

**CONSUMER FINANCIAL PROTECTION BUREAU**

**12 CFR Part 1006**

**Fair Debt Collection Practices Act (Regulation F); Time-Barred Debt**

**AGENCY:** Consumer Financial Protection Bureau.

**ACTION:** Advisory opinion.

**SUMMARY:** The Consumer Financial Protection Bureau (CFPB) is issuing this advisory opinion to affirm that the Fair Debt Collection Practices Act (FDCPA) and its implementing Regulation F prohibit a debt collector, as that term is defined in the statute and regulation, from suing or threatening to sue to collect a time-barred debt. Accordingly, an FDCPA debt collector who brings or threatens to bring a State court foreclosure action to collect a time-barred mortgage debt may violate the FDCPA and Regulation F.

**DATES:** This advisory opinion is effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** Seth Caffrey, Courtney Jean, or Kristin McPartland, Senior Counsels, Office of Regulations at (202) 435-7700 or <https://reinquiries.consumerfinance.gov/>. If you require this document in an alternative electronic format, please contact *CFPB\_Accessibility@cfpb.gov*.

**SUPPLEMENTARY INFORMATION:** The CFPB is issuing this advisory opinion through the procedures for its Advisory Opinions Policy.<sup>1</sup> Refer to those procedures for more information.

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<sup>1</sup> 85 FR 77987 (Dec. 3, 2020).

## I. Advisory Opinion

### A. Background

Leading up to the 2008 financial crisis, many lenders originated mortgages to consumers without considering their ability to repay the loans.<sup>2</sup> These practices, which harmed millions of people, included in some cases originating products such as “piggyback” mortgages in which high-interest second mortgages were issued simultaneously with the origination of the first mortgage. One common piggyback mortgage product, known as an 80/20 loan, involved a first lien loan for 80 percent of the value of the home and a second lien loan for the remaining 20 percent of the valuation. Some consumers in these loans found themselves unable to make full payments on their first and second mortgages, and when housing prices began to decline in 2005, refinancing became more difficult.<sup>3</sup>

When a borrower defaults on a second mortgage, the mortgage holder may be able to initiate a foreclosure even if the borrower is current on the first mortgage. However, the second mortgage holder only receives proceeds from the foreclosure sale if there are any funds left after paying off the first mortgage. As a result, many second mortgage holders of piggyback loans, recognizing that a foreclosure would not generate enough money to cover even the first mortgage, charged their defaulted loans off as uncollectible and ceased communicating with the borrowers. Some sold the loans to debt buyers, often for pennies on the dollar. Such sales often occurred unbeknownst to borrowers, who continued to receive no communications regarding the loans. Many borrowers, having not received any notices or periodic statements for years, concluded that their second mortgages had been modified along with the first mortgage, discharged in bankruptcy, or forgiven.

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<sup>2</sup> See generally 78 FR 79730, 79732-33 (Dec. 31, 2013).

<sup>3</sup> Id. at 79733.

In recent years, as home prices have increased and borrowers have paid down their first mortgages, after years of silence, some borrowers are hearing from companies that claim to own or have the right to collect on their long-dormant second mortgages.<sup>4</sup> These companies often demand the outstanding balance on the second mortgage, plus fees and interest, and threaten to foreclose if the borrower does not or cannot pay. The CFPB is concerned about homeowners who survived the 2008 financial crisis but who are now facing foreclosure threats and other collection activity because of long-dormant second mortgages. These borrowers are often told that they face a choice between entering into onerous payment plans or losing their homes and the equity they have diligently built since the financial crisis.

Because of the amount of time that has lapsed on these long-dormant loans, some have likely become time barred under State law. Time-barred debts are debts for which the applicable statute of limitations has expired.<sup>5</sup> Statutes of limitation are, typically, State laws that provide time limits for bringing suit on legal claims.<sup>6</sup> In most States the expiration of the applicable statute of limitations, if raised by the consumer as an affirmative defense, precludes the debt collector from recovering on the debt using judicial processes.<sup>7</sup> In many jurisdictions, State court (*i.e.*, judicial) foreclosure actions are subject to a statute of limitations.

The CFPB understands that some debt collectors collecting on long-dormant second mortgages may have filed or have threatened to file judicial foreclosure actions even though the underlying debt is time barred. The CFPB is issuing this advisory opinion to affirm that: (1) the FDCPA and its implementing Regulation F prohibit a debt collector, as that term is defined in

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<sup>4</sup> See generally Michael Hill, “*Zombie Debt*”: Homeowners face foreclosure on old mortgages, Associated Press (Nov. 16, 2022), <https://apnews.com/article/business-mortgages-44b1ffad08a80b96a8630e091d1e96f2>.

<sup>5</sup> See 86 FR 5766, 5776-77 (Jan. 19, 2021); 12 CFR 1006.26(a)(2).

<sup>6</sup> See 86 FR at 5775-76; 12 CFR 1006.26(a)(1).

<sup>7</sup> See 86 FR at 5777.

the statute and regulation, from suing or threatening to sue to collect a time-barred debt; and (2) this prohibition applies even if the debt collector neither knows nor should know that the debt is time barred. Accordingly, an FDCPA debt collector who brings or threatens to bring a State court foreclosure action to collect a time-barred mortgage debt may violate the FDCPA and Regulation F.

#### *B. Coverage*

This advisory opinion applies to debt collectors as defined in section 803(6) of the FDCPA and implemented in Regulation F, 12 CFR 1006.2(i).

#### *C. Legal Analysis*

The FDCPA<sup>8</sup> and its implementing Regulation F<sup>9</sup> govern the conduct of “debt collectors” when they collect “debt.” The statute and regulation generally define a debt collector as “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”<sup>10</sup> Many individuals and entities that seek to collect defaulted mortgage loans, and many of the attorneys that bring foreclosure actions on their behalf, are FDCPA debt collectors.

The FDCPA and Regulation F define “debt” as “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.”<sup>11</sup> A consumer’s

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<sup>8</sup> 15 U.S.C. 1692-1692p.

<sup>9</sup> 12 CFR part 1006.

<sup>10</sup> 15 U.S.C. 1692a(6); 12 CFR 1006.2(i). The statute and regulation also provide that, for purposes of section 808(6) and 12 CFR 1006.22(e), the term debt collector also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. *Id.*

<sup>11</sup> 15 U.S.C. 1692a(5); 12 CFR 1006.2(h).

payment obligation arising from a mortgage transaction primarily for personal, family, or household purposes, such as the purchase of the consumer’s residence, falls within the plain language of this definition.<sup>12</sup> It follows that State court foreclosure proceedings often constitute the collection of “debt” under the FDCPA,<sup>13</sup> and debt collectors who engage in such debt collection activity are subject to the requirements and prohibitions of the FDCPA and Regulation F.

Regulation F prohibits a debt collector from suing or threatening to sue to collect a time-barred debt.<sup>14</sup> As the CFPB explained in finalizing this prohibition, “a debt collector who sues or threatens to sue a consumer to collect a time-barred debt explicitly or implicitly misrepresents to the consumer that the debt is legally enforceable, and that misrepresentation is material to consumers because it may affect their conduct with regard to the collection of that debt, including whether to pay it.”<sup>15</sup> Regulation F’s prohibition on suits and threats of suit on time-barred debt is subject to a strict liability standard.<sup>16</sup> That is, a debt collector who sues or threatens to sue to collect a time-barred debt violates the prohibition “even if the debt collector neither knew nor should have known that a debt was time barred.”<sup>17</sup> Accordingly, a debt collector who brings or threatens to bring a State court foreclosure action with respect to a time-barred mortgage debt may violate the FDCPA and Regulation F. This is true even if the debt collector neither knew nor should have known that the debt was time barred.

The CFPB also notes that a broad range of non-foreclosure debt collection-related activity, such as communicating with consumers about defaulted mortgages, can be covered by

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<sup>12</sup> See, e.g., *Cohen v. Rosicki, Rosicki & Assocs., PC*, 897 F.3d 75, 83 (2d Cir. 2018).

<sup>13</sup> *Id.* at 83-84.

<sup>14</sup> 12 CFR 1006.26(b).

<sup>15</sup> 86 FR 5776, 5778 (Jan. 19, 2021).

<sup>16</sup> See *id.* at 5777, 5781.

<sup>17</sup> *Id.* at 5777.

the FDCPA. FDCPA debt collectors undertaking such activity are subject to the other requirements and prohibitions of the statute and Regulation F when collecting debt<sup>18</sup> whether or not that debt is time-barred. These include, for example, the prohibition on debt collectors: falsely representing the character, amount, or legal status of any debt;<sup>19</sup> threatening to take any action that cannot legally be taken or that is not intended to be taken;<sup>20</sup> and selling, transferring for consideration, or placing for collection a debt that the debt collector knows or should know has been paid or settled or discharged in bankruptcy.<sup>21</sup> They also include, for example, the requirement that debt collectors: identify themselves as a debt collector in all communications with the consumer (except formal pleadings in connection with a legal action);<sup>22</sup> provide the consumer with validation information in certain circumstances;<sup>23</sup> and respond to consumer disputes adequately before continuing to collect.<sup>24</sup> Finally, even if an FDCPA debt collector engages only in actions necessary to undertake a nonjudicial foreclosure action, the debt collector is still subject to FDCPA section 808(6)<sup>25</sup> and Regulation F, 12 CFR 1006.22(e),<sup>26</sup> which generally prohibit taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if the debt collector has no present right or intention to do so.<sup>27</sup>

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<sup>18</sup> See 15 U.S.C. 1692a(5); 12 CFR 1006.2(h).

<sup>19</sup> 15 U.S.C. 1692e(2)(a); 12 CFR 1006.18(b)(2).

<sup>20</sup> 15 U.S.C. 1692e(5); 12 CFR 1006.18(c)(1); 15 U.S.C. 1692f(6); 12 CFR 1006.22(e).

<sup>21</sup> 12 CFR 1006.30(b).

<sup>22</sup> 15 U.S.C. 1692e(11); 12 CFR 1006.18(e).

<sup>23</sup> 15 U.S.C. 1692g(a); 12 CFR 1006.34.

<sup>24</sup> 15 U.S.C. 1692g(b); 12 CFR 1006.38(d); 85 FR 76734, 76845-48 (Nov. 30, 2020).

<sup>25</sup> 15 U.S.C. 1692f(6).

<sup>26</sup> See 15 U.S.C. 1692a(6); 12 CFR 1006.2(i)(1).

<sup>27</sup> See *Obduskey v. McCarthy & Holthus LLP*, 139 S.Ct. 1029 (2019) (holding that a business engaged in no more than nonjudicial foreclosure proceedings is not a debt collector under FDCPA section 803(6), except for the limited purpose of FDCPA section 808(6)).

Although not the focus of this advisory opinion, the CFPB also notes that entities selling or collecting on these second mortgages who are mortgage servicers may also be subject to certain requirements under the Real Estate Settlement Procedures Act,<sup>28</sup> the Truth in Lending Act,<sup>29</sup> and the CFPB’s mortgage servicing regulations.<sup>30</sup> For example, unless an exemption applies, the CFPB’s mortgage servicing regulations require servicers to provide periodic statements to consumers.<sup>31</sup>

## **II. Regulatory Matters**

This advisory opinion is issued under the CFPB’s authority to interpret the FDCPA, including under section 1022(b)(1) of the Consumer Financial Protection Act of 2010,<sup>32</sup> which authorizes guidance as may be necessary or appropriate to enable the CFPB to administer and carry out the purposes and objectives of Federal consumer financial laws.<sup>33</sup>

An advisory opinion is a type of interpretive rule. As an interpretive rule, this advisory opinion is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.<sup>34</sup> Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.<sup>35</sup> The CFPB has also determined that this advisory opinion does not impose any new or revise any existing

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<sup>28</sup> 12 U.S.C. 2601 et seq.

<sup>29</sup> 15 U.S.C. 1601 et seq.

<sup>30</sup> See, e.g., 12 CFR 1024.33(b) (requiring a transferee and transferor servicer to provide a timely notice of transfer of servicing to the affected borrower), 12 CFR 1024.39 (requiring servicers to make early intervention contacts with delinquent borrowers), 12 CFR 1024.41 (requiring servicers to follow certain loss mitigation procedural requirements, including certain foreclosure-related protections). Note that small servicers, as defined in 12 CFR 1026.41(e)(4), are exempt from certain of these requirements. See 12 CFR 1024.30(b).

<sup>31</sup> See 12 CFR 1026.41(a); see also, e.g., 12 CFR 1026.41(e)(4) (exempting small servicers from this requirement) and 12 CFR 1026.41(e)(6) (exempting servicers from periodic statement requirements for certain charged-off loans but only if, among other conditions, the servicer sends a specific notice to the consumer and does not charge additional fees or interest on the account).

<sup>32</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

<sup>33</sup> 12 U.S.C. 5512(b)(1).

<sup>34</sup> 5 U.S.C. 553(b).

<sup>35</sup> 5 U.S.C. 603(a), 604(a).

recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.<sup>36</sup>

Pursuant to the Congressional Review Act,<sup>37</sup> the CFPB will submit a report containing this interpretive rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a "major rule" as defined by 5 U.S.C. 804(2).

**Rohit Chopra,**  
*Director, Consumer Financial Protection Bureau.*

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<sup>36</sup> 44 U.S.C. 3501-3521.

<sup>37</sup> 5 U.S.C. 801 *et seq.*