

**COMMENTS
to the
Consumer Financial Protection Bureau
on its**

Debt Collection Validation Notice Qualitative Testing

OMB Control Number: 3170-0022

Docket No. CFPB-2020-0024

85 Fed. Reg. 38,870

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

July 29, 2020

1. Introduction

The Consumer Financial Protection Bureau (“CFPB”) estimates that 140 million validation notices are sent annually.¹ The validation notice is a critical notice to consumers that informs them about the alleged debt and provides information about some critical debt collection rights, such as the right to dispute the debt.

As announced in the Federal Register, the CFPB plans “to conduct cognitive interviews to assess the effectiveness and validate the performance of the Bureau’s model debt collection validation notices.”² The focus of the qualitative testing is:

- (1) Whether the consumer can locate and use important information effectively, such as information about the debt, information about the consumer's rights, and 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.³

We applaud the CFPB for taking a data-driven approach to assess the effectiveness of the model validation notices and to ensure that consumers comprehend their rights pertaining to debt collection. Consumer testing is a critical step to ensure that the CFPB promulgates the most effective regulations in its ongoing debt collection rulemaking.⁴

However, the CFPB needs to make significant improvements to the proposed testing to maximize the effectiveness of the proposed qualitative testing and to ensure comprehension of this critical notice. The following are our recommendations for how “to enhance the quality, utility, and clarity of the information to be collected.”⁵

¹ Proposed Rules, Debt Collection Practices (Regulation F), 84 Fed. Reg. 23,274, 23,389 (May 21, 2019) [hereinafter Proposed Rules].

² Agency Information Collection Activities: Consumer Request, 85 Fed. Reg. 38,870 (June 29, 2020).

³ Id.

⁴ See Debt Collection (Regulation F), 78 Fed. Reg. 67,848 (Nov. 12, 2013).

⁵ Agency Information Collection Activities: Consumer Request, 85 Fed. Reg. 38,870 (June 29, 2020).

2. The Model Validation Notice Must Be Comprehensible to the Least Sophisticated Consumer.

Assessing the least sophisticated consumer's ability to comprehend the model validation notices is critical. To accomplish the consumer protection purpose of the Fair Debt Collection Practices Act (FDCPA), the courts apply a "least sophisticated"⁶ or "unsophisticated"⁷ consumer standard to analyze many of the protections of the FDCPA.⁸ Thus, in order to develop model validation notices, the CFPB needs to analyze whether such notices are comprehensible to the least sophisticated consumer. Testing results will not show whether the model notice meets the FDCPA's standards unless the test is designed to assess the proposed validation notices from the perspective of the least sophisticated consumer.

Accordingly, the CFPB should ensure that the testing pool includes a large enough sample of unsophisticated consumers to produce valid results for this group. Factors such as education level and general financial literacy could be used as proxies for consumer sophistication when assessing the validation notice. The CFPB should report

⁶ See, e.g., *Powell v. Palisades Acquisition XVI, L.L.C.*, 782 F.3d 119, 126 (4th Cir. 2014); *Crawford v. LVNV Funding, L.L.C.*, 758 F.3d 1254, 1258 (11th Cir. 2014); *Tourgeman v. Collins Fin. Servs., Inc.*, 755 F.3d 1109, 1117-18 (9th Cir. 2014), *as amended on denial of reh'g and reh'g en banc* (Oct. 31, 2014); *Caprio v. Healthcare Revenue Recovery Group, L.L.C.*, 709 F.3d 142, 149 (3d Cir. 2013); *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 509 (6th Cir. 2007); *Russell v. Equifax A.R.S.*, 74 F.3d 30, 34 (2d Cir. 1996).

⁷ See, e.g., *Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 103 (1st Cir. 2014); *McMahon v. LVNV Funding, L.L.C.*, 744 F.3d 1010, 1019 (7th Cir. 2014); *Peters v. Gen. Serv. Bureau, Inc.*, 277 F.3d 1051, 1055 (8th Cir. 2002).

⁸ The CFPB recognizes that the courts have applied a "least sophisticated" or "unsophisticated" consumer standard in interpreting claims under §§ 1692e and 1692f. See Proposed Rules, 84 Fed. Reg. at 23,283.

Additionally, courts have applied a least sophisticated consumer standard when analyzing claims under § 1692g. See, e.g., *Sims v. GC Servs. L.P.*, 445 F.3d 959, 963 (7th Cir. 2006) ("In reviewing the collection letters to determine whether they violate the FDCPA, we view the letters from the 'standpoint of the so-called unsophisticated consumer or debtor.'" (citation omitted)); *Graziano v. Harrison*, 950 F.2d 107, 111 (3d Cir. 1991) ("Statutory notice under the Act is to be interpreted from the perspective of the 'least sophisticated debtor.'"); *Swanson v. Southern Oregon Credit Serv., Inc.*, 869 F.2d 1222, 1225 (9th Cir. 1988) ("In this circuit, the impact of language alleged to violate section 1692g is judged under the 'least sophisticated debtor' standard.").

results of its consumer testing that are broken out by these categories to demonstrate that the potential disclosure is intelligible to the least sophisticated consumer.

3. The CFPB Should Increase Testing of the Proposed Model Validation Notice.

3.1 Testing of the Model Validation Notice To Date Has Been Inadequate.

To date, the CFPB has not engaged in sufficient testing of the proposed model validation notices. Previously, the CFPB tested model validation notices with only 30 consumers for cognitive testing and 30 consumers for usability testing.⁹ We have serious concerns about the ability of such limited testing to adequately evaluate comprehension of the proposed model validation notices. This is particularly true given that all testing took place prior to the release of the SBREFA Outline in July 2016¹⁰ even though the model validation notice changed from the SBREFA Outline¹¹ to the Proposed Rules released in May 2019.¹²

Currently, the CFPB is planning to engage in quantitative testing of the model validation notices with only 40 to 60 respondents.¹³ While any additional testing represents a step in the right direction, these 40 to 60 respondents will not cure the current inadequacy of consumer testing of the proposed model validation notices.

3.2 The CFPB Should Expand the Proposed Qualitative Testing.

⁹ Proposed Rules, 84 Fed. Reg. at 23,279. We note that there were additional focus group conversations discussing disclosures more generally that took place before the cognitive and usability studies, but it is not clear how many consumers were involved in those conversations. *See id.*

¹⁰ Proposed Rules, 84 Fed. Reg. at 23,279.

¹¹ Consumer Fin. Prot. Bureau, Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered (July 28, 2016), *available at* https://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf.

¹² Proposed Rules, 84 Fed. Reg. at 23,409.

¹³ Consumer Fin. Prot. Bureau, Request for Approval Under the “Generic Information Collection Plan for the Development and Testing of Disclosures and Related Materials” available at [regulations.gov](https://www.regulations.gov) as a related material for CFPB-2020-0024.

We urge the CFPB to conduct additional consumer testing in the current round of proposed qualitative testing. A larger group of respondents will enable the CFPB to ensure that there is a sufficiently diverse pool of respondents and that there are sufficient respondents from each subgroup to create statistical power to allow for comparisons of key subgroups.

Currently, the CFPB states that:

The contractor will select respondents from a variety of backgrounds, representing various ages, genders, races/ethnicities, education levels, and incomes. Additionally, the contractor will aim to recruit such that one-third of the sample is comprised of consumers without debt collection experience and approximately two-thirds of the sample is comprised of consumers who have had a debt in collection in the past two years. The contractor will also recruit respondents who have had a variety of types of debts (e.g., medical debt, student loan debt, etc.).¹⁴

We applaud the plan to include a diverse array of respondents. However, it appears impossible to achieve subgroups of sufficient size across all of these categories with only 40 to 60 qualitative interviews. Moreover, this list does not even include the additional variable – whether the respondent is first provided a paper-based or electronic model validation notice¹⁵ – that will add further complexity to ensuring that subgroups are of sufficient size.

The CFPB should interview a larger group of people to ensure comprehension by the least sophisticated consumer. It is also important to increase the size of the testing pool in order to identify any subgroups of respondents who lack comprehension, and to ensure adequate representation by subgroups such as communities of color that are disproportionately impacted by debt collection.¹⁶

¹⁴ Id.

¹⁵ Id.

¹⁶ 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.

3.3 The CFPB Should Also Use Quantitative Testing of the Proposed Model Validation Notices.

To test the proposed time-barred debt disclosures, the CFPB used a contractor to conduct quantitative testing with 8,000 respondents.¹⁷ This quantitative testing for the time-barred debt disclosures included three general comprehension questions about portions of the model validation notice.¹⁸ This limited testing of content from the model validation notice identified a significant comprehension problem with the model validation notice – more than 40 percent of respondents incorrectly answered a question about whom the consumer should pay.¹⁹

However, the CFPB has never conducted any quantitative testing designed to assess comprehension of the model validation notices as a whole. Nor has it explained the reason for using less robust testing for the model validation notices than it used for the proposed time-barred debt disclosures, which would also appear on the model validation notices for some consumers.

We urge the CFPB to rethink the role that quantitative testing should play in an analysis of consumer comprehension of the proposed model validation notices. Such testing may be particularly helpful to test different alternative language or layouts when consumer testing shows that consumers do not understand particular content in the proposed model validation notices.

3.4 The CFPB Should Test Comprehension of the Content of the Model Validation Notice.

Whether through quantitative or qualitative testing, the CFPB should explore consumer comprehension of the proposed model validation notices. In previous comments

¹⁷ Proposed Rules, Debt Collection Practices (Regulation F), 85 Fed. Reg. 12,672, 12,676 (Mar. 3, 2020).

¹⁸ Consumer Fin. Prot. Bureau, Disclosures of Time-Barred Debt and Revival: Findings from the CFPB's Quantitative Disclosure Testing 13-16 (Feb. 2020) available at https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-quantitative-disclosure-testing_report.pdf.

¹⁹ Id. at 13.

responding to the Proposed Rule,²⁰ we identified aspects of the model validation notice that are in need of additional testing. We summarize these here:

- The CFPB should conduct consumer testing to answer questions about the proposed itemization date:²¹
 - Whether the proposed itemization dates and other potential itemization dates like the date of default, tested one-by-one, enhance or impede consumer understanding;
 - What itemization date is most meaningful to consumers;
 - Whether it is confusing to consumers to disclose an itemization date without explaining what the date references, and whether an explanation of the itemization date can dispel that confusion; and
 - Whether the itemization of interest, fees, payments, and credits is more helpful to consumers when using a particular itemization date.
- The CFPB should conduct consumer testing to determine how to explain to consumers that they can continue to dispute debts even after the validation period has run.²²
- The CFPB should conduct consumer testing on whether consumers correctly distinguish between the effect of an oral dispute and the effect of a written one.²³
- The CFPB should test whether having additional dispute prompts on the tear-off portion would be helpful to consumers.²⁴
- The CFPB should conduct additional testing to identify whether combining a dispute tear-off form and a payment coupon causes consumer confusion.²⁵
- The CFPB should conduct testing of the model validation notices with all of the disclosures that the CFPB proposes to permit on the reverse side.²⁶
- The CFPB should conduct testing of translations of the model validation notices²⁷ and translated statements to be included in the English language model validation notices.²⁸

²⁰ National Consumer Law Center et al., Comments to the Consumer Fin. Prot. Bureau on its Proposed Debt Collection Rule, Docket No. CFPB-2019-0022 (Sept. 18, 2019), *available at* https://www.nclc.org/images/pdf/debt_collection/comments-debt-collection-sept2019.pdf.

²¹ Id. at 150.

²² Id. at 160.

²³ Id. at 163.

²⁴ Id. at 168-169.

²⁵ Id. at 177.

²⁶ Id.

Additionally, the proposed qualitative testing does not appear to include any questions that address the collection of decedent debt. If the CFPB modifies the model validation notices for collection of decedent debt, it will be important to separately test comprehension of those modified validation notices. If the CFPB does not create separate model validation notices for collection of decedent debt, it will be important to test comprehension of the existing model validation notices when they are used to collect decedent debt.

Finally, the proposed qualitative testing does not appear to include any questions that address the collection of time-barred debts. As our forthcoming comments on the proposed time-barred debt collection disclosures will discuss, additional testing is needed to ensure comprehension by the least sophisticated consumer. Moreover, qualitative testing presents an ideal opportunity to engage in more real world testing of the proposed time-barred debt disclosure, including whether or not consumers identify the relevant disclosure language without their attention being directed to the language and the interaction between state or city time-barred debt disclosures and the CFPB's proposed time-barred debt disclosures.

As the CFPB tests for comprehension in all of these areas, it should build in time for revisions. For example, if testing with a small group reveals comprehension problems, the CFPB should build in time to revise and retest that language with a new batch of respondents. In addition, the CFPB should build in time for as many rounds as are needed until there is a high level of comprehension among all subgroups, including unsophisticated consumers. The CFPB should publish detailed results of all testing, including: the questions asked; the answers; respondent selection criteria; demographic characteristics of the respondents; the dates of each round of testing; the model validation notices used for each test; and the testing company's analysis, including an analysis by subgroups.

4. The CFPB Needs to Test All Delivery Methods for Validation Notices.

4.1 The CFPB Should Improve the Current Proposal for Testing the Electronic Notice.

²⁷ Id. at 185.

²⁸ Id. at 187.

The proposed qualitative testing would assess consumer comprehension of the proposed model validation notice when presented as either a paper-based notice or an electronic notice. The testing of the electronic notice appears to be designed to assess comprehension of a validation notice received by email that will be presented via a “digital form.”²⁹ Rather than presenting the email notice to the respondent on a tablet or laptop, the CFPB should instead email a copy of the validation notice to the consumer at her or his actual email address. The CFPB could then evaluate the rate of messages that are refused or sent to spam.³⁰

A consumer selected to evaluate email delivery of the proposed model validation notices should also be asked to bring the device from home that would most likely be used to read the email, and then the consumer should be allowed to use that device whether it is a laptop, tablet, or phone.³¹ This would allow the CFPB to test consumer comprehension on a variety of different devices, including phones. Phones present unique comprehension challenges due to the very different layout and the limited amount of information that can be displayed on the screen at one time. In order to develop a statistically significant sample, the CFPB should ensure that sufficient respondents using laptops, tablets, and phones all participate.

The current survey design also calls for consumers to be presented with a validation notice in the other media after they have already answered comprehension questions (e.g., a paper-based notice if they first answered questions about an electronic notice). This portion of the qualitative interview should be eliminated, because a respondent who has already answered questions about a paper-based validation notice, and potentially had specific content pointed out by the interviewer, will know to anticipate such content in the electronic format. As a result, these respondents may be more likely

²⁹ Fors Marsh Group, Debt Collection Model Validation Notice Qualitative Testing Moderator’s Guide, *available at* regulations.gov as a related material for CFPB-2020-0024.

³⁰ This would, of course, not replicate the experience of a consumer who receives an email that they are not expecting or does not receive an email because it is sent to an old or inactive email account, which would both be possible if the CFPB proceeds with its proposal to allow alternatives to E-SIGN Act compliance. Alternatives to E-SIGN Act compliance are in § 1006.42(c). *See* Proposed Rules, 84 Fed. Reg. at 23,406. *See also* National Consumer Law Center et al., Comments to the Consumer Fin. Prot. Bureau on its Proposed Debt Collection Rule 206-215, Docket No. CFPB-2019-0022 (Sept. 18, 2019) (responding to § 1006.42(c)), *available at* https://www.nclc.org/images/pdf/debt_collection/comments-debt-collection-sept2019.pdf.

³¹ If the COVID-19 pandemic forces these qualitative interviews to be conducted virtually, it would also be possible for the respondent to use a desktop to read the message if that was the most likely way that she or he would read the email.

to be able to identify (or to continue look for) content in the electronic format because they have already seen such content in the paper-based format.

4.2 The CFPB Must Also Test Oral Comprehension of the Validation Information.

The CFPB has proposed allowing debt collectors to provide validation information orally despite significantly increasing the amount of validation information that would be provided to consumers.³² However, none of the prior testing and none of the proposed testing of the model validation notices have involved testing for oral comprehension of the information contained in a model validation notice.

Auditory comprehension is quite different from reading comprehension.³³ Moreover, information overload, which may result if the entire content of the model validation notice is delivered orally, is a well-documented impediment to comprehension.³⁴ The same language that results in strong comprehension among survey respondents who read the written disclosure may result in weak comprehension among consumers who hear the language recited orally.

If the CFPB intends to retain oral delivery of validation information in the final rule, it needs to add oral delivery of validation information as a separate method of delivery in

³² Delivering validation information orally in the initial communication is discussed at § 1006.34(a)(1)(ii). See Proposed Rules, 84 Fed. Reg. at 23,404. See also National Consumer Law Center et al., Comments to the Consumer Fin. Prot. Bureau on its Proposed Debt Collection Rule 146-147, Docket No. CFPB-2019-0022 (Sept. 18, 2019) (responding to § 1006.34(a)(1)(ii)), available at https://www.nclc.org/images/pdf/debt_collection/comments-debt-collection-sept2019.pdf.

³³ 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.”).

³⁴ See, e.g., Martin J. Eppler & Jeanne Mengis, *The Concept of Information Overload: A Review of Literature from Organization Science, Accounting, Marketing, MIS, and Related Disciplines*, 30 The Information Society 325 (2004) (“Researchers across various disciplines has found that the performance (i.e., the quality of decisions or reasoning in general) of an individual correlates positively with the amount of information he or she receives—up to a certain point. If further information is provided beyond this point, the performance of the individual will rapidly decline. . . . The burden of a heavy information load will confuse the individual, affect his or her ability to set priorities, and make prior information harder to recall.”).

the qualitative testing. Since oral validation information would be most likely to be delivered over the phone, this portion of the qualitative testing should be administered over the phone to most faithfully replicate real-world conditions.

4.3 The CFPB Must Also Test Validation Notices Delivered by Hyperlink.

The CFPB has proposed allowing debt collectors to provide validation information by placing the disclosure on a website and providing a hyperlink to that website via email or text message.³⁵ However, none of the prior testing and none of the proposed testing of the model validation notices have involved testing for delivery of validation notices via hyperlink.

If the CFPB intends to retain delivery of validation notices via hyperlink in the final rule, it needs to test comprehension of validation information delivered via hyperlink as a separate method of delivery in the qualitative testing. Such testing needs to include questions regarding whether the consumer would click on a hyperlink in an email or text message that is received from an unknown number or email address. As discussed above in Section 4.1, the CFPB should test the electronic version of the validation notice that would be displayed to the consumer on the type of device that the consumer would likely use to access such a hyperlink.

5. Conclusion

We urge the CFPB to engage in additional testing of the model validation notices beyond what it has proposed with this qualitative testing. When results show lack of comprehension or other problems with the proposed model validation notices, the CFPB should be committed to revising and retesting the notice. Moreover, due to the inevitable shortcomings of lab tests for the proposed model validation notices, we urge the CFPB to monitor comprehension and evaluate effectiveness of the model validation notices even after a final rule so that the CFPB can continue to improve this critical notice to consumers.

³⁵ Delivering validation notices via hyperlink is discussed at the proposed § 1006.42(c)(2)(ii). *See* Proposed Rules, 84 Fed. Reg. at 23,406. *See also* National Consumer Law Center et al., Comments to the Consumer Fin. Prot. Bureau on its Proposed Debt Collection Rule 212-214, Docket No. CFPB-2019-0022 (Sept. 18, 2019) (responding to § 1006.42(c)(2)(ii)), *available at* https://www.nclc.org/images/pdf/debt_collection/comments-debt-collection-sept2019.pdf.