



# Initial Analysis of Consumer Financial Protection Bureau's Proposed Outline to Address Debt Collection Abuses

Melissa Stegman, Senior Policy Counsel  
Lisa Stifler, Deputy Director of State Policy

September 2016

The following provides a summary of the outline of proposals that the CFPB is considering to address debt collection and CRL's initial reactions to it. As we review the proposal more closely, our reactions may evolve. CRL's reactions are provided in *italics*.

## I. Summary Overview

The CFPB's proposal addresses six principal areas: (1) information integrity and documentation, including handling disputes and the transfer of certain information between collectors; (2) time-barred debt; (3) disclosures; (4) collector communication practices; (5) efforts to thwart bad actors; and (6) recordkeeping. The proposal applies to the following small entities: collection agencies, debt buyers, collection law firms, and loan servicers. Creditors collecting debts and other so-called "first party collectors" will be addressed in a separate rulemaking process.

*CRL supports elements of the proposal as steps forward, including: requiring the transfer of information from prior attempts to collect the debt, requiring collectors to tell subsequent collectors about unresolved disputes and requiring resolution of those disputes before collection activity may continue, prohibiting suits on time-barred debt, prohibiting "parking" debts on credit reports without informing the consumer about the debt, and prohibiting the sale of certain debts. However, we are concerned that the CFPB's approach to information integrity and documentation is particularly weak, and thus will not successfully curb abusive debt collection practices. Additionally, for any strong final rule on third-party debt collection to be effective, the CFPB must address, in its upcoming rulemaking process on "first-party collectors" and creditors, the responsibility of creditors to transfer the proper information and account-level documentation to facilitate legal collection practices by third-party debt collectors.*

## II. Information Integrity

### A. Scope

The CFPB will require that debt collectors substantiate, or possess a reasonable basis for, claims that a particular consumer owes a particular debt. The CFPB will also require that certain information that the consumer provides to one collector during the collections process be passed on and reviewed by later collectors.

The proposal distinguishes between documentation for initial claims of indebtedness, claims of indebtedness following the appearance of a warning sign during the course of collections, claims of indebtedness following a dispute, and claims of indebtedness made in complaints filed in litigation. Table 1 on page 12 of the proposal provides a helpful summary of pertinent time periods and required actions.

*CRL strongly supports the concept that a debt collector must possess a reasonable basis for making a claim that an individual owes a debt. This broad concept is key to ensuring that individuals are not*

*improperly contacted for debt they do not owe. The burden rightfully should be on debt collectors to establish that they have the legal right to collect the debts and are collecting from the right people, for the right amount of money. However, as is explained in more detail below, we have concerns that the proposal as outlined does not do enough to ensure that collectors have specific information or original account documents at any stage of the collection process. Indeed, the collector need not abide by particular requirements at any collection stage. CRL believes that the CFPB should require collectors to possess and review specific information and account-level documentation before initiating collection, as well as when a dispute arises and before initiating litigation.<sup>1</sup>*

## **B. Initial Collection**

The CFPB identifies certain “fundamental information” that collectors can obtain and review that, along with a representation of accuracy from the creditor and a review for warning signs, would establish reasonable support for claims of indebtedness. The information the CFPB is considering is listed in Appendix C of the proposal and includes the following:

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

However, a collector need not obtain every item listed in Appendix C. Additionally, the CFPB states that it will provide flexibility to accommodate different approaches to substantiation and to consider alternative, though undefined, sets of information that could provide a collector with a reasonable basis to make a collection claim. The collector would have the burden of justifying its alternative approach.

To help form a reasonable basis, collectors may obtain a written representation from the debt owner that: (1) the debt owner has adopted and implemented reasonable written policies and procedures to ensure the accuracy of transferred information; and (2) the transferred information is identical to the information in the debt owner’s records. However, much like the list of information, the collector is not required to obtain this representation of accuracy.

*CRL supports a requirement that debt collectors must substantiate claims of indebtedness before initiating collection attempts. However, we are concerned that the proposal does not go far enough to*

---

<sup>1</sup> The CFPB’s recent enforcement actions provide for stronger protections than the CFPB’s rulemaking proposal. For instance, the enforcement actions mandate the review of account-level documentation under numerous circumstances. See, e.g., In the Matter of Encore Capital Group, et al, Consent Order 2015-CFPB-0022 (Sept. 9, 2015), [http://files.consumerfinance.gov/f/201509\\_cfpb\\_consent-order-encore-capital-group.pdf](http://files.consumerfinance.gov/f/201509_cfpb_consent-order-encore-capital-group.pdf); In the Matter of Portfolio Recovery Associates, LLC, Consent Order 2015-CFPB-0023 (Sept. 9, 2015), [http://files.consumerfinance.gov/f/201509\\_cfpb\\_consent-order-portfolio-recovery-associates-llc.pdf](http://files.consumerfinance.gov/f/201509_cfpb_consent-order-portfolio-recovery-associates-llc.pdf).

*ensure collectors will not make unsubstantiated claims of indebtedness. Due to the allowance of undefined alternative means of substantiation, the proposal does not set out a baseline requirement for the collector to possess and review specific basic and accurate information or account documents before attempting collection.*

### **C. Warning Signs**

Collectors that come across any specific warning signs (either at initial claim of indebtedness stage or later in the collections process) that the information associated with the debt is inaccurate or inadequate must stop collection attempts and take additional steps to provide reasonable support before proceeding with further collection activities. According to the proposal these additional steps, though again unspecified, could include obtaining and reviewing additional information and documentation. The warning signs to be reviewed are at both the individual account level and portfolio level.

At the initial review stage, examples of warning signs include:

1. Information for an individual debt is not in a clearly understandable form;
2. Information for an individual debt is facially implausible or contradictory;
3. A significant percentage of debt in the portfolio has missing or implausible information, either in absolute terms or relative to portfolios with comparable types of accounts; or
4. A significant percentage of debt in the portfolio has unresolved disputes, either in absolute terms or relative to portfolios with comparable types of accounts

At the ongoing review stage, the warning signs could include:

1. A dispute filed by a consumer with respect to an individual debt;
2. The inability to obtain underlying documents in response to a dispute; or
3. Receipt of disputes for a significant percentage of debt in the portfolio, either in absolute terms or relative to portfolios with comparable types of accounts.

*CRL supports the general concept that collectors should review for so-called warning signs before initiating collection and during the collection process. We also strongly support the requirement that collectors stop collection activities if a warning sign arises. However, we are concerned that the proposal requires the review of warning signs as a substitute for the review of account-level documents before collection begins.*

*In addition, collectors are not required to obtain particular documentation in response to a warning sign, at either the initial review or ongoing review stages. Although the proposal would make collectors responsible for taking steps in response to warning signs that they detect or should have detected, the CFPB also states that the standard would not require collectors to confirm all of the information they receive. This appears to be a standard without any teeth.*

## D. Disputes and Litigation

If a consumer lodges a dispute, a collector must stop collection until necessary documentation is reviewed. The CFPB defines a dispute as communication from a consumer that takes the form of a question or challenge related to the validity of the debt or the legal right of the collector to seek payment on the debt. The CFPB is considering allowing collectors to resume making claims once they have reviewed documentation outlined in Appendix D of the proposal responsive to the type of dispute<sup>2</sup> and conclude that it provides a reasonable basis for further claims. A subsequent collector cannot make claims of indebtedness until addressing the dispute (if the previous collector had not taken steps to do so).

Similarly, prior to filing a debt-collection lawsuit, collectors would be required to have reasonable support that the consumer owes the amount claimed and that the collector has a legal right to make the claim. Collectors may obtain and review all of the documentation specified in Appendix D of the proposal to satisfy their reasonable support obligation, but once again, may also acquire support through alternative, undefined means. Finally, the CFPB is considering requiring a brief litigation disclosure in all communications with a consumer in which the collector represents its intent to sue. The disclosure would inform the consumer of the intent to sue, potential consequences for failing to respond to a lawsuit, and that more information is available from the CFPB about debt collection litigation.

*CRL supports requiring collectors to respond to the specific consumer dispute and to prohibit collection attempts by all debt collectors until the dispute is addressed. However, for both disputes and litigation, the proposal does not require collectors to use the documentation outlined in Appendix D of the proposal. As the CFPB recognizes in the proposal, litigation raises the stakes for consumers, and there is an increased potential for consumer harm. In fact, for many, the harm is real, not simply an increased risk of harm, because debt-collection lawsuits overwhelmingly end in favor of debt collectors, often by default judgment. These harms include wage garnishment, bank account seizure, and negative credit reporting.*

*While the information and documentation listed in Appendix D of the proposal is more extensive than the documentation suggested for initial collection, we are concerned that the proposal permits undefined approaches that do not require the collector to review original account-level information or documents, nor does it prohibit the collector from depending on robo-signed affidavits or other documents created in anticipation of litigation. In fact, the proposal contemplates the explicit use of an affidavit instead of account-level documents. While the collector would have the burden of establishing that the alternative approach it uses is reasonable, this framework would still allow the debt-collection “lawsuit mill” business model to continue.*

---

<sup>2</sup> The CFPB distinguishes between generic disputes and specific disputes. Specific disputes encompass the following: (1) disputes as to amount of debt; (2) disputes as to wrong consumer; and (3) dispute as to wrong collector.

### E. Transferring Information

The collector must forward certain information it receives from consumers after the collector returns the debt to the debt owner or sells it to another debt buyer. The CFPB is considering requiring the following information be forwarded:

1. Payments submitted by the consumer;
2. Bankruptcy discharge notices;
3. Identity theft reports;
4. Disputes; and
5. Any assertion or implication by the consumer that his or her income and assets are exempt under federal or state laws from a judgment creditor seeking garnishment.

*CRL supports the requirement that collectors share and forward information obtained in the collection process. The failure to share information results in harassment of individuals and unjustly places the burden on the consumer to correct collectors' faulty information. The burden should be on collectors to ensure the information they obtain from consumers is passed on to subsequent collectors or back to the creditor.*

### III. Time-Barred Debt

The CFPB proposal would prohibit suit and threats of suit on "time-barred debt," debt for which the time period in which to sue an individual for the debt has expired. A collector may still *collect or attempt to collect* time-barred debt, but must provide particular disclosures and agree to waive the right to sue for the debt.

Collectors would be required to provide a disclosure to consumers when seeking to collect a time-barred or obsolete debt.<sup>3</sup> The statement would be included in the validation notice and the first oral communication in which the collector requests payment. In addition, a subsequent collector is prohibited from suing on a debt as to which an earlier collector provided a time-barred debt disclosure. The subsequent collector must likewise provide the disclosure in the validation notice and first oral communication.

The CFPB is also considering a disclosure that would inform consumers about obsolete debt. This disclosure would occur on the validation notice only.

Finally, the CFPB proposes to prohibit a debt collector from accepting payment on a debt that is both time-barred and obsolete until the collector obtains a consumer's written acknowledgment of having received a time-barred debt disclosure and an obsolescence disclosure.

*CRL supports the CFPB's proposal to prohibit suits and threats of suits on time-barred debt. However, as the proposal still permits the collection of time-barred debt, CRL is concerned that a time-barred debt*

---

<sup>3</sup> An obsolete debt is a debt that, because of its age, is generally barred from appearing on credit reports under the Fair Credit Reporting Act.

*disclosure will not be sufficient to protect consumers from unscrupulous collectors seeking to take advantage of consumer confusion. The CFPB itself acknowledges that these specific types of disclosures are notoriously difficult for consumers to understand.*

#### **IV. Validation and Statement of Rights**

The CFPB will require changes to the FDCPA validation notice and a new Statement of Rights to provide consumers with information to determine whether they owe a debt and to navigate the debt collection process. The CFPB is also considering providing these documents in Spanish and potentially other languages. The validation notice includes a "tear-off" with choices to facilitate exercising consumer rights. The tear-off would allow consumers to dispute the debt by checking a box. A model validation notice and statement of rights is included in the proposal. The CFPB is also considering a proposal to prohibit debt collectors from furnishing information about a debt to a consumer reporting agency unless the collector has communicated directly about the debt to the consumer (usually by sending a validation notice).

*CRL supports the requirement that collectors provide improved FDCPA notices and a Statement of Rights. Many individuals are unaware they have specific rights when dealing with debt collectors, let alone what the specific rights are. Providing an easy-to-use method of disputing a debt, as well as an easily understood Statement of Rights, will allow individuals to better protect their rights. However, we are concerned that the validation notice as written, specifically the "tear-off" portion, does not adequately address the scenarios a consumer may be facing, such as identity theft or a bankruptcy discharge, and may result in consumers not asserting their rights. Furthermore, the validation notice should not include an option to make a payment, as this may confuse consumers into thinking they must make a payment to lodge a dispute. In addition, CRL encourages the CFPB to require collectors to provide a method of disputing the debt electronically, in addition to providing the "tear-off" option.*

*Lastly, CRL supports the CFPB in its efforts to ensure that the validation notice and Statement of Rights are accessible to as many consumers as possible, particularly limited English proficiency (LEP) populations, and supports the use of translated validation notices and Statements of Rights.*

#### **V. Collector Communications Practices**

##### **A. Call Frequency & Leaving Messages**

The CFPB is considering limits to how often debt collectors may contact or attempt to contact consumers.

**Call Frequency:** The proposal distinguishes between situations where there is confirmed consumer contact and unconfirmed consumer contact. Collectors would be limited to *six communication attempts per week, per account* through any point of contact before they have reached the consumer. If the collector has confirmed consumer contact, the total allowable contact attempts per week, per account is three.<sup>4</sup>

---

<sup>4</sup> See Table 2 on page 26 of the proposal for a summary.

Collectors are permitted to contact third parties for location information when the collector does not have confirmed consumer contact, with a limit of six total contact attempts per third party, per week, per account. When the collector has confirmed consumer contact, all further location communications are prohibited.<sup>5</sup>

*CRL supports a regulator limit on the number of permitted calls but questions whether six communication attempts per week, per account to reach a consumer is excessive. The call frequency has the most potential for abuse in the student loan and medical debt contexts, where consumers are likely to have multiple accounts stemming from the same event or circumstances.<sup>6</sup> These multiple accounts are often collected by the same collector simultaneously. Furthermore, we suggest that the Statement of Rights contain a statement that the consumer has the right to stop calls (as distinct from all communications). Consumers may want to continue receiving information about the debt in writing, but may not want to receive calls.*

**Leaving Messages:** The CFPB proposes that no information about a debt is conveyed—and no FDCPA “communication” occurs—when collectors convey only: (1) the individual debt collector’s name; (2) the consumer’s name; and (3) a toll-free method that the consumer can use to reply to the collector. If the collector makes contact with the consumer, the FDCPA “mini-Miranda” disclosure must be provided. To satisfy the FDCPA requirement that a collector must disclose its identity in telephone calls, a collector must display a working, in-bound telephone number to appear on the consumer’s caller ID. In addition, a collector must not contact anyone using a communication method that causes the person to incur an unavoidable charge (i.e. must be free to the end user).

*The word “communication” is a legal term of art under the FDCPA, defined as “the conveying of information regarding a debt directly or indirectly to any person through any medium.”<sup>7</sup> Communications are subject to certain legal protections under the FDCPA, including a prohibition on communicating with third parties without the consumer’s consent, explicit rights related to communications, presumptive inconvenient times and places for communications, and the right to request that communications stop.<sup>8</sup> The limited content voicemails as proposed would be explicitly outside the definition of “communication” under the FDCPA, and thus outside the FDCPA’s various and numerous protections. CRL is concerned that the limited content voicemail option opens the door to harassing collector behavior that consumers would be unable to stop, including messages being left with third parties for reasons other than determining location or messages at inconvenient times and places.*

## **B. Time, Place, & Manner Restrictions**

The proposal sets out a variety of clarifications regarding inconvenient communication.

**Inconvenient Time:** With respect to inconvenient times, a debt collector knows or should know that communication is convenient if it would be convenient in all of the locations in which the collector’s

---

<sup>5</sup> See Table 3 on page 28 of the proposal for a summary.

<sup>6</sup> In the student loan context, it is typical for students to obtain (at least) one loan per semester, and each loan represents a separate account. Similarly, in the medical debt context, one visit to a hospital or even a doctor will often result in multiple bills for various services (e.g. doctor visit, facility fees, lab tests, and more), again each representing a separate account.

<sup>7</sup> 15 U.S.C. § 1692b(3).

<sup>8</sup> *Id.* at § 1692c.

information indicates the consumer might be. The proposal also clarifies how the restrictions apply to newer technologies. The proposal provides that whether the communication is sent at an inconvenient time is determined by the time at which the message is available for the consumer to receive it (e.g., an email or text message is available at the time it is sent).

**Inconvenient Place:** Four categories of places are deemed presumptively inconvenient for consumers:

1. Medical facilities, including hospitals, emergency rooms, hospices, or other places of treatment of serious medical conditions;
2. Places of worship;
3. Places of burial or grieving; and
4. Daycare or childcare centers or facilities.

The CFPB is seeking feedback on whether military combat zones and qualified hazardous duty postings should be included in this list. The workplace is not considered a presumptively inconvenient place.

**Inconvenient Method:** A collector would be prohibited from communicating by a method that the collector knows or should know is inconvenient. A collector knows if a method is inconvenient if the consumer indicates expressly or impliedly that the method is inconvenient. The CFPB also states that the consumer need not utter any “magic words” to provide a collector with the knowledge that a time, place, or communication method is inconvenient. The CFPB is considering prohibiting a collector from using a consumer’s workplace email for debt collection communications.

**Decedent Debt:** The CFPB is proposing to allow debt collectors to communicate with surviving spouses, parents of deceased minors, and individuals designated as an estate’s representative under state law, though such contacts would be subject to a 30-day waiting period after the consumer’s death.

*CRL is generally supportive of the time, place, and manner restrictions in the proposal. However, we recommend some clarifications, such as defining medical facility more broadly to include all medical facilities, not only those that deal with “serious” medical conditions. In addition, CRL supports the proposal to not require any “magic words” to provide a collector knowledge that a time, place, or communication method is inconvenient.*

### **C. Consumer Consent**

Various FDCPA communication restrictions may be waived by consumer consent. The CFPB proposes to require each collector to obtain consent directly from the consumer (whether orally or in writing) in order for the consumer to waive communication restrictions. Collectors would not be able to rely on consumer consent provided to the original creditor or a prior collector. The consumer may also revoke consent previously provided to a collector.

*CRL is supportive of the CFPB’s proposal that subsequent collectors cannot rely on prior consumer consent, that each collector must obtain consent directly from the consumer, and that consumers may revoke consent.*



## VI. Efforts to Thwart Unlawful Actors

The CFPB is considering prohibiting debt buyers from placing debt with, or selling debt to: (1) those subject to a judgment, order, or similar restriction prohibiting them from purchasing or collecting debt in the state in which the consumer resides; or (2) those that lack any license required to purchase or collect debt, as applicable, in the state in which the consumer resides. In addition, the CFPB is proposing to prohibit the sale or placement for collection of debt that the debt buyer knows or should have known has been paid, settled, discharged in bankruptcy, or is the result of identity theft.

*CRL supports restrictions to prevent unlawful actors from engaging in the business. However, we believe the CFPB's proposal will have limited impact, as a significant number of states do not require licensing. As a start, we suggest that the CFPB add that bonding is required to purchase or collect debt. For instance, some states – such as New Jersey and Texas – require bonding, but not licensing. Furthermore, to more effectively thwart unlawful actors, we would urge that the CFPB require account-level documentation for each debt sold at the time of sale and to prohibit the sale of debt for which the debt owner is unable to provide the documentation and information necessary to substantiate the debt in litigation.*

## VII. Recordkeeping

The CFPB proposes requiring a debt collector to retain records documenting actions it took regarding a debt for three years after its last communication or attempted communication with the consumer about the debt. The retention requirement may include all records the collector relied upon for the information in the validation notice and to support claims of indebtedness. It also includes all records related to the collector's interactions with the consumer.

*CRL supports a records retention requirement. However, a three year requirement may be insufficient for states with a longer statute of limitations period.*

---

### For more information, contact:

Melissa Stegman, Senior Policy Counsel, [Melissa.Stegman@responsiblelending.org](mailto:Melissa.Stegman@responsiblelending.org), (202) 349-1852

Lisa Stifler, Deputy Director of State Policy, [Lisa.Stifler@responsiblelending.org](mailto:Lisa.Stifler@responsiblelending.org), (919) 313-8551

### To arrange an interview, contact:

Ricardo Quinto, Director of Communications, [Ricardo.Quinto@responsiblelending.com](mailto:Ricardo.Quinto@responsiblelending.com), (202) 349-1866