

Request For Information To Assist the Taskforce on Federal Consumer Financial Law

Docket No. CFPB-2020-0013

Comments of Mark E. Budnitz

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General Considerations

The Taskforce should focus on how the Consumer Financial Protection Bureau can better prevent harm to consumers, especially at times like these when consumers are most vulnerable. The coronavirus pandemic is not the first time the devastating effects of a disaster have made evident the fragility of consumers, and it will not be the last.¹ Hurricanes, tornadoes, and wildfires will continue to wreak havoc on consumers' financial, social, and emotional health. The Bureau's top priority should be strong and aggressive enforcement of the law to make companies that violate the law reimburse consumers for their loss and pay substantial penalties to deter them and others from breaking the law in the future. The Bureau's enforcement efforts should be conducted in conjunction with those of its sister federal regulatory agencies and state attorneys general.

As in prior natural disasters, the current pandemic has brought forth a storm of scammers preying on those most in need of protection.² The Bureau should do all it can to stop these bad actors so they do not continue to rob consumers at the time they are facing unemployment, food insecurity, caring for a seriously ill family member, eviction, or foreclosure. Vigorous enforcement of the law will go far in deterring those who will otherwise harm consumers now and the next time a disaster strikes.

As the RFI states "It is important... that the policies, laws, and rules effectively target problems they are intended to address." The RFI should be asking for information documenting how consumers are being injured by violations of laws Congress enacted to protect consumers. Instead of prioritizing the harm to consumers and how to prevent it, the RFI repeatedly directs those responding to the RFI to provide information regarding competition among companies and consumer disclosure and education. The inappropriateness of focusing primarily on those factors is demonstrated by considering debt collection and student loan servicing, two areas in which the RFI states the Taskforce has a special interest.

¹ The Financial Crimes Enforcement Network has advised financial institutions "to remain alert about malicious or fraudulent transactions similar to those that occur in the wake of natural disasters." *The Financial Crimes Enforcement Network (FinCEN) Encourages Financial Institutions to Communicate Concerns Related to the Coronavirus Disease 2019 (COVID-19) and to Remain Alert to Related Illicit Financial Activity*, March 16, 2020, www.fincen.gov/news/news-releases.

² AnnaMaria Andriotis & Orla McCaffrey, *Card Scammers Take Advantage of Crisis*, Wall St. J., May 28, 2020, at B10; Kevin Green, *Duke Energy cautions about scammers*, Greensburg Daily News, May 23, 2020; Gene Myers, *Scammers posing as contract tracers*, Daily Record, May 23, 2020; Mengqi Sun, *Payment Companies Increase Efforts to Combat Coronavirus-Related Frauds*, Wall St. J., May 22, 2020, www.wsj.com/articles.

Debt collectors and loan servicers do not compete for the consumer's business. Consumers have no control over who will provide those services for businesses. The RFI stresses the need for consumers to be able to make "informed choices." Consumer education and disclosures to consumers can play a useful role in assisting consumers when they are deciding what financial services to purchase. But they are irrelevant when a debt collector calls at 2:00 AM and when the loan servicer refuses to respond to the consumer's questions.

The best way to foster competition among companies is to root out those who violate the law. Honest companies are at a disadvantage trying to compete with businesses that use fraud and deceptive practices to take the consumer's limited funds. The very nature of fraud and deception is that the consumer cannot fairly compare the deal offered by the fraudster with those of the honest seller. The fraudster always offers what appears to be the better bargain. The honest businessperson should not have to compete with those companies.

Furthermore, even honest companies do not compete on many of the terms which would most benefit consumers. While a company's price may be attractive, financial service businesses often pad the cost of the service with hidden fees. Companies require consumers to agree to long contracts filled with legal jargon. A consumer would need a law degree to fully understand the significance of warranty waivers, limitations of remedies, choice of venue and law provisions, privacy policies, and mandatory arbitration. Businesses do not compete on the basis of who can draft the most understandable contracts written in plain English. They do not market their products by touting their contract terms are more favorable to consumers than those of their competitors.

Finally, the RFI never asks those responding to the RFI to provide information that takes into account the important differences among consumers. Consumers vary greatly in terms of their income, education, and residence. Some are disabled, many are elderly. For others English is a second language. Businesses are aware of these differences and some specifically target the more vulnerable types of consumers in order to exploit them.

In addition to enforcement of current statutes and regulations, the Bureau should consider additions and modifications of regulations to protect consumers when future epidemics and natural disasters occur. For example, the Electronic Fund Transfers Act (EFTA) exempts financial institutions from liability when they are unable to comply with the statute's provisions due to "Acts of God" and technical malfunctions. 15 USC 1693h(b). Consumers need a provision in the law which takes into consideration their inability to meet deadlines in order to perfect their rights when an Act of God or technical malfunction makes that impossible or difficult.

Responses to specific items in the RFI

A. Expanding Access

1. Expanding banking services

The Bureau should definitely promote greater access to banking services. Consumers who are unbanked or underbanked are severely disadvantaged. However, improving their access to financial services should not deprive them of the protections from which they benefit when they use traditional banking services. For example, it is not clear that nonbanks that offer peer-to-peer electronic payments are subject to the same consumer protection law as traditional financial institutions.³ It would be a serious mistake not to fill this gap.

B. Consumer Data

9. Data breach laws

States have enacted various approaches to protect victims of a data breach. I do not believe there is any definitive empirical evidence that one approach is clearly superior to the others. Consequently, although a federal statute, regulation, or guidance may be helpful in establishing a baseline of minimum protection, states should be able to provide their citizens with greater protection. See 15 USC 1693q, providing that the state may enact a law that affords consumers greater protection than that provided in the EFTA. See 15 USC 1666j, providing that a state law with respect to credit billing practices is not inconsistent with the Truth-in-Lending Act (TILA) if the state law gives greater protection to the consumer.

C. The Regulations

11. and 12. Costs and benefits

It is impossible to measure costs and benefits with any quantitative certainty. How can one measure the cost to consumers of the failure of the federal law to protect consumers from the abusive practices of debt collection by creditors themselves? Federal law does provide limited protection when the debt collector is a third party, but how can one measure the emotional distress of collection practices violating that law? Or how does one measure the cost of forgoing medical care when threats and deceptive or abusive conduct push a consumer into paying an old, time-barred debt they cannot afford? Even if one could somehow quantify the emotional distress of abusive debt collection, the degree of distress would likely vary depending on factors such as age and medical condition of the consumer. Moreover, the degree of distress would likely be greater during periods of disruption such as the current pandemic.

³ Maxwell L. Gregson, *Less Is Not More: The Need To Regulate Apple Pay*, 20 N.C. Banking Inst. 311 (2016); Eric Pacifici, *Making PayPal Pay: Regulation and Its Application To Alternative Payment Services*, 13 Duke L. & Tech. Rev. 89 (2015).

Looking at costs and benefits from the perspective of businesses, how can one measure the cost of ambiguity or inconsistency in regulations? How can one quantify the benefits of better clarity and harmonization?

13. Rapid changes in consumer financial markets

Regulations have failed to keep up with the rapid changes in consumer financial services markets. Regulatory modifications and additions are needed to address new products and services and the way consumers obtain them. For example, as noted above in my response to item A.1., it is not clear that nonbanks offering peer-to-peer electronic payments are subject to the same consumer protection law as traditional financial institutions.

The context in which consumers interact with financial services online is entirely different from the pre-Internet world in which the EFTA was enacted and which largely characterizes Regulation E. Consumers agree to contract terms and choose financial services on websites that skillfully influence consumer decisions using “coercive architecture” and “dark patterns.”⁴ When companies obtain the consumer’s agreement using “browse-wrap” formats, these terms often are difficult for the consumer to access. Consumers enter into transactions by clicking on their mouse, tapping their smartphone, or talking to Alexa or Siri. They can pay for goods and services using contactless payment systems in which all they have to do is hold their credit card over the merchant’s card reader. Consumers engage in financial transactions using a wide variety of devices, including desktops, laptops, tablets, and smartphones. They access financial institutions through browsers and apps. The TILA and Reg. Z require “clear and conspicuous” disclosures. 15 USC 1632(a), 12 CFR 1026.17(a). The EFTA requires that disclosures be “clear and readily understandable.” 12 CFR 1005.4(a)(1). Disclosures on a 27 inch desktop monitor are very different than disclosures on the far smaller screen of a smartphone.

The current pandemic has made mobile banking not only a matter of convenience, but also a way to stay healthy by making a visit to a bank branch unnecessary. It is likely that after the crisis is over, consumers will continue to prefer mobile financial services such as depositing checks from their smartphones, transferring funds to others with a few taps on their phones, and making contactless payments.⁵

The Bureau should review the EFTA, Reg. E, TILA, Reg. Z, and other consumer protection laws to determine what revisions and additions may be necessary in light of the enormous changes in the financial services marketplace. But whatever form the protections and disclosures take, they must be equally strong in every format. Mobile disclosures may look different from written ones,

⁴ “Coercive architecture” refers to websites that make it difficult not to agree to choose services such as paperless delivery of bank statements. For example, the box where the consumer chooses that option is already checked and the consumer must uncheck it. “Dark patterns” refer to web design that intentionally steers consumers to make the choice the company wants. For example, the “I Agree” button is prominent and brightly colored, the “I Do Not Agree” is difficult to see and in a less conspicuous place.

⁵ According to an April 2020 survey conducted by Mastercard of 17,000 consumers in 19 countries, 74 percent said they intend to continue using contactless payments after the pandemic has passed. Sally French, *Switch To Contactless Payments*, New York Times, May 24, 2020, At Home, at 4.

but consumers need the same information and need it in a clear and understandable form. The advent of new technologies should not be an excuse for eliminating protections.

E. Improving Consumer Protection

21. Determining the appropriate remedy

Remedies for violations of the law should be determined based on the seriousness of the violation, the number of consumers affected, the harm to consumers, and the need to deter the violator and others from engaging in similar conduct. The RFI indicates that the Taskforce is concerned that a remedy may create adverse effects on competition. However, imposing a remedy that deters a violator benefits not only consumers, but also those competitors who do not violate the law. A remedy that does not deter those who violate the law in effect unfairly penalizes those who comply with the law.

22. Optimal mix of regulation, enforcement, supervision, and consumer education

The Bureau should give top priority to enforcement. That is by far the most effective way to prevent and remedy the harm caused by illegal conduct.

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