September 18, 2019

The Honorable Kathleen Kraninger
Director
Consumer Financial Protection Bureau
1700 G St., N.W.
Washington, D.C. 20552

Re: Debt Collection Practices (Regulation F), or proposed amendment to Regulation F, 12 CFR part 1006

Dear Director Kraninger,

Maine Equal Justice appreciates the opportunity to comment on the above-captioned rule proposed by the Bureau of Consumer Financial Protection (“Bureau”).

Maine Equal Justice is a civil legal services organization dedicated to working with and for people with low income to seek solutions to poverty through policy, education, and legal representation. We work with and for hundreds of low-income Mainers through policy advocacy, education, and legal representation.

Many of our clients face constant harassment from debt collectors. In addition to exacerbating the stress and anxiety of poverty, abusive debt collection tactics have caused our clients to lose employment, suffer social and professional humiliation, misunderstand their rights, and forego basic needs to make payments on expired debt. The Bureau’s proposed rules would make a bad situation worse. On behalf of our clients, we write to oppose certain portions of the Bureau’s proposed rules, and to make suggestions for improvements.

Summary

These comments challenge the proposed rules on (1) the paperwork necessary to prove ownership of debt (§ 1006.18), (2) expired or “zombie” debt (§ 1006.26), and (3) the permissible manner and frequency of communications to consumers (§ 1006.14). For each of these problems, the proposed rules fall short. These comments propose stronger protections for consumers than those set forth in the proposed rules.
1. **Collector Paperwork**

We and our partners who represent low-income consumers are nearly always successful in defending lawsuits against debt collectors because debt collectors frequently fail to prove their case against the consumer. Despite these successes, we have also repeatedly observed that debt collectors obtain default judgments in a majority of cases.\(^1\) This occurs despite the lack of proof possessed by the debt collector. An important protection for all consumers is to require debt collector attorneys to make sure the consumer is the right person and the debt is the right amount before suing to collect the debt.

**Proposed Rule**

Proposed § 1006.18(g) provides that an attorney has been meaningfully involved in the preparation of debt collection litigation submissions if the attorney: (1) Drafts or reviews the pleading, written motion, or other paper; and (2) personally reviews information supporting the submission and determines, to the best of the attorney’s knowledge, information, and belief, that, as applicable: The claims, defenses, and other legal contentions are warranted by existing law; the factual contentions have evidentiary support; and the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or lack of information. (Emphasis added).

**Comment**

Reviewing only “information supporting the” lawsuit is insufficient to ensure that only cases with a likelihood of success on the merits turn into lawsuits. The Bureau should require attorneys to review not only “information,” but also original account documents to make sure that they are suing the right defendant for the right amount.

In Maine and elsewhere, third party debt collectors have filed thousands upon thousands of lawsuits against consumers in small claims court seeking to collect relatively small dollar amounts.\(^2\) In a preponderance of these cases, once an attorney represents the consumer, the debt collector dismisses the case with prejudice. In other words, almost all the cases that we and our fellow civil legal services organizations in Maine know of have failed on the merits. One retired Maine attorney alone has successfully had more than $1,500,000 of debt discharged in hundreds of third-party debt collector cases that he has had dismissed with prejudice. He represented all his clients pro bono. Another legal services provider has been successful in having more than $3,000,000 of debt discharged.

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Despite these successes, most consumers in these cases are unfortunately not represented by counsel. In the typical case of this type, the consumer is absent from court on their hearing date, and thus fails to raise any defenses. The debt collector’s attorney then requests, and is readily granted, a default judgment. Armed with a default judgment, the third-party debt collector commences enforcement efforts against the consumer. Yet in many such cases, if the debt-collector’s attorney were required to review original documents to verify the debtor’s identity and the validity of the debt amount, then the attorney would learn that the debts or debtors may be inaccurate. Federal rules can protect consumers with the simple requirement that attorneys for debt collectors personally review original documents to verify the identity of debtors and the amounts of the debt. Indeed, in 2017, Maine passed a law strengthening the documentary requirements that a creditor or debt collector must have when collecting or attempting to collect a debt.

We also strongly recommend that before a debt collector can bring suit to collect a debt, the debt collector must be required to provide to the court and the consumer the following information:

   A. Proof of a chain of title for the debt between the original creditor and the debt collector that includes copies of all contracts transferring ownership of the debt;
   B. All contracts or other agreements entered into between the consumer and the original creditor; and
   C. An accounting that lists all charges and payments made between the consumer and the original creditor.

2. Time-Barred or “Zombie” Debt

Maine’s protections against the collection of time-barred debt are relatively strong. In Maine, a payment on a time-barred debt does not make the debt actionable. Even after a payment, the debt remains time-barred. This rule has worked in Maine and should be adopted nationally. More specific proposals currently under consideration are outlined below. Our comments follow the outline.

Proposed Rule: Disclosure

The Bureau is considering a proposal that would require a debt collector to provide a time-barred debt disclosure when it seeks to collect a time-barred debt. The disclosure itself would consist of a brief, plain-language statement informing the consumer that, because of the age of the debt, the debt collector cannot sue to recover it.

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3 The Bureau demonstrates knowledge of this problem but fails to fashion an adequate response. See Peter A. Holland, The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases, 6 J. Bus. & Tech. L. 259, 265 (2011) (“In the majority of debt buyer cases, the courts grant the debt buyer a default judgment because the consumer has failed to appear for trial. . . . Debtors who do receive notice usually appear without legal representation.”).

The Bureau is also considering whether a collector should be required to make this disclosure only if the collector knew or should have known that the debt was time-barred, or whether a collector should be strictly liable.

**Comment**

Our experience as a legal services organization serving hundreds of low-income consumers every year tells us that it is always necessary to inform clients of their rights. Unfortunately, even if disclosures are made, they do not always succeed in conveying the necessary information. Thus, we strongly recommend that the Bureau require the following message to be prominently displayed in all written messages to the consumer and stated to the consumer at the beginning of any oral message to the consumer:

“Because this debt is so old you do not have to pay this debt. We cannot take any action to force you to pay this debt. If you make any payment on this debt you may become responsible to pay the entire debt and we will be able to force you to pay the entire debt.”

A significant problem in litigation is that in many states a statute of limitation defense must be raised by affirmative defense or it is waived. Since the overwhelming number of consumers are unrepresented in court, they are usually unaware of this requirement. Any court complaint attempting to collect a time barred debt should therefore include the following statement:

“Because this debt is so old you do not have to pay this debt. We cannot take any action to force you to pay this debt. This is a defense to our lawsuit. You may waive this defense if you do not raise it as an affirmative defense to this lawsuit. If you do not raise this defense as an affirmative defense and a judgment is entered against you, you will become responsible to pay the entire debt and we may be able to force you to pay the entire debt.”

In addition, the Bureau should define as a violation of the Fair Debt Collection Practices Act (“FDCPA”) any attempt to institute a legal action to collect a time-barred debt. The Bureau should also promulgate a rule specifying that the initiation of such a lawsuit is a violation of the FDCPA that results in the entry of judgment with prejudice in favor of the consumer as well as statutory damages for such debt collection activity.

**Proposed Rule: Ban on Collection of Time-Barred Debt**

The Bureau has declined to adopt a rule barring the collection and sale of time-barred debt. As support, the Bureau states that barring the collection of time-barred debt may increase the rate and shorten the speed of collections efforts, increase the rate at which collectors file lawsuits, and increase overall litigation expenses, which will purportedly be passed onto consumers.

**Comment**

We strongly urge the Bureau to adopt rules that: (1) ban the sale of time-barred debt and (2) ban the collection of time-barred debt.
We strongly urge the Bureau to reconsider its dismissal of these alternatives. The Bureau’s rationale that banning the sale or collection of time-barred debt could encourage collectors to sue consumers in advance of the expiration of the statute of limitations may be incorrect as an empirical matter. We have seen no evidence to support the Bureau’s rationale that banning the sale or collection of time-barred debt has actually incentivized collectors to sue consumers in advance of the expiration of the statute of limitations. If the Bureau has data that points to this outcome (i.e. increased speed of collection efforts and increased costs to consumers) it should share such data with the public as a basis for its reasoning. The public should have an opportunity to review and comment on this data before the Bureau’s rules are finalized. Although the Bureau is right that consumers might prefer not to be sued, or to bear costs related to litigation, these outcomes will not necessarily follow a ban on collecting time-barred debt. We believe that consumers would prefer a rule banning the sale and collection of time-barred debt.

Finally, the older the debt, the less likely the consumer is to be in possession of the documents and other information necessary to dispute the debt. The proposed rule is misguided, not only because it provides the debt collector an indefinite time to collect upon a debt, but also because it undermines the consumer’s ability to defend a claim.

3. **Manner of Communications**

The Bureau should limit phone calls to consumers to only once per week per debtor, instead of seven times per week per debt.

**Proposed Rule: Calls Up To Seven Times Per Debt Per Week Allowed**

Proposed § 1006.14(b)(2) provides that, subject to certain exceptions set forth in proposed § 1006.14(b)(3), a debt collector violates proposed § 1006.14(b)(1) if the debt collector places a telephone call to a person in connection with the collection of a particular debt either: (i) More than seven times within seven consecutive days, or (ii) within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt.

**Comment**

This rule would almost certainly allow debt collectors to abuse and harass our clients in direct contradiction of the FDCPA’s original intent. According to the Consumer Sentinel Network Data Book 2017, 35% of Mainers already get calls from debt collectors to whom they have sent ‘Stop Calling’ notices.\(^5\)

The proposed rule would only worsen this problem. Under this proposed rule, some of our clients may face dozens and dozens of calls from debt collectors per week. For example, a client with five debts could face forty calls from debt collectors per week without any legal recourse. Others could face more than fifty. The Bureau should allow only one call per week per debtor.

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Proposed Rule: Text and Email Communications

The proposed rule includes provisions to encourage debt collectors to communicate with consumers by email and text message more frequently than they currently do. With respect to the validation notice, which most debt collectors currently provide by postal mail, proposed § 1006.42 specifies methods that debt collectors would be able to use to send notices by email or by hyperlink to a secure website in a way that complies with the FDCPA’s validation notice requirements. With respect to any communications about a debt, proposed § 1006.6(d)(3) specifies procedures that debt collectors would be able to use to send an email or text message to a consumer about a debt without risking liability under the FDCPA for disclosure of the debt to a third party.

Comment

This rule will almost certainly hurt most of our clients, all of whom are low-income, and most of whom rarely use email. Indeed, the wealth and income gaps in Maine map onto a digital divide: middle and high-income families generally have fast, reliable broadband, and high levels of internet literacy. Conversely, a disproportionate share of low-income Mainers – especially those living in rural areas – lack fast internet connections and have overall lower rates of internet and email literacy. Accordingly, Maine Equal Justice opposes the proposed rules on email and text communications in their entirety.

Conclusion

The world has changed in important ways since the FDCPA became law in 1977. Email, text messaging, and voicemail technologies have transformed communication. New rules to implement the FDCPA are thus in order. But the Bureau’s proposed rules make abusive debt collection tactics more, not less, likely. For instance, permitting debt collectors to call some consumers dozens of times per week is a far cry from the FDCPA’s original purpose. On behalf of our hundreds of low-income clients, we strongly urge the Bureau to reconsider this and other rules in line with our comments.

Thank you for considering our comments to the proposed rules.

Sincerely,

Michael Kebede
Consumer Rights Advocate
Maine Equal Justice