

**COMMENTS to the Consumer Financial Protection Bureau on its  
Supplemental Notice of Proposed Rulemaking  
Docket No. CFPB-2020-0010  
RIN 3170-AA41**

**By the National Consumer Law Center on behalf of its low-income clients**

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# Summary of Comments

In March 2020, the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) issued a supplemental debt collection rulemaking to propose disclosures for consumers when debt collectors attempt to collect a time-barred debt. These proposals do not protect vulnerable consumers from abusive practices associated with the collection of time-barred debts, but instead provide cover for continued abusive collection of time-barred debts.

The only way to truly protect consumers from abusive practices in connection with the collection of time-barred debt is to prohibit this collection activity entirely. Disclosures will not adequately protect vulnerable consumers who will not understand why they are being contacted about a debt that is too old to sue on, or how making a small payment or acknowledgment could end up reviving the statute of limitations on a debt.

Consumer testing evidence showed significant comprehension problems, even under laboratory conditions. In the real world, comprehension will be even lower. Aggressive debt collectors will be able to comply with the letter of the disclosure requirements while continuing to use high pressure collection tactics and limiting the likelihood that consumers will be protected by such disclosures. The CFPB should prohibit all collection of time-barred debt.

However, if the CFPB does not prohibit the collection of time-barred debt, then it must completely revamp the proposed disclosures. To protect consumers, the CFPB must:

- Dramatically improve comprehension of disclosures, ensuring comprehension by the least sophisticated and other vulnerable consumers, including communities of color.
- Conduct additional testing and analysis to study real-world comprehension of time-barred debt disclosures.
- Prohibit suits and threats of suits on revived debts.
- Limit collections of time-barred debts to only written communications - each containing the time-barred debt disclosure - to maximize protections for vulnerable consumers.
- Transfer determinations that a debt is time-barred, binding all subsequent debt collectors with the determination by a prior debt collector that a debt is time-barred.
- Apply the FDCPA’s existing strict liability standard to prevent collectors from claiming that they did not know a debt was time-barred.
- Study the importance of obsolescence disclosures to consumer decisions about payment of time-barred debts and explore the viability of obsolescence disclosures.
- Require debt collectors to provide the time-barred debt disclosure in Spanish whenever the collector has communicated with the consumer in Spanish or has notice that the consumer prefers to communicate in Spanish (and expand this requirement to other languages as soon as the Bureau has created model translations of the time-barred debt disclosure in those languages).

# Comments on the Supplemental Notice of Proposed Rulemaking

## 1. Prohibition on Time-Barred Debt Collection Is Needed Because Disclosures Will Not Protect Vulnerable Consumers.

In May 2019, the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) issued proposed debt collection rules (“Proposed Rules”) to prohibit lawsuits or threat of lawsuits on time-barred debt if debt collectors know or should know that the debt is time-barred.<sup>1</sup> The Proposed Rules did not prohibit out-of-court collection of time-barred debt or suing or threatening to sue on a revived time-barred debt. Instead, in March 2020, the CFPB issued a supplemental debt collection rulemaking (“Supplemental Rules”) to propose disclosures for consumers when debt collectors attempt to collect a time-barred debt.<sup>2</sup>

These proposals, viewed together, do not protect vulnerable consumers from abusive practices associated with the collection of time-barred debts. Rather, the proposals will encourage debt collectors to pursue time-barred debts, while protecting them from liability when they harm consumers. The disclosures will give the CFPB’s imprimatur to abusive communications that trick consumers into paying time-barred debts. Disclosures create the illusion of consumer protection through information even if consumers do not see or understand the disclosures. Instead, the CFPB needs to prohibit the collection of time-barred debts.

A prohibition on the collection of time-barred debt is necessary because the practice of collecting on time-barred debts, including the out-of-court collection at issue in the Supplemental Rules, harms consumers.<sup>3</sup> Consumers are harmed by the collection of time-barred debt because the majority of consumers assume that they can be sued on a debt if a debt collector is contacting them.<sup>4</sup> The CFPB correctly recognized that:

A consumer with the misimpression that a time-barred debt is enforceable in court may pay or prioritize that debt over another debt or expense, in the mistaken belief that doing

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<sup>1</sup> Consumer Fin. Prot. Bureau, Debt Collection Practices (Regulation F), 84 Fed. Reg. 23,274, 23,403 (May 21, 2019) [hereinafter Proposed Rules].

<sup>2</sup> Consumer Fin. Prot. Bureau, Debt Collection Practices (Regulation F), 85 Fed. Reg. 12,672 (Mar. 3, 2020) [hereinafter Supplemental Rules].

<sup>3</sup> See National Consumer Law Center et al., Comments to the Consumer Fin. Prot. Bureau on its Proposed Debt Collection Rule 130, Docket No. CFPB-2019-0022 (Sept. 18, 2019), *available at* [https://www.nclc.org/images/pdf/debt\\_collection/comments-debt-collection-sept2019.pdf](https://www.nclc.org/images/pdf/debt_collection/comments-debt-collection-sept2019.pdf) (discussing why the collection of time-barred debts is unfair, deceptive, and abusive) [hereinafter NCLC Sept. 18, 2019 Comments].

<sup>4</sup> Supplemental Rules, *supra* note 2, at 12,687 (65% of consumers who read a collection notice about a time-barred debt without a disclosure incorrectly believe that the collector can sue them to collect a debt).

so is necessary to avoid litigation. The consumer may, in turn, have less money to pay another debt on which the consumer can be sued, or to pay other expenses, such as household necessities.<sup>5</sup>

Evidence from empirical studies also shows that many consumers who are informed that a debt is time-barred will decline to pay.<sup>6</sup> This evidence suggests that many consumers are harmed to the extent that they make a payment on a time-barred debt without fully understanding that the debt is time-barred and what this means.

Finally, consumers are harmed to the extent that they make a partial payment, acknowledge the debt, or otherwise act to revive the statute of limitations on a time-barred debt. The fact that it is possible to restart the statute of limitations in most states is very counterintuitive because, as the CFPB has noted, “consumers believe that making a payment should avert the negative consequences of nonpayment, which is in tension with being subject to the risk of a lawsuit.”<sup>7</sup> As a result, consumers who make a small payment or admit that a debt is theirs at the urging of debt collectors, can end up subject to a lawsuit for the full amount of the alleged debt. It is hard to believe that any consumers, let alone the vulnerable ones these rules are designed to protect, would make a partial payment or acknowledgment if they understood that doing so could open them up to a lawsuit.

The proposed disclosures are not sufficient to prevent these harms because consumer testing has not shown that the proposed disclosures will actually protect consumers. Consumer testing evidence from the CFPB shows that a significant percentage of consumers did not understand the time-barred debt disclosures under ideal laboratory testing conditions. Indeed, the Bureau found that more than a third of respondents incorrectly answered a question about whether they could be sued on a debt after reviewing a time-barred debt disclosure.<sup>8</sup> Similarly, 30 percent of

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<sup>5</sup> Supplemental Rules, *supra* note 2, at 12,673.

<sup>6</sup> Consumer Fin. Prot. Bureau, *Disclosure of Time-Barred Debt and Revival: Findings from the CFPB's Quantitative Disclosure Testing 28-29* (Feb. 2020) (consumers who received time-barred debt disclosures, especially disclosures that included revival notices, were more likely to indicate that they would be “very unlikely” to pay the debt and more likely to indicate that they would be “very likely” to ignore the debt than consumers in control groups that did not receive such disclosures); Timothy E. Goldsmith & Nathalie Martin, *Testing Materiality Under the Unfair Practices Acts: What Information Matters When Collecting Time-Barred Debts?*, 64 *Consumer Fin. L.Q. Rep.* 372, 379 (2010) (34% of consumers who were informed that the debt was unenforceable in court declined to pay, compared to 6% of consumers who were not informed). *See also* Supplemental Rules, *supra* note 2, at 12,675, n.43 (noting that, in qualitative testing conducted by the CFPB, “many participants said they would be less likely to pay or prioritize a debt they knew was time barred”).

<sup>7</sup> Supplemental Rules, *supra* note 2, at 12,675 (citing results of qualitative testing done by the Bureau).

<sup>8</sup> Supplemental Rules, *supra* note 2, at 12,687 (“Approximately 65 percent of respondents who were randomly assigned a notice containing a time-barred debt disclosure (with or without a revival disclosure) correctly stated that they could not be sued on the debt.”).

respondents did not understand that a partial payment could revive a debt, and 42 percent did not understand that they could be sued after a written acknowledgement.<sup>9</sup>

Summarizing consumer testing results, the Bureau concluded that “a time-barred debt disclosure *tended to correct* the misimpression that a debt collector would be legally allowed to sue to collect a time-barred debt.”<sup>10</sup> But a disclosure that merely has the tendency of correctly informing some consumers legitimizes communications that deceive and harm many consumers.

Comprehension of proposed disclosures will be even lower in real-world conditions,<sup>11</sup> as discussed in Section 2.3, *infra*. The number of consumers who actually understand the disclosure at the time they receive it is likely to be far lower than in the CFPB’s testing.

Moreover, many consumers will not notice the disclosure, consider its implications, or remember it during a collection attempt. Since the Supplemental Rules would, at most, require delivery of the proposed disclosures two times at the beginning of collection,<sup>12</sup> even consumers that saw or heard the time-barred debt disclosures and understood them may forget that this particular debt is time-barred, especially if they are being contacted about multiple debts in collection. Aggressive debt collectors will be able to comply with the letter of the disclosure requirements while continuing to use high-pressure collection tactics and limiting the likelihood that consumers will be protected by such disclosures.<sup>13</sup>

In addition to raising concerns about lack of consumer comprehension and providing cover for abusive practices, the proposed disclosures may themselves actually affirmatively harm consumers. For example, three of the proposed disclosures contain the language “[i]f you do nothing or speak to us about this debt, we will not sue you to collect it.” Yet consumers will be harmed by such language to the extent that it is actually possible to revive a debt orally,<sup>14</sup> or if the consumer makes a partial payment or written acknowledgment as a result of the phone

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<sup>9</sup> *Id.* (“once a revival disclosure was provided, about 70 percent of respondents reported correctly that the debtor can be sued after making a partial payment, and about 58 percent reported correctly that the debtor can be sued after writing to the debt collector to acknowledge the debt as theirs”).

<sup>10</sup> Supplemental Rules, *supra* note 2, at 12,679 (emphasis added).

<sup>11</sup> See Talia B. Gillis, *Putting Disclosure to the Test: Toward Better Evidence-Based Policy*, 28 Loy. Consumer L. Rev. 31, 73-76 (2015) (listing ways in which the controlled, isolated environment in which consumer testing takes place overstates the comprehensibility of disclosures in real-world settings).

<sup>12</sup> The frequency of time-barred debt disclosures is discussed in Section 2.5, *infra*.

<sup>13</sup> See Lauren E. Willis, *The Consumer Financial Protection Bureau and the Quest for Consumer Comprehension*, 3 Russell Sage Found. J. Soc. Sci. 74, 74 (Jan. 2017) (discussing “Know Before You Owe” disclosure) (“No matter how well the bureau’s . . . disclosures perform in the lab, or even in field trials, firms will run circles around these disclosures when the experiments end, misleading consumers and defying consumers’ expectations.”). See also Talia B. Gillis, *Putting Disclosure to the Test: Toward Better Evidence-Based Policy*, 28 Loy. Consumer L. Rev. 31, 74 (2015) (explaining that consumer testing “fails to reflect the real life context of financial disclosures” due to a “lack of human interaction in the testing”).

<sup>14</sup> Oral revival of time-barred debts is discussed in Section 2.4.2, *infra*.

conversation that leads to the revival of the debt. Even if the collector sending the message does not sue, a subsequent collector might do so.

Alternatively, the proposed disclosures could lead to consumer harm by implying through their silence that time-barred debts that are also obsolete, or too old to appear on a credit report, could still impact a consumer's credit score.<sup>15</sup> Thus the proposed disclosures fail to achieve the minimum requirement of doing no harm to consumers.

Unfortunately, these problems are unlikely to be fixed simply by adopting different disclosure language. The dissonance between, on the one hand, a debt collector trying to convince a consumer that they must pay a debt, and, on the other hand, a disclosure that says that nothing will happen to them if they do not, is just too great.

Indeed, evidence shows that other time-barred debt disclosures have also failed to protect consumers. As the CFPB stated in its discussion of the Supplemental Rules:

[A]vailable evidence suggests that, in practice, time-barred debt disclosures in use today do not lead to a material reduction in the aggregate rate at which time-barred debt is repaid.<sup>16</sup>

Moreover, after comparing the probability of payment in states with and without time-barred debt disclosure requirements, the CFPB found that:

[T]ime-barred debt disclosures in these States have not resulted in a large drop in the aggregate likelihood that consumers pay time-barred debts.<sup>17</sup>

As a result, the Bureau concluded that it “does not expect that the proposed disclosures would have large effects on aggregate collection revenue.”<sup>18</sup>

However, if there is no drop in debt collection revenues, then that is essentially proof that, despite the disclosures, collectors will be allowed to pressure consumers who will not understand that paying will not help them and that doing so is against their self interest. In other words, the CFPB found little evidence that state time-barred debt disclosures changed consumer behavior, concluded that its own proposed disclosures would also have limited effect, and yet decided that it should still move forward with permitting collection of time-barred debt legitimized by disclosures that it did not believe would be effective.

In addition to the CFPB's findings, public statements by debt buyers also suggest that existing time-barred debt disclosures have failed to protect consumers. For example, filings with the Security and Exchange Commission (“SEC”) by debt buyers that have been required, as part of

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<sup>15</sup> Obsolescence of time-barred debts is discussed in Section 2.9, *infra*.

<sup>16</sup> Supplemental Rules, *supra* note 2, at 12,688.

<sup>17</sup> Supplemental Rules, *supra* note 2, at 12,690.

<sup>18</sup> Supplemental Rules, *supra* note 2, at 12,690.



consent orders, to deliver time-barred debt disclosures have also stated that the consent orders that included the time-barred debt disclosures would not impact their bottom line.<sup>19</sup> Recent filings with the SEC underscore that collection on old debts continues, despite time-barred debt disclosures.<sup>20</sup>

Ultimately, the Bureau rejects the idea of prohibiting the collection of time-barred debt because of the purported effectiveness of its time-barred debt disclosures.<sup>21</sup> The CFPB also claims that “banning the collection of time-barred debt could have unintended consequences for consumers, such as increased litigation before expiration of the statute of limitations.”<sup>22</sup>

However, the CFPB does not point to any evidence that prohibiting collection of time-barred debts would increase litigation, and does not appear to have examined the evidence from states where debts are extinguished after the statute of limitations has run.<sup>23</sup> Indeed, the Bureau admits that it does not even have data to quantify “the number of debt collectors who collect time-barred debt or the number of time-barred accounts they collect,”<sup>24</sup> although the Bureau is authorized to gather such information as part of its rulemaking authority.<sup>25</sup> Thus the Bureau has not presented any evidence-based reasons for rejecting the prohibition of time-barred debt collection as a method to protect consumers from abusive practices associated with the collection of time-barred debts, and it should reevaluate this approach.

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<sup>19</sup> See PRA Group, Inc., Annual Report (Form 10-K), at 26 (Feb. 26, 2016) (“we do not anticipate any material adverse impact on our operations as a result of our entry into the Consent Order”); Encore Capital Grp., Current Report (Form 8-K), at Item 8.01 (Sept. 9, 2015) (explaining that, after a one-time payment as part of the consent order, “any future earnings impact will be immaterial”); Asset Acceptance Capital Corp., Annual Report (Form 10-K) at F-12 (Mar. 7, 2013) (“The Company does not expect its compliance with the consent decree to have a material adverse effect on its business.”).

<sup>20</sup> See PRA Group, Inc., Annual Report (Form 10-K), at 33 (Mar. 2, 2020) (reporting that, in 2019, the company received more than \$19 million in payments on collection accounts purchased from 1996 to 2009); Encore Capital Grp., Annual Report (Form 10-K), at 45 (Dec. 31, 2019) (reporting that, in 2019, the company received more than \$40 million in payments on collection accounts purchased prior to 2010).

<sup>21</sup> Inadequate consumer comprehension of the proposed time-barred debt disclosures is discussed *supra* in this section and *infra* in Section 2.2.

<sup>22</sup> Supplemental Rules, *supra* note 2, at 12,680.

<sup>23</sup> See Miss. Code Ann. § 15-1-3(1) (“The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy.”); N.C. Gen. Stat. § 58-70-115(4) (“No collection agency shall collect or attempt to collect any debt by use of any unfair practices. Such practices include, but are not limited to, the following: ... (4) When the collection agency is a debt buyer or is acting on behalf of a debt buyer, bringing suit or initiating an arbitration proceeding against the debtor or otherwise attempting to collect on a debt when the collection agency knows, or reasonably should know, that such collection is barred by the applicable statute of limitations.”); Wis. Stat. Ann. § 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.”).

<sup>24</sup> Supplemental Rules, *supra* note 2, at 12,688.

<sup>25</sup> 12 U.S.C. § 5512(c)(4) [Dodd-Frank Act § 1032(c)(4)].

***Recommendation:*** *The CFPB should prohibit the collection of time-barred debt.*

## 2. If the CFPB Continues to Use Disclosures to Respond to Abuses in Time-Barred Debt Collection, They Must Be Completely Revamped.

### 2.1 Overview

Prohibiting the collection of time-barred debt is the best way to protect vulnerable consumers from abusive practices associated with the collection of time-barred debt, as discussed in Section 1, *supra*. However, if the CFPB does not prohibit the collection of time-barred debts, this section outlines ways that the current proposal must be completely revamped, as discussed in the remainder of this section.

***Recommendation:*** *If the CFPB does not prohibit the collection of all time-barred debt, it needs to significantly improve consumer protections related to the collection of time-barred debts, as outlined in the remainder of this section.*

### 2.2 Consumer Comprehension Must Be Improved.

#### 2.2.1 Overview

As discussed briefly in Section 1, *supra*, the CFPB's consumer testing showed that a significant percentage of consumers did not understand the disclosures. In addition to the summary data included in the discussion of the Supplemental Rules, the Bureau also released a separate report containing greater detail about the results of its quantitative consumer testing.<sup>26</sup> That report discusses comprehension testing that asked survey respondents to answer five questions about whether debt collectors are legally allowed to sue in five different hypothetical fact scenarios.<sup>27</sup> Understanding when debt collectors can sue on a time-barred debt was a key issue being evaluated by quantitative testing.

Table 1 shows that the percentage of consumers that answered those five comprehension questions *incorrectly* ranged from 28.83 to 81 percent, depending on the scenario.

<sup>26</sup> Consumer Fin. Prot. Bureau, Disclosure of Time-Barred Debt and Revival: Findings from the CFPB's Quantitative Disclosure Testing (Feb. 2020), *available at* [https://files.consumerfinance.gov/f/documents/cfpb\\_debt-collection-quantitative-disclosure-testing\\_report.pdf](https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-quantitative-disclosure-testing_report.pdf) [hereinafter CFPB Disclosure of Time-Barred Debt and Revival Feb. 2020 report]

<sup>27</sup> *See id.* at 16-25.

**Table 1: Percentage of Survey Respondents Incorrectly Answering Comprehension Questions about Whether the Debt Collector Is Legally Allowed to Sue After a Consumer Takes Different Actions<sup>28</sup>**

<b>Scenario Tested<sup>29</sup></b>	<b>Percentage Incorrect TBD Notice<sup>30</sup></b>	<b>Percentage Incorrect TBD with Revival Notice<sup>31</sup></b>
Partial Payment	n/a <sup>32</sup>	28.83
Written Acknowledgment	n/a	41.78
Oral Acknowledgment	n/a	73.00
No Action	31.99	34.72
Returns Tear-Off Notice Checking Box to Dispute Debt	n/a	81.00

The data in Table 1 reinforces concerns about an alarming lack of comprehension of the disclosures as currently proposed. The data also illustrates the general lack of understanding of the revival disclosures, especially for written or oral acknowledgements and the effect of using the tear-off box to dispute a debt.

<sup>28</sup> To calculate the percentage answering *incorrectly*, we used this formula: 100 percent minus the percent answering correctly (using the correct answer identified by the Bureau). Data for the percentage answering correctly came from Appendix Tables 8-12. *See id.* at 68-71.

<sup>29</sup> For survey language, see *id.* at 42-43.

<sup>30</sup> The data in this column is aggregate data based on all TBD Notices (without revival notice) that were tested. Comprehension testing results for the exact language selected for the Supplemental Rules is also available. *Id.* at 76-77. For the “FTC-Will Not” disclosure, 33.6 percent incorrectly answered the no action scenario for debt that is three years old, and 22.19 percent answered incorrectly for ten-year-old debt. *Id.* No single aggregate comprehension score was available for the “FTC-Will Not” disclosure. However, the Bureau reported that “performance of the TBD Notices was relatively consistent across the different versions. *Id.* at 23.

<sup>31</sup> The data in this column is aggregate data based on all TBD with Revival Notices that were tested. Comprehension testing results for language similar to that selected for the Supplemental Rules is available. *Id.* at 78-79 (reporting results for “Revival(5)” disclosure). However, this table uses aggregate comprehension results, since the revival notices selected as proposed notices are not exactly the same as any of the ones tested.

<sup>32</sup> Since the Supplemental Rules would require a time-barred debt with revival notice if revival is possible (§ 1006.26(c)(1)(ii)), debt collectors should be sending a time-barred debt notice only when revival is not possible. Therefore, Table 1 looks at rates of incorrect answers only for those who received the time-barred debt notice (without a revival notice) for the one non-revival scenario.

If the CFPB wishes to pursue disclosures as a consumer protection tool for time-barred debt collection, despite overwhelming comprehension problems, significantly more testing is needed to develop disclosure language that will be truly understandable. The subsections below focus on various aspects of consumer comprehension that urgently need the Bureau's attention.

**Recommendation:** *If the CFPB adopts disclosures instead of prohibiting the collection of time-barred debts, it must engage in additional rounds of consumer testing, amending and testing new language to ensure higher overall comprehension rates.*

## 2.2.2 The CFPB Must Ensure that Vulnerable Consumers Understand the Disclosures.

### 2.2.2.1 Overview

The CFPB bases its legal authority for the Supplemental Rules on the FDCPA and the Dodd-Frank Act.<sup>33</sup> The proposed disclosures do not currently comply with either legal standard and thus do not comply with the CFPB's requirements to protect vulnerable consumers under either statute.

### 2.2.2.2 The CFPB Has Failed to Create Disclosures that Are Comprehensible to the Least Sophisticated Consumer, As Required by the FDCPA.

The Bureau acknowledges that the sections of the FDCPA relied upon as a source of legal authority for the Supplemental Rules<sup>34</sup> “incorporate an objective, ‘unsophisticated’ or ‘least sophisticated’ consumer standard.”<sup>35</sup> However, beyond acknowledging the relevant legal standard under the FDCPA, the Bureau does not discuss why it believes the proposed disclosures are comprehensible to the least sophisticated consumer, even though consumer testing indicated significant comprehension problems, as discussed in Section 2.2.1, *supra*. This is a glaring omission. The CFPB must do more than pay lip service to this fundamental principle of the FDCPA.

In planning the quantitative testing for its proposed disclosures, the CFPB rejected “using financial literacy questions as controls and to understand the perspective of the least sophisticated consumer,” citing “space limitations in the survey and the challenges to consumers to answer financial literacy questions.”<sup>36</sup> Instead the Bureau stated that it would

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<sup>33</sup> See Supplemental Rules, *supra* note 2, at 12,677.

<sup>34</sup> 15 U.S.C. §§ 1692e, 1692f.

<sup>35</sup> Supplemental Rules, *supra* note 2, at 12,677 (citation omitted).

<sup>36</sup> Consumer Fin. Prot. Bureau, Supporting Statement Part A Debt Collection Quantitative Disclosure Testing, CFPB-2019-0003 (Feb. 4, 2019), available at <https://www.regulations.gov/document?D=CFPB-2019-0003-0003>.

“make use of demographic information like education, race, age, gender, and income to understand the perspectives of a very diverse group of consumers, including the most vulnerable and least sophisticated consumers.”<sup>37</sup>

In its separate report about the results of its consumer testing, the Bureau does report demographic information for quantitative survey panel participants, but it reports only on differences in comprehension for two demographic categories - education and income – thereby significantly reducing the subgroup analysis that was supposed to identify comprehension by the least sophisticated consumer.<sup>38</sup> The Bureau’s troubling failure to analyze or report comprehension results broken out by race is discussed in Section 2.2.2.3, *infra*.

Comprehension data broken out by education and income, reproduced in Tables 2 and 3, *infra*, demonstrate that vulnerable groups with less education and lower income showed lower average rates of comprehension of both the time-barred debt notices and the time-barred debt with revival notices. In both cases, the differences in average comprehension scores between the lowest and highest levels of educational attainment (35.07 percent to 51.12 percent) and the lowest and highest levels of income (40.52 percent to 52.06 percent) were greatest for the time-barred debt with revival notices.

**Table 2: Distribution of Average Comprehension Score, by Notice Type, by Education Level<sup>39</sup>**

Education	Average Percentage Correct TBD Notice	Average Percentage Correct TBD with Revival Notice
Less Than High School	26.17	35.07
High School	30.42	39.96
Some College	32.98	46.81
Bachelor's Degree or Higher	33.86	51.12

**Table 3: Distribution of Average Comprehension Score, by Notice Type, by Income<sup>40</sup>**

Education	Average Percentage	Average Percentage
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<sup>37</sup> *Id.*

<sup>38</sup> CFPB Disclosure of Time-Barred Debt and Revival Feb. 2020 report, *supra* note 26, at 25-28, 89-90.

<sup>39</sup> *Id.* at 79-80 (partial reproduction of Appendix Table 21).

<sup>40</sup> *Id.* at 80-81 (partial reproduction of Appendix Table 22).

	Correct TBD Notice	Correct TBD with Revival Notice
\$0-\$19,999	29.07	40.52
\$20,000-\$39,999	32.02	42.83
\$40,000-\$74,999	32.63	47.34
\$75,000-\$124,999	34.48	50.87
\$125,000+	34.35	52.06

Thus by the method that the Bureau chose to evaluate comprehension by the least sophisticated consumer - comparison of subgroups - it has failed to show that the least sophisticated consumer would comprehend the proposed disclosures. The CFPB merely says that “gains in comprehension for respondents who viewed these notices are more pronounced for those with higher levels of education and income,” without including any further discussion of what this disparity means for comprehension by vulnerable consumers.<sup>41</sup>

Nor does the CFPB consider whether “the language in question would be confusing or misleading to a significant fraction of the population,” as required by the Seventh Circuit.<sup>42</sup> To judge comprehension by unsophisticated consumers, the Seventh Circuit has looked to “the average consumer in the lowest quartile (or some other substantial bottom fraction) of consumer competence.”<sup>43</sup> However, with the percentage of consumers answering comprehension questions *incorrectly* ranging from 28.83 to 81 percent depending on the scenario, as discussed in Section 2.2.1, *supra*, the CFPB also fails to demonstrate that the proposed disclosures will not be confusing or misleading to a significant fraction of the population.

The CFPB must tailor the disclosures to ensure that an “unsophisticated” or “least sophisticated” consumer would understand whether or not they can be sued on a time-barred debt. For the reasons discussed, *supra*, the proposed disclosures clearly fall short. The CFPB should propose and test different wording until it can comply with the FDCPA.

<sup>41</sup> *Id.* at 26.

<sup>42</sup> *Johnson v. Enhanced Recovery Co., L.L.C.*, 961 F.3d 975, 980 (7th Cir. 2020). See also Consumer Fin. Prot. Bureau, Supervision and Examination Manual, UDAAP 5–6 (ver. 2 Oct. 2012), available at [https://files.consumerfinance.gov/f/201210\\_cfpb\\_supervision-and-examination-manual-v2.pdf](https://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf) (“a representation may be deceptive if the majority of consumers in the target class do not share the consumer’s interpretation, so long as a significant minority of such consumers is misled”); Fed. Trade Comm’n, FTC Policy Statement on Deception 2 n.20 (Oct. 14, 1983), available at [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf) (interpreting the Federal Trade Commission (FTC) Act) (“A material practice that misleads a significant minority of reasonable consumers is deceptive.”).

<sup>43</sup> *Evry v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 774 (7th Cir. 2007). See also *FTC v. John Beck Amazing Profits, L.L.C.*, 865 F. Supp. 2d 1052, 1070 n.88 (C.D. Cal. 2012) (evidence that 10.5 percent of respondents deceived by an advertisement is sufficient under the FTC Act).

**Recommendation:** *If the CFPB adopts disclosures instead of prohibiting the collection of time-barred debts, it should propose different wording and engage in further rounds of consumer testing to make sure that any time-barred debt disclosures are comprehensible to the least sophisticated consumer.*

### 2.2.2.3 The CFPB Has Failed to Create Disclosures that Are Comprehensible to Consumers or to Consider the Comprehension of Vulnerable Groups as Required by the Dodd-Frank Act.

The CFPB cites the section of the Dodd-Frank Act that addresses disclosures as one source of authority for the Supplemental Rules.<sup>44</sup> In addition to providing authority to issue disclosures, this section describes what is required from those disclosures:

The Bureau may prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and **effectively** disclosed to consumers in a manner that **permits consumers to understand** the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.<sup>45</sup>

This section goes on to say that model forms with required disclosures can be created by the Bureau<sup>46</sup> and that, among other things, such model forms must use “plain language **comprehensible to consumers.**”<sup>47</sup> Given the comprehension problems discussed in Section 2.2.1, *supra*, the proposed disclosures have failed to satisfy the CFPB’s obligations under this section of the Dodd-Frank Act. Moreover, the CFPB has failed to comply with its obligation to validate the proposed model validation notice as a whole through consumer testing.<sup>48</sup>

Proceeding with disclosures despite high rates of non-comprehension also conflicts with the Bureau’s purpose to ensure that “all consumers have access to markets” and that “financial products and services are fair, transparent, and competitive.”<sup>49</sup> This is particularly true given the CFPB’s mandate to research, analyze, and report on “experiences of traditionally underserved consumers,”<sup>50</sup> groups that surely must include individuals with lower incomes and less education who, as discussed in Section 2.2.2.2, *supra*, scored significantly lower on average

<sup>44</sup> Supplemental Rules, *supra* note 2, at 12,677-12,678.

<sup>45</sup> 12 U.S.C. § 5532(a) [Dodd-Frank Act § 1032(a)] (emphasis added).

<sup>46</sup> 12 U.S.C. § 5532(b)(1) [Dodd-Frank Act § 1032(b)(1)].

<sup>47</sup> 12 U.S.C. § 5532(b)(2)(A) [Dodd-Frank Act § 1032(b)(2)(A)] (emphasis added).

<sup>48</sup> 12 U.S.C. § 5532(b)(3) [Dodd-Frank Act § 1032(b)(3)]. *See also* Section 3.1, *infra* (discussing comprehension problem about whom to pay); NCLC Sept. 18, 2019 Comments, *supra* note 3, at 174-175 (discussing inadequacy of the consumer testing performed on the model validation notice).

<sup>49</sup> 12 U.S.C. § 5511(a) [Dodd-Frank Act § 1021(a)].

<sup>50</sup> 12 U.S.C. § 5493(b)(1)(F) [Dodd-Frank Act § 1013(b)(1)(F)].

comprehension measures. The Bureau also fails to address any “technical assistance” that they received from the Office of Community Affairs on the impact on traditionally underserved consumers.<sup>51</sup>

“Traditionally underserved communities”<sup>52</sup> also include racial and ethnic groups. As noted *supra*, the CFPB collected race and ethnicity data from survey respondents. However, the Bureau did not report comprehension data by race or ethnicity,<sup>53</sup> despite the knowledge that communities of color are disproportionately impacted by debt collection.<sup>54</sup> Failing to report this information violated the CFPB’s obligations under the Dodd-Frank Act to research, analyze, and report the impact on traditionally underserved communities such as communities of color.<sup>55</sup> Moreover, black and Hispanic survey respondents were underrepresented in the testing.<sup>56</sup> Thus the CFPB has also failed to satisfy its Dodd-Frank obligations to demonstrate that the proposed disclosures would protect all consumers with time-barred debts in collection.

**Recommendations:** *If the CFPB adopts disclosures instead of prohibiting the collection of time-barred debts, it should engage in further consumer testing to make sure that any time-barred debt disclosures it promulgates are comprehensible to and sufficiently tested with vulnerable consumers, including communities of color.*

### 2.2.3 The CFPB Should Test Other Factors that May Affect Comprehension.

Additional consumer testing may also identify other factors that impact comprehension.

For example, the model validation notice currently lists a number of possible actions under the headers “What else can you do?” and “How do you want to respond?”<sup>57</sup> However, none of the

<sup>51</sup> 12 U.S.C. § 5493(b)(2) [Dodd-Frank Act § 1013(b)(2)].

<sup>52</sup> 12 U.S.C. § 5493(b)(1)(F) [Dodd-Frank Act § 1013(b)(1)(F)].

<sup>53</sup> CFPB Disclosure of Time-Barred Debt and Revival Feb. 2020 report, *supra* note 26, at 89 (discussing the demographic distribution of survey respondents but failing to analyze comprehension scores).

<sup>54</sup> See, e.g., Urban Institute, Debt in America: An Interactive Map (last updated Dec. 17, 2019), available at <https://apps.urban.org/features/debt-interactive-map>; Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB’s Survey of Consumer Views on Debt 17-18, 20-23, 25 (Jan. 2017), available at [https://files.consumerfinance.gov/f/documents/201701\\_cfpb\\_Debt-Collection-Survey-Report.pdf](https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf).

<sup>55</sup> 12 U.S.C. § 5493(b)(1)(F) Dodd-Frank Act § 1013(b)(1)(F)].

<sup>56</sup> C. Rios, C. Bamona, M. Lindblad, & T. Feltner, Center for Responsible Lending, Research critique: Disclosure of time-barred debt and revival findings from the CFPB’s quantitative disclosure testing (2020) (on file with author) (noting that “about 8.6% of the CFPB ICF Debt Survey sample is Black, which is substantially less than the Black population of the U.S. at 13.4%. Similarly, Hispanics are 9.7% of the survey sample, whereas nationally, Hispanics comprise 18.3% of the population. Finally, the study sample is 76.7% Non-Hispanic white, yet nationally the Non-Hispanic population, yet nationally the non-Hispanic population is far smaller at 60.4%.”).

<sup>57</sup> Supplemental Rules, *supra* note 2, at 12,697.



options currently address the possibility of ignoring the time-barred debt and doing nothing in response to the validation notice. The contrast between the time-barred debt disclosure and the list of options available to the consumer may impact consumer understanding by creating a kind of cognitive dissonance between the disclosure and the consumer's possible actions. Real-world testing is more likely to reveal these problems.

Another factor that may influence consumer understanding of the disclosure is the order of the disclosure. All of the disclosures tested by the CFPB began with a general statement about the law: "The law limits how long you can be sued for a debt" or "According to the law, you can't be sued for debts over a certain age."<sup>58</sup> However, consumers are unlikely to read every word of a disclosure.<sup>59</sup> The CFPB should test the impact of putting the critical information - that the consumer cannot be sued *for this debt* – up front instead of at the end to see how this affects comprehension.

Additional testing would also allow the CFPB to better evaluate certain design elements, such as the location of the disclosure on the model validation notice or the font size or style, to assess whether consumers would be more likely to notice and understand the disclosure if the CFPB used a different design for the model validation notice.

**Recommendations:** *If the CFPB adopts disclosures instead of prohibiting the collection of time-barred debts, it should engage in additional testing to see how other content or design choices affect consumer comprehension.*

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<sup>58</sup> ICF, Quantitative Survey Testing of Model Disclosure Clauses and Forms for Debt Collection: Methodology Report 37-50 (Jan. 21, 2020), *available at* [https://files.consumerfinance.gov/f/documents/cfpb\\_icf\\_debt-survey\\_methodology-report.pdf](https://files.consumerfinance.gov/f/documents/cfpb_icf_debt-survey_methodology-report.pdf) [hereinafter ICF Quantitative Survey Testing Methodology Report].

<sup>59</sup> See, e.g., Omri Ben-Shahar & Carl E. Schneider, More Than You Wanted to Know: The Failure of Mandated Disclosure 11 (2014) ("How many people realize they received their bank's data-collection disclosure, much less read it? One Web site's disclosure offered \$100 to anyone noticing it; it kept its \$100."); Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts,"* 78 U. Chi. L. Rev. 165, 181 (2011) ("The average time spent on the page containing the EULA was 117 seconds, and the median was 65 seconds. Given that these companies require shoppers to enter personal information as well as agree to a lengthy EULA, most of the time spent on this page was not spent reading the EULA text. More precisely, if the average EULA is 2,300 words long and the average adult reading rate of non-legalese is 250 to 300 words per minute, then the shopper needs 10 minutes just to read the full contract, leaving aside the other tasks required on the page."); Richard A. Epstein, Contract, not Regulation: UCITA and High-Tech Consumers Meet Their Consumer Protection Critics, in *Consumer Protection in the Age of the "Information Economy"* 205, 227 (Jane K. Winn ed. 2006) ("[I]t seems clear that most consumers [. . .] never bother to read these terms anyhow: we [. . .] adopt a strategy of 'rational ignorance' to economize on the use of our time.").

## 2.3 The CFPB Needs More Realistic Testing of Proposed Disclosures and More Analysis of the Use of Actual Disclosures.

The issues of whether consumers notice, read, understand, and act upon time-barred debt disclosures are all central to assessing how helpful a disclosure is likely to be to consumers in the real world. If the CFPB does not prohibit all collection of time-barred debt, it should, at a minimum, use the following methods to assess whether the disclosure is likely to be effective in the real world: 1) investigate data from natural experiments; 2) make additional consumer testing more similar to real-world conditions; and 3) continue to evaluate and refine any disclosures that are adopted.

First, the CFPB should look at data from collectors that have used time-barred debt disclosures in actual collections, such as those adopted as the result of consent decrees.<sup>60</sup> The CFPB is authorized to gather such information as part of its rulemaking authority.<sup>61</sup> However, it currently does not even have data to quantify “the number of debt collectors who collect time-barred debt or the number of time-barred accounts they collect.”<sup>62</sup> The Bureau should conduct an analysis of the impact of the time-barred debt disclosures from its prior consent decrees.

Similarly, the CFPB should look at data from the nine states<sup>63</sup> and two cities<sup>64</sup> that have their own time-barred debt disclosure requirements for debt collectors. So far, the CFPB has conducted only a limited analysis of the probability of payment in states with time-barred disclosures and states without time-barred debt disclosures.<sup>65</sup> It should conduct a more rigorous analysis of state and municipal time-barred debt disclosures. For example, data broken out at the state level might show which state had the most effective disclosure language. At a minimum, the CFPB should conduct a state-by-state analysis of the monthly probability of payment data instead of an aggregate number for all states with time-barred debt disclosures in order to see if any state had a demonstrably more effective time-barred debt disclosure.

In addition to assessing whether one disclosure has been more effective, the CFPB should also consider whether other disclosures have components that it should adopt to make its own

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<sup>60</sup> See *In re Portfolio Recovery Assocs., L.L.C.*, CFPB No. 2015-CFPB-0023, ¶ 126 (Sept. 8, 2015), available at [https://files.consumerfinance.gov/f/201509\\_cfpb\\_consent-order-portfolio-recovery-associates-llc.pdf](https://files.consumerfinance.gov/f/201509_cfpb_consent-order-portfolio-recovery-associates-llc.pdf); *In re Encore Capital Grp.*, CFPB No. 2015-CFPB-0022, ¶ 133.b (Sept. 3, 2015), available at [https://files.consumerfinance.gov/f/201509\\_cfpb\\_consent-order-encore-capital-group.pdf](https://files.consumerfinance.gov/f/201509_cfpb_consent-order-encore-capital-group.pdf); *In re American Express Centurion Bank*, CFPB No. 2012-CFPB-0002, § II.3 (Oct. 1, 2012), available at <https://files.consumerfinance.gov/f/2012-CFPB-0002-American-Express-Centurion-Consent-Order.pdf>.

<sup>61</sup> 12 U.S.C. § 5512(c)(4) [Dodd-Frank Act § 1022(c)(4)].

<sup>62</sup> Supplemental Rules, *supra* note 2, at 12,688.

<sup>63</sup> Cal. Civ. Code § 1788.14(d); Conn. Gen. Stat. § 36a-805(a)(14); N.C. Gen. Stat. § 58-70-115(1); Tex. Fin. Code Ann. § 392-307(e); W. Va. Code § 46a-2-128(f); Mass. Regs. Code tit. 940, § 7.07(24); N.M. Admin. Code § 12.2.12.9; N.Y. Comp. Codes R. & Regs. tit. 23, § 1.3; Vt. Admin. Code 3-2-103:CP 104.05(a). See also Nev. Rev. Stat. § 649.332(2)(a)(2) (requiring a revival disclosure when collecting debts on behalf of a hospital regardless of whether the debt is currently time-barred).

<sup>64</sup> N.Y.C. Admin. Code § 20-493.2(b); City of Yonkers Code § 31-162.1(B).

<sup>65</sup> Supplemental Rules, *supra* note 2, at 12,690.

proposed disclosures more effective. We list some of the ways in which state and municipal disclosures differ from the CFPB's proposed disclosures and from each other:

- **Disclosure language:** In five jurisdictions, specific language for time-barred debt disclosures is required.<sup>66</sup> In at least another three jurisdictions, safe harbor language is provided.<sup>67</sup> None of the time-barred debt disclosure language required or identified as providing a safe harbor by state or municipal law is the same as the time-barred debt language provided by the CFPB.
- **Obsolescence disclosures:** Four jurisdictions require disclosures about obsolescence<sup>68</sup> in addition to the time-barred debt disclosure, in certain circumstances.<sup>69</sup> As discussed, *infra*, in Section 2.9, the CFPB's proposed time-barred debt disclosures do not include an obsolescence disclosure.
- **Revival disclosures:** Seven jurisdictions require disclosures to address the possibility of revival.<sup>70</sup> Even though the CFPB has also proposed time-barred debt with revival disclosures, the list of actions that can lead to revival of the time-barred debt is different.<sup>71</sup>

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<sup>66</sup> Cal. Civ. Code § 1788.14(d); Conn. Gen. Stat. § 36a-805(a)(14); Tex. Fin. Code Ann. § 392-307(e); W. Va. Code § 46a-2-128(f); 6 R.C.N.Y. ch. 2 subch. S, § 2-191(a).

<sup>67</sup> Mass. Regs. Code tit. 940, § 7.07(24); N.M. Admin. Code § 12.2.12.9; N.Y. Comp. Codes R. & Regs. tit. 23, § 1.3. *See also* City of Yonkers Code § 31-162.1(B) (requiring collectors to “provide[] the consumer such information about the consumer’s legal rights as the Commissioner prescribes by rule”).

<sup>68</sup> A debt that is too old to appear on a credit report is “obsolete.”

<sup>69</sup> Cal. Civ. Code § 1788.14(d); Conn. Gen. Stat. § 36a-805(a)(14); Tex. Fin. Code Ann. § 392-307(e); W. Va. Code § 46a-2-128(f). *See also* Mass. Regs. Code tit. 940, § 7.07(24) (safe harbor language notes that the alleged debt “MAY STILL AFFECT YOUR ABILITY TO OBTAIN CREDIT OR AFFECT YOUR CREDIT SCORE OR RATING” but regulation does not require disclosure about obsolescence or the possibility of obsolescence).

<sup>70</sup> N.C. Gen. Stat. § 58-70-115(1); Mass. Regs. Code. tit. 940, § 7.07(24); N.M. Admin. Code § 12.2.12.9; N.Y. Comp. Codes R. & Regs. tit. 23, § 1.3; 6 R.C.N.Y. ch. 2 subch. S, § 2-191(a); Vt. Admin. Code 3-2-103:CP 104.05(a). *See also* Nev. Rev. Stat. § 649.332(2)(a)(2) (applies only to the collection of hospital debts).

<sup>71</sup> *See, e.g.*, Nev. Rev. Stat. § 649.332(2)(a)(2) (“If the debtor pays or agrees to pay the debt or any portion of the debt, the payment or agreement to pay may be construed as: (1) An acknowledgment of the debt by the debtor; and (2) A waiver by the debtor of any applicable statute of limitations set forth in NRS 11.190 that otherwise precludes the collection of the debt.”); Mass. Regs. Code tit. 940, § 7.07(24) (“YOU CAN RENEW THE DEBT AND THE STATUTE OF LIMITATIONS FOR THE FILING OF A LAWSUIT AGAINST YOU IF YOU DO ANY OF THE FOLLOWING: MAKE ANY PAYMENT ON THE DEBT, SIGN A PAPER IN WHICH YOU ADMIT THAT YOU OWE THE DEBT OR IN WHICH YOU MAKE A NEW PROMISE TO PAY; SIGN A PAPER IN WHICH YOU GIVE UP OR WAIVE YOUR RIGHT TO STOP THE CREDITOR FROM SUING YOU IN COURT TO COLLECT THE DEBT.”); N.M. Admin. Code § 12.2.12.9(5)(B) (“You can renew the debt and start the time for the filing of a lawsuit against you to collect the debt if you do any of the following: make any payment of the debt; sign a paper in which you admit that you owe the debt or in which you make a new promise to pay; sign a paper in which you give up (‘waive’) your right to stop the debt collector from suing you in court to collect the debt.”); N.Y. Comp. Codes R. & Regs. tit. 23, § 1.3 (“However, be aware: if you make a payment on the debt, admit to owing the debt, promise to pay the debt, or waive the statute of limitations on the debt, the time period in which the debt is enforceable in court may start again.”).

- **Location requirements:** At least two jurisdictions require the state time-barred debt disclosure to be on the front page of a written communication.<sup>72</sup>
- **Who must make disclosures:** State and city law may also differ from the proposed Supplemental Rules in terms of who needs to make time-barred debt disclosures - either creating broader<sup>73</sup> or narrower<sup>74</sup> coverage.
- **Frequency required:** At least two jurisdictions require time-barred debt disclosures to be made more frequently than proposed in the Supplemental Rules.<sup>75</sup>
- **Appearance of disclosures:** Four jurisdictions have requirements that the text of the time-barred debt disclosure be in a specific font size,<sup>76</sup> and at least two jurisdictions have additional requirements for the appearance of the disclosure.<sup>77</sup>

Next, the CFPB should evaluate how it can more effectively mimic real-world conditions with future consumer testing of the time-barred debt disclosures. For example, future surveys should not instruct respondents to read the time-barred debt disclosure language before answering comprehension questions.<sup>78</sup> Instead, part of the assessment should be whether the respondent can identify the relevant information from the validation notice. The CFPB recently announced that it will engage in additional qualitative testing of validation notices.<sup>79</sup> This testing will present

<sup>72</sup> Mass. Regs. Code tit. 940, § 7.07(24)(b); N.M. Admin. Code § 12.2.12.9(E). *See also* 6 R.C.N.Y. ch. 2 subch. S, § 2-191(b) (time-barred debt disclosure "shall be placed adjacent to the identifying information about the amount claimed to be due or owed on such debt").

<sup>73</sup> *See, e.g.*, Mass. Regs. Code tit. 940, §§ 7.03, 7.07(24)(a) (requirement for time-barred debt disclosures applies to "creditors," which include "any person and his or her agents, servants, employees, or attorneys engaged in collecting a debt owed or alleged to be owed to him or her by a debtor and shall also include a buyer of delinquent debt who hires a third party or an attorney to collect such debt provided").

<sup>74</sup> *See, e.g.*, W. Va. Code § 46a-2-122(d) (excluding certain attorneys from the definition of "debt collector").

<sup>75</sup> W. Va. Code § 46a-2-128(f) (requiring time-barred debt disclosures "in all written communication with such consumer"); 6 R.C.N.Y. ch. 2 subch. S, § 2-191(a) (requiring disclosure in "every permitted communication" about a time-barred debt). *See also In re Portfolio Recovery Assocs., L.L.C., Assurance of Discontinuance Pursuant to G.L. c. 93A, §5, Docket No. 19-3487, ¶35* (Mass. Super. Ct. Nov. 6, 2019), available at <https://www.mass.gov/doc/portfolio-aod/download> (requiring PRA to make time-barred debt disclosures "in compliance with 940 C.M.R. 7.07(24) in all written or oral communications to such Consumer about the Debt").

<sup>76</sup> Conn. Gen. Stat. § 36a-805(a)(14) ("type not less than ten-point"); Tex. Fin. Code Ann. § 392-307(f) ("at least 12-point type"); Mass. Regs. Code tit. 940, § 7.07(24)(b) ("a minimum of eight-point type"); 6 R.C.N.Y. ch. 2 subch. S, § 2-191(b) ("at least 12 point type").

<sup>77</sup> Tex. Fin. Code Ann. 392-307(f) ("must be in at least 12-point type that is boldfaced, capitalized, or underlined or otherwise conspicuously set out from the surrounding written material"); 6 R.C.N.Y. ch. 2 subch. S, § 2-191(b) ("at least 12 point type that is set off in a sharply contrasting color from all other type on the permitted communication").

<sup>78</sup> ICF Quantitative Survey Testing Methodology Report, *supra* note 58, at 15 (The survey instructed participants: "Please take another look at this box of text that appears on the notice. The following questions relate to this text, so please make sure you read the text carefully before continuing.")

<sup>79</sup> Consumer Fin. Prot. Bureau, Agency Information Collection Activities: Comment Request, 85 Fed. Reg. 38,870, 38,870 (June 29, 2020) ("The Bureau will collect information on how consumers locate and use information in the model notice, including: (1) Whether the consumer can locate and use important information effectively, such as information about the debt, information about the consumer's rights, and

an important opportunity to engage in a more realistic assessment of the proposed time-barred debt disclosures.

Better mimicking of real-world conditions also means testing disclosures in the manner that they would be presented to consumers, such as testing the proposed time-barred debt disclosures together with the existing state and municipal time-barred debt disclosures.<sup>80</sup> The Supplemental Rules address state and municipal time-barred debt disclosure requirements only in a comment, which says that debt collectors can provide any disclosures required by other jurisdictions on the back of the validation notice.<sup>81</sup> The CFPB needs to test what effect the presence of time-barred debt disclosures required by states or cities would have on consumer comprehension of its proposed time-barred debt disclosures.

Ultimately, developing effective disclosure language that real people will understand and use should be a slow and iterative process involving testing, adjusting the language, and testing again. It is worth taking the time to get it right in light of the inadequacies of the current disclosures and the risk of real harm to consumers. If the CFPB ultimately does adopt time-barred debt disclosures, that should not represent the end of the process but, instead, an opportunity to conduct more testing and to further refine and improve disclosures.

**Recommendations:** *If the CFPB adopts disclosures instead of prohibiting the collection of time-barred debts, it should use the following methods to assess whether the disclosures are likely to be effective in the real world: 1) investigating data from natural experiments; 2) making additional consumer testing more similar to real-world conditions; and 3) continuing to evaluate and refine any disclosures that are adopted.*

## 2.4 Revival Disclosures Present Significant Additional Comprehension Challenges.

### 2.4.1 Overview

The proposed revival disclosures present particular problems. As discussed in section 2.2.1, *supra*, the percentage of consumers that answered five comprehension questions *incorrectly* about time-barred debt with revival notices ranged from 28.83 to 81 percent, depending on the scenario. Consumers who do not understand the revival disclosures may make a partial payment or acknowledge a debt without realizing that doing so may open them up to a lawsuit, thereby causing direct harm.

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information about how the consumer may respond if they so choose; and (2) How consumers view and respond to paper and electronic versions of the model validation notice.”).

<sup>80</sup> See also Section 2.5, *infra* (discussing concerns about untested oral disclosures).

<sup>81</sup> Supplemental Rules, *supra* note 2, at 12,702 (Proposed Comment 26(c)(3)(ii)-(2)).

Debt collectors that collect time-barred debts and sue<sup>82</sup> unsuspecting consumers who inadvertently revived the debt are engaging in unfair, deceptive, and abusive practices in violation of the FDCPA and the Dodd-Frank Act. To quote the Dodd-Frank Act, they have “take[n] unreasonable advantage of ... a lack of understanding on the part of the consumer of the material risks, costs, or conditions” of the debt collection activity.<sup>83</sup>

As a result, if the CFPB does not prohibit the collection of all time-barred debt, as discussed in section 1, *supra*, it absolutely must prohibit suit or threat of suit on debt that has been revived under applicable state laws, in order to protect consumers from predatory practices related to the revival of time-barred debts. Alternatively, in light of this evidence of incredible levels of consumer confusion, the CFPB must, at a minimum, engage in additional consumer testing of time-barred debt with revival notices to ensure robust comprehension of any disclosures adopted. However, the counterintuitive nature of revival makes it unlikely that the CFPB will ever be able to attain the necessary levels of consumer comprehension discussed in section 2.2.2, *supra*.

***Recommendation:*** *If the CFPB adopts disclosures instead of prohibiting the collection of time-barred debts, it must prohibit suit or threat of suit on revived debts.*

#### 2.4.2 Consumers Cannot Fully Comprehend Revival Disclosures If Some Methods of Revival Are Omitted.

In some states, common law still allows for oral revival because “[i]n the absence of a statute providing otherwise, it is not necessary that an acknowledgment of a debt or a new promise to pay an existing debt be in writing.”<sup>84</sup> States where oral revival still appears to be possible include: Hawaii,<sup>85</sup> Kentucky,<sup>86</sup> Louisiana,<sup>87</sup> Pennsylvania,<sup>88</sup> Rhode Island,<sup>89</sup> and Tennessee.<sup>90</sup>

<sup>82</sup> Alternatively, one debt collector might get a consumer to revive a debt that is later transferred to another debt collector that files suit on the revived debt.

<sup>83</sup> 12 U.S.C. § 5531(d)(2)(A) [Dodd-Frank Act § 1031(d)(2)(A)].

<sup>84</sup> 51 Am. Jur. 2d Limitation of Actions § 302 (May 2020 Update).

<sup>85</sup> Hawaiian cases have discussed revival based on a promise to pay without any indication that such promise must be in writing. See, e.g., *Mun Seek Pai v. First Hawaiian Bank*, 57 Haw. 429, 435, 558 P.2d 479, 482 (1977) (“The effect of a new promise is merely to revive the remedy upon the original obligation or to start the statute anew.” (citation omitted)); *First Hawaiian Bank v. Zukerkorn*, 2 Haw. App. 383, 385, 633 P.2d 550, 552 (Haw. Ct. App. 1981) (“A new promise by the debtor to pay his debt, whether then barred by the applicable statute of limitations or not, binds the debtor for a new limitations period.”).

<sup>86</sup> *Thornton's Adm'r v. Minton's Ex'r*, 250 Ky. 805, 64 S.W.2d 158, 160 (1933) (“to sustain a cause of action, the new promise must be clear, direct, positive, and unqualified; however, no set form of words is necessary, nor is it necessary that the promise be in writing”).

<sup>87</sup> *Armstrong v. Baldwin*, 181 So. 72, 74-75 (La. Ct. App. 1938) (“The remaining question, therefore, is, Did the verbal acknowledgment of the debt sued for and the promise to pay it made by defendant in October, 1935, more than two years after prescription had accrued, have the effect of reviving it? We are of the opinion it did. We know of no law which prohibits the renunciation of prescription by the debtor by

The failure to mention the possibility of revival by oral acknowledgment will harm consumers in states where this remains possible. If the CFPB promulgates time-barred debt with revival disclosures, it must, at a minimum, include all of the ways in which a consumer's actions may revive the statute of limitations.

**Recommendation:** *If the CFPB adopts disclosures instead of prohibiting the collection of time-barred debts, and if it does not prohibit suit or threat of suit on revived debts, it should ensure that all possible methods of revival are effectively disclosed, including revival by oral acknowledgment.*

### 2.4.3 Consumers Cannot Fully Comprehend Revival Disclosures if Some Methods of Revival Are Not Explained Sufficiently.

One of the comprehension questions asked survey respondents whether a debt collector would be legally allowed to sue after the consumer, having checked the box to indicate that the debt was disputed, returns the tear-off portion of the model validation notice.<sup>91</sup> According to the

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verbal acknowledgment and promise to pay of a prescribed debt when the debt or obligation is not evidenced by writing.”). *See also* 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 and internal quotation marks omitted)).

<sup>88</sup> Cases interpreting Pennsylvania law have discussed revival based on a promise to pay without any indication that such promise must be in writing. *See, e.g.,* Raab v. Lander, 427 Fed. Appx. 182, 187 (3d Cir. 2011); Crispo v. Crispo, 909 A.2d 308, 313 (Pa. Super. Ct. 2006) (“[T]he acknowledgement doctrine provides that a statute of limitations may be tolled or its bar removed by a promise to pay the debt. A clear, distinct, and unequivocal acknowledgement of a debt as an existing obligation, such as is consistent with a promise to pay, is sufficient to toll the statute.”(citation and quotation marks omitted)). *See also* Standard Pennsylvania Practice 2d § 13:204 (June 2020 Update).

<sup>89</sup> Cases interpreting Rhode Island law have discussed revival based on a promise to pay without any indication that such promise must be in writing. *See, e.g.,* Sec. Bank & Tr. Co. v. Beaufort, 540 A.2d 13, 16 (R.I. 1988) (“[Defendant] continually acknowledged the debt, thereby eliminating the defense by renewing the cause of action with each acknowledgment.”); La France v. Moquin, 49 R.I. 151, 141 A. 307, 308 (R.I. 1928) (“[The statute of limitations] bar may be removed either by (1) an acknowledgment of the debt under circumstances from which a promise to pay may be implied, or (2) an unconditional promise to pay the debt, or (3) a conditional promise to pay and evidence that the condition has been performed.” (citations omitted)).

<sup>90</sup> 22 Tenn. Prac. Contract Law and Practice § 12:88 (Aug. 2020 Update) (“[T]he defendant may revive a plaintiff's remedy that has been barred by a 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 . . . This expression of a defendant's willingness to pay might be implied from the **words or actions** of a debtor, but whatever the form of defendant's acknowledgment, it must equate to the defendant's recognition that there is a continuing obligation and a revitalization of the defendant's original promise.”(emphasis added; citations omitted)).

<sup>91</sup> The exact language of the question was: “Person A thinks that there is a mistake in the notice. He or she **mails in the tear-off portion** on the bottom of the notice, checking the box that says, ‘I want to dispute this debt.’” CFPB Disclosure of Time-Barred Debt and Revival Feb. 2020 report, *supra* note 26, at 43 (emphasis in original).

CFPB, more than four out of five survey respondents answered this question *incorrectly*.<sup>92</sup> Although the reasoning here is not clear, it appears that the CFPB believes that a consumer could revive a debt by checking the box to dispute the debt and then check the box to say that “the amount is wrong” or otherwise write something that acknowledges the debt.<sup>93</sup>

Whatever the CFPB’s meaning, the lack of comprehension here highlights the fact that the disclosure does not provide sufficient information to determine what constitutes a written acknowledgment that would revive a debt. The CFPB’s proposed disclosure states that “BUT if you . . . acknowledge in writing that you owe this debt, then we can sue you to collect it.”<sup>94</sup> The disclosure provides no guidance about what type of words could constitute an acknowledgment, nor does it specify what could count as a writing. Survey respondents likely did not think that checking boxes could be an acknowledgment and may not have thought of checking a box as a writing.

What constitutes an acknowledgment of a debt differs according to state law.<sup>95</sup> The CFPB was aware of this state variation and intentionally chose to draft the written acknowledgment portion of the disclosure “at a level of generality meant to accommodate debt collectors in all jurisdictions where written acknowledgement revives the debt collector’s right to sue.”<sup>96</sup>

However, by choosing to draft a universal disclosure for the convenience of debt collectors, the CFPB has sacrificed consumer comprehension in a way that the CFPB believes puts consumers at risk of inadvertently reviving the debt through an acknowledgment on its own tear-off form. If the CFPB is right, then a tear-off dispute form could affirmatively harm consumers. If the CFPB continues to pursue time-barred debt revival notices, it must ensure that consumers do not take any of the range of possible actions that might constitute a “written acknowledgment” without understanding the consequences.

***Recommendation:*** *If the CFPB adopts disclosures instead of prohibiting the collection of time-barred debts, and if it does not prohibit suit or threat of suit on revived debts, it should ensure that the disclosure effectively informs consumers of the range of behaviors that could constitute written acknowledgment.*

<sup>92</sup> *Id.* at 71. The CFPB identifies the correct answer as “it depends,” noting that “[i]f Person A used the tear-off to indicate the debt was not theirs, then that would not revive the debt in most jurisdictions. If, however, Person A used the tear-off both to dispute the amount and acknowledge the debt, then it is possible that the debt could be revived.” *Id.* at 21-22.

<sup>93</sup> We are deeply concerned by the idea that checking off boxes on a tear-off form meant to simplify consumer disputes could actually harm consumers who inadvertently revive a debt by checking off the wrong boxes. The CFPB should ensure that consumers are not harmed because they explain the reasons for a dispute.

<sup>94</sup> Supplemental Rules, *supra* note 2, at 12,698.

<sup>95</sup> Supplemental Rules, *supra* note 2, at 12,682 n.116. See also National Consumer Law Center, Collection Actions § 3.6.8.3.2 (4th ed. 2017), *updated at* [www.nclc.org/library](http://www.nclc.org/library).

<sup>96</sup> Supplemental Rules, *supra* note 2, at 12,682 n.116.



#### 2.4.4 Untested Language Added to Revival Disclosures Is Wrong and Misleading.

In the Supplemental Rules, the CFPB added language to one sentence in the three proposed revival disclosures. The consumer-tested version of the sentence read:

If you do nothing in response to this notice, we will not sue you to collect this debt.<sup>97</sup>

The Bureau explained:

Based on the testing results, the Bureau believes that this phrasing could lead consumers who receive such a revival disclosure to have the false impression that communicating with a debt collector by telephone would revive the debt collector's right to sue and thus make the consumer reluctant to communicate. To clarify that communicating with a debt collector by telephone would not revive the debt collector's right to sue, the first sentence of the revival disclosures on proposed Model Forms B-5 through B-7 also includes the phrase "or speak to us."

Thus the CFPB revised this sentence and, without conducting additional testing, added the bolded content in the proposed disclosures:

If you do nothing **or speak to us about this debt**, we will not sue you to collect it.<sup>98</sup>

The addition of this language is harmful and decreases consumer comprehension to the extent that an oral statement can revive the statute of limitations under the relevant state law as discussed in section 2.4.2, *supra*.

Further, even in states where revival by oral acknowledgment is not possible, the disclosure language is misleading. This is because the disclosure states: "[i]f you...speak to us about the debt, we will not sue you to collect it." The disclosure thus suggests that talking to the debt collector is a harmless activity. However, consumers may inadvertently revive the debt as the result of a call if they make a partial payment or take actions that qualify as a written acknowledgment, including sending an email, text, or other electronic communication that may constitute a written acknowledgment under the relevant state law.

Moreover, suggesting that consumers can safely contact debt collectors about time-barred debts is particularly likely to lead to consumer harm because the CFPB has not required the time-barred debt disclosure in every communication (*see* discussion at section 2.5, *infra*).

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<sup>97</sup> ICF Quantitative Survey Testing Methodology Report, *supra* note 58, at 48.

<sup>98</sup> Supplemental Rules, *supra* note 2, at 12,698 (emphasis added).

**Recommendation:** *If the CFPB adopts disclosures instead of prohibiting the collection of time-barred debts, and if it does not prohibit suit or threat of suit on revived debts, it should delete the phrase “or speak to us about this debt” from the time-barred debt with revival notices.*

## 2.5 Any Time-Barred Debt Disclosures Should Be Required in Every Communication.

In contrast to prior consent decrees on time-barred debt,<sup>99</sup> the Supplemental Rules require debt collectors to make, at most, two disclosures that the debt is time-barred.<sup>100</sup> This is true even though an account may be in collection with that same collector for months or years after the disclosure(s). In other words, regardless of how long ago the last disclosure was delivered, the debt collector would be free to try to convince the consumer to make a payment on the time-barred debt without informing the consumer again that the debt is time-barred or, if applicable, disclosing the possibility of revival. The CFPB is also allowing the time-barred debt disclosures to be made in validation notices that, under the Proposed Rules, consumers may never see.

The CFPB’s failure to require a time-barred debt disclosure in every communication is harmful, because consumers are likely to forget over time that the debt is time-barred, and they may then prioritize payment of the time-barred debt over immediate expenses for food, housing, or medical care. Indeed, this risk of time-barred debt collection was identified by the CFPB.<sup>101</sup> Consumers may also become confused about which account is time-barred if they are being

<sup>99</sup> See *In re Portfolio Recovery Assocs., L.L.C.*, CFPB No. 2015-CFPB-0023, ¶ 126 (Sept. 8, 2015) available at [https://files.consumerfinance.gov/f/201509\\_cfpb\\_consult-order-portfolio-recovery-associates-llc.pdf](https://files.consumerfinance.gov/f/201509_cfpb_consult-order-portfolio-recovery-associates-llc.pdf) (prohibiting from collection by any means unless time-barred debt disclosure provided); *In re Encore Capital Grp.*, CFPB No. 2015-CFPB-0022, ¶ 133.b (Sept. 3, 2015), available at [https://files.consumerfinance.gov/f/201509\\_cfpb\\_consult-order-encore-capital-group.pdf](https://files.consumerfinance.gov/f/201509_cfpb_consult-order-encore-capital-group.pdf) (prohibiting from collection by any means unless time-barred debt disclosure provided but only required to provide time-barred debt disclosure once per every 30-day period); *In re American Express Centurion Bank*, CFPB No. 2012-CFPB-0002, § II.3 (Oct. 1, 2012), available at <https://files.consumerfinance.gov/f/2012-CFPB-0002-American-Express-Centurion-Consent-Order.pdf> (requiring disclosures in “any and all solicitations and any other oral, written or electronic communications used in connection with the collection of consumer debts”).

<sup>100</sup> Supplemental Rules, *supra* note 2, at 12,696. Where the debt collector knows or should know that the debt is time-barred, the disclosures are in the initial communication and validation notice, if the validation notice is not the initial communication and if the validation notice is not provided orally, as discussed in Section 2.6.1, *supra*. See Proposed § 1006.26(c)(1). Where the debt becomes time-barred after the initial communication, the disclosures are in the first communication after the debt becomes time-barred and in the validation notice, if it has not already been provided. See Proposed § 1006.26(c)(2)(i). Where the debt collector becomes aware that the debt is time-barred after the initial communication, the disclosures are in the first communication after the debt collector becomes aware that the debt is time-barred, and in the validation notice, if it has not already been provided. See Proposed § 1006.26(c)(2)(ii).

<sup>101</sup> See Supplemental Rules, *supra* note 2, at 12,673.

contacted about multiple accounts in collection, incorrectly paying the time-barred account rather than the account that was not yet time-barred and for which they might be sued.

The CFPB's failure to require a time-barred debt disclosure in every communication is also harmful because the Supplemental Rules rely on validation notices that consumers may never see as a key method of providing these disclosures to consumers.<sup>102</sup> The CFPB's Proposed Rules make it likely that many consumers will **not** receive the validation notice containing such disclosures, for the reasons discussed *infra*.

First, the Proposed Rules would allow debt collectors to provide validation notices electronically (either in the body of an email or via a hyperlink provided in a text message or an email) without requiring compliance with the E-SIGN Act.<sup>103</sup> Such validation notices may be sent to old email addresses or phone numbers (in the cases of hyperlinks sent by text). Messages may be blocked entirely by mail servers or diverted to spam filters that the consumer never checks. Consumers who do not know that such messages are coming may not open the email at all nor click on the hyperlink due to concerns about viruses, especially when the messages are coming from an unknown number or company email. Moreover, as discussed in Section 3.2, *infra*, the CFPB survey testing shows that a high percentage of survey respondents were "not at all willing" to receive a debt collection notice by certain electronic delivery methods. Such consumers also may be less likely to open such messages if they did receive them.

Next, the Proposed Rules would also authorize debt collectors to send validation notices in the body of an email as the initial communication without sufficient protections to ensure that it is received by the consumer.<sup>104</sup> As discussed *supra*, such emails may be blocked, diverted to spam filters, misdirected, or simply never opened by a consumer who has never heard of the company emailing them.

Finally, the Proposed Rules would provide a safe harbor for disclosures provided by mail without providing any guidance about how to ensure that the residential address is the current address for the correct consumer, and without addressing the fact that mail is frequently not returned as undeliverable.<sup>105</sup>

As a result of all of these problems, consumers may not receive the time-barred debt disclosure because they did not receive the validation notice.

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<sup>102</sup> See, e.g., Supplemental Rules, *supra* note 2, at 12,697-12,700 (providing model validation notices with different time-barred debt disclosures).

<sup>103</sup> Alternatives to E-SIGN Act compliance are in § 1006.42(c). See Proposed Rules, *supra* note 1, at 23,406. See also NCLC Sept. 18, 2019 Comments, *supra* note 3, at 206-215 (responding to § 1006.42(c)).

<sup>104</sup> Safe harbors for validation notices contained in the initial communication are in § 1006.42(e)(2). See Proposed Rules, *supra* note 1, at 23,406-23,407. See also NCLC Sept. 18, 2019 Comments, *supra* note 3, at 220-221 (responding to § 1006.42(e)(2)).

<sup>105</sup> Safe harbors for disclosures provided by mail are in § 1006.42(e)(1). See Proposed Rules, *supra* note 1, at 23,406. See also NCLC Sept. 18, 2019 Comments, *supra* note 3, at 220 (responding to § 1006.42(e)(2)).

In addition to requiring a time-barred debt disclosure in every communication, the CFPB should also broadly define what constitutes a communication. The Proposed Rules would create a limited-content message that would not be considered a communication.<sup>106</sup> This proposal is harmful and should be eliminated for the reasons discussed in our prior comments,<sup>107</sup> and also because a debt collector would not be required to provide a time-barred debt disclosure in a limited-content message. In other words, even if the CFPB requires time-barred debt disclosures in all communications, a debt collector would not have to make such a disclosure in a limited-content message.

Separately, the CFPB should remind debt collectors that payment portals and other self-service platforms are also communications under the FDCPA that require time-barred debt disclosures.

**Recommendation:** *If the CFPB adopts disclosures instead of prohibiting the collection of time-barred debts, it should require such disclosures to be made in every communication, and the term “communication” should be broadly defined.*

## 2.6 The CFPB Should Require Any Time-Barred Debt Disclosures it Adopts to Be Made in Writing.

### 2.6.1 Exclusively Oral Time-Barred Debt Disclosures Are Harmful to Consumers.

As currently drafted, debt collectors would be able to deliver the proposed time-barred debt disclosures exclusively orally in three situations.

First, the Proposed Rules allow for the oral delivery of the validation information in the initial communication with the consumer.<sup>108</sup> Since the Supplemental Rules require that the time-barred disclosure be made in the initial disclosure where the debt collector knows or should know that the debt is time-barred,<sup>109</sup> such disclosure would be made orally if the validation information was delivered orally in the initial communication. In other words, the oral time-barred debt disclosure would be accomplished together with a deluge of other important validation information. The debt collector would not be required to provide a copy of a written validation notice with the time-barred debt disclosure.

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<sup>106</sup> 84 Fed. Reg. at 23,399 (Proposed §§1006.2(d), (h)).

<sup>107</sup> NCLC Sept. 18, 2019 Comments, *supra* note 3, at 47-56.

<sup>108</sup> See Proposed Rules, *supra* note 1, at 23,404 (Proposed §1006.34(a)(1)(ii)). See also NCLC Sept. 18, 2019 Comments, *supra* note 3, at 146-147 (responding to § 1006.34(a)(1)(ii)).

<sup>109</sup> See Supplemental Rules, *supra* note 2, at 12,696 (Proposed §1006.26(c)(1)).

Second, where the debt becomes time-barred after the initial communication and after the debt collector has already provided the validation notice, the debt collector would have to provide the time-barred debt disclosure in the next communication.<sup>110</sup> That communication could be oral.<sup>111</sup>

Similarly, in the third situation, if the debt collector becomes aware that the debt is time-barred after the initial communication and has already provided the validation notice, the debt collector would have to provide the time-barred debt disclosure in the next communication.<sup>112</sup> That communication could also be oral.<sup>113</sup>

Allowing important disclosures to be delivered exclusively orally is problematic because consumers are less likely to understand oral disclosures, especially for the more complex and counterintuitive time-barred debt with revival notices. Auditory comprehension is quite different from reading comprehension.<sup>114</sup> Consumers will not have time to fully consider and comprehend the significance of an oral disclosure, and will not have the ability to reread it nor the ability to share the exact wording with an attorney or another person that might help them understand what the disclosure means.

Oral provision of disclosures is also problematic because, in addition to lower levels of consumer comprehension, consumers are likely to ask debt collectors questions about the time-barred debt disclosure. Debt collectors should not be answering consumers' questions about the legal nuances of statutes of limitations and revival of time-barred debt, but they may do so when such questions are posed by consumers. This may result in debt collectors providing consumers with incorrect information and inappropriate legal advice in response to their questions.

Critically, and astoundingly, in light of these issues, the CFPB has not performed any testing of consumer comprehension of disclosures that are provided orally. If the CFPB does not limit the collection of time-barred debts to written communications, as described in Section 2.6.2, *infra*, it must engage in consumer testing of oral disclosures.

***Recommendation:*** *If the CFPB adopts disclosures instead of prohibiting the collection of time-barred debts, and if the CFPB does not limit all collector-initiated communications about the alleged time-barred debt to written communications and require that each written*

<sup>110</sup> See Supplemental Rules, *supra* note 2, at 12,696 (Proposed §1006.26(c)(2)(i)).

<sup>111</sup> See Supplemental Rules, *supra* note 2, at 12,701 (Proposed Comment 26(c)(2)(i)-(2)(i)).

<sup>112</sup> See Supplemental Rules, *supra* note 2, at 12,696 (Proposed §1006.26(c)(2)(ii)).

<sup>113</sup> See Supplemental Rules, *supra* note 2, at 12,702 (Proposed Comment 26(c)(2)(ii)-(2)(i)).

<sup>114</sup> See, e.g., Erica B. Michael, Timothy A. Keller, Patricia A. Carpenter, & Marcel Adam Just, *fMRI Investigation of Sentence Comprehension by Eye and by Ear: Modality Fingerprints on Cognitive Processes*, 13 *Hum. Brain Mapping* 239 (2001) (“[E]ven when written and spoken language have the same content, the two modalities provide different information and make different demands on the comprehender.”).

*communication include the disclosure, the CFPB should engage in comprehension testing for oral time-barred debt disclosures.*

## 2.6.2 Time-Barred Debt Collection, if Allowed, Should be In Writing Only.

The CFPB asks if “the debt collector should also be required to provide the disclosures in the first subsequent written communication” after an oral disclosure.<sup>115</sup> While a follow-up written disclosure is essential if the CFPB permits oral disclosures, “the first subsequent written communication” might be weeks or months in the future. At a minimum, if oral disclosures are allowed, the CFPB should require a written disclosure to be provided within a matter of days of an oral disclosure through the provision of a validation notice.

However, the CFPB’s regulations should go further to protect consumers. If the CFPB is not going to prohibit the collection of all time-barred debt, it should ensure that all time-barred debt disclosures are in writing. Since, as discussed in Section 2.5, *supra*, the time-barred debt disclosure should also be provided in every communication, these recommendations, taken together, mean that the CFPB, if it does not prohibit time-barred debt collection entirely, should limit all collector-initiated communications about the alleged time-barred debt to written communications and require that each written communication include the disclosure.

Limiting all collector-initiated communication about a time-barred debt to written communications would allow time for consumers to review the information or consult friends, family, or legal counsel. Consumers need time to understand why they are being pressured to pay a debt while also being told, confusingly, that the debt is so old that they will not be sued. Moreover, a writing-only requirement would limit the ability of a fast-talking debt collector to overshadow the oral disclosure with demands to pay the alleged debt.

***Recommendation:*** *If the CFPB adopts disclosures instead of prohibiting the collection of time-barred debts, it should limit all collector-initiated communications about the alleged time-barred debt to written communications, and should require that each written communication include the disclosure.*

## 2.7 The CFPB Should Require All Subsequent Debt Collectors to Treat a Debt as Time-Barred Once a Disclosure is Given.

The proposed disclosures state that debt collectors “will not sue,” not that they “cannot sue.” The CFPB explains:

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<sup>115</sup> Supplemental Rules, *supra* note 2, at 12,682.

[A] “will not sue” disclosure **merely represents that the debt collector believes that the debt is time barred, not that the debt collector has definitely determined that it is time barred**; it may not actually be the case that the debt is, or that a subsequent collector would conclude that the debt is, time barred.<sup>116</sup>

In other words, the CFPB interprets the Supplemental Rules to allow debt collectors to give time-barred debt disclosures on accounts that they believe, but are not sure, are time-barred, even though the consumer might ultimately be sued by a subsequent collector. As a result, the following may occur during the collection of an account:

Debt collector A sends the consumer a disclosure saying that an alleged debt is time-barred. The consumer decides to prioritize other financial obligations and ignores the alleged debt based on the information that the debt is time-barred. Debt collector A transfers the account to debt collector B.

Debt collector A is not required under the proposed Supplemental Rules to mark the account as time-barred when it is transferred to a subsequent debt collector (or back to the creditor), and even if debt collector A did transfer this information, the proposed Supplemental Rules do not require debt collector B to honor the determination made by debt collector A.

Thus, when debt collector B receives the account, it decides that the alleged debt is not time-barred and collects without providing a time-barred debt disclosure. The consumer continues to ignore collection attempts on the alleged debt believing it to be time-barred based on the disclosure provided by debt collector A. Ultimately, collector B sues the consumer for the alleged debt. The consumer’s reasonable reliance on the disclosure provided by debt collector A will not provide any defense.

Consumers who notice and understand time-barred debt disclosures will expect that the information in a time-barred debt disclosure is accurate. They will not understand why a previously time-barred debt is suddenly subject to a lawsuit. Consumers will not notice that debt collectors said “will not sue” in the disclosure instead of “cannot sue,” or understand the legal significance of the different language.<sup>117</sup> They may not even notice a change in collectors and will not understand that the “will not sue” language does not apply to subsequent collection attempts.

The CFPB needs to protect consumers by requiring the first debt collector that discloses to a consumer that the alleged debt is time-barred to mark the account as time-barred and transfer that information back to the original creditor or directly to any subsequent debt collector. Moreover, the CFPB must require any subsequent debt collector to treat an account as time-barred if a prior debt collector provided a time-barred debt disclosure.

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<sup>116</sup> Supplemental Rules, *supra* note 2, at 12,681 (emphasis added).

<sup>117</sup> See Supplemental Rules, *supra* note 2, at 12,681 (interpreting “cannot sue” to “imply that a debt collector has definitely determined that the debt is time-barred”).

**Recommendation:** If the CFPB adopts disclosures instead of prohibiting the collection of time-barred debts, the initial debt collector that provides a time-barred debt disclosure to a consumer must transfer that information back to the original creditor or directly to any subsequent debt collector, and all subsequent debt collectors should be bound by a determination that a debt is time-barred.

## 2.8 The “Know or Should Know” Standard Would Conflict with the FDCPA.

As in the Proposed Rules’ prohibition on suing or threatening to sue on a time-barred debt,<sup>118</sup> the CFPB once again proposes a “know or should know” standard instead of strict liability for the provision of time-barred debt disclosures.<sup>119</sup> This proposed rule goes beyond the CFPB’s authority in that it is inconsistent with the FDCPA’s strict liability standard and the statute’s extension of only a narrowly framed bona fide error defense to debt collectors.

Except for a narrow carve-out for bona fide errors at 15 U.S.C. § 1692k(c), the FDCPA is generally a strict liability statute.<sup>120</sup> Proposed § 1006.26(c)(1) would require a debt collector to provide a time-barred debt disclosure only if the debt collector “knows or should know” that the debt is time-barred. By including the language “knows or should know,” the Bureau purports to create an exception from the statute’s strict liability standard.

In particular, the Bureau’s proposal would be inconsistent with the statute’s narrow, carefully crafted bona fide error defense at § 1692k(c). As we discussed at length in our prior comments, the CFPB should not and cannot modify the specific, narrow conditions that Congress set forth for this defense.<sup>121</sup> The proposed “knows or should know” standard seems designed to excuse errors of state law that would not qualify as bona fide errors under the FDCPA.<sup>122</sup>

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<sup>118</sup> Section 1006.26(b) of the Proposed Rules says “[a] debt collector must not bring or threaten 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.” Proposed Rules, *supra* note 1, at 23,403 (emphasis added).

<sup>119</sup> Section 1006.26(c)(1) of the Supplemental Rules says “[a] debt collector who **knows or should know** that a debt is time barred when the debt collector makes the initial communication . . . must . . . disclose . . .” Supplemental Rules, *supra* note 2, at 12,696 (emphasis added).

<sup>120</sup> See, e.g., *Arias v. Gutman, Mintz, Baker & Sonnenfeldt L.L.P.*, 875 F.3d 128, 134 (2d Cir. 2017); *Stratton v. Portfolio Recovery Assocs., L.L.C.*, 770 F.3d 443, 448-449 (6th Cir. 2014); *Glover v. F.D.I.C.*, 698 F.3d 139, 149 (3d Cir. 2012); *McLean v. Ray*, 488 Fed. Appx. 677, 682 (4th Cir. 2012); *Clark v. Capital Credit and Collection Servs., Inc.*, 460 F.3d 1162, 1177 (9th Cir. 2006); *Picht v. John R. Hawks, Ltd.*, 236 F.3d 446, 451 (8th Cir. 2001). See also 15 U.S.C. § 1692k (“Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable....”).

<sup>121</sup> NCLC Sept. 18, 2019 Comments, *supra* note 3, at 131-132.

<sup>122</sup> Errors regarding interpretation of state law are not eligible for FDCPA’s bona fide error defense. See National Consumer Law Center, Fair Debt Collection § 12.2.3 (9th ed. 2018), *updated at* [nclc.org/library](http://nclc.org/library).



The conflict between the FDCPA and the Supplemental Rules is particularly clear since the Bureau is basing the Supplemental Rules on its interpretation of 15 U.S.C. §§ 1692e and 1692f. Neither the general prohibition under 15 U.S.C. § 1692e against “any false, deceptive, or misleading representation or means in connection with the collection of any debt” nor the general prohibitions in § 1692f against “unfair or unconscionable means to collect or attempt to collect any debt” contains any knowledge requirement. The CFPB exceeds the scope of its rulemaking authority in § 1692(d) by adding a knowledge requirement to a proposed regulation based on the interpretation of those statutory provisions.

The CFPB’s proposed standard will set up a dispute over what the debt collector “knows or should know,” with courts adopting a range of different interpretations. This will complicate enforcement of the time-barred debt regulations.<sup>123</sup> Conversely, a strict liability standard will be simpler to enforce, and will also create an incentive for debt collectors to treat an alleged debt as time-barred in situations where the date that the statute of limitations expired is in doubt instead of arguing that the lack of clarity rendered them not liable under the proposed “knows or should know” standard.

Holding debt collectors to a strict liability standard for suing or threatening to sue on time-barred debt would not create a substantial burden for debt collectors. As the Bureau has recognized, debt collectors generally are familiar with the concept of statutes of limitations and with the concept of time-barred debt.<sup>124</sup> In fact, the Bureau itself notes that “[m]any debt collectors already determine whether the statute of limitations applicable to a debt has expired.”<sup>125</sup> And if collectors are not already conducting a proper review, holding them to a strict standard will encourage them to do so and will prevent collectors who do not engage in this practice from gaining a competitive advantage.

***Recommendation:*** *If the CFPB adopts disclosures instead of prohibiting the collection of*

<sup>123</sup> Fed. Trade Comm’n, Comments to the Consumer Fin. Prot. Bureau on the Proposed Rule with Request for Public Comment, Debt Collection Practices (Regulation F), Docket No. CFPB-2019-0022, at 16 (Sept. 18, 2019), *available at* [https://www.ftc.gov/system/files/documents/advocacy\\_documents/comment-staff-federal-trade-commissions-bureau-consumer-protection-matter-proposed-rule-request/final\\_-\\_cfpb\\_debt\\_coll\\_draft\\_comment\\_9-13\\_v2\\_1pm\\_ver\\_to\\_comm.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-federal-trade-commissions-bureau-consumer-protection-matter-proposed-rule-request/final_-_cfpb_debt_coll_draft_comment_9-13_v2_1pm_ver_to_comm.pdf) (“FTC staff encourages further consideration and additional research as to whether requiring a showing that the debt collector knew or should have known the debt was time-barred places unnecessary additional burdens on law enforcement agencies.”). *See also* Supplemental Rules, *supra* note 2, at 12,676 (acknowledging that “it could be difficult to determine whether a ‘know or should know’ standard has been met”).

<sup>124</sup> Proposed Rules, *supra* note 1, at 23,328.

<sup>125</sup> Proposed Rules, *supra* note 1, at 23,329. *See also* Fed. Trade Comm’n, The Structure and Practices of the Debt Buying Industry. 49 (Jan. 2013), *available at* <https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf> (“[T]he information debt buyers receive as part of the process of bidding on debts and the information they receive when purchasing debts usually indicates the date of last payment or the charge-off dates for debts. In most circumstances, this information should allow debt buyers to readily determine if debt is time-barred.”).

*time-barred debts, it should hold debt collectors accountable for providing such disclosures pursuant to the FDCPA's strict liability standard rather than inventing a lesser "knows or should know" standard.*

## 2.9 Proposed Disclosures Do Not Provide Necessary Information about Obsolescence.

As the CFPB acknowledged in its discussion of the Supplemental Rules,<sup>126</sup> a debt, in addition to being time-barred for statute of limitations purposes, may also be "obsolete" – *i.e.*, too old to appear on a credit report. The fact that none of the Bureau's proposed disclosures inform consumers whether the alleged debt is obsolete necessarily raises concerns about consumers lacking critical information that they would need to determine whether to pay an old debt.

An account in collection that is more than seven years old generally may not be reported on a credit report.<sup>127</sup> Therefore, a debt that is more than seven years old is generally obsolete. Depending upon the age of the debt and the length of the applicable statute of limitations, debts can be both time-barred and obsolete, neither time-barred nor obsolete, or either time-barred or obsolete. Table 4 presents the four possibilities.

**Table 4: Four Scenarios for Time-Barred or Obsolete Debt**

Is the debt time-barred?	Is the debt obsolete?	Example
Yes	Yes	8-year-old debt; 6-year statute of limitations
Yes	No	4-year-old debt; 3-year statute of limitations
No	Yes	8-year-old debt; 10-year statute of limitations
No	No	3-year-old debt; 4-year statute of limitations

The proposed disclosures' failure to address obsolescence is a departure from the Bureau's previous consent orders with debt collectors, which required different disclosure language for a debt that was both time-barred and obsolete from the disclosure for debt that was time-barred

<sup>126</sup> Supplemental Rules, *supra* note 2, at 12,673 n.12.

<sup>127</sup> 15 U.S.C. § 1681c(a)(4).

but not yet obsolete.<sup>128</sup> Separately, the Bureau required time-barred debt and obsolescence disclosures in a consent order with a credit card company.<sup>129</sup>

The CFPB required both disclosures in these prior consent orders because information about obsolescence is important to consumers. Indeed, many may fear the current impact on their credit report more than the possibility of being sued. Departing from these prior precedents fails to protect consumers, undermines these prior enforcement actions, makes the CFPB's actions on this subject less uniform, and fails to provide clear expectations for debt collectors.

Studies conducted on behalf of the CFPB have found that consumers are confused about both time-barred and obsolete debts. In 2014, participants in all focus groups agreed that “it would be helpful and important to know that, ‘after a certain time/age, you could not be sued to collect the debt’ and ‘after a certain time/age, the debt could not appear on your credit report.’”<sup>130</sup> The report about these focus groups highlighted:

Participants' comments suggested that actual understanding of time-barred and obsolete debts varied considerably within groups . . . a high degree of confusion existed regarding these rights, specifically when an individual can be asked to pay a debt, when he or she can be sued, when it is taken off of credit reports, and when, if ever, debts are forgiven. When discussing time-barred and obsolete debts, false certainty that untrue rights were true was common.<sup>131</sup>

The Bureau's current failure to include a proposed obsolescence disclosure is also a departure from the CFPB's SBREFA Outline, which was issued in 2016.<sup>132</sup> At that time, the CFPB was considering “a disclosure that would inform the consumer whether a particular time-barred debt generally can or cannot appear on a credit report” and “a proposal to prohibit a debt collector from accepting payment on such a debt until the collector obtains the consumer's written

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<sup>128</sup> *In re* Portfolio Recovery Assocs., L.L.C., CFPB No. 2015-CFPB-0023, ¶ 126 (Sept. 8, 2015) available at [https://files.consumerfinance.gov/f/201509\\_cfpb\\_consent-order-portfolio-recovery-associates-llc.pdf](https://files.consumerfinance.gov/f/201509_cfpb_consent-order-portfolio-recovery-associates-llc.pdf); *In re* Encore Capital Grp., CFPB No. 2015-CFPB-0022, ¶ 133.b (Sept. 3, 2015). available at [https://files.consumerfinance.gov/f/201509\\_cfpb\\_consent-order-encore-capital-group.pdf](https://files.consumerfinance.gov/f/201509_cfpb_consent-order-encore-capital-group.pdf). See also *U.S. v. Asset Acceptance, L.L.C.*, Consent Decree, § IV ¶ D (M.D. Fla. Jan. 31, 2012), available at [www.ftc.gov/os/caselist/0523133/120131assetconsent.pdf](http://www.ftc.gov/os/caselist/0523133/120131assetconsent.pdf).

<sup>129</sup> *In re* American Express Centurion Bank, CFPB No. 2012-CFPB-0002, § II.3 (Oct. 1, 2012). available at <https://files.consumerfinance.gov/f/2012-CFPB-0002-American-Express-Centurion-Consent-Order.pdf>.

<sup>130</sup> Fors Marsh Grp., Debt Collection Focus Groups 9 (Aug. 2014), [https://files.consumerfinance.gov/f/documents/cfpb\\_debt-collection\\_fmg-focus-group-report.pdf](https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_fmg-focus-group-report.pdf).

<sup>131</sup> *Id.* at 9-10. See also Consumer Fin. Prot. Bureau, Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered 21 (July 28, 2016), available at [https://files.consumerfinance.gov/f/documents/20160727\\_cfpb\\_Outline\\_of\\_proposals.pdf](https://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf) [hereinafter SBREFA Outline] (“The Bureau is concerned that consumers may make erroneous assumptions about credit reporting on debts that they are told cannot be sued on, and that these assumptions may lead them to take action they would not have taken otherwise.”).

<sup>132</sup> See SBREFA Outline, *supra* note 131, at 21-22 (July 28, 2016).

acknowledgement of having received a time-barred debt disclosure and an obsolescence disclosure.”<sup>133</sup> The CFPB offers no explanation of the reasons for abandoning those initial proposals for obsolete debt.

Despite the prior evidence of consumer confusion related to obsolete debts and the SBREFA Outline’s proposals about obsolete debt, the CFPB did not test any disclosure language about obsolescence, test consumer understanding of consumer rights related to obsolete debts, or test whether the proposed disclosures, by omitting obsolescence, would lead consumers to believe mistakenly that the debt could impact their credit reports. Nor did the CFPB even ask whether knowledge that a debt was obsolete in addition to being time-barred would change the survey respondent’s answer to questions about whether to pay or ignore the debt in the hypothetical scenario.<sup>134</sup> This is despite the fact that obsolete debt was originally intended to be a focus of the consumer testing.<sup>135</sup> This portion of the survey was eliminated after the CFPB “paused the project to assess the research objectives.”<sup>136</sup> Even though the CFPB failed to ask questions about obsolete debt during its consumer testing, a number of survey respondents themselves brought up credit reporting in response to an open-ended question.<sup>137</sup>

Yet the CFPB acknowledged that “a consumer may pay a time-barred debt believing that doing so will improve the consumer’s credit report.”<sup>138</sup> Noting also that survey respondents might have more trouble identifying a three-year-old debt as time-barred because they confused the statute of limitations with the seven-year credit reporting period, the Bureau recognized the likelihood that consumers might confuse these different concepts in the absence of separate disclosures.<sup>139</sup>

Whether an alleged debt can still be reported is important to a consumer’s decision about whether or not to pay. Empirical evidence supports the conclusion that some consumers would decline to pay a time-barred debt if they understood that it was also obsolete.<sup>140</sup> Other studies have concluded that consumers may even pay debts that they do not owe in order to avoid credit reporting consequences.<sup>141</sup> Without a disclosure that a time-barred debt is also obsolete,

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<sup>133</sup> *Id.*

<sup>134</sup> See CFPB Disclosure of Time-Barred Debt and Revival Feb. 2020 report, *supra* note 26.

<sup>135</sup> ICF Quantitative Survey Testing Methodology Report, *supra* note 58, at 3.

<sup>136</sup> *Id.*

<sup>137</sup> CFPB Disclosure of Time-Barred Debt and Revival Feb. 2020 report, *supra* note 26, at 35-36.

<sup>138</sup> Supplemental Rules, *supra* note 2, at 12,673.

<sup>139</sup> See CFPB Disclosure of Time-Barred Debt and Revival Feb. 2020 report, *supra* note 26, at 23 n.16.

<sup>140</sup> Timothy E. Goldsmith & Nathalie Martin, *Testing Materiality Under the Unfair Practices Acts: What Information Matters When Collecting Time-Barred Debts?*, 64 Consumer Fin. L.Q. Rep. 372, 379 (2010) (finding that the portion of consumers who would decline to pay a time-barred debt increased from 34% to 49% if they were informed that paying the time-barred debt would not affect their credit rating).

<sup>141</sup> Jeff Sovern et al., *Validation and Verification Vignettes: More Results from an Empirical Study of Consumer Understanding of Debt Collection Validation Notices*, 71 Rutgers U.L. Rev. 189, 256 (2018)

consumers may not feel that they can ignore the collection notice for a time-barred debt without penalty. The CFPB's failure to test how important information about obsolescence is, and how it can be delivered effectively, will harm consumers by sowing confusion, potentially promoting misunderstanding, and causing more consumers to pay time-barred debts.

Consumers' confusion about obsolescence is also further reason why the better course is to completely bar collection of time-barred debt. While information about obsolescence is critical, it also must be conveyed in a way that is understandable and does not violate the FDCPA.<sup>142</sup> Indeed, further testing is likely to reveal that information about obsolescence is relevant to how consumers respond to time-barred debt disclosures but that there is no way to convey all of the critical information about time-barred debt, revival, and obsolescence disclosures to consumers in a way that is understandable to the most vulnerable consumers. This result would support the need to prohibit the collection of time-barred debt, as discussed in Section 1, *supra*.

***Recommendation:*** *If the CFPB adopts disclosures instead of prohibiting the collection of time-barred debts, it must test the importance of obsolescence disclosures to consumers and how that information can be disclosed effectively.*

## 2.10 Language Access

### 2.10.1 Overview

As we emphasized in our comments about the validation notice in the Proposed Rules,<sup>143</sup> the provision of the validation notice in Spanish must be mandatory, not voluntary. If the Bureau does not require that the validation notice be provided in Spanish to all consumers, then it should, at a minimum, require the inclusion of a brief statement informing the borrower of what this document is and how they can request the full validation notice in Spanish.<sup>144</sup> Moreover, the collector should be required to make the time-barred debt disclosure in Spanish whenever the collector either has communicated with the consumer in Spanish or has information in the file showing that the consumer speaks Spanish. The same should be required with respect to other

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(reporting that 3% of survey respondents indicated that they would pay a debt they didn't owe, and speculating that payment may have been motivated by concerns about damage to a credit report).

<sup>142</sup> For example, if a disclosure states that the debt collector "may report" the debt to a consumer reporting agency, but that debt collector never reports debts, that could be a violation of 15 U.S.C. § 1692e(5), which prohibits "[t]he threat to take any action . . . that is not intended to be taken."

<sup>143</sup> NCLC Sept. 18, 2019 Comments, *supra* note 3, at 179-190.

<sup>144</sup> As discussed in our comments on the Proposed Rules, the Spanish notification must inform Spanish-speaking consumers of what the form is, by including at least, "Esta notificación intenta coleccionar una deuda," (which translates to "This notification is an attempt to collect a debt"), before "Póngase en contacto con nosotros para solicitar una copia de este formulario en español." Consumers need to know why they might want to request the form in Spanish. See NCLC Sept. 18, 2019 Comments, *supra* note 3, at 183-185.

languages as soon as the Bureau has made available a model translation of the time-barred debt disclosure in that language, and the Bureau should create model translations of the time-barred debt disclosure in the top eight languages spoken by limited English proficient individuals in the United States.

## 2.10.2 Background

The number of U.S. residents for whom English is not their first language and who speak English with limited proficiency has increased significantly in recent years. In the most recent statistics from the American Community Survey, in 2017, it is estimated that 25.9 million individuals, some 8.5 percent of the U.S. population, were considered limited English proficient (“LEP”). Limited English proficiency refers to anyone above the age of five who reported speaking English less than “very well,” according to the U.S. Census Bureau. Approximately 63 percent of the U.S. LEP population speaks Spanish.<sup>145</sup> The U.S. has the second largest number of Spanish speakers of any country in the world, following only Mexico.<sup>146</sup> About 83 percent of the U.S. LEP population speaks one of the top eight languages (Spanish, Chinese, Vietnamese, Korean, Tagalog, Arabic, Russian, and Haitian Creole).<sup>147</sup>

The CFPB’s 2017 survey of consumers showed that only 79 percent of consumers contacted about a debt in collection were able to communicate in their preferred language.<sup>148</sup> Given that a large majority of the respondents likely were native English speakers, the fact that over 20 percent of those surveyed were unable to communicate with a debt collector in their preferred language is significant.<sup>149</sup>

In 2019, the New York Department of Consumer Affairs conducted a survey of debt collectors licensed to collect debts in New York City regarding language translation services they provide. The survey found that out of 517 collectors surveyed, 54 percent did not provide any services in languages other than English. Forty-six percent provided at least one service in a non-English

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<sup>145</sup> U.S. Census Bureau, 2017 American Community Survey 1-Year Estimates, American Community Survey tbl. B16001 (accessed July 27, 2019), available at <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

<sup>146</sup> Stephen Burgen, *U.S. now has more Spanish speakers than Spain – only Mexico has more*, The Guardian, June 29, 2015 (citing a report by the Cervantes Institute, *Español, Una Lengua Viva*).

<sup>147</sup> U.S. Census Bureau, 2017 American Community Survey 1-Year Estimates, American Community Survey tbl. B16001 (accessed July 27, 2019), available at <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

<sup>148</sup> Consumer Fin. Prot. Bureau, *Consumer Experiences with Debt Collection: Findings from the CFPB’s Survey of Consumer Views on Debt* (Jan. 2017), available at [http://files.consumerfinance.gov/f/documents/201701\\_cfpb\\_Debt-Collection-Survey-Report.pdf](http://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf).

<sup>149</sup> The CFPB did not release the data for responses to the question “Is English your preferred language?” The CFPB noted that the 79% who communicated in their preferred language was lower than expected, although the CFPB believed that some respondents might have misunderstood the question. See *id.* at 47 n.34.

language – including multilingual customer representatives, a translation line for telephone communications, or translated collection letters. However, only 20 percent of debt collectors surveyed provided translated collection letters.<sup>150</sup>

This gap – the 26 percent of collectors that were communicating with customers in a non-English language but not sending any written communications in that language – represents a significant cause for concern. Receiving written communications in one’s preferred language is important, as it allows the consumer to review the information with less pressure or intimidation, compare it to one’s own records, and also seek advice about the communication.

It is not clear whether all of the collectors who sent collection letters in languages other than English were providing all FDCPA-required disclosures in those translated letters.<sup>151</sup> The New York report revealed other problems, including that of collectors not tracking a consumer’s preferred language, and consumers being told they could speak with a representative in their preferred language but then being unable to access such language services when they called the collector.<sup>152</sup> Conduct like this puts LEP consumers at an unfair disadvantage, since they are likely to reach out to a collector with an expectation that in-language services will be available, and likely to be unprepared to address the language gap with any outside help they might otherwise be able to muster.

In response to conducting the language access study, the New York City Department of Consumer Affairs recently adopted rules requiring that debt collectors attempting to collect a debt from New York City consumers must ask about language preference; track consumers’ language preference; refrain from false, inaccurate, or partial translations; inform consumers of any translations services which are available; and notify consumers that a glossary of debt-related terms is available on the Department of Consumer Affairs’ website.<sup>153</sup>

Misconceptions about the laws surrounding debt collection abound in immigrant communities, and are heightened by language barriers. The potential for harassment and exploitation caused by this informational gap is substantial.

Debt collection abuses in the LEP community are reflected in several FTC enforcement actions addressing abusive debt collection targeting Spanish-speaking debtors.<sup>154</sup> The joint FTC-CFPB

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<sup>150</sup> N.Y.C. Dep’t of Consumer Affairs, *Lost in Translation: Findings from Examination of Language Access by Debt Collectors 18-19* (Sept. 2019), *available at* <https://assets.documentcloud.org/documents/6444517/LEP-Debt-Collection-Report-190930-5.pdf>.

<sup>151</sup> The New York City survey did not clarify whether the entities sending translated collection letters were making all disclosures required by the FDCPA in those translated collection letters. *See id.*

<sup>152</sup> *Id.* at 16-17.

<sup>153</sup> *See* N.Y.C. Dep’t of Consumer Affairs, Notice of Adoption (June 11, 2020), *available at* <https://rules.cityofnewyork.us/content/notice-adoption-debt-collectors>.

<sup>154</sup> *FTC v. Centro Natural Corp.*, No. 14-23879-CIV, Complaint (S.D. Fl. Oct. 20, 2014), *available at* <https://www.ftc.gov/system/files/documents/cases/141023centrocmt.pdf> (\$1.5 million judgment against an abusive debt collection operation that targeted Spanish and English speakers, along with a complete

Debt Collection and the Latino Community Roundtable, in October 2014, also highlighted debt collection challenges in LEP communities.<sup>155</sup> Participants reported that LEP debtors tend to be less likely to challenge any representations made by a debt collector, including the amount owed.<sup>156</sup> Even when translated documents are provided, they may be only partially translated, thereby failing to provide meaningful access while also concealing key facts about the situation.<sup>157</sup>

### 2.10.3 Recommendations

The Bureau's Supplemental Rules would require a collector to provide the time-barred debt disclosures in the same language as the communication in which it is contained.<sup>158</sup> However, since the Bureau's original Proposed Rules made providing a translated debt validation notice entirely optional,<sup>159</sup> the provision of that notice and, consequently, the time-barred debt disclosure in any language other than English is likely to be exceedingly rare. As the New York City Department of Consumer Affairs put it, making translated disclosures optional is "substantively pointless."<sup>160</sup>

Without time-barred debt information consumers can understand, an attempt to collect a debt is misleading, because it leads the consumer to believe that legal repercussions will follow upon failure to pay.<sup>161</sup> Failure to provide a time-barred debt disclosure in a language the consumer can understand will deprive the consumer of information that they might have used to make a decision about the debt if they both noticed and understood the disclosure.

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ban on debt collection activity and other injunctive relief); *FTC v. RTB Enters., Inc.*, No. 4:14-cv-01691, Complaint (S.D. Tex. June 19, 2014), *available at* <https://www.ftc.gov/system/files/documents/cases/140625rtbcmpt.pdf> (monetary judgment of \$4 million against abusive Texas-based debt collector that targeted Spanish and English speakers); *FTC v. Rincon Mgmt. Servs., L.L.C.*, No. 5:11-cv-01623-VAP-SP, Complaint (C.D. Cal. Mar. 26, 2014), *available at* <https://www.ftc.gov/sites/default/files/documents/cases/2011/10/111026rinconcmpt.pdf> (monetary judgment of over \$23 million against an abusive debt collection operation that targeted Spanish and English speakers, along with a complete ban on debt collection activity and other injunctive relief).

<sup>155</sup> A video of the roundtable and a Spanish language transcript are available at <http://www.consumerfinance.gov/about-us/blog/live-from-long-beach/>.

<sup>156</sup> *See id.*

<sup>157</sup> *See id.*

<sup>158</sup> Supplemental Rules, *supra* note 2, at 12,696 (§ 1006.26(c)(3)(iv)).

<sup>159</sup> Proposed Rules, *supra* note 1, at 23,405 (§ 1006.34(e)).

<sup>160</sup> N.Y.C. Dep't of Consumer Affairs, *Lost in Translation: Findings from Examination of Language Access by Debt Collectors* 12 (Sept. 2019).

<sup>161</sup> Supplemental Rules, *supra* note 2, at 12,687 ("about 65 percent of respondents who read a notice about a debt that did not include a time-barred debt disclosure incorrectly reported that the debt collector was legally allowed to sue to collect the debt").



For all the same reasons that the Bureau is electing to require a time-barred debt notice, it should require the disclosure to be made in the language in which the debt collector will be communicating with the consumer. Debt collectors should not be allowed to evade this obligation.

As currently proposed, the debt collector may not even notify the consumer that he or she could request the time-barred debt disclosure in another language.<sup>162</sup> The collector could provide an English-language validation notice, including the disclosure, and then have extensive conversations with the consumer by phone in Spanish, for example, demanding payment and letting the consumer believe that legal consequences will follow from a failure to pay. Although the collector has made a business decision to invest in multilingual staff or access to an interpretation line to increase its likelihood of effectively obtaining payment from a consumer, it could easily avoid providing the time-barred debt disclosure in that language – the cost of which would be minimal if the Bureau provides a model translation in the applicable language.<sup>163</sup>

To facilitate providing the time-barred debt disclosure in the appropriate language, the Bureau should provide a model translation in Spanish of the time-barred debt disclosures by the time of publication of the final rule. The Bureau should also work to provide model translations in the remaining top seven languages spoken by LEP consumers in the United States as soon as practicable.<sup>164</sup>

We urge the Bureau to *require* debt collectors to provide the time-barred debt disclosure in Spanish whenever the collector has communicated with the consumer in Spanish or has notice that the consumer prefers to communicate in Spanish. The same should apply to other languages as soon as the Bureau has created model translations of the time-barred debt disclosure in those languages. We support the Bureau's effort to incorporate LEP protections into the debt collection regulations. However, in order to make a meaningful impact, the Bureau must expand these translation *options* into reasonable *requirements*.

Collectors must also be required to collect and retain information about language preference in the consumer's file. Collectors should be required to have reasonable systems in place to record language preference once it is known, to ensure that translated validation notices are sent as appropriate, and to enable the collector to pass that information along to the original creditor and any future collectors. As of 2016, one-quarter of debt collectors already maintained

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<sup>162</sup> The Proposed Rules permit, but do not require, debt collectors to include a notice stating that a Spanish-language translation of the validation notice is available. See Proposed Rules, *supra* note 1, at 23,405 (§ 1006.34(d)(3)(vi)).

<sup>163</sup> As discussed in Section 2.5, *supra*, time-barred debt disclosures should be provided in every communication. The proposed § 1006.26(c)(3)(iv) would ensure that if the time-barred debt disclosure had to be provided in every communication it would be translated in any communication made in another language.

<sup>164</sup> Model time-barred debt disclosures could be translated as part of the translation of model validation notices. See NCLC Sept. 18, 2019 Comments, *supra* note 3, at 185-186 (discussing translation of model validation notices).

language preference information in the file in a form that could be transmitted to their subsequent collectors.<sup>165</sup> The fact that one-quarter of collectors already had capacity to track language preference and transmit such information means that these systems could be used as a basis for developing industry-wide protocols. Transfer of such data would aid debt buyers and debt collectors in complying with the debt collection regulations, and may even facilitate more effective collection.

**Recommendations:** *If the CFPB adopts disclosures instead of prohibiting the collection of time-barred debts, it should make the following changes in the final rule with respect to language access:*

- *Require debt collectors to provide the time-barred debt disclosure in Spanish whenever the collector has communicated with the consumer in Spanish or has notice that the consumer prefers to communicate in Spanish. The same requirement should apply to other languages as soon as the Bureau has created model translations of the time-barred debt disclosure in those languages; and*
- *Create model translations of the time-barred debt notice in the top eight languages spoken by LEP consumers in the United States.*

### 3. Consumer Testing Also Revealed Important Information for Rules Proposed in May 2019.

#### 3.1 Consumer Testing Revealed Comprehension Problems for Other Parts of the Model Validation Notice.

In addition to comprehension questions about time-barred debt disclosures, consumer testing also included three other questions about comprehension of the model validation notice more broadly.

The first question asked who the consumer should pay. After reviewing the model validation notice, more than 40 percent of respondents got the answer to this basic question wrong.<sup>166</sup> Astonishingly, the CFPB did not express any alarm that two out of five testers could not identify

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<sup>165</sup> Josh Adams, ACA International White Paper, Business Practices and Capabilities within the Debt Collection Industry (Nov. 2016), *available at* <https://www.acainternational.org/assets/research-statistics/p4-wp-businesspractices.pdf?viawrapper>.

<sup>166</sup> CFPB Disclosure of Time-Barred Debt and Revival Feb. 2020 report, *supra* note 26, at 65.

this most basic fact. The Bureau simply noted that the model validation notice had performed “significantly better” than a notice designed to model what consumers typically receive today.<sup>167</sup>

Fortunately, respondents scored better when asked if the consumer had a legal right to dispute the debt, with nearly 96 percent of those reviewing the model validation notice answering this question correctly.<sup>168</sup> However, comprehension slipped when respondents were asked to identify the deadline to dispute the debt, with only about 90 percent answering correctly.<sup>169</sup>

The dismal results on the first question point to the need to engage in more robust testing of the full model validation notice, not just the time-barred debt disclosures. Moreover, the lack of comprehension of this basic information was likely unexpected. This suggests that portions of the model validation notice may be surprisingly difficult to understand. In order to identify such sections, the CFPB should broadly test comprehension of the validation notice.

**Recommendation:** *The CFPB should conduct comprehension testing of the entire model validation notice.*

### 3.2 Survey Respondents Indicated Little Desire for Electronic Notices from Debt Collectors.

In addition to questions about time-barred debt disclosures, the survey also asked respondents about the method by which they would prefer “to receive a notice from a debt collector telling you that you owe a debt.”<sup>170</sup>

**Table 5: Percentage “Not at all Willing” to Receive Debt Collection Notice via Different Delivery Methods<sup>171</sup>**

Method	Percentage “Not at All Willing”
Postal Mail	5.78
Email	45.76
Clicking a Link Delivered in an Email	70.12
Clicking a Link Delivered in a Text Message	82.21

<sup>167</sup> *Id.* at 13.

<sup>168</sup> *Id.* at 66.

<sup>169</sup> *Id.* at 66-67.

<sup>170</sup> *Id.* at 45.

<sup>171</sup> *Id.* at 85-86 (partial reproduction of Appendix Table 27).

Table 5 shows that the overwhelming majority of survey respondents were “not at all willing” to click on a link in an email or text message to receive a debt collection notice. Moreover, slightly fewer than half would be “not at all willing” to receive a debt collection notice in an email. This is significant because these are the three electronic methods that debt collectors would be allowed to use to deliver a validation notice - without E-SIGN Act consent - under the Proposed Rules.<sup>172</sup> The unwillingness to click on a link is especially noteworthy, if not surprising given virus concerns, as that is an affirmative act that the consumer would have to take to see the debt collection notice. A consumer who is unwilling to receive a debt collection notice via email also may be less likely to open an email containing a validation notice if sent without the consumer’s consent.

These results highlight that depriving consumers of the ability to choose whether to receive validation notices electronically is likely to result in many consumers not receiving the important disclosures and information contained in this notice. It is the convenience of debt collectors, not the protection of consumers, which is driving the CFPB’s proposal to authorize alternative methods to deliver validation notices. The CFPB should abandon attempts to circumvent the E-SIGN Act’s consumer protections and, instead, require that debt collectors obtain E-SIGN Act consent before providing validation notices electronically.

***Recommendation:*** *The CFPB should require debt collectors to obtain E-SIGN Act consent before providing validation notices electronically.*

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<sup>172</sup> Alternatives to E-SIGN Act compliance are in § 1006.42(c). Proposed Rules, *supra* note 1, at 23,406. See also NCLC Sept. 18, 2019 Comments, *supra* note 3, at 206-215.