

COMMENTS
to the
Consumer Financial Protection Bureau
on its

Debt Collection Quantitative Disclosure Testing

OMB Control Number: 3170-XXXX
Docket No. CFPB-2017-0038
82 Fed. Reg. 52712

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

December 14, 2017

As announced in the Federal Register on June 5, 2017,¹ the Consumer Financial Protection Bureau (CFPB) plans to survey 8,000 individuals as part of its research into effective debt collection disclosures. On August 4, 2017, the National Consumer Law Center (NCLC)² offered several recommendations for how the proposed disclosure testing can be used most effectively to enhance consumer protection.³ In a November 14, 2017 publication in the Federal Register,⁴ the CFPB provided more details regarding the disclosure testing, including publication of the disclosures about time-barred and obsolete debts that will be tested.

As expressed previously,⁵ NCLC remains deeply concerned about the ability of any disclosure regime to adequately inform consumers of the complicated array of issues involved with the collection of time-barred and obsolete debts. NCLC continues to believe that a ban on collecting time-barred debts is necessary to adequately protect consumers.

Setting these concerns aside for the moment, NCLC continues to support consumer testing of any disclosures under consideration to inform the CFPB's debt collection rulemaking process and offers the comments below to suggest "[w]ays to enhance the quality, utility, and clarity of the information to be collected."⁶

Assessing Comprehension of the Least Sophisticate Consumer

As stated in our August 4, 2017 comments, assessing the least sophisticated consumer's ability to comprehend any proposed disclosures is critical. To accomplish the consumer protection purpose of

¹ 82 Fed. Reg. 25779.

² The National Consumer Law Center® (NCLC®) is a non-profit Massachusetts corporation specializing in low-income consumer issues, with an emphasis on consumer credit. Since 1969, NCLC has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness. NCLC publishes a series of consumer law treatises including Fair Debt Collection and Collection Actions.

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³ Available at: http://www.nclc.org/images/pdf/debt_collection/comments-to-cfpb-re-disclosure-testing.pdf

⁴ 82 Fed. Reg. 52712.

⁵ For more information about these concerns, see National Consumer Law Center, Comments to the Consumer Financial Protection Bureau on its Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals under Consideration and Alternatives Considered, 59-64 (Feb. 28, 2017), available at: https://www.nclc.org/images/pdf/debt_collection/debt-coll-sbrefa-cmmnts-02282017.pdf; National Consumer Law Center, Zombie Debt: What the CFPB Should Do about Attempts to Collect Old Debt (Jan. 2015), available at: http://www.nclc.org/images/pdf/debt_collection/report-zombie-debt-2015.pdf.

⁶ 82 Fed. Reg. 52712.

the Fair Debt Collection Practices Act (FDCPA), the courts apply a “least sophisticated”⁷ or “unsophisticated”⁸ consumer standard to analyze many of the protections of the FDCPA.⁹

In this situation, the question is whether a debt collector dunning on time-barred or obsolete debts is using “false, deceptive, or misleading” representations or means in violation of 15 U.S.C. § 1692e or “unfair or unconscionable” means in violation of 15 U.S.C. § 1692f. In order to allow collection of time-barred or obsolete debts with a required disclosure, the CFPB would need to conclude that collection communications with a particular disclosure are neither “false, deceptive, or misleading” nor “unfair or unconscionable” *to the least sophisticated consumer*.¹⁰ Thus, survey results will be of little utility to the CFPB unless the survey itself is designed to assess the proposed disclosures from the perspective of the least sophisticated consumer.

However, as currently outlined, the CFPB misses key opportunities to capture information that might be used to assess the comprehension of the least sophisticated consumer. First, the CFPB has decided to exclude any questions about financial literacy from the survey. The CFPB says that it decided to exclude these questions because “other research has indicated that many people have trouble answering traditional financial literacy questions.”¹¹ But the fact that the CFPB anticipates poor performance on financial literacy questions is not a reason to simply omit them. Rather, it may indicate a need to include a broader range of questions that will better indicate the respondent’s financial literacy. The CFPB’s proposal to substitute a “measure of financial well-being” is not an adequate substitute for financial literacy because financial well-being is not a proxy for consumer sophistication.

Level of formal education can also serve as a rough proxy for consumer sophistication in debt collection situations. However, there is no indication that the survey will collect information about the respondent’s level of education. The CFPB should ensure that this is among the demographic

⁷ See, e.g., *Russell v. Equifax A.R.S.*, 74 F.3d 30, 34 (2d Cir. 1996); *Caprio v. Healthcare Revenue Recovery Group, L.L.C.*, 709 F.3d 142, 149 (3d Cir. 2013); *Powell v. Palisades Acquisition XVI, L.L.C.*, 782 F.3d 119, 126 (4th Cir. 2014); *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 509 (6th Cir. 2007); *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); *Crawford v. LVNV Funding, L.L.C.*, 758 F.3d 1254, 1258 (11th Cir. 2014).

⁸ 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).

⁹ See, e.g., National Consumer Law Center, *Fair Debt Collection* ¶ 5.2.1 (8th ed. 2014), *updated at* www.nclc.org/library.

¹⁰ See, e.g., *Daugherty v. Convergent Outsourcing, Inc.*, 836 F.3d 507, 511 (5th Cir. 2016) (citation omitted) (“When evaluating whether a collection letter [offering to settle a time-barred debt] violates § 1692e or § 1692f, a court must view the letter from the perspective of an ‘unsophisticated or least sophisticated consumer.’”); *McMahon v. LVNV Funding, L.L.C.*, 744 F.3d 1010, 1019 (7th Cir. 2014) (citations omitted) (“[I]n deciding whether . . . a representation made in a dunning letter is misleading the court asks whether a person of modest education and limited commercial savvy would be likely to be deceived . . . The court views the letter through the perspective of an ‘unsophisticated consumer’ . . . This standard applies to claims under both § 1692e and § 1692f.”)

¹¹ Bureau of Consumer Financial Protection, *Debt Collection Quantitative Disclosure Testing, Supporting Statement Part A*, p. 11, available at <https://www.regulations.gov/>.

data collected by the survey firm. Moreover, the CFPB should also use this demographic data to mitigate the risk of oversampling individuals with more formal education as the result of conducting an online survey. Research shows that the 98 percent of college graduates use the internet, compared to 68 percent of individuals with less than a high school education.¹² The CFPB may need to take additional steps to ensure that consumers who do not use the internet, including individuals with less formal education, have access to this survey.¹³

The survey plans to intentionally oversample respondents who have had experience with debt collection in the past.¹⁴ People with prior debt collection experience may be more sophisticated consumers when it comes to evaluating debt collection scenarios in the survey. Thus, oversampling this group may make it more difficult for the CFPB to measure comprehension by the least sophisticated consumer.

Conclusion

NCLC urges the CFPB:

- 1) to evaluate all proposed disclosures based on the perspective of the least sophisticated consumer;
- 2) to ensure that the survey captures information that can be used to estimate the comprehension of the least sophisticated consumer; and
- 3) to consider how any intentional or unintentional oversampling of more sophisticated consumers may skew survey results.

¹² Pew Research Center, Internet/Broadband Fact Sheet, Who Uses the Internet (Jan. 12, 2017), available at: <http://www.pewinternet.org/fact-sheet/internet-broadband/> (data from 2016 highlighting differences in internet usage based on formal education).

¹³ Other groups are also less likely to use the internet, including: individuals over age 65, lower-income adults, and adults in rural areas. *Id.* While age, income, and community are not correlated with consumer sophistication, the CFPB should take steps to ensure that groups that are less likely to use the internet are represented in this survey in order to ensure that the survey results are broadly representative of American consumers.

¹⁴ Bureau of Consumer Financial Protection, *Debt Collection Quantitative Disclosure Testing, Supporting Statement Part A*, p. 1, available at <https://www.regulations.gov/>.