July 27, 2020

Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Re: Consumer Financial Protection Bureau (CFPB) Supplemental Notice of Proposed Rulemaking on Debt Collection Practices (Regulation F)
Docket No. CFPB-2020-0010; RIN 3170-AA41

Dear Director Kraninger:

We submit this comment to the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") Supplement Notice of Proposed Rulemaking on Debt Collection Practices (Regulation F) ("SNPRM") on behalf of the National Creditors Bar Association ("NCBA"). The NCBA is the only bar association in the country dedicated to promoting and protecting all creditors' rights attorneys, including attorneys who collect consumer debt. NCBA member firms practice law as officers of the court and must adhere to applicable state and federal laws, rules of state civil procedure, state bar association licensing, certification requirements, and the rules of professional conduct of each state in which they practice. NCBA's values are: Professional, Ethical, Responsible.

Important facts about NCBA member firms are as follows:

- Over 2,000 creditors' rights attorneys in over 500 law firms and other creditors' rights practices in all 50 states, Canada, Puerto Rico, and the United Kingdom;
- 70% of law firms are considered small businesses pursuant to the Small Business Administration classification;
- 40% practice creditors' right law across multiple state jurisdictions;
- 26% of law firms are either woman or minority owned;
- 75% are members of their State Creditors' Bar Associations;
- NCBA member law firm devote over 20% of their overall operating budget to compliance costs;
- NCBA members law firms are subject to an average of twenty-four (24) audits per year by their clients and devote over eighty (80) hours per month preparing for those audits; and
- NCBA member firms practice various subsets of creditors' rights law including:

Type and % of firms practicing

Commercial Collections	67%
Judgment Enforcement	67%
Contracts – General	62%
Credit Cards	62%
Auto Loans	57%
Bankruptcy	57%
Credit Unions	57%
Foreclosure	57%
Repossession/Replevin	57%
Landlord/Tenant	52%
Liens/Mechanic's Liens	43%
Medical Bills	38%
HOA	33%
Government/Tax	28%
Probate	28%
Student Loans	28%
FDCPA Defense	24%
Insurance Subrogation	24%
Utilities/Communications	19%
Family Support	9%

Attorneys, like lenders and consumers, are a necessary part of the "credit ecosystem." Sixty percent (60%) of NCBA members represent small businesses including local retail establishments, small or regional banks, credit unions, and small medical providers. These are long-term attorney-client relationships that have existed, on average, for over twenty-two (22) years. These small business clients do not have vast legal departments or even in-house attorneys and rely on their local attorneys to ensure that outstanding receivables are paid so that their businesses can continue to operate.

Attorneys who are members of NCBA law firms understand that they are officers of the court and work diligently to ensure that consumers, especially those that appear *pro se* in court, are treated fairly and with dignity and respect. Although our legal system is adversarial, NCBA attorneys make every effort to work with consumers throughout the legal process including efforts to help resolve their debts in a reasonable manner.

The Bureau's Supplemental Notice of Proposed Rulemaking Time-Barred Debt[1]

P. 33: *The Bureau requests comment on proposed § 1006.26(c)(1) and its related commentary. In particular, the Bureau requests comment on the merits of using a 'know or should know' standard versus a 'strict liability' standard for determining when debt collectors must provide time-barred debts and revival disclosures. The Bureau also requests comments on the merits of using, as an alternative, a 'strict liability' standard with a safe harbor for debt collectors who provide the disclosures when they neither knew or should have known the debt was time-barred.*

NCBA does not believe that using a "know or should know" standard versus a "strict liability" standard with a safe harbor will make a material difference. In both circumstances, the debt collector will be required to provide much discovery to prove it made an innocent mistake in calculating a complex statute of limitations.

While NCBA member firms take great care in evaluating each and every case before filing a lawsuit, including confirming that, under the applicable law, the statute of limitations has not lapsed, NCBA would first like to note that American jurisprudence has never treated the lapse of a statute of limitations as giving rise to an affirmative claim for relief as the Bureau proposes. Indeed, the NCBA is not aware of another area of law where attorneys or another claimant are required to affirmatively disclose that the statute of limitations has elapsed. "It is axiomatic that the statute of limitations is a shield, not a sword. At both the federal and state levels it has long been established that the statute of limitations is available only as a defense and not as a cause of action."[2] The Bureau's proposal regarding time-barred debt is a sword as it creates a cause of action based on the bar of statute of limitations.

The determination regarding whether or not a claim, in this case a debt, is time-barred involves a legal determination made by an attorney.[3] The Bureau's SNPRM attempts to force non-attorney debt collectors into making complex legal decisions for which they are not trained. Specifically, the Bureau would require non-attorney debt collectors to determine whether a debt is beyond the applicable statute of limitations in order to determine whether a debt collection communication is required to contain the Bureau's specific "disclosure." Under this structure, it is completely within the realm of possibility that such non-attorney debt collectors may be accused of engaging in the unauthorized practice of law under state law when they are merely attempting to comply with the Bureau's mandate.[4]

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[1] NCBA understands that the Bureau uses the term "time-barred debt" to describe debts which can no longer be recovered through legal action since they are the beyond the statute of limitations. NCBA prefers to use the technical term "out of" or "beyond the" statute of limitations, but for consistency with the Bureau's SNPRM will use the term "time-barred debt" for this comment.

[2] *Guild v. Meredith Village Sav. Bank*, 639 F.2d 25, 27 (1st Cir 1980). See also 1 C. CORMAN, LIMITATION OF ACTIONS § 1.1, p. 10 (1999) ("Statutes of limitations are defensive by nature and are not intended to be used when affirmative relief is sought.") (citing *Guild*, *supra.*; *Lackner v. La Crois*, 25 Cal. 3d 747, 602 P.2d 393, 396 (1979) (same); *Bellevue School Dist. No. 405 v. Brazier Constr.*, 100 Wash. 2d 776, 675 P.2d 232 (1984) (same)). *See also City of Saint Paul, Alaska v. Evans*, 344 F.3d 1029, 1033 (9th Cir. 2003); *In re Estate of Jotham*, 722 N.W.2d 447, 456 (Minn. 2006); *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 456 (Tenn. 2012); *Bernoskie v. Zarinsky*, 383 N.J. Super. 127, 135, 890 A.2d 1013, 1018 (N.J. App. Div. 2006). 51 Am. Jur. 2d Limitation of Actions § 377. *See e.g., Abbas v. Dixon*, 480 F.3d 636, 640 (2d Cir. 2007) ("The pleading requirements in the Federal Rules of Civil Procedure, however, do not compel a litigant to anticipate potential affirmative defenses, such as the statute of limitations, and to affirmatively plead facts in avoidance of such defenses.").

[3] 1 C. CORMAN, LIMITATION OF ACTIONS § 1.1, p. 4.

[4] *Am. Auto. Ass'n v. Merrick*, 117 F.2d 23, 25 (D.C. Cir. 1940) ("giving of advice prior to collection of a claim and the urging of legal propositions in discussions with the person from whom collection is attempted does involve the practice of law and may be performed only by lawyers…."); *In re Shoe Mfrs. Protective Ass'n*, 295 Mass. 369, 372–73, 3 N.E.2d 746, 748 (Ma. 1936) (concluding that collection agency engaged in the unauthorized practice of law because in part, it "determined whether or not legal proceedings should be instituted …."); *McMillen v. McCahan*, 14 O.O.2d 221, 167 N.E.2d 541, 551 (Ohio Com. Pl. 1960) ("The

The determination regarding the applicable statute of limitations for a debt involves numerous factors each of which are very specific to each particular debt. The creditor's location,[5] consumer's residence,[6] place of repayment,[7] terms and conditions of the underlying obligation,[8] and conduct (such as circumstances surrounding partial payment, imprisonment, bankruptcy, and acknowledgement of indebtedness)[9] all affect the statute of limitations. Furthermore, each of those factors may change during the life-cycle of a debt meaning that the statute of limitations assessment may lead to different conclusions at different time. Other factors that must be considered include:

- The place where the parties were located when the underlying transaction occurred;[10]
- The place where the parties are located when collection commences;[11]
- The venue where a lawsuit may be brought;
- The nature of obligation – written or non-written;[12]
- Whether the creditor accelerated the debt or demanded the full balance;[13]
- The time when the cause of action accrued;[14]
- Whether any conduct of the parties may have interrupted, restarted or suspended the operation of the running of the statute of limitations – acknowledgement of the debt,[15] partial payment,[16] bankruptcy,[17] or forbearance agreements;[18]
- State tolling provisions;[19] and
- Borrowing statutes.

Court is clearly of the opinion that the giving of advice as to whether a claim is good or not is the giving of advice as to legal rights. This is essentially the character of the service that is performed by an attorney in the practice of law.").

[5] *Shannon-Vail Five Inc. v. Bunch*, 270 F.3d 1207, 1213 (9th Cir. 2001).

[6] *Becker v. Mktg. & Research Consultants, Inc*., 526 F. Supp. 166, 170 (D. Colo. 1981).

[7] RESTATEMENT SECOND, CONFLICT OF LAWS § 195 (1971).

[8] *Wise v. Zwicker & Assocs., P.C*., 780 F.3d 710, 717 (6th Cir. 2015).

[9] *Thacker v. Bank of N.Y. Mellon*, 2019 U.S. Dist. LEXIS 40734, *16-18 (W.D. Wash. Mar. 13, 2019) (acknowledgement of debt extended limitations period); *Nilsson v. Kielman*, 70 S.D. 390, 392, 17 N.W.2d 918, 919 (S.D. 1945) (credits given by defendant toward obligation did not qualify as partial payment); *Robin v. Ely & Walker Dry Goods Co*., 137 S.W.2d 164, 165 (Tex. Civ. App. 1940) (statute of limitations on account claim was tolled during Defendant's incarceration in Oklahoma).

[10] *Glob. Fin. Corp. v. Triarc Corp*., 93 N.Y.2d 525, 529, 715 N.E.2d 482, 485 (N.Y. 1999) (cause of action accrues "where the plaintiff resides and sustains the economic impact of the loss.").

[11] *Ko v. Eljer Indus., Inc*., 287 Ill. App. 3d 35, 42, 678 N.E.2d 641, 646 (Ill. App. 1997) (construing 735 ILCS 5/13–210 (West 1994))(Illinois borrowing statute only applies if none of the parties is an Illinois resident).

[12] *Annotation, What constitutes a contract in writing within statute of limitations*, 3 A.L.R.2d 809 (1949).

[13] *Annotation, When statute of limitations begins to run against note payable on demand*, 71 A.L.R.2d 284 (1960); *Annotation, Acceleration provision in note or mortgage as affecting the running of the Statute of Limitations*, 34 A.L.R. 897 (1925).

[14] *CMACO Auto. Sys., Inc. v. Wanxiang Am. Corp*., 589 F.3d 235, 242, n. 7 (6th Cir. 2009).

[15] *Thacker*, *supra.* n. 9.

[16] *Annotation, Payment on account, or claimed to be on account, as removing or tolling statute of limitations*, 156 A.L.R. 1082 (1945); *Annotation, When Statute of Limitations begins to run against action to recover upon contract payable in instalments*, 82 A.L.R. 316 (1933); *Annotation, Payment on account as removing or tolling statute of limitation,* 36 A.L.R. 346 (1925).

[17] 11 U.S.C. §§ 108(c), 362(a)(1), 1301(a); *HSBC Bank USA, N.A. as Tr. for Merrill Lynch Mortg. Loan v. Crum*, 907 F.3d 199, 206 (5th Cir. 2018) (while in effect, bankruptcy stay operated to toll statute of limitations on foreclosure); *In re Swintek*, 906 F.3d 1100, 1106 (9th Cir. 2018) (bankruptcy stay tolled limitations period for lien enforcement).

[18] *JPMorgan Chase Bank, N.A. v. Mullen*, Case No. 2:16-cv-426, 2019 U.S. Dist. LEXIS 20034, *14 (S.D. Ohio Feb. 7, 2019).

[19] *Avery v. First Resolution Management Corp*., 568 F.3d 1018 (9th Cir. 2009), *cert. denied,* 130 S. Ct. 554, 175 L. Ed. 2d 383 (2009) (applying Oregon law); Annotation*, Provision of statute of limitation excluding period of absence of debtor or defendant from state as applicable to action on liability or cause of action accruing out of state*, 148 A.L.R. 732 (1944).

The last factor – borrowing statutes – is perhaps the stickiest of them all. Approximately 75% of states have enacted some form of a borrowing statute.[20]

A borrowing statute is a legislative exception from the general rule that the forum state always applies its statute of limitations to a cause of action, and provides that the forum state will apply the statute of limitations from the foreign jurisdiction in which a cause of action arises in another state, and addresses the situation where a plaintiff fails to sue within the time period allotted by the state where the action accrued, and then files suit in another state's court to avoid the time bar.[21]

Under borrowing statutes, the law of the state in which the action is brought is used to determine whether the cause of action accrued or arose. Once that state law is identified, the law of the other state is addressed to determine when the cause of action accrued.[22]

Furthermore, a single debt may be the subject of more than one cause of action which, in turn, affects the applicable statute of limitations. For example, a credit card obligation can be based on a written contract, an account stated,[23] or an unwritten contract theory of recovery.[24] Each of those causes of action may have a different applicable statute of limitations period which in turn would affect whether a non-attorney debt collector may choose to use the Bureau's proposed disclosure.

There are some instances when, given the complexities and dynamic factors that go into such an analysis, even attorneys cannot determine the appropriate statute of limitations. Consider the following fact pattern:

Mr. Smith opened a credit card account in 2001. A $40 payment was made in May 2003 and reflected on the June 2003 billing statement. The last payment was made on the account in May 2004, but a balance remained on the account. A lawsuit was filed to recover the remaining balance in 2008. Article 2 of the U.C.C. governs transactions in goods and provides for four (4) year statute of limitations. However, the jurisdiction in which Mr. Smith resides and where the lawsuit was brought has a six (6) year statute of limitations for written

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[20] *U.L.A., Uniform Conflict of Laws-Limitations Act, Prefatory Note* (Supp.1989) ("Another consequence [of the substantive-procedural dichotomy] was that about three-fourths of the state enacted so-called "borrowing statutes" which followed no regular pattern but required application of a limitation period other than the forum state's if some stated aspect of the cause of action occurred in or was connected with another state. These borrowing statutes are often difficult to interpret and apply. They have been the source of considerable judicial confusion."). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 142, 143 (1971). *See generally Cope v. Anderson,* 331 U.S. 461, 67 S.Ct. 1340, 91 L.Ed. 1602 (1947) (applying Ohio and Pennsylvania borrowing statutes)(location of bank defined where the cause of action arose under Ohio's former borrowing statute, G.C. § 11234 (1939)). *See, e.g.*, Arizona - ARIZ. REV. STAT. § 12-506; California - CAL. CIV. P. CODE § 361; Colorado - COL. REV. STAT. § 13-80-110; Delaware - DEL. CODE ANN., tit. 10, § 8121; Florida - FLA. STAT. ANN. § 95.10; Idaho - IDAHO CODE § 5-239; Illinois - ILL. COMPILED STAT. ANN., Ch. 735/13-210; Indiana - IND. CODE ANN. § 34-11-4-2; Kansas- KANS. STAT. ANN. § 60-516; Kentucky - KY. REV. STAT. ANN. § 413.320; Maine - MAINE REV. STAT. ANN., tit. 14, § 866; Michigan - MICH. COMP. LAWS ANN. § 600.5861; Missouri – MO. REV. STAT., § 516.190; North Carolina - N.C. GEN. STAT. ANN. § 1-21; Nevada - NEV. REV. STAT. § 11.020; New York - MCKINNEY'S C.P.L.R. § 202; Ohio – R.C. § 2305.03(b); Oklahoma - 12 OKL. ST. ANN. § 105; Oregon - OR. REV. STAT. § 12.430; Pennsylvania - 42 PA.C.S.A. § 5521; Texas - TEX. CIV. PRAC. & REM. CODE § 16.067; Utah - UTAH CODE ANN. § 78B-2-103 (1953); Virginia - VA. CODE ANN. § 8.01-247; West Virginia - W. VA. CODE, § 55-2A-2; Washington - WASH. REV. CODE § 4.18.020; Wisconsin - WISC. STAT. ANN. § 893.07; Wyoming - WY. STAT. ANN. § 1-3-117.

[21] 51 Am. Jur. 2d Limitation of Actions § 88.

[22] *See CMACO Auto. Sys., Inc.*, *supra*, n. 14..

[23] *Nyberg v. Portfolio Recovery Assocs., L.L.C.,* No. 3:15-CV-01175-PK, 2017 WL 1055962, at *3 (D. Or. Mar. 20, 2017).
[24] *Born v. Hosto & Buchan, PLLC*, 2010 Ark. 292, 19, 372 S.W.3d 324, 336 (Ark. 2010) (written contract); *Portfolio Acquisitions, L.L.C. v. Feltman*, 391 Ill. App. 3d 642, 655, 909 N.E.2d 876, 886 (Ill. App. 2009) (oral contract); *Colorado Nat. Bank of Denver v. Story*, 261 Mont. 375, 378, 862 P.2d 1120, 1122 (Mont. 1993) (account stated).

contracts or accounts receivables. If the 4-year statute applies, the lawsuit was untimely; if the 6-year statute of limitations applies, the lawsuit is timely. Which applies?[25]

The above situation begs the question of how a non-attorney debt collector can be expected to determine the appropriate statute of limitations when determining whether to utilize the Bureau's time-barred debt disclosure. Therefore, the NCBA urges the Bureau to consider the ramifications of any standard it adopts with respect to time-barred debt disclosures and take into careful consideration the legal complexities surrounding time-barred debt. The NCBA believes it is a legal determination and, as such the Bureau should leave this determination to practicing attorneys.

Thank you for considering the views of the NCBA on this important issue. If you have any questions regarding the NCBA's position on the Supplemental Proposed Rule, please contact NCBA Government Affairs Officer Nathan Willner at (410) 382-7588 or nathan@creditorsbar.org

Sincerely,

Elizabeth Terry

Executive Director

[25] The fact pattern was modeled after the facts in *Gray v. Suttell & Assocs., et al.*, 123 F. Supp. 3d 1283 (E.D. Wash. 2015) in which the Court denied summary judgment to the debt collector finding that "the Court does not have sufficient, undisputed information in the record currently before it to determine the applicable statute of limitations." *Id.*, 123 F. Supp. 3d at 1293. The Court did find that Suttell & Assocs. had sufficiently met the standard for a *bona fide* error defense and granted summary judgment on that ground.