



MORTGAGE BANKERS ASSOCIATION

August 4, 2020

Comment Intake
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

**Re: Supplemental notice of proposed rulemaking, Time-Barred Debt Collection
Docket No. CFPB-2020-0010, RIN 3170-AA41**

Dear Sir or Madam,

The Mortgage Bankers Association (“MBA”)¹ appreciates the opportunity to offer comments on the Bureau of Consumer Financial Protection’s (“CFPB” or “the Bureau”) Notice of Proposed Rulemaking (“NPR”)² addressing proposed amendments to Regulation F, which implements the Fair Debt Collection Practices Act (“FDCPA”).³ The proposal supplements the CFPB’s May 2019 Proposed Rule by proposing to require debt collectors to make certain disclosures when collecting time-barred-debts.

Time-barred debts are those for which the applicable statute of limitations has expired. Under Regulation F, a debt collector collecting a debt that the debt collector knows or should know is time barred is required to disclose (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 the debt collector’s right to bring a legal action against the consumer to collect the debt can be revived under applicable law, the fact that revival can occur and the circumstances in which it can occur.⁴

In September of 2019, MBA commented on the CFPB’s May 2019 proposal regarding Regulation F, that would prohibit a debt collector from suing or threatening to sue to collect a debt that the debt collector knows or should know that the applicable statute of

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, DC, the association works to ensure the continued strength of the nation’s residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,300 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, credit unions, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field. For additional information, visit MBA’s website: www.mba.org.

² CFPB, *Debt Collection Practice (Regulation F)*, 85 FR 12672 (March 3, 2020) (“NPR”).

³ 15 USC § 1692-1692p.

⁴ CFPB, *Debt Collection Practice (Regulation F)*, 85 FR 12672 (March 3, 2020) (“NPR”).

limitations has expired.⁵ In our comment letter, we recommended the continued use of disclosures for consumers when collecting time-barred debts rather than a prohibition of filing a claim. We also noted that a statute of limitations is meant to act as a *defense* to a claim, not a *total bar* on the claim. Moreover, case law has established that a statute of limitations neither extinguishes debt nor makes it automatically improper for a debt collector to seek re-payment on time-barred debts.⁶

Servicing rules and state legislative changes implemented after the 2008 financial crisis have resulted in an increase in the amount of time required for servicers to complete foreclosures in states where judicial or non-judicial review is required. It is estimated that it can take up to 43 months to complete foreclosures in states with judicial review and 30 months in states with non-judicial requirements.⁷ In states such as New York, stays due to court proceedings such as bankruptcy or the initiation of a loss mitigation procedure⁸ are not calculated in the six-year statute of limitation time period⁹. These events are frequent occurrences and this severely limits the amount of time servicers have to attempt to collect a debt.

In states such as Texas, where non-judicial foreclosures are predominant, the state enforces a statute of limitations of four-years that prohibits the restart of the debt clock¹⁰ and provides a small amount of time for servicers to collect a debt. The prohibition of a servicer's ability to file proof of a claim, even though the Supreme Court has ruled it would not violate the FDCPA,¹¹ will negatively impact the mortgage industry.

While we support disclosures over an absolute bar on collection, we note that the Bureau's proposed disclosures represents the collection of a single debt and would not be applicable to the collection of pass due mortgages that have not been accelerated. Because mortgages are installment loans, the debt will become time barred on a rolling basis. A debtor receiving a disclosure with multiple dates and informing only part of the debt can be collected will surely cause further confusion and prompt more questions. This would be the antithesis of the Bureau's goal and should be addressed to eliminate consumer confusion.

⁵ CFPB, Debt Collection Practices (Regulation F), 84 Fed. Reg. 23274 §1006.26 (May 21, 2019)

⁶ *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001) (“[A] statute of limitations does not eliminate the debt; it merely limits the judicial remedies available.”); *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 32-33 (3d Cir. 2011) (noting that “it is appropriate for a debt collector to request voluntary repayment of a time-barred debt”); *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014) ((clarifying that it is not “automatically improper for a debt collector to seek re-payment of time-barred debts,” as long as it conforms with the FDCPA, and noting that “some people might consider full debt re-payment a moral obligation, even though the legal remedy for the debt has been extinguished”).

⁷ Cordell, Larry and Lauren Lambie-Hanson. "A Cost-Benefit Analysis of Judicial Foreclosure Delay and a Preliminary Look at New Mortgage Servicing Rules." *Journal of Economics and Business* 84, (2016): 30-49.

⁸ 12 C.F.R. § 1024.41(g)

⁹ CPLR §213

¹⁰ Tex. Civ. Stat. & Rem. Code § 16.004; Tex. Fin. Code § 392.007(d).

¹¹ *Midland Funding, LLC v. Johnson*, 137 S.Ct. 1407 (2017) “[W]e conclude that filing (in a Chapter 13 bankruptcy proceeding) a proof of claim that is obviously time barred is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the Fair Debt Collection Practices Act.” 1415-1416.

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Therefore, MBA maintains that the use of disclosures for consumers when collecting time-barred debt would better serve both debtors and creditors rather than the prohibition of the filing of a proof of claim. Additionally, MBA maintains that “knows or should know” is too subjective of a standard to apply. Determining the relevant statute of limitations is often a complex task and not always clear cut; these laws vary by state, type of debt, and one debt may have more than one applicable limitation period. MBA suggests the Bureau consider implementing a single uniform disclosure to inform borrowers that a debt “may” be time-barred, instead of multiple disclosures proposed. A single disclosure advising a debt may be time-barred will support the Bureau’s goal to notify borrowers of their rights, while mitigating mortgage servicers’ legal liability.

Thank you for the opportunity to comment on this issue. Should you have questions or wish to discuss this issue further, please contact Darnell Peterson at 202-557-2922 or via email at dpeterson@mba.org or Lucia Jacangelo at 202-557-2921 or via email at ljacangelo@mba.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Pete Mills". The signature is fluid and cursive, with a large initial "P" and "M".

Pete Mills
Senior Vice President
Residential Policy and Member Engagement
Mortgage Bankers Association