COMMENTS
to the
Consumer Financial Protection Bureau
on its

Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking

Outline of Proposals under Consideration and Alternatives Considered

By the
National Consumer Law Center
On behalf of its low-income clients

February 28, 2017

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Introduction

The National Consumer Law Center,[1] on behalf of its low income clients, submits these comments on the Consumer Financial Protection Bureau's (CFPB or Bureau) Small Business Regulatory Enforcement Fairness Act (SBREFA) Outline[2] (Outline) of proposed regulations under the Fair Debt Collection Practices Act (FDCPA).[3]

First we want to thank the Bureau for tackling the arduous task of identifying and addressing needed changes in debt collection regulations. The CFPB's Outline includes a number of creative proposed solutions to current problems in the debt collection system. Additionally, the Outline proposes codifying several important judicial rulings.

We particularly appreciate proposals put forward by the Bureau in the following areas:

1) Affirming that collectors must possess a reasonable basis for all claims that a particular consumer owes a particular debt and that the collector has a right to collect it;
2) Requiring the transfer of information about the debt collection efforts, the debt, and the debtor between the entities attempting to collect the debt;
3) Outlining steps that must be taken and types of information that must be gathered to meaningfully respond to consumer disputes;
4) Developing and consumer testing a form validation notice and statement of rights;
5) Facilitating consumer disputes through a tear-off section on the model validation notice;
6) Considering proposals that would improve communication with consumers with limited English proficiency;
7) Prohibiting "parking" debts on credit reports without first informing the consumer about the debt;

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[1] The **National Consumer Law Center®** (NCLC®) is a non-profit Massachusetts corporation specializing in low-income consumer issues, with an emphasis on consumer credit. Since 1969, NCLC has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness. NCLC publishes a series of consumer law treatises including Fair Debt Collection and Collection Actions.

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[2] Published at: http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf (July 28, 2016).

[3] This document was prepared by the **National Consumer Law Center,** on behalf of its low-income clients, with the substantial input of attorneys from the **Center for Responsible Lending, National Center for Law and Economic Justice, and MFY Legal Services.** Additionally, attorneys from **Consumers Union, New Economy Project**, **National Association of Consumer Advocates,** and **North Carolina Justice Center** provided substantial input on Section 1**.**

8) Codifying the current judicial prohibition against litigating or threatening to litigate debts that are time-barred;
9) Requiring consumer acknowledgement before collectors can accept payment on debt that is both time-barred and obsolete;
10) Establishing clear limits on collection calls and other communications;
11) Imposing waiting periods on the collection of decedent debt; and
12) Prohibiting the transfer of debt in certain circumstances.

The Bureau has illustrated an impressive understanding of the complexities involved in regulating debt collection. Despite the wide-ranging set of proposals included in the Outline, however, we have a significant number of important recommendations that will ensure that consumers are protected from illegal debt collection activities, while ensuring that legitimate debt collection can proceed.

Our overarching, and most urgent request for change to the Outline involves the proposed substantiation requirements. As the Bureau is well aware,[4] over half of all consumers contacted by debt collectors are subjected to collection efforts that are based on flawed and inadequate documentation.[5] Unfortunately, we do not believe that the Bureau's proposal on substantiation sufficiently addresses the broken system of debt collection, particularly when these rules will be applied to debt buyers or other collectors who are more remote from the original creditor. While we believe that consumers will benefit if substantiation is improved across the board for all collectors, we recognize that the CFPB might choose to create a bifurcated system with enhanced substantiation requirements for certain collectors.[6]

Our key recommendations include:

1) **Enhance Substantiation Requirements.**
    - Expand the list of fundamental information that collectors must have on hand before initiating collection.
    - Require collectors to review original, account-level documentation before initiating any collection activities and to have access to such documentation at all times during the collection process.
    - Hold collectors strictly liable for the accuracy of the information they are using for collection.

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[4] *See e.g.* Consumer Financial Protection Bureau, "Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt" (Jan. 2017), http://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

[5] *Id.* ("Fifty-three percent of consumers contacted about a debt in the year prior said at least one collection effort was mistaken in some way. These consumers reported that the creditor or collector sought the incorrect amount, that the debt was not owed, or that the person owing the debt was a family member.")

[6] See section 1.1.4.1 for a discussion about how a bifurcated approach could be applied.

- Require robust representations and warranties from creditors.

2) **Improve Collector Responses to Consumer Disputes.**
   - Require review of original, account-level documentation in response to all disputes and prohibit substitution of affidavits or documents created after the fact, such as documents generated only for litigation.
   - Require collectors to provide documentation to consumers no matter how or when a dispute is raised.
   - Require collectors to accept disputes through any communication method that it uses to communicate with consumers.
   - Prohibit collectors from selling accounts with unresolved debt disputes or transferring such accounts to anyone other than the original creditor.

3) **Prevent Lawsuits and Default Judgments Based on Faulty or Inadequate Documentation.**
   - Require collectors to obtain and review original, account-level documentation prior to threatening or initiating litigation.
   - Require collectors to take reasonable efforts to identify the consumer's current address before sending important collection notices.
   - Require that a written litigation disclosure be provided to a consumer no more than 60 and no less than 15 days before litigation is initiated.
   - Require collectors to provide the court with relevant information and documentation to support their claims when seeking default judgment.

4) **Protect Consumers from Collection of Time-Barred Debt**.
   - Prohibit all efforts to collect on time-barred debt.
   - Alternatively, if the CFPB allows continued collection of time-barred debt it should enhance consumer protections by:
     - Prohibiting the filing of time-barred proofs of claims in bankruptcy, offering to "settle" time-barred debt, and suing on a "revived" debt;
     - Repeating any time-barred debt disclosure in each communication; and
     - Limiting collection of time-barred debts to written communications that would allow consumers more time to understand the time-barred nature of their debt.

5) **Protect Consumers from Abusive Communication Practices.**
   - Do <u>not</u> exempt limited content messages from the FDCPA's definition of a communication.
   - Prohibit collectors from making more than three attempted phone calls, per week per consumer, resulting in no more than one live conversation.

- Prohibit collectors from attempting to contact third parties more than one time per week.
- Allow consumers to identify certain types of communications as inconvenient, including all phone calls, and require collectors to inform consumers of this right.

These and other recommendations are discussed in greater detail in the sections below.

1. Information Substantiation[7]

The single most important problem for the CFPB to address in the debt collection rulemaking is the dangerously incomplete or inaccurate information collectors routinely use as the basis for their collection activities. Relying on inadequate or inaccurate information for collection efforts leads to the regular pursuit of the wrong people or the wrong amounts by collectors who cannot prove they are entitled to collect the alleged debt. This problem has been documented repeatedly by the CFPB in its own survey[8] and its reports about consumer debt collection complaints,[9] as well as reports by the Federal Trade Commission[10] and others.[11]

Recognizing these problems, the Office of the Comptroller of the Currency ("OCC") issued guidance for banks selling their debt to debt buyers regarding what documentation should be provided at sale.[12] Additionally, in recent years, a number of states have passed statutes, adopted regulations, or amended court rules to tackle these systemic information failures by placing additional requirements either on debt buyers specifically or all debt collectors.[13] Some states have

[7] A prior version of Section 1 was provided to the CFPB in a separate document called The Need for Substantially More Substantiation in Debt Collection: Recommendations for the CFPB on its Debt Collector and Debt Buyer Rulemaking on November 14, 2016.

[8] Outline Appendix B (showing 28% of survey participants were contacted about debts they did not owe and 33% were contacted for the wrong amount).

[9] See, e.g., CFPB, Fair Debt Collection Practices Act: CFPB Annual Report 2016 17 (Mar. 2016) ("most common issue selected by consumers submitting a debt collection complaint is continued attempts to collect a debt that the consumer states is not owed (40%)").

[10] Fed. Trade Comm'n, Collecting Consumer Debts: The Challenge of Change (A Workshop Report) (Feb. 2009); Fed. Trade Comm'n, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration (July 2010); Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry (Jan. 2013).

[11] See, e.g., Chris Albin-Lackey, Human Rights Watch, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor (Jan. 2016); Rick Jurgens and Robert J. Hobbs, The Debt Machine How the Collection Industry Hounds Consumers and Overwhelms Courts (July 2010).

[12] OCC Bulletin 2014-37. Available at http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-37.html.

[13] See, e.g., Cal. Civ. Code §1788.50-1788.64; Md. R. Civ. Pro. 3-306; Mass. Uniform Small Claim Rules (2009 amendments); Minn. Stat. §§ 491A.01, 541.053, 548.101, 550.011, 588.04; N.Y. DFS Rules, 23 NYCRR §1; N.Y. Court Rules 22 NYCRR §§ 202.27-a, 202.27-b, 208.14, 208.6(h), 210.14-a, 210.14-b, 212.14-a and 212.14-b.; N.C. Gen. Stat. §§ 58-70-115, 58-70-150, 58-70-155.

considered reforms but have not yet enacted them,[14] and reform efforts are anticipated in other states.

In prior enforcement actions charging debt collectors with unfair, deceptive, and abusive practices, the CFPB has identified the purchase of debt with inadequate or incomplete information as a core problem. In multiple settlements[15] the CFPB has identified the collection of debts without a "reasonable basis" as a violation of the sections in the FDCPA prohibiting the use of false, deceptive or misleading representations[16] and the use of any false representation or deceptive means to collect a debt.[17] Collecting debts without a reasonable basis would also violate the FDCPA's prohibition against collecting any amount unless authorized by the contract or applicable law.[18]

The CFPB's Outline[19] appropriately recognizes the importance of problems with collecting the wrong amount from the wrong consumer by collectors who may not be entitled to collect the debt. The Outline also correctly identifies "substantial deficiencies in the quality and quantity of information collectors receive at placement or sale of the debt"[20] as key causes of these problems. To address these problems, the Outline identifies a framework in which a collector would need a "reasonable basis" for claims that "a particular consumer owes a particular debt."[21] In order to ensure that the collector does not violate the rights of consumers by attempting to collect without a reasonable basis, the Outline identifies steps that the collector can take at certain key points in the collection process, including: before initiating collection, during collection efforts, after a dispute, and before filing a complaint in court.

Unfortunately, the CFPB's outlined proposals will not adequately remedy deficiencies in the quantity and quality of information used in debt collection. The proposal is far too complex, rendering it difficult to follow and impossible to enforce. Unless the CFPB does far more than it

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[14] See, e.g., Or. HB 2252 (2015); Or. H.B. 2826 (2013); Okla. S.B. 1430 (2012); Fla. S.B 1116 (2011); Ga. S.B. 448 (2011).

[15] Consent Order, In the Matter of Encore Capital Group, Inc., Midland Funding, LLC, Midland Credit Management, Inc. and Asset Acceptance Capital Corp. ¶ 105 (Sept. 9, 2015); Consent Order, In the Matter of Portfolio Recovery Associates, LLC ¶ 96 (Sept. 9, 2015).

[16] 15 U.S.C. § 1692e ("A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.")

[17] 15 U.S.C. § 1692e(10) ("The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer" violates the FDCPA).

[18] 15 U.S.C. § 1692f(1) ("The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law" violates the FDCPA.)

[19] Consumer Fin. Protection Bureau, Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered (July 28, 2016) (hereinafter "Outline").

[20] Outline 6.

[21] Outline 6.

has proposed in the Outline, the serious deficiencies in the substantiation and documentation requirements for debt collection will continue.

Even worse, if the CFPB promulgates these proposals as a rule, it will significantly jeopardize private remedies when consumers are harmed by collectors who pursue the wrong person or wrong amount. The rule would also undermine the efforts of advocates and state consumer protection agencies to improve the situation at the local level. This means that the proposal, as outlined, would do more harm than good.

Rather than the vague, byzantine and unenforceable tangle of fundamental information, warning signs, and possible alternative approaches set forth in the CFPB's Outline, the CFPB should require collectors to review one single, comprehensive set of documentation prior to initiating collection. The collector could then return to this same foundational set of documentation to respond to consumer disputes or prior to filing a lawsuit. Such a regime would be far easier to implement and enforce, whether through agency supervision, enforcement proceedings, or by private attorneys, and would lead to much more robust and comprehensive consumer protections.

Below we explain our precise concerns with the specifics in the CFPB's Outline, along with our recommendations to ensure that the current abuses will not continue.

1.1 Initial claims of indebtedness[22]

As the CFPB recognizes, any attempt to collect a debt is an implicit claim that the debt collector has reasonable support to prove that a specific individual owes the amount claimed and that the debt collector is legally entitled to collect the debt.

The CFPB's Outline indicates that it is considering adopting a rule that would allow debt collectors to establish that there is a reasonable basis for a claim of indebtedness if they: (1) review certain fundamental information, (2) obtain a representation of accuracy from the creditor, and (3) review for warning signs.

We appreciate the Bureau's proposal to address this issue. But there are multiple problems with the proposed requirements:

1. Collectors are not required to review sufficient information;
2. Collectors are not required to substantiate the information reviewed by looking at original-account level documentation;
3. Collectors are permitted to rely on minimal representations from creditors; and
4. Reviewing for warning signs is not sufficiently demanding to ensure that each collection effort is based on reliable, documented information.

[22] Outline 7-9, App. C.

These problems are discussed in more detail in the next three sections.

1.1.1 The List of Fundamental Information to be Reviewed is Inadequate

We analyze these issues from the perspective of a) what information does the collector need to have before beginning collection, and then b) what documentation does the collector need to review to substantiate that information. We differ with the CFPB's approach on both of these issues.

The CFPB has proposed the following list of fundamental information for debt collectors to review prior to initiating collection:

- The full name, last known address, and last known telephone number of the consumer;
- The account number of the consumer with the debt owner at the time the account went into default;
- The date of default, the amount owed at default, and the date and amount of any payment or credit applied after default;
- Each charge for interest or fees imposed after default and the contractual or statutory source for such interest or fees; and
- The complete chain of title from the debt owner at the time of default to the collector.

Each of the pieces of fundamental information that the CFPB identifies is critical. However, this list is not sufficient to ensure that the collector has all of the necessary information about the debt to proceed properly with collection efforts.

1.1.2 Problems with Safe Harbor Approach

In addition to being insufficient, this list of fundamental information is problematic because it is only a safe harbor. The CFPB indicates that collectors need not even have all of the fundamental information identified before initiating collection.[23] Instead, the outlined proposal would allow a collector who proceeds without a specific type of information to "bear the burden of justifying its alternative approach [to fundamental information]."[24] Allowing collectors to adopt "alternative approaches" to fundamental information raises serious unanswered questions:

- To whom would the collector have to justify its approach?
- What standards would be used to determine if the alternative is sufficient?

[23] Outline App. C.

[24] *Id.*

- How would courts enforce these standards in private litigation or public enforcement actions?

Private enforcement of the FDCPA is critical to the protection of individual consumers.[25] Vague requirements make it more difficult, if not impossible, for consumers to effectively enforce their rights through litigation. The outlined proposal will undermine private enforcement where it is most necessary - the substantiation of the debt collector's authority to collect the correct amount from the correct consumer.

1.1.3 Additional Information Needed to Initiate Collection

This list of fundamental information should be expanded to include the critical pieces of information discussed below:[26]

[25] In 2015, consumers filed 11,697 FDCPA cases in federal courts. WebRecon LLC, Out Like a Lion . . . Debt Collection Litigation & CFPB Complaint Statistics, December 2015 & Year in Review. In contrast, the CFPB initiated 15 enforcement actions in 2015 and the FTC initiated 12. CFPB, Fair Debt Collection Practices Act CFPB: Annual Report 2016 (Mar. 2016).

[26] The CFPB can address concerns about the fact that certain information in this list is not currently transmitted to collectors by only applying these requirements prospectively to debts purchased or transferred after the effective date of the regulation.

Table 1: Additional Information about the Debt

Type of Information	Reason Information Needed
Type of debt[27] (e.g., credit card, medical, student loan (including the type of loan[28]), etc.)	Enables collector to provide information during dunning that helps the consumer identify the debt. It also helps the collector and consumer know about specific laws that may apply to the type of debt.
Name[29] and address of the original creditor	Enables collector to provide information during dunning that helps the consumer identify the debt
Date on which the statute of limitation runs on claims for this debt[30]	Enables collector to identify any debts requiring special treatment or extra disclosures during dunning. Prevents collector from initiating lawsuits after the statute has expired.
State law governing the agreement	Enables collector to determine and calculate statute of limitations and to identify other laws that may apply.
Details of any settlement or repayment agreements	Prevents collector from dunning for more than is owed or when no payment is due

[27] Debt collectors already have this information because they are required to provide it to Equifax, Experian, and TransUnion under the Metro 2 reporting format.

[28] Different types of student loans (e.g., private, Perkins, Direct or FFEL Stafford, Consolidated, or PLUS) have different rights and remedies. Therefore, collectors must know the specific type of student loan in order to understand the debtor's rights and obligations and to address the debtor's questions.

[29] The name of the original creditor is contained in the sample validation notice in Appendix F but not listed as fundamental information in Appendix C.

[30] We are *not* suggesting that the collector provide this information to the consumer at this juncture; only that the collector should be required to make this determination early in the process, record it, and abide by that determination.

Table 2: Additional Information about the Alleged Debtor

Type of Information	Reason Information Needed
Alleged debtor's social security number[31]	Enables collector to determine that the consumer contacted is the alleged debtor in question
Whether the alleged debtor is a primary obligor, co-signor, or authorized user	Enables collector to determine whether an alleged debtor is legally obligated to pay the debt.[32] Enables the consumer to identify the debt.
Whether the alleged debtor is an active duty servicemember or was a servicemember or dependent at the time the debt was incurred	Enables collector to comply with the Servicemembers Civil Relief Act and to ensure that the debt did not violate the Military Relief Act.
Whether the alleged debtor is deceased and, if so, the date of death	Enables collector to identify limits on collection including who can be contacted and when
Information about any bankruptcy filings or discharges[33]	Enables collector to identify accounts requiring special collection techniques (e.g., filing a proof of claim rather than dunning) or where all collection is prohibited post-discharge

Information from Prior Collectors: In addition to the items above, the CFPB should clarify that, before initiating collection, collectors must review all of the information in Appendix E that prior collectors are responsible for transferring to subsequent collectors.[34]

[31] This should be the number provided by the consumer at the time the credit was obtained. If the number came from another source, e.g., a location service or credit reporting agency, that source should be clearly noted and that information should be included in every response to a consumer dispute with the statement that this is not a social security number supplied by the consumer.

[32] According to the CFPB's survey, "12 percent of consumers who had been contacted about a debt indicated these contacts included attempts to collect a debt owed by a family member for whom the consumer had not co-signed." Outline App. B.

[33] For the last three items on this list, the CFPB should clarify that in addition to reviewing any information provided by prior collectors about servicemember status, whether the consumer is deceased, and bankruptcy filings, each debt collector should have an independent obligation to scrub its accounts to affirmatively identify this information.

[34] Information transfer requirements and Appendix E are discussed below

***Recommendations**: 1) Expand the list of fundamental information that collectors must have on hand before initiating collection. 2) Clarify that collectors must review information from prior collectors prior to initiating collection.*

1.1.4 Documentation Necessary to Substantiate the Information

The CFPB's articulated approach to fundamental information is also inadequate because collectors are not required to review original documentation to ensure they have the specified information. Instead, the CFPB's Outline states that "[t]he information could still be conveyed in a spreadsheet, as is done typically today, without transferring the full underlying records."[35]

This approach represents a significant departure from the one that the CFPB adopted in recent enforcement actions. The consent decrees currently in force for two of the largest debt buyers require the review of "Original Account-Level Documentation" before making representations about an alleged debt.[36] Instead, the Outline would allow debt collectors to rely on minimal information conveyed by spreadsheet, effectively sanctioning the continuation of the current broken system that has been repeatedly shown to be untrustworthy.

Spreadsheets are inadequate substitutes for original account-level documentation because:

- Creditors make mistakes in transferring information from original, account-level documents to spreadsheets;[37]

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[35] Outline 8.

[36] Consent Order, In the Matter of Encore Capital Group, Inc., Midland Funding, LLC, Midland Credit Management, Inc. and Asset Acceptance Capital Corp. ¶ 129 (Sept. 9, 2015) (Encore is "prohibited from making any representation, expressly or by implication, that a Consumer owes a Debt to Encore or as to the amount of a Debt owed or allegedly owed to Encore unless, at the time of making the representation, Encore can substantiate the representation. Without limiting the foregoing, such substantiation must include reviewing Original Account-Level Documentation reflecting the Consumer's name and the claimed amount"); Consent Order, In the Matter of Portfolio Recovery Associates, LLC ¶ 116 (Sept. 9, 2015) (PRA is prohibited from "[m]aking any representation, expressly or by implication, that a Consumer owes a Debt to Respondent or as to the amount of a Debt unless, at the time of making the representation, Respondent can substantiate the representation. Without limiting the foregoing, such substantiation must include reviewing Original Account-Level Documentation reflecting the Consumer's name and the claimed amount").

[37] Here are some examples from the CFPB's 2015 consent order with Chase:

> 24. Because Respondents sometimes failed to accurately update, maintain, and reconcile the Account information in their databases before selling defaulted Accounts to Debt Buyers, the resulting Account information was not always accurate for accounts that had gone to judgment.
>
> 25. Compounding this problem, when Respondents obtained portfolios of credit card Accounts from acquired banks, they did not always receive important documentation needed to support claims that Consumers owed the Debts and owed the amount stated. On certain Accounts Respondents were unable to conform their databases with the original Account documents for Accounts that they acquired.
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> 26. As a result of these failures, Respondents sold certain Accounts to Debt Buyers that Respondents knew or should have known were unenforceable or uncollectable. Respondents also provided erroneous and incomplete information to Debt Buyers who Respondents knew or should have known would use this information in conducting collection activity.

- If collectors only receive spreadsheets conveying basic information about the debt, they will not have documents in hand that are necessary to respond accurately to questions or disputes, leading to unnecessary collection contacts when collectors are ultimately unable to obtain the documents, or to delays while collectors attempt to obtain documents;
- Spreadsheets are not an effective way of conveying some information (e.g., a line in a spreadsheet cannot convey payment history);
- No matter how comprehensive the list of "fundamental information," it is likely that there will be some item of relevant information that is not included on the spreadsheet but is addressed in the relevant documentation;
- Spreadsheets can be easily manipulated (e.g., altering a key date to avoid a statute of limitations);
- Spreadsheets are susceptible to theft or being sold multiple times;[38] and
- It is harder for collectors to recognize fraudulent, wrong person, or phantom debts if only basic information about a debt is transferred via spreadsheet.[39]

To ensure that information used as the basis of collection efforts is reliable and accurate, debt collectors should be required to have access[40] to the following original, account-level documentation:

- *To prove the proper balance owed:*
    - A charge-off statement, billing statement, periodic statement, or other document generated by the creditor that reflects the balance at default;
    - A copy of any settlement or repayment agreements; and
    - A post-default itemization of amount owed distinguishing between principal, interest, and fees.

> 27. Respondents sold certain Accounts to Debt Buyers where Respondents knew or should have known the electronic sale file contained erroneous or missing information about the identity of the Account holder, the amount owed, whether the Account had been paid or settled, and whether Respondents' internal operations had deemed an Account to be fraudulent.

Consent Order, In the Matter of Chase Bank, USA N.A. and Chase Bankcard Services, Inc. ¶¶ 24-27 (July 8, 2015).

[38] See Jake Halpern, Bad Paper: Inside the Secret World of Debt Collectors (Oct. 13, 2015) (discussing debt collection practices of small debt buyers in Buffalo, New York).

[39] See In re Atlas Acquisitions LLC, 16-302 (Bankr. S.D. TX Mar. 7, 2016) ("Beginning in December, 2015, Prorania began to receive objections to certain of its $390 claims. Pursuant to the purchase and sale agreement covering the 10K claim transaction, Prorania repeatedly demanded that First Source and Mr. Brooks provide to Prorania electronic copies of the underlying agreements (sometimes referred to as "media") supporting the $390 claims. Neither First Source nor Mr. Brooks provided to Prorania any of the underlying documentation regarding the claims included in the 10K claim transaction, which includes all 23 of the $390 claims covered by this Court's Show Cause Order.")

[40] As discussed below, we are not insisting that the collector have physical possession of this documentation.

- *To prove that the consumer has agreed to be responsible for the debt:*
    - A signed[41] account application and contract or promissory note proving the consumer's agreement to the debt, or if no such document exists, documentation showing that the consumer has agreed to be responsible for this debt; and
    - Documentation that a consumer is a co-signor or has otherwise agreed to be responsible for the debt (*if attempting to collect from someone other than the primary obligor*).[42]

- *To prove that the collector has the right to charge interest or fees added after default and to establish choice of law:*
    - A copy of the terms and conditions in effect during the term of the contract and/or at default to justify any interest or fees included in the claim (*if attempting to collect contractual fees or interest post-default*);[43]

- *To be able to respond to a request for verification about the amount of the debt from the consumer:*
    - The last 12 statements with account activity;
    - An accounting[44] of the charges, fees, interest, and payments since the account last had a zero balance (*for open end credit*);
    - An itemization of amount owed, distinguishing between principal, interest, and fees at the time of default (*for closed end credit*).

- *To establish the collector's right to collect on the debt:*
    - Documentation establishing that the collector has a right to collect the debt (e.g., the contract between the debt collector and the creditor or the debt buyer that owns the debt); and
    - Documentation of the chain of title,[45] including proof that the original creditor sold the debt allegedly owed by the individual consumer to the first debt buyer and proof of each subsequent sale in the chain (*for debts that have been sold*).

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[41] Or proof that the agreement was e-signed.

[42] Information that the consumer is a spouse or is an authorized user of a credit card would not be sufficient to show that the consumer is responsible for the debt.

[43] Although Appendix C lists "the contractual or statutory source for . . . interest or fees" in the list of fundamental information, the outline states that all fundamental information may be transmitted by spreadsheet. Outline 8. Thus, this requirement is not sufficient because it appears to allow some reference to the relevant document and not the document itself.

[44] The accounting of charges, fees, interest and payments is to enable the distinction between purchases made by the consumers, and charges imposed by the creditor. It also enables an accurate amount to be included in a 1099 if the debt is to be treated as income under IRS rules, as only the amount of principal—the consumer's purchases or cash advances—that is forgiven is considered income for tax purposes. *See generally,* IRS, *Canceled Debts, Foreclosures, Repossessions, and Abandonments (for Individuals), Publication 4681: 1. Canceled Debts,* at 3.

[45] Although Appendix C lists "[t]he complete chain of title from the debt owner at the time of default to the collector" in the list of fundamental information, the outline states that all fundamental information may be transmitted by

While we urge the CFPB to require that the documentation identified be *available* to debt collectors at all stages of the collection process, it does not need to be physically transferred to the debt collector. For example, creditors might chose to maintain databases that can be remotely accessed by third-party debt collectors or debt buyers.[46] The key is to ensure that real-time access to original, account-level documentation is available to anyone collecting on the debt *before initiating any collection activities and* at all times during the collection process.

Moreover, to deal with the serious problems with substantiation of relevant information, the CFPB should reiterate that debt collectors are strictly liable for the accuracy of the fundamental information. Additionally, the CFPB should clarify that no bona fide error defense is available for any collector communicating information that is contradicted by any of the original, account-level documentation identified above. These provisions will ensure that collectors have the appropriate incentives to review information conveyed by a creditor and compare it to original, account-level documentation.

Recommendations: *The CFPB should: 1) Require collectors to review original, account-level documentation before initiating any collection activities and to have access to such documentation at all times during the collection process. 2) Reiterate that debt collectors are strictly liable for the accuracy of the fundamental information. 3) Clarify that no bona fide error defense is available for any collector communicating information that is contradicted by any of the original, account-level documentation identified above.*

1.1.4.1 Bifurcating Substantiation Requirements

We strongly urge the Bureau to require the more comprehensive documentation requirements that we outline above in section 1.1.4 for all debt collectors. However, to the extent that the Bureau is not convinced that all debt collectors require the higher degree of substantiation, we propose that the Bureau apply the more stringent standards outlined above to collectors unless they qualify for an exemption. Collectors that are directly acting for the creditor that created the debt, which still owns the debt, would qualify for the exemption. Collectors that qualify for such an exemption would not need to comply with the proposal in section 1.1.4.

1.1.5 Representations of Accuracy from the Creditor Are An Insufficient Basis on Which to Initiate Collections

The CFPB indicated that it rejected proposals that would have required review of original, account-level documentation in part because it believes that the representations of accuracy from

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spreadsheet. Outline 8. Thus, this requirement appears to require a recitation of the chain of title rather than a bill of sale showing the date of sale and the identity of the buyer and proving that the account in collection was part of the portfolio that was sold.

[46] As we have noted in previous comments, any centralized debt repositories created for this purpose would be entities covered by the consumer protections of both the Fair Credit Reporting Act and the FDCPA.

creditors will be sufficient to allow collectors to establish a reasonable basis to initiate collection.[47] The CFPB envisions that this representation would consist of "a written representation from the debt owner that it has [1] adopted and implemented reasonable written policies and procedures to ensure the accuracy of transferred information and [2] that the transferred information is identical to the information in the debt owner's records."[48] Collectors would not be required to obtain a representation of accuracy but collectors without such a representation would have to "justify an alternative approach."

As outlined above, these representations are of little value. Simply guaranteeing that the copy of the information provided is identical to that contained in the files does not guarantee that the information is correct.

Moreover, the proposal is insufficiently specific. What are "reasonable written policies and procedures"? Can every debt owner simply self-certify as to reasonableness? What about payday lenders, subprime auto lenders, and other peddlers of fringe financial products? A "reasonable procedures" approach has not worked for credit reports, which are plagued with inaccuracies despite the fact that the primary credit reports are provided by three large entities with sufficient resources for compliance. It will not work for debt collection, where a broad range of creditors collect debts, place debts for collection, or sell debts, and even large banks have had serious errors in the accuracy of their information.

Moreover, any protection potentially provided by this vague representation is completely eviscerated by the fact that collectors are not even required to obtain this representation, but could instead use an unspecified "alternative approach" provided by debt owners. As explained above, it is not clear what standard collectors would be held to for an "alternative approach" and to whom they would have to justify this approach.

The particular representations stated in the Outline are much less rigorous than those previously identified as necessary by the CFPB. In its recent study of the credit card industry, the CFPB surveyed debt sale agreements to determine whether they contained the following more robust representations and warranties:

- The affirmative representation that the seller has title to the accounts;
- The affirmative representation that the seller has complied with all the relevant consumer laws; and
- An affirmative representation as to the accuracy and completeness of the information the debt buyer is purchasing.[49]

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[47] Outline 9.

[48] Outline 8.

[49] Consumer Financial Protection Bureau, The Consumer Credit Card Market at 259 (December 2015).

The CFPB found that "all agreements we reviewed made all of the above representations, [but] a minority of agreements did so subject to the 'best of the seller's knowledge' caveat."[50]

An affirmative representation that information is accurate and complete is far different than a statement that the seller has "reasonable procedures" to ensure accuracy and completeness, as the proposal would permit. A statement that the seller has "reasonable procedures" is little different than the problematic practice that the CFPB has criticized of providing these representations with the caveat "to the best of the seller's knowledge," which make the assurances listed above "significantly less meaningful."[51]

As articulated above, we strongly disagree with the idea that debt collectors should be able to rely on representations rather than look at primary source data. Instead, the CFPB needs to require robust representations and warranties *in addition to* individual, account-level review. The CFPB should require debt collectors to obtain all three of the representations listed above before initiating collection on a debt – and to back them up with documentation. The CFPB should make clear that the representations have not been provided if caveats like "to the best of the seller's knowledge" or "based on our reasonable procedures" are included. Moreover, the CFPB should also clarify that even when there are robust representations, debt collectors are still strictly liable for any inaccurate information communicated to the consumer.[52]

Recommendations: *The CFPB should: 1) Require the three robust representations and warranties listed above in addition to individual, account-level review. 2) Make clear that the representations have not been provided if caveats like "to the best of the seller's knowledge" or "based on our reasonable procedures" are included. 3) Clarify that even when there are robust representations, debt collectors are still strictly liable for any inaccurate information communicated to the consumer.*

1.1.6 Warning Signs Do Not Provide Sufficient Protections for Individual Consumers

In the CFPB's Outline, the final prong to establish a reasonable basis for initiating collection involves looking for warning signs in individual accounts and across entire portfolios during the initial review. The CFPB provides examples of warning signs for individual debts (these would include information that is implausible, contradictory, or not in a clearly understandable form) and debt portfolios (which would trigger a warning sign only if an unspecified "significant percentage" of accounts have missing or implausible information or unresolved disputes).[53] If there are warning signs, the collector would then be required to take unspecified additional steps that might

[50] *Id.* at 260.

[51] *Id.*

[52] Section 1692k(c) will continue to provide a defense to debt collectors who make a "bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."

[53] Outline 8-9.

include obtaining and reviewing additional information from the original creditor or outside data vendors in order to establish a reasonable basis.[54]

We agree that the collector should always be on the lookout for warning signs. However, we are concerned that with the limited amount of fundamental information proposed by the Outline, a collector would be unlikely to see any warning signs by simply reviewing a few data points in a spreadsheet. There is simply not enough material in the "fundamental information" to allow most collectors to see the problems. Instead, by requiring the collector to review the account specific documents, they would be much more likely to see the inconsistencies and errors that would warn them of problems that should stop their collection activities until the problems are resolved.

We agree that the onus should be on the collector to be on the lookout for warning signs in every individual account[55] prior to initiating collection of that account. However, this review should be an *integrated part* of the process of reviewing critical documents for an expanded list of fundamental information as described above rather than a separate requirement that somehow eliminates the need to review original, account-level documentation.

Debt collectors should be required to have accessed and reviewed *all* of the fundamental information and documentation identified above (unless a particular type of information never existed) before initiating collection. Thus, missing information should be both a warning sign and a prohibition against future collection unless the collector obtains the missing information. Similarly, unresolved disputes or information that is implausible, contradictory, or not clearly understandable are also warning signs and collection should not proceed on an account with these warning signs until the dispute or discrepancy is resolved.

The CFPB's proposed portfolio-level warning signs are too vague to be meaningful. What is a "significant percentage of debt in the portfolio"? Is it 50%? 25%? 5%? 1%? In a portfolio with 10,000 debts, a 1% rate of warning signs would mean that there were 100 consumers whose debts were being collected *despite those warning signs*. In a country where there are likely hundreds of millions of debts in collection, allowing even a relatively tiny 1% error rate would still result in millions of consumers being subjected to collections on inaccurate debts.[56] Without a specific threshold, the determination would be up to the individual debt collector. Moreover, the remedy for addressing portfolio-level warning signs is similarly vague: collectors might have to obtain and review documentation for a "representative sample of accounts -- or in some cases, for all

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[54] Outline 9.

[55] In the outline, it is not clear whether collectors would be expected to review a sample of accounts individually for warning signs rather than each account. The CFPB should clarify that this requirement applies to each account.

[56] As of 2013, more than one in three adults with a credit history—77 million people—had debt in collections reported in their credit files. Caroline Ratcliffe et al., Urban Institute, Delinquent Debt in America (July 30, 2014). The CFPB's survey found that 57% of consumers who had been contacted in the prior year about repaying a debt were contacted regarding two to four debts and 15% were contacted about five debts or more. Outline App. B.

accounts."[57] The CFPB has not provided guidance about when a particular remedy will be appropriate, again leaving the decision up to the individual debt collector.

The incidence of portfolio-level warning signs will be lower if, as we suggest, the CFPB adopts a rule that requires review of individual, account-level documentation to confirm critical information for each account before collection begins. To the extent that collectors continue to see portfolio-level warning signs, this might indicate that the collector needs to a better job with its initial review (e.g., auditing the thoroughness of the pre-collection review). The solution for this problem would be to improve individual, account-level review procedures pre-collection. Alternatively, continuing to see portfolio-level warning signs despite effective pre-collection account reviews could indicate that consumers need better information about their alleged debts (e.g., consumers who dispute debts because they do not recognize them) or problems with the underlying account documentation--such as fraudulent or phantom debts (e.g., "debts" were based on payday loan leads and not actual loans). The solution for communication problems with consumers might be improved communication strategies while the solution for fraudulent debts would be ceasing collection on these accounts altogether.

In sum, we agree that collectors should be responsible for taking remedial steps when warning signs arise that collectors detect or should have detected. But warning signs are clearly not an adequate substitute for reliable access to original, account-level documentation.

Recommendations: *Debt collectors should be required to: 1) Access and review all of the fundamental information and documentation identified above (unless a particular type of information never existed) before initiating collection. 2) Consider missing information as both a warning sign and a prohibition against future collection unless the collector obtains the missing information. 3) Treat unresolved disputes or information that is implausible, contradictory, or not clearly understandable as warning signs. 4) Stop collection on an account with these warning signs until the dispute or discrepancy is resolved.*

1.2 During collection[58]

The CFPB has also proposed requiring debt collectors to continue to monitor for warning signs during the course of collection. The Bureau provides examples of individual account warning signs (a dispute or inability to obtain underlying documents after a dispute) and portfolio-level warning signs (consumers dispute a "significant percentage" of accounts in the portfolio).

We agree that collectors are required under the FDCPA to continue to be on the lookout for and respond to problems that arise during collection. However, as discussed above, warning signs are no substitute for reviewing original, account-level documentation. Moreover, requiring collectors to have access to critical documents at all stages of collection would eliminate (or at least

[57] Outline 9.

[58] Outline 9-10.

significantly decrease the frequency of) at least one warning sign - the failure to obtain underlying documents after a dispute.

We agree that disputes or other problems that arise when collecting an individual account must trigger additional scrutiny and review of relevant documentation. Where appropriate documentation is missing or confirms the consumer's dispute, the CFPB should make clear that the collector must cease all additional efforts to collect the debt and may not sell the debt.

As discussed above, the portfolio-level review proposed is too vague to be meaningful. No threshold is specified for when a "significant percentage" of accounts have disputed the debt. Collectors have no incentive to set a low threshold since this would require them to do additional work in order to continue collecting.

It is also difficult to imagine how a consumer could use private litigation to enforce requirements to review portfolios for warning signs. For example, a consumer who is subject to collection activity despite the fact that a "significant percentage" of accounts have disputed the debt could be required to prove that the collector had no procedures in place to review portfolios for warning signs or that the collector violated its own internal procedures. Forcing litigation about an entire portfolio rather than the appropriateness of collecting the debt in question could undermine the effectiveness of the FDCPA's remedial scheme.

Recommendations: *The CFPB should require: 1) That collectors have access to critical documents at all stages of collection. 2) That disputes or other problems that arise when collecting an individual account must trigger additional scrutiny and review of relevant documentation. 3) That collectors cease collection when appropriate documentation is missing or confirms the consumer's dispute, and not sell the debt.*

1.3 After a Dispute[59]

The CFPB is considering requiring debt collectors to obtain additional support before proceeding with collection whenever an oral or written dispute disrupts the collector's reasonable basis for a claim of indebtedness. While collectors would need to review information to re-establish a reasonable basis before collecting, they would not be required to review original account-level documentation. Collectors would also only be required to provide documentation to the consumer that is responsive to this dispute if a dispute is submitted in writing within 30 days of receiving the initial collection letter. The CFPB's regulations need to go much further to safeguard consumers in a number of ways.

[59] Outline 10-12, App. D.

1.3.1 Collection After a Dispute

We agree that, whether written or oral, a dispute disrupts the collector's reasonable basis for a claim of indebtedness. However, once a debt is disputed, the collector must be required to review original, account-level documentation and determine that there are no valid grounds for the dispute, or all collections efforts should be required to cease.

The CFPB is considering requiring collectors to transfer unresolved disputes to subsequent collectors, who are in turn prohibited from engaging in collection until the dispute is resolved.[60] We are concerned that this just passes the responsibility for resolving the dispute down the line, potentially to collectors who are less scrupulous or have fewer resources to attempt to resolve the dispute. There is no reason to believe that a subsequent debt collector would be better able to resolve a dispute when the first collector has been unable to do so. Moreover, consumers faced with subsequent collection attempts by new debt collectors might have a difficult time proving that they submitted a dispute to the first collector -- collectors do not usually provide receipts after receiving a dispute. Instead of transferring information about unresolved disputes, the CFPB should prohibit collectors from selling accounts with unresolved debt disputes or transferring such accounts to anyone other than the original creditor.[61]

Recommendation: *The CFPB should prohibit collectors from selling accounts with unresolved debt disputes or transferring such accounts to anyone other than the original creditor.*

1.3.2 Providing Documentation to Consumers in Response to Disputes

The CFPB should require collectors to provide documentation[62] to consumers no matter how or when a dispute is raised. The Outline indicates that collectors would only have to provide copies of substantiating documents to consumers who file timely, written disputes. For disputes filed after the initial 30 days, or disputes made orally, collectors would only be required to review the documentation, and not provide it to consumers. In that situation, collectors would not even be required to respond to the consumer with an explanation of how they resolved the dispute. Setting up two different standards will create unnecessary confusion for consumers[63] and will present significant enforcement challenges.

Without the requirement that the substantiating documentation be provided to consumers, neither consumers nor regulators will know if collectors actually reviewed the relevant documentation and

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[60] Outline 11.

[61] In its rulemaking for first-party debt collectors, the CFPB should also prohibit creditors from selling or transferring accounts with unresolved disputes.

[62] The separate issue of *which* information to provide to consumers is addressed below.

[63] See, e.g., the confusing text in the model validation notice in App. F and the fact that a collector would be expected to inform a consumer making an oral dispute of the option to obtain verification by making a timely written dispute (Outline 11).

resolved the dispute before continuing collection. Instead, collectors should be required to provide copies of original, account-level documentation to consumers in response to all disputes, regardless of whether the dispute was submitted orally or in writing and regardless of when it was submitted.

The CFPB's reason for requiring copies of substantiating documents to be provided only in response to written disputes received within 30 days is apparently based on the text of section 1692g(b) of the FDCPA.[64] However, the CFPB's Outline views disputes as disrupting the collector's reasonable basis to collect a debt. As previously discussed, collecting a debt without a reasonable basis would violate the FDCPA. There is no basis under sections 1692e, 1692e(10), or 1692f(1) to distinguish between the timing of the dispute or the manner in which it was submitted. As such, there is no reason to make the collector's obligation to deal with a dispute dependent on the timing of the dispute or the manner in which it was submitted.

Recommendation: *The CFPB should require collectors to provide documentation to consumers no matter how or when a dispute is raised.*

1.3.3 Expanding Ways for Consumers to Dispute a Debt

To make it easier for consumers to dispute a debt, the CFPB should require collectors to accept disputes through any method that the collector uses to contact consumers, be contacted by consumers, or accept payments from consumers. For example, if the collector accepts payments online, it should also accept disputes online. If the collector communicates with consumers via text, it should accept disputes by text. Regardless of how the dispute is made, the collector should be required to acknowledge that it received the dispute and will investigate.

Recommendation: *The CFPB should require collectors to accept disputes through any method that the collector uses to contact consumers, be contacted by consumers, or accept payments from consumers.*

1.3.4 Reviewing Original, Account Level Documentation to Resolve Disputes

The CFPB should require review of original, account-level documentation[65] in response to all disputes and should prohibit substitution of affidavits or documents created after the fact, such as

[64] The relevant portion of 15 U.S.C. § 1692g(b) says:

> If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

[65] The CFPB states that, "[t]he documentation requirement could be satisfied through collector review of copies of account-level documents establishing the required information" (Outline App. D), but does not require review of such documentation.

documents generated only for litigation. Robosigning and other abusive practices related to affidavits have been the target of prior CFPB enforcement actions.[66] When key original, account-level documents are missing, this should require the cessation of the collection of the debt. The CFPB should not open the door to collectors substituting affidavits as proposed.[67]

Documents created for litigation are not admissible in court as business records.[68] They are considered unreliable because they were not created contemporaneously or kept in the regular course of business activity.[69] The same concerns make them untrustworthy for investigating disputes. Allowing documents created for litigation to be used instead of original, account-level documentation would permit the current flawed system to continue -- a debt collector could use the same data from its spreadsheet both to send a collection letter to the consumer and to respond to the consumer dispute with a document created in response to the dispute.

Recommendation: *The CFPB should require review of original, account-level documentation in response to all disputes and should prohibit substitution of affidavits or documents created after the fact, such as documents generated only for litigation.*

1.3.5 Documentation That Collectors Should Review After a Dispute

Collectors must be required to review and provide accurate and relevant information in response to consumer requests for information and disputes. The CFPB Outline provides a list of different categories of disputes (generic dispute, dispute as to amount of debt, dispute as to wrong consumer, and dispute as to wrong collector),[70] together with the types of documentation that "may" be reviewed in each category. However, the CFPB's failure to require collectors to review all of the relevant documents is a significant loophole that weakens efforts to protect consumers who dispute their debts. As discussed above, the idea that collectors "would bear the burden of justifying any alternative approach" creates significant impediments to public and private enforcement.

There are also problems with the information collectors would be required to review for each of the individual dispute categories as follows:[71]

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[66] *See, e.g.,* Consent Order, In the Matter of Pressler & Pressler, LLP, Sheldon H. Pressler, and Gerald J. Felt ¶ 39 (Apr. 25, 2016); Consumer Fin. Protection Bureau v. Frederick J. Hanna & Assoc., Stipulated Final Judgment and Order, 14-cv-02211-AT, at ¶¶ 10-11 (D.Ga. 2015).

[67] Outline App. D n.1.

[68] National Consumer Law Center, *Collection Action*s § 4.2.4.1.2 (3d ed. 2014), updated at www.nclc.org/library.

[69] *Id.*

[70] These categories of disputes are related to the proposed categories in the sample validation letter in Appendix F. However, we note that there is no category in Appendix D to address a dispute related to paying the debt in full or as settled (one of the categories in the sample validation letter). The sample validation letter is addressed in more detail below.

[71] See Outline App. D.

- **Generic disputes:** In response to a generic dispute, the Outline's approach is to direct collectors to review the information included in the list in Appendix D (name, address, account number, date of default and date of last payment, name and address of creditor, and amount of debt balance at default and post default interest and fees). Collectors should be required to review and provide copies of the following original, account-level documentation to consumers:

    - A charge-off statement, billing statement, periodic statement, or other document generated by the creditor that reflects the balance at default;
    - A signed[72] account application, contract, or promissory note proving the consumer's agreement to the debt, or if no such document exists, documentation showing that the consumer has agreed to be responsible for this debt;
    - Proof of assignment to the current collector (*for debts being collected by an entity other than the current owner of the debt*); and
    - Documentation of chain of title,[73] including proof that the original creditor sold the debt allegedly belonging to the individual consumer to the first debt buyer and proof of each subsequent sale in the chain (*for debts that have been sold*).

- **Dispute as to amount of debt.** If the consumer disputes the amount of the debt, the Outline's approach is to direct collectors to review the information included in the list in Appendix D (amount of principal, interest or fees disputed, basis for seeking disputed amount, and date and amount of each payment after default). Collectors should also be required to review and provide copies of the following original, account-level documentation to consumers:
    - A charge-off statement, billing statement, periodic statement, or other document generated by the creditor that reflects the balance at default;
    - A copy of the terms and conditions in effect during the term of the contract and/or at default to justify any interest or fees included in the claim (*if attempting to collect fees or interest*);
    - Date and amount of each payment (or other credit) after default;
    - A copy of any settlement or repayment agreements;
    - The last 12 statements with account activity;
    - An accounting of the charges, fees, interest, and payments since the account last had a zero balance (*for open end credit*); and
    - Itemization of amount owed, between principal, interest, and fees (*for closed end credit*).

[72] Proof that the agreement was e-signed would satisfy this requirement.

[73] Many consumers may have difficulty articulating a chain of title dispute. Thus, it is important to include a review of chain of title documentation in the case of a generic dispute.

- **Dispute as to wrong consumer.** In addition to reviewing the information included in the list in Appendix D (date of birth, current and prior addresses, unique identifying numbers,[74] and consumer's original agreement or original consent to the debt), collectors who use credit or other consumer reports or specific consumer location tools[75] should be required to review and provide copies of these reports to the consumer.

- **Dispute as to wrong collector.** It is very unlikely that most consumers will be sufficiently knowledgeable about the purchase and sale practices of debt buyers and agency practices of collectors to know to ask this question. Yet, too often debt buyers and collectors cannot adequately prove that they have the right to collect the debts. As discussed above, the CFPB should require each debt collector to conduct a careful review of the chain of title documentation before it initiates any collection activities. If a dispute is raised on this point, collectors should be required to review and provide copies of the following original, account-level documentation to consumers:
    - Proof of assignment to the current collector (*for debts being collected by an entity other than the current owner of the debt*); and
    - Documentation of chain of title, including proof that the original creditor sold the debt allegedly belonging to the individual consumer to the first debt buyer and proof of each subsequent sale in the chain (*for debts that have been sold*).

- **Dispute as to payment/settlement of debt.**[76] Collectors should be required to review and provide copies of the following original, account-level documentation to consumers:
    - A copy of any settlement or repayment agreements; and
    - Date and amount of each payment (or other credit) after default.

One type of dispute that was not addressed is bankruptcy. If a consumer disputes a debt due to filing for bankruptcy, the collector should use PACER to confirm that the consumer filed for bankruptcy. If the bankruptcy is pending, the collector should be limited to submitting a proof of claim that otherwise complies with the Bankruptcy Code and applicable non-bankruptcy law, such as the FDCPA, unless the creditor is not subject to the automatic stay or other stay of collection activity.[77] If unsecured debt is discharged in bankruptcy, the collector should be required to permanently retire the debt from collection. The CFPB should prohibit the sale of such debt. If the consumer filed for bankruptcy, but the case was dismissed before a discharge, the collection activity and the sale of the debt should continue normally.

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[74] Information about the consumer such as date of birth and prior addresses should be reviewed in addition to unique identifying numbers. Collectors should not be able to pick one category or the other.

[75] For example, LexisNexis offers a product called Accurint for Collections.

[76] Although there is no category in Appendix D to address a dispute related to paying the debt in full or as settled, we address it here because it was listed as a category in the the sample validation letter in Appendix F.

[77] 11 U.S.C. § 362.

Another type of dispute that was not addressed includes identity theft. If a consumer submits an identity theft report, the collector should be required to stop all collection on the consumer's account. An identity theft report should be defined similarly to the same term as used in Regulation V, 12 C.F.R. § 1022.3(i).

Recommendations: *Collectors must be required to review and provide accurate and relevant information (as outlined in this subsection) in response to consumer requests for information and disputes.*

1.3.6 Concerns about Burden Shifting to Consumers

Once a dispute has been made, the CFPB is considering:

> clarifying that debt collectors are permitted to contact consumers while a dispute is pending to request clarification of a dispute submitted by the consumer, as long as the content of their communication is strictly limited to achieving this purpose and does not also include, for example, a request for payment.[78]

While we agree with the prohibition on requesting payment, we are concerned that allowing any oral communication would effectively allow debt collectors to pressure consumers to withdraw their disputes, to demand information or documentation from consumers, or otherwise shift the burden to the consumer to disprove that they owe the debt. Instead, the CFPB should limit the collector to either written communications or recorded oral communication[79] for any clarification of a dispute and also clarify that a consumer cannot be required to submit documentation or other information to trigger the right to have a dispute investigated.[80]

Similar concerns about burden shifting come up in response to the CFPB's proposal to allow collectors to ignore "duplicative disputes" unless the consumer provides "new and material information to support the dispute." Consumers have legitimate reasons to submit disputes that may at first glance appear duplicative. For example, a consumer might dispute the amount of the debt and then learn that the amount the collector is seeking contains a large amount of interest. The consumer might then dispute that amount of interest, seeking evidence that the collector has the legal authority to charge the indicated amount of interest. Although these are both disputes about the amount of the debt, they should not be treated as duplicative, nor should the consumer need to submit additional documentation in order to trigger the collector's obligation to respond

[78] Outline 10.

[79] The CFPB should require the collector to provide notice that the call is being recorded and that a copy of the recording is available to the consumer upon request.

[80] Similarly, Regulation Z's provisions for Fair Credit Billing Act disputes provide that a creditor cannot deny a claim based solely on the cardholder's refusal to comply with a particular request although the creditor can terminate the investigation if the consumer refuses to provide information solely within the consumer's knowledge or control. Official Interpretations § 1026.12(b)-3.

with substantiating documentation. Similarly, the consumer may dispute that the collector has the right person, receive a response rejecting that dispute, and then submit additional information showing that the consumer lived in a different location or otherwise cannot be the person the collector is seeking. Collectors should be prohibited from treating follow-up inquiries as duplicative disputes where the consumer raises additional questions or seeks additional clarification and the collector has not yet provided documentation to respond to the new issue.

Recommendation: *The CFPB should: 1) Limit the collector to written communications for any clarification of a dispute. 2) Clarify that a consumer cannot be required to submit documentation or other information to trigger the right to have a dispute investigated. 3) Prohibit collectors from treating follow-up inquiries as duplicative disputes where the consumer raises additional questions or seeks additional clarification and the collector has not yet provided documentation to respond to the new issue.*

1.4 Prior to threatening or filing a complaint in litigation[81]

The CFPB is considering a proposal that would require collectors to have "reasonable support for claims that the consumer being sued owes the amount claimed and that the collector has a legal right to make the claim."[82] The CFPB Outline proposes that one way that collectors could establish reasonable support prior to filing litigation is by reviewing all of the documents in Appendix D identified for responding to disputes.

We appreciate the fact that the CFPB is taking on the complex issue of requiring collectors to ensure more substantiation before initiating litigation to collect a debt. However, the CFPB's proposal is flawed with respect to pre-litigation document review for the same reasons that it was flawed with respect to disputes. First, there is no requirement that the collector review original, account-level documentation as opposed to affidavits or documents created for litigation. Next, there is no fixed list of documents that the collector will be required to review, as Appendix D permits substitution of unspecified documents. Finally, the proposal would not even require collectors to review the documents in Appendix D at all because collectors would be allowed to demonstrate "reasonable support" through unspecified "alternative means." As discussed above, the requirement that the collector "justify" these alternative means is vague and raises significant enforcement challenges.

In order to have reasonable support before threatening or initiating litigation, the collector should be required to obtain[83] and review the same original, account-level documentation that all debt collectors must review prior to initiating collection. These documents are listed above in section 1.1.4.

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[81] Outline 12.

[82] Id.

[83] As discussed above, the collector should have unlimited access to this documentation throughout the collection process, so "obtaining" should just involve accessing the already available data.

If threatening or initiating litigation on a court judgment (e.g., payment review, wage or bank account garnishment proceedings, levies on personal property, or the filing of liens), however, collectors should be required to review additional documents, including the judgment establishing: the original amount of the judgment, the chain of title related to any assignments of the judgment, as well as previous collectors' records of all post-judgment interest and payments.

Collectors should also be required to review information transferred from prior collectors and make sure that the consumer is not deceased, is not an active-duty servicemember, and has not filed for bankruptcy before filing a lawsuit.

Recommendations: *Collectors should be required: 1) To obtain and review the same original, account-level documentation that all debt collectors must review prior to initiating collection before threatening or initiating litigation. 2) To review information transferred from prior collectors and make sure that the consumer is not deceased, is not an active-duty servicemember, and has not filed for bankruptcy before filing a lawsuit.*

1.5 Review and Transfer of Certain Information[84]

1.5.1 Requirement to Transfer and Review Certain Information

The CFPB is considering requiring collectors to transfer certain information when returning a debt to a creditor or transferring a debt from one debt buyer to another such that subsequent collectors would be required to review the information. The CFPB envisions transfer of three categories of information: 1) affecting FDCPA compliance obligations, 2) affecting compliance with other federal laws; or 3) that may benefit consumers.[85]

Applying clear requirements for the transfer of information represents a significant step forward in cleaning up the debt collection system. We strongly support the proposed requirements to transfer information about prior collection attempts and agree that all of the categories listed need to be transferred to any subsequent collectors. This information transfer will make it easier for consumers to assert their rights. Consumers will not need to explain to each new collector that they cannot get phone calls at work or send a new cease communication letter every time their debt is sold.

However, in addition to the list of information in Appendix E, the CFPB should also require the following categories of information to be transferred:

- Information related to bankruptcy filings;

[84] Outline 13-15, App. E.

[85] App. E.

- Information about identity theft claims (whether oral or written);[86]
- A record of any payments made post-default, including any payments made to this collector;
- Copies of any correspondence required by law (such as information required under state law necessary for a deficiency judgment, or the sending of mandatory notices).

Recommendations: *The list of information to be transferred between collectors should be expanded to include the categories listed above.*

1.5.2 Responsibility for Accuracy of Transferred Information

The CFPB Outline does not mention which parties have a duty to ensure the accuracy of transferred information. To ensure that collectors build systems that rely only on full and corrected information from previous collection efforts, it is critically important that each collector should be responsible for the accuracy of the information on which it is basing its collection efforts. This means that a collector that violates the FDCPA because it relied on inaccurate information from a previous collector is itself liable for that violation.

It should not be up to consumers to ascertain the break in the information transfer requirements (e.g., was it the creditor's fault that the information was not transferred, or the fault of Collector B, who failed to transfer the information to Collector C?). The current collector doing the collecting should be responsible for the accuracy of the information on which its collection activities are based, even if a prior collector failed to transfer information. Previous collectors and original creditors[87] should also be liable for failing to pass on information. However, consumers might face challenges bringing FDCPA claims against prior collectors due to the FDCPA's one year statute of limitations and consumers would not be able to bring FDCPA claims against original creditors who do not qualify as debt collectors under the statute. Clarifying the liability of the current collector enhances private enforcement and ensures that the collection industry will have the incentives to create a system of transferring information that ensures its accuracy. Collectors can purchase insurance, have buy-back agreements, or have indemnity agreements to cover the risk of acting on inaccurate information.

Recommendation: *The CFPB should clarify that each collector is fully responsible for the accuracy of the information on which it is basing its collection efforts.*

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[86] As noted above, collection should cease if there is an identity theft report.

[87] The CFPB has recognized the role that original creditors play in transferring information from one collector to another (for example Collector A may return an account to the original creditor who then places the account with Collector B) and identified this as an area for future rulemaking. Outline 14, n.23 ("[T]he Bureau understands that the ability of collectors to obtain information arising from prior collection activity depends on the conduct of debt owners. The Bureau intends to consider in the future comparable proposals for debt owners not subject to this proposal under consideration.").

1.6 Requirements to Forward Certain Information After Returning or Selling a Debt

The CFPB is considering requiring collectors to forward certain information even after they have either returned the account to the original creditor or sold to another debt buyer. We agree with this proposal on all points except for payments by consumers after they no longer have the account. We are concerned about the possibility that funds will not properly be credited to the consumer's account if transferred to the original creditor or subsequent debt buyer. We propose that where a consumer can demonstrate that she paid a previous collector, the current creditor should have no recourse against the consumer to collect that money (or any late fees, penalties, etc.). Original creditors or subsequent debt buyers would, instead, have a claim against the prior collector for any funds that were not properly forwarded.

Recommendation: *The collector receiving the payments from the consumer should be clearly responsible for ensuring that the consumer's payments are properly transferred to the subsequent collector.*.

2. Other Proposals in the Outline

2.1 Coverage[88]

The proposals in the CFPB's Outline would apply to debts acquired in default by collection agencies, debt buyers, collection law firms, and loan servicers. To accomplish this the CFPB should promulgate a rule interpreting the term "debt collector" under 15 U.S.C. § 1692a(6), with particular attention to clarifying that the FDCPA unquestionably covers:

- **Debt Buyers.** When the FDCPA was first passed in 1977, there were creditors collecting their own debts and third-party debt collectors collecting debts on behalf of those creditors. In the intervening years, debt buyers who purchase defaulted debts from creditors and then collect on these debts, either directly or through the use of third-party debt collectors, have emerged as some of the largest players in the collection industry. For nearly three decades courts have applied the FDCPA to debt buyers.[89] However, some debt buyers still argue that they are not covered by the FDCPA, and a few courts have found that certain debt buyers are not debt collectors under the FDCPA.[90] The CFPB

[88] Consumer Fin. Protection Bureau, Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered 4 (July 28, 2016) (hereinafter "Outline").

[89] See, e.g., Kimber v. Federal Fin. Corp., 668 F. Supp. 1480, 1484 (M.D. Ala. 1987). See also, National Consumer Law Center, Fair Debt Collection § 4.2.4 (8th ed. 2014), *updated at* www.nclc.org/library.

[90] Gold v. Midland Credit Mgmt., Inc., 2015 WL 1037700 (N.D. Cal. 2015) and Kasalo v. Trident Asset Mgmt., LLC, 2014 WL 3056821 (N.D. Ill. 2014) both held that debt buyers who hired debt collectors to collect their debts were not debt collectors under the FDCPA. Henson v. Santander Consumer USA, Inc., 817 F.3d 131 (4th Cir. 2016), *cert. granted*, 2017 WL 125669 (U.S. Jan. 13, 2017) and Davidson v. Capital One Bank (USA), 797 F.3d 1309 (11th Cir. 2015), which both involved banks purchasing portfolios of current and some defaulted debts, rejected the interpretation from Kimber v. Federal Fin. Corp., 668 F. Supp. 1480, 1484 (M.D. Ala. 1987) of "owed . . . to another"

should use the rulemaking process to clearly affirm that debt buyers are debt collectors under 15 U.S.C. § 1692a(6).

- **Trustees, Foreclosure Attorneys, and Mortgage Servicers.** Scores of courts have erroneously held that the FDCPA does not apply to the process of foreclosure,[91] depriving homeowners facing foreclosure of FDCPA protections. Collection of a debt cannot be divorced from the enforcement of the security interest. As the purpose of the sale of the property is to collect the amount owed by the borrower, it should be treated as a direct or indirect method to collect the debt. The CFPB should promulgate a rule to remove any remaining doubt that trustees, foreclosure lawyers, and mortgage servicers collecting home secured debts acquired after default are all debt collectors covered by the FDCPA.

***Recommendations**: Clarify that debt buyers, trustees on deeds of trust, foreclosure attorneys, and mortgage servicers collecting debts in default when they obtained the servicing rights are debt collectors under the FDCPA.*

2.2 Validation Notice[92]

The CFPB proposes to enhance and clarify information in the validation notice that collectors are required to provide to consumers[93] because it is concerned that validation notices do not contain sufficient information to be effective.[94] To remedy this, the CFPB proposes a model validation notice.[95] These proposals are examined below.

2.2.1 Information about the Debts

Currently, the FDCPA requires collectors to send a written validation notice containing the following information about the debt:

- the amount of the debt; and
- the name of the creditor to whom the debt is owed.[96]

The CFPB is considering a proposal to require the validation notice to contain the following information about the debt:

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in 15 U.S.C. § 1692a(6) in reaching the conclusion that the entities in question were creditors exempt from the FDCPA.

[91] See, e.g., NCLC, Fair Debt Collection Appx. J.1.2.2.3.2 (8th ed. 2014), *updated at* www.nclc.org/library.

[92] Outline 15-17, App. F.

[93] 15 U.S.C. §1692g.

[94] Outline 15.

[95] Outline App. F.

[96] 15 U.S.C. §1692g(a).

- the consumer's full name and address;
- the debt collector's name and address;
- a description of the debt type (e.g., "credit card");
- the merchant brand associated with the debt (e.g., the name of the retailer that appears on a branded card), if applicable;
- the name of the creditor at the time of default (the "default creditor");[97]
- the account number with the default creditor;
- the amount owed on the default date;
- the creditor to which the debt is currently owed;
- an itemization of interest, fees, payments, and credits since the default date; and
- the amount owed currently.

This is a good list. On balance the potential benefits of including this additional information outweigh the risks of overwhelming consumers with too much information or making it more difficult to locate critical information on the page. The additional information should answer many basic questions about the debt to help the consumer more easily identify the debt and assess whether to dispute it or seek additional information. The proposed layout of the information about the debt in the CFPB's model validation notice succinctly provides this information and generally enhances readability.

We ask that the CFPB consider additional requirements to further improve the reliability and transparency of important information provided to consumers at this early stage of the debt collection process. The CFPB should also require that collectors:

- To standardize the categories for types of debts across the debt collection industry and promote clarity for consumers between debt collection and credit reporting, the same categories should be used for different types of debts that creditors are currently required to use when information is furnished to Equifax, Experian, and TransUnion under the Metro 2 reporting format;[98]
- For medical debts, include the name of the hospital or healthcare facility where treatment was received for medical bills that do not come directly from the medical facility (e.g., physician, radiology, laboratory, anesthesiology, etc.) in the same way that the CFPB proposes identifying the merchant brand associated with the debt;
- Name the original creditor (the entity that provided the services or extended the credit) or the creditor to whom payments were primarily made over the term of the contract in

[97] The CFPB would allow this information to be omitted when included elsewhere. Outline App. F, n.2. As noted below in section 2.2.5, we believe that the CFPB should prohibit anything other than the validation notice and the statement of rights from being sent to consumers during the initial communication. Thus, the information would need to be provided in the validation notice.

[98] This will standardize the categories for types of debts across the debt collection industry and promote clarity for consumers between debt collection and credit reporting.

addition to the name of the creditor at the time of default to avoid confusion that may be caused by debt that is sold pre-default; and

- Use the account number with the original creditor rather than the default creditor.

***Recommendations**: 1) All of the information described in 2.2.1 should be included in the initial validation notice. 2) The CFPB should define when a debt is in default.*

2.2.2 Information about Consumer Rights

Currently, the FDCPA requires collectors to send a written notice containing the following information about the consumer's rights:

- a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
- a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
- a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.[99]

The CFPB proposes providing the following additional information about the consumer's rights in the validation notice:

- A statement describing the effect of submitting either an oral dispute or any dispute outside of the 30-day period—e.g., that before the debt collector may continue making collection communications it must confirm that it has a reasonable basis for its claims of indebtedness;[100]
- A statement explaining the "collections pause"—e.g., the requirement that a debt collector in receipt of a timely written dispute or an original-creditor-information request cease collection until it verifies the debt or provides the name and address of the original creditor, as appropriate; and
- A statement that, for additional information, the consumer should refer to the accompanying Statement of Rights and visit the Bureau's website.

[99] 15 U.S.C. §1692g(a).

[100] The CFPB would allow this information to be omitted when included elsewhere. Outline App. F, n.4. As noted in section 2.2.5 below, we believe that the CFPB should prohibit anything other than the validation notice and the statement of rights from being sent to consumers during the initial communication.

Unfortunately, as implemented in the model validation notice under the heading "How can you dispute the debt?", these ideas produce a confusing tangle of information that will be incomprehensible to the least sophisticated consumer.[101]

The way out of this quagmire is for the CFPB to require collectors to respond to all disputes with documentation showing that the consumer owes the debt, regardless of when or how the disputes are made.[102] If the CFPB adopts such a requirement, the validation notice would still comply with § 1692g(a) if it says something much simpler like:

> You can contact us by [phone, email, online, or at our mailing address][103] at <u>any time</u> to dispute all or part of the debt or request the name and address of the original creditor. We will stop collecting until we send you our response.
>
> If we do not hear from you by [date 40 days after letter is mailed],[104] we will assume that our information is correct.

Since a statement of rights will be included with the validation notice, it is not necessary to include a statement on the validation notice referencing that document or the CFPB's website. Removing this information would free up critical space that may be needed for additional disclosures as discussed below.

***Recommendations**: Simplify the information about consumer rights provided on the validation notice and avoid duplication of content included in the statement of rights.*

2.2.3 Dispute "Tear-Off"

The CFPB is considering the novel idea of requiring a tear-off portion of the validation notice that consumers could mail back to collectors to dispute the debt or ask for more information about the original creditor. The model validation notice provides a list of different categories that a consumer might check to indicate what type of dispute he or she is making - information that would trigger specific response requirements for collectors.

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[101] Outline App. F.

[102] See also National Consumer Law Center, The Need for Substantially More Substantiation in Debt Collection: Recommendations for the CFPB on its Debt Collector and Debt Buyer Rulemaking 16-17 (Nov. 2016).

[103] The section in brackets could be customized to reflect the communication methods available to that collector. The CFPB should require collectors to accept disputes through any communication method that it uses to communicate with consumers.

[104] This formula would allow the validation notice to include a specific deadline for responses that approximates the time frame provided under 15 U.S.C. § 1692g(a) ("within thirty days after receipt of the notice") while still allowing for sufficient time for mailing. The CFPB's model validation notice includes the specific date of the deadline but did not need to allow for mailing time because it was dated 30 days from the date that it was received during the consumer testing session. Outline App. F n.5.

As currently structured in the model validation notice, the dispute tear-off includes a payment coupon, which is likely to lead some consumers to erroneously believe that they have to submit a payment in order to make a dispute - further decreasing the number of consumers likely to dispute the debt. The payment coupon should be removed from any tear-off form included in a model validation notice.

Although a dispute tear-off should help some consumers by removing the need for the consumer to draft a letter or find a sample letter to copy, low response rates from class action settlements,[105] where claims typically need to be sent by mail, suggests that few consumers will send a dispute by mail. In addition to a tear-off form, the CFPB should require collectors to accept disputes through any communication method that it uses to communicate with consumers. So, if the collector makes or receives phone calls or emails from consumers, it should accept disputes by phone or email. If the collector has a web portal for accepting payments from consumers, it should also accept disputes through that portal.[106] The collector should be required to list all of the ways that a consumer can dispute the debt in the validation notice and should be required to provide a receipt to the consumer acknowledging the dispute. Additionally, the receipt should explain the next steps that the collector will be taking to respond to the dispute.

***Recommendations**: 1) Remove the payment coupon from any tear-off form. 2) Require collectors to accept disputes through any communication method that it uses to communicate with consumers. 3) Require a receipt of the dispute to be provided to the consumer that explains the next steps.*

2.2.4 Consumer Testing

The creation of a model validation notice represents an opportunity for consumers to benefit from consumer-tested language and design. If it has not already done so, the CFPB should ensure that the validation notice is tested with all potential disclosures, including:

- any disclosures required by state law,[107]
- the statement of rights,

[105] In 105 cases examined by the CFPB, the average response rate was 21% and the median response rate was 8%. Consumer Financial Protection Bureau, Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a) p. 17 (Mar. 2015).

[106] Web portals could provide a number of benefits to consumers. For example, consumers could provide collectors with information about communication and language preferences or the details about any disputes. Consumers could also use these to propose payment plans or chat with a company representative. Collectors could use the portal to easily provide receipt of disputes, provide access to account-level documentation in response to a dispute, or inform the consumer about the status of an investigation or request for a payment plan.

[107] The CFPB should prohibit the collector from including any state law disclosures from states other than the state to which the validation notice is being mailed. Multiple state validations are confusing because a) it is too much information, and b) consumers may assume that they do not have the right mentioned in the disclosure for another state if they do not live in that state even though their state may simply not highlight that right or not require separate, mandatory disclosures.

- the proposed litigation disclosures, and
- the proposed disclosures about time-barred and obsolete debt.

These tests need to focus on issues like information overload to ensure that consumers are able to process all of the information when it arrives together. If testing indicates consumer confusion, the CFPB should consider alternative approaches such as mailing the validation notice and the statement of rights separately to keep key disclosures clear, conspicuous, and simple.

Similarly, collectors who do not wish to use the model CFPB validation notice or statement of rights[108] should be required to track key data identified by the Bureau (e.g. number of disputes) in order to enable evaluation of these notices during supervision.

***Recommendations**: 1) Perform consumer testing on all CFPB proposed notices. 2) Require collectors who do not use the model validation notice and statement of rights to maintain key statistics so that the CFPB can evaluate the efficacy of their letter.*

2.2.5 Other Improvements to the Validation Notice

In addition to the other proposals related to validations notes, the CFPB should:

- Clarify that <u>each</u> collector is required to send a validation notice.[109] A small, but growing, number of court decisions have erroneously held that 15 U.S.C. § 1692g only applies to the first debt collector to work a debt, allowing a creditor to effectively avoid the verification requirement by hiring a short term debt collector who sends the § 1692g notice and then hiring a second debt collector who claims that the § 1692g requirements were satisfied by the first collector's notice.[110]

- Explain that the § 1692g notice requirement is not satisfied until the collector has sent the notice to the consumer's current address.[111] Collectors should not be permitted to simply rely on the address received from the owner of the debt or a previous collector without making any effort to verify that it is the most current address. The CFPB's rule should

[108] The CFPB proposes allowing debt collectors to opt-out of using the validation notice or statement of rights developed by the CFPB using consumer testing. Outline 16.

[109] Hernandez v. Williams, Zinman & Parham PC, ___ F.3d ___, 2016 WL 3913445 (9th Cir. July 20, 2016) (each debt collector must send a notice with the disclosures required by §1692g(a), even if previous debt collectors have already sent the required notice.).

[110] See NCLC, *Fair Debt Collection* § 5.7.2.2 (8th Ed. 2014).

[111] Ponce v. BCA Fin. Servs., Inc., 467 Fed. Appx. 806, 807 (11th Cir. 2012) ("While the plain language of the statute might not require the debt collector to ensure actual receipt of the written notice, the plain language does require the debt collector to send the written notice to a valid and proper address where the consumer may actually receive it."). *Accord* Duranseau v. Portfolio Recovery Assocs., L.L.C., 2015 WL 632144 (D. Minn. Feb. 13, 2015); Johnson v. CFS II, Inc., 2013 WL 1809081 (N.D. Cal. Apr. 28, 2013).

state that relying on addresses provided by previous collectors without independent confirmation does not qualify as a bona fide error.[112]

- Prohibit anything other than the validation notice and the statement of rights from being included in the initial mailing to the consumer to ensure that consumers are not overwhelmed with extraneous information.

***Recommendations**: 1) Each collector should be required to send a validation notice. 2) This requirement should not be met until the notice is sent to the consumer's current address. 3) Relying on addresses reported to prior creditors or collectors without independent verification should not be considered a bona fide error. 4) Nothing other than the validation notice and the statement of rights should be permitted to be included in the initial mailing to the consumer.*

2.3 Statement of Rights[113]

In addition to the information included in the validation notice, the CFPB is considering requiring collectors to include a one page statement of rights - both with the initial validation notice and in the "first post-180-day communication."[114] This proposal represents an important attempt to require collectors to convey additional information to consumers about their rights.

The CFPB has developed a model statement of rights document that it is refining through consumer testing. This draft is an important first step to ensure that consumers have key information about their rights in debt collection. However, we believe that the model statement of rights can be improved further.

For example, the CFPB's draft Statement of Rights is missing key information about consumer rights. First, it is critically important that consumers be informed that they have the right to stop all collection calls or all contacts at work. This right, pursuant to 15 USC 1692c(a)(1), is distinct from the right to stop *all* communications. Consumers are often afraid of exercising their right to stop all communications, because of their fear of being sued. Other important information that should be added includes information about the ability to file a complaint with the CFPB or sue the collector. Finally, we recommend that some provisions be re-written to emphasize concrete prohibitions (e.g., calling before 8 am or after 9 pm) instead of general protections.

We propose that the body of the statement of rights be amended to say:

[112] 15 U.S.C. §1692k(c).

[113] Outline 15-17, App. G.

[114] Outline 16.

You have the right to . . .

- **Stop all collection phone calls and all contacts at work.** Tell the collector if you want it to stop all calls or if certain times, places, or types of communication are inconvenient. (Collectors will still be able to contact you in other ways. For example, if you stop all calls, they could still write to you.)
- **Stop all communications.** Write to the collector to tell it to stop all contact with you. (This will stop all but a few contacts allowed by law.) The debt will not go away, and collectors may still sue you to collect the debt. If you are sued, you have the right to defend yourself in court.
- **Ask questions or dispute the debt at any time.** Contact your collector using the contact information it provided. Ask questions or tell it if you think the information is wrong.
- **Complain about the collector.** You can submit a complaint at consumerfinance.gov/complaint. The collector will have a chance to respond.
- **Find an attorney to represent you.** If collectors break the law in their attempts to collect a debt, you can sue them. Many attorneys take these cases for free and may represent you without charge.
- **Review your credit report.** You can get a free copy of your credit report at annualcreditreport.com. You can dispute any incorrect information with the credit bureau and the debt collector.

It is illegal for debt collectors to . . .

- **Call you before 8 am or after 9 pm.**
- **Speak to you more than once a week without your permission.** There are also limits on how often they can try to contact you.
- **Swear at you, threaten you, or use other abusive language.**
- **Pretend to be officials such as police or immigration officers.**
- **Deceive you, mislead you, or make false statements.**
- **Discuss your debt with others.** Collectors may only contact other people to try to locate you. Otherwise, collectors generally are not permitted to discuss your debt with anyone other than you, your spouse, or your attorney.
- **Take certain protected income and property.** Federal and state laws protect certain income and property. For example, collectors may not be able to take SSI, Social Security, public assistance, veterans', disability, unemployment, and workers' compensation benefits. Tell the collector if these types of benefits are your only source of income, and ask it to stop collection on the debt.

The CFPB proposes providing a link to additional information about debt collection on its website at the bottom of the statement of rights. The proposed website[115] does not currently exist.[116] When developed, the landing page should include a more detailed discussion of the issues discussed in the statement of rights instead of simply directing consumers to the existing Ask CFPB webpage for debt collection.[117] Both the Statement of Rights and the website should be in simple language (e.g., at a comprehension level of 6th grade or below), to be fully understandable to the least sophisticated consumer, and, as discussed in the next subsection, should be available in languages other than English.

Finally, the CFPB should remove the Spanish language notice at the bottom of this document, and should include a full Spanish translation on the reverse of every statement of rights as discussed in the next section.

Recommendations: *1) Articulate that consumers have the right to tell collectors that they want all calls to stop, as distinct from the right to stop all communications. 2) Inform consumers of their right to file complaints or sue debt collectors. 3) Highlight concrete rights or prohibitions.*

2.4 Language Access[118]

We applaud the CFPB for including questions in its SBREFA Outline regarding access for consumers with limited English proficiency. We recognize the importance of the proposals made by the Bureau and urge the Bureau to expand its approach. The comments that follow discuss our recommendations in detail.

Recommendations: *The CFPB should mandate:*

- *Automatic distribution of translated validation notices and Statements of Rights in Spanish;*
- *Provision of validation notices and statements of rights in additional languages;*
- *Language access for web portals and state disclosures;*
- *Treatment as timely of certain key documents submitted in Spanish and other languages;*
- *Collection and retention of language preference;*
- *Transfer of existing language preference information to subsequent collectors; and*
- *Reasonable availability of oral interpretation.*

[115] consumerfinance.gov/debtcollection

[116] Attempts to connect to the website on December 20, 2016 returned a 404 error.

[117] http://www.consumerfinance.gov/askcfpb/search/?selected_facets=category_exact:debt-collection

[118] Outline 17.

2.4.1 CFPB's Current LEP Proposals

The Bureau has offered two alternative approaches for increasing LEP access to information in the debt collection process:

1. Require debt collectors beginning collection to give all debtors validation notices and statements of rights that include a Spanish translation on the reverse side of the English document.[119]

2. Require debt collectors beginning collection to provide the two notices in another language when either:

   - the debt collector's initial communication with the consumer took place predominantly in a language other than English, or
   - the debt collector received information from the creditor or a prior collector indicating that the consumer prefers to communicate in a language other than English.

   However, under the second proposal, translated notices would only be required where the Bureau has published translated version of the notices in that language.[120]

We urge the CFPB to take advantage of this critical moment and broaden its plan to include both of these approaches as well as additional limited requirements discussed below.

2.4.2 CFPB Authority

The CFPB has the authority to take substantial steps toward providing meaningful language access for consumers. Title X of the Dodd–Frank Wall Street Reform and Consumer Protection Act[121] established the CFPB to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[122] The CFPB is entrusted with implementing and enforcing the federal consumer financial laws "for the purpose of ensuring that *all consumers have access* to markets for consumer financial products and services and that markets for consumer financial products and services are *fair*, transparent, and competitive."[123] Moreover, the CFPB has

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[119] This approach does not appear to contemplate expanding the disclosures to borrowers needing these documents in other languages.

[120] The Bureau notes that it anticipates that it would start by developing Spanish-language forms and "might" develop other language translations over time.

[121] 12 U.S.C. §§ 5481 *et seq.*

[122] *Id.* § 5491(a); *see also Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 785 F.3d 684, 686-87 (D.C. Cir. 2015) (summarizing the CFPB's authority in implementing and enforcing the Federal financial consumer laws).

[123] 12 U.S.C. § 5511(a) (emphasis added). The CFPB's framework is analogous to Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12182, which prohibits discrimination by public accommodations and services operated by private entities. The ADA provides a national mandate to ensure meaningful access for persons with disabilities, 42 U.S.C. § 12101, similar to the CFPB's mandate to ensure all consumers have access to the markets for consumer financial products and services.

broad authority under the Equal Credit Opportunity Act ("ECOA"), which makes it unlawful to discriminate against any borrower with respect to any aspect of a credit transaction on the basis of a prohibited distinction, including national origin. Similarly, the CFPB has authority to issue regulations under the Fair Debt Collection Practices Act ("FDCPA"),[124] which mandates certain written[125] and oral disclosures[126] and has broad prohibitions against false or misleading representations[127] and unfair collection practices.[128]

2.4.3 LEP Consumers Are an Essential Part of the Credit Market

As the demographics of the United States evolve, the number of U.S. residents for whom English is not a first language and who speak English with limited proficiency has increased dramatically. In 2015, approximately 25.9 million individuals, some 9 percent of the U.S. population, were considered limited English proficient (LEP). Limited English proficient refers to anyone above the age of 5 who reported speaking English less than "very well," according to the U.S. Census Bureau. Approximately five-sixths (83.4%) of all LEP residents speak one of eight languages: Spanish, Chinese, Vietnamese, Korean, Tagalog, Russian, Arabic, and Haitian Creole. About 64% of the LEP population speaks Spanish, followed by Chinese, spoken by 6% of the LEP population.[129] These individuals use financial products and services, but those who are not proficient in English have greater difficulty navigating the marketplace and resolving challenges when they arise.

Many lenders conduct market research to tailor their sales pitches to members of the LEP community, including advertising financial products to LEP consumers in their own languages. Borrowers facing delinquency and default, however, too often face an English-only system, creating additional barriers to responding to debt collection efforts and overcoming financial distress.

Debt collection is a significant issue in many LEP communities. For example, the metropolitan area in the U.S. with the highest proportion of the population with a debt in collections reported in their credit file, McAllen, TX, is 85% Latino,[130] with 32% of the working-age population

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[124] 15 U.S.C. § 1692l(d).

[125] 15 U.S.C. §§ 1692e(11); 1692g(a).

[126] 15 U.S.C. § 1692e(11).

[127] 15 U.S.C. § 1692e.

[128] 15 U.S.C. § 1692f.

[129] U.S. Census Bureau, *2010–2014 American Community Survey 5-Year Estimates*, American Community Survey (Washington, DC: U.S. Census Bureau) Table B16001 (accessed February 22, 2016).

[130] Caroline Ratcliffe et al., Delinquent Debt in America, Urban Institute (2014), *available at* http://www.urban.org/research/publication/delinquent-debt-america/view/full_report.

considered to be LEP.[131] Because LEP populations tend to experience poverty at much greater rates, they also are likely to face greater challenges paying their debts. In 2013, about 25 percent of LEP individuals lived in households with an annual income below the official federal poverty line—nearly twice as high as the share of English-proficient persons.[132]

Debt collection abuses in the LEP community are reflected in several FTC enforcement actions addressing abusive debt collection targeting Spanish speaking debtors.[133] The joint CFPB Debt Collection and the Latino Community Roundtable in October 2014 highlighted debt collection challenges in LEP communities.[134] Participants reported that LEP debtors tend to be less likely to challenge any representations made by a debt collector, including the amount owed.[135] In addition, translation issues result in problems, such as LEP debtors believing that a caller from a "debt collection agency" is in fact from a government agency. Even when translated documents are provided, they may only be partially translated, failing to provide meaningful access while also concealing key facts about the situation.[136]

The CFPB's Fall 2016 Supervisory Highlights further underlines the importance of providing LEP protections in debt collection. The CFPB stated that it continues to encourage lenders to assist LEP consumers.[137] It also noted that examiners have observed financial institutions providing services in languages other than English, including to LEP consumers, such as marketing and servicing of loans, collection of customer language information, translation of monthly statements

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131 Fred Dews, *Six Questions about the Limited English Proficient Workforce,* Brookings Now, Brookings Institution (Sept. 24, 2014), a*vailable at* https://www.brookings.edu/blog/brookings-now/2014/09/24/six-questions-about-the-limited-english-proficient-lep-workforce/.

132 Jie Zong and Jeanne Batalova, The Limited English Proficient Population in the United States, Migration Policy Institute (July 8, 2015), *available at* http://www.migrationpolicy.org/article/limited-english-proficient-population-united-states.

133 FTC vs. Centro Natural Corp., No. 14-23879-CIV (S.D. Fl. Oct. 20, 2014) ($1.5 million judgment against an abusive debt collection operation that targeted Spanish and English speakers, along with a complete ban on debt collection activity and other injunctive relief), complaint available at https://www.ftc.gov/system/files/documents/cases/141023centrocmpt.pdf); FTC v. Rincon Management Services, LLC, No. 5:11-cv-01623-VAP-SP (C.D. Cal. Mar. 26, 2014) (monetary judgment of over $23 million against an abusive debt collection operation that targeted Spanish and English speakers, along with a complete ban on debt collection activity and other injunctive relief), complaint available at https://www.ftc.gov/sites/default/files/documents/cases/2011/10/111026rinconcmpt.pdf; FTC v. RTB Enterprises,Inc. , No. 4:14-cv-01691 (S.D. Tex. June 19, 2014) (monetary judgment of $4 million against abusive Texas-based debt collector that targeted Spanish and English speakers), complaint available at https://www.ftc.gov/system/files/documents/cases/140625rtbcmpt.pdf.

134 A video of the roundtable is available here (as well as a Spanish language transcript): http://www.consumerfinance.gov/about-us/blog/live-from-long-beach/.

135 *Id.*

136 *Id.*

137 CFPB, Supervisory Highlights: Fall 2016 Section 3.1, available at: https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_13__Final_10.31.16.pdf.

and payment assistance forms, oral customer assistance including multi/bi-lingual staff, and quality assurance testing and monitoring of non-English services. These market changes are welcome developments. However, the CFPB's recent survey of consumers showed that only 79% of consumers contacted about a debt in collection were able to communicate in their preferred language.[138] Without knowing what percent of respondents indicated that English was their preferred language, this data is difficult to interpret.[139] Requiring enhanced LEP access at the debt collection phase is an important part of assuring that consumers have fair market access throughout the life of the loan, including at a stage that may have a long-term impact on their credit history.

We support the Bureau's effort to incorporate LEP protections into the debt collection regulations and provide detailed recommendations below.

2.4.4 Recommendations to Expand Protections for LEP Consumers

In its proposal, the Bureau has identified two potential requirements that could significantly increase access to the rights provided for by the FDCPA without imposing an undue burden on the collection industry. As discussed below, we urge the Bureau to adopt both of these proposals together. We also propose limited additional requirements that would support the intended goal of making the FDCPA's key protections accessible to LEP consumers.

2.4.4.1 The CFPB Should Require Automatic Distribution of Translated Disclosures in Spanish

More than 16 million individuals, approximately 5.6% of the total United States population recorded in the most recent census, are Spanish speakers with limited English proficiency.[140] It is likely that this number is even higher than reported given concerns about undercounting immigrants generally[141] and Latinos specifically.[142]

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[138] Consumer Financial Protection Bureau, "Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt" (Jan. 2017), http://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

[139] The CFPB did not release the data for responses to the question "Is English your preferred language?" The CFPB noted that the 79% who communicated in their preferred language was lower than expected, although the CFPB believed that some respondents might have misunderstood the question. *See id.* at 47 n.34.

[140] U.S. Census Bureau, *2010–2014 American Community Survey 5-Year Estimates*, American Community Survey (Washington, DC: U.S. Census Bureau) Table B16001 (accessed February 22, 2016) (16,346,401 Spanish speakers who speak English less than "very well" divided by 294,133,373 total individuals).

[141] The Leadership Conference, Immigrants and the Census, http://www.civilrights.org/census/messaging/immigrants.html.

[142] William P. O'Hare, et al., Child Trends, The Invisible Ones: How Latino Children Are Left Out of Our Nation's Census Count (Apr. 2016), *available at* https://www.scribd.com/document/314525078/The-Invisible-Ones-How-Latino-Children-Are-Left-Out-of-Our-Nation-s-Census-Count.

Respondents to NCLC's 2014 survey of consumer attorneys in response to the Bureau's ANPR indicated that validation notices are only occasionally provided in Spanish and never in other languages. Moreover, the CFPB's own roundtable found that translations are often only partial, concealing key information. LEP consumers who receive notices in English may not understand the status of their accounts. This failure to comprehend may result in default judgments.

The Bureau should require debt collectors beginning collection on an account to include a Spanish translation on the reverse side of every English validation notice and statement of rights, regardless of whether collectors have reason to believe the debtor speaks Spanish. The only exception should be when the collector has information indicating a language preference other than English or Spanish, as discussed below. Because approximately 64% of the LEP population speaks Spanish, this basic additional measure on its own would meaningfully augment consumer understanding for millions of LEP consumers with debts in collection.

Automatically distributing validation notices and statements of rights in Spanish as well as English would not create substantial costs if the documents were standardized by the Bureau. One translation could be provided by the Bureau to limit both collectors' translation costs and litigation risk.[143] Since the Spanish translation could simply be printed on the reverse of the validation notice and statement of rights, sending the translated version would not add to the cost of postage.

When creating a model validation notice, the Bureau also should create Spanish language model inserts addressing additional issues such as time-barred debt disclosures, obsolescence disclosures, litigation disclosures, and any other disclosures required by the CFPB's debt collection regulation that are not addressed in the current Outline. The CFPB should provide model translations of each disclosure.

As we discuss further below, a model validation notice should also include language asking debtors who have a language preference to notify the collector of this fact.

2.4.4.2 The CFPB Should Also Require the Provision of the Validation Notice and Statement of Rights in Additional Languages

After Spanish, there are seven languages spoken by nearly 5 million LEP individuals,[144] yet the Bureau does not commit to translating the validation notice and statement of rights into any languages other than Spanish.[145] By the time the final regulations are in effect, the Bureau should

[143] Litigation risk would also be mitigated by the bona fide error defense under 15 U.S.C. § 1692k(c).

[144] U.S. Census Bureau, *2010–2014 American Community Survey 5-Year Estimates*, American Community Survey (Washington, DC: U.S. Census Bureau) Table B16001 (accessed February 22, 2016) (83.4% of 25.3 million LEP speakers is 21,100,200 minus 16,192,000 LEP Spanish speakers is 4,908,200).

[145] U.S. Census Bureau, 2010–2014 American Community Survey 5-Year Estimates, American Community Survey (Washington, DC: U.S. Census Bureau) Table B16001 (accessed February 22, 2016).

translate and publish in the Federal Register for comment the validation notice[146] and statement of rights in the top eight languages spoken by LEP individuals in the United States: Spanish, Chinese, Vietnamese, Korean, Tagalog, Russian, Arabic, and Haitian Creole.

These eight languages, which we refer to as the top LEP languages, should be targeted by the CFPB for access to translation services. In future years, as immigration patterns change, different languages may become the top LEP languages, and the CFPB should expand its translation services and requirements to encompass the most common languages.

By expanding translated versions of standardized validation notices and statements of rights beyond the Spanish speaking community to LEP speakers of the top eight languages, the CFPB would be able to ensure that most LEP debtors in the country receive key documents in a form they can understand.

The Bureau should require collectors beginning collection on an account to replace the standard Spanish translation on the back of the English language validation notice and statement of rights with one of the other top LEP languages if:

> (1) the debt collector's initial communication with the consumer took place predominantly in a language other than English or Spanish, or the debt collector received information from the creditor or a prior collector indicating that the consumer prefers[147] to communicate in a language other than English or Spanish and
> (2) the Bureau has published in the Federal Register versions of the validation notice and statement of rights in that language.

In some cases, the collector may learn that the consumer has a preference for a language other than English or Spanish after sending out the standard validation notice and statement of rights. If the other language is one of the top LEP languages, the CFPB should require collectors to re-send the validation notice and statement of rights in the relevant language within 5 business days of learning that the consumer has a preference for one of the languages in which the CFPB has provided translated documents.[148]

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[146] As discussed above, the translated validation notice should include the model language on time-barred debt disclosures, obsolescence disclosures, litigation disclosures, and any other disclosures required by the CFPB's debt collection regulation that are not addressed in the current outline. As we discuss further below, a model validation notice should also include language asking debtors with a language preference to notify the collector.

[147] The question of whether a debtor prefers a certain language should be based on the debtor's personal assessment; it is not feasible to have collectors or creditors attempting to measure the debtor's English proficiency.

[148] One way in which this could occur is if the validation notice goes out and at the top the collector includes a statement (as we recommend in section 2.4.4.5) that translations into other languages are available and providing a website and phone number for requesting such documents. This is discussed further below.

In addition to adopting both of its proposed measures for language access, the CFPB should expand its proposal in the limited ways described below.

2.4.4.3 The CFPB Should Provide Translated Model Language for Web Portals and Translate State Disclosures

It is essential that LEP consumers have access to the range of crucial information provided by a debt collector. As the CFPB's Fall 2016 Supervisory Highlights demonstrates in its discussion of partial translations of documents, uneven information dissemination to non-English speakers results in their not having access to critical consumer rights. This lack of equal access to important information was highlighted in the Bureau's American Express Centurion Bank matter,[149] in which telemarketing calls primarily in Spanish were used to enroll consumers in a credit card add-on product but the written materials were all provided in English. As a result, consumers were unable to access the full range of product benefits.

Even if the validation notice and statement of rights are provided in-language for LEP consumers, failing to require translation of other information will deny consumers key information necessary to fully access their rights under the FDCPA and similar state laws.

One key area where translated information should be made available is a collector's web portal. Translations will allow LEP debtors to make payments online. In addition, web portals can be designed to collect information from consumers such as communication preferences, language preferences, proposing payment plans or debt settlements, reviewing account information, disputing debts and communicating after business hours. There are already some precedents for bi-lingual collection portals.[150] The Bureau should create a model web portal translated into Spanish and the other top LEP languages. The model portals would limit expense and risk for collectors while enhancing access and payment options for LEP debtors.

The validation notice also contains state disclosures. Debtors would receive a more complete picture of their rights if the state disclosures were only provided for the state in which the consumer resides and were provided in-language as well. Currently, there are a limited number of state disclosures. These should be translated as part of the Bureau's translation of the validation notice, along with the additional inserts for time-barred debt disclosures, obsolescence disclosures, and litigation disclosures. The Bureau could coordinate with states to generate acceptable translations.[151]

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[149] Consent Order, *In re American Express Centurion Bank. No.2013-CFPB-0011.*

[150] *See, e.g.,* Government Collection Agency Launches Spanish Language Payment Gateway, *Inside ARM* (May 25, 2007), *available at* https://www.insidearm.com/news/00002021-government-collection-agency-launches-spa/ (describing a bilingual portal created by Municipal Services Bureau).

[151] While we recognize the importance of also providing access in-language in subsequent correspondence between the debtor and the collector, we also recognize that a mandate for translating non-standardized communications

2.4.4.4 Collectors Should Be Required to Treat as Timely Documents Submitted in Spanish and Additional Languages

Consumers often submit documents to debt collectors, including dispute letters, cease communication requests, and records of payment, and these submissions trigger particular rights and protections when done within certain timeframes. When consumers submit these documents in languages other than English, it is important that the submissions be treated as timely and dealt with appropriately under the FDCPA. Therefore, in order to further the same goals the Bureau seeks to advance by requiring translation of these key notices, submissions of such documents in one of the top LEP languages other than English should be accepted and considered to meet any applicable deadlines, even if the English translation of the document is obtained by the collector after the deadline has expired.

As a first step, the CFPB should immediately require that documents submitted in Spanish be accepted as timely. Then, to transition to an equal access platform, and as third party translation services develop for collectors to use, the CFPB should require that documents in the other top seven LEP languages be accepted. Finally, as the third party translations services become more available, additional languages should be accepted as well.

2.4.4.5 Language Preference Information Should Be Collected and Retained

In order to make these limited translation requirements meaningful, collectors must be required to collect and retain information about language preference. Collectors should be required to have reasonable systems in place to record language preference and be able to retrieve it for purposes of future disclosures, correspondence, or oral communication. Systematically recording such information will allow collectors to:

- provide validation notices and statements of rights in the appropriate language (where CFPB translations exist);
- assign calls to bilingual employees where available;
- respond more quickly to oral inquiries from LEP consumers using bilingual staff or language line resources when available; and
- transmit this information to other debt buyers, debt collectors, or the original creditor.

To facilitate collection of language preference information, the model validation notice and statement of rights should indicate that translations into other languages are available. This could be done by prominently printing the names of other languages available onto the validation notice in those languages and then providing a web link and phone number for requesting translated disclosures. An expression of language preference should be treated as a request for a translated validation notice and statement of rights (where CFPB translation exists).

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would take longer to implement and involve greater costs and risks. Oral interpretation access is one way to cover some of that gap.

2.4.4.6 Transfer of Existing Language Preference Information to Subsequent Collectors Should Be Required

As noted in NCLC's response to the Bureau's ANPR,[152] debt owners do not generally transfer or make available information relating to the consumer's LEP status. In fact, in NCLC's 2014 survey of consumer attorneys, respondents uniformly stated that none of this information was transferred to the subsequent collector or debt buyer in cases handled by the respondents. Only one quarter of collectors maintain language preference in a form that can be transmitted to their clients.[153]

In the Outline's Appendix E, the Bureau notes that it is considering requiring subsequent collectors to obtain (and prior collectors to transfer) language preference, among other information. The Bureau should require transferring collectors to transfer existing language preference information and require receiving collectors to review such information. The fact that one quarter of collectors already have capacity to track language preference and transmit such information means these systems could be used as a basis for developing industry-wide protocols. Transfer of such data would aid debt buyers and debt collectors in complying with the debt collection regulations and may even facilitate more effective collection.[154]

2.4.4.7 Larger Collectors Should Be Required to Take Reasonable Steps to Provide Oral Interpretation

Finally, the Bureau should require larger debt collectors to take reasonable steps to provide oral interpretation to debtors with a language preference, either through in-house staff or through a third-party provider (for the languages available on a commonly accepted language line service). Initially oral interpretation should be required for all Spanish-speaking consumers. Then the Bureau should expand it to the other top LEP lanugages. Finally, to facilitate oral interpretation for all consumers, the CFPB should establish guidelines for access to these third-party services by all collectors and provide glossaries of key debt collection terms in the covered languages.

Reports from attorneys in the field as well as a review of the Bureau's own consumer complaint database reveal a consistent problem with LEP consumers who are unable to communicate in-language during phone calls with a debt collector. Often the consumer enlists a child to translate—not ideal for several reasons, including the untrained nature of a child translator, especially with terms of art, and the exposure of the child to the family's financial distress. Older debtors may not have anyone at home to interpret at all. Relying on family members also raises the potential for abuse by the translator. Family members could knowingly mistranslate in order to promote their

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[152] National Consumer Law Center, Comments to the CFPB in response to the Advance Notice of Proposed Rulemaking Regarding Debt Collection, Q6 (Feb. 28, 2014), www.nclc.org/images/pdf/debt_collection/comments-cfpb-debt-collection-anprm-2-28-14.pdf.

[153] Josh Adams, *Business Practices and Capabilities within the Debt Collection Industry,* ACA International (Nov. 2016).

[154] While the Bureau states in Appendix E states that transfer of information would not affect the legal obligations of subsequent collectors, such information would at minimum trigger any new LEP obligations under the debt collection regulations affected by possession of such information.

own financial gain or use the information to access the debtor's bank account or other funds. Many collectors already employ bilingual staff, particularly in Spanish, but coverage is not uniform.

Oral interpretation is a crucial building block of language access because it is the locus of informal dialogue, where a debtor can respond to allegations and straighten out problems with the account. Oral access also allows debtors to ask questions in what can be a confusing process. In addition, translating documents into the eight most common languages spoken by LEP individuals will still leave more than 4 million LEP individuals whose primary language is neither English nor one of those top eight languages.[155] Oral interpretation would provide access to a wider array of LEP consumers who could get their questions answered by phone. Moreover, reasonable access to oral interpretation would ensure that the oral disclosures required by the FDCPA are made in a language the consumer can understand.[156]

To facilitate access to oral interpretation, the Bureau should develop guidance for debt collectors on appropriate ways to respond should an LEP consumer have a question or need to communicate orally with a debt collector in a language other than English.

The Bureau also should publish glossaries in key languages to assist with interpretation of terms of art. These glossaries should take into account the fact that direct translations of complex terms may themselves not be understood by many consumers. The Bureau's own glossary of financial terms in Spanish is a good start for this.[157] Other examples include the IRS English-Spanish glossary of words and phrases[158] and the Superior Court of Sacramento County's glossaries in 11 languages, which are produced for use by oral interpreters and others.[159] Standards already are established for Spanish translation, including the use of Business Spanish.[160]

Because many collectors already are collecting in languages other than English (most commonly in Spanish in areas with a high-percentage of LEP Spanish speakers), providing additional guidance is

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[155] U.S. Census Bureau, *2010–2014 American Community Survey 5-Year Estimates*, American Community Survey (Washington, DC: U.S. Census Bureau) Table B16001 (accessed February 22, 2016) (16.6% of 25.3 million LEP speakers is 4,199,800).

[156] 15 U.S.C. § 1692e(11).

[157] Consumer Financial Protection Bureau, *The CFPB's Glossary of English-Spanish Financial Terms, available at* http://files.consumerfinance.gov/f/201510_cfpb_spanish-style-guide-glossary.pdf.

[158] Internal Revenue Service, English-Spanish Glossary of Tax Words and Phrases, U.S. Department of the Treasury, *available at* https://www.irs.gov/pub/irs-pdf/p850.pdf.

[159] https://www.saccourt.ca.gov/general/legal-glossaries/legal-glossaries.aspx.

[160] This approach was discussed in the CFPB-FTC roundtable on Debt Collection and the Latino Community. A video and Spanish language transcript of that event are available here: http://www.consumerfinance.gov/about-us/blog/live-from-long-beach/. For a summary of some of these issues, see Astrid Rial, The Challenges of Spanish-Language Collections in the U.S., Credit and Collection News (Dec. 17, 2014).

essential.[161] An example from a legal services organization in Texas illustrates the problem: an elderly debtor was told repeatedly by a Spanish-speaking collector that his debt was "delinquent" ("delincuente"). The debtor believed he was being accused of a crime for not payingan unidentified debt, causing him severe distress that impacted his physical health.[162] By providing glossaries and guidelines, the Bureau could prevent the consumer harm that arises when poor translation or mistranslation happens in the context of collections that already are being conducted in other languages.

2.5 Credit Reporting Issues

2.5.1 Preventing Passive Collection[163]

The Bureau notes the harm to consumers from the practice of providing information to a consumer reporting agency (CRA) without first communicating with a consumer about the debt. To address this, the Bureau is considering whether to prohibit debt collectors from furnishing information about a debt to a CRA unless the collector has communicated directly about the debt to the consumer.[164] We strongly support this proposal.

As the CFPB notes, some debt collectors will furnish information to a CRA without engaging in any dunning activity or otherwise contacting the consumer. The collector then simply waits to collect the debt, which will often be paid when the consumer needs a "clean" credit report to get a mortgage, access other credit, or obtain employment where the employer reviews a credit report. At that point, the consumer is in a bind, and will often pay the debt just to be able to get the credit or job, even if the consumer has a meritorious dispute regarding the debt, or even believes she does not owe the debt. This sort of passive collection is sometimes referred to as "parking" a debt.

Parking is especially prevalent with medical debt. The Bureau has noted that passive collection often occurs if the cost of active collection exceeds the expected return, suggesting that smaller dollar amount debts are the most frequently "parked."[165] The Bureau's own research shows that medical debts are usually smaller in amount, with an average of $579 and a median of $207, at least

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[161] As noted in 2.4.3 above, at the FTC-CFPB Roundtable on debt collection in Latino communities, a participant pointed out that borrowers receiving a phone call from a debt collection "agency" often believe this agency is from the government.

[162] Telephone interview with Carla Leticia Sanchez-Adams, Texas RioGrande Legal Aid, January 9, 2017.

[163] Outline 17-18.

[164] As discussed about in section 1, any communication with the consumer about a debt will trigger the requirement of the validation notice, which will give the consumer the right to ask questions about the debt or dispute it. Moreover, the collector would first have to establish a "reasonable basis" that the individual contacted owes the amount of debt claimed and the collector is legally entitled to collect that amount prior to sending a validation notice. All of this will need to occur before the debt can be reported to the CRA.

[165] Outline 17-18.

in terms of debts reported on a credit report.[166] Furthermore, the Bureau itself has suggested that medical debts, along with telecom and utility debts, are likely to be the subject to passive collections.[167]

The CFPB has also noted that consumers are more likely to be unaware of a medical debt, noting "[l]ack of prior knowledge can be more prevalent in the case of medical debt due to the confusion caused by the medical billing process."[168] It is this confusion that also makes parking especially harmful in the case of medical debt. As discussed below in section 3.2, medical debt is unique in many ways, including the fact that it may end up in collections due to billing disputes, errors, or consumer confusion. Most consumers have had the frustrating experience of receiving a mysterious medical bill of several hundred dollars even when covered by insurance or from an anesthesiologist or radiologist with whom they have never communicated.

The CFPB's proposal will give consumers time to dispute or resolve alleged debts before they appear on a credit report. For example, it would allow the consumer an opportunity to appeal an insurance denial or determine if the provider correctly calculated his/her portion of the medical bill after an insurance payment. The Bureau's proposal for collectors to notify consumers gives consumers a fighting chance to deal with the debt before they need to apply for credit or a job.

Recommendation: *Proceed with the proposal to prohibit passive debt collection by prohibiting reporting a debt to a consumer reporting agency without first communicating with the consumer about the debt.*

2.5.2 Require Debt Collectors to Proactively Notify a Consumer Reporting Agency about a Dispute

The CFPB should require debt collectors that have already furnished account information to a consumer reporting agency (CRA) to proactively notify the CRA when the consumer disputes the account. The FDCPA prohibits "[c]ommunicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed."[169] However, the weight of authority has been that there is no requirement under the FDCPA to proactively notify a CRA about a dispute involving a debt already reported to the CRA.[170] The CFPB should address this flaw by requiring that when

[166] Consumer Fin. Prot. Bureau, Consumer credit reports: A study of medical and non-medical collections 5 (Dec. 11, 2014).

[167] *Id.* at 15-16.

[168] *Id.* at 36.

[169] 15 U.S.C. § 1682e(8).

[170] The FTC Staff Commentary to the FDCPA stated that if the collector receives a dispute after reporting the debt to a CRA, it need not report the dispute if it is not making new communication about the debt. 53 Fed. Reg. 50,097, 50,106 (Dec. 13, 1988). As a result, two federal Court of Appeal have held there is no duty to update with a dispute. *See* Llewellyn v. Allstate Home Loans, Inc., 711 F.3d 1173, 1185–86 (10th Cir. 2013)("collector does not have an affirmative duty to notify CRAs that a consumer disputes the debt unless the debt collector knows of the dispute and

the consumer disputes the account, the debt collector must notify any CRAs reporting the debt that the account is disputed.

Note that there is a requirement to update a debt as disputed under section 623(a)(3) of the Fair Credit Reporting Act, 15 U.S.C. § 1681s-2(a)(3). However, that section does not provide a consumer with any remedies if a collector fails to comply with its requirements.[171] The lack of a private remedy for § 1681s-2(a) means that this provision is rarely enforced, thus affecting compliance by collectors. The result is that the accuracy of a consumer's credit report is undermined because disputed debts are not properly listed as disputed.

A requirement to proactively update a debt as disputed under the FDCPA is particularly important for consumers afflicted by medical debt. As discussed in section 3.2, many times a medical bill will be sent to a debt collector and end up on a consumer's credit report as a result of a billing error or an insurance dispute. It will be extremely helpful for consumers who have had their credit reports impaired by medical debt to have a dispute noted when the debt was due to an insurance error or dispute.

Recommendation: *Require debt collectors to proactively notify all consumer reporting agencies to whom they have already reported the existence of a debt about a dispute of that debt.*

2.6 Litigation Disclosure[172]

Across the country, collectors obtain default judgments in the overwhelming majority of debt collection lawsuits,[173] often without presenting any evidence and despite the fact that consumers may have legitimate defenses. New national data from the CFPB suggest that 74% of collection lawsuits may end in default judgments for collectors.[174] We are disappointed that the CFPB's only response to this pervasive problem is to propose a litigation disclosure. Specifically, collectors

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elects to report to a CRA"); Wilhelm v. Credico, Inc., 519 F.3d 416, 418 (8th Cir. 2008) Hylkema v. Assoc. Credit Serv. Inc., 2012 WL 13681 (W.D. Wash. Jan. 4, 2012). *See generally* National Consumer Law Center, Fair Debt Collection § 5.5.11 (8th ed. 2014), updated at www.nclc.org/library (citing contrary cases).

[171] 15 U.S.C. § 1681s-2(c)(1) and (d).

[172] Outline 18-19.

[173] *See, e.g.*, Mary Spector, "Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts," 6 Va. L. & Bus. Rev. 257, 288 (2011) (77% default rate in Dallas County); Claudia Wilner and Nasoan Sheftel-Gomes, Neighborhood Economic Development Advocacy Project, Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Low Income New Yorkers (2010) (81% default rates in New York City); Federal Trade Commission, Repairing a Broken System 7 (July 2010) ("panelists from throughout the country estimated that sixty percent to ninety-five percent of consumer debt collection lawsuits result in defaults, with most panelists indicating that the rate in their jurisdictions was close to ninety percent") and 7 n.18 (collecting studies on default rates).

[174] Consumer Financial Protection Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt (Jan. 2017) (reporting that consumers defend 26% of collection lawsuits).

would be required to inform consumers "in all written and oral communications in which [collectors] represent, expressly or by implication, their intent to sue":

- of the collector's intent to sue,
- that the court can rule against a consumer if he or she fails to defend a lawsuit, and
- that additional information about debt collection litigation, including contact information for legal services and private attorneys specializing in FDCPA representation, is available on the Bureau's website and by calling the Bureau's toll-free telephone number.

2.6.1 Improving the Litigation Disclosure

As currently formulated, the litigation disclosure will be of limited usefulness to consumers. We address the problems with the existing proposal and then propose a different approach to litigation disclosures.

There are multiple issues with the proposal. These include:

- Collectors' ability to avoid the disclosure altogether by simply never "representing . . . their intent to sue," thereby defeating the CFPB's purpose of providing basic information to consumers.
- Conversely, the disclosure could also be subject to the opposite problem - overuse. Specifically, since "intent to sue" is left undefined, a collector could make litigation disclosures in every communication for months as a tactic to pressure consumers to pay the debt.[175]
- Many consumers will not trust advice from collectors who have just told them that they intend to sue, limiting the usefulness of information required under the second and third prongs of the disclosure.
- It is very stressful for most consumers to be told they will be sued. They are likely to miss important information conveyed at the same time as a disclosure about the intent to sue. This is especially true if the information is conveyed orally. Few consumers will have the presence of mind to record the phone number or web address for the CFPB right after receiving the distressing news that they are about to be sued.
- Information about legal representation on the CFPB's website and through the CFPB's toll-free phone number should not be limited to information about legal services programs. Not all consumers are income qualified for legal services assistance and, even if income eligible, legal services programs frequently cannot keep up with the

[175] Some of these statements might violate 15 U.S.C. 1692e(5), but this might require additional discovery or a fact intensive analysis to identify when a collector did intend to sue. See National Consumer Law Center, Fair Debt Collection § 5.5.8.3 (8th ed. 2014), updated at www.nclc.org/library.

overwhelming demand for their services.[176]

To address some of these problems, the CFPB should instead require collectors to provide a written litigation disclosure to the consumer no more than 60 days and no less than 15 days prior to filing a lawsuit and must specify the date when the collector intends to file a lawsuit. In addition to informing the consumer of the intent to sue, the notice should provide information about:

- how to locate information about debt collection,
- how to find an attorney to defend the consumer in court (both legal services and private attorneys), and
- how to find information about representing oneself in court.

The CFPB should provide a model litigation disclosure letter and translate it into Spanish and other languages. As discussed above, any model litigation disclosure should also be consumer-tested for effectiveness.

Once the litigation disclosure letter has been sent, all oral communications should inform the consumer of the collector's intent to file a lawsuit and the date on which the collector intends to sue. Collectors should ask if the consumer has received the litigation notice and, if not, should inquire about an address where another copy can be mailed.

Recommendations: *The CFPB should amend the litigation disclosure to: 1) Require that a written litigation disclosure (containing the information outlined above) be provided to a consumer no more than 60 and no less than 15 days before litigation is initiated. 2) Require the collector to inform the consumer of the date when the collector intends to file a lawsuit. 3) Inform consumers of the intent to sue in any conversations after the litigation disclosure has been sent, confirming receipt of letter, and re-sending to proper address if not yet received.*

2.6.2 Other Ways to Prevent Default Judgments

In addition to litigation disclosures, the CFPB can adopt a number of other approaches to help minimize the number of default judgments around the country.

First, as discussed above in section 2.2.5, collectors should not be permitted to simply rely on the address received from the owner of the debt or a previous collector without making any effort to verify that it is the most current address. Making sure that consumers have adequate notice about lawsuits is a critical first step to preventing default judgments.

[176] Legal Services Corporation, "The Unmet Need for Legal Aid" (50 percent of those who sought legal aid were turned away due to insufficient program resources).

Next, the CFPB should collect and make available to consumers state-specific information about how to represent themselves in court. Studies show that between 91 and 99% of consumers are unrepresented by an attorney when they are sued on a debt.[177] Even with improved information about how to access legal representation, there will still be many consumers who are unrepresented. Providing consumers with tools to better represent themselves may decrease the number of defaults by decreasing consumer anxiety about appearing in court.

Finally, it is important to recognize that, in addition to inadequate notice or fear associated with representing oneself in court, there are many other reasons that consumers do not appear in court when they are sued on a debt. These include failure to understand the court summons, lack of transportation to reach the court, inability to take time off of work, disability, and lack of childcare. Regardless of the reasons that they are not in court, the CFPB should do more to protect consumers from the harms resulting from default judgments for debts that consumers do not owe, that they do not owe in the amount claimed, that are time-barred, or that the collector cannot prove it has the right to collect.

To protect consumers from the ongoing problem of default judgments that are entered without any documentation that the consumer owes the debt, the CFPB should use its prior enforcement actions[178] as a model and require collectors to provide the court with relevant information and documentation to support their claims when seeking default judgment. This would provide a national baseline requirement that collectors seeking default judgment must provide

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[177] *See* Paul Kiel, "So Sue Them: What We've Learned About the Debt Collection Lawsuit Machine," ProPublica (May 5, 2016) (99% of defendants sued by New Jersey collection law firm Pressler & Pressler did not have attorneys; 97% of defendants in debt collection cases filed in New Jersey's lower level court in 2013 did not have attorneys; 91% of defendants in Missouri debt collection cases in 2013 did not have attorneys); Samantha Liss, "When a nonprofit health system outsources its ER, debt collectors follow," St. Louis Post-Dispatch (Apr. 17, 2016) (reporting that in 1,078 lawsuits filed by CP Medical in St. Louis, St. Louis County and St. Charles County between December 2, 2014 and March 10, 2016, only 17 defendants had an attorney); Chris Albin-Lackey, Human Rights Watch, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor (Jan. 2016) (consumers had legal representation in 3 out of 247 cases in a randomized sample of lawsuits filed in New York by debt buyers in 2013 that resulted in judgments); Peter Holland, "Junk Justice: A Statistical Analysis of 4400 Lawsuits Filed by Debt Buyers," 26 Loy. Consumer L. Rev. 179 (2014) (consumers were represented by an attorney in only 2% of debt collection lawsuits in Maryland); Susan Shin and Claudia Wilner, New Economy Project, The Debt Collection Racket in New York (June 2013) (attorneys represented consumers in only 2% of debt collection cases filed in New York City); Mary Spector, "Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts," 6 Va. L. & Bus. Rev. 257, 288 (2011) (fewer than 10% of defendants served in debt collection lawsuits were represented by an attorney in Dallas County, Texas); Claudia Wilner and Nasoan Sheftel-Gomes, Neighborhood Economic Development Advocacy Project, Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Low Income New Yorkers 1 (2010) (only 1% of people sued by debt buyers in New York City are represented by counsel).

[178] Consent Order, In the Matter of: Pressler & Pressler, LLP, Sheldon H. Pressler, and Gerard J. Felt ¶ 44 (Apr. 25, 2016) ("In seeking a default judgment in connection with a Collection Suit, the Firm shall tender to the court relevant information and documentation to support its client's claims, unless prohibited by law or court rule, including all the information and documentation that Respondent is required to possess under this Consent Order."); Consent Order, In the Matter of: Chase Bank, USA N.A. and Chase Bankcard Services, Inc. ¶75(e) (July 8, 2016) ("Before obtaining a default judgment against a Consumer, Respondents shall proffer to the court relevant information and documentation maintained by Respondents to support their claims, unless prohibited by law or court rule.").

documentation to the court. States could then adopt their own court rules, regulations, or statutes to address when default judgments can be awarded.[179]

As discussed in section 1 of our comments, the most critical response to the threats of inappropriate litigation is to require much more robust documentation and substantiation of the debt before collection efforts can begin and before litigation can be threatened. Then collectors would already have the necessary documentation on hand, so requiring the documents to be filed in court when seeking a default judgment would not represent a significant additional burden.

Recommendations: *The CFPB should: 1) Require collectors to take reasonable efforts to identify the consumer's current address before sending important collection notices. 2) Collect and make available to consumers state-specific information about how to represent themselves in court. 3) Require collectors to provide the court with relevant information and documentation to support their claims when seeking default judgment.*

2.7 Time-Barred Debt[180]

2.7.1 Prohibit All Efforts to Collect on Time-Barred Debt

Collecting on time-barred debts is unfair, deceptive, and abusive:

- Unfair: Collecting time-barred debts causes substantial injury to consumers, particularly the least sophisticated consumers, who do not understand that the statute of limitations has run or understand that this provides them with a legal defense. Such injury is not reasonably avoidable by consumers due to the complexity involved in understanding what a statute of limitations is, which limitations period applies to their debt, and when the relevant period has run. This substantial injury is not outweighed by countervailing benefits to consumers or to competition.
- Deceptive: Attempts to collect time-barred debt mislead consumers who will reasonably believe that the collector has a legally-enforceable right to collect the amount sought. Aggressive collection attempts, even without express threats to sue, deceive consumers into paying debts for which they have a complete defense, because of the implicit threats involved in these collection activities. This deception is material because it causes consumers to make payments on debts who would not otherwise do so.
- Abusive: Collecting time-barred debts takes unreasonable advantage of consumers' reasonable reliance on debt collectors to attempt to collect only legally-enforceable debts.[181]

[179] *See, e.g.*, New York Uniform Civil Rules 202.27-a; California Civil Code § 1788.60. *See also* proposed Mass. R. Civ. P. 55.1.

[180] Outline 19-22.

[181] For a full discussion on the problematic and illegal abuses that accompany the collection of time barred debt, *see* April Kuehnhoff and Margot Saunders, National Consumer Law Center, Zombie Debt: What the CFPB Should Do about Attempts to Collect Old Debt (Jan. 2015).

In light of the unfairness, deceptiveness and abusiveness that are inherent when collectors pursue time-barred debt and the inability of disclosures to adequately protect consumers, we strongly urge the CFPB to ban all efforts to collect time-barred debt - whether by litigation or other means.

Although the CFPB's proposal falls far short of the needed prohibition on the collection of time-barred debt, we review the elements of the current proposal to highlight its shortcomings and propose ways it can be strengthened.

Recommendation: *The CFPB should prohibit all efforts to collect on time-barred debt.*

2.7.2 Prohibited Collection Practices Involving Time-Barred Debt

The CFPB is considering codifying existing case law by prohibiting suits and threats of suits on time-barred debt. The courts have uniformly concluded that filing suit or threatening to file suit on a time-barred debt violates the FDCPA.[182]

The list of prohibited practices should be expanded to include prohibitions against other similar practices:

- Filing proofs of claims on time-barred debt in bankruptcy proceedings. As the CFPB has stated in its amicus brief to the United States Supreme Court:

  > In bankruptcy as in other contexts, the FDCPA prohibits a debt collector from invoking judicial processes to collect a debt that the collector knows is time-barred. When a debt collector knows that a claim is time-barred and therefore unenforceable in bankruptcy, the filing of a proof of claim is misleading and unfair, in violation of the FDCPA.[183]

  The CFPB should clarify that its prohibition on filing suit on time-barred debt includes time-barred proofs of claims.
- Offering to "settle" a time-barred debt. As the CFPB has recognized in its amicus briefs, offering to "settle" a time-barred debt is likely to deceive the least sophisticated consumer despite the inclusion of a time-barred debt disclosure.[184] A practice that is deceptive when coupled with a disclosure is even more likely to deceive consumers when no disclosure is required. Under the CFPB's current proposal, time-barred debt disclosures (discussed below in section 2.7.4) would not be required in each communication. A collector could include a time-barred debt disclosure in an initial validation notice and then make an offer

[182] See, e.g., Crawford v. LVNV Funding, LLC, 758 F.3d 1254, 1259-60 & n.6 (11th Cir. 2014) (collecting cases).

[183] Brief for the United States as Amicus Curiae, Midland Funding, LLC v. Johson, 16-348 p.9 (US Dec. 2016) (brief joined by the CFPB).

[184] Brief of Amicus Curiae CFPB and FTC, Delgado v. Capital Management Services p.2 (7th Cir. Aug. 14, 2013); Brief of Amicus Curiae CFPB and FTC, Buchanan v. Northland Group, Inc. (6th Cir. Mar. 10, 2014).

to "settle" the time-barred debt in a subsequent communication in which the disclosure is not required. To prevent collectors from gaming the system, the CFPB should simply prohibit these misleading offers to "settle" a time-barred debt.

- Suing on a "revived" debt. In many states, making a payment or acknowledging a debt months or years after the statute has run can restart the statute of limitations period all over again.[185] Even if an effective disclosure can be created about time-barred debt, notifying consumers about the possibility of revival is too complicated and counter-intuitive.[186] Similarly, concerns (discussed below in section 2.7.5) exist about the scope of waiver of revival. It would be far simpler and clearer to ban all lawsuits on revived debt.

Recommendations: *The CFPB should prohibit 1) filing time-barred proofs of claims in bankruptcy; 2) offering to "settle" a time-barred debt; and 3) suing on a "revived" debt.*

2.7.3 Determination of Date Debt Becomes Time Barred

The CFPB should clearly state what it implies in various places in the Outline already - that collectors must be responsible for determining the date that a debt becomes time barred. The CFPB (and the courts) have implicitly required that collectors make this determination by prohibiting collectors from suing or threatening to sue on a time-barred debt. Moreover, collectors already know the ages of debts they are collecting.[187] Indeed, several states' laws prohibit the collection on time-barred debt (North Carolina, Wisconsin, Mississippi), which means that collectors are already making these determinations.[188] An explicit requirement by the CFPB is necessary to clarify the rule; to make explicit what is already implicit.

The CFPB's proposal to make the determination by one collector that a debt is time-barred binding on any subsequent collectors will provide important protections from confusing "re-calculations" regarding the time-barred nature of the debt. We applaud this proposal.

Additionally, the CFPB should clarify its footnote stating that the bona fide error defense is available to collectors in connection with a requirement to disclose that a debt is time-barred.[189] Errors regarding interpretation of state law are not eligible for FDCPA's bona fide error defense.[190]

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[185] National Consumer Law Center, Collection Actions, at 3.6.8.3 (8th ed. 2014).

[186] Accord Outline 20.

[187] See Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry v (Jan. 2013).

[188] N.C. Gen. Stat. § 58-70-115(4) (prohibiting debt buyers from collecting time barred debt); 12 Wis. Stat. Ann. § 893.05 (extinguishing the right and remedy after the expiration of the statute of limitations); Miss. Code Ann. § 15-1-3 (same). See also Proposed Mass. R. Civ. P. 8.1 (proposing to require affidavit that limitations period has not run).

[189] Outline 20, n.34.

[190] *See* National Consumer Law Center, Fair Debt Collection § 7.2.3 (8th ed.).

Recommendations: *The CFPB should: 1) clarify that collectors are responsible for determining the date that a debt becomes time-barred; 2) adopt its proposal that subsequent collectors may not re-calculate the running of the statute of limitations once a consumer has been informed that a debt is time-barred; and 3) clarify that errors of law regarding the limitation period are not bona fide errors under the FDCPA.*

2.7.4 Time-Barred Debt Disclosure

The CFPB proposes to develop a disclosure to inform consumers that a debt is time-barred, but does not provide any sample language. Time-barred debt disclosures are one of many disclosures that the CFPB may require.[191] As discussed in section 2.2.4, it is important that any proposed language be tested in combination with the model language of the validation notice, the obsolescence disclosure (discussed below) and any other model language the CFPB may adopt or that are already required by state law.[192]

In order to maximize the effectiveness of any disclosure, the CFPB must require the disclosure about time-barred debt to be made in *each* communication, whether oral or in writing. Absent such a requirement, the collector could imply that it can still sue to collect the debt (for example by offering to settle the debt as discussed above) in a communication where it is not required to make a time-barred debt disclosure. Moreover, a consumer may not have noticed the time-barred debt disclosure in a validation notice or other document crowded with additional information. Repeating the disclosure at each contact makes it more likely that the least sophisticated consumer will understand.

Even if the time-barred debt disclosure is made in every communication, the time-barred debt disclosure will be confusing for many people who are confronted with the conflicting message that "you need to pay me $600 right now" and "if you don't pay me, I am not allowed to sue you." If the CFPB retains its disclosure-only approach, it would reduce the confusion if the collection efforts for time barred debt were limited to written communications, which allow consumers the opportunity to review the message and reflect on the information. Limiting collection of time-barred debt to written communications only would also allow consumers time to consult others regarding the meaning of the time-barred debt disclosure and how they should respond.

Recommendations: *The CFPB should: 1) ensure that any time-barred debt disclosure is consumer tested together with other disclosures; 2) repeat any time-barred debt disclosure in each communication; and 3) limit collection of time-barred debts to written communications that would allow consumers more time to understand the time-barred nature of their debt.*

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[191] Unfortunately, history suggests that time-barred debt disclosures will make little difference for consumers. For example, the disclosure required in the Asset Acceptance case appears to have had no effect on consumer behavior, and thus clearly provided them with no benefit. Consent Decree, U.S. v. Asset Acceptance, L.L.C. (M.D. Fla. Jan. 31, 2012). This is proven by the complete failure of the agreed-to disclosure to have any impact on the company's cash collection. Asset Acceptance Capital Corp., Consent Decree FAQs (accessed Feb. 26, 2014).

[192] *See, e.g.,* 23 NYCRR § 1.3.

2.7.5 Obsolescence Disclosure

The CFPB is also considering requiring collectors to disclose whether or not a time-barred debt can appear on a credit report. Consumers should be informed when their time-barred debt is too old to be reported to CRAs regardless of whether the collector ever furnishes information to CRAs. This information will help consumers prioritize which bills to pay as they assess the consequences of failing to pay a particular bill.

Consumers should also be informed when their debt is obsolete but not time-barred. For example, in a state with a 10 year statute of limitations, an 8 year old debt would be obsolete for credit reporting purposes but not time-barred. The CFPB's proposal does not address this possibility.

Similarly, for non-obsolete debts, consumers should be specifically informed when the collector is furnishing information about a particular debt to CRAs (or that the collector has immediate, concrete plans to begin furnishing this information to CRAs).[193] This information should be provided regardless of whether the debt is time-barred.

However, where information about a non-obsolete debt is not being furnished to a CRA and the collector has no immediate, concrete plans to furnish it, consumers should not be informed that the information could be furnished. Threatening to take an action that the collector does not intend to take is a violation of the FDCPA.[194]

Any obsolescence disclosure should be delivered at the same time as the time-barred debt disclosure. Consumer testing should take this into account.

We strongly support the CFPB's proposal that collectors be prohibited from accepting payment on time-barred, obsolete debt unless the consumer first provides written acknowledgment of having received both a time-barred debt disclosure and an obsolete debt disclosure. This is an important safeguard to ensure that these disclosures are made. Moreover, the written acknowledgment will also encourage consumers to carefully consider whether they want to make a payment on a debt that is both time-barred and obsolete.

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[193] There is a requirement under the FCRA that furnishers provide a "negative information" notice before they furnish information to a CRA. However, debt collectors are not required to provide this notice because it only applies to financial institutions that extend credit. 15 U.S.C. § 1681s-2(a)(7). Furthermore, the notice is very non-specific, boilerplate, and of limited use. See National Consumer Law Center, Fair Credit Reporting § 6.9 (8th ed. 2013), *updated at* www.nclc.org/library

[194] 15 U.S.C. § 1692e(5) ("threat to take any action . . . that is not intended to be taken").

Recommendations: *The CFPB should: 1) require disclosure that a debt is obsolete whether or not it is time-barred; 2) inform consumers when a specific, non-obsolete debt is being reported to CRAs; and 3) adopt the recommended requirement for written acknowledgement before accepting payment on a debt that is both time-barred and obsolete.*

2.7.6 Waiver of Revival and Maintenance of Waiver

Recognizing the challenges of adequately disclosing to consumers that a partial payment or acknowledgment of a debt may revive the statute of limitations, the CFPB is considering "whether to prohibit collectors from collecting on time-barred debt that can be revived under state law unless they waive the right to sue on the debt." This creative proposal appears to mean that suing on a debt after the original statute of limitations period has run would be a violation of the FDCPA even if the partial payment or acknowledgment would revive the debt under state law.

Moreover, the prohibition included in the regulations should clearly state that the waiver applies to both the original and subsequent collectors. So, if collector A transfers a revived debt to collector B, collector B (and subsequent recipients) is also prohibited from suing on the revived debt. Likewise, the CFPB should ensure that the original creditor cannot sue on a revived debt. Otherwise collector A could evade the prohibition by transferring any revived debts back to the original creditor. A ban on the sale or transfer of time-barred debt (discussed below) would also eliminate these concerns.

Recommendation: *The CFPB should ensure that neither subsequent collectors nor the original creditor can sue on a debt revived after any collector has collected on a time barred debt.*

2.8 Limited-content messages[195]

The CFPB proposes the creation of a class of contacts by debt collectors that would not be covered by the FDCPA. Specifically, the CFPB proposes that contacts by debt collectors would not be FDCPA communications when the debt collector conveys only:

1. The individual debt collector's name,
2. The consumer's name, and
3. A toll-free method that the contacted party can use to reply to the collector.

Contacts containing this information would be permitted in voicemail messages, with a third-party in a live conversation, in text messages, in emails, and in other methods of communication.

This proposal is harmful to consumers and we strongly urge the CFPB not to permit these limited content messages. There is nothing in the current law that permits such messages, and the

[195] Outline 24.

proposal would authorize debt collectors to do an end run around existing protections in the FDCPA.

Section 1692c(b) of the FDCPA prohibits contacting third parties unless attempting to obtain location information as specified in section 1692b. Section 1692b is a very narrowly crafted exception that should *only* be used to obtain location information when the debt collector cannot locate the consumer. As the CFPB itself highlighted in an amicus brief,[196] Congress carefully balanced the risks to consumers against debt collectors' interests when crafting the limitations on third-party contracts.[197] The outlined proposal would significantly erode consumer protections and unnecessarily shifting the balance in the collector's favor by allowing a collector to contact the consumer's parent, friend, neighbor, boss, clergy, relative, or commanding officer to deliver a limited-content message that goes beyond the communication permitted in 1692b. Such messages will inevitably lead to additional questions and violations of the consumer's privacy as third parties ask about the strange phone call they received.

The CFPB's proposal is also fundamentally inconsistent with the broad definition of communication in the FDCPA. Creating a class of debt collection contacts that are outside of this broad definition of communication will weaken consumer protections and be contrary to the vast majority of case law that has interpreted section 1692a(2).[198]

The CFPB says that it is considering "specifying that debt collectors engage in harassing or abusive conduct in violation of FDCPA section 806 [section 1692d] if they use the limited-content voicemails or other messages to engage in contacts that would be prohibited if they were FDCPA 'communications.'"[199] This is confusing. It is unclear how any limits would interact with limits on third-party location contacts and consumer contacts.[200] It is not clear how the CFPB proposes to exempt these limited-content messages from the FDCPA for one purpose but not for others. Moreover, it is not enough to reinstate partial FDCPA coverage. The term "communication" appears 29 times in the FDCPA, "communicate" appears 8 times, and "communicating" appears 5

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[196] Brief for the Consumer Financial Protection Bureau as Amicus Curiae Supporting Rehearing En Banc, Marx v. Gen. Revenue Corp., 10-1363 (10th Cir. 2011).

[197] S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, reprinted in 1977 U.S.C.C.A.N. 1695, 1696 ("[T]his legislation adopts an extremely important protection ... it prohibits disclosing the consumer's personal affairs to third persons. Other than to obtain location information, a debt collector may not contact third persons such as a consumer's friends, neighbors, relatives or employer. Such contacts are not legitimate collection practices and result in serious invasions of privacy, as well as loss of jobs.")

[198] *See* National Consumer Law Center, Fair Debt Collection §§ 4.6.4, Appx. J.1.5 (8th ed. 2014), *updated at* www.nclc.org/library.

[199] Outline 24.

[200] Outline 26 (proposing limits on consumer contacts) and Outline 27 (proposing limits on location contacts to a third-party).

times. Altering the definition of such a central term would have unintended and serious consequences beyond section 1692d.[201]

Moreover, as formulated, the proposed limited-content message will indirectly convey information regarding a debt, bringing the message squarely within the definition of communication.[202] The phone number can be easily researched to identify the caller.[203] Indeed, once these "limited-content" calls become widespread, called parties will know perfectly well that they relate to debt collection, making these calls an ideal tool for collectors to embarrass and harass the debtor.

The proposal defines a single authorized contact that is outside of the FDCPA definition of "communication." However, it is likely that debt collectors will argue that other messages should be considered contacts and not "communications." Having given its blessing to the idea that certain messages fall outside of the FDCPA, the CFPB would have no control over what additional content might be included in other messages that the courts will deem to also be contacts that are outside of the definition of communication. Similarly, these limited-content messages might be conveyed to consumers through media not envisioned by the CFPB's Outline, including postcards, message on Facebook timelines, Tweets, blog posts, etc.

Recommendation: *The CFPB should not exempt limited content messages from the FDCPA's definition of a communication.*

2.9 Contact Limits

The Outline includes proposed limits on the number of contacts with consumers and the number of location contacts with third-parties. We analyze each in turn.

2.9.1 Consumer Contact Limits[204]

Where the collector does not have a confirmed consumer contact, the CFPB proposes a limit of six contact attempts per consumer per collection account per week, with no more than three attempts per unique address or phone number. If the collector has confirmed that the consumer is the alleged debtor, the collector would be limited to three contact attempts per consumer per collection account per week, with no more than two attempts per unique address or phone

[201] For example, 15 U.S.C. § 1692f(7) prohibits "[c]ommunicating with a consumer regarding a debt by post card." Excluding certain contacts from the definition of "communication" creates the possibility that debt collectors could send postcards containing this or other limited-content messages to the consumer at home or at work. Similarly, 15 U.S.C. § 1692c(a)(1) restrictions on time and place of communications would not apply under the CFPB's proposal.

[202] "The term 'communication' means the conveying of information regarding a debt directly *or indirectly* to any person through any medium." 15 U.S.C. § 1692a(2) (emphasis added).

[203] For example, using Google a caller searching for 855-488-1524 will easily identify that the call originated with the debt collector Midland Credit Management. Even unpublished phone numbers used by debt collector are identified on some consumer complaint websites.

[204] Outline 22-23, 24-27.

number and no more than one live communication. The proposed limits in the Outline are an important first step toward limiting harassing collection communications. However, the number of calls permitted in the proposal is still too high.

Moreover, the CFPB's proposal conflates calls and texts with emails and snail mail contacts. We think this is unnecessary, and causes the total number of limited contacts to be too high. We see few complaints or problems with consumers being mailed too many notices. Postal mail is not as intrusive or annoying as phone calls or texts. Emails are not nearly as intrusive as phone calls either. While emails to consumers' places of work should be restricted as discussed in section 2.10.3, emails need not be subject to the same limit on communications as applied to telephone calls.

Two states already provide reasonable limits on the number of permissible communications that can be made to consumers while collecting a debt. Longstanding Massachusetts regulations limit phone calls, text messages, and voicemails to two per week, while the applicable statute in Washington applies more broadly to a "communication" and limits contacts to three times per week.[205] These limits have existed since 1971 in Washington[206] and 1986 in Massachusetts.[207] Thus, debt collectors have long needed to adapt to contact restrictions.

[205] 940 Code Mass. Regs. § 7.04(1)(f) (It is an unfair or deceptive act or practice for creditors to "[i]nitiat[e] a communication with any debtor via telephone, either in person or via text messaging or recorded audio message, in excess of two such communications in each seven-day period to either the debtor's residence, cellular telephone, or other telephone number provided by the debtor as his or her personal telephone number and two such communications in each 30-day period other than at a debtor's residence, cellular telephone, or other telephone number provided by the debtor as his or her personal telephone number, for each debt.") and 209 Code Mass. Regs. 18.14(1)(d) (Without prior consent of the consumer, the debt collector may not "engage[] any consumer in communication via telephone or via text messaging, initiated by the debt collector, in excess of two such communications in each seven-day period to a consumer's residence or cellular telephone and two such communications in each 30-day period other than at a consumer's residence, or cellular telephone for each debt"); Wash. Rev. Code § 19.16.250(13)(a), (b) ("A communication shall be presumed to have been made for the purposes of harassment" if the debtor is contacted more than once per week at work or the debtor or spouse are contacted more than three times per week in "any form, manner, or place.").

[206] As originally enacted in 1971, Wash. Rev. Code § 19.16.250(12)(a), (b) stated that, "[a] communication shall be presumed to have been made for the purposes of harassment if: (a) It is made with a debtor or spouse in any form, manner, or place, more than three times in a single week; (b) It is made with a debtor at his or her place of employment more than one time in a single week." 1971 ex.s. c 253 § 16.

[207] The version of 940 Code Mass. Regs § 7.04(1)(f) enacted December 31, 1986 stated that it was an unfair or deceptive act or practice for creditors to engage "any debtor in communication via telephone, initiated by the creditor, in excess of two calls in each seven-day period at a debtor's residence and two calls in each thirty-day period other than at a debtor's residence, for each debt." (historical version on file with author). In the version of 209 CMR 18.00 that became effective as of December 31, 1993, section 18.15(1)(f) prohibited "[e]ngaging any debtor in connection via telephone, initiated by the collection agency, in excess of two calls in each seven-day period at the debtor's residence and two calls in each 30-day period other than at a debtor's residence, for each debt.

The CFPB should use these states as models and prohibit more than three attempted phone calls[208] per week, resulting in no more than one live conversation initiated by the debt collector. The CFPB's survey of consumer experiences with debt collection indicated that 63% of consumers were contacted (including attempted contacts) three times per week or less.[209] Thus, the majority of collection calls would already be in compliance with a cap of three calls per week. However, all limits on contacts should be with the caveat that the consumer always has the right – as described in section 2.10.3 – to stop the calls or other types of communications by simply telling the collector to stop.

In contrast to per consumer limits in Massachusetts and Washington, the CFPB's proposed contact limits are per account in collection. The CFPB's survey demonstrates that the majority of consumers who had been contacted about repaying a debt in the prior year had been contacted about more than one debt, with 57% contacted about two to four debts and 15% contacted about five or more debts.[210] Under the CFPB's formula, someone with 5 debts in collection could be contacted up to 30 times per week, even if the same debt collector was collecting all of the accounts. Collection of multiple accounts by the same collector occurs frequently, especially with certain types of debts such as student loan debts, medical debts, and store credit cards. The CFPB should make contact limits per consumer rather than per account (e.g. Collector A should have a limit on the number of times it can call a consumer per week and this limit would not change based on the number of accounts in collection).

Additionally, the contact limits should be the same regardless of whether the consumer has made a "confirmed consumer contact." Having one limit for calls before there is a confirmed consumer contact and another for after will be confusing to consumers, as will the proposal that no more than three of those contacts can come at a particular address or phone number (or two if there is a confirmed consumer contact). A simple limit of three calls per week will be much easier for consumers to understand (and for the collection industry). As a result, consumers would be better able to report violations to state and local authorities or take private enforcement actions.

We also urge the CFPB to make it clear that the limits imposed on contacts with the debtor are in addition to the restrictions imposed by the Telephone Consumer Protection Act (TCPA), to the extent the TCPA is applicable to these calls.[211] The TCPA prohibits autodialed or prerecorded calls

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[208] Text messages are also obtrusive, but we believe that a combination of currently available tools to block text messages from certain numbers by blacklisting those numbers, the CFPB's proposal prohibiting spoofing (see section 2.13) that would limit the number of , and a requirement to inform all consumers in the first text message that they can text STOP to prevent future text messages (see section 2.10.3) will allow consumers to prevent unwanted text messages without requiring a numerical cap.

[209] Consumer Financial Protection Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt (Jan. 2017) (33% of consumers contacted about a debt in collection were contacted less than once per week and 30% were contacted one to three times per week).

[210] Outline App. B.

[211] 47 U.S.C. § 227.

to cell phones unless the called party has provided prior express consent. Consent must be written in the case of telemarketing calls, but can be oral for non-telemarketing calls such as debt collection.[212] In addition, pursuant to a 2015 amendment to the TCPA, the FCC has adopted a rule limiting collectors of government debt to three autodialed or prerecorded calls per month to debtors' cell phones.[213] Stricter limits on the number of calls to cell phones are appropriate because of their greater intrusiveness and the fact that many consumers have limited-minutes calling plans or pay per call received.

Whatever number the CFPB adopts should be a bright-line limit that allows for additional contacts only with explicit, documented consumer consent. The CFPB's proposal to treat the call caps as a rebuttable presumption that would permit additional contacts if the collector "knew or had reason to know . . . the collector would not violate the regulation by contacting or attempting to contact the consumer more often than the thresholds otherwise would allow" would make it too easy for collectors to circumvent illusory contact limits.

Recommendation: *Collectors should be prohibited from making more than three attempted phone calls per week per consumer, resulting in no more than one live conversation.*

2.9.2 Third Party Contact Limits[214]

The CFPB proposes to limit the number of permissible attempted contacts with third parties that can be made each week to obtain consumer location information[215] to six calls per account per week, with no more than three attempts per unique address or phone number. There would be no limit on the number of third parties who could be contacted. Collectors would be limited to one live conversation per third party and location contacts would be prohibited once the collector has confirmed consumer contact.

As with the number of consumer contacts, the number of permissible location contacts is far too high. No more than one attempted location contact should be permitted per week per third party. We agree with the proposal to limit the collector to no more than one live communication with that third party and prohibit any communications once there is a confirmed consumer contact.

While we strongly oppose allowing collectors to contact third parties to deliver limited content messages in violation of the FDCPA (see discussion in section 2.8 above), if the CFPB moves forward with this proposal it should clarify that:

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[212] 47 C.F.R. § 64.1200(a)(1), (2).

[213] *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 2016 WL 4250379 (Aug. 11, 2016).

[214] Outline 27-28.

[215] The FDCPA permits debt collectors to contact third parties for the limited purpose of obtaining location information for the alleged debtor. 15 U.S.C. § 1692b.

- all attempted contacts with third parties, whether location contacts or limited content messages, are capped at a total of one call per week to each third party (e.g., no more than one attempted contacts per third party per week for any purpose);
- it is impermissible to combine location contacts and limited content messages; and
- the same limit of one live communication per third party applies.

Moreover, there is no reason for these limits to be per account rather than per consumer. A collector should not be able to attempt to call the consumer's mother 30 times per week just because the collector has five accounts in collection in that consumer's name. The collector can easily share any location information obtained from the consumer's mother between the different accounts that it has in collection for that debtor.

Recommendation: *Collectors should not be permitted to attempt to contact third parties more than one time per week.*

2.10 Time, Place, and Manner Restrictions

The Outline includes proposed limits on the time, place, and manner of collection communications. We analyze each in turn.

2.10.1 Inconvenient Times[216]

We agree with the proposed clarifications regarding inconvenient times. These clarifications would provide that a collector "knows or should know that it is convenient to communicate with a consumer if it would be convenient in all of the locations in which the collector's information indicates the consumer might be" and clarifying that "whether a communication is sent at an unusual or inconvenient time is determined by the time at which the message generally is available for the consumer to receive it."

Recommendation: *The CFPB should adopt the proposed clarifications regarding inconvenient times.*

2.10.2 Inconvenient Places[217]

We agree with the four categories of places where it should be presumed inconvenient for consumers to receive collection communications. While the CFPB has rejected the idea of deeming contacts at the consumer's place(s) of employment presumptively inconvenient, the CFPB should require collectors who know (or should know) that they are contacting someone at work to ask, immediately after disclosing the debt collection purpose of the call, if it is convenient

[216] Outline 29.

[217] Outline 29-30.

for the consumer to talk at work. If the consumer responds that calls at work are inconvenient or gives any other indication during the contact that she does not wish to receive calls there, the debt collector should be required to terminate the call and make no further calls to the consumer at work.

Military combat zones and qualified hazardous duty postings should be presumed inconvenient for collector-initiated, real-time communications like phone calls or text messages. However, given the fact that deployments may be lengthy, other forms of communication like letters and emails (subject to the additional protections discussed in other sections) should be permitted.

Recommendations: *The CFPB should 1) adopt the list of locations that are presumed inconvenient for collection communications;* 2) *require collectors who know (or should know) that they are contacting someone at work to ask, immediately after disclosing the debt collection purpose of the call, if it is convenient for the consumer to talk at work; and 3) prohibit collector-initiated, real-time communications with consumers in combat zones.*

2.10.3 Inconvenient communication methods[218]

We strongly support the CFPB's proposal to allow consumers to identify certain categories of communications as inconvenient. For example, collectors should be required to comply with requests not to make any further collection calls to the consumer. As discussed above in section 2.3, the Statement of Rights should specifically inform consumers of this right.

The CFPB should also investigate different technological options to allow consumers to express communication preferences. For example, the CFPB should require:

- all collectors with web portals to allow consumers to express communication preferences as well as receive payments from consumers;
- each collection email to contain a link to allow the consumer to opt out of any future emails;
- any collector using text messages to send a message saying "Text STOP to opt-out of future text messages"[219] in its first text message to any phone number; and
- robocalls to have opt-out mechanisms (e.g., "Press 1 to opt-out to prevent future calls at this number.").[220]

[218] Outline 31.

[219] In addition to "STOP," collectors should also be required to recognize and respond to additional opt-out phrases like UNSUBSCRIBE, END, QUIT, and CANCEL.

[220] This was required by the Federal Communications Commission for all debt collection calls made to cell phones to collect federal debts. 47 C.F.R. § 64.1200(j)(3).

Recommendations: *The CFPB should: 1) allow consumers to identify certain types of communications as inconvenient, including all phone calls, 2) require collectors to inform consumers of this right, and 3) require collectors to use various technological fixes to allow consumers to express their communication preferences.*

2.10.3.1 Work Emails[221]

The CFPB proposes generally prohibiting collectors from emailing consumers at an email address that the collector knows or should know is a workplace email absent consumer consent (which would not transfer from the original creditor or a prior collector). This general prohibition is consistent with the FDCPA's concern for privacy[222] and appropriate given the fact that many employers monitor employee emails.[223]

However, as proposed, this general prohibition would only apply to FDCPA communications and not to limited content messages that the CFPB proposes to exempt from FDCPA coverage.[224] This creates a significant loophole in the general prohibition that would allow collectors to continue to email consumers at work without their consent. If the CFPB moves forward with the limited content messages portion of its proposal, which we strongly oppose, it should prohibit sending limited content messages to an email address that the collector knows or should know is a workplace email.

Recommendations: *The CFPB should prohibit collectors from emailing consumers at an email address that the collector knows or should know is a workplace email absent consumer consent, and this prohibition should include any limited-content emails the rule allows.*

2.11 Decedent Debt[225]

2.11.1 Personal Representatives

Section 1692c(d) of the FDCPA includes "executors" and "administrators" in the definition of "consumers" for purposes of § 1692c, allowing debt collectors to communicate with executors and administrators of decedents' estates about the decedent's debts and assets. The CFPB

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[221] Outline 31-32.

[222] Many provisions of the FDCPA protect the consumer's privacy and relationships from harm. Section 1692c(a)(3) restricts calls to the consumer's workplace. Section 1692c(b) generally prohibits debt collector calls to friends, parents, children, other relatives, neighbors, and employers. Section 1692d(3) prohibits the publication of shame lists of consumers alleged to be refusing to pay their debts. Sections 1692f(7)-(8) prohibit debt collectors from placing debt collection information on postcards and envelopes. Section 1692b provides a narrow exception to the prohibition on third-party contact by allowing limited contacts that are only for the purpose of obtaining the consumer's location information. These restrictions combine to provide significant protection of consumers' privacy, friendships, familial and work relationships.

[223] American Management Association, "The Latest on Workplace Monitoring and Surveillance" (2007) (43% of employers monitored employee emails).

[224] Outline 24. *See* Section 2.8.

[225] Outline 32-34, App. H(3).

proposes to allow debt collectors to also contact "personal representatives" who under state law duplicate the functions of executors and administrators. This is reasonable and consistent with Congressional intent.

The CFPB also asked for comments on expanding the definition of "personal representative" to include all persons with authority to pay the decedent's debts out of the decedent's assets, not just those recognized by state law. This is a dangerous and bad idea. Relatives or friends of the decedent acting outside of established state procedures are much less likely to have learned which assets are the decedent's and which are the assets of beneficiaries, joint account holders, the surviving spouse, etc. They are much more likely to mistakenly pay decedent's debts with assets that are not part of the decedent's estate. If the debt collector believes that there are sufficient assets to pay the some of the decedent's debts, it should initiate the appropriate state procedure for distribution of the assets.

Recommendations: *The CFPB should: 1) allow collectors to contact "personal representatives" who under state law duplicate the functions of executors and administrators; and 2) not expand the definition of "personal representative" to include all persons with authority to pay the decedent's debts out of the decedent's assets.*

2.11.2 Waiting Period

The death of a family member is a highly traumatic experience for most people, and the CFPB's proposed debt collection waiting period after a consumer dies is a very good idea. The CFPB applies the waiting period to "§1692c(d) consumers" so it protects not only the surviving spouse, but also the executor, administrator or personal representative of the estate from requests for payment during the waiting period. Adult grieving children who are legal representatives of the estate would also be shielded by the CFPB's waiting period.

Extending the waiting period to two months is a good idea. It often takes that much time for bereaved relatives and others involved in the decedent's estate to begin to piece together an overview of the decedent's finances. Except for cases where an account is actively being collected when the consumer passes away, few creditors or debt collectors learn of a debtor's death within a month anyway. Giving the family a two month period to work through some of their grief and to begin to piece together the decedent's financial affairs is beneficial to the family and levels the playing field between debt collectors and creditors who may not learn of the death until later.

The CFPB also proposes to allow debt collectors to communicate with a "consumer" (surviving spouse, administrator, executor, or personal representative) during the waiting period only if the consumer independently consents to such contacts. This is a good idea. But the debt collector should also be prohibited from requesting payment or asset information during any consented to conversation during the waiting period.

The CFPB also proposes that a debt collector be allowed to seek location information for executors, administrators, or personal representatives during the waiting period. In order for a waiting period to be meaningful, all location contacts should also be prohibited.

Recommendations: *The CFPB should: 1) extend the waiting period for contact with the decedent's relatives to two months; 2) prohibit contacts during the waiting period unless the consumer independently consents to such contacts; and 3) prohibit collectors from requesting payment or asset information during any consented to conversation during the waiting period.*

2.11.3 False, Misleading, or Unsubstantiated Claims and Other Protections for Individuals Paying Decedents' Debts

As suggested in Appendix H(3) of the Outline, the CFPB should clarify that prohibited false, misleading, or unsubstantiated claims include false claims that someone is liable for the debt of a decedent. The CFPB should also promulgate regulations to protect consumers who are making payments on decedent debt 1) where the debt collector did not make any claims about their liability to pay the debt or 2) where the consumer *is* legally liable to pay the debt.

Debt collectors might contact consumers to urge them to make a payment on a decedent's debt in order to "honor" that person's memory. In order to prevent unfair or deceptive practices that might fall short of false claims that someone is legally liable for the debt, the CFPB should promulgate a rule requiring a debt collector, before accepting any payment on the decedent's debt, to state clearly and simply in writing to the person offering to make the payment that the person is not legally obligated to make the payment.

In cases where the debt collector believes that the consumer is legally obligated to pay the decedent's debt, the CFPB should require debt collectors to send the consumer 1) a verification notice, 2) a statement of rights, and 3) a clear and simple written statement explaining that the debt collector believes that the consumer is legally obligated for the decedent's debt and explaining the contractual or legal basis for this belief (e.g., you co-signed the contract, state doctrine of necessaries, etc.). All three documents must be provided before the debt collector can accept any payment on the decedent's debt.

Recommendation: *The CFPB should: 1) require a collector who is dealing with a person who is not legally obligated to make the payment to so inform the person before accepting any payment on the decedent's debt, and 2) require a collector who is dealing with a person who is legally obligated on the debt to send the person a verification notice and a statement of rights, along with a statement explaining the basis for the belief that the person is legally obligated for the decedent's debt.*

2.11.4 Other Suggestions Related to Decedent Debt

The CFPB should also further develop its web resources for relatives of decedents[226] explaining how the major state and federal laws generally treat a decedent's assets and debts and surviving family members and how the CFPB regulates debt collectors and creditors seeking payment on a decedent's debts. The FTC also maintains a website[227] on decedent's debts, and it may make sense for the CFPB and FTC to collaborate on additional web resources. However, the statement on the FTC and CFPB website that consumers should be consulting a lawyer is impractical for the great number of estates that have few or no assets. It would be better, for example, to add more information about which states are community property states and mention that the income of the surviving spouse earned after the death is not community property and not subject to claims against the decedent in some of the community property states.

Recommendation: *The CFPB should develop additional online resources for relatives of decedents explaining how the major state and federal laws generally treat a decedent's assets and debts and surviving family members and how the CFPB regulates debt collectors and creditors seeking payment on a decedent's debts.*

2.12 Consumer Consent[228]

Because consumers can waive certain restrictions on communications, the CFPB proposes the following critical regulations designed to ensure consent:

- Each collector has to obtain consent directly from each consumer (transferring consent from prior collectors or creditors would be prohibited);
- Collectors must clearly and prominently disclose to consumers what they are consenting to;
- Collectors must memorialize consumer consent; and
- Consumers may revoke consent previously provided to a collector.

Each of these elements is critical to ensure robust consumer protections.

As the CFPB considers how to best allow consumers to express communication preferences, it should explore the use of web portals that collectors may already use to collect payments or allow consumers to file disputes. Debt collectors should also be required to disclose an email address with which the consumer may correspond. These portals and email addresses could allow

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[226] The CFPB has a number of webpages briefly answering questions related to decedent debt, including: If someone dies owing a debt, does the debt go away when they die?; Can a debt collector contact me about a deceased person's debt when it was in that person's name only?; Am I responsible to pay off the debts of my deceased spouse?; and I am the executor/administrator of my deceased relative's estate. Can a debt collector contact me about my deceased relative's debts?

[227] Fed. Trade Comm'n, Debts and Deceased Relatives (July 2011).

[228] Outline 34-35.

consumers to express or revoke consent to communications of a particular type, in a particular location, or at a particular time or request that the collector cease all communications. Portals could also summarize what types of communications the consumer has consented to receive in keeping with the CFPB's disclosure requirement. The portals should give consumers confirmation that that their communication has been received and routed to the appropriate person.

Unfortunately, under the Outline, the protections that the CFPB proposes to ensure consent to receive FDCPA communications would not extend to limited content messages. Collectors would be able to continue to leave limited content voicemails, text messages, emails, and other communications despite their expressed communication preferences. Moreover, collectors would be able to continue to contact third-parties to convey limited content messages. Eliminating the limited content message portion of the debt collection proposal will correct this problem.

Recommendations: *The CFPB should require consumer consent for communications as proposed in the Outline. Eliminating the CFPB's limited content message proposal will avoid problems with consumers and third-parties being inundated with contacts to which they did not consent.*

2.13 Collector Contact Information[229]

In order to prevent spoofing, the CFPB proposes to require collectors to display working, in-bound, toll-free telephone numbers to appear on caller ID screens. This proposal will enhance the ability of consumers to identify collectors because the same number will be associated with the collector each time one of its agents calls or texts, allowing consumers to potentially block unwanted calls or texts from that number. The CFPB should ensure that the number displayed is posted on the collector's website so that a consumer who is searching for that number online can easily identify it as belonging to the collector. This number should also be included in letters and emails.

Recommendation: *As proposed, the CFPB should require collectors to display working, in-bound, toll-free telephone numbers to appear on caller ID screens.*

2.14 Unavoidable Charges for Communications[230]

The CFPB proposes prohibiting collectors from using any communication methods that would cause the consumer to incur an unavoidable charge. While we agree with the proposal as it relates to text messages and the need to use Free-to-End-User text messaging, we disagree with the CFPB's assessment that people can simply avoid charges for voice calls on their cell phone by not picking up the phone. People depend on their cell phone to receive emergency communications like contacts from childcare about a sick child or important business communications like notices

[229] Outline App. H.

[230] Outline App. H.

about job interviews. If the only protection from incurring unwanted charges is not picking up the phone, then the phone becomes a less reliable communication tool. While requiring the collector to display the same number every time they call will reduce the problem by allowing the consumer to block or screen out calls more readily, consumers will not know who 877-240-2377 is the first time that Midland Credit Management calls. Furthermore, many consumers will not have the technical savvy to block unwanted calls from a debt collector even if all spoofing is eliminated. The only way to ensure that consumers are not charged for calls that they have not consented to receive is to require collectors to obtain consent for those calls from the consumer before they are made.

Revocation of consent is also a critical protection from unavoidable charges.[231] As discussed in section 2.10.4, the CFPB should investigate different technological options to allow consumers to express communication preferences. Communication methods that cause consumers to incur a charge may be more likely to be inconvenient to the consumer.

Recommendation: *The CFPB should: 1) adopt its proposal to only allow Free-to-End-User text messaging, and 2) prohibit collector calls to cell phones unless the consumer has consented to receive calls related to the debt on the cell phone and has not revoked that permission.*

2.15 False/ Misleading Statements[232]

We agree with the CFPB's proposal that certain false or misleading claims enumerated in this section should be prohibited.

Recommendation: *The CFPB should adopt the proposal in Appendix H of the Outline to clarify that collectors are prohibited from making false, misleading and unsubstantiated claims.*

2.16 Identifying Information about Debt Collector[233]

The CFPB proposes to prohibit collectors from sending an email message to a consumer if the "from" or "subject" lines contain information that would indicate that the email is about a debt. This provision is a logical extension of existing FDCPA privacy protections.[234]

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[231] Under the TCPA, revocation of consent by the consumer to the debt collector terminates the permissibility of those calls. *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 ¶ 64, ___ F.C.C. ___, 2015 WL 4387780 (F.C.C. July 10, 2015). *See* Cartrette v. Time Warner Cable, Inc., 157 F. Supp. 3d 448 (E.D.N.C. 2016) (applying FCC's ruling); King v. Time Warner Cable, 113 F. Supp. 3d 718, 726 (S.D.N.Y. 2015) (applying FCC's 2015 declaratory ruling; consumer's revocation, communicated to caller, was effective).

[232] Outline App. H.

[233] Outline App. H.

[234] 15 U.S.C. §§ 1692f(7)-(8).

The CFPB should also go beyond email to prohibit communications via social media that raise similar privacy concerns. For example, commenting on the consumer's blog, Tweeting at the consumer, or posting on someone's Facebook timeline should all be prohibited if any of these communications contain content[235] that reveal that the message relates to the collection of a debt.

Recommendations: *Clarify that collectors are prohibited from sending emails that provide information about the debt in the "from" or "subject" line, and prohibit communications about debts to consumers on social media where the communication can be viewed publicly.*

2.17 Incidental Fees[236]

The CFPB is considering a regulation that would permit "convenience" and other incidental fees only if "(1) state law expressly permits them; *or* (2) the consumer expressly agreed to them in the contract that created the underlying debt and state law neither expressly permits nor prohibits such fees." This proposal is likely to open the floodgate to allow collectors to pass along unspecified costs of collection to consumers. For example, a creditor could include a term in the form contract allowing debt collectors to charge $100 for each phone call placed by a debt collector. As outlined, such a charge would be permissible as long as the state law does not address permissible fees for collection phone calls.

Debt collection is a $14 billion dollar industry[237] with a lot of incidental expenses it could shift to consumers. To the extent that this CFPB proposal supports or encourages shifting some of the costs of collection onto families that are already struggling with insurmountable debt, it will increase those families' hopelessness and hinder their financial recovery. This proposal should be limited to allowing recovery only of collection fees that are expressly permitted by the law of the state where the consumer resides.

Historically, creditors have borne the costs of collection by charging interest to compensate for inevitable losses and by carefully screening of borrowers for their creditworthiness. Debt collectors have historically met their expenses by contracting with creditors allowing the collector to retain a portion of what they collect as their fee and, more recently, by purchasing delinquent debts from creditors at pennies on the dollar and collecting more on some accounts than the amount that they paid to purchase the account.

Historically, when a debtor failed to make timely payment of a debt, the common law strictly limited the damages a creditor could recover to the interest provided in the contract or by

[235] As noted above, call-back numbers can be easily Googled to identify the source and should thus be prohibited from public social media posts.

[236] Outline App. H(5).

[237] IBISWorld, Debt Collection Agencies in the US: Market Research Report (July 2016).

statute.[238] That interest compensated the creditor for collection expenses and losses, so any separate recovery of collection expenses would have been duplicative.

Outside of the context of debts owed to governmental entities, most judicial decisions have held that collection agencies are not entitled to recover fees from consumers for their collection efforts, regardless of any clause in the contract.[239] The CFPB should prohibit debt collectors from shifting collection expenses to consumers unless the collection fees are *expressly permitted* by the law of the state where the consumer resides *and* provided for in the consumer's contract. In the absence of state permission to impose a collection fee, the common law approach limiting damages for the failure to pay a debt to interest should be presumed.

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[238] *See* Loudon v. Taxing Dist., 104 U.S. 771, 774, 26 L. Ed. 923 (1881) ("[A]ll damages for delay in the payment of money owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due. The law assumes that interest is the measure of all such damages."); Eternity Glob. Master Fund L.P. v. Morgan Guar. Trust Co. of New York, 2003 WL 288988 at *8 (S.D.N.Y. Feb. 7, 2003) (citations omitted) ("[W]here the alleged breach of contract consists only of a failure to pay money, remedy for the breach is limited to the principal owed plus damages in the form of interest at the prevailing legal rate.").

[239] *Refusing to allow recovery of collection fees*: Seeger v. AFNI, Inc., 548 F.3d 1107 (7th Cir. 2008) (neither contract nor Wisconsin law entitled new owner of debt to collection fee that would be payable to itself, not third-party collector); Fields v. W. Mass. Credit Corp., 479 F. Supp. 2d 287 (D. Conn. 2007) (collector not entitled to fee when debt arose from retail installment sale, as governing statute prohibits collection fees); Ozkaya v. Telecheck Services, Inc., 982 F. Supp. 578 (N.D. Ill. 1997) (state collection agency law prohibits fees unless "expressly authorized by law"; collection agency not entitled to fee for check on which consumer stopped payment when state law allows fees for certain dishonored checks but is silent as to stop-payments); Patzka v. Viterbo College, 917 F. Supp. 654 (W.D. Wis. 1996) (Wisconsin prohibits collection fees, even if separately negotiated; even in absence of statutory prohibition, fees here would be impermissible because not disclosed on face of consumer's contract with creditor); Teemogonwuno v. Todd, Bremer & Larsen, Inc., Clearinghouse No. 45,946B (N.D. Ga. 1991) (under Georgia law non-legal expenses are not recoverable as collection costs); Bolden v. G.H. Perkins Assoc., Inc., Clearinghouse No. 31,470 (D. Conn. 1981) (finding collection agency's claims for collection expenses excessive; no challenge as to recoverability of a more reasonable claim for collection expenses); Bondanza v. Peninsula Hosp., 590 P.2d 22 (Cal. 1979) (enjoining collection agency's addition of one-third collection fee to hospital debt; finding fee to be a penalty unrelated to the actual anticipated expense of collection when the contract provided for reasonable attorney fees and collection expenses); Beasley v. Wells Fargo Bank, 1 Cal. Rptr. 2d 446 (Cal. Ct. App. 1992) (illegal for bank to charge customers the fixed percentage fee it pays debt collectors). See also Kojetin v. C.U. Recovery, Inc., 1999 WL 33916416 (D. Minn. Feb. 17, 1999) (creditor could not pass on to consumer the percentage fee that the collection agency charged it when percentage was not related to actual costs of collection effort and contract made debtor liable for "costs of collection"), *adopted by* 1999 WL 1847329 (D. Minn. Mar. 29, 1999), *aff'd*, 212 F.3d 1318 (8th Cir. 2000) (per curiam); Y-12 Credit Union v. Wiseman, 1986 WL 5240 (Tenn. Ct. App. May 6, 1986) (contract allowed reasonable fee of attorney or collection agency; refusing to award 40% collection fee when creditor did not prove that it was reasonable). Cf. Massa v. I.C. Sys., Inc., 2008 WL 504329 (S.D. Ind. Feb. 21, 2008) (attempt to collect unauthorized 50% collection fee violates FDCPA, but bona fide error shown when fee added by previous collector and current collector reasonably relied on creditor as to amount of debt).

Allowing recovery of collection fees: Talbott v. G.C. Services, L.P., 53 F. Supp. 2d 846 (W.D. Va. 1999) (telephone company's tariff filed with FCC authorizes reasonable collection costs, so consumer can be required to pay collector's 35% fee); Grant Road Lumber Co. v. Wystrach, 682 P.2d 1146 (Ariz. Ct. App. 1984) (rejecting argument that collector committed unauthorized practice of law by filing suit and seeking collection fee; enforcing contractual clause requiring defendant to pay 20% collection fee); Decatur Imaging Ctr. v. Ames, 608 N.E.2d 1198 (Ill. App. Ct. 1992) (interpreting debt collection statute to allow collection fee if expressly authorized by contract; statement in contract here was sufficient, but creditor must prove not only that fees were incurred but also that they were reasonable).

The CFPB should also clarify that incidental fees that are expressly permitted by law are unfair under the FDCPA where they significantly exceed the cost of the service provided. It should prohibit practices such as fee splitting between debt collectors and payment processors that are likely to lead to excessive fees. Other unfair practices that should be prohibited include having consumers pay incidental fees to companies affiliated with the debt collector and debt collectors receiving dividends, rewards, or income from other companies that charge incidental fees for providing services used by consumers in connection with paying a debt to a debt collector.

Recommendations: *Collectors should be prohibited from: 1) Charging collection fees to consumers unless the collection fees are expressly permitted by the law of the state where the consumer resides and provided for in the consumer's contract. 2) Charging fees that are expressly permitted by law are unfair under the FDCPA where they significantly exceed the cost of the service. 3) Requiring the consumers pay incidental fees to affiliates of the debt collector.*

2.18 Prohibitions on Transferring Debt[240]

The CFPB is considering prohibiting debt buyers from placing debt with or selling debt to:

- Entities subject to a judgment, order, or other restriction that prohibits them from collecting debt in that state or
- Entities that are not properly licensed.

These proposed restrictions raise questions about implementation. For example, does the first category include entities beyond those listed on the FTC's list of Banned Debt Collectors?[241] If so, will the CFPB maintain a more comprehensive list? Similarly, for the second category, will the CFPB maintain a separate list of which entities are licensed[242] and the states where they are licensed?[243] It would be useful for consumers to have a single website with comprehensive information about whether a collector is licensed in their state and a complete list of banned collectors in order to help consumers identify fraudulent collection scams.

The CFPB is also considering prohibiting debt buyers from selling or placing for collection:

- Debt that was paid or settled,
- Debt discharged in bankruptcy, or

[240] Outline 35.

[241] FTC, Banned Debt Collectors.

[242] Some states require collectors to have a bond but not a license. See insideARM, State Licensing for Collection Agencies. The prohibition should cover collectors that do not have the license or bond required by state law.

[243] Currently, six states use the Nationwide Mortgage Licensing System & Registry. Anne Rosso May, ACA International, Collector "The Top 10 industry trends, news and issues to watch in 2017" (Jan. 2017). This appears to be the only website aggregating licensing information for multiple states.

- Debt generated due to identity theft.

This list is an important starting point but should be broadened to include a prohibition on selling time-barred debt. The more a debt is sold and resold, the greater the chance of unfair, deceptive, and abusive practices. Collectors that buy debt that is not legally collectible are more likely to engage in risky practices, to violate the law, and harm consumers. These may also be smaller collectors with weaker legal compliance regimes.

Moreover, the CFPB should generally prohibit debt buyers from selling or placing for collection any debt where the debt buyer does not have original account documentation supporting a reasonable basis for claims that this consumer owes the specific amount of debt and that the debt buyer is legally entitled to collect this debt.

Finally, the CFPB should clarify that the prohibited transfer of certain types of debts is itself is a violation of the FDCPA for which the transferor can be held liable.

Recommendations: *The CFPB should prohibit the transfer of –*
1) debts to entities that are not properly licensed and/or are under existing sanctions;
2) debts that are paid or settled, discharged in bankruptcy, generated due to identity theft, or time barred; and
3) debts for which the transferring party does not have original account documentation supporting a reasonable basis for claiming that this consumer owes the specific amount of debt and that the debt buyer is legally entitled to collect this debt.

2.19 Recordkeeping/Document Retention[244]

The CFPB is considering requiring debt collectors to retain debt collection records for three years after the last communication (or attempted communication) with the consumer. The records that the collector would be required to retain include "all records the debt collector relied upon for the information in the validation notice and to support claims of indebtedness." This basic policy is a good starting point that should be clarified to address specific collection situations.

2.19.1 Additional Documents that Need to Be Retained

In addition to the records identified by the CFPB in the Outline, in cases where the consumer has made a payment the debt collector should be required to retain the consumer's contact information, the name of the original creditor, the date and amount of every payment the collector or any predecessor collector received, the amount of the debt when the collector received the debt for collection, and the amount and date of any interest or fee collected from the consumer by the collector.

[244] Outline 35.

In some states, judgments against consumers may be collectible for decades[245] so it is essential that debt collectors be required to retain accurate records about the original amount of the judgment, any assignments of the judgment, the interest on the judgment, and all payments made in addition to the records identified by the CFPB in the Outline.

Recommendations: *The CFPB should require the retention of addition documents where 1) the consumer has made payment(s) or 2) there is a judgment against the consumer.*

2.19.2 Record Retention and Defining "Last Communication"

The CFPB proposes to require debt collectors to retain the specified documentation for three years after the collector's last communication with the consumer.[246]

Where the debt has been reduced to judgment, the documents should be retained until the judgment is satisfied, extinguished by the passage of time, extinguished for good cause (such as invalid service of process in the suit leading to judgment), or for three years after assignment of the judgment to another collector.

Where the debt has not been reduced to judgment, the CFPB should clarify that the "last communication" is the notice that the debt collector sends the consumer to say that:

- the debt has been fully paid (or paid in accordance with the settlement agreement),
- the debt is being transferred to another debt collector (or back to the original creditor) and providing the name and contact information of the new debt collector (or original creditor),
- any remaining debt is being extinguished, or
- the debt collector terminates all debt collection efforts regarding the debt, including credit reporting and sending a IRS form 1099

Recommendations: *The CFPB should: 1) identify specific triggers that end record retention requirements when a debt has been reduced to a judgment and 2) define what counts as a "last communication" for purposes of record retention related to debts that have not been reduced to a judgment.*

2.19.3 Recordkeeping and Credit Reporting

The CFPB should also affirm in its rulemaking that collectors who are furnishing information to CRAs also have recordkeeping requirements established by the CPFB's FCRA Furnisher Accuracy and Integrity Guidelines. Section III(c) of these Guidelines requires furnishers to develop policies and procedures that address the need for "[m]aintaining records for a reasonable period of time,

[245] See National Consumer Law Center, Collection Actions, § 12.15 (3d ed. 2014) (50 state overview on statutes of limitations for enforcement of judgments).

[246] Outline 35.

not less than any applicable recordkeeping requirement, in order to substantiate the accuracy of any information about consumers it furnishes that is subject to a direct dispute."[247]

Recommendation: *The CFPB should clarify that collectors may have separate recordkeeping obligations if they furnish information to CRAs.*

3. Issues Not Addressed in the Outline

3.1 Remedies

The CFPB should issue rules or guidance clarifying 1) that injunctive relief is available for violations under the FDCPA; 2) that multiple statutory damages are available for multiple violations of the Act; and 3) that payments made by consumers in response to collection activities by collectors violating the FDCPA are actual damages that may be recovered by the consumer. We also ask the CFPB to issue a regulation or a guidance encouraging courts to exercise their discretion not to tax costs against financially distressed consumers who file unsuccessful FDCPA claims in good faith.

First, in light of the increasing number of small, judgment-proof debt collectors, it is essential that courts presiding over private FDCPA litigation have the authority to deter future misconduct by issuing injunctions to compel debt collectors to abide by the FDCPA under penalty of civil or criminal contempt.[248] For a number of debt collectors, the threat of damages does not serve as a sufficient deterrent to abusive practices because the collector cannot pay out any substantial damages award. Rogue collectors may even structure their companies so that the entity violating the FDCPA has no assets and can use illegal collection tactics without fear of consumer suits. Because many of these debt collectors are so small, they are unlikely to be targeted by public enforcement agencies, which, as the Bureau recognizes,[249] generally only take on the largest and most egregious cases. Authorizing consumers to pursue these rogue collectors by seeking injunctive relief will help close a serious gap in FDCPA enforcement.

Second, the view that the statutory damages cap applies to each action and not to each violation of the Act undermines the statutory damages scheme to such an extent that it fails to serve as a sufficient deterrent to debt collectors or incentive to potential plaintiffs to bring suit. Even if a

[247] Section III(c) of the Guidelines provides that furnishers should develop policies and procedures that address the need for "[m]aintaining records for a reasonable period of time, not less than any applicable recordkeeping requirement, *in order to substantiate the accuracy of any information about consumers it furnishes that is subject to a direct dispute*." Appx. E to 12 C.F.R. Part 1022, Guidelines Concerning the Accuracy and Integrity of Information Furnisher to Consumer Reporting Agencies, § III(c)(emphasis added).

[248] For a summary of cases where injunctive relief has been granted or courts have assumed that it is an available remedy, see National Consumer Law Center, Fair Debt Collection 6.7.2 (8th ed. 2014), *updated at* www.nclc.org/library.

[249] FPB's Brief for the United States as *Amicus Curiae* Supporting Petitioner at 22-23, *Olivea Marx v. Gen. Rev. Corp.*, No. 11-1175, 133 S. Ct. 1136 (2013)(citations omitted).

$1000 cap per incident was sufficient when the Act was enacted in 1977, that amount is certainly insufficient today. Accounting for inflation, $1000 in 1977 is the equivalent of almost $4000 today.[250] Moreover, in many of the most appalling FDCPA cases,[251] the debtor is subject to serious and ongoing abuse. By clarifying that numerous violations yield an increased statutory damages cap, the Bureau would deter debt collectors from committing multiple violations within the same course of wrongful conduct.

Third, a rule allowing courts to award as actual damages amounts paid by debtors in response to FDCPA violations would rectify an increasingly severe imbalance in the incentives provided by the FDCPA damages scheme. As debtors face increasingly serious financial troubles, and are thus more susceptible to paying debts (whether valid or not) in response to FDCPA violations, abusive debt collectors have a greater incentive to violate the Act and internalize possible statutory damages as a cost of doing business as a successful collection agency. The CFPB can counteract this trend.

And, finally, consistent with the congressional intent to encourage low-income debtors to sue to protect their rights, the CFPB should do everything in its power to encourage courts to award fees and costs to prevailing debt collector-defendants only in cases where the debtor-plaintiff has brought suit in bad faith.

3.2 Medical Debt

We are very disappointed that the Bureau's proposal does not discuss additional measures to protect consumers with respect to medical debt collection. The CFPB should do more to protect consumers from the most common and oftentimes most unfair form of debt collection activity.

As the CFPB's own research has shown, medical debt is the most prevalent type of debt that is reported by collectors to the nationwide consumer reporting agencies (CRAs). It comprises over 50% of the collection tradelines on consumer credit reports and one in five Americans with a credit report is affected by this problem. Furthermore, medical debts are unique among the types of consumer debts for many reasons, including:

- Medical debt is often involuntary or unplanned. Consumers do not choose to get sick or end up in the emergency room.
- A third party, *e.g.*, the insurance company, is often responsible for paying most of the bill. Medical bills often end up in collections because of insurance disputes, billing errors, or other problems that arise from the complexity of healthcare reimbursement. Even when

[250] *See* CPI Inflation Calculator, Bureau of Labor Statistics, *available at http://data.bls.gov/cgi-bin/cpicalc.pl.*

[251] *See, e.g.*, Chiverton v. Fed. Fin. Grp., 399 F. Supp. 2d 96 (D. Conn. 2005) (describing serious, ongoing, and repeated violations).

errors are eventually fixed, they result in long delays in payments to providers, during which bills may be sent to debt collectors.

- Consumer confusion and frustration with the complexities of health insurance and medical billing. Some consumers will let a medical bill go to a collection agency because of confusion, or they believe that their insurer will pay it, something the Bureau itself has noted.[252]
- The availability of financial assistance or insurance coverage for low-income consumers. Low-income consumers are sometimes eligible for government insurance programs (Medicaid, CHIP, worker's compensation) or financial assistance from a provider. In fact, the Affordable Care Act (ACA) prohibits nonprofit hospitals from engaging in "extraordinary collection actions" during a 120 day period until they determine whether a patient qualifies for financial assistance[253]
- Discriminatory or variable pricing. Out-of-network or uninsured patients are often charged significantly higher prices than the prices charged to private and government insurers.

Even the collections industry has recognized the special nature of medical debt, going so far as to issue specific best practices regarding medical debt collection, including recommendations that collectors allow patients 120 days to pay a medical bill before reporting the account to a CRA and removing or marking as resolved paid medical debts on credit reports within forty-five days.[254]

Despite the unique nature and tremendous harm caused by medical debt and its collection, the CFPB proposal only addresses medical debt specifically in one regard, by providing that a medical facility is a presumptively inconvenient location for purposes of Section 805(a)(1) of the FDCPA, 15 U.S.C. § 1692c(a)(1). While other provisions may help with medical debt, such as the prohibition on parking, we urge the CFPB to do more to help the millions of consumers unfairly impacted by medical debt. We urge the CFPB to consider the follow proposals:

Codify and reinforce the provision in the multistate Attorney General settlement with the nationwide CRAs that prohibit the reporting of medical debt for 180 days. Pursuant to an agreement last year with a multistate group of over 30 Attorneys General, the nationwide CRAs (Equifax, Experian and TransUnion) agreed to refrain from reporting medical debts on a

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[252] Consumer Fin. Prot. Bureau, Consumer credit reports: A study of medical and non-medical collections 15 (Dec. 11, 2014), available at http://files.consumerfinance.gov ("the complexity of medical billing and the third-party reimbursement processes faced by most patients and their families is a potential source of confusion or misunderstanding between patient, medical provider, and insurer. That complexity could lead some consumers to be unaware of when, to whom, or for what amount they owe a medical bill or even whether payment was the responsibility of the consumer rather than an insurance company.").

[253] 26 U.S.C. § 501(r)(6); 26 C.F.R. § 1.501(r)-1 *et seq.* For a discussion of these requirements, see National Consumer Law Center, Collection Actions § 9.3.1 (2015 update), *at* www.nclc.org/library

[254] These best practices were issued by ACA International and the Healthcare Financial Management Association. ACA Int'l and HFMA, Best Practices for Resolution of Medical Accounts 11-12 (rev. April 2016).

consumer's credit report until 180 days have passed after the Date of First Delinquency (DOFD), which is the date that a debt first becomes delinquent and serves as the trigger date for the FCRA obsolescence period. This provision recognizes the need for a time period to deal with insurance or billing problems or to apply for government insurance programs and financial assistance. In order for this provision to work, debt collectors must properly report the DOFD, as well as the fact that a debt is medical in nature.

We urge the CFPB to strengthen and make more effective this 180 day "no reporting" period in the multistate AG agreement. The Bureau should declare as a presumptively unfair practice under Section 808 of the FDCPA, 15 U.S.C. § 1692f, the furnishing of information about a medical debt for the first 180 days after a bill has been sent to a consumer. While we hope that the multistate AG agreement will result in fairer results for consumers afflicted with medical debt, we note that it is an agreement between the state Attorneys General and the nationwide CRAs and does not explicitly give consumers any rights or remedies if this 180 day prohibition on reporting is violated. Thus, there is a need for the CFPB to reinforce the protections of the multistate AG agreement by placing a parallel prohibition on debt collectors.

At a minimum, in order for the multistate AG agreement to properly work, the Bureau should make mandatory certain reporting by debt collectors when furnishing a medical debt to a CRA. In particular, the CFPB should provide that a failure to properly report to a CRA that a debt is medical in nature, or to report the DOFD, constitutes a violation of the FDCPA.

Make violation of the Affordable Care Act regulations on collection of nonprofit hospital debt a violation of the FDCPA for debt collectors. The Affordable Care Act (ACA) includes provisions governing collection of medical debt owed to nonprofit hospitals in relationship to their charitable obligation to offer financial assistance to low-income patients. The Internal Revenue Service (IRS) issued regulations implementing this provision. Together, the ACA and IRS regulations require nonprofit hospitals to:[255]

- develop and publicize written financial assistance policies;
- refrain from engaging in "extraordinary" collection actions[256] during the 120 day period after a bill is issued, until after the hospital makes a reasonable effort to determine eligibility for financial assistance;
- accept and process applications for financial assistance for a 240 day period after a bill is sent;
- charge patients eligible for financial assistance, at most, only "amounts generally billed" to insured patients; and

[255] For an in-depth discussion of the ACA debt collection provisions, see National Consumer Law Center, Collection Actions § 9.3.1 (3d ed. 2014), *updated at* www.nclc.org/library.

[256] Extraordinary collection actions include furnishing to a CRA, selling a debt (with certain exceptions), denying care for past debt, and any action requiring judicial process such as a home lien or wage garnishment.

- provide a notice 30 days before commencing any extraordinary collection action.

The IRS regulations implementing the ACA collection provisions also indirectly govern debt collectors, in that they impute the collection activity of the debt collector to the hospital[257] and require hospitals to have agreements with debt collectors to ensure that no extraordinary collections actions are taken until reasonable efforts are made to determine financial assistance eligibility.[258]

We urge the CFPB to strengthen the ACA protections for collection of nonprofit hospital debt by directly applying these protections to debt collectors. The Bureau should do so by providing that a violation of the ACA protections is also a violation of the FDCPA if committed by a collector pursuing a nonprofit hospital debt. If an activity is already illegal under another statutory scheme, such as the ACA and IRS regulations, it should also be unlawful under the FDCPA when committed by debt collectors.

3.3 Limiting Use of Arbitration by Debt Collectors

The CFPB's debt collection Outline does not address arbitration. The CFPB's proposed arbitration rule[259] would prohibit debt collectors (and others) from relying on arbitration clauses to challenge court class actions. NCLC supports that proposal while continuing to advocate for an expanded final regulation that would prohibit mandatory consumer arbitration in individual as well as class actions.[260] If the CFPB does not prohibit forced consumer arbitration in all cases, the CFPB should include the following, narrowly-tailored provisions in the debt collection regulation to prevent abusive arbitration practices related to debt collection:

- prohibit collection of a consumer debt via arbitration in lieu of court proceedings, and
- prohibit use of a creditor's arbitration clause in private actions against debt collectors.

The CFPB has authority to prohibit or limit the use of arbitration agreements between a covered person and a consumer for a consumer financial product or service if that is in the public interest and for the protection of consumers.[261] Debt collectors are covered persons,[262] and these provisions would be in the public interest and protect consumers.

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[257] 26 C.F.R. § 1.501(r)-6(a)(2).

[258] 26 C.F.R. § 1.501(r)-6(c)(10).

[259] 81 Fed. Reg. 32830 (May 24, 2016).

[260] *See* National Consumer Law Center, Comments to the Consumer Financial Protection Bureau regarding 12 CFR Part 1040 (Aug. 22, 2016).

[261] 12 U.S.C. § 5518(b).

[262] 12 USC §§ 5481(6), (15)(A)(x).

3.3.1 Prohibit Collection of a Debt via Arbitration in Lieu of Court Actions

Hundreds of thousands of collection suits were initiated in perfunctory arbitration proceedings before the National Arbitration Forum (NAF) where the NAF would receive a bare-bones complaint and issue default rulings without any hearing or additional evidence being submitted.[263] Although a state enforcement action[264] put a stop to National Arbitration Forum (NAF)'s use of arbitration proceedings in collection suits and the American Arbitration Association (AAA) has refused to conduct any arbitration seeking to collect a consumer debt,[265] there is still a present danger that creditors will insert other arbitration forums in their agreements and then use attorneys to bring collection actions before these other arbitration forums instead of before a court.

Collection via arbitration presents a significant risk of repeat-player bias. By its nature, a collection attorney using this procedure would likely do so for thousands of cases, meaning that the arbitration forum would receive significant arbitration fees from that one firm. Being a collection action, all or virtually all costs for the arbitration would be paid for by the collection firm, meaning that a private entity would be receiving perhaps hundreds of thousands of dollars from one firm and nothing from consumers.

The leverage that companies as opposed to consumers have with arbitration forums was brought home by a vivid example involving JAMS, a major arbitration forum. At one point, JAMS announced it would not conduct arbitrations where arbitration agreements prohibited class arbitration. In response, major creditors threatened to switch from JAMS to AAA or NAF, forcing JAMS to renounce that policy.

State legislation, court rules, and courts increasingly demand additional documentation about the nature and amount of a debt or other safeguards before a collection attorney can obtain a default judgment in a court consumer collection case. But collection via arbitration may very well evade these standards since the rules of the arbitration procedure instead are set by the private arbitration forum and not by the state or a court.

Consumers also are unfamiliar with collection via arbitration, and the normal consumer confusion concerning a court collection action is exponentially greater when consumers receive notices from private entities telling them to respond to arbitration proceedings regarding debts. Since a notice

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[263] These abusive practices are discussed in more detail at National Consumer Law Center, Consumer Arbitration Agreements § 11.2 (7th ed. 2015), *updated at* www.nclc.org/library.

[264] State v. Nat'l Arbitration Forum (Minn. Dist. Ct. Hennepin County July 17, 2009) (consent judgment).

[265] See, e.g.. Am. Arbitration Ass'n, Notice on Consumer Debt Collection Arbitrations, available at www.adr.org (describing AAA moratorium on consumer debt collection actions). *But see* Consumer Fin. Protection Bureau, Arbitration Study § 5.6.4 (March 2015) (identifying 24 filings during the relevant study period that likely conflicted with AAA's moratorium).

about private arbitration does not come from a court, consumers might ignore it because they think that it is a scam or otherwise do not appreciate its significance.

Nor is there a compelling reason for a debt collector to use collection via arbitration, other than seeking out a biased forum where consumer protections may be evaded. A contested arbitration will cost hundreds if not thousands of dollars more than a court proceeding since arbitrators, unlike judges, are paid by the hour. Moreover, the debt collector cannot enforce an arbitration award without going to court to obtain a judgment confirming the arbitration award.

For all of these reasons, collection via arbitration is unfair and abusive, and the CFPB should prohibit the collection of consumer debts using this procedure.

3.3.2 Prohibit Use of Creditor's Arbitration Clause in Private Consumer Actions Against Collector's Illegal Conduct

The CFPB should prohibit debt collectors from invoking original creditors' arbitration clauses when the collector is being sued due to its tortious or otherwise unfair, deceptive, or illegal debt collection conduct.

The FDCPA was drafted to encourage individuals to bring private individual actions, providing up to $1000 in statutory damages and attorney fees to prevailing consumers. However, in individual arbitration cases, small statutory damages may be dwarfed by the consumer's liability for arbitration filing fees, arbitrator fees, and other costs that may be assessed to a non-prevailing consumer. These and other difficulties consumers face in bring individual arbitration actions against collectors make them impractical options and thus conflict with the Congressional intent to encourage private enforcement of consumer rights.

Just as significantly, when consumers enter into arbitration agreements with a creditor, they have no expectation that the agreement will limit their right to bring to court actions against third parties for conduct unrelated to the creditor. The collector is not a party to the original credit agreement, and the consumer is not suing to enforce terms of the credit agreement but for the independent torts or other illegal activity of a debt collector. Consumers typically do not understand that the arbitration agreement with its creditor could cover future debt collectors or prevent them from enforcing their rights by suing the debt collector in court.

In addition, arbitration is secret and, unlike litigation in court, does not set valuable precedent with regard to the contours of the FDCPA. FDCPA claims are especially in need of judicial resolution because debt collection practices continue to evolve with technological and economic changes.[266] Historically, courts have played a critical role in defining the conduct that constitutes a violation of

[266] Cf. U.S. Gov't Accountability Office, GAO–09–748, Credit Cards: Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology (2009).

the Act.[267] When FDCPA claims are arbitrated in secret, debt collectors, advocates, and arbitrators themselves cannot learn about new kinds of debt collection abuses and how the Act should be applied to address them.[268]

For all these reasons, we ask the CFPB to prohibit debt collectors from seeking to enforce arbitration agreements the consumer enters into with other parties where the consumer's dispute with the collector is unrelated to the terms or working of the credit agreement.

[267] See Colin Hector, Note, Debt Collection in the Information Age: New Technologies and the Fair Debt Collection Practices Act, 99 Cal. L. Rev. 1601, 1611-17 (2011).

[268] See S. Rep. No. 382, 95th Cong., 1st Sess. 4, reprinted in 1977 U.S.C.C.A.N. 1695, 1698 ("In addition to these specific prohibitions, this bill prohibits in general terms any harassing, unfair, or deceptive collection practice. This will enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed.")