CFR 1006.2(i) (same).

[11] 15 U.S.C. 1692e; 12 CFR 1006.18(a).

[12] 15 U.S.C. 1692e(2)(A); 12 CFR 1006.18(b)(2)(i).

[13] 15 U.S.C. 1692f; 12 CFR 1006.22(a).

[14] 15 U.S.C. 1692f(1); 12 CFR 1006.22(b). *See also, e.g.*, *Tuttle v. Equifax Check*, 190 F.3d 9, 13 (2nd Cir. 1999) (noting that, if state law expressly prohibits service charges, a service charge cannot be imposed even if the contract allows it).

amount that exceeds what is owed would violate the prohibition on unfair or unconscionable debt collection practices.

Many debt collectors furnish information about unpaid medical debts to consumer reporting agencies (CRAs).[15] Debt collectors who furnish information and the CRAs to which they furnish that information are subject to the FCRA and its implementing Regulation V.[16] The FCRA and Regulation V impose obligations on CRAs and furnishers relating to the accuracy of information in consumer reports. Among these is the requirement that, when preparing a consumer report, CRAs "shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates,"[17] and the requirement that furnishers "establish and implement reasonable written policies and procedures regarding the accuracy and integrity of the information relating to consumers that it furnishes to a consumer reporting agency."[18] The FCRA and Regulation V also require CRAs and furnishers to conduct reasonable and timely investigations of consumer disputes to verify the accuracy of furnished information.[19]

The Bureau reminds furnishers and CRAs that the accuracy and dispute obligations imposed by the FCRA and Regulation V apply with respect to debts stemming from charges that

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[15] *See* Bureau of Consumer Fin. Prot., *Market Snapshot: Third-Party Debt Collections Tradeline Reporting*, at 5, 12-14 (July 2019), *https://files.consumerfinance.gov/f/documents/201907_cfpb_third-party-debt-collections_report.pdf* (finding that, in the second quarter of 2018, medical debt accounted for approximately two-thirds of total third-party collections tradelines). *See also* Bureau of Consumer Fin. Prot., *Consumer credit reports: A study of medical and non-medical collections*, at 4-5 (Dec. 2014), *https://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medical-collections.pdf* (finding that, based on data from 2012 through 2014, medical debt collections tradelines affected the credit reports of nearly one-fifth of all consumers with credit reports); *id.* at 5 (finding that, based on data from 2012 through 2014, medical debt collection tradelines accounted for over half of all debt collection tradelines with an identifiable creditor or provider).

[16] 15 U.S.C. 1681 through 1681x; 12 CFR part 1022.

[17] 15 U.S.C. 1681e(b).

[18] 12 CFR 1022.42(a).

[19] 15 U.S.C. 1681i, 1681s-2; 12 CFR 1022.43.

exceed the amount permitted by the No Surprises Act. Thus, for example, a debt collector who furnishes information indicating that a consumer owes a debt arising from out-of-network charges for emergency services (or a CRA that includes such information in a consumer report) may violate the FCRA and Regulation V if those charges exceed the amount permitted by the No Surprises Act or if the furnisher (or CRA) fails to meet its dispute obligations.

The Bureau will closely review the practices of those engaged in the collection or reporting of medical debt. The Bureau will hold debt collectors accountable for failing to comply with the FDCPA and Regulation F, and it will hold CRAs and furnishers accountable for failing to comply with the FCRA and Regulation V. The Bureau will use all appropriate tools to assess whether supervisory, enforcement, or other action may be necessary.

II. Regulatory Matters

This Bulletin constitutes a general statement of policy exempt from the notice and comment rulemaking requirements of the Administrative Procedure Act.[20] It summarizes existing legal requirements. It does not impose any legal requirements on external parties, nor does it create or confer any substantive rights on external parties that could be enforceable in any administrative or civil proceeding. Because no notice of proposed rulemaking is required in issuing this Bulletin, the Regulatory Flexibility Act also does not require an initial or final regulatory flexibility analysis.[21] The Bureau has also determined that the issuance of this Bulletin does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of

[20] 5 U.S.C. 553(b).

[21] 5 U.S.C. 603(a), 604(a).

information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995.[22]

/s/ Rohit Chopra

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Rohit Chopra

Director, Consumer Financial Protection Bureau.

[22] 44 U.S.C. 3501 *et seq*.

CFPB Report Spotlights Medical Billing Challenges

Consumer complaints show coercive credit reporting and privacy intrusions based on unverified and inaccurate medical billing

APR 20, 2022

Washington, D.C. – A report issued today by the Consumer Financial Protection Bureau (CFPB) examines the financial consequences of medical billing and collections endured by individuals and families across the country. The report draws from the rising volume of medical billing and collection complaints submitted to the CFPB. The CFPB is using today's research to strengthen its across government and industry efforts to support patients and families suffering the consequences of medical billing and collections.

"Many Americans feel forced to pay medical bills that they have already paid or never owed to begin with," said CFPB Director Rohit Chopra. "The credit reporting system should not be used as a weapon to coerce patients into paying medical bills they do not owe."

People report that they receive medical bills that are inaccurate or not owed, and they describe the subsequent and significant difficulties identifying, verifying, or eliminating the bills. People also report learning of an outstanding medical bill only after experiencing a drop in their credit score and being told that only paying the bill would remove the negative collections information from their credit report. When they did receive prior notice of medical bills in collections, people reported that debt collectors included detailed medical information that resulted in privacy breaches of sensitive medical information. Many people reported paying medical bills to avoid adverse financial and privacy consequences, even when they did not believe the bill to be valid.

When allegedly unpaid or unresolved medical bills get referred to collections and reported to the credit reporting system, people face reduced access to credit, increased risk of bankruptcy, and difficulty securing employment and housing. These negative consequences can occur even when the underlying bill is erroneous, not owed, or unverified.

Among the key findings from today's reports are that people:

- **Do not recognize or owe alleged medical bills, but they continue to be contacted by debt collectors.** Debt collectors are required to take reasonable steps to verify debts. Yet, in some complaints, individuals stated that they did not recognize the company sending them collection notices or that the notices did not contain sufficient information to identify and verify the alleged debt. People also submitted complaints about being contacted by debt collectors for bills that had already been paid in full, covered by insurance, or resolved through charity care. From 2018 to 2021, complaints about collection attempts on medical bills that were not owed increased by 31%.
- **Suspect unpaid medical bills are being surreptitiously and unlawfully placed on their credit reports.** Many people submitting complaints about medical bills state that they only realized the bills were in collections when they checked their credit report or when they were applying for credit. This coercive use of the credit reporting system by debt collectors is an illegal but common debt collection tactic, especially for error-prone debts, such as medical bills.
- **Experience their credit reports being used as weapons to force payments.** People reported that once medical bills were placed in collections and furnished to credit reporting agencies, their credit scores stopped reflecting their ability to repay debts. Their lower credit scores became weapons debt collectors could use against them to force payment. In some instances, individuals reported becoming so frustrated trying to resolve allegedly unpaid bills that they gave in and paid the debt collector. They just wanted to make the collection efforts stop and to increase their credit scores.
- **Report that collection notices contained large amounts of highly sensitive medical information.** Individuals described feeling that collection notices included more personal medical information than authorized or permissible under the Health Insurance Portability and Accountability Act (HIPAA). The notifications they received often included detailed bills, which listed procedures, tests, and medications.

The consumer experiences in today's report strongly suggest that many medical bills reported on credit reports are disputed, inaccurate, or not owed. This finding supports previous research by the CFPB (https://www.consumerfinance.gov/about-us/newsroom/cfpb-study-finds-medical-debt-overly-penalizes-consumer-credit-scores/) that found medical bills are less predictive of future repayment than other bills or credit obligations. Specifically, medical bills do less to help lenders determine the likelihood that a credit applicant will repay a new credit extension, like a personal loan.

To mitigate the impact allegedly owed medical bills can have on a person's ability to participate in the financial marketplace, the CFPB is committed to:

- **Engaging with the healthcare industry.** The CFPB is engaging with a wide

cross-section of the healthcare industry to learn more about medical billing practices, patient access to charity care, and consumer and patient-centric approaches to medical billing and collections.

- **Supporting patients and families.** The CFPB will continue to publish information (https://www.consumerfinance.gov/rules-policy/medical-debt/) designed to help patients and families navigate the complex medical billing system, and it will hold bad actors in the consumer financial services marketplace accountable.
- **Working with federal partners to reduce coercive credit reporting.** The CFPB will continue to partner with agencies across government to ensure medical billing and collections are not stopping people from accessing jobs, housing, and credit. Earlier this month, federal agencies announced a series of actions (https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/11/fact-sheet-the-biden-administration-announces-new-actions-to-lessen-the-burden-of-medical-debt-and-increase-consumer-protection/) to reduce the impact of medical debt as a barrier to opportunity.
- **Determining whether unpaid medical billing data should be included in credit reports.** Today's report calls into further question the practical usefulness of including medical bills in the credit reporting system. Due to the various concerns around accuracy and validity, as well as lower predictive value, the inclusion appears to be of little use to creditors and other market participants.

Read today's report, *Complaint Bulletin: Medical billing and collection issues described in consumer complaints* (https://files.consumerfinance.gov/f/documents/cfpb_complaint-bulletin-medical-billing_report_2022-04.pdf).

Read the CFPB's March 2022 report, *Medical Debt Burden in the United States* (https://www.consumerfinance.gov/about-us/newsroom/cfpb-estimates-88-billion-in-medical-bills-on-credit-reports/).

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The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit consumerfinance.gov (cfpb.gov/).

PRESS INFORMATION

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CFPB Estimates $88 Billion in Medical Bills on Credit Reports

Inaccurate medical billing data contaminates credit reporting system

MAR 01, 2022

WASHINGTON, D.C. – The Consumer Financial Protection Bureau (CFPB) today released a report highlighting the complicated and burdensome nature of the medical billing system in the United States. The report reveals that the U.S. healthcare system is supported by a billing, payments, collections, and credit reporting infrastructure where mistakes are common, and where patients often have difficulty getting these errors corrected or resolved.

"When it comes to medical bills, Americans are often caught in a doom loop between their medical provider and insurance company," said CFPB Director Rohit Chopra. "Our credit reporting system is too often used as a tool to coerce and extort patients into paying medical bills they may not even owe."

Today's report details how medical bills are often incurred through unexpected and emergency events, are subject to opaque pricing, and involve complicated insurance or charity care coverage and pricing rules. In emergency situations, patients might not even sign a billing agreement until after receiving treatment. In other instances, patients, including those with chronic illnesses or who are injured or ill, may desperately feel that the need for medical care forces them into accepting any costs for treatment.

When those bills end up in collections, the repercussions can be far-ranging. Medical bills placed on credit reports can result in reduced access to credit, increased risk of bankruptcy, avoidance of medical care, and difficulty securing employment, even when the bill itself is inaccurate or erroneous. The report outlines how these repercussions are especially acute for people from Black and Hispanic communities, as well as people with low incomes, veterans, older adults, and young adults of all races and ethnicities.

The report describes challenges and sources of confusion when a person's

medical bills go into collection or are placed on a credit report. Bills may be sent to collectors by doctors, hospitals, parent companies, or groups representing a service provider, so there may be multiple charges for the same visit. The total billed amount can quickly become unrecognizable, and the time and effort needed to parse legitimate charges from inaccurate ones can become unmanageable.

Among the other key findings of the report:

- **Medical debt affects tens of millions of households:** Roughly 20% of U.S. households report that they have medical debt. The CFPB found that medical collections tradelines appear on 43 million credit reports. As of the second quarter of 2021, 58% of bills that are in collections and on people's credit records are medical bills.
- **COVID-19 has made the situation worse:** Both uninsured and insured patients incurred substantial costs to cover COVID-19 related services, including testing and hospitalization. To the extent people deferred routine care during the pandemic, costs and medical debt are expected to increase post-pandemic.
- **Medical debt affects households unevenly:** Past-due medical debt is more prevalent among Black (28%) and Hispanic (22%) individuals than white (17%) and Asian (10%) individuals. Medical debt is also more common in the Southeastern and Southwestern U.S., in part because states in those regions did not expand Medicaid coverage.
- **Medical debt weakens underwriting accuracy:** Previous research (cfpb.gov/about-us/newsroom/cfpb-study-finds-medical-debt-overly-penalizes-consumer-credit-scores/) by the CFPB has shown that medical billing data on a credit report is less predictive of future repayment than reporting on traditional credit obligations. Some newer credit scoring models weigh medical collections tradelines less heavily, with dramatic effects; an updated FICO model resulted in an average 25-point increase in consumers' scores. However, there has been very little adoption so far, and the most widely-used models use the older, less accurate approach. As a result, people with medical debt, who are disproportionately Black and Hispanic, continue to be penalized with lower credit scores.

The CFPB will act to ensure that the consumer credit reporting system is not used coercively against patients and their families to force them to pay questionable medical bills. Specifically, the CFPB intends to:

- **Hold credit reporting companies accountable:** Federal law requires credit reporting companies to have reasonable procedures in place to assure that medical debt on consumer reports is accurate. Those procedures must include, if necessary, taking action against furnishers who routinely report inaccurate information. If furnishers, of medical debt or otherwise, are contaminating the credit reporting system with inaccurate reports, the CFPB

expects the Big Three agencies to cut off their access to the system.

- **Work with federal partners to reduce coercive credit reporting:** The CFPB is working with the U.S. Department of Health and Human Services to ensure that patients are not coerced into paying bills more than the amounts due. In January, the CFPB issued a compliance bulletin (cfpb.gov/about-us/newsroom/cfpb-issues-bulletin-to-prevent-unlawful-medical-debt-collection-and-credit-reporting/) that reminded debt collectors, credit reporting companies, and others that it is illegal to collect or report as owing a debt that is not legally due and owing, including where the billed amount violates the No Surprises Act. The CFPB also supported recent changes by the Department of Veterans Affairs (https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5758) that will reduce financial distress for veterans by requiring all other methods of debt collection to be exhausted before a veteran's bill is reported to the credit reporting agencies. The CFPB will also further investigate, in cooperation with its federal partners, how best to facilitate patients' access to financial assistance programs offered by medical providers.
- **Determine whether unpaid medical billing data should be included in credit reports:** The CFPB will conduct additional research on how medical billing, collections, and credit reporting practices affect patients and families. Informed by those findings, the CFPB will assess whether consumer credit reports should include data on unpaid medical bills.

Read the CFPB's full report, *Medical Debt Burden in the United States* (cfpb.gov/data-research/research-reports/medical-debt-burden-in-the-united-states/).

Consumers having an issue resolving a medical debt or facing a problem with other consumer financial products or services can submit a complaint with the CFPB online (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

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The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit consumerfinance.gov (cfpb.gov/).

PRESS INFORMATION

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SUNSET OF THE LIBOR INDEX

Articles Included:

CFPB Executive Summary of the 2021 LIBOR Transition Rule, 86 Fed. Reg. 69716 (Dec. 8, 2021), corrected at 87 Fed. Reg. 8733 (Feb. 16, 2022).

Online or Other Resources:

Consumer Financial Protection Bureau

1700 G Street NW, Washington, DC 20552

December 7, 2021

86 Fed. Reg. 69716 (Dec. 8, 2021), corrected at 87 Fed. Reg. 8733 (Feb. 16, 2022)

Executive Summary of the 2021 LIBOR Transition Rule

On December 7, 2021, the Consumer Financial Protection Bureau (Bureau) issued a final rule (2021 LIBOR Transition Final Rule or LIBOR Transition Rule) amending certain provisions in Regulation Z, which implements the Truth in Lending Act (TILA), to address the sunset of LIBOR.

Background

In the United States, financial institutions have used LIBOR as a common benchmark rate for a variety of adjustable-rate consumer financial products, including adjustable-rate mortgages, reverse mortgages, home equity lines of credit (HELOCs), credit cards, and student loans. The UK Financial Conduct Authority has stated that it cannot guarantee the publication of certain U.S. Dollar (USD) LIBOR tenors beyond June 30, 2023.

On June 18, 2020, the Bureau published in the Federal Register a notice of proposed rulemaking to amend Regulation Z to facilitate the LIBOR transition for open-end and closed-end credit. For closed-end products, the proposed provisions discussed example indices that were considered "comparable" to certain LIBOR indices and as a result, would not trigger a refinance of the transaction under the existing Regulation Z provisions. For open-end products, the proposed amendments included LIBOR-specific provisions and examples for certain open-end index change

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This is a Compliance Aid issued by the Consumer Financial Protection Bureau. The Bureau published a Policy Statement on Compliance Aids, available at https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/policy-statement-compliance-aids/, that explains the Bureau's approach to Compliance Aids.

requirements and credit card rate reevaluation requirements, and proposed additional triggers for change-in-terms notices. The proposal also included technical corrections including replacing references to a LIBOR index, with references to a Secured Overnight Financing Rate (SOFR) index, throughout Regulation Z.

This summary discusses the LIBOR Transition Rule, which generally finalizes these proposed amendments to Regulation Z.

Effective Date

Generally, the amendments take effect on April 1, 2022. For certain change-in-terms notice provisions applicable to HELOCs and credit card accounts, creditors and card issuers can begin complying on April 1, 2022, although mandatory compliance does not begin until October 1, 2022. Additionally, for changes to the Initial and Subsequent Interest Rate Adjustment sample forms in Appendix H applicable to certain closed-end ARMs, creditors (and assignees and servicers) may optionally rely on either a format substantially similar to the legacy sample forms or the updated sample forms beginning April 1, 2022, through September 30, 2023. However, beginning on October 1, 2023, those entities may only rely on a format substantially similar to the *updated sample forms*.

Closed-End Credit

The LIBOR Transition Rule adds an example to the commentary of an index that would be comparable to LIBOR for purposes of Regulation Z's requirements that apply to refinancings of closed-end loans.

Specifically, the LIBOR Transition Rule identifies SOFR-based spread-adjusted indices recommended by the Alternative Reference Rates Committee (ARRC) for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as an example of a comparable index for the LIBOR indices that they are intended to replace. This example allows a creditor to replace LIBOR indices with the respective SOFR-based spread-adjusted indices recommended by the ARRC for consumer products without triggering refinancing requirements under Regulation Z. The ARRC plans to announce no later than June 30, 2022, which SOFR-based spread-adjusted replacement index for consumer products it will recommend to replace the 1-year USD LIBOR. The Bureau is not finalizing the SOFR-based spread-adjusted index replacement for 1-year USD LIBOR for consumer products until it has a chance to review the details of the index recommended by the ARRC and make a determination about the index's comparability to 1-year USD LIBOR.

Additionally, the LIBOR Transition Rule adds commentary that provides a non-exhaustive set of factors for use in determining if indices are comparable to LIBOR indices. The determination of whether a particular replacement index meets the Regulation Z standards is fact-specific and, among other factors, depends on the replacement index being considered and the tenor of LIBOR being replaced. These factors provide insight for creditors when completing the analysis comparing LIBOR to other indices besides the SOFR-based spread-adjusted indices discussed above. The factors include, but are not limited to, whether:

- The movement of the index levels of the two indices over time are comparable (i.e., increases and decreases in value or the correlation);
- The replacement index will have a comparable impact on the consumers' payments (if there is sufficient data for this analysis);
- The index levels are comparable (i.e., although indices may increase and decrease at the same rate, is one index always a certain number of basis points higher than another or is a spread-adjustment required);
- The replacement index is publicly available; and
- The replacement index is outside the control of the creditor.

The LIBOR Transition Rule also updates the interest rate adjustment sample forms applicable to certain closed-end ARMs. The updates include replacing LIBOR references with references to a SOFR-based index and correcting an error in the sample form published in 2013. Given that most USD LIBOR tenors will not sunset until June 30, 2023, creditors (and assignees and servicers) may optionally rely on either a format substantially similar to the legacy sample forms or the updated sample forms beginning April 1, 2022, through September 30, 2023. However, beginning on October 1, 2023, those entities may only rely on a format substantially similar to the updated sample forms to be deemed in compliance.

The LIBOR Transition Rule also contains technical edits to other closed-end provisions to replace LIBOR references.

Open-End Credit

LIBOR-SPECIFIC INDEX CHANGE PROVISION FOR HELOC LOANS

The LIBOR Transition Rule includes revisions for changing an index on a HELOC (including an open-end reverse mortgage) under Regulation Z. First, the Rule amends the existing Unavailable

Provision, with updates that facilitate the transition from a LIBOR index when LIBOR is no longer available.

Second, the Rule adds an alternative provision, the LIBOR-Specific provision, which allows HELOC creditors to replace a LIBOR index used on the account and adjust the margin to calculate the variable rate on or after April 1, 2022, even if prior to the discontinuation of LIBOR.

Both options require certain conditions to be met, including:

1. *Historical fluctuation comparison:* Generally, the replacement index must have historical fluctuations substantially similar to those of the LIBOR tenor being replaced. This condition does not apply if the replacement index is newly established.

2. *APR comparison:* The replacement index and replacement margin must result in an APR substantially similar to the APR calculated generally using the LIBOR index values on a specified date and the account's existing margin.

The LIBOR Transition Rule identifies the following examples of replacement indices that meet the "historical fluctuation comparison" standard: 1) the prime rate published in the Wall Street Journal (Prime) with respect to 1-month and 3-month USD LIBOR indices; and 2) the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, and 6-month USD LIBOR indices with respect to the LIBOR indices they are intended to replace.

The Bureau is not finalizing the safe harbor for the SOFR-based spread-adjusted index replacement for 1-year USD LIBOR until it has a chance to review the replacement index recommended by the ARRC and a chance to make a determination about whether that index meets the "historical fluctuation comparison" standard with respect to 1-year USD LIBOR.

The determination of whether a particular replacement index meets the Regulation Z standards is fact-specific and, among other factors, depends on the replacement index being considered and the tenor of LIBOR being replaced. The LIBOR Transition Rule contains a non-exhaustive set of factors used to determine if indices have historical fluctuations substantially similar to those of a particular LIBOR index. These factors provide insight for creditors when completing the analysis comparing LIBOR to other indices besides the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products discussed above or Prime. These factors include but are not limited to, whether:

- The index movements (i.e., increases and decreases in value) of the two indices over time are substantially similar; and

- The consumers' payments using the replacement index compared to payments using the LIBOR index are substantially similar (if there is sufficient historical data for this analysis).

If the creditor selects a newly established index as the replacement index, the creditor need not compare the first criteria regarding historical fluctuations, but must still confirm the newly established index and replacement margin meet the "APR comparison" condition, discussed above.

LIBOR-SPECIFIC INDEX CHANGE PROVISION FOR CREDIT CARDS

Regulation Z allows a card issuer to change the index and margin only under certain conditions. For example, prior to the amendments of the LIBOR Transition Rule, Regulation Z allowed card issuers to change the index and margin on an existing contract for credit card accounts when the index used on the account to calculate variable rates becomes unavailable and other conditions are met. Similar as for HELOC accounts, the LIBOR Transition Rule includes revisions for changing an index on credit card requirements under Regulation Z. First, the Rule amends the existing Unavailable Provision, with updates that facilitate the transition from a LIBOR index when LIBOR is no longer available.

Second, the Rule adds an alternative provision, the LIBOR-Specific Provision, which allows credit card issuers to replace a LIBOR index used on the account and adjust the margin to calculate the variable rate on or after April 1, 2022, even if prior to the discontinuation of LIBOR.

Both options require certain conditions to be met, including:

1. *Historical fluctuation comparison:* Generally, the replacement index must have historical fluctuations substantially similar to those of the LIBOR tenor being replaced. This condition does not apply if the replacement index is newly established.

2. *APR comparison:* The replacement index and replacement margin must result in an APR substantially similar to the APR calculated generally using the LIBOR index values on a specified date and the account's existing margin.

Similar to the HELOC provision, the LIBOR Transition Rule also has a provision for newly established indices.

Additionally, as with the HELOC provision, the LIBOR Transition Rule identifies Prime and SOFR-based spread adjusted indices recommended by the ARRC for consumer products as examples of indices that have historical fluctuations that are substantially similar to LIBOR for

purposes of the credit card provision and provides the same factors for comparison that can be used when looking at other indices.

CREDIT CARD RATE REEVALUATION REQUIREMENTS

The LIBOR Transition Rule provides a LIBOR-Specific Rate Reevaluation Exception from the credit card rate reevaluation requirements if the card issuer transitioned from a LIBOR index using either the Unavailable Provision or LIBOR-Specific Provision for credit cards, discussed above.

If a card issuer transitioning from LIBOR does so on or after April 1, 2022, and does not qualify for the LIBOR-Specific Rate Reevaluation Exception, or was subject to the rate reevaluation requirements prior to the transition from LIBOR (and is using LIBOR as the benchmark index for comparison), the LIBOR Transition Rule provides a replacement comparison formula. In these cases where the LIBOR-Specific Rate Reevaluation Exception doesn't apply, card issuers will need to identify an index to replace LIBOR as the benchmark index in the rate reevaluation so that they have future index values for the benchmark of comparison.

In selecting the replacement benchmark index in the replacement comparison formula, the card issuer must comply with the LIBOR-Specific Provision for index changes, discussed above.

Once a replacement benchmark index is identified, the card issuer uses the replacement benchmark index value on October 18, 2021 (or other applicable date), the LIBOR index on October 18, 2021 (or other applicable date), and the margin immediately prior to the rate increase to calculate the replacement margin.[1] The formula is as follows:

> (replacement index on October 18, 2021 [or other applicable date]) + (replacement margin) = (LIBOR index on October 18, 2021 [or other applicable date]) + (margin immediately prior to the rate increase)

The card issuer uses the replacement index values and the identified replacement margin to determine when the obligation to complete rate reevaluations is terminated.

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[1] If the replacement index isn't available on October 18th, the creditor must use the first date that the replacement index and LIBOR are both published for selecting the index value to use in the replacement formula. However, for SOFR-based spread adjusted indices recommended by the ARRC for consumer products, which will not be available until July 2023, the creditor must use June 30, 2023 as the date for selecting the index value for LIBOR and the date of first publication as the date for selecting the index value for the SOFR-based spread-adjusted index.

CHANGE-IN-TERMS NOTICE REQUIREMENTS

The LIBOR Transition Rule revises disclosure requirements for change-in-terms notices for HELOCs and credit card accounts transitioning from LIBOR to a replacement index. Under the Rule, in addition to current requirements (such as the requirement to disclose the index that is replacing LIBOR), a creditor in change-in-terms notices for HELOCs and credit card accounts is also required to disclose any adjusted margin that will be used to calculate the consumer's rate for the LIBOR transition, regardless of whether the margin is being reduced or increased. Historically, Regulation Z required creditors to disclose the replacement index and any increase in the margin but not a margin reduction. While compliance is not mandatory until October 1, 2022, creditors are permitted and encouraged to comply with this change beginning April 1, 2022, the date the rule takes effect. This will ensure that consumers are notified of how the variable rates on their accounts will be determined going forward after the LIBOR index is replaced.

Additionally, the LIBOR Transition Rule adds new commentary to provide details on how a creditor may disclose information about the periodic rate and APR in a change-in-terms notice for HELOCs and credit card accounts if the creditor is using the SOFR-based spread-adjusted indices to replace the 1-month, 3-month, or 6-month USD LIBOR index in certain circumstances. If those conditions are met, the creditor may state that:

1. Information about the rate is not yet available but that the creditor estimates that, at the time the index is replaced, the rate will be substantially similar to what it would be if the index did not have to be replaced; and
2. The rate will vary with the market based on a SOFR index.

The Bureau is not finalizing the SOFR-based spread-adjusted index replacement for 1-year USD LIBOR until it has a chance to review the details of the index recommended by the ARRC and make a determination as to whether the replacement index and the account's existing margin would have resulted in an APR substantially similar to the rate calculated using the LIBOR index.

ISSUES AFFECTING MINORITY, LOW-INCOME, AND OTHER UNDERSERVED COMMUNITIES

Articles Included:

Interagency Statement on Special Purpose Credit Programs Under the Equal Credit Opportunity Act and Regulation B (Feb. 22, 2022).

CFPB Advisory Opinion, *Equal Credit Opportunity (Regulation B); Revocations or Unfavorable Changes to the Terms of Existing Credit Arrangements*, ____ Fed. Reg. ____ (May 9, 2022).

Online or Other Resources:

CFPB, Fair Lending Report of the Consumer Financial Protection Bureau, https://www.consumerfinance.gov/data-research/research-reports/fair-lending-report-of-the-consumer-financial-protection-bureau-2021/ (May 2022).

CFPB Advisory Opinion, *Equal Credit Opportunity (Regulation B); Special Purpose Credit Programs*, 86 Fed. Reg. 3762 (Jan. 15, 2021), https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_special-purpose-credit-program_2020-12.pdf.

Board of Governors of the Federal Reserve System
Federal Deposit Insurance Corporation
National Credit Union Administration
Office of the Comptroller of the Currency
Consumer Financial Protection Bureau
Department of Housing and Urban Development
Department of Justice
Federal Housing Finance Agency

February 22, 2022

Interagency Statement on Special Purpose Credit Programs Under the Equal Credit Opportunity Act and Regulation B

The Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Office of the Comptroller of the Currency (OCC), the Consumer Financial Protection Bureau (CFPB or Bureau), the Department of Housing and Urban Development (HUD), the Department of Justice (DOJ), and the Federal Housing Finance Agency (FHFA) (hereafter, the agencies) are issuing this interagency statement to remind creditors of the ability under the Equal Credit Opportunity Act (ECOA) and Regulation B to establish special purpose credit programs to meet the credit needs of specified classes of persons. Many financial institutions have publicly committed billions of dollars to better meet the needs of underserved communities, and this statement calls attention to the special purpose credit options under ECOA and Regulation B.[1]

ECOA and Regulation B permit creditors to extend special purpose credit offered pursuant to—

- any credit assistance program expressly authorized by Federal or state law for the benefit of an economically disadvantaged class of persons;
- any credit assistance program offered by a not-for-profit organization for the benefit of its members or an economically disadvantaged class of persons; or

[1] *See* Equal Credit Opportunity (Regulation B); Special Purpose Credit Programs, 86 Fed. Reg. 3762, 3764 n.26 (Jan. 15, 2021).

- any special purpose credit program offered by a for-profit organization, or in which such an organization participates to meet special social needs, if it meets certain standards prescribed in regulations by the Bureau.[2]

On December 21, 2020, the CFPB issued an Advisory Opinion (AO) on special purpose credit programs to clarify the content that a for-profit organization must include in a written plan that establishes and administers a special purpose credit program under Regulation B.[3] In addition, the AO clarified the type of research and data that may be appropriate to inform a for-profit organization's determination to establish a special purpose credit program to benefit a specified class of persons.[4]

Previously, some stakeholders expressed uncertainty as to the treatment of ECOA and Regulation B special purpose credit programs under the Fair Housing Act (FHA).[5] On December 7, 2021, HUD released guidance concluding that special purpose credit programs instituted in conformity with ECOA and Regulation B generally do not violate the FHA.[6] Accordingly, creditors may consider the use of special purpose credit programs across all types of credit covered by ECOA and Regulation B.

As creditors consider how they may expand access to credit to better address special social needs, the agencies encourage creditors to explore opportunities to develop special purpose credit programs consistent with ECOA and Regulation B requirements as well as applicable safe and sound lending principles.

While the agencies do not determine whether a program qualifies for special purpose credit status, creditors with questions about any aspect of ECOA and Regulation B's special purpose credit provisions may consult their appropriate regulatory agencies.

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[2] *See* 15 U.S.C. § 1691(c)(1)-(3); 12 C.F.R. § 1002.8(a).
[3] *See* 86 Fed. Reg. at 3762, 3764–65 (Jan. 15, 2021); *see also* Susan M. Bernard and Patrice Alexander Ficklin, *Expanding Access to Credit to Underserved Communities* (July 31, 2020) (calling attention to opportunities to develop special purpose credit programs and use of affirmative advertising consistent with the ECOA and Regulation B requirements).
[4] *See* 86 Fed. Reg. at 3765–66.
[5] *See* 42 U.S.C. § 3601 *et seq*.
[6] *See* https://www.hud.gov/sites/dfiles/GC/documents/Special_Purpose_Credit_Program_OGC_guidance_1s2-6-2021.pdf.

BILLING CODE: 4810-AM-P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1002

Equal Credit Opportunity (Regulation B); Revocations or Unfavorable Changes to the Terms of Existing Credit Arrangements

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Advisory Opinion.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) is issuing this advisory opinion to affirm that the Equal Credit Opportunity Act and Regulation B protect not only those actively seeking credit but also those who sought and have received credit.

DATES: This advisory opinion is applicable on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER.] ___ Fed. Reg. _____ (May __, 2022)

FOR FURTHER INFORMATION CONTACT: Christopher Davis, Attorney-Advisor; Office of Fair Lending and Equal Opportunity, at *CFPB_FairLending@cfpb.gov* or 202-435-7000. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION: The CFPB is issuing this advisory opinion through the procedures for its Advisory Opinions Policy.[1] Refer to those procedures for more information.

[1] 85 FR 77987 (Dec. 3, 2020).

I. Advisory Opinion

A. Background

The Bureau is issuing this advisory opinion to affirm that the Equal Credit Opportunity Act (ECOA)[2] and Regulation B[3] protect both those actively seeking credit and those who sought and have received credit. ECOA is a landmark civil rights law that protects individuals and businesses against discrimination in accessing and using credit—"a virtual necessity of life" for most people.[4] Congress enacted ECOA in 1974, initially to address "widespread discrimination . . . in the granting of credit to women."[5] Accordingly, ECOA made it unlawful for "any creditor to discriminate against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction."[6] From the beginning, this prohibition has protected both those actively seeking credit and those who sought and have received credit.

Then as now, ECOA defined "applicant" to mean "any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit."[7] The drafters of these provisions emphasized that ECOA's prohibition on discrimination "applies to all credit transactions including the approval, denial, renewal, continuation, *or revocation* of any open-end consumer credit account."[8] Among other examples of the sort of discrimination against "applicants" that ECOA would bar, its drafters cited a scenario in which a lender required a "newly married woman whose creditworthiness has otherwise remained the same" to reapply

[2] 15 U.S.C. 1691 *et seq.*
[3] 12 CFR Part 1002.
[4] S. Rep. 94-589, 94th Cong., 2nd Sess., at 4, *reprinted in* 1976 U.S.C.C.A.N. 403, 406.
[5] S. Rep. 93-278, 93rd Cong., 1st Sess., at 16 (1973).
[6] Pub. L. 93-495, sec. 503, 88 Stat. 1521, 1521 (1974).
[7] Pub. L. 93-495, sec. 503, 88 Stat. at 1522 (codified at 15 U.S.C. 1691a(b)).
[8] S. Rep. 93-278, at 27 (emphasis added).

for her existing credit arrangement as a new applicant.[9] The Act also created a private right of action under which aggrieved "applicant[s]" can hold liable a creditor that fails to comply with "any requirement imposed under [ECOA]."[10] And it provided that this private right of action extends to violations of any requirement imposed under ECOA's implementing regulations.[11]

Congress originally tasked the Board of Governors of the Federal Reserve System (Board) with prescribing those regulations.[12] The Board issued those rules, known as Regulation B, the year after ECOA was enacted and several days before the Act took effect.[13] From the beginning, Regulation B made clear that the new law's protections against credit discrimination cover both those currently applying to receive credit and those who have already received it. It did so by defining "applicant" to expressly include not only "any person who applies to a creditor directly for an extension, renewal or continuation of credit" but also, "[w]ith respect to any creditor[,] . . . any person to whom credit is or has been extended by that creditor."[14] In explaining this provision, the Board noted that ECOA's express terms and its legislative history "demonstrate that Congress intended to reach discrimination . . . 'in any aspect of a credit transaction.'"[15]

Two years after enacting ECOA, Congress significantly broadened the Act to prohibit discrimination on bases in addition to sex and marital status.[16] These bases now generally include "race, color, religion, national origin, sex or marital status, or age" as well as the receipt

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[9] S. Rep. 93-278, at 17.
[10] 15 U.S.C. 1691e(a).
[11] 15 U.S.C. 1691a(g) ("Any reference to any requirement imposed under this subchapter . . . includes reference to the regulations of the Bureau under this subchapter . . . .").
[12] Pub. L. 93-495, sec. 503, 88 Stat. at 1522.
[13] *See* 40 FR 49298 (Oct. 22, 1975) (promulgating 12 CFR pt. 202); 40 FR 42030 (Sept. 10, 1975); 40 FR 18183 (Apr. 25, 1975).
[14] 12 CFR 202.3(c) (1976); *see also* 40 FR at 49306.
[15] 40 FR at 49298 (quoting 15 U.S.C. 1691(a)).
[16] *See* ECOA Amendments of 1976, Pub. L. 94-239, 90 Stat. 251.

of public-assistance income.[17] In what the Senate drafters called "one of [the amendments'] most important provisions,"[18] the amendments also provided that "[e]ach applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor."[19] The amendments defined "adverse action" as "a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested."[20] Thus, since 1976, ECOA has provided that "applicants" are entitled to an explanation when the terms of an existing credit arrangement are altered or the credit cancelled outright, among other circumstances.

ECOA's notice requirements "were designed to fulfill the twin goals of consumer protection and education."[21] In terms of consumer protection, "the notice requirement is intended to prevent discrimination *ex ante* because 'if creditors know they must explain their decisions . . . they [will] effectively be discouraged' from discriminatory practices."[22] The notice requirement "fulfills a broader need" as well by educating consumers about the reasons for the creditor's action.[23] As a result of being informed of the specific reasons for the adverse action, consumers can take steps to try to improve their credit status or, in cases "where the creditor may have acted on misinformation or inadequate information[,] . . . to rectify the

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[17] ECOA Amendments of 1976, Pub. L. 94-239, sec. 2, 90 Stat. 251 (codified at 15 U.S.C. 1691(a)). In 2021, the CFPB issued an interpretive rule to clarify that, with respect to any aspect of a credit transaction, the prohibition against sex discrimination in ECOA and Regulation B encompasses sexual orientation discrimination and gender identity discrimination, including discrimination based on actual or perceived nonconformity with sex-based or gender-based stereotypes and discrimination based on an applicant's associations. 86 FR 14363 (Mar. 16, 2021).
[18] S. Rep. 94-589, 94th Cong., 2nd Sess., at 2, *reprinted in* 1976 U.S.C.C.A.N. 403, 404.
[19] 15 U.S.C. 1691(d)(2); *see also* 15 U.S.C. 1691(d)(3) ("A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken."). In lieu of providing this statement of specific reasons, a creditor may instead disclose the applicant's right to receive such a statement. 15 U.S.C. 1691(d)(2)(B); *see also* 12 CFR 1002.9(a)(2)(ii).
[20] 15 U.S.C. 1691(d)(6).
[21] *Fischl v. Gen. Motors Acceptance Corp.*, 708 F.2d 143, 146 (5th Cir. 1983); *see also id.* (calling these provisions "[p]erhaps the most significant of the 1976 amendments to the ECOA").
[22] *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 977–78 (7th Cir. 2004) (quoting *Fischl*, 708 F.2d at 146); *see also* S. Rep. 94-589, at 4 (calling the notice requirement "a strong and necessary adjunct to the antidiscrimination purpose of the legislation").
[23] S. Rep. 94-589, at 4.

mistake."[24]

Following the ECOA Amendments of 1976, the Board amended Regulation B, including by adding new provisions to implement ECOA's notice requirement.[25] The amended rule defined "adverse action" to include "[a] termination of an account or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor's accounts."[26] And it required that adverse action notices give a "statement of reasons" for the action that is "specific" and "indicate[s] the principal reason(s) for the adverse action."[27]

Finally, the Board made a "minor editorial change" to Regulation B's definition of "applicant" in order to "express more succinctly the fact that the term includes both a person who requests credit and a debtor," a debtor being one who has already requested and received credit.[28] Whereas Regulation B originally defined "applicant" to include one who "applies to a creditor directly for an extension, renewal or continuation of credit" as well as, "[w]ith respect to any creditor[,] . . . any person to whom credit is or has been extended by that creditor,"[29] the revised definition simply stated that "applicant" includes "any person who requests or *who has received* an extension of credit from a creditor."[30] Although the Board revised other parts of the definition over the years, it never departed from the bedrock understanding of the term "applicant" as including any person "who has received" an extension of credit.[31]

The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted in 2010, revoked primary rulemaking responsibility under ECOA from the Board and transferred it to the

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[24] *Id.*
[25] 42 FR 1242 (Jan. 6, 1977); 41 FR 49123 (Nov. 8, 1976); 41 FR 29870 (July 20, 1976).
[26] 12 CFR 1002.2(c)(1)(ii).
[27] 12 CFR 1002.9(b)(2).
[28] 41 FR 29870, 29871 (July 20, 1976) (proposed rule).
[29] 12 CFR 202.3(c) (1976).
[30] 12 CFR 202.2(e) (1978) (emphasis added); *see also* 42 FR 1242, 1252 (Jan. 6, 1977) (final rule).
[31] *See* 12 CFR 1002.2(e).

newly created Bureau.[32]

Shortly thereafter, the Bureau republished the Board's ECOA regulations, including the definition of "applicant," without material change.[33] In addition, the Bureau's *Supervision and Examination Manual* makes clear that creditors subject to the Bureau's supervisory jurisdiction must comply with ECOA and Regulation B's requirements with respect to existing accounts. For instance, the Examination Manual explains that "[n]otification of adverse action taken on an *existing* account must also be made within 30 days."[34]

B. Coverage

This advisory opinion applies to all "creditors" as defined in section 702 of ECOA.[35] As used in this advisory opinion, "existing account holder" refers to an applicant who has applied for and received an extension of credit. "Existing account" or "existing credit arrangement" refers to an extension of credit previously made by a creditor other than an extension of credit that is closed or inactive. This advisory opinion has no application to any other circumstance and does not offer a legal interpretation of any other provisions of law.

C. Legal Analysis

ECOA and Regulation B plainly protect applicants who have received credit and are existing account holders, not just those in the process of applying for credit. This has been the longstanding position of the Bureau, and the view of federal agencies prior to the Bureau's creation. Despite this well-established interpretation,[36] the Bureau is aware that some creditors

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[32] Pub. L. 111-203, sec. 1085, 124 Stat. 1376, 2083–84.
[33] *See* 76 FR 79442 (Dec. 21, 2011) (promulgating 12 CFR pt. 1002 & Supp. I).
[34] CFPB Supervision and Examination Manual, at ECOA 7, https://files.consumerfinance.gov/f/documents/201510_cfpb_ecoa-narrative-and-procedures.pdf (emphasis added); *see also id.* at ECOA 10 ("[a] creditor must preserve any written or recorded information concerning adverse action on an existing account as well as any written statement submitted by the applicant alleging a violation of the ECOA or Regulation B.").
[35] *See* 15 U.S.C. 1691a(e).
[36] *See* 12 CFR 202.3(c) (1976) (expressly defining the term "applicant" to include "any person to whom credit is or has been extended").

fail to acknowledge that ECOA and Regulation B plainly apply to circumstances that take place after an extension of credit has been granted, including a revocation of credit or an unfavorable change in the terms of a credit arrangement.[37] In addition, the Bureau is aware that some creditors fail to provide applicants with required notifications that include a statement of the specific reasons for the adverse action taken or disclose an applicant's right to such a statement.[38] But ECOA's text, history, purpose, and judicial interpretation all point the same way: As used in ECOA, the term "applicant" includes persons who applied for and have received credit. Any uncertainty about ECOA's protections for existing borrowers is dispelled by Regulation B.

a. Statutory Text

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[39] Reading together the relevant provisions of ECOA makes clear that the term "applicant" is not limited to those who are in the process of applying for credit. The Supreme Court's analysis in *Robinson v. Shell Oil Co.*[40] is instructive. In that case, the Court held that the term "employees" in Section 704(a) of Title VII includes those who were former employees when the discrimination occurred.

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[37] *See* Brief of Amici Curiae Consumer Fin. Prot. Bureau, Dep't of Justice, Bd. of Governors of the Fed. Reserve Sys., and Fed. Trade Comm'n in Support of Appellant and Reversal, *Fralish v. Bank of Am.*, No. 21-2846 (7th Cir. filed Dec. 16, 2021), https://files.consumerfinance.gov/f/documents/cfpb_fralish-v-bank-of-america_amicus- brief_2021-12.pdf; Brief of Amici Curiae Consumer Fin. Prot. Bureau and Fed. Trade Comm'n, *TeWinkle v. Capital One, N.A.*, No. 20-2049 (2d Cir. filed Oct. 7, 2020), https://files.consumerfinance.gov/f/documents/cfpb_amicus- brief_tewinkle-v-capital-one-na_2020-10.pdf.

[38] Credit cards are one of the most commonly held and widely used financial products in America—over 175 million Americans hold at least one credit card. During the COVID-19 pandemic, credit cards played a vital role as both a source of credit in emergencies and a payment method as more transactions occurred online. According to the CFPB's 2021 Credit Card Report, about 2%, or over 10 million credit card accounts, were closed in 2020 and consumers with low credit scores are two to three times more likely to have their accounts closed than those with a higher credit score. *See* Bureau of Consumer Fin. Prot., *The Consumer Credit Card Market* (Sept. 2021), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf. Additionally, the same report shows that over 10 million accounts experienced a credit line decrease in 2020. *See id.*; *see also 5 Reasons Credit Card Companies Close Accounts Without Notice – And How to Fix Them*, USA TODAY (July 13, 2021), https://www.usatoday.com/story/money/personalfinance/budget-and-spending/2021/07/13/5-reasons-a- credit-card-company-can-close-your-account-with-no-notice/47470647/; '*My Credit Card Just Got Canceled and I Don't Know Why*,' THE CUT (Sept. 11, 2020), https://www.thecut.com/article/can-my-credit-card-company-cancel- my-card.html.

[39] *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007) (quotation marks omitted).

[40] 519 U.S. 337 (1997).

Writing for a unanimous Court, Justice Thomas explained that although "[a]t first blush, the term 'employees' . . . would seem to refer to those having an existing employment relationship with the employer in question," that "initial impression . . . does not withstand scrutiny in the context of § 704(a)."[41]

For one thing, the Court observed, there is "no temporal qualifier in the statute such as would make plain that § 704(a) protects only persons still employed at the time of the retaliation."[42] The same reasoning applies to the term "applicant" in ECOA, which is not expressly limited to those currently in the process of seeking credit. The Court further noted that "a number of other provisions in Title VII use the term 'employees' to mean something more inclusive or different than 'current employees.'"[43] The same reasoning applies to the term "applicant" used in ECOA.

Reading ECOA's definition of "applicant" alongside the Act's other provisions makes clear that the term includes applicants who have received credit and become existing borrowers. For example, ECOA's core anti-discrimination provision protects "applicant[s]" from discrimination "with respect to *any aspect* of a credit transaction"—not just during the application process itself.[44] The phrase "any aspect of a credit transaction" is most naturally read to include both the initial formation of a credit agreement as well as the performance of that agreement.[45] Consistent with this ordinary meaning, Regulation B has always defined the term "credit transaction" to encompass "every aspect of an applicant's dealings with a creditor,"

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[41] *Id*. at 341.
[42] *Id.*
[43] *Id*. at 342.
[44] 15 U.S.C. 1691(a) (emphasis added); *see also Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218 (2008) ("[T]he word 'any' has an expansive meaning . . . .") (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)).
[45] *See, e.g.*, BLACK'S LAW DICTIONARY 1668 (rev. 4th ed. 1968) (defining "transaction" to include the "[a]ct of transacting or conducting any business" and defining "transact" as "equivalent to 'carry on,' when used with reference to business").

including elements of the transaction that take place after credit has been extended.[46] The expansive language of this provision shows an intent to sweep broadly, beyond just the initial process of requesting credit, to bar discrimination in all parts of a credit arrangement. Indeed, the main Senate report accompanying ECOA specifically noted that "[t]he prohibition applies to all credit transactions including . . . revocation of any open-end consumer credit account."[47]

Similarly, ECOA's disclosure provision requires that creditors give a statement of reasons to "[e]ach applicant" against whom they take "adverse action."[48] ECOA defines "adverse action" to include a "revocation of credit" as well as a "change in the terms of an existing credit arrangement."[49] These are actions that can be taken only with respect to persons who have already received credit.

ECOA's private right of action points in the same direction. It allows an aggrieved "applicant" to bring suit against creditors who fail to comply with ECOA or Regulation B.[50] These references to "applicant[s]" cannot be understood to refer only to those with pending credit applications. Otherwise, a person whose application was denied on a prohibited basis would have no recourse under ECOA's private right of action, which Congress intended would

[46] 12 CFR 1002.2(m) (defining "credit transaction" to include, among other things, the "revocation, alteration, or termination of credit" and "collection procedures"); 12 CFR 202.3(k) (1976) (defining "credit transaction" to include the "furnishing of credit information and collection procedures"). Accordingly, the Bureau interprets aspects of the credit transactions enumerated in Regulation B as including and encompassing the servicing of that credit, debt collection, loss mitigation, payment plans, settlements, co-signer release, and certain other services provided to existing accountholders.
[47] S. Rep. 93-278, 93rd Cong., 1st Sess., at 27 (1973).
[48] 15 U.S.C. 1691(d)(2).
[49] 15 U.S.C. 1691(d)(6).
[50] 15 U.S.C. 1691e(a); *see also id*. 1691e(b) (a "creditor, other than a government or governmental subdivision or agency," shall be liable to the aggrieved "applicant" for punitive damages); *id.* 1691e(c) (aggrieved "applicant" may seek relief in district court).

be the Act's "chief enforcement tool."[51] Instead, these references further confirm that the term "applicant" is not limited to those currently applying for credit.[52]

b. Legislative History

Congress's history of amending the statute strongly supports reading the statute to include existing borrowers. As noted, the Board issued Regulation B in 1975, through notice-and-comment rulemaking, shortly before ECOA took effect. The rule defined "applicant" to include "any person to whom credit is or has been extended."[53] If Congress thought this definition an unreasonable departure from the statute it had just passed, it would surely have given some sign of that when it amended and expanded ECOA the following year. Nor is there any doubt that the drafters of those statutory amendments were generally aware of the new Regulation B, as they cited parts of it in explaining their bill.[54]

But the 1976 amendments did not limit the reasonable definition of "applicant" that the Board had promulgated just months before. To the contrary, the 1976 amendments added new provisions—such as the ones entitling "applicants" to a statement of reasons when their credit is revoked or modified—that make sense only if "applicant" is understood to include existing borrowers, as stated in Regulation B. Nor has Congress ever amended the statutory definition of "applicant" or otherwise expressed disapproval of the understanding of that term in Regulation B, despite revising the statute multiple times since 1976.[55]

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[51] S. Rep. 94-589, at 13.
[52] *Cf. Robinson*, 519 U.S. at 343 (similarly concluding that the reference to aggrieved "employees" in Title VII's private right of action shows that that term is not limited to current employees).
[53] 12 CFR 202.3(c) (1976).
[54] *See* S. Rep. 94-589, at 2 (citing the Board's rules and noting that the amendments expanded the Board's rulemaking authority).
[55] *See* FDIC Improvement Act of 1991, Pub. L. 102-242, § 223, 105 Stat. 2306-07; Dodd-Frank Act, Pub. L. 111-203, §§ 1071, 1474, 124 Stat. 2056-57, 2199–2200.

"[W]hen," as here, "Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'"[56] That maxim applies with particular force here: The first time Congress revisited the statute after the Board defined "applicant" to include existing borrowers, Congress enacted new provisions that implicitly approved the Board's interpretation by requiring that creditors provide an explanation for adverse actions that can be taken only with respect to existing borrowers.

c. Statutory Purpose

Reading "applicant" to protect individuals and businesses from discrimination both during the process of requesting credit and once credit has been extended furthers ECOA's purpose. It prevents a creditor from canceling an existing account because of a borrower's race. It bars a creditor from unfavorably modifying the terms of an existing account—perhaps by lowering the amount available on a line of credit—because of a borrower's national origin. It stops a creditor from requiring women with existing accounts to reapply for their credit upon getting married.[57] And it ensures that a creditor would be required to provide a statement of reasons to the applicant in any of these situations. This is the most plausible interpretation of ECOA.

Finally, reading "applicant" in this way—*i.e.*, ECOA protects applicants from discrimination both during the process of requesting credit and once credit has been extended—precludes obvious paths to evasion. A creditor that wished to deny credit applications on a

[56] *CFTC v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274–75 (1974)).
[57] *Cf.* S. Rep. 93-278, at 17 (citing this very scenario as an example of the discrimination against "applicants" that ECOA prohibits).

prohibited basis, or to offer credit on inferior terms for the same prohibited reason, cannot do so by simply extending credit on the terms requested and later revoking or amending the terms of the credit arrangement. Nor can a creditor use similar means to avoid ever having to explain to an applicant the reasons for an adverse action. This interpretation of ECOA, therefore, forecloses a potential loophole that could effectively swallow much of the Act. Such a loophole would be plainly inconsistent with ECOA.

d. Judicial Precedent

Those courts that have properly read the term "applicant" in its statutory context, including the only court of appeals to have addressed the issue, have agreed that the statute protects existing borrowers. In *Kinnell v. Convenient Loan Co.*,[58] the Tenth Circuit considered a claim that a creditor discriminated in violation of ECOA when it refused to accept a late payment on an existing loan and instead accelerated the remaining balance due. The court rejected the argument that the plaintiff was not an "applicant" under ECOA because he was no longer actively seeking credit.[59] ECOA, the court explained, prohibits discrimination "with respect to any aspect of a credit transaction,"[60] and was meant "to protect people from the 'denial *or termination* of credit'" on a prohibited basis.[61] The lender's reading of "applicant" would mean that "any sua sponte action on the part of the creditor . . . would not be actionable. Such an interpretation improperly narrows the scope of the ECOA."[62] The court noted that its reading of "applicant" was directly supported by Regulation B.[63]

[58] 77 F.3d 492 (10th Cir. 1996) (unpublished table decision).
[59] *Id*. at *2.
[60] *Id*. (quoting 15 U.S.C. 1691(a)).
[61] *Id*. (emphasis added) (quoting *Miller v. American Express Co.*, 688 F.2d 1235, 1239 (9th Cir. 1982)).
[62] *Id.*
[63] *Id.*

At least one district court has reached the same conclusion. In *Powell v. Pentagon Fed. Credit Union*,[64] the court held that the plaintiff, who alleged that his existing credit plan was terminated on a prohibited basis, was an "applicant" under ECOA. The court relied on ECOA's requirement that "applicants" receive notice when their credit is revoked and on the longstanding definition in Regulation B.[65] The court observed that the contrary interpretation would be wholly at odds with ECOA's purposes because it "would preclude a plaintiff with an existing account from bringing a claim for the discriminatory revocation of that account."[66] The court found nothing to "suggest[] that Congress' intent to discourage discrimination against applicants somehow ceases when the alleged discrimination is against existing credit customers."[67]

The Bureau acknowledges that a few other district court decisions have interpreted "applicant" to include only persons actively seeking credit, but the Bureau does not believe this interpretation is persuasive.[68] No court of appeals has endorsed these district courts' narrow reading. These district court decisions read "applicant" in isolation instead of reading this statutory term in context, as required by the Supreme Court. For example, these decisions did not attempt to square their interpretation with ECOA's requirement that "applicants" receive an explanation when their existing credit is terminated or modified. Nor did they grapple with the clear loophole their interpretation would create or the degree to which it would frustrate the Act's remedial purposes.

e. Regulation B

Regulation B has always defined the term "applicant" to include those who applied for

[64] No. 10-cv-785, 2010 WL 3732195 (N.D. Ill. Sept. 17, 2010).
[65] *Id*. at *4–5.
[66] *Id*. at *4.
[67] *Id*. at *4 n.2.
[68] *See, e.g.*, *TeWinkle v. Capital One, N.A.*, No. 1:19-cv-01002, 2019 WL 8918731, at *4–5 (W.D.N.Y. Dec. 11, 2019); *Kalisz v. Bank of America, N.A.*, No. 1:18-cv-00516, 2018 WL 4356768, at *2–3 (E.D. Va. Sept. 11, 2018).

and have received credit.[69] Other provisions reflect the same interpretation.[70] Neither the Board nor the Bureau has ever amended the rule to reflect a contrary understanding of the term.

As described above, the best interpretation of ECOA is that the term "applicant" includes existing borrowers. It was thus reasonable for the Board and then the Bureau to adopt that interpretation in Regulation B. Adopting the contrary reading would have led to the serious textual inconsistencies described above and run directly contrary to the statute's purposes. Regulation B's definition avoids those difficulties and, in the process, serves to "carry out" and "effectuate" the purposes of ECOA.[71] And because the contrary interpretation would open a glaring loophole in ECOA, Regulation B's definition is "necessary or proper . . . to prevent circumvention or evasion" of the Act.[72]

Notably, Regulation B has expressly included existing borrowers as applicants since the rule was first promulgated through notice-and-comment rulemaking in 1975. Indeed, the interpretation of "applicant" discussed here has been confirmed by numerous federal agencies for decades. For example, nine separate agencies or offices, including the Department of Justice, Federal Trade Commission, and the Board, previously published a statement confirming their view that ECOA prohibits discrimination in the treatment of existing borrowers, such as by "[t]reat[ing] a borrower differently in servicing a loan or invoking default remedies" or "[using] different standards for pooling or packaging a loan in the secondary market."[73] The same view is reflected in the manual used by the Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, and other financial regulators to conduct examinations of financial

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[69] *See* 12 CFR 1002.2(e) (including in the definition "any person . . . who has received an extension of credit from a creditor"); *see also* 12 CFR 202.3(c) (1976) (including in the definition "any person to whom credit is or has been extended by [a] creditor").
[70] *See, e.g.*, 12 CFR 1002.2(m) (defining "credit transaction" to mean "every aspect of *an applicant's* dealings with a creditor regarding an application for credit *or an existing extension of credit*") (emphasis added).
[71] 15 U.S.C. 1691b(a).
[72] *Id.*
[73] Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266, 18268 (Apr. 15, 1994).

institutions for compliance with fair lending laws.[74] The Bureau has consistently taken the same view of "applicant," including by reissuing the Board's original definition; issuing guidance that Regulation B "covers creditor activities before, during, and after the extension of credit"[75]; and taking enforcement action to address violations of ECOA against existing borrowers.[76] In short, the Bureau's interpretation is longstanding and well established.

II. Regulatory Matters

This advisory opinion is an interpretive rule issued under the Bureau's authority to interpret ECOA and Regulation B, including under section 1022(b)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which authorized guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of Federal consumer financial laws.[77]

By operation of ECOA section 706(e), no provision of ECOA imposing any liability applies to any act done or omitted in good faith in conformity with this interpretive rule, notwithstanding that after such act or omission has occurred, the interpretive rule is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[78]

As an interpretive rule, this rule is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.[79] Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final

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[74] *See* Interagency Fair Lending Examination Procedures, at ii (Aug. 2009), *available at* https://go.usa.gov/xeY37.
[75] Bureau of Consumer Fin. Prot., Equal Credit Opportunity Act Examination Procedures, at 1 (Oct. 2015), *available at* https://go.usa.gov/xekcN.
[76] *See, e.g.*, *In re American Express Centurion Bank and American Express Bank, FSB*, No. 2017-CFPB-0016, 2017 WL 7520638 (Aug. 23, 2017) (consent order resolving claims that creditors discriminated against existing borrowers on the basis of race and national origin by, for example, subjecting certain borrowers to more aggressive collection practices).
[77] 12 U.S.C. 5512(b)(1). The relevant provisions of ECOA and Regulation B form part of Federal consumer financial law. 12 U.S.C. 5481(12)(D), (14).
[78] 15 U.S.C. 1691e(e).
[79] 5 U.S.C. 553(b).

regulatory flexibility analysis.[80] The Bureau also has determined that this interpretive rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[81]

Pursuant to the Congressional Review Act,[82] the Bureau will submit a report containing this interpretive rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a "major rule" as defined by 5 U.S.C. 804(2).

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Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[80] 5 U.S.C. 603(a), 604(a).
[81] 44 U.S.C. 3501–3521.
[82] 5 U.S.C. 801 *et seq.*

INQUIRY INTO "BUY NOW PAY LATER" PRODUCTS

Articles Included:

CFPB *Notice and Request for Comment Regarding the CFPB's Inquiry Into Buy-Now-Pay-Later (BNPL) Providers*, Docket No. 2022-0002, 87 Fed. Reg. 3511 (Jan. 24, 2022).

Comment of 77 Consumer, Housing, Civil Rights, Legal Services, Faith, Community, Small Business, Student Borrower, and Public Interest Organizations to CFPB's Inquiry Into Buy-Now-Pay-Later Products (Mar. 25, 2022).

Comment of Several States' Attorneys General to CFPB's Inquiry into Buy-Now-Pay-Later Products (Mar. 25, 2022).

Comment of Credit Union National Association to CFPB's Inquiry Into Buy-Now-Pay-Later Products (Mar. 25, 2022).

Online or Other Resources:

View all comments to CFPB's Inquiry Into Buy-Now-Pay-Later Providers at https://www.regulations.gov/docket/CFPB-2022-0002/comments.

BILLING CODE: 4810-AM-P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No.: CFPB-2022-0002]

Notice and Request for Comment Regarding the CFPB's Inquiry into Buy-Now-Pay-Later (BNPL) Providers

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice; request for comment.

SUMMARY: On December 16, 2021, the Consumer Financial Protection Bureau (Bureau) opened market monitoring orders, inquiring into Buy-Now-Pay-Later (BNPL) products in the United States to gain information about the size, scope, and business practices of the BNPL market. The information will help the Bureau better understand how consumers interact with BNPL providers, and how BNPL business models impact the broader e-commerce and consumer credit marketplaces. The Bureau also issued a press release to accompany these orders. The Bureau invites any interested parties, including consumers, small businesses, consumer advocates, financial institutions, trade associations, investors, state and Federal regulators and Attorneys General, and experts in consumer lending, payments, and marketing to submit comments to inform the agency's inquiry.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. 87 Fed. Reg. 3511 (Jan. 24, 2022)

ADDRESSES: You may submit comments, identified by Docket No.: CFPB-2022-0002, by any of the following methods:

- *Federal eRulemaking Portal*: https://www.regulations.gov. Follow the instructions for submitting comments.

- *Email*: BNPLInquiry@cfpb.gov. Include Docket No.: CFPB-2022-0002 in the subject line of the message.
- *Mail/Hand Delivery/Courier*: Comment Intake—Statement into BNPL Providers, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552. Please note that due to circumstances associated with the COVID-19 pandemic, the Bureau discourages the submission of comments by hand delivery, mail, or courier.

Instructions: The Bureau encourages the early submission of comments. All submissions should include document title and docket number. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to *https://www.regulations.gov*. In addition, once the Bureau's headquarters reopens, comments will be available for public inspection and copying at 1700 G Street NW, Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. At that time, you can make an appointment to inspect the documents by telephoning 202-435-7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Comments will not be edited to remove any identifying or contact information. This docket is not for submitting other information to the Bureau, such as consumer complaints on a particular company. If you would like to submit a complaint, please visit consumerfinance.gov (https://www.consumerfinance.gov/complaint/).

FOR FURTHER INFORMATION CONTACT: Laura Udis, Program Manager, Small Dollar, Marketplace, and Installment Lending, 202-435-9158. If you require this document in an

alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

In the December 16, 2021, market monitoring orders and accompanying press release, the Bureau required five providers of Buy-Now-Pay-Later (BNPL) products in the United States to provide information about their size, scope, and business practices.[1] The Bureau listed six areas of specific interest:

- Business Model and Transaction Metrics
- Loan Performance Metrics
- Consumer Protections
- User Contacts and Demographics
- Data Harvesting
- Data Monetization

The Bureau invites any interested parties to submit comments to inform the agency's inquiry.

II. Public Comment

The Bureau encourages comments about BNPL products. For example: what is the consumer experience with BNPL products? What are the benefits and risks to consumers from BNPL products? What is the merchant experience with BNPL products? What perspectives do

[1] The press release and sample order can be found at https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-opens-inquiry-into-buy-now-pay-later-credit/

regulators and Attorneys General have with respect to BNPL products? Are there ways in which the BNPL market can be improved?

The Bureau is opening a docket on Regulations.gov and invites any interested parties to submit relevant comments to inform the agency's inquiry.

/*s*/ Rohit Chopra

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Rohit Chopra

Director, Bureau of Consumer Financial Protection.

Rohit Chopra, Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Comment Regarding the CFPB's Inquiry Into Buy-Now-Pay-Later (BNPL) Providers (CFPB-2022-0002)

Dear Director Chopra,

The undersigned 77 consumer, housing, civil rights, legal services, faith, community, small business, student borrower, and public interest organizations appreciate the opportunity to comment on the CFPB's inquiry into Buy Now, Pay Later (BNPL) credit products that are proliferating across market areas. We welcome the CFPB's recent inquiry into Affirm, Afterpay, Klarna, PayPal, and Zip, however we remain alarmed by the lack of regulation of this exploding consumer credit product market. We urge the CFPB to view BNPL products as credit cards covered by the Truth in Lending Act (TILA), to enact a larger participant rule to supervise this market, and to look out for practices that harm consumers.

BNPL credit may provide some consumers with an affordable way to finance purchases, as the business model typically allows consumers to purchase an item by only paying a portion of the price up front and pay the rest of the debt in three equal, interest-free installments over a set period (usually 6 weeks). However, BNPL credit presents cause for concern, including: a lack of meaningful underwriting for a consumer's ability to repay; hidden fees and absence of clear disclosures; lack of dispute or refund rights should a consumer be unsatisfied with their purchase; an incentive created that could lead consumers into taking on unmanageable amounts of debt; a negative impact on credit reporting; and debt collection issues.

Buy Now, Pay Later (BNPL) options have increased dramatically in recent years. Although purchases financed with BNPL account for only 3% of U.S. online shopping revenue as of December 2021, 8.42 million consumers used BNPL in December 2021, which marked an all-time high.[1] Roughly one third of U.S. adults say that they have used BNPL,[2] and this is likely to grow dramatically—the industry is expected to increase 10 to 15 times its current size by 2025.[3] In California, the top six BNPL providers originated more than 10 million loans to consumers in 2020, which accounted for 91% of all non-bank consumer loans originated in the state that year.[4]

Based on complaints to the CFPB and Better Business Bureau, consumers are already being harmed by a lack of regulatory oversight.[5] Oversight is especially urgent as these offerings

[1] Jonathan Berr, Payments Dive, "Buy now-pay later demand hit U.S. high during holiday season" (Jan. 14, 2022), https://www.paymentsdive.com/news/buy-now-pay-later-demand-hit-us-high-during-holiday-season/617146/.
[2] Erika Giovanetti, Dan Shepard, LendingTree "Shoppers Use 'Buy Now, Pay Later' Financing to Purchase Things They Can't Afford" (Apr. 20, 2021), https://www.lendingtree.com/personal/buy-now-pay-later-survey/.
[3] CB Insights, *Disrupting The $8T Payment Card Business: The Outlook On 'Buy Now, Pay Later'* (Mar. 2, 2021), https://www.cbinsights.com/research/report/buy-now-pay-later-outlook/ [hereinafter CB Insights, Disrupting (Mar. 2021)].
[4] California Department of Financial Protection and Innovation, *Annual Report of Finance Lenders, Brokers, and PACE Administrators Licensed Under the California Financing Law* (Jan. 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/10/2020-CFL-Aggregated-Annual-Report.pdf.
[5] Ed Mierzwinski and Mike Litt, U.S. PIRG, *The Hidden Costs of "Buy Now, Pay Later:" Complaints to the CFPB Show Need for Action*, (Mar. 2022), https://uspirg.org/sites/pirg/files/reports/BNPL%20REPORT%20USPIRG_0.pdf.

continue to expand and infiltrate new market areas that pose even great risks to consumers.[6] Additionally, without supervision, this product has potential to contribute to unaffordable debt loads. Allowing these products to escape coverage would lead to an undermining of consumer protection laws,[7] making the financial marketplace less fair and competitive.

Small businesses also benefit from oversight of the financial products marketed towards their business and their employees, as small employers want to improve access to tools that help both themselves and their workers.

Consumer Risks

Marketing of BNPL credit is enticing, with promises of instant approval and no impact on a consumer's credit. However, many providers are **not conducting meaningful underwriting to assess a borrower's ability to repay** along with the rest of a consumer's financial obligations. Although some providers run a "soft" credit check, others do not check credit at all. Many BNPL providers offer the first extension of credit with a limited assessment of the consumer's current obligations, and base future purchase approvals and spending limits on the number of past purchases and on-time payments made on that BNPL application, rather than assessing the consumer's ability to repay the credit within the context of all financial obligations. Without holistically considering a consumer's ability to repay, consumers may accumulate unaffordable amounts of debt or trigger overdraft and non-sufficient fund fees if repayment is made with a debit card.[8] According to one recent survey, nearly 40% of BNPL users said that they used BNPL credit to make purchases that would otherwise not fit in their budget.[9] Additional recent analysis found that consumers who had overdrafted their account were more than twice as likely to have used BNPL services.[10]

BNPL products offer a promise of interest-free payments, **but many providers charge fees, including late fees, missed payment fees, account reactivation fees, returned payment fees, and rescheduling fees that are not clearly disclosed.** Research by the United Kingdom Financial Conduct Authority found that for some providers that charge fees, these fees can make up a significant portion of the company's revenue.[11] Fees vary depending on the provider, but can reach as high as $25.[12] Unpaid or late fees can trigger overdraft fees in a consumer's bank

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[6]Student Borrower Protection Center, *Point of ~~Sale~~ Fail: How a Flood of "Buy Now, Pay Later" Student Debt is Putting Millions at Risk* (Mar. 2022), https://protectborrowers.org/wp-content/uploads/2022/03/SBPC_BNPL.pdf.

[7] Lauren Saunders, National Consumer Law Center, Testimony to Task Force on Financial Technology U.S. House Committee on Financial Services Hearing on "Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products" (Nov. 2, 2021), https://www.nclc.org/images/pdf/banking_and_payment_systems/fintech/Fintech-task-force-liquidity-testimony-Lauren-Saunders-2021-11-2-FINAL.pdf.

[8] Marisabel Torres, Center for Responsible Lending, Testimony to Task Force on Financial Technology U.S. House Committee on Financial Services Hearing on "Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products" (Nov. 2, 2021), https://financialservices.house.gov/uploadedfiles/hhrg-117-ba00-wstate-torresm-20211102.pdf.

[9]Insider Intelligence, Business Insider, *Buy Now Pay Later Report: Market trends in the ecommerce financing, consumer credit, and BNPL industry* (Feb. 3, 2022), https://www.insiderintelligence.com/insights/buy-now-pay-later-ecommerce-financing-consumer-credit/.

[10] Claire Williams, Morning Consult, "'Buy Now, Pay Later' Users Significantly More Likely to Overdraft Than Nonusers" (March 2, 2022), https://morningconsult.com/2022/03/02/buy-now-pay-later-bnpl-overdraft-data/ [hereinafter Williams, BNPL users (Mar. 2022)].

[11] Personal Finances and Funds Team, U.K. HM Treasury, *Regulation of Buy-Now Pay-Later Consultation* (Oct. 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1027366/210923_-_BNPL_condoc_-_Cleared.pdf.

[12] Leticia Miranda, NBC News, "The Hidden Costs of 'Buy Now, Pay Later' Loans" (Nov. 4, 2021), https://www.nbcnews.com/business/consumer/hidden-costs-buy-now-pay-later-loans-rcna4367.

account; thus, a consumer can be charged by both the BNPL provider and their bank.[13] Some providers charge returned payment fees, which are triggered when a payment is returned unpaid due to insufficient funds and may also trigger an additional bank fee for the consumers.[14] These fees can accumulate quickly and be incredibly damaging to consumers, as overdraft and NSF fees are highly associated with closed bank accounts, leading to financial exclusion.[15] Further, some BNPL products can only be used with a credit card, resulting in the consumer potentially being charged interest or charges imposed by the credit card company in addition to any fees associated with the BNPL product.[16]

Consumers have limited access to refund or redress should there be a problem with the item purchased. If a consumer has a problem with the product purchased, refund and return rights vary between providers, and again, information about these rights is difficult to find.[17] According to complaints to the CFPB and Better Business Bureau, consumers face difficulty initiating disputes, lengthy delays in receiving a refund, and continuing collection of repayment during the refund and return process.[18]

Lack of clear and uniform consumer disclosures and statement requirements make it difficult for consumers to understand potential costs, to compare fees amongst providers, and to keep track of multiple BNPL credit extensions and payments at a given time. Products and providers do not uniformly or clearly disclose how much fees are, where to find information about fees, and whether fees are capped. Some fees are listed in the terms and conditions, while others are listed in an installment agreement or in the "frequently asked questions" sections on websites. Certain products contain disclosures about the possibility of a fee without an indication of the amount of that fee. Further, each consumer purchase of a product or good is financed with its own payment plan and has its own payment due dates, as opposed to a single, monthly payment like other forms of credit. A single monthly payment is easier to track and manage than various payments throughout the month. Consumers with multiple BNPL credit plans may find them difficult to track since due dates vary based on the date of purchase. According to a recent Morning Consult survey, 20% of BNPL users have missed a payment.[19] In some instances, BNPL credit has been subject to rescheduling fees for consumers who need to move their payments, making it burdensome for consumers to change the payment schedule should an unexpected financial obligation arise.[20]

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[13] U.K. Financial Conduct Authority, *The Woolard Review - A Review of Change and Innovation in the Unsecured Credit Market* (Feb. 2, 2021), https://www.fca.org.uk/publication/corporate/woolard-review-report.pdf [hereinafter U.K. Financial Conduct Authority, Woolard Review (Feb. 2021)].

[14] For example, Klara charges a $25 (or any lower amount required by law) if payment is returned unpaid for "non-sufficient funds." See Klarna Pay in 4 Agreement, https://cdn.klarna.com/1.0/shared/content/legal/terms/0/en_us/sliceitinx.

[15] Center for Responsible Lending Statement for the Record: *Overdraft Fees Cause Financial Exclusion; Policymakers Must Act*
Hearing on "Banking the Unbanked: Exploring Private and Public Efforts to Expand Access to the Financial System"
Before the U.S. House Committee on Financial Services, Subcommittee on Consumer Protection and Financial Institutions (July 21, 2021), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-testimony-overdraft-financial-exclusion-21jul2021.pdf.

[16] For example, Splitit charges all payment to a credit card rather than a bank account, see terms and conditions, (Nov. 5, 2021) https://www.splitit.com/shopper/.

[17] Penelope Wang, Consumer Reports, "The Hidden Risks of Buy-Now, Pay-Later Plans" (Feb. 14, 2021), https://www.consumerreports.org/shopping-retail/hidden-risks-of-buy-now-pay-later-plans-a7495893275/.

[18] Rachel Gittleman, Consumer Federation of America, Statement for the Record for Task Force on Financial Technology U.S. House Committee on Financial Services Hearing on "Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products" (Nov. 2, 2021), https://consumerfed.org/wp-content/uploads/2021/11/CFA-Submits-Statement-for-the-Record-to-U.S.-House-Task-Force-11.2.21.pdf.

[19] Williams, BNPL users (Mar., 2022)

[20] For example, Sezzle provides one free reschedule on every order, but charges fees for any payment moves beyond that, see https://shopper-help.sezzle.com/hc/en-us/articles/360045946992-How-do-I-reschedule-a-payment-.

New financial products can result in disparate impacts on communities of color and other financially vulnerable consumers. **It is essential that the CFPB apply anti-discrimination laws to new lending platforms, and especially BNPL credit, which is disproportionately used by Black and Hispanic Americans,** along with young adults.[21] Negative disparate impacts of new products will further harm disadvantaged communities. For young adults, who are just starting to build their credit profiles, the lack of sufficient oversight of BNPL credit has the potential to negatively impact credit building.

BNPL has been promoted by some as a "credit building" product. For example, Equifax has touted a study of consumers with a BNPL tradeline in their credit file, where a majority of consumers in its study experienced an average FICO score increase of 13 points when the BNPL tradeline showed on-time payments.[22] However, this increase was due in part to consumers choosing to have the BNPL account reported as a revolving account, like a credit card. Unless BNPL accounts are treated as open-end credit, the credit building potential of BNPL is significantly limited given how frequently opening short-term loans (even if they are paid on-time) has a negative effect on credit scores, as opposed to the positive effects associated with managing timely payments on a revolving, open-end credit account. This is another reason BNPL products should be treated as credit cards. There are also significant risks from BNPL to consumer's credit scores if they fail to make payments on time. If it is regarded and reported as individual loans and not cumulatively as revolving credit, BNPL has the potential to do damage to credit reports. **The CFPB should conduct research on the realistic impact of BNPL on credit scores, develop educational materials about the actual benefits versus risks, and watch out for deceptive claims about credit building aspects.**

BNPL credit can result in unexpected debt collection impacts. Consumer understanding of the terms of BNPL credit varies widely, with many consumers not viewing BNPL as debt.[23] As a result, consumers may not fully understand the consequences of failing to repay, including the possible involvement of debt collectors. Even small BNPL debts can end up being placed with third-party debt collectors for collection, or sold to debt buyers. Since BNPL lenders typically don't obtain social security numbers from consumers, they cannot pass on this information to collectors– which can make it harder for collectors to confirm that they are collecting from the right person. Correct identifying information is vital when debt collectors and/or debt buyers may attempt to collect accounts for years, especially given that contact information such as phone numbers and email addresses change over time. The CFPB should monitor the treatment of delinquent and charged-off BNPL debt and look out for unfair, deceptive or abusive debt collection practices.

Given the explosion of product offerings and consumer usage, it is imperative that the CFPB supervise BNPL providers to ensure that they are not engaging in unfair, deceptive, or abusive acts or practices.

Financial Inclusion

[21] Williams, BNPL users (Mar.,2022)
[22] Equifax, "Market Pulse: Buy Now, Pay Later Credit Score Impact Analysis - Webinar Slides," (Feb. 10, 2022) https://www.equifax.com/resource/-/asset/presentation/market-pulse-buy-now-pay-later-credit-score-impact-analysis-webinar-slides/.
[23] U.K. Financial Conduct Authority, Woolard Review (Feb. 2021).

We are particularly concerned about products that claim to promote financial inclusion but, in reality, may do quite the opposite. Without meaningful, holistic underwriting, affordable repayment options, and price transparency, these products may do more to exacerbate financial exclusion rather than promote financial inclusion.

Many of these products use promises of no credit check, which may entice consumers with thin or damaged credit histories who do not realize that these products are credit. For those consumers with blemished credit histories or who are struggling to make ends meet, they may not have the capacity to take on more debt. These consumers, especially low- and moderate-income workers, those with limited English proficiency (LEP), and people of color, have long been targeted by predatory practices, excluded from traditional financial systems, and struggled to build wealth and financial security. Failing to properly underwrite loans and transparently disclose prices will simply lead to more unaffordable and unsustainable debt for consumers.

Recommendations

BNPL products have largely evaded oversight by federal and state regulators. Although these products could have a place in meeting consumer needs if they operate as promised, they need to be covered by basic consumer protections, as these products still pose risks to consumers.

We recommend that the Bureau:

- Apply credit card protections of the Truth in Lending Act (TILA), including the provisions of the Credit Card Accountability Responsibility and Disclosure Act. BNPL providers issue devices that are "charge cards," which do not need finance charges or more than four installment payments to be covered by TILA. Applying credit card rules to BNPL credit would provide consumers with basic protections, such as dispute and chargeback rights, cost transparency, uniform disclosures and statements, reasonable penalty fees, and underwriting for a consumer's ability to repay.
- Issue a larger participant rule to bring the BNPL market (along with other installment loan markets) within the CFPB's supervision.
- Prevent or take action against unfair, deceptive or abusive acts and practices (UDAAPs) and ensure compliance with fair lending laws.
- Enforce the Electronic Fund Transfer Act's ban on compulsory repayment of credit by preauthorized electronic fund transfer.
- Conduct research on the impact of the BNPL market on consumers and on their credit reports.

Thank you for considering this request.

Yours very truly,

<u>National Organizations</u>

20/20 Vision DC

Accountable.US
Americans for Financial Reform Education Fund
Association for Financial Counseling & Planning Education
Bend the Arc: Jewish Action
Better Markets
CAARMA: Consumer Advocates Against Reverse Mortgage Abuse
Center for Digital Democracy
Center for Economic Justice
Center for Responsible Lending
Consumer Action
Consumer Federation of America
Consumer Reports
Consumers for Auto Reliability and Safety
Credit Builders Alliance
Local Initiatives Support Corporation (LISC)
Main Street Alliance
National Association for Latino Community Asset Builders
National Association of Consumer Advocates
National Center for Law and Economic Justice
National Consumer Law Center (on behalf of its low income clients)
National Consumers League
Public Citizen
Public Good Law Center
Revolving Door Project
Student Borrower Protection Center
Student Debt Crisis Center (SDCC)
U.S. PIRG
Woodstock Institute

State and Local Organizations

Alaska PIRG
Arizona PIRG Education Fund
Center for Economic Integrity
Arkansans Against Abusive Payday Lending
California Reinvestment Coalition
CALPIRG (California Public Interest Research Group)
CAMEO - California Assoc for Micro Enterprise Opportunity
Consumer Federation of California
East Bay Community Law Center
Fresno Building Healthy Communities
Housing and Economic Rights Advocates
Public Counsel
Bell Policy Center
Connecticut Legal Services, Inc.
Delaware Community Reinvestment Action Council, Inc.

Tzedek DC
Florida Consumer Action Network
Georgia Watch
Illinois People's Action
Illinois PIRG
Legal Action Chicago
Citizens Action Coalition of IN
Indiana Community Action Poverty Institute
Kentucky Equal Justice Center
Louisiana Budget Project
CASH Campaign of Maryland
Maryland Consumer Rights Coalition
Public Justice Center
Greater Boston Legal Services
New Jersey Citizen Action
New Mexico Center in Law & Poverty
Prosperity Works
Empire Justice Center
New Yorkers for Responsible Lending
Asheville Area Habitat for Humanity
NC Coalition for Responsible Lending
North Carolina Justice Center
The Collaborative
VOICE OKC (Voices Organized In Civic Engagement)
Columbia Consumer Education Council
SC Appleseed Legal Justice Center
RAISE Texas
Texas Appleseed
Legal Aid Justice Center
Virginia Citizens Consumer Council
Virginia Organizing
Virginia Poverty Law Center
Mountain State Justice

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

March 25, 2022

Submitted Electronically and Via E-mail
Rohit Chopra
Director, Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Notice and Request for Comment Regarding the CFPB's Inquiry Into Buy-Now-Pay-Later Providers, Docket No. CFPB-2022-0002; 87 Fed. Reg. 3511

Dear Director Chopra:

The Attorneys General of Illinois, California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington, as well as the Hawaii Office of Consumer Protection submit this letter in response to the Consumer Financial Protection Bureau's ("CFPB") "Notice and Request for Comment Regarding the CFPB's Inquiry into Buy-Now-Pay-Later Providers," CFPB-2022-0002; 87 Fed. Reg. 3511.

I. State Attorneys General Enforcement against Predatory Lending

We commend the CFPB for opening its inquiry into Buy-Now-Pay-Later providers ("BNPL")[1] and hope it is the first step towards greater transparency and regulation of the industry. While we encourage access to safe and affordable credit, we have concerns about new and supposedly innovative financial products that promise to disrupt and democratize the industry but push consumers into cycles of debt and carry some of the same terms and features as other expensive and predatory financial products. We are particularly concerned when such products are popular among younger consumers unfamiliar with navigating credit products and consumers who may already be struggling to make ends meet and to cover their existing debt burdens.

[1] *Consumer Financial Protection Bureau Opens Inquiry into "Buy Now, Pay Later" Credit*, Consumer Financial Protection Bureau (Dec. 16, 2021) [hereinafter *CFPB Inquiry*], https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-opens-inquiry-into-buy-now-pay-later-credit/

As the chief law enforcement officers of our states, we have long held lenders to account for their efforts to prey on vulnerable borrowers through attempts to evade consumer credit laws.[2] Examples of such evasion include structuring loans to fall outside the scope of state lending laws, mischaracterizing fees or interest charges, and leveraging relationships with third-parties to take advantage of that third-party's ability to export higher interest rates than are allowed by state law. Our states have also enacted laws to protect consumers from abuses associated with high-cost, small-dollar credit offered by fringe lenders. These laws reflect the will of the people to encourage safe and affordable loans while restricting predatory lending practices.[3] We are concerned that BNPL providers' claims of quick application approvals, no credit checks, no interest or fees, and convenient payment schedules are masking features that will contribute to long-term damage to consumers' financial health. We will continue to use all resources at our disposal to ensure the citizens of our states are protected from the potential harms of new financial products. We appreciate the opportunity to provide our views on BNPL providers and look forward to viewing the results of the CFPB's inquiry.

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[2] *Illinois by Madigan v. CMK Invs., Inc.*, No. 14 C 2783, 2014 WL 6910519, at *2 (N.D. Ill. Dec. 9, 2014) (alleging installment lender's mandatory account protection fee that was charged on a sliding scale based on the amount financed was undisclosed interest in violation of the applicable 36% rate cap imposed by Illinois law); *Oasis Legal Fin. Grp., LLC v. Coffman*, 361 P.3d 400 (Colo. 2015) (finding litigation finance agreements were loans subject to Colorado's consumer credit regulations); *Commonwealth v. Credit Acceptance Corp.* (2084-CV-01954-BLS2, filed August 28, 2020) (alleging subprime loan financier engaged in unfair lending practices, including usury); *Minnesota by Ellison v. Future Income Payments, LLC*, No. 27-CV-1712579, 2018 WL 1512814, *13 (Minn. 4th Dist. Mar. 13, 2018) (finding that financial product is a "loan" and that courts look to the "substance and effect of transactions to ascertain that there is not shrift or device on the part of the lender to evade the law or conceal the real nature and object of the transaction"); *Oregon v. Future Income Payments, LLC et al*, Multnomah County Case No. 18CV18811 (judgment in State's favor declaring loans null and void, saving victims over $5 million in principal, interest, and fees and fining defendants almost $5.9 million in civil penalties)

[3] *See* e.g. Illinois Predatory Loan Prevention Act, 815 ILCS 123/15-5-5 (lenders limited to 36% APR on unpaid balance of the amount financed for a loan); 815 ILCS 123/5-5-15 (prohibits any device, subterfuge, or pretense to evade the Act, including charging greater interest than allowed); Cal. Fin. Code §§ 22303, 22304, 22304.5, 22306 (establishing usury caps tied to amount of loan); Haw. Rev. Stat. § 480J-4(a) (lenders limited to 36% APR on the unpaid principal balance of an installment loan); Haw. Rev. Stat. § 480J-4(g) (prohibiting lenders from charging any further amounts on the loan other than permitted interest and loan charges); Maryland Consumer Loan Law, Md. Code Ann., Com. Law § 12-306 (interest rates on consumer loans limited to 33% or less); M.G.L. c. 255B, sec. 14 & M.G.L. c. 140D, secs 4-5 (setting usury cap for certain types of loans and requiring interest rate disclosures); Michigan Usury Law, MCL 438.31 (unsecured loans by unlicensed entities are limited to 5% without a written contract and 7% with a written contract); Minn. Stat. s 334.01 (limiting interest rates on loans by non-exempt lenders); Minn. Stat. s 47.60, 47.601 (providing for registration and rate limits for "consumer small loans" and "consumer short-terms loans"); N.J.S.A. 31:1-1(a) (imposing a maximum interest rate of 16% per annum when there is a written contract specifying a rate of interest, or 6% per annum in the absence of a written contract); N.C. Gen. Stat. § 24-2.1(g) ("It is the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws.") and N.C. Gen. Stat. § 24-1.1(a), (c) (maximum interest rate that North Carolina's usury laws allow for contract loans of $25,000 or less is 16% per annum unless another law provides for a higher rate); Nev. Rev. Stat. Ann. § 604A.010; Nev. Rev. Stat. Ann. Title 55, Ch. 675; Oregon Consumer Finance Act, ORS 725.010 – ORS 725.910; Payday and Title Loans and Student Loan Servicing, ORS 725A.010 – 725A.990.

II. The BNPL Industry

We acknowledge the potential benefits of BNPL financing when compared to certain forms of credit, such as high-cost payday and installment loans. For consumers who are able to afford BNPL payments, the ability to split the cost of goods or services into multiple installments without interest or fees can be helpful in paying for merchandise that would otherwise not fit into consumers' budgets. Additionally, we welcome lawful economic activity in our states, including that which benefits local businesses; BNPL products may help to spur economic development through increases in customer acquisition and overall sales.

The CFPB's inquiry comes while the BNPL sector has been experiencing rapid and exponential growth. Every year since 2018, there has been a 300% increase in the number of consumers who have taken out a BNPL loan.[4] A December 2020 survey found that 42% of Americans had used a BNPL service.[5] Loan volume in the BNPL sector jumped from an estimated $3 billion in 2019 to over $39 billion in 2020.[6] The growth in the BNPL industry parallels the growth of online shopping in general during the COVID-19 pandemic.[7] Consumers can find BNPL financing for an ever-growing number of products and services: electronics, clothing, household goods, and concert and travel tickets. Consumers can apply for BNPL financing at a merchant's online or in-store checkout, or directly through a BNPL provider's mobile app. Consumers who utilize BNPL tend to increase their spending. Merchants are willing to pay higher transaction fees than for credit card purchases because they see higher order volumes when purchases are made with BNPL financing.[8]

While BNPL has not overtaken the traditional credit card market share, this nascent yet developing stage is precisely when regulatory inquiry and investigation is necessary to root out potential harms and ensure that market actors are complying with existing laws.

III. Lack of Consumer Protections

We are concerned that some BNPL products are designed to evade certain consumer protection laws, including those loans that allow consumers to pay in four or fewer installments without

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[4] Jennifer Surane, Klarna Says Retailers Paying Less in Buy Now/Pay Later Frenzy, Bloomberg (Jan. 25, 2022), https://www.bloomberg.com/news/articles/2022-01-25/klarna-says-retailers-paying-less-in-buy-now-pay-later-frenzy.

[5] Gaby Lapera, *72% of Americans Saw Their Credit Scores Drop After Missing a 'Buy Now, Pay Later' Payment, Survey Finds*, Credit Karma (Feb. 8, 2021), https://www.creditkarma.com/insights/i/buy-now-pay-later-missed-payments.

[6] Brian Riley, *Buy Now, Pay Later: Gaining Scale And Disrupting Status Quo in Lending*, Mercator Advisory Group (May 7, 2021), https://www.mercatoradvisorygroup.com/product/Buy-Now-Pay-Later:-Gaining-Scale-and-the-Disrupting-Status-Quo-in-Lending/.

[7] *Buy Now, Pay Later Statistics and User Habits*, C+R Research, https://www.crresearch.com/blog/buy_now_pay_later_statistics (last accessed March 11, 2022) (51% of consumers say they used Buy Now, Pay Later services during the pandemic); *see also* Bureau of Consumer Financial Protection, *The Consumer Credit Card Market*, p. 165 (Sept. 2021), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.

[8] Ed Mierzwinski & Mike Litt, U.S. PIRG, *The Hidden Costs of "Buy Now, Pay Later* (March 2022), https://uspirg.org/sites/pirg/files/reports/BNPL%20REPORT%20USPIRG_0.pdf.

interest.[9] For example, providers offering these products may opine that they are not required to provide consumers with the same disclosures of interest and fees, and are not subject to the same dispute resolution protections or return/refund procedures as other credit products.[10] Some providers even claim that their products are not loans or credit products at all, but instead refer to them as payment plans.[11]

Regardless of what some BNPL providers and advocates may claim, BNPL financing is credit. Credit is defined by law as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment."[12] While state laws vary as to the precise definition, terms, and allowable charges on various credit products,[13] we are no less concerned that BNPL providers are frequently failing to provide consumers with clear and conspicuous disclosures, including total costs, payments, fees, and to fully describe available dispute resolution mechanisms. If some BNPL products were to fall outside the scope of certain federal laws or regulations, it would be even more important that the CFPB pay special attention to whether and how providers ensure the same levels of consumer rights and protections for their customers. **We urge the CFPB to analyze whether and how BNPL providers ensure consumer rights and protections, disclosure of fees, charges, and other essential terms to consumers, as well as how they comply with general requirements to refrain from unfair, deceptive, and abusive acts and practices.**

IV. Ability-to-Repay Analysis

We are also concerned that BNPL providers may not be considering a consumer's ability-to-repay prior to extending loans.[14] A lack of robust underwriting coupled with marketing that touts the ease of splitting the cost of goods or services into multiple payments without interest or fees, provides little protection against an unsustainable accumulation of debt – particularly for younger borrowers and consumers who already struggle to make ends meet or owe on other debts. There is also no guarantee that BNPL providers are able to track when consumers have BNPL loans from multiple providers.[15] One analysis found a correlation between consumers that use BNPL loans

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[9] 15 U.S.C. §1602(g) (The Truth In Lending Act generally only covers creditors who regularly extend consumer credit subject to a finance charge or payable by written agreement in *more than* four installments); *see* Congressional Research Service, *Rapidly Growing "Buy Now, Pay Later" (BNPL) Financing: Market Development and Policy Issues* (Nov. 1, 2021), https://crsreports.congress.gov/product/pdf/IN/IN11784/3; *see also CFPB Inquiry*, *supra* note 1.

[10] Nelson Akeredolu et al., *Should You Buy Now and Pay Later?*, Consumer Financial Protection Bureau (July 6, 2021), https://www.consumerfinance.gov/about-us/blog/should-you-buy-now-and-pay-later/.

[11] Elaine S. Povich, *Regulators Scrutinize Buy Now, Pay Later Plans*, Pew Charitable Trusts – Stateline (Feb. 2, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/02/02/regulators-scrutinize-buy-now-pay-later-plans; Tomio Geron, '*Buy Now, Pay Later' is Booking. But Companies are Facing Pressure to Change*, Protocol (Nov. 28, 2021), https://www.protocol.com/fintech/buy-now-pay-later-holidays.

[12] 15 U.S.C. §1602(f)

[13] *See* 815 ILCS 123/15-1-10 (The Illinois Predatory Loan Prevention Act defines "loan" as money or credit provided to a consumer in exchange for the consumer's agreement to a certain set of terms, including, but not limited to, any finance charges, interest, or other conditions, and includes transactions conducted over the internet.)

[14] Julian Alcazar & Terri Bradford, *The Appeal and Proliferation of Buy Now, Pay Later: Consumer and Merchant Perspectives*, Federal Reserve Bank of Kansas City (Nov. 10, 2021), https://www.kansascityfed.org/documents/8504/psrb21alcazarbradford1110.pdf.

[15] *Id*.

and consumers that incur overdraft fees.[16] While this did not show causation, the findings underscore the need for BNPL providers to consider a consumer's ability to repay so that consumers do not overextend their finances. Customer surveys also show that a substantial percentage of borrowers have fallen behind on payments. A December 2020 study found that 38% of BNPL borrowers had fallen behind, [17] and a 2021 survey found 56% of borrowers had fallen behind.[18] Another study showed that more than half of BNPL users have seen their credit card limits decrease.[19] For the young consumers and thin-credit file consumers that appear to use BNPL products often, early financial trouble risks hindering access to credit in the future. Some preliminary data indicates that these products are particularly attractive to consumers who have difficulty in managing their budgets.[20] It is this population that is most susceptible to harm from the use of BNPL. **We ask the CFPB to analyze what steps, if any, BNPL providers take in considering ability-to-repay and the types and sources of information they rely on. The CFPB should also consider specific rulemaking to clarify BNPL providers' obligations to conduct ability-to-repay analyses.**

V. Credit Reporting

The impact of BNPL products on consumer credit reports is also troubling. Some BNPL providers promote the lack of credit reporting as a central benefit of its products, as it allows for quicker approvals, but this leads to uneven outcomes for consumers. Many BNPL providers fail to report positive credit activity (such as on-time payments) and instead only report late payments or negative activity to credit bureaus.[21] Moreover, there is much negative activity to report. A survey found that nearly three quarters of consumers with a BNPL loan that had a late payment saw their credit scores decrease.[22]

In any event, how credit reporting is handled for BNPL is in flux. Since the CFPB opened its inquiry, the three leading credit bureaus announced plans to add BNPL payment activity to credit reports, including by establishing specific trade lines or independent divisions to handle BNPL payments.[23] Incorporating BNPL payment history into credit reports may help borrowers that make on-time payments build good credit and assist with underwriting to make sure borrowers can afford

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[16] Claire Williams, *'Buy Now, Pay Later' Users Significantly More Likely to Overdraft Than Nonusers*, Morning Consult (Mar. 2, 2022), https://morningconsult.com/2022/03/02/buy-now-pay-later-bnpl-overdraft-data/.
[17] Lapera, *supra* note 5.
[18] Mierzwinski, *supra* note 8.
[19] Ron Shevlin, *PayPal is Winning the $24 Billion Buy Now, Pay Later Battle – For Now*, Forbes (November 22, 2020), https://www.forbes.com/sites/ronshevlin/2020/11/22/the-24-billion-buy-now-pay-later-battle/?sh=40e83c542f53.
[20] *Id*.
[21] Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products, Hearing on H.R. 4277 Before the Task Force on Financial Technology U.S. House Committee on Financial Services, 117th Congress (2021) [hereinafter *Hearings*] (statement of Lauren Saunders, Associate Director, National Consumer Law Center).
[22] Lapera, *supra* note 5.
[23] Robin Saks Frankel, *TransUnion Follows Equifax's Move To Include Buy Now, Pay Later Data In Credit Reports*, Forbes (March 7, 2022), https://www.forbes.com/advisor/personal-finance/transunion-equifax-buy-now-pay-later-credit-report/; Greg Wright, *Introducing The Buy Now Pay Later Bureau™ from Experian*, Experian, (Jan. 26, 2022), https://www.experian.com/blogs/news/2022/01/26/buy-now-pay-later-bureau/.

payments. Reporting to credit bureaus can also help to mitigate or prevent identity theft; when BNPL payments are not reported to credit bureaus, consumers may be unaware that credit has been fraudulently established in their names, and alert and monitoring services may not capture this fraudulent activity.[24] Should the industry incorporate credit reporting on a broad scale, we hope that this will lead to BNPL providers conducting rigorous ability-to-repay analyses, including where consumers use BNPL loans through multiple providers at the same time.

However, complaints about inaccurate information in credit reports are too common, and the introduction of credit reporting to the BNPL industry may come with a host of other problems. In fact, one-third of complaints about BNPL loans submitted to the CFPB so far concern incorrect information on a consumer's credit report.[25] **We urge the CFPB to analyze BNPL policies and procedures for credit reporting and the information that BNPL providers furnish to credit bureaus. We further urge the CFPB to monitor the emerging role of credit bureaus in the BNPL marketplace, including to ensure that BNPL providers comply with obligations to furnish accurate information and that credit bureaus comply with validation and dispute resolution requirements. Given the number of complaints about credit reporting, BNPL providers that do report to credit bureaus should implement policies and procedures, and allocate sufficient resources and staff to timely and thoroughly handle consumers' credit reporting disputes.**

VI. Fees and Charges

We are concerned about the types and amounts of fees that BNPL providers charge consumers, as well as the clarity and adequacy of fee disclosures. While many BNPL products do not charge interest, most do charge several types of fees including late fees or activity fees.[26] We are concerned that when considered as interest, these fees may exceed state usury caps.[27] We are equally concerned that BNPL providers depend on late fees to drive revenue while not adequately disclosing late fees in advertisements and other statements to consumers.[28] We would be troubled to see BNPL loans become more expensive or complicated for consumers, including through the introduction of new or higher fees. As the industry continues to grow, merchants may seek to contract with BNPL providers for lower transaction fees.[29] And we are concerned that this will push BNPL providers to increase the fees they assess against consumers.

Additionally, some BNPL providers do charge interest, which may exceed state usury caps, as well as the average interest imposed on credit card users. Further, consumers who link their BNPL

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[24] Alcazar, *supra* note 14.
[25] Mierzwinski, *supra* note 8.
[26] Sasha Hupka, *Buy-Now-Pay-Later Apps: How They Work*, Los Angeles Times, (Aug. 11, 2021) https://www.latimes.com/politics/story/2021-08-11/buy-now-pay-later-apps-how-they-work (some providers, like Quadpay, charge a $1 platform fee for each installment payment); see also Akeredolu, *supra* note 10.
[27] Student Borrower Protection Center, *Point of Fail: How a Flood of "Buy Now, Pay Later" Student Debt is Putting Millions at Risk*, p. 10, (March 2022) (citing analysis that certain BNPL late fees may equate to 68% APR interest charges), https://protectborrowers.org/wp-content/uploads/2022/03/SBPC_BNPL.pdf.
[28] Alcazar, *supra* note 14; *see Hearings*, *supra* note 21 (Saunders testimony).
[29] Surane, *supra* note 4; *Hearings*, *supra* note 21 (testimony of Marisabel Torres, Director of California Policy, Center for Responsible Lending).

accounts to bank accounts may also incur NSF fees and overdraft charges if they fail to make a timely payment. Those who link their BNPL accounts to their credit cards may also incur interest charges directly on their credit cards.[30] **We recommend that the CFPB study the state of BNPL providers' disclosures to consumers, and consider using its rulemaking authority to ensure, first, that BNPL providers are clearly and accurately disclosing all actual and potential fees and charges to consumers and, second, that any fees and charges are reasonable and proportional to the overall cost of the loan.**

VII. Dispute Resolution, Returns, Refunds

We are concerned that if some BNPL providers claim that they are not required to comply with consumer protections required by providers of other forms of credit, consumers will have difficulty returning merchandise and with dispute resolution.[31] Consumers may continue to be on the hook to repay their loans even if they purchase faulty merchandise or merchandise from a scam company.[32] **The CFPB should review the dispute resolution procedures and protections offered by BNPL providers, ensure that BNPL providers implement rigorous oversight policies, immediately take action to cancel loans associated with defective or returned merchandise or purchased through scam merchants, and end relationships with unscrupulous merchants.**

VIII. Debt Collection

We are further concerned that BNPL providers ask for minimal consumer information on applications, which may lead to harms throughout the life-cycle of the loan. In particular, debt buyers and debt collectors that purchase portfolios of debt may have difficulty verifying borrower identity and validating debts when BNPL providers collect limited borrower information in applications and do not rely on credit reports to underwrite loans.[33] Consumers have already submitted complaints to the CFPB about attempts to collect on debts the consumers do not owe or for which the consumers do not remember applying.[34] **We recommend that the CFPB look into BNPL provider policies, procedures, and practices related to debt collection to ensure that providers comply with all applicable consumer protections.**

IX. Collection and Use of Consumer Data

We also appreciate the CFPB's focus on BNPL providers' use and monetization of consumer data.[35] The BNPL industry is growing while longstanding concerns over the collection, use, sale, and protection of consumer data in the financial services industry remain. BNPL providers collect

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[30] Mierzwinski, *supra* note 8; *citing* Akeredolu, *supra* note 10.
[31] Andrew Braden, *Know Before You Buy (Now, Pay Later) This Holiday Season*, Consumer Financial Protection Bureau (Dec. 16, 2021), https://www.consumerfinance.gov/about-us/blog/know-before-you-buy-now-pay-later-this-holiday-season/.
[32] Congressional Research Service, *supra* note 9.
[33] *Panel Discusses Viability of BNPL Loans for Buying, Selling*, AccountsRecovery.net, https://www.accountsrecovery.net/2022/02/10/panel-discusses-viability-of-bnpl-loans-for-buying-selling/ (last accessed, March 14, 2022).
[34] Mierzwinski *supra* note 8.
[35] *CFPB Inquiry*, *supra* note 1.

consumer data that is valuable for other companies that want to understand shopping behavior in order to target consumers for new products.[36] Merchant partnerships, and merger and acquisition activity with banks and other financial service providers, may lead to consumer data being shared amongst a variety of companies in ways that consumers may not understand or expect. **We recommend the CFPB inquire into provider privacy policies, as well as into how BNPL providers collect, use, sell, and protect consumer data.**

X. BNPL Financing for Education

Finally, we are concerned about the apparent emerging relationships between BNPL providers and for-profit schools, including online bootcamps and credentialing programs.[37] Many of these types of schools make false or misleading promises that graduates will obtain substantial salary increases. Such claims, combined with few consumer protections from BNPL loans, may lead to students being saddled with unaffordable debts and little recourse. State Attorneys General have spent years cracking down on the consumer harms that result from predatory for-profit schools and the financial products that prop up their dubious and unsubstantiated claims of lucrative salaries and job security.[38] The proliferation of partnerships between BNPL providers and for-profit schools occurs while federal regulators pay close attention to the risks of other "innovative" education financing products. For example, only recently the CFPB entered into a consent judgment, and the Department of Education issued guidance, both of which found that "income share agreements," are in fact "private education loans" under the Truth in Lending Act/Regulation Z and the Higher Education Act respectively.[39] While revenue from education financing may

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[36] Congressional Research Service, *supra* note 9.

[37] Student Borrower Protection Center, *supra* note 27.

[38] Press Release, *Attorney General Raoul Announces Settlement With ITT Tech Private Student Loan Lender*, (June 18, 2019) (available at https://www.illinoisattorneygeneral.gov/pressroom/2019_06/20190618.html); Colorado Attorney General, *Denver District Court Judge Orders CollegeAmerica to Pay $3 Million in Civil Penalties to State and Forgive Loans for Deceiving Students*, (Aug. 21, 2020), https://coag.gov/press-releases/8-21-20/; Maryland Attorney General, *Attorney General Frosh Announces Over $2.6M in Debt Relief for Former Brightwood College Students in Maryland* (November 16, 2020) https://www.marylandattorneygeneral.gov/Press/2020/111620.pdf; Press Release, AG Healey Reaches Settlement With U.S. Bank Securing Over $230,000 in Debt Relief for Massachusetts Student Borrowers, (May 28, 2021) (available at: https://www.mass.gov/news/ag-healey-reaches-settlement-with-us-bank-securing-over-230000-in-debt-relief-for-massachusetts-student-borrowers); New York Attorney General, *A.G. Schneiderman Obtains Settlement With DeVry University Providing $2.25 Million in Restitution For New York Graduates Who Were Misled About Employment And Salary Prospects After Graduation*, (Jan. 31, 2017), https://ag.ny.gov/press-release/ag-schneiderman-obtains-settlement-devry-university-providing-225-million-restitution; *Minnesota by Swanson v. Minn. Sch. of Bus., Inc.*, 899 N.W.2d 467 (Minn. 2017) (holding that higher-education institution's student lending operations were unlicensed and violated usury laws); Oregon Attorney General, *AG Rosenblum Announces 192 Million Aequitas Settlement* (August, 2017), https://www.doj.state.or.us/media-home/news-media-releases/ag-rosenblum-announces-192-million-aequitas-settlement-2-1-million-oregon-students/; Washington Attorney General, *AG Obtains $7 Million in Debt Relief for Nearly 2,000 Washington Student Borrowers*, (Aug. 17, 2017), https://www.atg.wa.gov/news/news-releases/ag-obtains-7-million-debt-relief-nearly-2000-washington-student-borrowers;

[39] *In the Matter of: Better Future Forward, Inc., et al*, 2021-CFPB-005, Sept. 7, 2021, https://files.consumerfinance.gov/f/documents/cfpb_better-future-forward-inc_consent-order_2021-09.pdf; *see* Office of Postsecondary Education, U.S. Dep't of Education, General 22-12, Comment on Income Share Agreements and Private Education Loan Requirements, (March 2, 2022) (discussing 2021-CFPB-005, and 34 C.F.R.

represent only a small fraction of the BNPL industry overall,[40] we believe the trend warrants further investigation and regulatory guidance. **We urge the CFPB to monitor partnerships between BNPL providers and for-profit schools and online course providers and consider issuing guidance and rulemaking clarifying regulations for BNPL credit to finance education.**

Thank you again for this opportunity, and thank you for taking the initiative to open an inquiry into Buy-Now-Pay-Later providers and the risks they may pose in the consumer financial marketplace.

Respectfully Submitted,

Kwame Raoul
Illinois Attorney General

Rob Bonta
California Attorney General

Philip J. Weiser
Colorado Attorney General

William Tong
Connecticut Attorney General

Kathleen Jennings
Delaware Attorney General

Stephen H. Levins
Executive Director, Hawaii Office of Consumer Protection

Holly T. Shikada
Hawaii Attorney General

601) https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2022-03-02/income-share-agreements-and-private-education-loan-requirements.

[40] Polo Rocha, *Buy Now/Pay Later is Latest Form of 'Shadow Student Debt':* Report, American Banker (March 9, 2022), https://www.americanbanker.com/news/buy-now-pay-later-is-latest-form-of-shadow-student-debt-report.

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Credit Union National Association
CUNA

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March 25, 2022

Comment Intake—Statement into BNPL Providers
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Notice and Request for Comment Regarding the CFPB's Inquiry Into Buy-Now-Pay-Later (BNPL) Providers; Docket No.: CFPB-2022-0002

Dear Sir or Madam:

The Credit Union National Association (CUNA) represents America's credit unions and their 130 million members. On behalf of our members, we are writing in response to the Consumer Financial Protection Bureau's (CFPB or Bureau) notice and request for information (RFI) on Buy-Now-Pay-Later (BNPL) products.[1]

General Comment

CUNA appreciates the CFPB's interest in the growing influence of BNPL products and their impact on consumers. The Bureau's examination of BNPL is appropriate and timely. In 2021, consumers spent nearly $100 billion in purchases using BNPL programs, up from $24 billion in 2020.[2] Nevertheless, BNPL providers remain largely unregulated.

Credit unions are concerned that unregulated BNPL providers are increasingly engaged in financial activities by offering products intended to be glossy, tech-savvy alternatives to traditional loan products. These non-bank providers often strive to offer these products without being subject to robust consumer protection laws and regulations in place for banks and credit unions. We agree that there is value in the Bureau further exploring these products and the companies that offer them as they begin serving a larger segment of consumers' financing purchases.

While credit unions welcome innovation in the market, we are concerned the exponential growth of BNPL products has outpaced prudent regulatory oversight and could ultimately result in consumer harm. In addition, the absence of effective oversight creates an uneven playing field to the material disadvantage of traditional lenders. Credit unions and other well-established financial service providers are heavily regulated for safety and soundness and consumer protection regulatory compliance. This is not always the case for companies offering BNPL products.

[1] Notice and Request for Comment Regarding the CFPB's Inquiry Into Buy-Now-Pay-Later (BNPL) Providers, 87 Fed. Reg. 3511 (Jan. 24, 2022).
[2] CFPB's Probe of Buy Now Pay Later: What's the Risk to Consumers? Eamonn Moran & Robin Nunn; Morgan, Lewis & Bockius LLP. Feb. 15. 2022 *available at* https://news.bloomberglaw.com/banking-law/cfpbs-probe-of-buy-now-pay-later-whats-the-risk-to-consumers.

Background

In December 2021, the Bureau issued orders to five BNPL companies requiring them to provide information about their size, scope, and business practices.[3] The Bureau listed six areas of specific interest: (1) Business Model and Transaction Metrics, (2) Loan Performance Metrics, (3) Consumer Protections, (4) User Contacts and Demographics, (5) Data Harvesting, and (6) Data Monetization. The information is intended to assist the Bureau in better understanding how consumers interact with BNPL providers, and how BNPL business models impact the broader e-commerce and consumer credit marketplaces. The Bureau subsequently expanded the orders to solicit comments from the public, including regulated stakeholders.

Application of consumer protection laws

We understand the attraction of BNPL and other similarly situated financial technology companies (fintech) to consumers as they seem to create novel products and services at a rapid pace. Some of these products and services are truly new while others may merely repackage traditional products and services wrapped in a thin veneer of technology and supported by venture capital that allows for pricing that undercuts traditional service providers in order to rapidly gain market share. While competition is a necessary component of properly functioning markets, we are concerned that some products offered by BNPL providers are intended to skirt state and federal consumer protection regulations by exploiting loopholes in regulatory coverage.

CUNA has long held the position that similar products and services should be regulated similarly so that consumer protections run with a product or service, not with the entity providing the products or service. Credit unions and banks are subject to most of the same consumer protection laws. While not perfect, these consumer protection laws are often intended to be in the best interest of consumers. The CFPB should continue to stay focused on BNPL providers as their business model and substantial growth could result in irreparable harm to consumers and cause consumers to lose trust in the financial services marketplace.

BNPL's impact on consumers

Credit unions are concerned the non-application of consumer protection laws to some BNPL products could leave consumers unprotected while also impacting the ability of credit unions to lend with full and complete credit information. A more evenhanded application of consumer financial protection laws could improve the role BNPL products play in the financial lives of consumers. In an ideal environment, BNPL products would be a tool for consumers use in coordination with traditional financial products like credit cards or personal loans.

In particular, the Bureau should evaluate the disclosures of terms and fees associated with BNPL and whether these disclosures are sufficient to inform consumers of their payment obligations, potential penalties associated with late payments, and the potential pitfalls of using BNPL. For example, some BNPL providers do not inform consumers that their purchases are not covered by the same dispute resolution protections as purchases made using traditional credit cards. In addition, consumers may be unaware that BNPL products may impact the information on their credit reports.

The lack of meaningful underwriting coupled with many easily accessed BNPL providers could lead consumers to take on too many installment payments at one time. This situation is especially concerning because survey data shows consumers are likely to substantially increase their non-essential spending in

[3] CFPB press release and sample order can be found at https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-opens-inquiry-into-buy-now-pay-later-credit/.

response to the availability of BNPL options.[4] Consumers may be put in a position where the minimum payments on multiple "low cost" BNPL loans are stacked in a manner that substantially impedes their cash flow and increases instances of late payments.

It may also be difficult for consumers to track their BNPL loans and make timely payments, even if they have sufficient funds available to make those payments. We encourage the Bureau to study how BNPL companies assist consumers in keeping track of their payment schedules, how they account for BNPL obligations from other providers, and how they are approaching the issue of credit reporting. While more BNPL obligations are likely to be reported to the credit bureaus in the future, credit unions are concerned about how these "shadow" obligations may impact consumers and the ability of other lenders to appropriately evaluate consumers' credit profiles.

Consumers are often attracted to BNPL because of their ease of access and focus on digital channels. Often the first time consumers' learn of BNPL is when they checkout an online cart on a merchant's website or app. However, access to e-commerce is not uniform in the United States and often leaves certain groups behind. The CFPB should study digital-only BNPL providers and determine how their business model may impact consumers without access to the e-commerce solutions.

Access to credit from traditional providers

We believe credit unions often provide the safest and most affordable loan options for consumers in need of credit. When addressing emerging providers, the Bureau should carefully evaluate and consider the impact its policies may have on the availability of credit for consumers. It is important that the CFPB strike an appropriate balance between its consumer protection goals and the availability of products and services. This balance is critical whether the product is a credit card, installment loan, or emergency loan. Many consumers rely on access to credit to manage their everyday finances and the Bureau should ensure reputable providers, especially community-based providers, are able to meet those needs.

Innovation in consumer financial services

Innovation, through technology and other creative solutions, has the potential to enhance the delivery and quality of financial products and services to consumers. In recent years, credit unions have been at the vanguard of innovation as a byproduct of their cooperative nature, member-driven focus, and relatively small size. Consumers benefit from innovation that offers new delivery channels and products as well as innovations to traditional products. Credit unions want to ensure that financial products and services available from fintech companies or any company offer the same protections as those offered by regulated entities. Our members do not want to discourage innovation, they merely want to ensure that innovation does not allow new entrants to make an end run around regulation.

Protection of consumer data

CUNA is also troubled by how fintechs use, monetize, and protect data collected from consumers. Protecting data from misuse and theft in the current environment has become increasingly difficult. The CFPB should closely evaluate the BNPL companies' data security and privacy practices to ensure that consumers are thoroughly protected. Everyone should be safeguarding consumer information, especially entities that house and use it the most. Any sharing of information that leads to less protection of credit union members' valuable information - and that leads to members being less protected or at worst exploited - is not supported by CUNA and our member credit unions.

[4] Buying the Holidays Now, Paying Later, Cardify (Nov. 22, 2021) *available at* https://www.cardify.ai/reports/bnpl-holidays-2021.

Conclusion

Currently, there are regulatory gaps that BNPL and other fintech companies exploit to provide financial services to consumers. This leads to less consumer protection and, at its worst, leads to the exploitation of consumers as their expectation of consumer protection is based on the regulation of traditional financial institutions and the products and services they offer. Consumer protection can be vastly different when a product or service is offered by non-financial institutions, and consumers do not always appreciate this difference. For the reasons detailed above, CUNA supports the CFPB's inquiry into the BNPL companies' practices and strongly encourages the CFPB to carefully examine and regulate these entities moving forward.

On behalf of America's credit unions and their 130 million members, thank you for your consideration. If you have questions or require additional information related to our comments, please do not hesitate to contact me at (202) 508-3629 or amonterrubio@cuna.coop.

Sincerely,

Alexander Monterrubio
Senior Director of Advocacy & Counsel for Consumer Protection

INQUIRY INTO BIG TECH PAYMENT PLATFORMS

Articles Included:

CFPB Orders Tech Giants to Turn Over Information on Their Payment System Plans (CFPB Oct. 21, 2021).

CFPB, *Notice and Request for Comment Regarding the CFPB's Inquiry Into Big Tech Payment Platforms*, Docket No. CFPB-2021-0017, 86 Fed. Reg. 61182 (Nov. 5, 2021).

Comment of 65 Consumer, Civil Rights, Faith, Legal Services and Community Groups to CFPB's Inquiry Into Big Tech Payment Platforms (Dec. 21, 2021).

Comment of Credit Union National Association to CFPB's Inquiry Into Big Tech Payment Platforms (Dec. 20, 2021).

Comment of Several States' Attorneys General to CFPB's Inquiry Into Big Tech Payment Platforms (Dec. 20, 2021).

Online or Other Resources:

View all comments to CFPB's Inquiry Into Big Tech Payment Platforms at https://www.regulations.gov/document/CFPB-2021-0017-0002/comment.

CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans

Orders will help CFPB monitor for data surveillance, access restrictions, and other consumer protection risks as payments technologies and markets evolve

OCT 21, 2021

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) issued a series of orders to collect information on the business practices of large technology companies operating payments systems in the United States. The information will help the CFPB better understand how these firms use personal payments data and manage data access to users so the Bureau can ensure adequate consumer protection.

"Big Tech companies are eagerly expanding their empires to gain greater control and insight into our spending habits," said CFPB Director Rohit Chopra. "We have ordered them to produce information about their business plans and practices."

The orders are issued pursuant to Section 1022(c)(4) of the Consumer Financial Protection Act. The CFPB has the statutory authority to order participants in the payments market to turn over information to help the Bureau monitor for risks to consumers and to publish aggregated findings that are in the public interest. The CFPB's work is one of many efforts within the Federal Reserve System to make payments safer, faster, and more competitive. The initial orders were sent to Amazon, Apple, Facebook, Google, PayPal, and Square. The Bureau will also be studying the payment system practices of Chinese tech giants, including Alipay and WeChat Pay.

Families and businesses benefit from faster, cheaper, and more secure payment systems. As online commerce and electronic payments have become consumers' normal expectation -- especially during the pandemic -- companies have developed new products and business models to meet this demand.

At the same time, these changes present new risks to consumers and to a fair,

transparent, and competitive marketplace. For example, large technology firms such as Apple and Google have sought to integrate payments services into their operating systems. Person-to-person (P2P) payments platforms such as Venmo and CashApp have grown quickly, and speedy growth can present risks to families and businesses. Chinese giants Alipay and WeChat Pay are part of broader super apps that touch multiple parts of a consumer's life and until recently were actively seeking to expand their presence in the US market.

The CFPB's orders build on the efforts of the Federal Trade Commission's work to shed light on the business practices of the largest technology companies in the world. The orders also seek to illuminate the range of these consumer payment products and their underlying business practices. Specifically, the orders will compel information on:

Data harvesting and monetization. Payment companies may be actively sharing payment data across product lines and with data brokers and other third parties. In some cases, Big Tech companies may be using this data for behavioral targeting. These practices may not align with consumers' expectations. The orders seek information on how companies collect and use data.

Access restrictions and user choice. When payment systems gain scale and network effects, merchants and other partners feel obligated to participate, and the risk increases that payment systems operators will limit consumer choice and stifle innovation by anticompetitively excluding certain businesses. The orders seek to understand any such restrictive access policies and how they affect the choices available to families and businesses.

Other consumer protections. Consumers expect certain assurances when dealing with companies that move their money. They expect to be protected from fraud and payments made in error, for their data and privacy to be protected and not shared without their consent, to have responsive customer service, and to be treated equally under relevant law. The orders seek to understand the robustness with which payment platforms prioritize consumer protection under laws such as the Electronic Fund Transfer Act and the Gramm-Leach-Bliley Act.

Read a CFPB example order. (https://files.consumerfinance.gov/f/documents/cfpb_section-1022_generic-order_2021-10.pdf)

Read the full Statement of CFPB Director Rohit Chopra on this action. (cfpb.gov/about-us/newsroom/statement-regarding-the-cfpbs-inquiry-into-big-tech-payment-platforms/)

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The Consumer Financial Protection Bureau (CFPB) is a 21st century agency that

BILLING CODE: 4810-AM-P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB-2021-0017]

Notice and Request for Comment Regarding the CFPB's Inquiry into Big Tech Payment Platforms

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice; request for comment.

SUMMARY: On October 21, 2021, the Consumer Financial Protection Bureau (Bureau or CFPB) ordered six large technology companies operating payments systems in the United States to provide information about certain of their business practices. The information will help the CFPB better understand how these firms use personal payments data and manage data access to users so the Bureau can ensure adequate consumer protection. Accompanying the orders, the Director of the Bureau issued a statement which is reprinted in this document for public review and comment. The Bureau invites any interested parties, including consumers, small businesses, advocates, financial institutions, investors, and experts in privacy, technology, and national security to submit comments to inform the agency's inquiry.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. 86 Fed. Reg. 61182 (Nov. 5, 2021)

ADDRESSES: You may submit comments, identified by Docket No. CFPB-2021-0017, by any of the following methods:

- *Federal eRulemaking Portal*: https://www.regulations.gov. Follow the instructions for submitting comments.

- *Email*: *BigTechPaymentsInquiry@cfpb.gov*. Include Docket No. CFPB-2021-0017 in the subject line of the message.
- *Mail/Hand Delivery/Courier*: Comment Intake—Statement into Big Tech Payment Platforms, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552. Please note that due to circumstances associated with the COVID-19 pandemic, the Bureau discourages the submission of comments by hand delivery, mail, or courier.

Instructions: The Bureau encourages the early submission of comments. All submissions should include document title and docket number. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to *https://www.regulations.gov*. In addition, once the Bureau's headquarters reopens, comments will be available for public inspection and copying at 1700 G Street NW, Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. At that time, you can make an appointment to inspect the documents by telephoning 202-435-7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Amy Zirkle, Program Manager for Payments & Deposits, (202) 435-7505. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

The following statement was issued by the Bureau's Director, Rohit Chopra, on October 21, 2021. This statement accompanied orders issued to six large technology companies operating payments systems in the United States to provide information about certain of their business practices.[1] The Bureau invites any interested parties to submit comments to inform the agency's inquiry.

II. October 21, 2021 Statement

Faster, friction-less, and cheaper payment systems offer significant potential benefits to consumers, workers, their families, and small businesses in the United States. For example, families can send money to friends without delay, or to relatives overseas at lower costs. Fast payment systems can also help small businesses succeed with quicker transactions, lower cost, and more revenue conversion. And faster settlement can reduce the need for families and businesses to borrow.

But payments businesses are network businesses and can gain tremendous scale and market power, potentially posing new risks and undermining fair competition. Furthermore, knowing what we spend our money on is a valuable source of data on consumer behavior. This data can be monetized by companies that seek to profit from behavioral targeting, particularly around advertising and e-commerce. That many Big Tech companies aspire to grow in this space only heightens these concerns.

[1] An example order can be found at https://www.consumerfinance.gov/documents/10176/cfpb_section-1022_generic-order_2021-10.pdf.

In China, we can already see the long-term implications of these forces. Alipay and WeChat Pay are deeply imbedded into the lives of the Chinese public, combining messaging, e-commerce and payment functionality into super-apps. In such a market, consumers have little choice but to use these apps and little market power to shape how their data is used.

Today the Consumer Financial Protection Bureau (CFPB) has ordered six technology platforms offering payment services to turn over information about their products, plans and practices when it comes to payments. The orders were issued to Google, Apple, Facebook, Amazon, Square, and PayPal. The CFPB will also study the practices of the Chinese tech giants that offer payments services, such as WeChat Pay and Alipay.

Congress has tasked the CFPB with ensuring that markets for consumer financial products and services are fair, transparent, and competitive. To that end, it has authorized the CFPB to require participants in the marketplace to provide information that help the Bureau monitor risks to consumers and to publish aggregated findings that are in the public interest.

Little is known publicly about how Big Tech companies will exploit their payments platforms. For example, will the operators engage in invasive financial surveillance and combine the data they collect on consumers with their geolocation and browsing data?[2] Will they in turn use this data to deepen behavioral advertising, engage in price discrimination, or sell to third parties?

Will these companies operate their payment platforms in a manner that interferes with fair, transparent, and competitive markets? Will the payment platforms be truly neutral, or will they use their scale to extract rents from market participants? Will small businesses feel coerced

[2] In 2019, I joined global privacy regulators to seek information about Facebook's Libra project. At the time, the company failed to substantively respond. See https://www.priv.gc.ca/en/opc-news/speeches/2019/s-d_190805/.

into participating in the payment platform out of fear of being suppressed or hidden in search or product listings? If these tech companies enter a market that competes with other providers on the platform, will these providers be removed or otherwise disadvantaged? What factors will these tech companies use when disqualifying or delisting an individual or business from participating on the platform?

Finally, how will these payment platforms ensure that key consumer protections are adhered to? How effectively do they manage complaints, disputes and errors? Are they sufficiently staffed to ensure adequate steps are taken to address consumer protection and provide responsive customer service when things go wrong?[3]

The CFPB's inquiry will help to inform regulators and policymakers about the future of our payments system. Importantly, it will also yield insights that may help the CFPB to implement other statutory responsibilities, including any potential rulemaking under Section 1033 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The CFPB's orders build on the efforts of the Federal Trade Commission's work to shed light on the business practices of the largest technology companies in the world.

The CFPB's inquiry is one of many efforts within the Federal Reserve System to plan for the future of real-time payments and to ensure a fair and competitive payments system in our country. The Bureau intends to open a Federal Register docket to invite public comment. I invite any interested parties to submit comments to inform the agency's inquiry.

[3] The law currently provides for a number of safeguards in the payments sector, including but not limited to the Electronic Fund Transfer Act, the Gramm-Leach-Bliley Act, and the Consumer Financial Protection Act.

Dated: November 1, 2021.

/s/ Rohit Chopra

_____

Rohit Chopra,

Director, Bureau of Consumer Financial Protection.

65 Consumer, Civil Rights, Faith, Legal Services and Community Groups

December 21, 2021

Submitted to Regulations.gov

Director Rohit Chopra
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

Re: Big Tech Payment Platforms, Docket No. CFPB-2021-0017

Dear Director Chopra,

The 65 undersigned consumer, civil rights, faith, legal services and community groups submit these comments in response to the Consumer Financial Protection Bureau's (CFPB) inquiry into certain business practices of six large technology companies operating payments systems in the United States. In these comments, we would like to focus on consumer protections in those payment systems, and in particular the lack of protection against consumer errors and fraud. We also discuss the application of existing federal data governance laws. These comments will not address other privacy issues, but we agree with other commenters that any data collected through payment systems should be used only with consumer permission and in ways that they would expect.

Scams and errors can have a particularly harsh impact on low-income families and communities of color. Payment system providers can do far more to protect consumers, and ultimately the systems themselves will benefit if consumers have greater protection and confidence when making person-to person (p2p) payments.

The lack of protection in p2p systems plagues not only the payment systems of large technology companies but also new or proposed faster p2p payment systems that operate through banks and credit unions. Accordingly, we urge the CFPB to:

- Clarify that all payment services providers and financial institutions have an existing duty under the Electronic Fund Transfer Act (EFTA) to investigate and resolve all errors committed through p2p systems, including errors committed by consumers.

- Enact a rule to define fraud in the inducement as an error covered by the EFTA's error resolution procedures.

- Most urgently, without waiting for an EFTA rulemaking to be complete, work with the Federal Reserve Board (FRB) to revise the proposed regulations for the soon-to-be-

launched FedNow payment system to require financial institutions to protect consumers in the event of consumer errors or fraud in the inducement.

- Clarify the protections when a consumer's account is wrongfully frozen, generally applying the EFTA's error resolution framework.

- Clarify application of existing federal data governance laws including the Gramm-Leach-Bliley Act (GLBA) and possibly the Fair Credit Reporting Act (FCRA).

As consumer, small business, civil rights, community and legal service groups described at greater length in comments submitted three months ago to the FRB, the existing p2p payment systems of large technology companies and financial institutions simply are not safe for consumers to use.[1] Scams often take the last dollar from those least able to afford it, and often target older adults, immigrants and other communities of color.[2] These communities, already denied or stripped of wealth through discrimination over the centuries to the present day, can least afford to lose money to scams and errors. Fast p2p payment systems, if properly designed, can provide broad benefits to consumers. But those benefits will only be realized if the systems are safe to use.

The providers of these p2p systems make decisions about what safety features to install, when to protect consumers, and how to monitor and react to red flags of potentially fraudulent payments received by their customers. Unfortunately, these companies have made the decision to prioritize speed, convenience and ubiquity at the expense of safety. They must instead take responsibility for their choices and protect consumers when the systems they design and implement result in predictable errors or fraud.

Protecting consumers from errors and fraud will create greater incentives for payment system providers to prevent those problems in the first place, benefiting everyone. Getting those incentives right is the most important thing the CFPB can do, as companies that are incentivized to prevent fraud and errors will use constantly improving technology and innovations to spot potential scams and errors, aggregate reports of fraud, and freeze accounts that are being used

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[1] *See* Letter from 43 consumer, small business, civil rights, community and legal service groups to Board of Governors of the Federal Reserve System re Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers Through Fedwire, Docket No. R-1750; RIN 7100-AG16 (Sept. 9, 2021), https://bit.ly/FedNowCoalitionComments; Comments of National Consumer Law Center, National Community Reinvestment Coalition, National Consumers League re: Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers Through Fedwire, Docket No. R-1750, RIN 7100-AG16 (Sept. 9, 2021), https://bit.ly/FedNowNCLC-NCRC-NCL.

[2] Anthony Hill, ABC Action News, "In-depth: Top scams that are targeted against the Black community; how to avoid falling victim; 41% of African Americans say they were targeted by a scam" (Aug. 12, 2021); https://www.abcactionnews.com/news/in-depth/in-depth-top-scams-that-are-targeted-against-the-black-community-how-to-avoid-falling-victim; Josh McCormack, Salud America, "Scammers Target Latinos, Blacks More Than Other Groups" (Aug. 31, 2021), https://salud-america.org/scammers-target-latinos-blacks-more-than-other-groups/; Matthew Petrie, AARP, Consumer Fraud in America: The Latino Experience (Aug. 2021), https://www.aarp.org/research/topics/economics/info-2021/scam-experiences-hispanic-latino.html.

to receive fraudulent funds before the funds are gone and before more consumers can be defrauded.

In today's world of fintech and innovation, it is ironic that the primary response of payment system providers to fraud and errors in p2p systems is to use old-fashioned disclosures and warnings to consumers to "be careful" and not to send payments to people they do not know -- even while promoting their systems for broad use. Scammers prey on consumers' trust, and warnings are far less effective than the sophisticated systems that payment providers can design.

It is especially important to flag the responsibilities of the institution that holds the account that receives a fraudulent payment. Institutions already have the duty to know their customer and to monitor accounts to prevent illegal activity. When they fail in those responsibilities and allow their customer to use an account that enables a scam, it is appropriate for that institution to bear the costs if the funds cannot be recouped.

If fraud and error rates are low in the aggregate, the system can bear those costs and spread them. If rates are high, then the systems clearly have fundamental problems that must be addressed. But even a single instance of fraud or mistake can be devastating to a consumer. The equities strongly favor protecting consumers with the same type of strong protection they have in the credit card market.

Accordingly, we have five requests.

1. **The CFPB should make clear that the existing obligation under the EFTA to investigate and resolve errors applies in the case of consumer errors in p2p systems.** There are no limitations in the definition of "error" that would eliminate errors committed by consumers.[3] Indeed, the EFTA generally protects consumers even in situations when they are negligent. If a payment is made in error -- whether to the wrong person or in the wrong amount -- it does not matter who made the error; the recipient is not entitled to that payment, and it should be reversed. Thus, institutions should be complying with their duty to investigate and resolve errors.

2. **The CFPB should ensure that consumers using p2p services have protection from scammers, using the Bureau's EFTA rulemaking authority to define additional "errors."[4]** While payments that consumers are fraudulently induced to send fall outside of the definition of "unauthorized charge,"[5] fraudulently induced payments can still be

[3] Acts constituting an "error" include "an incorrect electronic fund transfer from or to the consumer's account." 15 U.S.C. § 1693f(f)(2); *see* 12 C.F.R. 1005.11(a)(2)(ii) (same). Nothing in the statute, regulations or official comments requires that the error be one made by the financial institution.
[4] 15 U.S.C. § 1693f(f)(7).
[5] *See* 15 U.S.C. §1693a(12).

considered an error triggering a duty to investigate and resolve the error.[6] A payment that was sent to an imposter or under other situations involving fraud can and should be deemed an error.

3. **Most urgently, the CFPB must work with the FRB to improve the proposed rules governing the FedNow system to add in protection against consumer errors and fraud.** The FedNow system should not be launched unless and until consumers (and small businesses) are protected from fraud and errors. Consumer protection issues cannot be ignored in the FedNow rules and cannot wait for EFTA rules covering the entire market. We have an opportunity now for FedNow to be a model for how other p2p systems can and should operate, and the CFPB and FRB should work together to seize that opportunity.

4. **The CFPB should clarify the rules and protections when accounts are frozen**. If a financial institution freezes an account because it spots red flags of fraudulent use or identity theft, it is not clear how long the freeze may last or what rights consumers have if they believe their account was wrongfully frozen. Our general view is that consumers should have the right to contest a frozen account as an error under the EFTA (because the freeze will prevent the correct debiting and crediting of electronic fund transfers), and that error resolution procedures should apply: Unless law enforcement requires a different result, the institution should have 10 days to resolve whether any funds in the account should be unfrozen or whether the funds should be returned to the sender (or held for distribution to victims). But the topic deserves more consideration, as we recognize that the correct result requires balancing the importance of stopping fraudulent use with the rights of consumers whose accounts are incorrectly frozen.

5**. With respect to data sharing issues, we urge the CFPB to make clear the application of existing federal data governance laws, including GLBA and the FCRA.** A p2p payment system is most definitely a "financial institution" under GLBA since payment processing is a "financial activit[y] as described in" the Bank Holding Act.[7] Thus, any sharing of information with third parties is subject to the privacy notice requirements of Regulation P, and the p2p company is subject to the data security requirements of the Federal Trade Commission's Safeguards Rule. To the extent that the p2p company sells or shares information to a third party, it could be a furnisher under the FCRA, or even a consumer reporting agency if the information is not first-hand experience information and the third party uses it for credit, employment or other FCRA-

[6] For example, the definition of "unauthorized transfer" also excludes a transfer by the financial institution or its employee, 12 C.F.R. § 1005.2(m)(3), but a "consumer has no liability for erroneous or fraudulent transfers initiated by an employee of a financial institution," Official Interpretation of Regulation E 2(m)-1

[7] 15 U.S.C. § 6809(3)(A) (referring to 12 U.S.C. § 1843(k)); 12 C.F.R. § 1016.3(l)(1). Note that 12 U.S.C. § 1843(k) states at paragraph 4 "the following activities shall be considered to be financial in nature: (A) Lending, exchanging, *transferring*, investing for others, or safeguarding *money* or securities." (emphasis added).

covered purpose. And if consumer report information is shared internally between affiliated companies, the affiliate marketing provisions of the FCRA are implicated.[8]

Thank you for considering these comments.

A New Leaf, MesaCAN
Alaska PIRG
Americans for Financial Reform Education Fund
Arizona PIRG
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
California PIRG
California Reinvestment Coalition
Center for Economic Integrity
Center for LGBTQ Economic Advancement & Research (CLEAR)
Colorado PIRG
Community Action Human Resources Agency (CAHRA)
Congregation of Our Lady of Charity of the Good Shepherd, U.S. Provinces
Consumer Action
Consumer Federation of America
Consumer Reports
Consumers for Auto Reliability and Safety
Georgia Watch
Greater Boston Legal Services
Housing and Economic Rights Advocates
Illinois PIRG
Legal Action Chicago
Legal Aid Justice Center
Legal Services of New Jersey
Maryland Consumer Rights Coalition
Maryland PIRG
Missouri Faith Voices
NAACP
National Advocacy Center of the Sisters of the Good Shepherd
National Association of Consumer Advocates
National Community Action Partnership
National Community Action Partnership
National Consumers League
National Council on Independent Living
National Employment Law Project
National Fair Housing Alliance
New Jersey Appleseed Public Interest Law Center

[8] 15 U.S.C. §§ 1681a(d)(2)(A)(iii), 1681s-3.

New Jersey Citizen Action
New Jersey Citizen Action
New Jersey Institute for Social Justice
New Jersey PIRG
North Carolina PIRG
Oregon PIRG
Pennsylvania PIRG
Prof. Cathy Mansfield, Case Western Reserve University Law School
Prosperity Works
Public Citizen
Public Good Law Center
Public Justice Center
RAISE Texas
RESULTS
RESULTS DC/MD
SC Appleseed Legal Justice Center
Texas Appleseed
Texas PIRG
Tzedek DC
U.S. PIRG
University of Iowa Law and Policy in Action Clinic
Virginia Citizens Consumer Council
Virginia Organizing
Virginia Poverty Law Center
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December 20, 2021

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

RE: Notice and Request for Comment Regarding the CFPB's Inquiry Into Big Tech Payment Platforms [Docket No. CFPB–2021–0017]

To Whom It May Concern:

On behalf of America's credit unions, I am writing to the Consumer Financial Protection Bureau (CFPB) in response to the Notice and Request for Comment Regarding the CFPB's Inquiry Into Big Tech Payment Platforms.[1] The Credit Union National Association (CUNA) represents America's credit unions and their 120 million members.

CUNA appreciates the CFPB's interest in exploring the business practices of tech companies providing payments services. The Consumer Financial Protection Bureau (CFPB) has ordered six technology platforms offering payment services to turn over information about their products, plans and practices when it comes to payments. According to the Federal Register, this order was issued to Google, Apple, Facebook, Amazon, Square, and PayPal, and the CFPB will "also study the practices of the Chinese tech giants that offer payments services, such as WeChat Pay and Alipay." We think that there is value in exploring the business practices and plans of these tech giants as they venture into offering financial products and services.

The CFPB details that the Bureau will be looking at the following questions to help with the study of the tech giants' product and service offerings:

> Will these companies operate their payment platforms in a manner that interferes with fair, transparent, and competitive markets? Will the payment platforms be truly neutral, or will they use their scale to extract rents from market participants? Will small businesses feel coerced into participating in the payment platform out of fear of being suppressed or hidden in search or product listings? If these tech companies enter a market that competes with other providers on the platform, will these providers be removed or otherwise disadvantaged? What factors will these tech companies use when disqualifying or delisting an individual or business from participating on the platform? Finally, how will these payment platforms ensure that key consumer protections are adhered to? How effectively do they manage complaints, disputes and errors? Are they sufficiently staffed to ensure adequate steps are taken to address consumer protection and provide responsive customer service when things go wrong?[2]

Over the last several years, continued technological innovation in the financial sector has led technology companies and other non-traditional financial companies to offer many financial products and services that have traditionally been offered by credit unions and other financial institutions. Credit unions welcome innovation as it has led to credit unions offering new products and services to members. Nonetheless, we remain concerned that the playing field does not always remain

[1] 86 Fed. Reg. 61182 (Nov. 5, 2021).
[2] Id. at 61183.

level. Credit unions and other financial institutions are heavily regulated for safety and soundness and consumer protection regulatory compliance. This is not always the case for other companies offering financial products.

Consumers benefit from innovation that offers new delivery channels and products as well as innovations to traditional products. Credit unions want to ensure that financial products and services available from fintech companies or any company offer the same protections as those offered by regulated entities. Our members do not want to discourage innovation, they merely want to ensure that innovation does not allow new entrants to make an end run around regulation.

Credit unions have partnered with some of the tech giants that are part of this information collection to provide innovative products and services to members. Nonetheless, we fear that many of these companies will eventually move on from the partnership model to offer financial services and payments services directly and lock credit unions out of their platforms or at the very least, give their own offering preferential treatment.

This request for comment acknowledges the potentially limited consumer protection for financial service offerings from tech companies as compared to more regulated entities, but states that the law currently provides for a number of safeguards.[3] Safeguards aside, CUNA continues to be concerned that tech companies and other non-banks purposely construct products and services and use partnerships to skirt consumer protection laws, therefore creating different levels of consumer protection based on the type of entity offering a product or service. We encourage the CFPB to take a deep dive into the avoidance of consumer protection by tech, which is used to lower the cost of delivery of tech's finance products.

CUNA is also troubled by how tech uses and protects information collected from consumers. Protecting data from misuse and theft in the current environment has become increasingly difficult. The CFPB should closely examine the tech companies' data security and privacy practices to ensure that consumers are thoroughly protected. Everyone should be safeguarding consumer information, especially those that house and use it the most. Any sharing of information that leads to less protection of credit union members' valuable information - and that leads to members being less protected or at worst exploited - is not supported by CUNA and our member credit unions.

Currently, there are regulatory gaps that fintech and other companies exploit to provide financial services. This leads to less consumer protection and, at its worst, leads to the exploitation of consumers as their expectation of consumer protection is based on the regulation of financial institutions and the products and services they offer. Consumer protection can be vastly different when a product or service is offered by non-financial institutions, and consumers do not always appreciate this difference. For the reasons detailed above, CUNA supports the CFPB's inquiry into the tech companies' payments practices and strongly encourages the CFPB to carefully examine and regulate these entities moving forward.

If you have any questions about our comments, please do not hesitate to contact me at (202) 508-6705.

Sincerely,

Lance Noggle
Senior Director of Advocacy and Senior Counsel for Payments and Cybersecurity

[3] Id.

STATE OF OREGON
OFFICE OF THE ATTORNEY GENERAL

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

ELLEN F. ROSENBLUM
ATTORNEY GENERAL

LAWRENCE WASDEN
ATTORNEY GENERAL

December 20, 2021

VIA ELECTRONIC SUBMISSION

Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

RE: Request for Comments: Big Tech Payment Platforms
Docket No. CFPB-2021-0017

Dear Director Chopra:

The undersigned Attorneys General submit this comment in response to the Consumer Financial Protection Bureau's Request for Comments on its inquiry into Big Tech Payment Platforms.[1]

The Attorneys General encourage and support innovation from real-time payment platform providers, particularly because their platforms can provide faster, easier, and cheaper payment systems to consumers, workers, their families, and small businesses in the United States. The potential benefits of immediate money transfers are vast, but with those benefits come an increased risk of user error and fraud. In addition to these risks, payment platform users may not fully understand that, except under very specific circumstances, their account balances are not federally insured and do not have the same protections that consumers have come to expect from their traditional bank accounts. Consequently, it is essential that platform providers ensure baseline consumer protections to guard against the substantial harm that can result from user mistakes, fraudulent acts of unscrupulous third parties, and the platforms' business operations.

We share the CFPB's goal of safeguarding consumers. To do so in this context, we believe it is particularly important to ensure that real-time payment platform providers employ appropriate safeguards to protect consumers from fraud, effectively manage complaints, disputes, and errors,

[1] See Notice and Request for Comment Regarding the CFPB's Inquiry Into Big Tech Payment Platforms, 86 Fed. Reg. 61182 (November 5, 2021), Agency/Docket Number CFPB-2021-0017, Document Number: 2021-24176.

and provide responsive customer service when things go wrong. These comments seek to provide additional context on the current state of consumer complaints related to real-time payment platforms, stress the importance of prioritizing consumer protection challenges, and encourage all regulators, policymakers, and stakeholders to work collaboratively to tackle this issue.

Many of our states have seen a notable rise in the number of consumer complaints related to real-time payment platforms, particularly since the beginning of the pandemic. The complaints we have received raise three common issues: 1) difficulties accessing a customer service representative; 2) inability to access and retrieve funds; and 3) fraudulent money transfers often caused by 3rd party scams.

Customer Service

Complainants often say that they are unable to locate customer support contact information, and, when they do, they face long hold times or have difficulty contacting a human representative. A customer service email address or chat function is often difficult to find or requires navigating multiple layers to access. When consumers can contact customer service, they are often unable to speak with customer service directly and must wait to be called back. Speaking directly with a customer service representative is an important feature that is still desired by many, and one that should not be overlooked even with advances in technology.

Account Access

Other complaints focus on consumers' inability to access or transfer money, including funds directly deposited into their accounts by their employer or the government, e.g., paychecks, unemployment benefits, and CARES Act funds. Such issues prevent consumers from using their own funds, and these problems are exacerbated by not being able to easily connect with customer service. If a consumer cannot access their account because it has been locked, sometimes without warning or explanation, or because the consumer has a problem with their email address or phone number, the consumer may be left without any further recourse. Additionally, real-time payment platforms are often marketed as a solution for consumers without access to traditional banks – a population that is especially impacted by the inability to access funds.

Third-Party Scams

Many consumers have been scammed out of hundreds or thousands of dollars by other users of these payment platforms. Scammers are attracted to real-time payment platforms, in large part, because they do not need to reveal their true identity to set up an account. The complaints describe a wide range of scams. In some, third parties contacted consumers through social media offering investment opportunities or prize entries in exchange for payment. In others, scammers pose as family members and request money from unsuspecting consumers. In some cases, fraudsters take advantage of the platforms' limited customer support systems. Because it may be difficult to find contact information for customer service, many consumers resort to trying to find a phone number through an internet search. This leads to consumers encountering fake customer service phone numbers, which direct consumers to scammers who engage in tech support scams.

The perpetrators of such scams offer to assist consumers for a fee (processed through the payment platform) or convince the consumer to allow them access to their device or their account, allowing the perpetrator to quickly drain the account of funds.

In short, our offices support the CFPB's efforts to ensure consumer protections in light of the increasing utilization of payment platforms. We hope that our comments will further help guide regulators and policymakers to craft efficient solutions to these issues.

Respectfully submitted,

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Idaho Attorney General

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Treg R. Taylor
Alaska Attorney General

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Mark R. Herring
Virginia Attorney General

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Washington Attorney General

Joshua L. Kaul
Wisconsin Attorney General

OTHER ISSUES

Articles Included:

Frotman, *Helping Borrowers Hold Mortgage Servicers Accountable* (CFPB Apr. 4, 2022).

Online or Other Resources:

Amendments to the Federal Ability-to-Repay Rule, 75 Cons. Fin. L.Q. 139 (2021).

CFPB Report, *New Data on the Characteristics of Mortgage Borrowers During the COVID-19 Pandemic*, https://www.consumerfinance.gov/data-research/research-reports/new-data-characteristics-of-mortgage-borrowers-during-covid-19-pandemic/ (March 2022).

Consumer Financial Protection Bureau (cfpb.gov/)

Helping borrowers hold mortgage servicers accountable

By Seth Frotman – APR 04, 2022

On Monday, the Consumer Financial Protection Bureau (CFPB) filed a friend-of-the-court ("amicus") brief in McCoy v. Wells Fargo Bank, N.A., a case in which two mortgage borrowers sued their loan servicer for refusing to answer their questions about their loans. Wells Fargo argued that it is not required to answer these written questions from its borrowers despite clear obligations in federal law, and that is the issue now before the U.S. Court of Appeals for the Ninth Circuit.

In the modern mortgage market where the ownership of a loan frequently changes hands, borrowers often have only one place to turn to get needed information about their loans—their servicers. But loan servicers have few market incentives to respond to borrowers' needs. Servicers are virtually always picked and paid by a loan's owners or investors without any input from the borrower. That means market forces can leave servicers with significant incentives to skimp on serving their captive borrowers' needs and even to hunt for opportunities to impose unreasonable fees for what should be routine assistance. When the 2008 financial crisis erupted, these dynamics had disastrous consequences. Mortgage borrowers often struggled to even get in touch with their loan servicers to get answers to questions, correct errors with their loans, or to discuss options for avoiding foreclosure.

After the financial crisis, Congress created the CFPB to protect consumers from abusive, deceptive, and unfair financial practices. One of the CFPB's first rulemakings in 2013 was to reshape the mortgage servicing industry by amending Regulation X, the regulation that implements the Real Estate Settlement Procedures Act. Regulation X previously only expressly required loan servicers to respond to borrower requests for information relating specifically to servicers' receipt of payments from borrowers and making of payments to the loan's owners or other third parties, but the 2013 amendments gave mortgage borrowers the right under Regulation X to get a response from their servicer for almost any written question about their loans. This added important protections on top of Section 1034(c) of the Dodd-Frank

Act, which Congress wrote to give people a right to obtain any information (with few exceptions) concerning their account – mortgage or otherwise – in the possession of large banks like Wells Fargo.

Unfortunately for the borrowers in this case, Wells Fargo allegedly ignored its obligation to answer their questions. Instead, Wells Fargo told them it wouldn't answer because there was an ongoing lawsuit to foreclose on their homes. But a pending lawsuit does not take away a borrower's right to a response from their loan servicer under Regulation X. When this case got to court, Wells Fargo didn't even try to argue that it was entitled to ignore the borrowers' requests because of the foreclosure proceedings.

Instead, Wells Fargo argued that even after the CFPB's 2013 amendments, Regulation X didn't require it to respond to the borrowers' requests, which asked for things like transaction histories and the identities of their loans' owners. According to Wells Fargo, Regulation X today just requires it to provide the same limited types of information that were expressly required prior to the 2013 rulemaking. In other words, Wells Fargo argues that the CFPB's amendments to Regulation X didn't do much at all to help borrowers get responses. But that's not what Regulation X says, that's not what the CFPB intended, and that's not what mortgage borrowers need in the modern mortgage market. And even apart from Regulation X, banks like Wells Fargo have other legal obligations to give people information about their accounts.

People need a banking system that provides high-quality customer service, and banks should focus on relationship banking by treating customers fairly and attending to their needs. Mortgage borrowers too often struggle to get answers to their questions about their loans, and that can cause serious harm to consumers. Instead of a direct relationship between banks and their customers, the modern mortgage market is a complex web that often also involves securitized trusts and multiple servicers. It's only fair that the same entity that takes the homeowner's payments, usually the only entity in this complex web for whom the homeowner has any contact information, should also answer questions the homeowner has about their loan. Otherwise, many borrowers will have nowhere to turn to get information they need about their loans.

The CFPB filed its amicus brief to urge the Ninth Circuit to make sure mortgage borrowers can get the information they need.

The case is McCoy v. Wells Fargo Bank, N.A., No. 21-35892 (9th Cir.)

Read the CFPB's amicus brief (https://files.consumerfinance.gov/f/documents/cfpb_mccoy-v-wells-fargo_amicus-brief_2022-04.pdf).

Speaker Biographies

Beverly M. Burden, Lexington, Kentucky, has served as the Chapter 13 Trustee for the Eastern District of Kentucky since 1999. Before her appointment as trustee, she clerked for the late Bankruptcy Judge Joe Lee. She has presented at numerous national, regional, and local bankruptcy seminars, and strives to share practical information that consumer bankruptcy attorneys can use. She writes a blog for practitioners in the Eastern District of Kentucky at www.ch13edky.wordpress.com and is the Chair of the Biennial University of Kentucky Consumer Bankruptcy Law Conference. Ms. Burden is a member of the National Association of Chapter Thirteen Trustees (NACTT) and serves on the Board of Directors of the NACTT Academy for Consumer Bankruptcy Education (www.considerchapter13.org). She served on the Chapter 13 Advisory Committee to the ABI Commission on Consumer Bankruptcy. Ms. Burden received her J.D. from the University of Kentucky College of Law in 1983 and holds a B.B.A. degree in Accounting. She is a Fellow in the American College of Bankruptcy (2017).

Alice Whitten is Managing Counsel - Senior Vice President in the Wells Fargo Legal Department in their Irving, TX office. She leads a team that provides guidance and support for consumer bankruptcy operations across the Wells Fargo enterprise, including mortgage, automobile, credit cards and student lending and supports FCRA, SCRA & MLA across the consumer lending enterprise. She has been with Wells Fargo since 2014. Prior to joining Wells Fargo, she previously served as a Standing Chapter 13 Trustee in the Northern District of Texas for four years and was Senior Vice President – Associate General Counsel with AmeriCredit Financial Services, Inc. (now known as GM Financial) providing legal support for bankruptcy and default services operations. Alice is a graduate of St. Mary's University School of Law (cum laude) in San Antonio, Texas and the University of Minnesota – Carlson School of Management. Alice is admitted to practice in Texas. She is currently the Co-Chair of the NACTT Automobile Committee and a Board Member for the NACTT Academy. She was a Council Member of the Bankruptcy Law Section Counsel of the State Bar of Texas from 2013-2015, and a Committee Member of the Committee on Case Administration and the Estate for the ABI Commission on Consumer Bankruptcy (2018-2019). She is currently the Co-Chair of the NACTT Automobile Committee and a Board Member for the NACTT Academy.

Heather M. Giannino is the Managing Attorney of the Bankruptcy Department at Heavner, Beyers & Mihlar, LLC, where she oversees secured creditor's rights in bankruptcy, foreclosure and related matters. She is a member of the American Bankruptcy Institute (ABI), Bankruptcy Association of Southern Illinois (BASIL), National Association of Chapter Thirteen Trustees (NACTT), American Legal and Financial Network (ALFN), Illinois State Bar Association (ISBA), Decatur Bar Association (DBA) and Missouri Bar Association. Ms. Giannino currently serves as Co-Chair for the ABI Consumer Committee. She has served as co-chair of the Hon. Eugene R. Wedoff Seventh Circuit Consumer Bankruptcy Conference, Education Director, Special Projects Leader and Communications Manager of the ABI Consumer Committee, co-chair of ALFN's BKPG Events, Content & Social Media Sub-Committee, coordinating editor for the Consumer Point-Counterpoint Column of the *ABI Journal*, member of the Loan Modification Mediation sub-committee of the Northern District of Illinois Bankruptcy Court Liaison Committee and member of the planning committee for ABI's Consumer Practice Extravaganza. She is licensed in Illinois, Missouri and Indiana. Ms. Giannino received her B.S. in Accounting and Finance *summa cum laude* from Millikin University and her J.D. *cum laude* from Chicago-Kent College of Law.