

CFPB Proposes Time-Barred Debt Disclosures

March 31, 2020 | [Chuck Dodge](#) and [Anastasia V. Caton](#)

As a supplement to its notice of proposed rulemaking on debt collection, on February 21, 2020, the Consumer Financial Protection Bureau issued additional proposed rules addressing attempts to collect debts for which the statute of limitations on collection has run. The proposed rules would apply only to persons who are "debt collectors" as defined under the federal Fair Debt Collection Practices Act. They were published to the federal register on March 3, 2020. The comment period on this supplemental rulemaking will run until June 5, 2020.

Background

The CFPB's proposed time-barred debt disclosure is the natural extension of a body of case law under the FDCPA holding that a debt collector violates the FDCPA when it sues or threatens to sue on a time-barred debt. That case law says that a debt collector misrepresents the legal status of a debt when the debt collector implies that the debt is enforceable in court. The courts reason that because a consumer can raise the expiration of the statute of limitations as an absolute defense to payment, it is misleading for debt collectors to imply that they may be able to recover the debt through the legal process. The [CFPB's original proposed rule covering debt collection](#), issued in May of 2019, proposed to prohibit a debt collector from suing or threatening to sue on a time-barred debt, but left open the question of how a debt collector might attempt to collect a time-barred debt otherwise. The CFPB was clear it did not want to totally prohibit debt collectors from collecting on time-barred debt that is still a valid debt obligation. But, the CFPB also indicated that debt collectors ought to provide some notice to consumers about the status of the debt when it is time-barred. At the time of its original rulemaking, the CFPB said that it needed more time to conduct consumer studies before developing any disclosures. Now, less than a year later, the CFPB has proposed those disclosures.

Proposed Rule

The CFPB proposes to require a debt collector, when it knows or should know that a debt is time-barred, to clearly and conspicuously disclose in its initial communication about the debt and any required validation notice:

- (1) that the law limits how long the consumer can be sued for a debt and that, because of the age of the debt, the debt collector will not sue the consumer to collect it; and
- (2) If, under applicable law, the debt collector's right to bring a legal action against the consumer can be revived, the fact that revival can occur and the circumstances in which it can occur.

The know/should know standard gives debt collectors some breathing room in an area of the law that is

wrought with uncertainty. It is also consistent with the CFPB's original proposed rule, which proposes to prohibit a debt collector from suing or threatening to sue on a debt that the debt collector knows or should know is time-barred. Despite the language in the proposals, the CFPB indicated in the supplemental proposed rule that it is open to comment on a strict liability standard.

The proposed rule also includes specific timing requirements for the disclosures if either the debt becomes time-barred after the debt collector's initial communication or the debt collector learns (or should have learned) that the debt is time-barred after the initial communication:

- If the debt collector has not yet sent the debt validation notice, the debt collector must provide the time-barred debt disclosure in the debt collector's first communication, if any, with the consumer following the date on which the debt collector knows or should know that the debt became time barred and on any required validation notice; and
- If the debt collector has sent the debt validation notice, the debt collector must provide the time-barred debt disclosure in the debt collector's first communication, if any, with the consumer following the date on which the debt collector knows or should know that the debt became time barred.

The CFPB proposes four safe harbor forms of the disclosure:

- A safe harbor for when the debt is time-barred and applicable state law provides that the debt cannot be revived;
- A safe harbor for when the debt is time-barred and applicable state law provides that the debt can be revived by a payment or written acknowledgment of the debt;
- A safe harbor for when the debt is time-barred and applicable state law provides that the debt can be revived by only a payment;
- A safe harbor for when the debt is time-barred and applicable state law provides that the debt can be revived by only written acknowledgment of the debt.

If the disclosure appears in a debt validation notice, it must be on the front page of the notice.

The proposed safe harbor forms of disclosure and the know/should know standard offer at least some peace of mind to debt collectors attempting to collect valid debts. But this supplemental rulemaking does not answer all questions about collecting out-of-statute debt.

State Law Questions

Because statutes of limitations for the collection of consumer debts are creatures of state law, the CFPB's proposed rule implicates state law.

State revival laws. The proposed rule requires a debt collector to disclose whether and how the debt can be revived (by a payment, written acknowledgment, or both). This requires the debt collector to determine what the revival rule is in the states where it operates, which is a complex and labor-intensive undertaking. While some states provide for revival by statute, many others provide for it in case law,

which can be fluid and subject to change at any time without notice. Some states are totally silent on revival. The CFPB does not indicate which of its safe harbor disclosures is appropriate in circumstances where the state does not expressly address revival.

State disclosure requirements. The CFPB acknowledges and cites to state laws that require creditors and/or debt collectors to provide disclosures when the debt is time-barred. The safe harbor disclosures are similar to the text of several state disclosures (some of which are safe harbors, some of which are required language), but not identical. This means a debt collector would have to provide both federal and state disclosures, with slightly different wording, when it knows or should know the debt is time-barred. The CFPB also proposes that state-mandated time-barred disclosures appear on the reverse side of a debt validation notice, while the federal disclosure must appear on the front of the debt validation notice. But the CFPB seeks comment on whether this would conflict with any applicable state laws. New Mexico is one state that specifically requires that its time-barred disclosure appear on the front page of any writing.

Applicable statute of limitations. The debt collector must decide which statute of limitations applies. In certain contexts, for example, in a retail installment contract, there are potentially several different statutory periods that could apply (Article 2 of the state's UCC has its own limitations period for sales, the state may have a general contractual limitations period that applies to agreements to pay money, and the state credit statute may have a limitations period that applies to credit sales specifically). Further, different statutes of limitations in a particular state may have different rules addressing revival depending on the limitations rule that applies. If the rule becomes final as proposed, it will effectively require a debt collector to undertake this labor-intensive analysis for each debt it collects.

Based on language in this supplemental proposal, the CFPB believes that debt collectors are already engaging in this analysis so that they do not run afoul of FDCPA case law prohibiting a debt collector from suing or threatening to sue on a time-barred debt, and so that they can provide the appropriate disclosures in the handful of states requiring time-barred debt disclosures. But some debt collectors never sue or threaten to sue on any debt they are collecting. Therefore, except to the extent a debt collector is operating in one of the handful of states that requires a time-barred debt disclosure, it generally does not have to determine which statutory limitations period applies to every single account. That would change if this rule were finalized as proposed. Note that the know/should have known standard gives debt collectors some cover when making this difficult determination but does not change the fact that the proposal would create an additional burden on a debt collector for every account it collects that is near or past the expiration of the statute of limitations.

Federal Law Questions

As explained above, federal courts interpreting the FDCPA have held that a debt collector violates the FDCPA when it sues or threatens to sue on a time-barred debt. The CFPB's original proposed rule on debt collection incorporates these two prohibitions. But what language constitutes a "threat to sue"? Does the threat have to be explicit or will debt collectors have to worry about extreme interpretations of facially innocuous language that could *imply* a threat to sue? Courts have held that an offer to "settle" a time-barred debt for less than the balance owed is effectively a "threat to sue" because resolution of litigation before final adjudication in a court is typically referred to as "settling" matter. The CFPB did not provide any clarity in its original proposed rule or in the supplemental proposed rule about whether only explicit threats constitute a "threat to sue." Under both proposals it is clear that a debt collector cannot remedy a threat to sue on a time-barred debt by including a time-barred debt disclosure.

That begs the question: is an offer to "settle" or "resolve" a time-barred debt a prohibited threat to sue, or is it a permissible collection communication requiring the CFPB's proposed time-barred debt disclosures? The CFPB's proposals fail to answer this important question.

Conclusion

The CFPB's supplemental rulemaking could provide some clarity and peace of mind to debt collectors, but it also leaves areas of risk and uncertainty. These areas of risk and uncertainty allow ample opportunity for comment.

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