The Center for Responsible Lending

Comments to the Consumer Financial Protection Bureau
Debt Collection Validation Notice Qualitative Testing
Docket No. CFPB-2020-0024
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Comment Intake Consumer Financial Protection Bureau
1700 G Street NW Washington, DC 20552

The Center for Responsible Lending (CRL) appreciates the opportunity to submit comments on the Consumer Financial Protection Bureau's proposed Debt Collection Validation Notice Qualitative Testing (Proposal).

CRL is a non-profit, non-partisan research and policy organization that works to ensure a fair, inclusive financial marketplace. CRL's work focuses on those who may be marginalized or underserved by the existing financial marketplace, people who often are targeted for unfair and abusive financial products that leave them worse off. This includes people of color, women, rural residents and low-wealth families and communities. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. Over 37 years, Self-Help has provided over $7 billion in financing through 146,000 loans to homebuyers, small businesses, and nonprofits. It serves more than 145,000 mostly low-income members through 45 retail credit union locations in North Carolina, California, Florida, Greater Chicago, and Milwaukee.

Introduction

We support the CFPB's decision to conduct additional testing of the validation notice it has proposed and agree that such research is a necessary part of the Bureau's debt collection rulemaking. As discussed below, we believe that the utility of the research will depend upon: the criteria used to select individuals to participate in the research; and the scope of the issues that are probed through the research. This comment is thus offered to address ways to "enhance the quality, utility, and clarity of the information to be collected."

For the reasons discussed below, CRL urges the Bureau to withdraw the Proposal for limited qualitative testing and to submit a revised proposal with a more robust research design to answer the important empirical questions posed by the Bureau's 2019 Notice of Proposed Rulemaking (NPRM) and the comments thereon.

I. We urge the Bureau to Increase its Sample Size.

The Request for Approval indicates that the Bureau intends to conduct between 40 and 60 interviews. That coupled with the 30 cognitive and 30 user experience interviews conducted in 2014-2015, albeit on an earlier version of the validation notice, means that at most the Bureau will be basing its decisions on a convenience sample of only 120 individuals. That is a miniscule sample for creating a notice which, by the Bureau's own estimate, may be used 140 million times each year, and is critical to conveying important information about the debt to consumers. We recommend a substantial increase in the sample size to produce more "robust and reliable" evidence, which is the standard that the Bureau holds for itself in other contexts.

II. The Bureau Should Strongly Consider Altering its Selection Criteria Such That Communities of Color Who Disproportionately Experience Debt Collection Are Represented Adequately.

In order for the research to be useful in determining whether the proposed validation notice will be effective in achieving its objectives and the purposes of the Fair Debt Collection Practices Act ("FDCPA"), it is essential that the research be conducted with participants who are representative of those who are likely to be subject to third-party debt collection, and thus likely to be exposed to validation notices. That is especially important in light of the unrepresentativeness of the research the Bureau has conducted to date as part of this rulemaking as discussed below.

At the threshold, CRL questions the Bureau's intention, as reflected in the Request for Approval that accompanies the Proposal, to devote up to one-third of the testing among participants who have *not* had any experience with debt collection in the prior two years. We recognize, of course, that in any given time period some consumers will be contacted by a debt collector—and thus exposed to a validation notice—for the first time. But, given the small number of interviews the Bureau plans to conduct, we believe the research would be more valuable if it were limited to those who have actually had debts that were subject to collection within the past two years. However, if the Bureau believes it is important to conduct "non-collection sessions," we recommend that the participants for those session be screened so as to identify individuals who are likely to be subject to debt collection in the future. For example, the Bureau could screen to identify individuals who are struggling to make ends meet, especially those who currently have past due accounts and are not confident in their ability to repay those debts.

Of particular importance, for this research to be useful the Bureau must assure robust participation of Black and Latinx individuals. The Bureau's landmark Survey of Consumers Views on Debt found that 44% of Black people had experienced debt collection activity in the prior year, a rate 50% higher than among white individuals, and that the rate for Latinx people was 25% higher than for non-Hispanic white individuals. Thus, a representative sample would include an over-representation of Black and Latinx individuals relative to their percentage in the overall population. Yet, in the quantitative research the Bureau conducted regarding time-barred debt, Black and Latinx individuals actually were underrepresented. The Bureau should not repeat that error in this round of research.

Moreover, in the cognitive testing that the Bureau conducted in 2014—almost five years prior to releasing the proposed debt collection rule—only two Latinx people were included among the 30 individuals interviewed. The Bureau did not release demographic information regarding the 30 participants in the user experience testing. Even in the testing conducted in Las Vegas – a city that is roughly one-third Latinx – only *one* of the test participants was Latinx It is even more important now than it was five years ago to assure robust representation of Latinx individuals in the Bureau's testing given that the Bureau's 2019 NPRM – in contrast to the concepts that were the subject of the 2014 research and were included in the Outline of Proposals Under Consideration that the Bureau released in 2016 – would permit the validation notice to be given almost entirely in English. A key empirical question posed by the proposal is whether individuals for whom Spanish is their primary language and with limited English proficiency will find, let alone make use of, the option to request a Spanish translation. That question cannot

be answered without including a meaningful number of such participants in the cognitive interviews. To do so, a question about language preference should be added to the Screener and the Bureau should instruct the contractor to screen on that basis.

Finally, we note, as the Bureau did in its debt collection proposal, that "circuit courts have held … that the least sophisticated consumer standard applies to a consumer's understanding of a validation notice."[1] That means that the utility of the research in answering legally relevant questions will depend on the Bureau's ability to assess the extent to which unsophisticated consumers comprehend the validation notice. Although sophistication, of course, cannot be directly measured, the Bureau could select participants based on objective factors that may be correlated with the degree of sophistication such as levels of education.

III. The Bureau Should Consider Expanding the Scope of its Research in Light of the 2019 NPRM.

The Proposal identifies two questions that the Bureau intends to research: "(1) Whether the consumer can locate and use important information effectively…" and "(2) How consumers view and respond to paper and electronic versions of the model validation notice." CRL submits that this limited agenda ignores the most important empirical questions posed by the Bureau's validation proposal and by the comments that CRL and other consumer advocates have submitted in response to the Bureau's 2019 NPRM with respect to that proposal. We discuss, below, a number of such questions.

A. The Effect of Electronic Delivery Impacts Whether Consumers Can Locate and Use Validation Notice Information Effectively.

The question of whether consumers can "locate and use important information effectively" necessarily presupposes that consumers will actually see the information contained in the validation notice. Yet, the Bureau has proposed to allow these notices to be sent electronically, without compliance with the E-SIGN Act, by sending an e-mail or a text message with a hyperlink to an e-mail address or phone number that the creditor or a prior debt collector could have used under the E-SIGN Act. As discussed in the comments that CRL and other advocates, including the National Consumer Law Center (NCLC) submitted, that proposal raises a myriad of concerns, including the potential that such electronic notifications will end up in a spam folder or the inbox of an inactive e-mail account, or will be sent to a phone number that no longer belongs to the consumer. Those are empirical questions that the Bureau should research, but not ones that can be answered through consumer interviews.

However, as also discussed in the comments, even if an e-mail or text is sent to a consumer's current e-mail address or current mobile phone number, there is a substantial risk that a consumer receiving an e-mail from a debt collector who is new to the consumer—which is a precondition for sending the validation notice—will ignore that e-mail or text altogether or will open the e-mail/text, but decline to click on the hyperlink to avoid potential malware. Indeed, at least some debt collectors might deliberately attempt to structure their e-mails in such a way as to engender such a (non-)response in order to minimize the number of disputes resulting from the

[1] 83 Fed. Reg. 23274, 23282-23283 n.84 (May 21, 2019).

validation notice. The questions of (i) whether consumers will open emails from unknown debt collectors and (ii) whether consumers will click on hyperlinks to get to a validation notice, are questions that could be explored through well-structured consumer testing. It is imperative that the Bureau do so for this research to have practical utility.

B. The Bureau's Proposed Research Protocol Should Better Test the Ability of Consumers to Recognize Debts, Especially in Light of the Bureau's 2019 NPRM Concerning Itemization Dates.

As the Bureau stated repeatedly in the 2019 NPRM, the purpose of the validation notice is to "help a consumer recognize a debt and determine whether the amount of a debt is accurate."[2] In principle, then, a key research question should be whether the proposed validation notice achieves this objective. Yet, in the Moderator's Guide accompanying this proposal, the participants are given a notice and told to assume "you owe this debt"; the Guide explains that the purpose of this instruction is to "reduce participant ambiguity in how to respond." But, one goal of the research should be to determine whether, in fact, the proposed validation notice reduces ambiguity – not to assume it away.

This limitation is particularly troubling in light of the comments the Bureau has received on its proposal. The Bureau has proposed to require that the validation notice include an itemization of the amount owed. However, the itemization required is based upon the "itemization date," and under the Bureau's proposal debt collectors have a choice of itemization dates. As is discussed in detail in the comments on the 2019 NPRM, at least some of the proposed itemization dates—such as the date that the original creditor removed the debt from the creditor's balance sheet as an asset (i.e. the charge-off date)—are almost surely opaque for most consumers. For these reasons, the NCLC in its comments urged the Bureau to "conduct thorough and rigorous consumer testing to determine what dates will help consumers and whether use of any of the proposed itemization dates helps consumers or causes confusion." The Bureau's Proposal ignores that recommendation.

Determining whether the alternative itemization dates permitted by the proposal are meaningful to consumers is admittedly challenging, at least so long as the research protocol uses validation notices based upon hypothetical debts of hypothetical consumers. However, the Bureau's researchers could potentially design a research protocol to address this challenge, such as by obtaining consumer reports for the participants with their authorization, and using the information in those reports to construct validation notices for real debts using various proposed itemization dates. In any event, the research surely could explore with those consumers who have had recent debt collection experience, their memory about the various potential itemization dates to assess which would be most meaningful, constituting yet another reason to focus the research among those with such experience.

[2] 84 Fed. Reg. 23274, 23341 (May 21, 2019).

C. The Bureau Should Consider Testing Alternatives to Improve Clarity Given the Validation Notice's Purpose to Convey Important Information to the Least Sophisticated Consumer.

The comments on the 2019 NPRM identified a number of areas in which the proposed validation notice risks creating a false or misleading impression and recommended that the Bureau conduct testing to develop revised language to mitigate these risks. For example, NCLC's comment noted that specifying the ending date of the validation period, coupled with a statement of the consumer's right to dispute the debt during that period could leave consumers with the false impression that disputes cannot be submitted after that date or that such disputes would have no legal consequence. NCLC likewise noted that specifying that the consumer should submit a dispute in writing to trigger the collection pause could leave consumers with the false impression that oral disputes have no legal consequence.

Rather than designing the research to explore ways to improve upon its proposed validation notice in light of these concerns, the Bureau's research plan appears to take that proposed notice as a given and asks only whether it is adequate. But, more than minimal adequacy is required—the validation notice must be *clearly and effectively* conveyed to the *least sophisticated consumer* so that they is certain of their rights.[3] Moreover, merely striving for adequacy negates the very purpose of the notice-and-comment process which is designed to elicit recommendations for ways to improve on what has been proposed.

IV. Conclusion

For all of the above stated reasons, CRL urges the Bureau to withdraw the Proposal for limited qualitative testing and to submit a revised proposal with a more robust research design to answer the important empirical questions posed by the Bureau's proposed rule and the comments thereon.

[3] *See Russell v. Equifax A.R.S.,* 74 F.3d 30, 35 (2d Cir. 1996) ("A notice is overshadowing or contradictory if it would make the least sophisticated consumer uncertain as to her rights. It is not enough for a debt collection agency simply to include the proper debt validation notice in a mailing to a consumer—Congress intended that such notice be clearly conveyed."); *Wilson v. Quadramed Corp.,* 225 F.3d 350, 354 (3d Cir. 2000), *as amended* (Sept. 7, 2000) ("Thus, in order to comply with the requirements of section 1692g, more is required than the mere inclusion of the statutory debt validation notice in the debt collection letter-the required notice must also be conveyed effectively to the debtor") (citing *Miller v. Payco–General American Credits, Inc*., 943 F.2d 482, 483–84 (4th Cir.1991)).