REGULATING DEBT COLLECTION

CHRISTOPHER K. ODINET*
ROEDERICK C. WHITE, SR.†

Abstract

Debt collection. It often starts as a late night call carrying threats of 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 either do not know their legal rights 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 by regulating how collectors interact with consumers and how debts are bought and sold. Consumer protection groups have lauded the proposal 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. Such provisions would have an adverse effect on individuals' ability to obtain the type of everyday credit that makes the wheels of the economy turn. This article explores the proposal, critiques provisions of the proposal that fall short or go too far, and considers future developments and issues that will arise from their enactment.

* Horatio C. Thompson Endowed Assistant Professor of Law, Southern University Law Center, Baton Rouge, LA; 2016–2018 Louisiana Bar Foundation Scholar-in-Residence; Real Property Scholar, American College of Real Estate Lawyers/American Bar Association Real Property, Trust & Estate Law Section.
† Vice Chancellor for Academic and Student Affairs and Charles Hatfield Endowed Professor of Law, Southern University Law Center, Baton Rouge, LA.

Table of Contents

I. Introduction

Debt collection has long been the source of much legal and political discussion in the United States.[1] From upholding the

[1] *See* Steve Fraser, *The Politics of Debt in America*, THE NATION (Jan. 29, 2013), https://www.thenation.com/article/politics-debt-america/ [https://perma.cc/W5XK-JD4M] (summarizing the politics of debt in the United States); RACHEL TERP & LAUREN BROWNE, CONSUMERS UNION & EAST BAY CMTY. LAW CTR., PAST DUE: WHY DEBT COLLECTION PRACTICES AND THE DEBT BUYING INDUSTRY NEED REFORM NOW (2011), http://consumersunion.org/pdf/Past_Due_

legitimate rights of creditors seeking payment, to protecting debtors in distress from abusive practices, debt collection is a major subject of conversation in consumer finance circles.[2] When creditors are able to collect debts efficiently and effectively, the cost of borrowing is reduced.[3] Cost reduction, in turn, benefits borrowers seeking access to consumer credit.[4] However, the original creditor often does not end

---

Report_2011.pdf [https://perma.cc/QA4L-M2W7] (discussing legal issues surrounding debt collection in the United States).

[2] *See generally, e.g.*, BILL ARNOLD, THE DEBT: COLLECTIONS MADE HUMAN (Philip Holsinger ed., 2012) (describing debt collection stories); TERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT (2010) (discussing the debt crisis in America); Brianna Gallo, *One Time to Sue: The Case for a Uniform Statute of Limitations for Consumers to Due Under the Fair Debt Collection Practices Act*, 84 FORDHAM L. REV. 1653 (2016) (discussing circuit split over application of the Fair Debt Collection Practices Act); Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41 (2015) (discussing lending and debt collecting practices); 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) (discussing regulation addressing civil investigation and enforcement of debt collection); Michael A. DeNiro, Note, *Hijacked Consent: Debt Collection and the Telephone Consumer Protection Act*, 100 CORNELL L. REV. 493 (2015) (explaining third-party debt collectors and potential abuses).

[3] *See* Clinton W. Francis, *Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740–1840*, 80 NW. U.L. REV. 807 (1986) ("Thus, the common-law litigation pricing mechanism not only allowed the vested interests to maximize profit by taxing pretrial litigation, but also conserved the limited supply of judicial energy by regulating the number of cases that proceeded to trial."); Todd Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, LOY. CONSUMER L.J. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2658326 [https://perma.cc/8Y42-GTGW] [hereinafter Zywicki, *Law and Economics*] (stating that strict regulation is likely to raise costs for all consumers); Todd Zywicki & Chad Reese, *The Unintended Consequences of CFPB Debt Reform*, MERCATUS CTR. (Nov. 18, 2015), https://www.mercatus.org/expert_commentary/unintended-consequences-cfpb-debt-reform [https://perma.cc/Q42J-W74W] [hereinafter Zywicki & Reese, *Unintended Consequences*].

[4] *See* Zywicki, *Law and Economics*, *supra* note 3 ("Although consumers who are already in default generally will benefit from greater restraints on collections, the benefit will come at the expense of other consumers who may end up paying more or obtaining less access to credit (including the borrower currently in default, who may want new credit in the future).").

up seeking to collect the debt once there is a default.[5] Instead, it is frequently a third party, entirely foreign to the borrower, which ends up seeking payment.[6] Indeed, a tremendous market has developed for companies that either purchase debt at a discounted rate from the original creditor and then collect the debt themselves, or enter into agreements with the original creditor to collect the debt on its behalf in exchange for a commission.[7] These companies are known as debt collectors.[8]

Under federal law, "debt collector" is defined as any individual who, through any form of interstate commerce, is in the principal business of collecting debts or regularly collects or attempts to collect debts owed.[9] While this definition may appear to include all creditors, the term does not include, *inter alia*, purchasers of debt that was not in default at the time of purchase, or creditors that originated the debt at issue.[10] Thus, a bank that makes a loan to a consumer and tries to collect on that loan upon default is not considered a debt collector.[11] Rather, when a bank, after the default, sells the loan to a company that seeks to enforce the obligation to pay, that company is legally considered a debt collector.[12] Similarly, a third party engaged by a

---

[5] *See* FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 5 (2009), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf [https://perma.cc/AP86-5NG3]; Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 390–91 (2007).

[6] *See* FED. TRADE COMM'N, *supra* note 5, at 5.

[7] *See* FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 11 (2013), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf [https://perma.cc/R474-6U3N]; JAKE HALPERN, BAD PAPER: CHASING DEBT FROM WALL STREET TO THE UNDERWORLD (2014) (writing about the enormous debt collection industry); ASS'N CREDIT & COLLECTION PROF. (Aug. 28, 2016), http://www.acainternational.org [http://perma.cc/V344-H9QC] (showing advertisement for the Association of Credit and Collection Professionals).

[8] *See* Jiménez, *supra,* note 2 (describing practices of debt collectors).

[9] 15 U.S.C. § 1692a(6) (2010).

[10] § 1692a(6)(F).

[11] *See id.*

[12] *See id.*

creditor to collect the debt on the bank's behalf is considered a debt collector.[13]

While some argue that debt collectors are necessary to maintain access to consumer credit,[14] others assert that the practices that pervade the debt collection industry invite frequent abuse and injustice.[15] On July 28, 2016, the Consumer Financial Protection Bureau (CFPB) released a proposal aimed at issuing regulations under the Fair Debt Collection Practices Act (FDCPA)[16] and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank).[17] In essence, the CFPB seeks to give a complete overhaul to

---

[13] *See id.*

[14] *See, e.g.,* Christina Digani, *Debt Collectors Respond to Your Top Complaints*, ABC NEWS (Mar. 26, 2014), http://abcnews.go.com/Business/debt-collectors-respond-top-complaints/story?id=23055055 [http://perma.cc/S239-H3FH].

[15] *See* Sam Glover, *Has the Flood of Debt Collection Lawsuits Swept Away Minnesotans' Due Process Rights?*, 35 WM. MITCHELL L. REV. 1116 (2009) ("Debt collectors in Minnesota take advantage of favorable rules and laws, rely on the fact that many defendants often do not understand their rights, and thus collect millions from consumers every year."); Mary Spector, *Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 258, 293 (2011); Emanuel J. Turnbull, *Account Stated Resurrected: The Fiction of Implied Assent in Consumer Debt Collection*, 38 VT. L. REV. 339, 340 (2013) ("The high volume of claims and the abuse of consumers that accompanies them led the Federal Trade Commission (FTC) to declare the debt collection system 'broken,' providing insufficient protection for consumers."); Editorial: *Bad Debt Collectors and Their Prey*, N.Y. TIMES (Nov. 17, 2015) https://www.nytimes.com/2015/11/17/opinion/bad-debt-collectors-and-their-prey.html?_r=0 [https://perma.cc/JL3X-WA5B] ("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 generally* Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355 (2012); Jiménez, *supra* note 2 (describing abusive debt collecting practices); Mann, *supra* note 5 (describing credit card debt collection practices subject to potential abuse).

[16] 15 U.S.C. §§ 1692–1692p (2010).

[17] CONSUMER FIN. PROT. BUREAU, SMALL BUS. REVIEW PANEL FOR DEBT COLLECTOR & DEBT BUYER RULEMAKING, OUTLINE OF PROPOSALS UNDER CONSIDERATION AND ALTERNATIVES CONSIDERED (2016), https://s3.amazonaws.com/files.

the way debt collection is regulated in the United States, by clarifying existing rules and imposing new rules that further restrict the ways the industry can interact with consumer debtors and transact in debt portfolios.[18] This article gives an overview of the proposed regulations, examines the regulations' impact on those operating in the American consumer credit market, and discusses possible future issues and developments that may result.

II. Debt Collection/Buying in the United States

Understanding the structure and operation of the debt collection industry in the United States is a prerequisite to appreciating the significance of the CFPB's proposal. While most consumer debtors go about their days paying bills and making purchases on credit, there is an enormous substructure that underpins these transactions.[19] This section provides an overview of the debt collection industry and debt buying, and discusses some of the contemporary critiques of the system that led the CFPB to promulgate new rules to govern this sector.

A. Overview of the Industry

Consumers and creditors enter into transactions in which consumers receive funds to make purchases.[20] In exchange for the

---

consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf [https://perma.cc/9BBU-5YZA] [hereinafter CFPB Proposal]; *see* Yuka Hayashi, *CFPB Unveils Overhaul of Debt Collection*, WALL ST. J. (July 28, 2016), http://www.wsj.com/articles/cfpb-unveils-overhaul-of-debt-collection-1469678460 [https://perma.cc/7VJC-ZR4Y]. The reason that the CFPB released only a proposal, rather than actual proposed rules, is due to the agency's obligations under the little known Small Business Regulatory Enforcement Act (SBREFA). *See* 5 U.S.C. § 609(b) (2016). Prior to engaging in the formalized rulemaking process, SBREFA and portions of Dodd-Frank require that if the CFPB intends to enact rules that will have a significant economic impact on certain small business, then the agency must first consult with a panel representing these small debt collection/debt buyer companies early in the process. 5 U.S.C. § 603(d) (2016)); *see* CFPB Proposal, *supra* note 17, at 5. The report issued in July is meant to provide a guide to the panelists as they engage in this consultative process. CFPB Proposal, *supra* note 17, at 5.

[18] *See* CFPB Proposal, *supra* note 17, at 4.

[19] *See generally* Jiménez, *supra* note 2.

[20] FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 11 (2013), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf [https://

funds, the consumer will repay the amount borrowed, plus interest, to the creditor over a set period of time.[21] The law provides a number of mechanisms that allow the creditor to collect on a debt if the consumer refuses or is unable to pay.[22] Arguably, if there is an efficient and effective way for creditors to collect debts, then creditors will be more likely to extend credit to those seeking it and will do so on terms more favorable to consumers.[23] In turn, consumers with increased access to credit make more purchases, thus improving the economy.[24]

In the simplest debt-collection model, the creditor that extends credit is also the party that enforces collection against the debtor.[25] Creditors, however, often hire a third party with expertise in collection to do the collection work for them.[26] Creditors hire third-party debt collectors because creditors often lack the skills and infrastructure to collect the debt in an efficient manner.[27] Third-party 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.[28]

In a second debt-collection scenario, the original creditor does not collect the debt itself or through a third-party debt collector,

---

perma.cc/G842-BVCH] [hereinafter FTC Report].

[21] *Id.*

[22] *See id.*

[23] *See generally* Tullio Jappelli et al., *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) (suggesting that judicial efficiency is necessary to keep interest rates down).

[24] *See Access to Credit Remains a Challenge for Entrepreneurs Despite Improving Economy,* KAUFFMAN FOUND. (Feb. 24, 2015), http://www.kauffman.org/newsroom/2015/02/access-to-credit-remains-a-challenge-for-entrepreneurs-despite-improving-economy [https://perma.cc/L47P-QHUZ]; BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2014 25–29 (2015), https://www.federalreserve.gov/econresdata/2014-report-economic-well-being-us-households-201505.pdf [https://perma.cc/42V7-7NGR].

[25] FTC Report, *supra* note 20, at 11.

[26] *See id.*

[27] *See id.*

[28] *See id.* ("The costs of acquiring such expertise or infrastructure may be impractical or inefficient for small creditors, but even large creditors may find third-party debt collection to be cost-efficient.").

but rather sells the debt to someone else—namely, a debt buyer.[29] The debt buyer then either collects the debt or engages a third-party debt collector to collect the debt on the debt buyer's behalf.[30] This practice of selling debts has its origins in the savings and loan crisis of the 1980s when the federal government created the Resolution Trust Company (RTC) to take control of and liquidate a number of failed financial institutions.[31] The RTC sold off the debt of these failed institutions to third parties.[32] The transactions proved to be so successful for the debt buyers that a market soon developed for purchasing consumer debt from various types of creditors.[33] Today, it is not unusual for a single portfolio of debt to change hands multiple times.[34] Many banks and originating creditors use third-party collectors immediately after a default and, when collection is unsuccessful, sell the debt to a third party altogether.[35] 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.[36] Accordingly, after the requisite period of time has expired, although the bank can continue to try to collect on the debt, it cannot continue to account for that debt on its books for purposes of meeting federal bank capital requirements.[37]

---

[29] *Id.*
[30] *Id.*
[31] *See id.* at 12.
[32] *Id.*; *see also* Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—in Lawsuits*, N.Y. TIMES (Nov. 1, 2010), https://www.wsj.com/articles/SB10001424052702304510704575562212919179410 [https://perma.cc/324H-TBE4].
[33] *See* FTC Report, *supra* note 20, at 12.
[34] *See generally* LISA STIFLER & LESLIE PARRISH, CTR. FOR RESPONSIBLE LENDING, DEBT COLLECTION & DEBT BUYING (2014), http://www.responsiblelending.org/state-of-lending/reports/11-Debt-Collection.pdf [https://perma.cc/HE7J-P3RM] (describing the process of selling debts and the difficulties consumers may face when dealing with the practice).
[35] FTC Report, *supra* note 20, at 12.
[36] *Id.* at 13 (citing Uniform Retail Credit Classification and Account Management Policy, 65 Fed. Reg. 36,903 (June 12, 2000)) ("Banks and other depository institutions specifically must charge off installment loan debts by the end of the month in which the debts become 120 days past due, credit card loan debts by the end of the month in which they become 180 days past due, and debts in in bankruptcy within 60 days of the bank's receipt of notification that consumers have filed for bankruptcy.")
[37] *Id.*

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.[38] These "charge-off" requirements create another powerful incentive for banks to sell credit card debt on a routine basis upon payment delinquency.[39]

While the terms debt collector and debt buyer are technically different, they have a common legal meaning. The FDCPA's definition of debt collector captures more than just those third-party firms that collect consumer debts on behalf of their clients.[40] It also captures those firms that purchase defaulted consumer debt from the original creditor.[41] 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.[42] Accordingly, this article uses the term debt collector to mean both true debt collection agencies as well as those firms that purchase debt and collect on their own behalf.[43]

The debt-buying and -collecting system is based on achieving economies.[44] For example, a creditor may be owed a total of $1,000,000 from a number of different consumer debtors, but may lack the resources to collect it efficiently.[45] As a result, the creditor may then sell the debt to a debt buyer at a discount (for instance, at $0.04 on the

---

[38] *Id.*

[39] *See id.* ("In a 2009 study of credit card debt collection, the Government Accountability Office found that five of the six largest credit card issuers sold at least some of their delinquent credit card debt to debt buyers."); Mark D. Erickson, *When Selling Charged-Off Loans and Leases Makes Smart Sense*, ABF JOURNAL (July/Aug. 2011), http://www.abfjournal.com/articles/when-selling-charged-off-loans-and-leases-makes-smart-sense/ [https://perma.cc/43DD-ZBVP] ("[B]anks and finance companies are selling more of their non-performing assets. In fact, some of the largest banks and credit card issuers now sell a majority of certain charged-off debt portfolios to debt buyers.").

[40] *See* 15 U.S.C. § 1692a(6) (2010).

[41] *Id.*

[42] *See id.*

[43] 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* § 1692a(6)(F).

[44] FTC Report, *supra* note 20, at 11.

[45] *Id.*

dollar).[46] The creditor will walk away with $40,000. While $40,000 is certainly less than $1,000,000, the sale of the debt may nevertheless put the creditor in a better position than it would have been in had the creditor sought to collect the debt, incurring substantial expenses in attorneys' fees, court costs, and human capital.[47] Now, the debt buyer, which has the requisite expertise, can seek to collect on the $1,000,000.[48] Even if the debt buyer is, in the end, only able to collect $700,000 from the consumers, it will still make a profit of $660,000. Thus, the creditor and the debt buyer walk away from the transaction with money,[49] while losses are diminished and credit continues to flow into the consumers' pockets at lower prices.[50]

To understand the impact of the CFPB's proposed regulations, it is helpful to have a snapshot of the debt collection/buying industry as a whole. According to a 2016 report, about 6,000 firms in the United States were engaged in the primary business of collecting payments for claims or debt collection.[51] Of these firms, approximately 95 percent have annual receipts of $15 million or less and are consequently considered small businesses under the FDCPA.[52] On the other hand, in the debt-buyer field, although there are many firms that buy debt, large debt buyers purchase the most debt.[53] Specifically, a 2008 Federal Trade Commission study revealed that approximately nine debt buyers

---

[46] Jiménez, *supra* note 2, at n.4.

[47] *See* FTC Report *supra* note 20, at 12 ("Ongoing cooperation between creditors and third-party debt collectors also may result in an efficient and effective collection process that leads to greater returns for creditors than selling the debts.").

[48] *See id.* at 11.

[49] *Id.*

[50] *Id.*

[51] CONSUMER FIN. PROTECTION BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2016 8 (2016), http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf [https://perma.cc/C3HM-2EA6]; ERNST & YOUNG, THE IMPACT OF THIRD-PARTY DEBT COLLECTION ON THE U.S. NATIONAL AND STATE ECONOMIES IN 2013, i–ii (2014), http://www.wacollectors.org/Media/Default/PDFs/_images_21594_impacteconomies2014.pdf [https://perma.cc/V4NS-6RE4].

[52] *Id.*

[53] FTC Report, *supra* note 20, at 14.

purchased over 76 percent of all consumer debt sold that year.[54] There are approximately 330 debt buyers in the United States.[55]

Debt collection is big business and often brings in big money.[56] 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.[57] 71 percent of the debt collected was more than ninety days past due, with 38 percent of the overall debt consisting of healthcare-related debt.[58] Student loan debt was a runner-up to healthcare-related debt, and credit card debt comprised about 10 percent of the overall debt.[59] In 2013, debt collection agencies employed over 136,100 individuals,[60] and collectively paid about $724 million in federal taxes, $400 million in state taxes, and $287 million in local taxes.[61]

B. Contemporary Issues

Over the course of the past several years the CFPB has received a tremendous number of complaints regarding debt collection.[62] A number of government, advocacy, and consumer watchdog groups have echoed those complaints.[63] Since it began operating in 2011, the

---

[54] *See id.*

[55] *See* CFPB Proposal, *supra* note 17, at 36.othing inse is mandatory and,

[56] *See* ERNST & YOUNG, *supra* note 51, at i–ii. othing inse is mandatory and,

[57] *Id.* othing inse is mandatory and,

[58] *Id.*

[59] *See id.*

[60] *Id*. at i.

[61] *Id*.

[62] *See* CFPB Proposal, *supra* note 17, at 1.

[63] *See generally, e.g.*, CAROLINE RATCLIFFE ET AL., DELINQUENT DEBT IN AMERICA (2014), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/413191-Delinquent-Debt-in-America.PDF [https://perma.cc/4X8B-G26U]; STIFLER & PARRISH, *supra* note 34; Neil L. Sobol, *Protecting Consumers From Zombie-Debt Collectors*, 44 N.M. L. REV. 327 (2014); Blake Ellis & Melanie Hicken, *The Secret World of Government Debt Collection*, CNNMONEY (Feb. 17, 2015), http://money.cnn.com/interactive/pf/debt-collector/government-agencies/ [https://perma.cc/F95B-24RF]; Jake Halpern, *Paper Boys: Inside the Dark, Labyrinthine, and Extremely Lucrative World of Consumer Debt Collection*, N.Y. TIMES (Aug. 15, 2014), https://www.nytimes.com/interactive/2014/08/15/magazine/bad-paper-debt-collector.html [https://perma.cc/A95H-CJDS]; Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*,

CFPB has filed twenty-five debt-collection lawsuits and, in connection with those lawsuits, has sought hundreds of millions of dollars in restitution to consumers and significant civil penalties.[64] At the same time, the Federal Trade Commission (FTC) launched forty cases involving unfair or deceptive practices against debt collection firms.[65] Indeed, the FTC reports that it has received more complaints regarding consumer debt collection than any other matter.[66] From roughly 2011 to 2016, consumers individually filed over 50,000 lawsuits in federal court against debt collectors on the basis of FDCA violations.[67]

In the 200,000 complaints regarding debt collection the CFPB received in 2015, consumers most commonly complained of attempts to collect debts that the consumers did not owe.[68] A number of complaints dealt with attempts to collect a debt for which claims to the indebtedness were not substantiated by any reasonable documentation.[69] Accordingly, the CFBP is concerned that consumers are not given information adequate for them to discern whether the supposed debt is theirs.[70] Furthermore, consumers may not understand the information that is provided throughout the debt collection process.[71] Many complaints regarded debt collectors harassing consumers and taking or threatening to take illegal actions.[72] Some alleged that debt

---

PROPUBLICA (Oct. 8, 2015), https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods [https://perma.cc/57AB-F8SU]; Nicole F. Munro, *Our Mini-Theme: Debt Collection Issues Reign in the Brace New World of Consumer Finance Services*, AM. BAR ASS'N (2014), http://www.americanbar.org/publications/blt/2014/04/intro.html [https://perma.cc/QUM8-DWFS].

[64] CFPB Proposal, *supra* note 17, at 1.

[65] *Id.*

[66] *See id.* at 2.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 5–18 (discussing information integrity and related concerns); *see also* Cody Vitello, *Debt Collectors Behaving Badly: A Guide to Consumer Rights*, 23 LOY. CONSUMER L. REV. 252, 264 (2010) ("[D]ebts are often sold from one collector to the next, and the collector rarely keeps critical information such as proof of the original debt . . . .").

[70] CFPB Proposal, *supra* note 17, at 6.

[71] *Id.* at 18–22.

[72] *See id.* at 6–15 (discussing proposals to prohibit unsubstantiated claims of indebtedness to reduce the practice of debt collectors using poor-quality information resulting in a variety of harms).

collectors shared personal debt information with third parties and a failed to provide required information and notices.[73] Others dealt with debt collectors' attempts to enforce debt that are barred by the running of the statute of limitations.[74] Finally, some complaints concerned the manner in which collectors communicate with consumers when collecting the debt.[75]

In response to these complaints, as well as related research and litigation experiences, 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.[76] The following section describes and discusses these proposals.

III. Summary and Critique of the CFPB's Proposal

The CFPB's proposal takes a two-pronged approach. One approach can be viewed as addressing the horizontal aspects of debt collection (between buyers and sellers of debt), and the other as speaking to the vertical aspects of debt collection (between debt collectors and consumers).[77] The proposal 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.[78] Some of the rules reflect prevailing industry practices, while other rules seek to adopt the current practices of a few firms as the now required norm for all firms.[79] In doing so, the proposal imposes some new and sometimes substantial requirements on debt collectors.[80] 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.[81]

---

[73] *Id.* at 2.
[74] *See id.* at 19. *See generally* Charles V. Gall, *Proceeding with Caution: Collecting Time-Barred Debts*, 56 CONSUMER FIN. L.Q. REP. 244 (2002).
[75] *See* CFPB Proposal, *supra* note 17, at 23–34.
[76] *See id.* at 6.
[77] *See generally* CFPB Proposal, *supra* note 17 (proposing rules to regulate consumer-collector and buyer-seller relationships).
[78] *See id.* at 6.
[79] *Id.* at 9.
[80] *Id.*
[81] *See id.* at 36 ("The Bureau estimates that there are approximately 330

The following section provides an overview of the CFPB's proposal, and notes various interpretation and enforcement issues that may arise. Additionally, the next section examines certain rules that the CFPB is considering in addition to those it affirmatively intends to enforce, as well as criticism of the CFPB's policy approaches.[82]

A. Addressing the Integrity of Consumer Information

The CFPB reports that the most common complaint it has received relating to debt collection deals with bad consumer information.[83] Such allegations often involve a consumer stating that a collector is attempting to enforce credit rights against the wrong borrower or for the wrong amount.[84] 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.[85] Often the information that is provided to the debt collector is incomplete or confusing.[86] Because some original creditors keep better records than others, the quality of the data often diminishes through each transfer of the debt.[87] This issue is particularly relevant

---

debt buyers in the United States, and that a substantial majority of these are small entities."); Jiménez, *supra* note 2, at 118 ("Changing [debt collection] practices will no doubt involve costs. But those costs will be offset by the increased capability of debt buyers to collect legitimate debts and the right amounts from the right consumers."). othing inse is mandatory and,

[82] CFPB Proposal, *supra* note 17, at 8.

[83] *See* CFPB Proposal, *supra* note 17, at 5–6.

[84] *Id.*

[85] *Id.* at 6 ("[T]here are often substantial deficiencies in the quality and quantity of information collectors receive at placement or sale of the debt that frequently result in collectors contacting the wrong consumers, for the wrong amount, or for debts that the collector is not entitled to collect.").

[86] For an excellent discussion of the debt buying and selling process, see Jiménez, *supra* note 2, at 80.

[87] *See* Jeff Horwitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, AM. BANKER (Mar. 30, 2012), https://www.americanbanker.com/news/bank-of-america-sold-card-debts-to-collectors-despite-faulty-records [https://perma.cc/67AG-J8E8] (discussing disputes arising out of the sale of debts accompanying allegedly unreliable records from Bank of America and JPMorgan Chase).

in instances when the debt is passed to many debt collectors in a long chain of title.[88]

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.[89] Thus, the first and perhaps central part of the proposed regulations deals with creating an environment for better information integrity, for both consumers and debt collectors.[90] The remedy for these problems comes in three parts.

1. Reasonable Debt Substantiation

The first remedy for informational deficiencies requires that the debt collector have a reasonable foundation upon which to base the collection of the debt.[91] One might think of this as an equivalent to the "ability-to-repay" requirement already in place for residential mortgage originators[92] and being considered for small-value lenders.[93]

---

[88] CFPB Proposal, *supra* note 17 at 7.

[89] *Id.* at 15 ("The current notices also may not clearly inform consumers of their FDCPA rights and how to exercise them.").

[90] *See id.* at 6–7.

[91] *Id.* at 6. othing inse is mandatory and,

[92] *See* Christopher K. Odinet, *The Unfinished Business of Dodd-Frank: Reforming the Mortgage Contract*, 69 SMU L. REV. 653, 672 (2016) (describing the ability-to-repay analysis that is required for all mortgage originators and which calls for a consideration of underwriting factors that include current or reasonably expected income or assets; current employment status; monthly mortgage payment for this loan; monthly payment on any simultaneous loans secured by the same property; monthly payments for property taxes, insurance, and related costs; debts, alimony, and child-support obligations; monthly debt-to-income ratio or residual income; and credit history); 15 U.S.C. *§ 1639*(c) (2010); 12 C.F.R. § 1026.43(c)(2).

[93] *See generally* 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, 269 (2015) (discussing the CFPB's proposed "Ability-to-Repay" regulatory framework for small-value lenders, which includes looking to the borrower's income basis (verified through bank statements, paystubs, and the like) and the borrower's existing major financial obligations (like mortgage and insurance payments or rent), as well as other frequently occurring expenses like medical costs and utility payments).

Basically, this proposal requires the collector to substantiate its claim that the debt is due before proceeding against the debtor.[94] At issue is what sort of substantiation process(es) should occur. As the CFPB acknowledges, different types of debt call for different methods of substantiation,[95] particularly when the information obtained by the collector is imperfect.[96] Accordingly, the CFPB is looking to identify "warning signs" that collectors should look for when substantiating its claims.[97] The CFPB is considering warning signs that include instances where: (1) the debt described is not in a clearly understandable form; (2) information about the debt is presented in a way that is conflicting or improbable; (3) a portion of the debt in the portfolio is absent or contains questionable information when compared with similar accounts; or (4) a material portion of the debt comprising the portfolio consists of unresolved or disputed debt.[98]If a collector encounters any of these warning signs during their review of the portfolio, then it would have to further investigate the debt portfolio to obtain better information.[99] The CFPB notes that the "standard would not require collectors to confirm all of the information they receive, but it also would not permit collectors to ignore potential problems."[100]

If the collector was able to obtain supplemental information and/or procure representations and support from the original creditors, it could then dismiss some warning signs.[101] Thus, as long as there are no warning signs and the debt seller makes representations regarding accuracy to the debt collector, it is not necessary for the debtor collector to review the documentation underlying the entire portfolio in order to meet the substantiation requirement.[102]

However, should this aspect of the proposal become law, the willingness of debt sellers—particularly collectors/buyers downstream of the original creditor—to make affirmative representations of accuracy may pose an issue.[103] A recent study by Professor Dalié

[94] *See* CFPB Proposal, *supra* note 17, at 7–8.
[95] *See id.* at 7.
[96] *See id.*
[97] *Id.* at 8.
[98] *Id.* at 8–9.
[99] *Id.* at 9.
[100] *Id.*
[101] *See id.*
[102] *See id.*
[103] *See id.* at 9 n.17.

Jiménez notes that many debt sellers desire to transfer the debt while making few or no representations as to the accuracy of the debt and the title to the debt, or as to the legality of the debt.[104] Rather, debt sellers prefer to have the debt buyer engage in its own due diligence and let the buyer, as a sophisticated party, beware.[105] As such, this aspect of the proposal might require significant changes in the debt collectors' internal systems and increase their costs.[106] On one hand, such changes could ultimately harm the debt collection industry by causing original creditors to shift to collecting their own debts.[107] On the other hand, it may just cause all debt collectors to track the required data through their existing management systems.[108] Since information from the creditor will be important to the debt collector's ability to substantiate claims in the face of warning signs, debt collectors might negotiate terms of engagement and warranties to reflect substantiation needs.[109]

Another aspect of the warning sign analysis involves those signs that appear *after* collection efforts have commenced.[110] Rather than missing information in the portfolio that was acquired, these post-initial review warning signs include: (1) consumer disputes regarding an individual debt; (2) inability to produce documentation regarding the debt once a dispute has been commenced; or (3) a large quantity of disputes with regard to the debt in a single portfolio, compared to disputed debt percentages in similar portfolios.[111] In this way, collectors would be obligated to continue to seek and obtain additional documentation throughout the collection process should any warning signs arise.[112]

The disputes contemplated by this aspect of the proposal arise when consumers push back when confronted by debt collectors by

---

[104] For a database of consumer debt purchase agreements, see *Consumer Debt Purchase and Sale Agreements*, DALIÉ JIMÉNEZ, http://www.daliejimenez.com [https://perma.cc/P43Z-P3ZQ]; *see also* Jiménez, *supra* note, 2, at 55–63.
[105] *See* Jiménez, *supra* note 2, at 87 (discussing the use of reliance waivers, specific disclaimers of representations and warranties, and "big boy" clauses in debt purchase agreements).
[106] CFPB Proposal, *supra* note 17, at 48.
[107] *See id.*
[108] *See id.* at 53.
[109] *See id.* at 54–55.
[110] *Id.* at 10.
[111] *Id.* at 9.
[112] *Id.*

challenging the validity of the debt.[113] The CFPB views this consumer action as critical to its proposed regulatory framework.[114] For a debtor's communication to qualify as a dispute under the proposed rule, no magic words would be required and any question or challenge as to the validity of the debt would suffice.[115] The proposal breaks disputes into the following categories: generic disputes, wrong amount disputes, wrong consumer disputes, and wrong collector disputes.[116] Consumers could indicate the dispute type through their oral or written notices of dispute, or validation notices.[117] The collector would then be required to produce documentation to refute the claim and send that information to the consumer.[118]

Thus, if the consumer disputes the debt, the collector would have to produce documentation that reasonably substantiates the amount the collector is claiming before it could proceed with collection efforts.[119] Should the collector be unable to reasonably substantiate its claim when faced with a consumer dispute, the collector would be barred from proceeding.[120] If that collector failed to substantiate the claim, and sold the debt to a subsequent collector, that collector would similarly be required to substantiate a claim before attempting to collect on the previously disputed debt.[121] In effect, any collector's ability to continue its collection efforts would hinge on its ability to make yet another reasonable substantiation as to the validity of the debt with respect to the disputed item.[122]

---

[113] *See id.* at 10.
[114] *See id*. ("The Bureau believes that if a consumer disputes a debt, orally or in writing, by asserting that he or she does not owe the debt or the amount being claimed, then that dispute calls into question the collector's basis for claiming that the collector is pursuing the right person or the right amount.").
[115] *Id.* at 10–11.
[116] *Id.* at app. D. othing inse is mandatory and,
[117] *Id.*; *see infra* note 124 and accompanying text (discussing validation notices, which a creditor must send to a debtor to provide information relating to the verification of the debt when the debtor sends a written dispute notice to the creditor within thirty days of receiving notice of the debt).
[118] *See id.*
[119] *Id.* at 10.
[120] *See id.* at 10 (stating that the proposal "would prohibit debt collectors from making unsubstantiated claims of indebtedness following a dispute").
[121] *Id.*
[122] *See id.*

The CFPB is assessing how to limit communications between collectors and debtors during periods of dispute solely to communications aimed at requesting clarification of a dispute submitted by the debtor.[123] Under current FDCPA law, if a debtor sends a written dispute to the creditor within thirty days of having received notice of the debt, then the collector must provide a validation notice, which includes information relating to the verification of the debt to the debtor.[124] Unfortunately, the contours of what constitutes sufficient validation are ambiguous.[125] Different jurisdictions have adopted various interpretations of the validation requirement.[126] Thus,

---

[123] *Id.*

[124] 15 U.S.C. § 1692g(b) (2010); CFPB Proposal, *supra* note 17, at 15.

[125] CFPB Proposal, *supra* note 17, at 11 (stating that despite FDCPA requirements that a collector provide the consumer a copy of the verification after a consumer has submitted a written dispute, "the FDCPA provides no explanation of these requirements").

[126] *Compare* Chaudhry v. Gallerizzo, 174 F.3d 394 (4th Cir. 1999) (holding that verification only requires confirmation that the debt claimed is the amount actually owed and no great amount of detail is required), *and* Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991) (finding that printouts listing the amount of consumer's debt, services for which the consumer was being charged, and the dates of debt incurrence provided the consumer adequate verification), *and* Homeowners Ass'n of Victoria Woods, III, Inc. v. Incarnato, 778 N.Y.S.2d 811 (App. Div. 2004) (opining that confirming the amount demanded suffices as debt verification), *and* Spears v. Brennan, 745 N.E.2d 862 (Ind. Ct. App. 2001), *with* Thomas v. Trott & Trott PC, No. 10–13775, 2011 WL 576666 (E.D. Mich. Feb. 9, 2011) (holding that the debtor forwarded sufficient information upon the consumer's request, when the debtor provided the reasons it believed the loan was correct, contact information of individuals who could provide consumers assistance, and an explanation for information it was unable to provide), *and* Mabry v. Ameriquest Mortg. Co., No. 09-12154, 2010 WL 1052353 (E.D. Mich. Feb. 24, 2010) (noting that a creditor needs only to provide the minimum amount of information statutorily required and has no duty to forward more detailed information regarding the debt), *and* Dunham v. Portfolio Recovery Assocs., LLC, No. 4:09CV00086 JLH, 2009 WL 3784236 (E.D. Ark. Nov. 10, 2009) (finding that a creditor must provide the debtor with more than a mere statement that a debt is owed, and must provide additional information such as when the debt was incurred and to whom the debt is owed), *and* Rudek v. Frederick J. Hanna & Assocs., P.C., No. 1:08–CV–288, 2009 WL 385804 (E.D. Tenn. Feb. 17, 2009) (finding verification merely requires confirmation of basic information, such as how much debt is being claimed), *and* Burgi v. Messerli

the CFPB's proposal specifically delineates the types of information a collector could provide that would constitute sufficient validation, again varying based on the nature of the dispute.[127]

The proposal also considers requiring collectors that receive two written notices of dispute from the same debtor to notify the consumer and believe the notices to be duplicative, to inform consumers of the duplicative notices.[128] Currently, a duplicative dispute notice does not require a response.[129] Also, the proposals may require debt collectors to provide debtors standard disclosure language to apprise the debtors of their right to dispute the debt in writing, and thus be entitled to receive a written validation notice.[130] Most consumers do not know their rights under the FDCPA and are therefore unable to exercise them.[131] Such provisions, while perhaps placing a greater burden on debt collectors, could produce a positive overall result by ensuring that consumers are apprised of their right to have the debt validated.[132]

Additionally, the CFPB proposal requires that any debt collector, prior to commencing litigation against a debtor, would have to review specific types of documentation to ensure that it had reasonable support for the claims being brought against the debtor.[133] Many consumers currently fail to defend themselves in litigation, resulting in a default judgment—sometimes against the wrong defendant and sometimes when the collector has no legal right to

---

& Kramer PA, Civ. No. 08-419 (PJS/JJK), 2008 WL 4181732 (D. Minn. Sept. 5, 2008) (finding that collectors must provide the nature, status, and balance of the debt to consumers). othing inse is mandatory and,

[127] *See* CFPB Proposal, *supra* note 17, at app. D.

[128] *See id.* at 11 ("If a collector decided against responding to a dispute . . . because it determined that the dispute was duplicative of a prior dispute, the proposal under consideration would require the collector to notify the consumer of this fact.").

[129] *See generally id.*

[130] *See id.*, at app. F; *infra* notes 151–58 and accompanying text (discussing disclosures required under the CFPB's proposed rules).

[131] *See generally* Press Release, Consumer Fed'n of Am., Consumers Very Confused About Their Rights with Telemarketers (Mar. 6, 2013), http://www.consumerfed.org/pdfs/Consumer_Telemarketing_Rights.pdf [https://perma.cc/WD4J-4YLX].

[132] *See id.* at 60–61.

[133] CFPB Proposal, *supra* note 17, at 12.

collect.[134] Therefore, the bureau believes that placing a greater burden on debt collectors when filing a lawsuit would help alleviate undue burdens on consumers.[135]

2. Better Transmission of Consumer Data

The second part of the CFPB's proposal relating to the integrity of consumer information deals with the transmission of consumer debt data from creditor to creditor.[136] Information often is lost or insufficiently presented when documentation is handed over from the original creditor to the debt collector or from debt collector to a subsequent debtor collector.[137] Poor information transfer can subject consumers to abuse during the collection process.[138] To address this problem, the CFPB proposes that before any collection activity can

[134] *Id.* at 12, 18 (stating that consumers' inability to defend themselves in litigation may result in debt collectors "obtain[ing] judgments against the wrong consumer, for the wrong amount, or where the collector had no legal right to collect," and that an estimated 60–90 percent "of debt collection lawsuits result in default judgments").

[135] *See id.* at 12.

[136] *See id.* at 13 ("[T]he subsequent placement or sale of debt to new debt collectors may exacerbate informational problems because information the consumer provided to the prior collector may not be transferred along with the debt.").

[137] *See generally* Dan Trevas, *Court Resolves How Federal Debt Collection and State Consumer Sales Laws Impact Debt-Buyers and Collection Lawyers*, OHIO CT. NEWS (Jun. 16, 2016), http://www.courtnewsohio.gov/cases/2016/sco/0616/130118.asp#.WIVHO2QrJcw [https://perma.cc/Q48V-VRNQ] (summarizing a case arising from an insufficient transfer of the consumer's credit card agreement terms from the original debtor to the new debtor); PETER HOLLANDS, FED. RESERVE BANK OF BOS., DEBT-BUYER LAWSUITS AND INACCURATE DATA 20 (2014), https://www.bostonfed.org/publications/communities-and-banking/2014/spring/debt-buyer-lawsuits-and-inaccurate-data.aspx [https://perma.cc/S4NN-YDS6] (discussing many of the issues pervasive in debt selling and buying, including insufficient data being transferred to the debt buyer).

[138] *See* CLAUDIA WILNER & NASOAN SHEFTEL-GOMES, URBAN JUSTICE CTR., DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS (2010), http://www.mfy.org/wp-content/uploads/reports/DEBT-DECEPTION.pdf [https://perma.cc/F3QW-L3VJ] (indicating that the minimal and incomplete information debt buyers usually obtain regarding a debt are "insufficient to ensure that the debt buyers collect the correct amount from the correct person").

commence, the collector must conduct an investigation as to prior collection activity.[139]

Further, if a creditor, after transfers debt to another party, obtained information about that debt from the consumer, then that creditor would be obligated to pass that information along to the new owner, despite that creditor no longer owning the debt.[140] The same obligation would exist in cases where the collector returned the debt to the creditor, as is often the case when a consumer disputes the debt held by a collector in a portfolio.[141] Information that would need to be passed along would include: (1) payments furnished by the debtor; (2) notices regarding discharges in bankruptcy; (3) identity theft reports; (4) notices of disputes as to the validity of the debt; and (5) any information suggesting that the assets or income of the debtor are exempt from seizure.[142] The theory behind this proposed rule is to prevent the compartmentalization of consumer information amid various parties who may hold the debt over time.[143]

Consumers have complained that if it had raised a dispute with Collector A, it would have to raise the dispute again once the debt was sold to Collector B.[144] Requiring Collector B to ascertain Collector A's collection activities, and requiring Collector A to pass along to Collector B any post-transfer information about the consumer, are both aimed at ameliorating this problem.[145]

3. Debt Verification and Credit Reporting

The third provision relating to data integrity under the CFPB's proposal requires validation notices to contain several new items.[146] The CFPB believes that the information currently provided by debt collectors under the FDCPA's validation notice requirement

---

[139] CFPB Proposal, *supra* note 17, at 14.
[140] *Id.*
[141] *Id.*
[142] *Id.* at 14–15.
[143] *See id.* at 13–14.
[144] *Id.* (stating "consumers may not resubmit information to each collector seeking to recover on a debt because it may be inconvenient or frustrating to do so").
[145] *Id.* at 14.
[146] *Id.* at app. F (setting forth "a list of information that the proposals under consideration would require to be included in the validation notice").

is too vague.[147] The proposal notes that validation notices often only contains the current amount due, without any back-up information or support.[148] The CFPB notes that better information would decrease "downstream interactions" later on, and better inform debtors of their legal rights.[149]

The required validation notice information would include: (1) a description of the debt, the merchant brand associated with the debt (i.e., the name of the retailer or the credit card company); (2) the name of the creditor at the time the default occurred; (3) and an itemized breakdown of the principal, interest, and fees since the date of default, among other information.[150] The proposal also requires 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.[151] The rights that would need to be disclosed include the ability to dispute the debt,[152] restrictions on communications from the creditor,[153] and limitations on enforcement of rights as to exempt assets.[154] The CFPB is also considering requiring that debt collectors make a second transmission of the statement of rights to the consumer after a 180-day period from the consumer's receipt of the validation notice and statement of rights, to ensure that the debtor is aware of his rights throughout the collection process.[155]

To ease the burden of implementing these requirements, the CFPB is considering promulgating a model form for validation and disclosure of the statement of rights.[156] The validation notice and the statement of rights might also be offered in Spanish for Spanish-

---

[147] *Id.* at 15.
[148] *Id.*
[149] *Id.*
[150] *Id.* at app. F.
[151] *See id.* at 15–16, app. G.
[152] *See supra* note 110–32 and accompanying text (discussing dispute procedures and informational rights).
[153] *See* CFPB Proposal, *supra* note 17, at 10; *supra* note 123 and accompanying text (discussing limiting communications during dispute periods to information regarding the basis for the dispute notice).
[154] CFPB Proposal, *supra* note 17, at app. G (describing the information that the considered proposal would require to be included in the statement of rights document).
[155] *Id.*othing inse is mandatory and,
[156] *Id.* at 16.

speaking consumers.[157] This option might involve a separate form or a translation on the reverse side of an English-version of the documents.[158]

The CFPB is also considering how to deal with what has become known as "passive collection" or "debt parking,"[159] which occurs 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.[160] Although creditors often inform consumers prior to sending information to a credit agency, consumers frequently find out only after the information has been sent.[161] The CFPB has collected reports where debtors proceeded to pay the debt even when the validity of the debt was in dispute just to have it removed from their credit report.[162] To address this problem, the CFPB has proposed a rule that would require creditors to inform consumers prior to passing along any information to a credit-reporting agency.[163] The issue, of course, is whether the consumer's knowledge will serve as a deterrent to nevertheless paying the invalid or disputed debt in order to remove any adverse credit marks. The consumer might have need of a clean credit report (such as in instances of applying for new credit) and might make the calculation that she should pay now because the effort and time involved in disputing the debt might not be worth it or would take too long. But, at the very least, it will ostensibly prevent a surprise negative credit event.

B. Requiring New Consumer Disclosures

Along with an overhaul of the FDCPA's validation notice and the inclusion of the new statement of rights notice, the CFPB is

---

157 *Id.* at 16–17.

158 *Id.* at 17.

159 *Id.;* Gerri Dettweiler, *Can a Debt Collector Come After Me If I Never Got a Bill?*, CREDIT.COM: MANAGING DEBT (June 23, 2015), http://blog.credit.com/2015/06/can-a-debt-collector-come-after-me-if-i-never-got-a-bill-119162/ [https://perma.cc/R7AD-SDMR].

160 *See* CFPB Proposal, *supra* note 17, at 17; BUREAU OF THE FISCAL SERV., MANAGING FEDERAL RECEIVABLES 7-1 (MAR. 2015), https://fiscal.treasury.gov/fsservices/gov/debtcoll/pdf/mfr/managingfederalreceivables.pdf [https://perma.cc/E6MS-MS7U].

161 CFPB Proposal, *supra* note 17, at 17.

162 *Id.* at 17–18.

163 *Id.* at 18.

considering two additional disclosure-related requirements.[164] The first addresses litigation matters, while the second deals with the temporal limits on debt collectors' ability to collect debt.[165]

1. Beware of Litigation

The CFPB's proposal would require collectors to affirmatively inform debtors of the collector's intent to sue.[166] The collector's disclosure would also have to include statements that: (1) a judgment would be rendered against the debtor if he or she did not mount a legal defense, and (2) that the debtor could obtain additional information about debt collection litigation, including access to legal counsel, on the CFPB's website.[167] It is possible that the CFPB could develop model language, although no such language has yet been developed.[168]

Most plaintiffs already send demand letters prior to commencing litigation[169] and this requirement, in essence, turns the plaintiff into a help desk for the consumer. It requires that the plaintiff point the consumer toward legal assistance resources and informs the consumer of the consequences of his or her failure to respond to the complaint. 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 doubtful.[170] It may be

---

[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.* at 19. ("The Bureau does not anticipate providing model language at this time but is interested in receiving feedback from the SERs about the usefulness of model language.").
[169] *See* Barbara Hoey & Evelyn Perez, *Extortion by Demand Letter: What's the Next Step?*, INSIDE COUNSEL (Oct. 2, 2014), http://www.insidecounsel.com/2014/10/02/extortion-by-demand-letter-whats-the-next-step [https://perma.cc/K6KV-NCQA] ("'Demand letters' are a fact of life in Corporate America."); David J. Cook, *Demand Letters: The Lingua Franca of Attorneys*, ABA: 4 GPSOLO E-REPORT 12 (2015), http://www.americanbar.org/publications/gpsolo_ereport/2015/july_2015/demand_letters_the_lingua_franca_of_attorneys.html [https://perma.cc/J2Z7-R9GZ] ("A demand letter initiates a lawsuit. The first contact in nearly every litigation file is a demand letter.").
[170] *See* Micheal Zuckerman, *Is There Such a Thing as an Affordable Lawyer?*, THE ATLANTIC (May 30, 2014), https://www.theatlantic.com/business/archive/2014/05/is-there-such-a-thing-as-an-affordable-lawyer/371746/

very well that the individual is apprised of his rights and even directed toward public interest law firms but might still find the prospect of engaging in a formalized legal process to be complex, intimidating, and expensive.[171] And, because of this perception, the consumer may never seek the help he needs.

2. Time-Barred Debt Collection No More

The second disclosure requirement deals with what the CFPB calls "time-barred debt,"[172] debt on which the statute of limitations has run out on the right to collect, and whether expired debt is treated like "obsolete debt," which is prohibited from being included on consumers credit reports.[173] However, in most states, plaintiff collectors are allowed to bring stale claims and defendants must affirmatively raise expiration of the statute of limitations in its defense.[174] 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.[175]

To address these concerns, the CFPB may propose that, whenever collectors attempt to enforce a time-barred debt, they must disclose that it can no longer sue to collect the debt.[176] Whether this disclosure would always be mandatory, or whether it would only be required when a collector had a reason to believe the debt was time-barred is an issue still being considered by the CFPB.[177] Also under consideration is whether the disclosure would only be required in

---

[https://perma.cc/9QK6-BVE3].

171 *See generally* MATTHEW DESMOND, EVICTED: PROPERTY AND PROFIT IN THE AMERICAN CITY (2016) (describing the ways in which consumer protection statutes, lease provisions, and contract terms are often ineffective for those who lack the resources and understanding to avail themselves of their protections).

172 CFPB Proposal, *supra* note 17, at 19. *See generally* Thomas R. Dominczyk, *Time-Barred Debt: Is it Now Uncollectible?*, 33 NO. 8 BANKING & FIN. SERVICES POL'Y REP. 13 (2014).

173 CFPB Proposal, *supra* note 17, at 19.

174 *Id.*

175 *Id. See generally* 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).

176 *Id.* at 19–20.

177 *Id.*

initial communications or also at additional times following the initial communications.[178]

Where debt would pass from one collector to another, once one collector had sent the debtor a time-barred notice, subsequent collectors would be bound by the first notice.[179] Put differently, the time-barred letter has a binding effect on future collectors, and would prevent subsequent collectors from suing on the related debt. The subsequent collector would also be required to provide time-barred notices in during initial communications with consumers regarding collection and with any validation notices.[180]

This notification requirement raises two important issues. First, the time-barred notification would shift a fundamental aspect of civil procedure, with the burden on the defendant to affirmatively raise the issue of the expiration of statutes of limitations.[181] Here, depending on which approach is taken, the collector might be required to make a determination as to whether the debt is barred. Even where the collector would have to send the time-barred notice if it had reason to believe the debt was barred, practically all collectors would feel compelled to make an independent determination unless they are found to have 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.

This regulation is also a bit puzzling because although the collector might make a determination that the debt is no longer payable, he may nevertheless proceed to collect on the debt.[182] It might make more sense for the CFPB to require that if a collector determines that a debt is time-barred it cannot proceed to enforce it at all. However, the CFPB does not appear to consider such an approach.

The second disclosure requirement relates to whether expired debt can appear on credit reports. Obsolete debt for credit reporting purposes includes 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.[183] Because the presence of a debt on a credit

---

[178] *Id.*
[179] *Id.* at 21.
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] CFPB Proposal, *supra* note 17, at 19.

report has significant effects, the CFPB is concerned with expired debt not being properly removed from such reports.[184] To address this concern, one proposal requires collectors to disclose to consumers whether a time-barred debt can appear on their credit report.[185] This notice could be included in the validation notice, and possibly again at regular intervals throughout the collection process.[186]

Another provision of the bureau's proposal concerns the revival of debts.[187] Under some state law, if an individual makes a payment on time-barred debt or otherwise acknowledges that the debt is theirs, the consumer may revive the debt, thereby making the debt enforceable.[188] The CFPB has found that consumers often pay time-barred debts, believing that doing so will be beneficial to them, when in fact it only resurrects the right to collect.[189] The CFPB is considering "whether to prohibit collectors from collecting on time-barred debts that can be revived under state law unless they waive the right to sue on the debt."[190] In other words, the collector can still pursue time-barred debt, but only if the collector 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.

This proposal carries a number of logical inconsistencies. The general purpose of disclosing time-barred debt is to alert consumers, while still allowing collectors to pursue the debt. However, under this proposal, if state law provides that partial payment would revive the debt, the creditor can only take the partial payment if he waives his ability to go after the debtor for the remainder.[191] In practice, this would seem to bar all creditors from seeking payment from all debtors when the statute of limitations has run. Accordingly, the CFPB's multi-part proposal seems to allow the collection of time-barred debt, provided disclosures are made, and simultaneously make the collection of time-barred debt impossible. In fact, the CFPB noted that it considered outright bans on the sale and collection of time-barred

---

[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *See id.*
[188] *See id.*; Chaplin, *supra* note 175 at 1588 (hypothesizing that humans have an "urge to seek good" that trumps the finality of a time-barred debt).
[189] CFPB Proposal, *supra* note 17, at 21.
[190] *See id.*
[191] *Id.*

debt, but 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."[192] This response is 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 goal by complex means.

The CFPB is also considering prohibiting debt collectors from accepting any payment on a time-barred debt without first obtaining an acknowledgement from the debtor that the debt is no longer due.[193] This proposal begs the question: why would a debtor ever pay a debt no longer due if the debtor knew it was no longer due? Debt collectors would not waste the time and money sending disclosures to attempt to collect on time-barred debt, knowing no reasonable debtor would make a payment. 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 roundabout way of achieving this goal seems confusing and likely to produce economic waste and litigation.

C. Changing Consumer Communication Methods

The final part of the CFPB's proposal concerns how debt collectors communicate and interact with consumers in the course of attempting to enforce the right to collect the debt.[194] The FDCPA already imposes a number of requirements on debt collectors regarding how they communicate with debtors.[195] However, such communications are the source of frequent consumer grievances and even debt collectors attest that the FDCPA's regulatory requirements are often confusing and ineffective.[196] To remedy these issues, the CFPB proposes adopting a multi-pronged approach to dealing with debt collection communications.[197] This includes the CFPB possessing

---

[192] *See id.*
[193] *Id.* at 22.
[194] *Id.*
[195] *Id.*
[196] *See id.*
[197] *Id.*

"more control over the rhythm and channels of communications and [providing] greater regulatory certainty for all parties."[198]

1. Frequency and Form

A common scenario that comes to mind when one thinks of debt collection is a constant stream of phone calls wherein a collector harasses a debtor, either at home or at work.[199] Collectors report that they must call often because it often takes several attempts to get the right person on the phone.[200] They also state that since the FDCPA prohibits revealing a person's debts to a third party, collectors almost never leave a voicemail, in fear of running afoul of this rule.[201] Without the ability to leave messages, the collector's need to continue calling persists.[202]

The CFPB proposes a rule that would allow leaving voicemails that only convey the debtor's name, the collector's name, and a toll-free method for returning the call.[203] A message that meets this safe harbor's requirements would be immune for later attack as a violation of the FDCPA.[204] The CFPB hopes that this method will mitigate the frequent-caller problem.[205]

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 and communicated with the consumer about the debt. The proposal defines this concept as a "confirmed consumer contact."[206] Such a contact does not exist unless the person communicating with the collector confirms that she is indeed the debtor sought,[207] and unless the creditor has no reason to believe that the other person is misrepresenting that she is the

---

[198] *Id.*
[199] *Id.* at 23.
[200] *Id.* at 22.
[201] *See id.*
[202] *Id.*
[203] *Id.* at 24.
[204] *Id.*
[205] *Id.*
[206] *Id.* at 25.
[207] *See id.*

debtor.[208] The CFPB also intends to extend the numerical cap to all forms of communication—phone, text, and email.[209]

With regard to the actual caps, the CFPB is considering either a bright-line cap (perhaps with some exceptions) or a number that, once exceeded, creates a presumption of harassment.[210] The current proposal provides that if the collector has not yet had a confirmed consumer contact, it may engage in three communication attempts per unique address or phone number per week, but no more than a total of six attempts at communication in that period.[211] If the collector has made a confirmed consumer contact, it 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.[212] After a confirmed consumer contact takes place, the collector is limited to just one live communication with the consumer per week.[213]

The CFPB is still 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.).[214] For larger debt collectors, the CFPB will need to put a number of controls in place to ensure that attempts at communication are accurately tracked to avoid rule violations.

In addition, the CFPB is looking to limit the number of times a debt collector can contact third parties.[215] Debt collectors will often contact third parties in an effort to locate and contact the debtor.[216] However, there are numerous instances where unscrupulous debt collectors called third parties to encourage them to pay the consumer's debt or otherwise harass the consumer to pay.[217] The caps for third-party

---

[208] *Id.*

[209] *See id.*

[210] *Id.*

[211] *Id.* at 26.

[212] *Id.*

[213] *See id.*

[214] *Id.* at 27.

[215] *See id.*

[216] *See id.*

[217] *Id.*; *see also* Herb Weisbaum, *Debt Collectors Troll Facebook—Are They Going Too Far?*, NBC NEWS, http://www.nbcnews.com/id/42687734/ns/business-consumer_news/t/debt-collectors-troll-facebook-are-they-going-too-far/#.V9r-h2UomFc [http://perma.cc/79FY-3EXJ] (discussing collectors'

communications would provide that, prior to a confirmed consumer contact, the collector would be 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 party.[218] Prior to a confirmed consumer contact, a collector could only have one single live communication per third party.[219] After a confirmed consumer contact the collector would be prohibited from contacting any third parties.[220]

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 contacted. 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.[221] The statute takes both a general and a prescriptive approach by both requiring that collectors avoid inconvenient or unusually-timed communications with the consumer, and also strictly prohibiting communications before 8:00 AM and after 9:00 PM.[222] However, the CFPB reports that consumers complain that despite these restrictions they frequently hear from collectors at inconvenient hours and locations.[223] Moreover, collectors assert that the FDCPA's

---

use of social media to collect debts); 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/ [http://perma.cc/QJ8R-F2AT] (discussing collectors calling consumers at work).

218 CFPB Proposal, *supra* note 17, at 28. othing inse is mandatory and,

219 *See id.*

220 *Id.*

221 *See id.*

222 *Id.*

223 *See id.*

rules are not well suited to forms of communication beyond phone calls, such as emails, text messages, and other forms of social media.[224]

The CFPB's proposal takes a number of steps to try to address these time, place, and manner issues. First, under the proposal, consent as to time, place, and manner of communications by the consumer to one creditor would not constitute consent of the same to any future holders of the debt.[225] 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 acquires the debt, may automatically take similar measures.

For the benefit of debt collectors, the proposal seeks to clarify the law.[226] The proposal states 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.[227] 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 in both area codes.[228] One criticism of this is that if the locations are far enough away and there are a number of pieces of locational 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.[229] A better proposal might state that when the collector has multiple pieces of location information about a debtor, the collector could contact the debtor in one such location, when the time would be convenient under FDCPA for that location. In other words, the collector could take 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., area code/time zone), even if another piece of information, such as a street

---

[224] *Id.*

[225] *See id.*; *infra* notes 249–52 and accompanying text (discussing why debtors should be required to give consent to each collector).

[226] *Id.* at 29.

[227] *Id.*

[228] *Id.*

[229] *See id.*

address in a different time zone, might indicate that it would not be convenient as to that information.

The proposal also addresses when electronic messages can be sent. As noted above, one of the current criticisms of the FDCPA is that it contemplates a world of only telephone calls, with no electronic communication.[230] While the proposal acknowledges that a consumer may not actually check or read an email for a long period after it is sent, the proposal seeks to clarify the law by marking the timing of electronic communications as the moment of its transmission.[231] 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 not 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. In other words, the act of a collector sending an email message to a debtor in the middle of the night seems inoffensive since, unlike with a phone call, the debtor will not receive the communications until a later point in time. Nevertheless, the proposal does produce greater certainty than what currently exists with regard to the convenience timing of electronic transmissions, although different rules for phone calls versus types of electronic communication might be more desirable.

Another aspect of the time, place, and manner portion of the proposed regulation concerns where attempts to contact the consumer may be made. Consumers complain that collectors try to call them at their place of employment, which may damage their reputation when a co-worker is the one who receives the communication.[232] The proposal seeks to deal with this issue by making certain locations presumptively off-limits, including medical facilities, places of worship, places of burial or grieving, and childcare centers or facilities.[233] Because the FDCPA prohibits attempts to collect at places that are inconvenient to the debtor, the prescribed locations here are all locations where the debtor would likely find collection communications inconvenient.[234]

[230] *Id.*

[231] *Id.* (stating that whether a communication took place at an inconvenient time is determined by "the time at which the message is generally available for the consumer to receive it"). othing inse is mandatory and,

[232] CONSUMER FIN. PROTECTION BUREAU, *supra* note 51, at 9.

[233] CFPB Proposal *supra* note 17, at 29.

[234] *Id.* (explaining that when customers are in these locations, it is "highly unlikely to be convenient for consumers to receive debt collection communi-

The CFPB is also 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.[235] To the benefit of collectors, this presumption would only apply if the collector knew or had reason to know that the consumer was located in one of these locations.[236] The collector is not obligated to investigate the debtor's location absent some alerting evidence.[237]

Since most communications occur via cell phones with collectors who are geographically remote from the consumer, it is likely that collectors will dispute violations of these new rules.[238] There could be much litigation caused by calls made to consumers who happened to be in restricted locations, by collectors who did not have actual knowledge of the consumer's location, but may arguably have had constructive knowledge.[239]

Notably absent from this list of presumptively off-limits communication locations is the debtor's place of employment—one of the biggest sources of debtor complaints regarding collection calls.[240] However, the CFPB is considering a prohibition on the collector's ability to contact the debtor through her work email, at least without consent.[241] Consumers seek this protection because employers

---

cations"). othing inse is mandatory and,

[235] *See id.* at 30–31 (opining that it may be to the consumer's benefit to learn of a debt when they are in these situations).

[236] *Id.* at 30 (providing limitation is due to the fact that most consumers are not at the stated locations for long periods of time).

[237] *Id.* (explaining that while there is no duty to investigate, a collector cannot ignore information that provides them with a consumer's location at one of the named locations).

[238] *Id.*

[239] See *id.*

[240] APRIL KUEHNHOFF & MARGOT SAUNDERS, NAT'L CONSUMER LAW CTR., DEBT COLLECTION COMMUNICATIONS: PROTECTING CONSUMERS IN THE DIGITAL AGE 9 (2015), http://www.nclc.org/images/pdf/debt_collection/21st-century-communications.pdf [https://perma.cc/G4BY-X3CU]; Scott Hannah, *Take Control and Stop Collection Calls & Creditor Harassment at Work*, THE PROVINCE (Nov. 10, 2014, 7:00 AM), http://theprovince.com/business/how-to-stop-collection-calls-creditor-harassment-at-work [https://perma.cc/N5LR-5BKK]; *Stop Collection Calls at Work*, MONEY MGMT. BLOG (Sept. 20, 2010), https://www.moneymanagement.org/community/blogs/blogging-for-change/2010/september/stop-collection-calls-to-work.aspx [https://perma.cc/5H65-ZWC4].

[241] CFPB Proposal, *supra* note 17, at 31.

generally have the power to review employees' emails.[242] As a result, debt information may 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.[243] Of course, all of these time, place, and manner restrictions assume the existence of a debtor from whom a sum can be collected. In the event of a deceased debtor, however, collectors face an entirely different challenge.

3. Debt of the Dead

How to deal with the debts of deceased persons has been a big point of discussion in debt collection circles.[244] The CFPB's proposal seeks to clarify that collectors do not run afoul of the FDCPA when they speak to a decedent's surviving spouse, or parents if the decedent is a minor, and succession representatives or executors.[245] The only caveat is that the proposal will likely involve a thirty- or sixty-day waiting period from the date of death, to allow a grieving period before collection activities commence or continue.[246] 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.[247]

4. Waiver

There are many instances in practice and under the FDCPA where a consumer may consent to being contacted at a certain location, in a certain manner, and at a certain time.[248] The proposal

---

[242] *Id.*
[243] *Id.*
[244] *See* Sid Kirchheimer, *Paying the Debts of the Dead*, AARP BULLETIN (July 29, 2011), http://www.aarp.org/money/estate-planning/info-07-2011/paying-the-debts-of-the-dead.html [https://perma.cc/B98D-AW8Y]; Arielle Pardes, *Debt Collectors Make a Killing on the Debts of the Dead*, VICE.COM (Feb. 10, 2016, 10:26 AM), https://www.vice.com/en_ca/article/debt-collectors-make-a-killing-on-the-debts-of-the-dead [https://perma.cc/AEB3-Y83G]; *Debts and Deceased Relatives,* FED. TRADE COMM'N, https://www.consumer.ftc.gov/articles/0081-debts-and-deceased-relatives [https://perma.cc/26AR-MF-PK].
[245] CFPB Proposal, *supra* note 17, at 32.
[246] *Id.* at 33. othing inse is mandatory and,
[247] *Id.*
[248] *Id.* at 34.

contemplates that the debtor may give such consent and thereby waive various restrictions on the collector.[249] However, the CFPB is concerned with ensuring that when a debtor gives such consent that the debtor understands the implications of giving it.[250] Consequently, the proposal considers whether consent by the consumer given to one creditor should necessarily constitute consent given to a subsequent creditor who acquires the debt.[251] 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.[252] Next, the CFPB contemplates requiring collectors to clearly disclose to a consumer when they are effectively consenting to the waiver of a restriction, and the bureau is also considering whether collectors should be additionally required to memorialize the consumer's consent.[253] The proposal also 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.[254]

Obviously, such requirements could become somewhat burdensome on debt collectors, but each collector could likely develop a system to provide collectors' agents template language to read to the debtor. [255] The notion of memorializing the consent, however, would increase the transaction cost of collecting the debt, and limit collectors' ability to collect.[256] On the other hand, the more elaborated process for how a debtor waives such FDCPA protections could also help the collector in later in proving it has obtained meaningful consent by the debtor.

D. Regulating Debt Collection Administration

The CFPB further proposes a number of rules regarding the administration of the debt collection market.[257] The bureau believes that more oversight into the actual mechanics of debt sales might prove

249 *Id.*
250 *Id.*
251 *Id.*
252 *Id.*
253 *Id.*
254 *Id.* at 34–35.
255 *See generally id.*
256 *Id.* at 47.
257 *Id.* at 35.

useful in preventing bad actor collectors from skirting consumer-based regulations.[258]

1. Market Transactions

The first piece of this regulatory framework deals with the buying and selling of debts between parties.[259] The CFPB's goal is to "keep debt out of the hands of those who cannot collect on debts lawfully."[260] As such, the CFPB is considering whether it should prohibit sales of debt to individuals that either are subject to a judicial order that prohibits them from transacting in debt in the state where the consumer debtor resides, or who do not have a license to carry on debt collect activities in a state where such license is mandatory and debtor resides.[261] It is possible that the two categories of prohibited buyers may be expanded or narrowed as the bureau receives feedback on the proposal.[262] The proposal does not stipulate the punishment for running afoul of the rule, although violations would presumably constitute violations of the FDCPA.[263]

From a due diligence perspective, 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.[264] The original creditor may hold debt owed by 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.[265] This issue might be dealt with through representations

---

[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] *Id.* othing inse is mandatory and,
[262] *See id.* ("The Bureau seeks input form the SERs about the costs associated with prohibiting transfers to these categories of entities.").
[263] *See generally id.* (proposing new rules without punishments for violations).
[264] *See* Jiménez, *supra* note 2, at 87 ("These transfers introduce further complexity and increased possibility of errors."); FTC Report, *supra* note 20, at iii (summarizing findings that debt information was often inaccurate or incomplete in the transfer of debt).
[265] *See* CFPB Proposal *supra* note 17, at 35 (explaining that transferors would be prohibited to selling to buyers subject to judicial orders and buyers lacking licenses).

and warranties in the transfer documents, although such a solution might give cold comfort to the original creditor, particularly if the penalty for transacting with a prohibited party is severe.

Finally, the CFPB is considering a rule prohibiting 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.[266] This rule also incorporates a higher degree of investigation than what occurs during the course of such transactions today.[267] To avoid wrongdoing most parties would likely conduct independent and perhaps extensive investigations, therefore driving up costs to the industry.[268]

2. Records Retention

The CFPB's debt collection proposal contemplates mandatory records retention.[269] Specifically, the proposed rules would require a collector to maintain documentation regarding its collection efforts for three years from the last date of communication with a debtor.[270] The definition of records under this initial proposal is extensive.[271] It includes 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 all communications with the debtor, including certain oral communications.[272] It also includes communications that occurred in the course and scope of litigation.[273] The extent to which collectors currently keep records of their interactions with consumers varies, so there is some value in bringing everyone in line with the same practice.[274] Still, the cost of doing business is likely to increase given the cost of maintaining extensive records. Larger firms will likely be able to more easily absorb these cost through investment in technologies that make the continuity and automation of record

[266] CFPB Proposal, *supra* note 17, at 35.
[267] Jiménez, *supra* note 2, at 47 (summarizing results of the study revealing the paucity of information and investigation accompanying debt buying).
[268] CFPB Proposal, *supra* note 17, at 35.
[269] *Id.*; Odinet, *supra* note 93, at 284.
[270] CFPB Proposal, *supra* note 17, at 35.
[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] *See id.* at 11.

formatting and retention more efficient. Smaller collectors may opt to merge or consolidate, or else close.

IV. Possible Future Issues and Developments

A number of issues that might be arise as a result of the proposed regulations. Since rulemaking regarding debt collection practices is still in the early stages, it is unknown whether 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

The CFPB's proposal only applies to debt collectors as they are defined in the FDCPA.[275] 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 payment is only delinquent.[276] According to the notice of advance rulemaking released in November 2013, the CFPB's proposal was initially supposed to include so-called "first party creditors."[277] When the actual proposal was released in July 2016, however, first party creditors were not covered under the proposed regulations, and the CFPB has since stated that it will seek to regulate original creditors and non-FDCPA debt collectors more broadly in a separate proposal still to come.[278]

---

[275] *See* 15 U.S.C. § 1692a(6) (2012) (defining debt collector).
[276] *See id.* ("The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."); *see supra* notes 9–13 and accompanying text (discussing the definition of debt collector under the FDCPA).
[277] *See* Debt Collection (Regulation F), 78 Fed. Reg. 67848 (proposed Nov. 12, 2013).
[278] Press Release, Richard Cordray, Consumer Fin. Protection Bureau, 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/ [https://perma.cc/7C5B-YB3N] ("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

The cause of this change in the rule's application is likely due to the CFPB's anticipation of serious opposition from those large banks and financial institutions that would fall into the first party creditor box.

As for the future proposal dealing with non-FDCPA creditors, it remains to be seen whether the proposal will be as stringent as the one discussed in this article. The CFPB draws its power to regulate non-FDCPA creditors from its broad authority under Dodd-Frank to regulate "unfair, deceptive, or abusive acts or practices" by any person "offering a consumer financial service."[279] Despite the CFPB's broad authority, because the original creditor is in a better position than a third party to know the nature and terms of the debt, some of the substantiation requirements presumably will be less stringent than those imposed on collectors or buyers under the current proposal. Nevertheless, the compliance process for original creditor substantiation may impose a greater burden than that which is the current industry norm.

B. Indirect Regulation

Still, although the CFPB's proposal does not directly affect original creditors' operations and practices, it will likely cause a number of indirect effects on original creditors.[280] For instance, the new rules regulating the transfer of information and data from the original creditor to the debt buyer include a number of measures that will absolutely impose a compliance cost on original creditors.[281] "Specifically, the proposal under consideration would require subsequent collectors to obtain and review certain information that could either affect the subsequent collectors' obligations to comply with the FDCPA and other federal consumer protection laws or facilitate collector behavior that may be beneficial to consumers." 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.

---

on a separate track.")*elements of the proposal that").*

[279] 12 U.S.C. § 5531(a)–(c) (2012).

[280] *See* CFPB Proposal, *supra* note 17, at 14.

[281] *Id.* ("Specifically, the proposal under consideration would require subsequent collectors to obtain and review certain information that could either affect the subsequent collectors' obligations to comply with the FDCPA and other federal consumer protection laws or facilitate collector behavior that may be beneficial to consumers.").

Further, the proposal seeks to limit the types of parties that can acquire debts.[282] This will naturally impose more due diligence costs on original creditors when it comes to selecting debt buyers. This cost creation may result in debt collection/buyer industry groups playing a larger part in certifying or otherwise validating the eligibility of certain parties, thereby providing original creditors a resource for seeking out appropriate counterparties. This might have the desirable effect of reducing the number of bad collectors out in the debt-buying marketplace.

C. Chain of Title Due Diligence

There are a number of items in the proposal that limit the action of downstream collectors based on the activities or knowledge of upstream parties.[283] For example, if a party engages with the debtor in a particular way or has certain knowledge concerning the debtor or the debt, then those facts alone can affect the rights of subsequent holders of the debt. The "flow-through" limitations run along the chain of title, and will require upstream parties to provide information when, for example, downstream collectors are dealing with consumer disputes or waivers of certain communication methods.[284] The proposed standard of care for many of the proposal's requirements also lends itself to excessive fishing expeditions in litigation between consumers and collectors. Whether various holders of debt in a chain of transactions will handle these limitations by adjusting practices or by ceasing to allow the debt to change hands frequently will be an interesting development to observe.

V. Conclusion

The future of the proposal has been rendered uncertain by the October 2016 *PHH Corp. v. CFPB* decision,[285] in which the U.S.

---

[282] *Id.* at 35.
[283] *Id.* at 55.
[284] *See id.* at 9 n.17 ("The Bureau understands that the ability of collectors to support claims of indebtedness often will depend on receiving documents or information from debt owners. If debt owners fail to transfer accurate and adequate information when placing or selling a debt, or fail to make available documentation sufficient to resolve warning signs, then debt collectors may not have the support they would need to make such claims of indebtedness.").
[285] *See generally* PHH Corp. v. Consumer Fin. Protection Bureau, 839 F.3d 1 (D.C. Cir. 2016). For a full discussion of the case and its implications, see

Court of Appeals for the D.C. Circuit struck down a key provision of Dodd-Frank that provided that the director of the CFPB would be appointed by the President and confirmed by the Senate for a set term, and could only be removed by the President for cause.[286] Traditionally, federal agencies are either headed by an executive branch official who serves at the pleasure of the President or by a group of independent commissioners serving for terms (e.g., the Securities and Exchange Commission).[287] By giving the director of the CFPB—a single individual appointed for a set term and without even budgetary oversight by Congress—such broad authority, Congress created an unconstitutional agency position.[288] The D.C. Circuit resolved the constitutional issue by striking out the appointment clause in Dodd-Frank, thereby allowing the President to remove the director at will.[289]

There has been much speculation that President Trump will quickly attempt to remove the current director of the CFPB, Richard Cordray.[290] This theory is buttressed by the many comments and

---

William Simpson, Note, *Above Reproach: How the Consumer Financial Protection Bureau Escapes Constitutional Checks and Balances*, 36 REV. BANKING & FIN. L. 343 (2016).

[286] *Id.* at 15–16 ("Congress made the Director of the CFPB removable only for cause—that is, for 'inefficiency, neglect of duty, or malfeasance in office'—during the Director's fixed five-year term.") (citation omitted).

[287] *Id.* at 17 ("As a single-Director independent agency exercising substantial executive authority, the CFPB is the first of its kind and a historical anomaly.").

[288] *Id*. ("The concentration of massive, unchecked power in a single Director makes a departure from settled historical practice and makes the CFPB unique among traditional independent agencies. . . .").

[289] *Id.* at 8 ("The CFPB therefore will continue to operate and to perform its many duties, but will do so as an executive agency akin to other executive agencies headed by a single person, such as the Department of Justice and the Department of the Treasury.").

[290] *See, e.g.,* Yuak Hayashi, *Trump Versus Cordray: Can New President Fire CFPB Chief on Day One?*, WALL ST. J. (Dec. 2, 2016), http://www.wsj.com/articles/trump-versus-cordray-can-new-president-fire-cfpb-chief-on-day-one-1480719515 [https://perma.cc/LVT9-EEUS]; Lisa Lambert, *The Debate Over the Firing of U.S. Consumer Watchdog Director Richard Cordray Intensifies*, REUTERS (Jan. 10, 2017), http://www.reuters.com/article/us-usa-congress-consumers-idUSKBN14U2RL [https://perma.cc/6HBV-LMHU]; Megan Leonhardt, *Trump May Tap Consumer Watchdog's Biggest Opponent to Run It*, TIME: MONEY (Jan. 13, 2017), http://time.com/money/4634976/donald-trump-cfpb-richard-cordray-randy-neugebauer/

critiques of the agency lodged by various officials within the Trump transition team, including the Secretary of the Treasury, Steven Mnuchin.[291] Nevertheless, Richard Codray has stated that he intends to remain in his job until his term expires in 2018.[292] On February 16, 2017 the D.C. Circuit decided to grant a rehearing of the case *en banc*.[293] Thus, for now, the ruling of the three-judge panel is put on pause pending the *en banc* decision, allowing Dodd-Frank's appointment provision to stand and thus preventing President Trump from removing the CFPB director without cause.[294] The bureau

[https://perma.cc/4LLY-R2FP]; Jim Puzzanghera, *Two GOP Senators Want Trump to Remove Consumer Bureau Chief Richard Cordray*, L.A. TIMES (Jan. 10, 2017), http://www.latimes.com/business/la-fi-trump-cordray-20170110-story.html [https://perma.cc/KTP4-YPTJ].

[291] *See, e.g.,* Jesse Hamilton & Elizabeth Dexheimer, *Trump's Transition Team Pledges to Dismantle Dodd-Frank Act*, BLOOMBERG (Nov. 10, 2016), https://www.bloomberg.com/news/articles/2016-11-10/trump-s-transition-team-pledges-to-dismantle-dodd-frank-act [https://perma.cc/9YWH-8298]; Matthew Nussbaum, *Dodd-Frank Will Be Targeted, Mnuchin Says*, POLITICO (Nov. 30, 2016), http://www.politico.com/blogs/donald-trump-administration/2016/11/dodd-frank-targeted-mnuchin-231994 [https://perma.cc/774Z-GC4S]; Ryan Tracy, *Regulatory Critic Added to Trump Transition Team for CFPB, FSOC*, WALL ST. J. (Dec. 21, 2016), http://www.wsj.com/articles/regulatory-critic-added-to-trump-transition-team-for-cfpb-fsoc-1482342039 [https://perma.cc/7W5L-VCMH].

[292] Ben White & Andrew Hanna, *Do Dems Need Their Own Trump?*, POLITICO (Dec. 20, 2016), http://www.politico.com/tipsheets/morning-money/2016/12/do-dems-need-their-own-trump-217950 [https://perma.cc/3DA8-A8JN].

[293] *See* Lawrence Hurley and Lisa Lambert, *U.S. Appeals Court to Reconsider Challenge to Consumer Bureau*, REUTERS (Feb. 16, 2017), http://www.reuters.com/article/us-usa-court-cfpb-idUSKBN15V2DI [https://perma.cc/PJT9-2YMR]; Petition for Rehearing En Banc for Respondent, PHH Corp. v. Consumer Fin. Protection Bureau, 839 F.3d 1 (D.C. Cir. 2016) (No. 2014-CFPB-0002); Order of the United States Court of Appeal for the District of Columbia Circuit, No. 15-1177 (Feb. 16, 2017), https://www.cadc.uscourts.gov/internet/opinions.nsf/5D0253C4E25B93FB852580C9005F3AE1/$file/15-1177-1661681.pdf [https://perma.cc/Q5X5-FWQP].*elements of the proposal that").*

[294] There is some question as to whether President Trump will attempt to remove Cordray for cause on account of past allegations as to discrimination in CFPB hiring decisions. *See* Kate Berry, *Trump vs. Cordray: The Battle Ahead*, AM. BANKER (Dec. 6, 2016), https://www.americanbanker.com/news/trump-vs-cordray-the-battle-ahead [https://perma.cc/YTL8-4ZRG]. There is an interesting potential twist worth mentioning if the D.C. Circuit hears the

appears to be moving along with business as usual until the issue is finalized, thus indicating that the debt collection proposal will proceed ahead for now.

Regardless of the uncertain future of the CFPB, the fair and efficient collection of debt remains an important piece of ensuring consumers have access to credit markets. Of course, the need for clear regulation based on solid research and thoughtful legal analysis is equally important to ensuring that any such credit markets operate 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 consumer protections, at least generally, when it comes to interacting with debt collectors. The proposal also has the potential to provide debt collectors with much needed clarity regarding compliance with the FDCPA. Since no agency had the authority to issue rules for this federal statute until 2010, there has been widespread divergence and confusion among courts in interpreting the FDCPA's provisions. Finally, the proposal presents an opportunity to bring the regulation of debt collection, particularly with respect to communication methods, into the twenty-first century through increased compatibility with today's technologies.

The increased compliance costs may drive some players out of the market.[295] While large debt collectors and buyers may be able to absorb the cost of compliance by investing in monitoring, control systems, and protocols, many small businesses may struggle. As the rulemaking and eventual implementation process unfolds, policymakers and advocates should be cognizant that small businesses' inability to sustain increased compliance costs may reduce competition

---

case en banc and affirms the panel's decision. The CFPB, under Cordray, would likely want to appeal the decision to the Supreme Court. However, a provision in the Dodd-Frank Act provides that "The Bureau may represent itself in its own name before the Supreme Court of the United States, provided that the Bureau makes a written request to the Attorney General within the 10-day period which begins on the date of entry of the judgment which would permit any party to file a petition for writ of certiorari, and the Attorney General concurs with such request or fails to take action within 60 days of the request of the Bureau." *See* 12 U.S.C. § 1054(e) (2010). Therefore, assuming President Trump will not want the Supreme Court to overturn the D.C. Circuit, he will likely instruct the Attorney General to deny the CFPB's request to appeal.

[295] *See* Zywicki, *Law and Economics*, *supra* note 3, at 6–7.

among the remaining large industry players. It will also be interesting to see whether these more onerous requirements on debt collectors result in a tightening of consumer credit.[296] If debt collection becomes more difficult, increasing the expense of off-loading defaulted debt to collectors, consumer access to credit may decrease.[297] Naturally, higher cost credit or less credit is bad for consumers, but so is the proliferation of bad-behaving debt collectors. The CFPB has taken a muscular approach in trying resolve this tension, both through robust new restrictions and clarifications of existing rules, as well as through soliciting the input of the regulated firms. A process that engages consumer advocates and the regulated industry as the proposals move on to the next stage will be key to striking the right balance.

---

[296] *See* Zywicki & Reese, *Unintended Consequences*, *supra* note 3 ("Poorly designed or overzealous regulation of collection practices can result in higher interest rates or a reduction of access to credit for consumers. Those consumers who are deemed to be the riskiest borrowers (often lower-income consumers) will be the first to be denied credit, or will be priced out of their first-choice credit options. Since those consumers will still have a need for credit, that means forcing them to use less-preferred and more expensive options like payday lending or auto-title loans.").

[297] Michael B. Mierzewski et al., *CFPB Finalizes Ability-to-Repay and Qualified Mortgage Rule*, 130 BANKING L.J. 611 (2013) ("Regulation Z . . . prohibits creditors from extending higher-priced mortgage loans without regard for the consumer's ability to repay. The final rule extends application of this requirement to all loans secured by dwellings, not just higher-priced mortgages. Creditors must, at a minimum, consider eight factors while making a determination that the consumer has a reasonable ability to repay the loan before entering any consumer credit transaction secured by virtually any dwelling."). *See generally* David Reiss, *Message in a Mortgage: What Dodd Frank's "Qualified Mortgage" Tells Us About Ourselves*, 31 REV. BANKING & FIN. L. 717 (2012). Although the imposition of the CFPB's ability-to-repay rule has not yet been shown to have decreased residential mortgage credit, it may just be too early to tell. Neil Bhutta & Daniel Ringo, *Effects of the Ability to Repay and Qualified Mortgage Rules on the Mortgage Market*, BD. OF GOVERNORS OF THE FED. RESERVE SYS. (Dec. 29, 2015), https://www.federalreserve.gov/econresdata/notes/feds-notes/2015/effects-of-the-ability-to-repay-and-qualified-mortgage-rules-on-the-mortgage-market-20151229.html [https://perma.cc/Y3JP-9XJV] ("We find evidence that some market outcomes were affected by the new rules, but the estimated magnitudes of the responses are small.").