

## REGULATING DEBT COLLECTION

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By: Christopher K. Odet<sup>1</sup>  
Roederick C. White, Sr.<sup>2</sup>

### Abstract

*Debt collection. It often starts as a late night call carrying threats of being thrown in prison, ruin at the workplace, and trouble for the family unless you pay up. While the law actually prohibits some of these tactics, most consumers do not know their legal rights, which leave much to be desired, or fail to exercise them when faced with the harassing practices of some debt collectors. Moreover, the debt collection industry as a whole—both massive and sophisticated—lacks the incentives to self-police or internally punish bad actors. In July 2016 the Consumer Financial Protection Bureau released a proposal aimed at overhauling the entire debt collection industry—both as to how collectors interact with consumers and how debts are bought and sold. Consumer protection groups have lauded the new rules as a win for average Americans, while consumer credit firms caution that some of the provisions go too far and risk crippling the collection industry, which would have an adverse effect on the ability of people to obtain the type of everyday credit that makes the wheels of the economy turn. This Article explores the proposed rules and critiques the places where they fall short or go too far, as well as considers future developments and issues that will arise from their enactment.*

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<sup>1</sup> Horatio C. Thompson Endowed Assistant Professor of Law, Southern University Law Center, Baton Rouge, LA; 2016-2018 Louisiana Bar Foundation Scholar-in-Residence; Faculty Scholar, American College of Real Estate Lawyers.

<sup>2</sup> Vice Chancellor for Academic and Student Affairs and Charles Hatfield Endowed Professor of Law, Southern University Law Center, Baton Rouge, LA.

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## INTRODUCTION

Debt collection has long been the source of much discussion—both legal and political—in the United States.<sup>3</sup> From upholding the legitimate rights of creditors seeking paying to protecting debtors in distress from abusive practices, debt collection is a major subject of conversation in consumer finance circles.<sup>4</sup> When creditors are able to collect debts efficiency and

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<sup>3</sup> Steve Fraser, *The Politics of Debt in America*, THE NATION (Jan. 29, 2013); see also Consumers Union & East Bay Community Law Center: Rachel Terp & Lauren Bowne, PAST DUE: Why Debt Collection Practices and the Debt Buying Industry Need Reform Now (Jan. 2011), [http://consumersunion.org/pdf/Past\\_Due\\_Report\\_2011.pdf](http://consumersunion.org/pdf/Past_Due_Report_2011.pdf).

<sup>4</sup> See, e.g., Brianna Gallo, *One Time to Sue: The Case for a Uniform Statute of Limitations for Consumers to Sue Under the Fair Debt Collection Practices Act*, 84 FORDHAM L. REV. 1653 (2016); Michael A. DeNiro, Note, *Hijacked Consent: Debt Collection and the Telephone Consumer Protection Act*, 100 CORNELL L. REV. 493 (2015); Alan S. Kaplinsky & Christopher J. Willis, *The CFPB Addresses Civil Investigations, Enforcement, Debt Collection and Student Loan Servicing*, 67 CONSUMER FIN. L.Q. REP. 182 (2013); Bill Arnold, *The Debt - Collections Made Human* (2012); TERESA A. SULLIVAN, ELIZABETH WARREN, & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN*

effectively the cost of borrowing is reduced.<sup>5</sup> This, in turn, benefits borrowers seeking access to consumer credit.<sup>6</sup> Often, however, it is not the original creditor that ends up seeking to collect the debt once there is a default.<sup>7</sup> Instead, it is frequently a third party, entirely foreign to the borrower, that ends up seeking payment. Indeed, a tremendous market has developed for companies that purchase debt at a discounted rate from the original creditor and then act to collect the debt themselves or who enter into agreements with the original creditor to collect the debt of its behalf in exchange for a commission.<sup>8</sup> These individuals are known as debt collectors.<sup>9</sup>

Under federal law a “debt collector” is defined as any individual who, through any form of interstate commerce, is in the principal business of collecting debts or is one who regularly collects or attempts to collect (whether directly or indirectly) debts owed.<sup>10</sup> While this may seem to include any and all creditors, the term does not include (among other things) the creditor who originated the debt nor the purchaser of such debt if, at the time of the purchase, there was no default.<sup>11</sup> Thus, the bank that made the loan to the consumer and then tries to collect on that loan once the consumer fails to pay is not considered a “debt collector” even though it is trying to collect on a debt owed. But if the bank, after

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DEBT (2008); Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41 (2015).

<sup>5</sup> Todd Zywicki & Chad Reese, *The Unintended Consequences of CFPB Debt Reform*, REAL CLEAR MARKETS (Nov. 18, 2015), [http://www.realclearmarkets.com/articles/2015/11/18/the\\_unintended\\_consequences\\_of\\_cfpb\\_debt\\_reform\\_101889.html](http://www.realclearmarkets.com/articles/2015/11/18/the_unintended_consequences_of_cfpb_debt_reform_101889.html); Clinton W. Francis, *Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740-1840*, 80 NW. U. L. REV. 807 (1986).

<sup>6</sup> *See id.*

<sup>7</sup> *See generally* Ronald J. Mann, *Bankruptcy Reform and the “Sweat Box” of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 391 (2007); Federal Trade Commission: *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* (2009).

<sup>8</sup> *See generally* The Association of Credit and Collection Professionals (last visited Aug. 28, 2016), <http://www.acainternational.org>; Federal Trade Commission: *The Structure and Practices of the Debt Buying Industry* (January 2013), <https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf>; JAKE HALPERN, *BAD PAPER: CHASING DEBT FROM WALL STREET TO THE UNDERWORLD* (2014).

<sup>9</sup> *See* Jiménez, *supra*, note \_.

<sup>10</sup> 15 USC 1692a(6) (2010).

<sup>11</sup> 15 USC 1692a(6)(F) (2010).

the default, sells the loan to Buyer, Inc. who then seeks to enforce the obligation to pay, we now have a “debt collector” in the legal sense. Similarly, a third party engaged by a creditor to collect the debt on their behalf is considered a “debt collector.”

Some argue debt collectors are necessary in order to keep access to consumer credit going,<sup>12</sup> while others assert that the practices that pervade the debt collection industry invite frequent abuse and injustice.<sup>13</sup> On July 28, 2016 the Consumer Financial Protection Bureau (the “CFPB or the “bureau”) released a proposal aimed at issuing the first-ever set of regulations under the Fair Debt Collection Practices Act (FDCPA),<sup>14</sup> as well as under a number of other statutes affected by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.<sup>15</sup> In essence, the CFPB seeks to give a complete overhaul to the way debt collection is regulated in the United States, mainly through clarifying existing

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<sup>12</sup> Christina Digani, *Debt Collectors Respond to Your Top Complaints*, ABC NEWS (Mar. 26, 2014) (“Collecting a consumer debt isn't an enjoyable experience for either party involved, but it's necessary, the organization said. And it's more complicated than you may think.”).

<sup>13</sup> Editorial: *Bad Debt Collectors and Their Prey*, N.Y. TIMES (Nov. 17, 2015) (“All states have laws that are intended to prevent debt collectors from driving families into destitution. But those laws, some of which date to the distant past, have been rendered ineffective by debt collectors using new and devious ways to win court judgments that allow them to seize debtors’ paychecks or bank accounts.”); see Jiménez, *supra* note \_\_; see Mann, *supra* note \_\_; Emanuel J. Turnbull, *Account Stated Resurrected: The Fiction of Implied Assent in Consumer Debt Collection*, 38 VT.

L. REV. 339 (2013); Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355 (2012); Mary Spector, *Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 258 (2011); Sam Glover, *Has the Flood of Debt Collection Lawsuits Swept Away Minnesotans’ Due Process Rights?*, 35 WM. MITCHELL L. REV. 1116 (2009).

<sup>14</sup> 15 U.S.C. §§ 1692-1692p (2010).

<sup>15</sup> Yuka Hayashi, *CFPB Unveils Overhaul of Debt Collection*, WSJ (July 28, 2016). See also Consumer Financial Protection Bureau: Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking—Outline of Proposals Under Consideration and Alternatives Considered (July 28, 2016), [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjh1uHi2OTOAhVP0GMKHbHRDgUQFggcMAA&url=http%3A%2F%2Ffiles.consumerfinance.gov%2F%2Fdocuments%2F20160727\\_cfpb\\_Outline\\_of\\_proposals.pdf&usq=AFQjCNGVdsF64I9LQNzyteDwqZj16Kkl4g&sig2=q\\_TG\\_u-DwdRPcXhAHqulEA&bvm=bv.131286987,d.eWE](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjh1uHi2OTOAhVP0GMKHbHRDgUQFggcMAA&url=http%3A%2F%2Ffiles.consumerfinance.gov%2F%2Fdocuments%2F20160727_cfpb_Outline_of_proposals.pdf&usq=AFQjCNGVdsF64I9LQNzyteDwqZj16Kkl4g&sig2=q_TG_u-DwdRPcXhAHqulEA&bvm=bv.131286987,d.eWE) [hereinafter “CFPB Proposal”].

rules and imposing new ones that further restrict the ways the industry can interact with consumer debtors and transact in debt portfolios.<sup>16</sup> This Article gives an overview of the proposed regulations, examines their impact on those operating in the American consumer credit market, and discusses possible future issues and developments that may result.

## I. DEBT COLLECTION/BUYING IN THE UNITED STATES

A prerequisite to appreciating the significance of the CFPB's current proposal is an understanding of how the debt collection industry is structured and operates in the United States. Indeed, while most consumer debtors go about their day paying their bills and making purchases on credit, there exists an enormous substructure that underpins these transactions.<sup>17</sup> This section gives an overview of the debt collection industry, and debt buying in particular, as well as discusses some of the contemporary critiques of the system that led to the CFPB's decision to promulgate new rules to govern this important, but often hidden sector.

### *A. Overview of the Industry*

The foundation of the debt buying and collection industry is simple. A consumer and a creditor enters into a transaction whereby he receives funds in order to make a purchase.<sup>18</sup> In exchange for the funds, the consumer will repay the amounts, plus interest, to the creditor over a set period of time.<sup>19</sup> The law provides a number of mechanisms whereby the creditor can collect on a debt if the consumer refuses or cannot pay.<sup>20</sup> As noted above,

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<sup>16</sup> See CFPB Proposal, *supra* note \_\_.

<sup>17</sup> See Jiménez, *supra* note \_\_.

<sup>18</sup> See Federal Trade Commission: The Structure and Practices of the Debt Buying Industry 11-12 (January 2013), [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjXrMfa7fPOAhUGpB4KHZ2sC1EQFggcMAA&url=https%3A%2F%2Fwww.ftc.gov%2Fsites%2Fdefault%2Ffiles%2Fdocuments%2Freports%2Fstructure-and-practices-debt-buying-industry%2Fdebtbuyingreport.pdf&usg=AFQjCNF6GF7pTz2iP\\_MZAUHNigk6nR8r0Q&sig2=hNM2lxymgaaFM5D8wme9cQ&bvm=bv.131783435,d.eWE](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjXrMfa7fPOAhUGpB4KHZ2sC1EQFggcMAA&url=https%3A%2F%2Fwww.ftc.gov%2Fsites%2Fdefault%2Ffiles%2Fdocuments%2Freports%2Fstructure-and-practices-debt-buying-industry%2Fdebtbuyingreport.pdf&usg=AFQjCNF6GF7pTz2iP_MZAUHNigk6nR8r0Q&sig2=hNM2lxymgaaFM5D8wme9cQ&bvm=bv.131783435,d.eWE) [hereinafter FTC Report].

<sup>19</sup> *Id.*

<sup>20</sup> See *id.*

the theory is that if there is an efficient and effective way for creditors to collect debts they will be more likely to extend credit to others seeking it and will do so on more favorable terms.<sup>21</sup> More consumers with access to credit can make more purchases, which is ostensibly good for the economy.<sup>22</sup>

In the simplest model, the creditor who extends the credit is also the one who enforces collection as against the debtor.<sup>23</sup> But often creditors will hire a third party with expertise in collection to do that work for them.<sup>24</sup> This is usually done because the creditor, while ready and able to extend credit to borrowers, does not necessarily have the skills and infrastructure in place to collect the debt in a way that makes the effort worth it.<sup>25</sup> Third party firms that provide these types of services (i.e., debt collectors) are adept at navigating the legal rules for enforcement and often have technology and processes that make collection efforts easier and more cost-effective.<sup>26</sup>

In yet another scenario, the original creditor does not collect the debt itself (or even through a third party debt collector), but rather sells the debt to someone else—called a debt buyer.<sup>27</sup> Then, the debt buyer may itself collect the debt or engage a third party debt collector to do it on the debt buyer's behalf.<sup>28</sup> This practice of selling debts has its origins in the savings and loan crisis in the 1980s when the federal government created the Resolution Trust Company to take control of and liquidate a

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<sup>21</sup> See generally Tullio Jappelli, Marco Pagano, & Magda Bianco, *Courts and Banks: Effects of Judicial Enforcement on Credit Markets*, 37 J. MONEY, CREDIT, & BANKING 223 (2005); Luc Laeven & Giovanni Majnoni, *Does Judicial Efficiency Lower the Cost of Credit?*, 29 J. BANKING & FIN. 1791 (2005).

<sup>22</sup> Kauffman Foundation: Access to Credit Remains a Challenge for Entrepreneurs Despite Improving Economy (Feb. 23, 2015); Board of Governors of the Federal Reserve System: Report on the Economic Well-Being of U.S. Households in 2014 (last visited Sept. 3, 2016), <http://www.federalreserve.gov/econresdata/2015-economic-well-being-of-us-households-in-2014-banking-credit-access-credit-usage.htm>.

<sup>23</sup> See FTC Report, *supra* note \_\_, at 11.

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> *Id.*

<sup>27</sup> See *id.* at 12.

<sup>28</sup> *Id.*

number of failed financial institutions.<sup>29</sup> The RTC sold off the debt of these failed institutions to third parties.<sup>30</sup> The transactions proved to be so successful for the debt buyers that a market quickly developed for the buying of consumer debt from many different types of creditors.<sup>31</sup> Today it is not unusual for a portfolio of debt to change hands multiple times through the course of many sales.<sup>32</sup> According to studies, many banks and originating creditors use third party collectors immediately after a default and, when collection is not successful, sell the debt to a third party altogether.<sup>33</sup> In the case of credit card debt, banks have an obligation under federal law to “charge-off” defaulted amounts after a certain amount of time has passed.<sup>34</sup> This means that after the requisite period of time has expired, the bank can continue to try to collect on the debt but it cannot continue to account for that debt on its books for purposes of meeting federal bank capital requirements.<sup>35</sup> However, by selling the debt to third parties the banks can then use the purchase money as an asset for meeting federal capital supply requirements.<sup>36</sup> This creates yet another powerful incentive for banks to sell credit card debt on a routine basis after a delinquency.<sup>37</sup>

The debt buying and collection system is based on achieving a number of economies. Creditor may be owed a total of \$1 million from a number of different consumer debtors, but may lack the resources to collect it efficiently. Creditor may then sell the debt to Debt Buyer at a discount (for instance, at .40 on the

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<sup>29</sup> See *id.* (citing Robert J. Andrews, *Debt Collection Agencies in the US*, IBISWORLD INDUS. REP. 56144, at 14 (2010); Timothy E. Goldsmith & Natalie Martin, *Testing Materiality Under the UnFair Practice Acts: What Information Matters When Collecting Time-Barred Debts?*, 64 CONSUMER FIN. L.Q. REP. 372, 725 (2010)).

<sup>30</sup> *Id.* See also Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—in Lawsuits*, N.Y. TIMES (Nov. 1, 2010).

<sup>31</sup> See FTC Report, *supra* note \_\_, at 12.

<sup>32</sup> See generally Center for Responsible Lending: Lisa Stifler and Leslie Parrish, *Debt Collection & Debt Buying—The State of Lending in America & its Impact on U.S. Households* (April 2014) [hereinafter CFRL Debt Collection Report].

<sup>33</sup> FTC Report, *supra* note \_\_, at 12.

<sup>34</sup> *Id.* at 13.

<sup>35</sup> *Id.*

<sup>36</sup> See *id.*

<sup>37</sup> *Id.* See also Mark D. Erickson, *When Selling Charged-Off Loans and Leases Makes Smart Sense*, ABF JOURNAL (July/August 2011).

dollar).<sup>38</sup> That means Creditor will walk away with \$400,000. While that is certainly less than the full \$1 million, it may nevertheless make Creditor better off than if he would have sought to collect the debt himself and incurred substantial expenses in attorneys' fees, court costs, and human capital trying to do so. Now, Debt Buyer, who has the requisite expertise, can seek to collect on the \$1 million. Even if Debt Buyer is, in the end, only able to collect \$700,000 of the total, it will still make a profit of \$300,000. Creditor and Debt Buyer both walk away with money. Losses are diminished and credit continues to flow into the pockets of consumers.

Before understanding the impact of the CFPB's proposed regulations it is helpful to have a snapshot of the debt collection/buying industry as a whole. As for debt collectors (those third parties engaged by a creditor to carryout collection efforts), according to the 2012 census there were about 4,000 firms in the United States engaged in the primary business of collecting payments for claims.<sup>39</sup> About 95 percent of those firms have annual receipts of \$15 million or less, and are therefore considered small businesses according to the CFPB.<sup>40</sup> As for debt buyers (those who purchase debt and may or may not carryout collection efforts on their own behalf), the field is occupied by many firms, but the majority of debt nation-wide is purchased by a number of large players.<sup>41</sup> According to a Federal Trade Commission study in 2008, about nine debt buyers purchased over 76 percent of all consumer debt sold that year.<sup>42</sup> In total, the CFPB states that there are approximately 330 debt buyers in the United States.<sup>43</sup>

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<sup>38</sup> See generally The Impact of Third-Party Debt Collection on the U.S. National and State Economies in 2013, i-ii (July 2014) (prepared by Ernst & Young for ACA International-the Association of Credit and Collection Professionals), [http://www.wacollectors.org/Media/Default/PDFs/\\_images\\_21594\\_impacteconomies2014.pdf](http://www.wacollectors.org/Media/Default/PDFs/_images_21594_impacteconomies2014.pdf) [hereinafter Ernst & Young Report]; see also Jiménez, *supra* note \_\_, at n.4 (“On average, debt buyers paid 4.0 cents for each dollar of debt.”).

<sup>39</sup> See *id.* at 36.

<sup>40</sup> *Id.*

<sup>41</sup> See FTC Report, *supra* note \_\_, at 14.

<sup>42</sup> See *id.* (citing Federal Reserve Bank of Philadelphia: Robert M. Hunt, Overview of the Collection Industry, Presentation at the 207 FTC Debt Collection Workshop 11 (Oct. 10, 2007)).

<sup>43</sup> See CFPB Proposal, *supra* note \_\_, at 36.



Debt collection is big business and often brings in big money. In a 2013 report it was estimated that debt collectors recovered about \$55.2 billion in total debt that year, earning roughly \$10.4 billion in fees and related commissions.<sup>44</sup> The highest amount of debt was collected in New York, Texas, California, Illinois, and Florida.<sup>45</sup> Most of the debt collected (71 percent) was more than 90-days past due, with the largest category of overall debt consisting of healthcare related debt (about 38 percent).<sup>46</sup> Student loan debt was a runner-up, and credit card debt comprised about ten percent.<sup>47</sup> In 2013 Debt collection agencies employed over 136,000 individuals, consisting of over 128,000 fulltime employees, 6,600 part-timers, and 1,600 workers on a contract-basis.<sup>48</sup> Collectively for that year debt collection firms paid about \$724 million in federal taxes, roughly \$400 million at the state level, and \$287 million in local taxes.<sup>49</sup>

As noted above, while the term debt collector and debt buyer are technically different, they have a common legal meaning. The FDCPA uses a definition of “debt collector” that captures more than just those third party firms that collect consumer debts on behalf of their clients.<sup>50</sup> It also captures those firms that purchase defaulted consumer debt from the original creditor.<sup>51</sup> Therefore, a debt buyer (i.e., one who purchases debt from another) is nevertheless considered a debt collector if the purchase of the consumer debt was made after the consumer defaulted.<sup>52</sup> Because of this, we use the term “debt collector” throughout this Article in order to mean both true debt collection agencies as well as those firms that purchase debt and collect on their own behalf.<sup>53</sup>

### *B. Contemporary Issues*

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<sup>44</sup> See Ernst & Young Report, *supra* note \_\_, at i-ii.

<sup>45</sup> *Id.* at i.

<sup>46</sup> *Id.*

<sup>47</sup> See *id.*

<sup>48</sup> *Id.* at ii.

<sup>49</sup> See *id.*

<sup>50</sup> See 15 USC 1692a(6) (2010).

<sup>51</sup> *Id.*

<sup>52</sup> See generally

<sup>53</sup> Importantly, those who collect on behalf of another and those who collect on their own behalf are not considered “debt collectors” under the FDCPA if the debt is commercial in nature. See 15 USC 1692a(6)(F) (2010).

Over the course of the past several years the CFPB notes that it has received a tremendous number of complaints in connection with debt collection.<sup>54</sup> These have been echoed by a number of government, advocacy, and consumer watchdog groups.<sup>55</sup> The bureau states that since it began operating in 2011 it has filed 25 debt collection lawsuits and, in connection with this litigation, has sought hundreds of millions in restitution to consumers and the imposition of significant civil penalties.<sup>56</sup> For this same period the Federal Trade Commission launched 40 cases involving unfair or deceptive practices against debt collection firms.<sup>57</sup> Indeed, the FTC reports that over the years it has received more complaints regarding consumer debt collection than on any other matter.<sup>58</sup>

The CFPB reports that of the 200,000 complaints it has received in 2015 regarding debt collection, the chief complaint had to do with attempts to collect debts that were not owed.<sup>59</sup> Another common complaint, so reports the bureau, has to do with harassment by debt collectors or threats by collectors to take actions which the law does not allow.<sup>60</sup> Sharing personal debt information with third parties and a failure to provide required information and notices also rank high on their list.<sup>61</sup> In the period between roughly 2011 and 2016 consumer individually filed over 50,000 lawsuits in federal court against debt collectors on the basis of FDCA violations.<sup>62</sup>

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<sup>54</sup> See CFPB Proposal, *supra* note \_\_, at 1.

<sup>55</sup> See, e.g., Jake Halpern, *Paper Boys: Inside the Dark, Labyrinthine, and Extremely Lucrative World of Consumer Debt Collection*, N.Y. TIMES (Aug. 15, 2014); CFRL Debt Collection Report, *supra* note \_\_; Blake Ellis & Melanie Hicken, *The Secret World of Government Debt Collection*, CNNMONEY (Feb. 17, 2015); Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015); Urban Institute: Caroline Ratcliffe, Signe-Mary McKernan, Brett Theodos, & Emma Cancian Kalish, *Delinquent Debt in America* (July 29, 2014); Neil L. Sobol, *Protecting Consumers From Zombie-Debt Collectors*, 44 N.M. L. REV. 327 (2014); Nicole F. Munro, *Our Mini-Theme: Debt Collection Issues Reign in the Brave New World of Consumer Finance Services*, 2014 BUS. L. TODAY 1 (2014).

<sup>56</sup> CFPB Proposal, *supra* note \_\_, at 1.

<sup>57</sup> *Id.*

<sup>58</sup> See *id.* at 1-2.

<sup>59</sup> *Id.* at 2.

<sup>60</sup> See *id.* at 6-15.

<sup>61</sup> *Id.* at 2.

<sup>62</sup> *Id.* at 2-3.

Consumer complaints and lawsuits filed in connection with such grievances can be distilled into a number of broad policy considerations. A number of complaints deal with attempts to collect a debt for which claims to the indebtedness are not substantiated by any reasonable documentation.<sup>63</sup> In other words, collectors are attempting to collect a debt for which they lack evidence as to the validity of it. Consumers also complain that when information is given to them regarding the debt, it is incorrect, incomplete, or confusing.<sup>64</sup> Another significant point of criticism has to do with attempts to enforce debt that is barred by the passage of time (i.e., the running of the state of limitations).<sup>65</sup> Yet additional complaints deal with the way collectors communicate with consumers in furtherance of collecting the debt.<sup>66</sup>

In hearing these complaints, and with the input of those who have conducted research in the area, as well as based on the bureau's own research and litigation experience, the CFPB has issued a series of significant proposed rules that would largely reshape the way in which the debt collection industry operates in the United States. A description and discussion of those proposals, as well as critiques of them, is what follows.

## II. SUMMARY AND CRITIQUE OF THE THE CFPB'S PROPOSAL

The CFPB's proposal takes a two-pronged approach—one that can be viewed as addressing the horizontal aspects of debt collection (between buyers and sellers of debt) and the other can be viewed as speaking to the vertical aspects of debt collection (between the collector and the consumer). It covers not only how transactions involving the sale of debt operate, but also how consumer information is handled, what disclosures are due to consumers, and how collectors are to communicate with consumers throughout the enforcement process. Some of the rules reflect prevailing industry practices, while others seek to adopt the

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<sup>63</sup> *Id.* at 5-20; see also Cody Vitello, *Debt Collectors Behaving Badly: A Guide to Consumer Rights*, 23 LOY. CONSUMER L. REV. 252 (2010).

<sup>64</sup> CFPB Proposal, *supra* note \_\_, at 18-22.

<sup>65</sup> See *id.* at 19; see also Charles V. Gall, *Proceeding with Caution: Collecting Time-Barred Debts*, 56 CONSUMER FIN. L.Q. REP. 244 (2002),

<sup>66</sup> CFPB Proposal, *supra* note \_\_, at 23-34.

practices of some as the now required norm for others. Moreover, in a number of places the proposal imposes new (and sometimes substantial) requirements on debt collectors. At different times the CFPB's goals are more or less direct, variously leaving concepts open-ended. Naturally, a major concern among those in the industry is how these new regulations will affect the cost of doing business—particularly since the vast majority of debt collectors in the United States are small firms.<sup>67</sup>

The following gives an overview of the proposal, noting in various places where issues will likely arise as to interpretation and enforcement of the rules. In a number of places, the CFPB notes that it is only “considering” a certain rule, rather than making a firm statement now on how it will ultimately approach a certain issue. These issues, as well as criticisms of the policy approaches that the CFPB takes in certain instances, are noted below.

#### *A. Addressing the Integrity of Consumer Information*

The CFPB reports that the most common complaint it has received relative to debt collection deals with bad consumer information.<sup>68</sup> In other words, the allegation often involves a consumer stating that a collector is attempting to enforce credit rights against the wrong borrower or for the wrong amount.<sup>69</sup> The CFPB attributes these problems to a lack of accurate borrower information being conveyed from the original creditor to the debt collector at the time of the sale of the debt.<sup>70</sup> Often the information that is handed over is incomplete or confusing.<sup>71</sup> Because some original creditors keep better records than others, the quality of the data can vary greatly.<sup>72</sup> This becomes all the more difficult when the debt is passed to many debt collectors in a long chain of title.<sup>73</sup>

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<sup>67</sup> See CFPB Proposal, *supra* note \_\_; see also Mann, *supra* note \_\_; Jimenez, *supra* note \_\_.

<sup>68</sup> See CFPB Proposal, *supra* note \_\_, at 5-6.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 6.

<sup>71</sup> For an excellent discussion of the debt buying and selling process, see Jimenez, *supra* note \_\_.

<sup>72</sup> See Jeff Horwitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, THE AMERICAN BANKER (Mar. 29, 2012).

<sup>73</sup> CFPB Proposal, *supra* note \_\_, at 6.

The CFPB believes these problems of correct consumer information are tied, in part, to the inadequate notice requirements provided under existing law, particularly the FDCPA.<sup>74</sup> Thus, the first and perhaps central part of the proposed regulations deals with created an environment for better information integrity—both for consumers and for debt collectors. The remedy for these problems comes in three parts.

### 1. Reasonable Debt Substantiation

The first part deals with requiring that the debt collector have a reasonable foundation upon which to base the collection of the debt.<sup>75</sup> One might think of this as a counterpart to the “ability-to-repay” requirement already in place for residential mortgage originators<sup>76</sup> and being considered for small-value lenders.<sup>77</sup> In other words, the collector must substantiate its claim that the debt is due before proceeding against the debtor.<sup>78</sup> How this process takes place is, of course, where the real questions lie. As the CFPB acknowledges, different types of debt call for different methods of substantiation.<sup>79</sup> This is particularly true when the information obtained by the collector is imperfect. The CFPB is looking to identify “warning signs” that collectors should look for when engaging in the substantiating process. Examples of warning signs being considered include (i) when the debt described is not in a clearly understandable form; (ii) when information about the debt is presented in a way that is conflicting or improbable; (iii) when a portion of the debt in the portfolio is absent or contains questionable information when compared with similar accounts; or (iv) when a material portion of the debt comprising the portfolio consists of unresolved or disputed debt, particularly when compared to similar portfolios.<sup>80</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 6-7.

<sup>76</sup> Christopher K. Odinet, *The Unfinished Business of Dodd-Frank: Reforming the Mortgage Contract*, SMU LAW REVIEW (forthcoming Spring 2017).

<sup>77</sup> Christopher K. Odinet, *Payday Lenders, Vehicle Title Loans, and Small-Value Financing: The CFPB’s Proposal to Regulate the Fringe Economy*, 132 BANKING L.J. 263 (2015).

<sup>78</sup> CFPB Proposal, *supra* note \_\_, at 7-8.

<sup>79</sup> *Id.* at 8.

<sup>80</sup> *Id.* at 8-9.

Some of these signs might be dismissed if additional support can be obtained or representations and support from the original creditors can be procured.<sup>81</sup> Should a collector encounter any of these warning signs during their review of the portfolio, it would have to engage in further investigations to obtain better information. The CFPB notes that the “standard would not require collectors to confirm all the information they receive, but it also would not permit collectors to ignore potential problems.”<sup>82</sup>

Thus, as long as there are no warning signs and as long as the debt-seller makes representations of accuracy to the debt collector, it is not necessary for the debt collector to review the documentation underlying the entire portfolio in order to meet the substantiation requirement.<sup>83</sup> However, an issue that will likely come up if this becomes law deals with the willingness of debt-sellers (particularly collectors/buyers downstream of the original creditor) to make affirmative representations of accuracy. As a recent 2015 study by Professor Dalié Jiménez notes, many sellers of debt desire to transfer the debt while making few or no representations as to the accuracy of the debt, title to it, or as to the legality of the debt.<sup>84</sup> Rather, they would rather the debt-buyer engage in its own due diligence and, as a sophisticated party, let the buyer beware.<sup>85</sup> But if debt collectors can only collect if they can substantiate their basis for doing so, and if engaging in this process involves, in part, representations by the debt-seller or creditor, then there will likely be transactional concerns going forward. It could ultimately harm the debt collection industry by causing original creditors to shift to collecting their own debts. On the other hand, it may just cause the industry to conform to a more transaction cost-intensive process moving forward. In the case of a creditor who uses a debt collector to act on its behalf, since

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<sup>81</sup> *Id.* at 9.

<sup>82</sup> *Id.*

<sup>83</sup> *See id.*

<sup>84</sup> For a database of consumer debt purchase agreements, see <http://www.daliejimenez.com>; *see also* Jiménez, *supra* note \_\_, at 55-63 (quoting from a representative debt purchase agreement: “Bank has not and does not represent, warrant or covenant the nature, accuracy, completeness, enforceability or validity of any of the Accounts and supporting documentation provided by Bank to Buyer . . .”).

<sup>85</sup> *See id.* at 87 (discussing the use of reliance waivers, specific disclaimers of representations and warranties, and “big boy” clauses in debt purchase agreements.).

information from the creditor will be important when it comes to the debt collector's ability to substantiate the claim in the face of warning signs, we might expect more dickering over the terms of engagement. The same issue of terms of the deal and warranties given will be present in instances where the debt is sold to the collector.

Another part of the warning sign analysis involves those signs that appear *after* collection efforts have commenced. Rather than missing information in the portfolio that was acquired, these post-initial review warning signs would include (i) consumer disputes regarding the debt; (ii) the inability to produce documentation regarding the debt once a dispute has been commenced; or (iii) a large quantity of disputes with regard to the debt in a single portfolio, compared to disputed debt percentages in similar portfolios.<sup>86</sup> In this way, collectors would be obligated to continue to seek out and obtain additional documentation and support throughout the collection process should any warning signs arise.<sup>87</sup>

In the debt collection process consumers will sometimes push back when confronted with collection efforts by disputing the validity of the debt. The CFPB views this move by the consumer as critical in its proposed regulatory framework. For a communication from the debtor to be one that raises a "dispute" there would be no magic words required, but rather any question or challenge as to the validity of the debt would suffice.<sup>88</sup> The collector's ability to proceed with collection efforts would then hinge on its ability to make yet another reasonable substantiation as to the validity of the debt with respect to the particular item that is disputed. The proposal breaks this down by categories of disputes: generic disputes, wrong amount disputes, wrong consumer disputes, and wrong collector disputes.<sup>89</sup> In addition to oral or other written notices of a dispute, the consumer could select the type of dispute he is raising by checking a box or making some other indication on the validation notice (discussed below).<sup>90</sup> The collector would then have to produce documentation to refute the

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<sup>86</sup> CFPB Proposal, *supra* note \_\_, at 9.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 10.

<sup>89</sup> *Id.* at Appendix D.

<sup>90</sup> *Id.*

claim and send that information to the consumer. Thus, if the consumer disputes the amount due, the collector would have to produce documentation that reasonably substantiates the amount the collector is claiming before it could proceed with collection efforts.<sup>91</sup> Should the collector be unable to reasonably substantiate its claim when faced with a consumer dispute, then the collector would be barred from proceeding.<sup>92</sup> That would be equally true for any subsequent collector who acquires the debt after the initial dispute is raised with the prior collector—thereby creating yet another transaction cost in sales of debts.<sup>93</sup>

The CFPB is also considering how it might limit the ability of the collector to communicate with the debtor during periods of dispute by allowing the collector to make requests and ask for clarification without coming across as merely continuing collection efforts.<sup>94</sup> Under current FDCPA law if a debtor sends a written dispute to the creditor within 30-days of having received notice of the debt, then the collector must provide information relative to the verification of the debt to the debtor (often called the “validation notice”).<sup>95</sup> The CFPB notes that unfortunately the contours of what constitutes sufficient validation are ambiguous.<sup>96</sup> Courts have interpreted this provision in a variety of ways.<sup>97</sup> Thus, as part of the CFPB’s proposal it would specifically delineate the types of information that a collector could provide and that would constitute sufficient validation —again, varying based on the generic or specific nature of the dispute.<sup>98</sup>

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<sup>91</sup> *Id.* at 9.

<sup>92</sup> *Id.* at 11.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> 15 U.S.C. 1692g(b) (2010) (discussing validation of debts).

<sup>96</sup> CFPB Proposal, *supra* note \_\_, at 11.

<sup>97</sup> *See generally* Graziano v. Harrison, 950 F. 2d 107 (3d Cir. 1991); Chaudhry v. Gallerizzo, 174 F. 3d 394 (4th Cir. 1999); Homeowners Ass’n of Victoria Woods, III, Inc. v. Incarnato, 778 N.Y.S. 2d 811 (N.Y. App. Div. 4th Dep’t 2004); Spears v. Brennan, 745 N.E. 2d 862 (Ind. Ct. App. 2001), *cf.* Dunham v. Portfolio Recovery Assocs., LLC, 2009 WL 3784236 (E.D. Ark. 2009), *cf.* Rudek v. Frederick J. Hanna & Assocs., P.C., 2009 WL 385804 (E.D. Tenn. 2009); Thomas v. Trott & Trott, P.C., 2011 WL 576666 (E.D. Mich. 2011); Mabry v. Ameriquet Mortg. Co., 2010 WL 1052353 (E.D. Mich. 2010); Burgi v. Messerli & Kramer PA, 2008 WL 4181732 (D. Minn. 2008).

<sup>98</sup> *See* CFPB Proposal, *supra* note \_\_, Appendix D.



The proposal might also include a requirement that if the collector receives two written notices of dispute from the same debtor and believes them to be duplicative, the collector would be required to respond to the consumer and tell him of the duplication.<sup>99</sup> Under current law a duplicative dispute notice does not require a response. Lastly, the proposal may include some form of standard disclosure language that debt collectors would have to affirmatively give to debtors apprising them of their right to dispute the debt in writing and thus be entitled to receive a written validation notice.<sup>100</sup> This provision, while perhaps placing a greater burden on debt collectors, could nonetheless produce a positive overall result by ensuring that consumers are apprised of their right to have the debt validated. As with many issues, most consumers do not know what their rights are under the FDCPA and are therefore unable to exercise them.<sup>101</sup>

Lastly, the CFPB would require that any debt collector, prior to commencing litigation against a debtor, would have to review a prescribed amount of documentation to ensure that it had reasonable support for the claims being brought against the consumer.<sup>102</sup> The CFPB notes that many consumers fail to defend themselves in litigation, thus resulting in a default judgment—sometimes against the wrong defendant or under incorrect pretenses.<sup>103</sup> Thus, the bureau believes that placing a greater burden on debt collectors in the run-up to filing a lawsuit would help alleviate undue burdens on consumers.<sup>104</sup>

## 2. Better Transmission of Consumer Data

The next major portion of the proposal relative to integrity of consumer information deals with the transmission of consumer debt data from creditor to creditor.<sup>105</sup> As mentioned above, it is often the case that information is lost or is insufficiently presented when documentation is handed over from the original creditor to

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<sup>99</sup> *See id.* at 11.

<sup>100</sup> *Id.*

<sup>101</sup> *See generally* Consumer Federation of America: Consumers Very Confused About Their Rights with Telemarketers (Mar. 6, 2013), [http://www.consumerfed.org/pdfs/Consumer\\_Telemarketing\\_Rights.pdf](http://www.consumerfed.org/pdfs/Consumer_Telemarketing_Rights.pdf)

<sup>102</sup> CFPB Proposal, *supra* note \_\_, at 12.

<sup>103</sup> *Id.*

<sup>104</sup> *See id.*

<sup>105</sup> *Id.* at 13.

the debt collector or from debt collector to another debtor collector.<sup>106</sup> Poor information transfer can contribute to consumer abuse in the collection process.<sup>107</sup> To address this problem, the CFPB proposes that before any collection activity can commence, the collector must conduct an investigation as to prior collection activity.<sup>108</sup>

Further, if a creditor, subsequent to transfer of the debt to another, obtained information from the consumer relative to the debt, then that creditor (although no longer the owner of the debt) would be obligated to pass that information along to the new owner.<sup>109</sup> The same obligation would exist in cases whether the collector returned the debt to the selling-creditor (such as is often the case when a consumer disputes the debt held by a collector in a portfolio).<sup>110</sup> Information that would need to be passed along would include (i) payments furnished by the debtor; (ii) notices regarding discharges in bankruptcy; (iii) identify theft reports; (iv) notices of disputes as to the validity of the debt; and (v) any information suggesting that the assets or income of the debtor are exempt under the law from seizure.<sup>111</sup> The theory behind this proposed rule is prevent the compartmentalization of consumer information amid various parties who may hold the debt over time. One complaint by consumers was that while the consumer might have raised a dispute with Collector A, it would have to raise the dispute all over again once the debt was sold to Collector B. The requirement that Collector B would have to ascertain Collector A's collection activities, as well as the requirement that Collector A would have to pass along to Collector B any post-transfer

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<sup>106</sup> See generally Dan Trevas, *Court Resolves How Federal Debt Collection and State Consumer Sales Laws Impact Debt-Buyers and Collection Lawyers*, OHIO COURT NEWS (Jun. 16, 2016); Federal Reserve Bank of Boston: Peter Hollands, *Debt-Buyer Lawsuits and Inaccurate Data* (Mar. 13, 2014), <https://www.bostonfed.org/publications/communities-and-banking/2014/spring/debt-buyer-lawsuits-and-inaccurate-data.aspx>.

<sup>107</sup> Neighborhood Economic Development Advocacy Project: *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower- Income New Yorkers* (May 2010), [http://www.nedap.org/pressroom/documents/DEBT\\_DECEPTION\\_FINAL\\_WEB.pdf](http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf).

<sup>108</sup> See CFPB Report, *supra* note \_\_, at 14.

<sup>109</sup> See Appendix E.

<sup>110</sup> *Id.* at 14.

<sup>111</sup> See *id.* at 14-15.

information about the consumer, are both aimed at ameliorating this problem.

### 3. Debt Verification and Credit Reporting

Lastly with regard to information integrity, the CFPB believes that the information currently provided by debt collectors under the FDCPA's validation notice requirement is too lax.<sup>112</sup> The bureau's proposal notes that often the validation notice only contains the current amount due, without any back-up information or support.<sup>113</sup> Better information would decrease "downstream interactions" later, as well as better inform debtors on their legal rights, so the CFPB notes.

Thus, under the proposal the validation notice would need to contain a number of new items. These would include a description of the debt, the merchant brand associated with the debt (i.e., the name of the retailer or the credit card company), the name of the creditor at the time the default occurred, and an itemized breakdown of all principal, interest, and fees since the date of default, among other information.<sup>114</sup> The proposal would also require that the validation notice be accompanied by a statement of rights that would contain information apprising the debtor of what legal rights he has with regard to the collection of debt.<sup>115</sup> Rights that would need to be disclosed include the ability to dispute the debt, restrictions on communications from the creditor, and limitations on enforcement of rights as to exempt assets.<sup>116</sup> To make the process easier, the CFPB is considering the promulgation of a model form for validation and disclosure of the statement of rights that debt collectors could use and thereby meet the new regulatory requirements.<sup>117</sup> The CFPB is also at least considering the possibility of requiring a second transmission of the statement of rights be made by the debt collector to the consumer after a 180-day period from the initial communication, on the notion that this will ensure that the debtor is aware of his

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<sup>112</sup> *Id.* at 15.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at Appendix F.

<sup>115</sup> *See id.* at 15-16.

<sup>116</sup> *Id.* at Appendix G.

<sup>117</sup> *Id.* at 16.

rights throughout the collection process.<sup>118</sup> This proposed regulation might also entail that the validation notice and the statement of rights come in a version for Spanish-speaking consumers. This might involve a separate form or a translation on the reverse side of an English-version of the documents—the final position on that matter is still under deliberation.<sup>119</sup>

Lastly regarding the passage of information, the CFPB is considering how to deal with what has become known as “passive collection” or “debt parking.”<sup>120</sup> This is when the debt collector reports information about the consumer to a credit reporting agency, even though the debt may not be valid or the collector does not intend on proceeding with enforcement.<sup>121</sup> While often creditors inform consumers prior to sending information to a credit agency, there are many times when the consumer only finds out after the information has been sent and the consumer is applying for a new loan that requires the running of a credit report.<sup>122</sup> The CFPB has collected reports where debtors proceeded to pay the debt just to have it removed from their credit report, even when the validity of the debt was in dispute.<sup>123</sup> To address this problem, the CFPB proposes a rule that would require creditors to inform consumers prior to passing along any information to a credit reporting agency.<sup>124</sup>

### *B. Requiring New Consumer Disclosures*

Aside from an overhaul of the validation notice (already required by the FDCPA) and the inclusion of the new statement of rights notice, the CFPB is also considering two additional items that deal with disclosure. The first addresses litigation matters and

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 17.

<sup>120</sup> *Id.* See also Gerri Dettweiler, *Can a Debt Collector Come After Me If I Never Got a Bill?*, CREDIT.COM (June 23, 2015).

<sup>121</sup> See CFPB Report, *supra* note \_\_, at 17; see also U.S. Department of the Treasury: Termination of Collection Action, Write-off and Close-out/Cancellation of Indebtedness (Mar. 2015), [https://fiscal.treasury.gov/fsservices/gov/debtColl/pdf/mfr/chapter7\\_Mar2015.pdf](https://fiscal.treasury.gov/fsservices/gov/debtColl/pdf/mfr/chapter7_Mar2015.pdf).

<sup>122</sup> CFPB Report, *supra* note \_\_, at 17.

<sup>123</sup> *Id.* at 18.

<sup>124</sup> *Id.*

the second deals with the possibility that the debt may no longer be collectable due to the running of time.

### 1. Beware of Litigation

The first disclosure is one where the collector would have to affirmatively tell the debtor of its intent to sue.<sup>125</sup> The disclosure would also have to state that the a judgment would be rendered against the debtor if he did not mount a legal defense, and that the debtor could obtain additional information about debt collection litigation (including access to legal counsel) by going to the CFPB's website.<sup>126</sup> It is possible that model language could be developed, although none is at this time.<sup>127</sup> There are a couple of things that are notable about this approach. In essence, it makes the plaintiff in a lawsuit into a bit of a helpdesk for the consumer. It requires that the plaintiff point the consumer toward legal assistance resources and to inform the consumer of the consequences of his failure to respond to the complaint. Although on the other hand, aside from directing the defendant to sources of information and counsel, most plaintiffs send a demand letter prior to commencing litigation. Whether this additional information actually helps a consumer, who may lack the resources to engage legal counsel or even to obtain pro bono legal services, seems a bit doubtful.<sup>128</sup> Most consumers understand that lawsuits have legal consequences.

### 2. Time-Barred Debt Collection No More

The second disclosure deals with what the CFPB calls "time-barred debt and obsolete debt."<sup>129</sup> After the statute of limitations has run on the right to collect a debt then it is no longer enforceable.<sup>130</sup> It is considered time-barred and thus obsolete. However, this fact must usually be affirmatively raised by the

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<sup>125</sup> See *id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 19.

<sup>128</sup> Micheal Zuckerman, *Is There Such a Thing as an Affordable Lawyer?*, THE ATLANTIC (May 30, 2014).

<sup>129</sup> CFPB Report, *supra* note \_\_, at 19; Thomas R. Dominczyk, *Time-Barred Debt: Is it Now Uncollectible?*, 33 NO. 8 BANKING & FIN. SERVICES POL'Y REP. 13 (2014).

<sup>130</sup> CFPB Report, *supra* note \_\_, at 19.

defendant.<sup>131</sup> Typically, a court will not raise the issue on its own. Therefore, absent an affirmative defense by the debtor, it is possible for a court to render a judgment in favor of a creditor even when the right to collect is stale.<sup>132</sup> The concept of obsolete debt for credit reporting purposes deals with a debt that is, typically, over seven years old and thus is prohibited from appearing on a credit report in accordance with the Fair Credit Reporting Act.<sup>133</sup> Because the presence of a debt on a credit report has such significant effects, the CFPB is concerned with expired debt not being properly removed from such reports.<sup>134</sup>

To address these problems, the CFPB proposes that collectors would have to give a time-barred disclosure whenever it tries to enforce a debt.<sup>135</sup> The disclosure would be comprised of a statement telling the consumer that the debt is no longer enforceable.<sup>136</sup> Whether collectors would always have to give this disclosure (meaning they would have to always make a determination) or whether they would only have to give the disclosure when they had a reason to believe the debt was time-barred is still being considered by the CFPB.<sup>137</sup> This disclosure may come only at the time of the initial communications, or it may need to be given additional times thereafter.<sup>138</sup> That too is being considered.

As to those frequent instances where the debt is passed from one collector to another, once a time-barred notice has been given by one collector, if the debt is subsequently sold to another collector, then that next collector would be bound by the first notice.<sup>139</sup> In other words, the time-barred letter has a binding effect on future collectors. The subsequent collector would also have to

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<sup>131</sup> *Id.*

<sup>132</sup> Michael E. Chaplin, *Reviving Contract Claims Barred by the Statute of Limitations: An Examination of the Legal and Ethical Foundation for Revival*, 75 NOTRE DAME L. REV. 1571 (2000).

<sup>133</sup> CFPB Report, *supra* note \_\_, at 19.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 20.

<sup>136</sup> *Id.*

<sup>137</sup> See *id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 21.

give a time-barred letter in his initial communication and with any validation notices.<sup>140</sup>

As to obsolete debts, it is also being proposed that a disclosure be provided to consumers telling them whether a time-barred debt can appear on their credit report.<sup>141</sup> This will likely be included in the validation notice and might also involve the collector giving the notice again at regular intervals throughout the collection process.<sup>142</sup>

There are a few things to note here. First, this proposed regulation would shift a fundamental aspect of civil procedure. As mentioned, it is usually for the defendant to raise the issue of the running of time on stale claims. Here, depending on which approach is taken, the collector would have to make a determination as to whether the debt is barred. And even if the collector would only have to send the time-barred notice *if* it had reason to believe the debt was barred, practically speaking all collectors would feel compelled to make an independent determination lest they be found to have had constructive knowledge and failed to send the disclosure. The cost of not providing the disclosure, and then having a court find that there were sufficient facts to raise suspicion would be more than enough to make all collectors take the more conservative approach.

The other piece that makes this regulation a bit puzzling is that, although the collector might make a determination that the debt is no longer payable, he may nevertheless proceed to collect. It might make more sense for the CFPB to require that if a collector determines that a debt is time-barred then he cannot proceed to enforce it at all. However, that does not appear to be the approach the bureau takes.

Another part of this proposed regulation deals with revival of debts. Under some state law even a time-barred debt, once partially paid, will be revived and again enforceable.<sup>143</sup> The CFPB states that it has found through its testing that consumers will often pay a time-barred debt, believing that doing so will be beneficial to

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<sup>140</sup> *Id.*

<sup>141</sup> *See id.*

<sup>142</sup> *Id.*

<sup>143</sup> *See id.* *See also* Champlin, *supra* note \_.

them, when in fact it only causes more problems by resurrecting the right to collect.<sup>144</sup> The CFPB is considering “whether to prohibit collectors from collecting on time-barred debts that can be revised under state law unless they waive the right to sue on the debt.”<sup>145</sup> That means that if the debt is time-barred, the collector can still pursue the debt but only if he promises not use the fact of the consumer’s payment or acknowledgement of the debt as a reason to try to collect the rest of the debt. There are a number of logical inconsistencies here. The general idea presented by the disclosure of time-barred debt is that consumers should be alerted to the issue but that after this point the creditor can still pursue the debt. But now, if state law would provide that the debt was resurrected by a partial payment by the debtor, the creditor can only take the partial payment if he waives his ability to go after the debtor for the remainder.<sup>146</sup>

This, in practice, this would seem to bar all creditors from seeking payment from all debtors when the statute of limitations has run on the debt. Indeed, the CFPB’s multi-part proposal seems to both allow the collection of time-barred debt, provided disclosures are made, and then simultaneously make the collection of time-barred debt impossible. In fact, the CFPB’s proposal report even notes that the bureau considered an outright ban on the sale of time-barred debt or an outright ban on the collection of such debt, but that it ultimately decided against this course because the proposals currently under consideration “may adequately address the risks to consumers posed by the sale and collection of time-barred debt.”<sup>147</sup> This response is quite unsatisfactory since, regardless of whether one agrees with the wisdom of shifting the responsibility to assert the statute of limitations on debt, a clear regulatory scheme that articulates a federal policy in a straightforward manner is far better than one that seeks to achieve that same policy ends through twists and turns.

Lastly, the CFPB is considering an outright prohibition on debt collectors accepting any form of payment on a time-barred debt without first obtaining an acknowledgement from the debtor

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<sup>144</sup> CFPB Report, *supra* note \_\_, at 21-22.

<sup>145</sup> See *id.*

<sup>146</sup> *Id.*

<sup>147</sup> See *id.*



that the debt is no longer due.<sup>148</sup> The clear question here is: why would anyone ever do this? Other than through the acceptance of a payment and receipt of the acknowledgment that is then ignored, a debt collector would not want to go through the time and expense of gambling on collecting the debt and sending the disclosure only to then have to return the funds later or receive nothing in the first instance. Again, it would seem more straightforward and consistent with the general notion of protecting consumer debtors from the collection of time-barred debt to outright prohibit its collection. The round-about way of achieving this goals seems confusing and likely to produce some level of economic waste—and litigation.

### *C. Changing Consumer Communication Methods*

The final part of the overall proposal, and what the CFPB reports as its second largest source of complaints deals, with how debt collectors communicate and interact with consumers in the course of attempting to enforce the right to collect the debt.<sup>149</sup> The FDCPA already imposes a number of requirements on debt collectors when it comes to how they communicate with debtors.<sup>150</sup> However, such communications are frequently the source of grievances by consumers and even debt collectors say that the regulatory requirements under the FDCPA often lead them to inadvertently step into a trap.<sup>151</sup>

To remedy these issues, the CFPB proposes adopting a multi-pronged approach to dealing with debt collection communications. This includes the CFPB having more “control over the rhythm and channels of communications and to provide greater regulatory certainty for all parties.”<sup>152</sup>

#### 1. Frequency and Form

A common scenario that comes to mind when one thinks of debt collection is the constant stream of phone calls whereby the collector harasses the debtor, either at home or at the workplace.<sup>153</sup>

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 22.

<sup>150</sup> *Id.*

<sup>151</sup> See *id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 23;

Collectors report that they must call often because it frequently takes many attempts prior to getting the right person on the phone.<sup>154</sup> Moreover, collectors state that since the FDCPA prohibits the revealing of a person's debts to a third party collector almost never leave a voicemail, for fear of running afoul of this rule.<sup>155</sup> Therefore, without the ability to leave messages the need to continue calling persists.<sup>156</sup>

The CFPB proposes to open up the door to leaving messages by stating in regulation that a voicemail which only conveys the debtors' name, the collectors' name, and a toll-free method for returning the call is not considered revealing the debt to a third party.<sup>157</sup> In other words, a message that meets this safe harbor will be immune for later attack as being a violation of the FDCPA. The CFPB hopes that this safe harbor-like method will cut down on the frequent-caller problem.<sup>158</sup>

As to the actual frequency of calls, the CFPB proposes placing a numerical cap on the number of times a collector can call depending on whether the collector has actually made contact with the consumer (a concept that the proposal defines as a "confirmed consumer contact").<sup>159</sup> A confirmed consumer contact is when a collector has communicated with the debtor about the debt.<sup>160</sup> Such a contact does not exist without a confirmation by the person communicating with the collector that she is indeed the debtor being sought.<sup>161</sup> It is also not a confirmed consumer contact if the creditor has reason to believe that the other person is misrepresenting that she is the debtor.<sup>162</sup> The CFPB also intends to make the cap applicable to all forms of communication—whether by phone, text, or email.<sup>163</sup>

With regard to the actual caps, the CFPB is considering either a bright-line cap (perhaps with some exceptions) or a

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<sup>154</sup> *Id.* at 22.

<sup>155</sup> See *id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 24.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 25.

<sup>160</sup> *Id.*

<sup>161</sup> See *id.*

<sup>162</sup> *Id.*

<sup>163</sup> See *id.*

number that, once exceeded, creates a presumption of harassment.<sup>164</sup> The current proposal under consideration provides that if the collector *has not* yet had a confirmed consumer contact, he may engage in three attempts at communication per unique address or phone number per week (but no more than a total of six attempts at communication in that period).<sup>165</sup> If the collector *has* made a confirmed consumer contact, he may engage in two attempts at follow-up communication per unique address or phone number per week (but no more than a total of three attempts at follow-up communication in that period).<sup>166</sup> After a confirmed consumer contact takes place, the collector is limited to just one live communication with the consumer per week.<sup>167</sup>

It is uncertain as to whether this proposal will hold. The CFPB is considering whether to take a per-consumer rather than a per-account approach to the cap, as well as whether to allow the contact cap to vary depending on the type of debt (i.e., healthcare, student, credit card etc.).<sup>168</sup> For larger debt collectors there will need to be a number of controls put in place to ensure that attempts at communication are accurately tracked to avoid violating the rule.

Still on the issue of communications, the CFPB is looking to also limit the number of times a debt collector can contact third parties. Debt collectors will often contact third parties in an effort to locate and contact the debtor. However, there are numerous stories of instances where unscrupulous debt collectors called third parties to encourage them to pay the consumer's debt or otherwise harass the consumer to pay.<sup>169</sup> The caps for third party communications would provide that, *prior* to a confirmed consumer contact, the collector is limited on a per-week basis to three attempted communications per unique address or phone number per third party (with a total limit of six per week per third

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 26.

<sup>166</sup> *Id.*

<sup>167</sup> See *id.*

<sup>168</sup> *Id.* at 27.

<sup>169</sup> *Id.*; Herb Weisbaum, *Debt Collectors Troll Facebook—Are They Going Too Far?*, NBCNEWS (last visited Sept. 15, 2016), [http://www.nbcnews.com/id/42687734/ns/business-consumer\\_news/t/debt-collectors-troll-facebook-are-they-going-too-far/#.V9r-h2UomFc](http://www.nbcnews.com/id/42687734/ns/business-consumer_news/t/debt-collectors-troll-facebook-are-they-going-too-far/#.V9r-h2UomFc); Anne Fisher, *Bill Collectors Calling Your Boss? Here's What to Do*, FORTUNE (Aug. 28, 2014), <http://fortune.com/2014/08/28/bill-collectors-boss-workplace/>.

party).<sup>170</sup> *After* a confirmed consumer contact the collector may not contact any third parties.<sup>171</sup> *Prior* to a confirmed consumer contact, a collector may only have one single live communication per third party (and that is total, not on a weekly basis).<sup>172</sup> Obviously *after* a confirmed consumer contact, there can be no live communications with third parties.<sup>173</sup>

This process may cut back on the abusive practice of calling the debtor's place of work or other family members even when the collector has been in contact with the consumer. Further, the limits in place prior to such consumer contact may dissuade a collector from being too liberal with the number of third parties he contacts. Nevertheless, debt collection companies will need to be more careful in tracking their agents' communications with consumers. It is likely that technology will play a major role in helping manage the administrative burdens resulting from these communication limitations.

## 2. Time, Place, and Manner

The current provisions of the FDCPA already place restrictions on when and where collectors can engage with consumers regarding outstanding debts.<sup>174</sup> The statute takes a general and a more prescriptive approach by both requiring that collectors avoid inconvenient or unusually timed communications with the consumer and also strictly prohibiting communications after 8:00 am and before 9:00 pm.<sup>175</sup> The CFPB reports that consumers complain that despite these restrictions they frequently hear from collectors at inconvenient hours and locations.<sup>176</sup> Moreover, collectors assert that the FDCPA's rules are not well-suited to forms of communication beyond phone calls (such as emails, text messages, and the like).<sup>177</sup>

The bureau's proposal takes a number of steps to try to address the time, place, and manner complaints of both sides. First,

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<sup>170</sup> CFPB Report, *supra* note \_\_, at 28.

<sup>171</sup> *Id.*

<sup>172</sup> *See id.*

<sup>173</sup> *Id.*

<sup>174</sup> *See id.*

<sup>175</sup> *Id.*

<sup>176</sup> *See id.*

<sup>177</sup> *Id.*

consent as to time, place, and manner of communications by the consumer to one creditor does not constitute consent of the same to any future holders of the debt.<sup>178</sup> Thus, just because consumer agreed that Creditor A could call him at his office during lunchtime hours does not mean that Creditor B, who subsequently comes to own the debt, may take similar measures.

On the collector's side, the proposal seeks to clarify the law to state that when a collector has information about a debtor that would indicate she is located in multiple places the collector is entitled to view a time as "convenient" for statutory purposes if it would be convenient in all of the locations in which the collector has information about the debtor.<sup>179</sup> Thus, if the collector has a mobile number (with one area code) and a land line (with a different area code), then the collector could not violate the time-period limitations in the FDCPA if he avoided calling during the prohibited periods for both area codes.<sup>180</sup> One criticism of this is that if the locations are far enough away and there's a number of pieces of location information in the hands of the collector, then it might become quite onerous to make a perfect, global determination as to convenience in all locales.<sup>181</sup> It might be a better idea to state that where the collector has multiple pieces of location information about a debtor that the collector could contact the debtor, per that piece of information, when the time would be convenient under FDCPA for that location. In other words, a location-by-location approach based on the information in hand. The collector could communicate with the consumer via the mobile number during convenient times pursuant to the information relative to that mobile number (i.e., like the area code/time zone), even if another piece of information (like a street address in a different time zone) might indicate that it would not be convenient as to that information.

The proposal also tries to address the timing of when electronic messages can be sent. As noted above, one of the current criticisms of the FDCPA is that it really contemplates a world of telephone calls, rather than electronic communications. While the proposal acknowledges that a consumer may not actually check or

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<sup>178</sup> See *id.*

<sup>179</sup> *Id.* at 29.

<sup>180</sup> *Id.*

<sup>181</sup> See *id.*

read an email for a long period of time after it is sent, the proposal seeks to clarify the law by marking the timing of electronic communications to the moment of its transmission.<sup>182</sup> Thus, even though a person may be sleeping and unable to receive a message in the middle of the night, transmission of that email in the middle of the night would violate the regulation. This result, considering the ways in which consumers can turn off their phones or alerts as to incoming messages, comes across as a bit arcane. On the other hand, it produces greater certainty than what currently exists with regard to the convenience timing of electronic transmissions.

Another aspect of the time, place, and manner portion of the proposed regulation deals with where the communications can be sent. In other words, in what types of consumer-related locations can attempts to contact the consumer be made. One of the major complaints made by consumers is that collectors try to call them at their place of employment and this becomes damaging to their reputation when a co-worker is the one who receives the communication (either inadvertently or through a switchboard line).<sup>183</sup> The proposal seeks to deal with this issue by making certain locations presumptively off-limits.<sup>184</sup> These include (i) medical facilities; (ii) places of worship; (iii) places of burial or grieving; (iv) childcare or daycare centers.<sup>185</sup> The notion behind this is that since the FDCPA prohibits attempts to collect at places that are inconvenient to the debtor, the prescribed locations listed here are all likely locations where the debtor would find collection communications inconvenient.<sup>186</sup> To the benefit of collectors, however, the presumption only applies if the collector knows or has reason to know that the consumer is located in one of these locations.<sup>187</sup> He is not obligated to investigate as to the location absent some alerting evidence.<sup>188</sup>

Obviously since most communications are made via cell phones from collectors located at quite a distance from the consumer it is likely there will be much dispute over when these

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<sup>182</sup> *Id.*

<sup>183</sup> *See id.*

<sup>184</sup> *Id.*

<sup>185</sup> *See id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 30.

<sup>188</sup> *Id.*

new rules are violated. The multitude of instances in which communications are made with consumers when they are located in various places, without necessarily any actual knowledge by the collector but with at least some hint of constructive knowledge could lead to a great deal of litigation. Lastly, with regard to location, the CFPB is open to ideas about how to deal with service members who are located in combat zones or are in the middle of hazardous duty service.<sup>189</sup>

Notably absent from this list of presumptively off-limits location is the debtor's place of employment (which is one of the biggest complaints among debtors when it comes to collection calls).<sup>190</sup> However, the CFPB is considering a prohibition on the collector's ability to contact the debtor through her work email—at least without her consent.<sup>191</sup> This mostly has to do with a fear that, since employers generally have the power to review employees' emails, that debt information will be inadvertently disclosed to a third party and therefore violate the FDCPA and, of course, potentially result in adverse consequences for the consumer at work.<sup>192</sup>

### 3. Debt of the Dead

How to deal with debts of a deceased person has been a big point of discussion in debt collection circles.<sup>193</sup> The CFPB's

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<sup>189</sup> See *id.*

<sup>190</sup> *Stop Collection Calls at Work*, MONEY MANAGEMENT (Sept. 20, 2010); Scott Hannah, *Take Control and Stop Collection Calls & Creditor Harassment at Work*, THE PROVINCE (Nov. 10, 2014); National Consumer Law Center: Debt Collection Communications: Protecting Consumers in the Digital Age 9 (“Communications at a consumer’s place of employment run the gamut from potentially causing the consumer’s discharge because of the employer’s prohibition against receiving such calls to being potentially embarrassing because of privacy reasons. Moreover, evidence suggests that communications at a consumer’s place of employment are inconvenient because the calls interrupt the consumer’s concentration. For example, one study found that even brief interruptions resulted in twice as many errors and another study reported that it takes an average of 25 minutes to resume a task after interruption and an additional 15 minutes after that to regain the same level of focus.”).

<sup>191</sup> CFPB Report, *supra* note \_\_, at 31.

<sup>192</sup> *Id.*

<sup>193</sup> See generally Sid Kirchheimer, *Paying the Debts of the Dead*, AARP BULLETIN (July 29, 2011); Arielle Pardes, *Debt Collectors Make a Killing on the Debts of the Dead*, VICE.COM (Feb. 10, 2016); Federal Trade Commission: Debts and Deceased Relatives (last visited Sept. 15, 2016),

proposal also seeks to clarify that collectors do not run afoul of the FDCPA when they speak to a decedent debtor's surviving spouse, parents if the decedent is a minor, and succession representatives or executors.<sup>194</sup> The only caveat to that is that the proposal will likely involve a thirty-day waiting period from the date of death, so as to take into account the grieving period before collection activities commence or continue.<sup>195</sup>

The CFPB also notes that this waiting-period approach seems to be the practice of many debt collectors across the country, and thereby adopts a prevailing (and desirable) norm.<sup>196</sup> There is some thought being given by the CFPB to making this a sixty-day waiting period instead.<sup>197</sup>

#### 4. Waiver

There are many instances in practice and under the FDCPA where the consumer may give his consent to being contacted at a certain location, in a certain manner, and at a certain time. The proposed regulations contemplate that the debtor may give such consent and thereby waive various restrictions on the collector.<sup>198</sup>

However, the CFPB is concerned with ensuring that when a debtor gives such consent and thereby makes such a waiver that he understands what he is doing.<sup>199</sup> To that end, the proposal considers whether a consent by the consumer as to one creditor should necessarily constitute a consent to a subsequent creditor who acquires the debt.<sup>200</sup> By requiring a separate consent for each collector, the proposal seeks to give the consumer a chance to reassess whether he should have given his consent in the first place.<sup>201</sup> Second, the CFPB contemplates requiring collectors to

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<https://www.consumer.ftc.gov/articles/0081-debts-and-deceased-relatives>  
("After a relative dies, the last thing grieving family members want are calls from debt collectors asking them to pay a loved one's debts. As a rule, those debts are paid from the deceased person's estate.")

<sup>194</sup> CFPB Report, *supra* note \_\_, at 32.

<sup>195</sup> *Id.* at 32.

<sup>196</sup> *Id.* at 33.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 34.

<sup>199</sup> *Id.*

<sup>200</sup> See *id.*

<sup>201</sup> *Id.*



clearly disclose to a consumer when they are effectively consenting to the waiver of a restriction and is considering whether collectors should also be required to memorialize the consumer's consent, such as in writing or through a recording of the consent.<sup>202</sup> Obviously this could become somewhat burdensome on debt collectors when it comes to disclosure, although it is likely that a system could be worked out by the individual collector to ensure that the collector's agent who makes contact has template language to read to the debtor. The notion of memorializing the consent, however, could be more cumbersome as it would increase the transaction cost of collecting the debt. And third, the proposal seeks to solicit possible ways that a consumer could revoke their consent (*in globo* or only to certain prior authorizations) after it has been given.<sup>203</sup>

#### *D. Regulating Debt Collection Administration*

Last but not least the CFPB proposes creating a number of rules relative to the administration of the debt collection market. In other words, the bureau believes that more oversight into the actual mechanics of debt sales might prove useful in preventing bad actor collectors from skirting the consumer-based rules described above.

##### 1. Market Transactions

The first piece of this framework deals with the buying and selling of debts between parties. One possibility that the CFPB is considering is whether to prohibit sales of debt to individuals that are subject to some judicial or administrative order prohibiting them from transacting in debt in the state where the consumer debtor resides or to individuals who do not have a license to carry on debt collect activities if such a license is required in the state where the debtor resides.<sup>204</sup> The CFPB notes that the purpose behind this rule would be to "keep debt out of the hands of those who cannot collect on debts lawfully."<sup>205</sup> It is possible that the two categories of prohibited buyers may be expanded or narrowed as the bureau receives feedback on the proposal.<sup>206</sup>

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<sup>202</sup> See *id.*

<sup>203</sup> *Id.* at 34-35.

<sup>204</sup> *Id.* at 35.

<sup>205</sup> *Id.*

<sup>206</sup> See *id.*

From a due diligence standpoint, it might be difficult for a debt seller to be certain that it is transferring the rights to an eligible party under current industry practices.<sup>207</sup> The original creditor may hold debt owed by literally hundreds of debtors located in many different jurisdictions. Before selling to a collector the creditor would have to ensure that there were no issues regarding licensure or administrative orders for the buyer in any of those jurisdictions in order not to run afoul of the rule. This might be dealt with through representations and warranties in the transfer documents, although that might give cold comfort to the original creditor—particularly if the penalty for transacting with a prohibited party is severe. The current proposal being circulated by the bureau does not stipulate the punishment for running afoul of the rule, other than presumably constituting a violation of the FDCPA.

As a final note with regard to administration, the CFPB is also considering a rule that would prohibit the transfer of debt to a party (and the acceptance by such party) if either knows or should know that the debt is no longer collectable, has been paid, has been discharged in bankruptcy court, or has been generated as a result of identity theft.<sup>208</sup> This too incorporates a higher degree of investigation than what appears to be going on in these types of transactions right now.<sup>209</sup> Granted, the rule only applies when either “knows or has a reason to know” but to be safe most parties will likely be hesitant to gamble and will therefore feel the need to conduct independent (and sometimes extensive) investigations—therefore driving up the cost to the industry.

## 2. Records Retention

As with the CFPB’s payday lending proposal, the proposal being floated for debt collectors also contemplates mandatory records retention.<sup>210</sup> Specifically, a collector would have to maintain documentation as to collection efforts for a period of three years from the last date of communication.<sup>211</sup> This would

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<sup>207</sup> See Jiménez, *supra* note \_\_; see also FTC Report, *supra* note \_\_.

<sup>208</sup> CFPB Report, *supra* note \_\_, at 35.

<sup>209</sup> Jiménez, *supra* note \_\_;

<sup>210</sup> See Odinet, *Payday Lending*, *supra* note \_\_.

<sup>211</sup> CFPB Report, *supra* note \_\_, at 35.

even include communications that occurred in the course and scope of litigation.<sup>212</sup> The definition of records, at least under this initial proposal, is quite extensive. It would include not only the validation notice and any related documents, but also all documents and information that the collector used or relied upon to collect the debt and any and all communications with the debtor (even some oral communications).<sup>213</sup>

The extent to which collectors already keep records of their interactions with consumer varies, so there is some value in bringing everyone in line with the same practice. On the other hand, the cost of doing business is bound to go up in light of the very expansive scope of what records must be maintained.

### III. POSSIBLE FUTURE ISSUES AND DEVELOPMENTS

Aside from the actual proposals themselves outlined above, there are a number of other considerations that can be raised by the regulations. Some of these areas are discussed below. Since rulemaking on debt collection practices is still early in the process, it remains to be seen if some or any of these issues will be addressed on the front-end, or whether they will be left to manifest in the implementation and enforcement process.

#### *A. Regulation of Original Creditors*

As noted above, the CFPB's proposal is intended to only apply to "debt collectors" as they are defined in the FDCPA. Notably, it does not apply to the original creditor or to those debt buyers who purchase debt that is not yet in default—whether that debt is still performing or whether payment is only delinquent. Initially the CFPB's proposal was supposed to include so-called "first party creditors" according to the notice of advance rule-making released back in November 2013.<sup>214</sup> However, when the

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<sup>212</sup> *Id.*

<sup>213</sup> *See id.*

<sup>214</sup> *See* Advance Notice of Proposed Rulemaking, Debt Collection (Regulation F), 78 Fed. Reg. 67847 (Nov. 12, 2013), <https://www.federalregister.gov/articles/2013/11/12/2013-26875/debt-collection-regulation-f> ("The Bureau can exercise the Dodd-Frank Act rulemaking authority above with regard to any "covered person or service provider." "Covered person" is defined as "(A) any person that engages in offering or providing a consumer financial product or service; and (B) any

actual proposal was released in July 2016 first party creditors were not included. Now, the CFPB has stated that it will seek to regulate original creditors and non-FDCPA “debt collectors” more broadly in a separate proposal to come at a later date.<sup>215</sup> The reason for the change of direction is uncertain, although likely due to the anticipation of serious opposition from large banks and financial institutions that would fall into the first party creditor box.

The CFPB draws its power to regulate non-FDCPA creditors from its broad authority under the Dodd-Frank Act to regulate “unfair, deceptive, or abusive acts or practices” by any person “offering a consumer financial service.”<sup>216</sup> What such a regulation will look like remains to be seen, although one might be able to draw some inferences from the current proposal for debt collectors. One question is whether the proposal for non-FDCPA collectors/creditors will be as stringent as the one outlined above. Assumedly some of the substantiation requirements will be less important, since the original creditor is in a better position to know of the nature and terms of the debt than a third party (whether a collector or a buyer). Nevertheless, the substance of the compliance process for original creditor substantiation might still impose a greater burden than that which is the current industry norm.

### *B. Indirect Regulation*

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affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person.” “Covered persons” for purposes of the Dodd-Frank Act includes first-party collectors and third-party collectors who are collecting or attempting to collect on debts that arise out of consumer credit transactions. “Service provider” is generally defined as “any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service.”) (citations omitted).

<sup>215</sup> Prepared Remarks of CFPB Director Richard Cordray on Field Hearing on Debt Collection (July 28, 2016), <http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-field-hearing-debt-collection/> (“Today we are considering proposals that would drastically overhaul the debt collection market. Our rules would apply to third-party debt collectors and to others covered by the Fair Debt Collection Practices Act, including many debt buyers. As part of our overhaul, we also plan to address first-party debt collectors soon, but on a separate track.”).

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Still with regard to original creditors, although the proposal above does not *directly* affect their operations and practices, there are a number of *indirect* effects. For instance, in the new rules for the transfer of information and data from the original creditor to the debt buyer there are a number of measures which will absolutely impose a compliance cost on original creditors. This will likely mean that the form and format of how consumer debts are conveyed to collectors and buyers will change or at least become more prescribed.

Further, part of the proposal seeks to limit the types of parties that can acquire debts. This will naturally create more due diligence costs on original creditors when it comes to selecting debt buyers. This may result in debt collection/buyer industry groups playing a larger part in certifying or otherwise validating the eligibility of certain parties, thereby giving original creditors a resource to use in seeking out appropriate counterparties.

### *C. Chain of Title Due Diligence*

Lastly, there are a number of places in the proposal that limit the action of downstream collectors based on the activities or knowledge of upstream parties. In other words, if Party A has engaged with the debtor in a certain way or has certain knowledge relative to the debtor or the debt then those facts alone can affect the rights of subsequent holders of the debt. These “flow-through” limitations along the chain of title are identified in various places above, such as when dealing with disputes raised by consumers or in waivers by consumers of certain communication methods. In many places the standard being proposed is “know or should have known”—a yardstick that can lead to a tremendous amount of fishing expeditions in litigation between consumers and collectors. How various holders of debt in a chain of transactions will handle these limitations—either by adjusting practices or ceasing to allow the debt to change hands frequently—will be an interesting aspect to follow.

## CONCLUSION

The fair and efficient collection of debt remains an important piece of ensuring consumers have access to credit markets. And, of course, the need for clear regulations, based on

research and thoughtful legal analysis, is equally important to ensuring that any such credit market operates in a way that is just and even-handed. Whether the CFPB's proposal hits the mark on both of these goals is debatable, but it is a step in the right direction. The proposal certainly provides heightened protections, at least generally, for consumers when it comes to their interactions with debt collectors. The proposal also has the potential to provide much needed clarification for debt collectors when it comes to complying with the FDCPA. Indeed, since no agency has until 2010 had the authority to issue rules for this federal statute, the result has been wide divergence and confusion as different courts have interpreted its provisions in different ways. The proposal also presents the opportunity to bring the regulation of debt collection, particularly when it comes to communication methods, into the twenty-first century by being more compatible with today's technologies.

On the other hand, the increased compliance cost might drive some players out of the market. Large debt collectors and buyers may indeed be able to absorb the cost of compliance through investment in monitoring, control systems, and protocols, but many small businesses could struggle. Creating a monopoly for only the largest players in the industry is a potential side-effect that policymakers and advocates should be cognizant of as the rule-making and eventual implementation process unfolds. Lastly, it will be most interesting to see whether these more onerous requirements on debt collectors results in a tightening of consumer credit. If debt collection becomes more difficult, and thus it is more difficult or expensive to off load defaulted debt to collectors, then this may have an effect on access to credit. Although, the imposition of the CFPB's ability-to-repay rule<sup>217</sup> has not yet shown to have decreased residential mortgage credit—but it may still be too early to tell.<sup>218</sup> One thing is for certain—judging from the

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<sup>217</sup> Michael B. Mierzewski, Christopher L. Allen, Jeremy W. Hochberg, & Kevin Hall, *CFPB Finalizes Ability-to-Repay and Qualified Mortgage Rule*, 130 *BANKING L.J.* 611 (2013); David Reiss, *Message in a Mortgage: What Dodd Frank's "Qualified Mortgage" Tells Us About Ourselves*, 31 *REV. BANKING & FIN. L.* 717 (2012).

<sup>218</sup> Board of Governors of the Federal Reserve: Neil Bhutta & Daniel Ringo, *Effects of the Ability to Repay and Qualified Mortgage Rules on the Mortgage Market* (Dec. 29, 2015) ("We find evidence that some market outcomes were affected by the new rules, but the estimated magnitudes of the responses are small.").

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REVIEW OF BANKING AND FINANCIAL LAW (forthcoming Spring 2017).

breath and depth of the proposal, the CFPB has the debt collection industry in its scope, and the bureau will likely seek to impose and enforce its ultimate scheme quite aggressively.