

# CFPB Outlines Proposals Under Consideration for Debt Collection Rule

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Financial Services

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Today, the Consumer Financial Protection Bureau (“CFPB”) issued its [outline of proposals](#) under consideration for a debt collection rulemaking that would govern third-party debt collection activities of debt collection agencies, debt buyers, collection law firms, and loan servicers. Release of this outline of proposals signals the start of the Small Business Regulatory Enforcement Fairness Act (“SBREFA”) process. Under the SBREFA process, the CFPB must hold a Small Business Review Panel to discuss this outline of proposals and consider the potential impacts on small business entities before issuing a proposed rule. In other contexts, such as the CFPB’s proposed payday and small dollar lending rule, more than one year elapsed between the Small Business Review Panel and the issuance of a proposed rule.

The proposals under consideration generally would amend the Fair Debt Collection Practices Act (“FDCPA”). The CFPB simultaneously released a [study](#) of the debt collection market along with the outline of proposals under consideration.

Significantly, the CFPB deferred consideration of potential rules covering first-party debt collection, such as collection activities by creditors. The CFPB indicated that it expects to initiate a second proceeding and convene a separate Small Business Review Panel over the next several months to address first-party debt collection issues.

The CFPB’s proposals under consideration for third-party debt collection rules fall into four general categories:

1. Information Integrity and Related Concerns;
2. Consumer Understanding Initiatives;
3. Collector Communication Practices; and
4. Debt Transfers and Recordkeeping.

We discuss each category below.

## Information Integrity and Related Concerns

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The CFPB is concerned about debt collectors attempting to collect debts from the wrong consumer or in the wrong amount. The CFPB believes these problems primarily result from two causes: first, deficiencies in the quality and quantity of information collectors receive when purchasing debt; and second, the lack of critical elements within information provided to consumers that would help them identify the debt as theirs.

### Substantiation of Debt

The CFPB is considering proposals to require debt collectors to substantiate claims of indebtedness at different times in the collection process. Substantiation of debts has been a key component of previous CFPB debt collection enforcement actions in [Encore Capital Group](#), [Portfolio Recovery Associates](#), and [Chase Bank](#).

First, the CFPB is considering a standard requiring collectors to establish reasonable support for initial claims of indebtedness, which could be satisfied by obtaining and reviewing fundamental information, along with a representation of accuracy from the creditor and a review of certain “warning signs.” The fundamental list of information the CFPB is considering, contained in Appendix C to the outline of proposals, includes:

- 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.

The proposals under consideration would require collectors to review this information to look for warning signs regarding the adequacy or accuracy of the information regarding a particular consumer or the portfolio information in general. The CFPB is considering requiring collectors to look for specific warning signs, including information on an individual debt that is not in a clearly understandable form, facially implausible or contradictory information on an individual or portfolio level, and a significant percentage of unresolved disputes at the portfolio level.

The CFPB is also considering whether to require collectors to look for warning signs that may arise later during the course of collection activity, and to obtain additional support prior to continuing with collection activities. This ongoing review would be triggered if a consumer disputes a debt, a collector cannot obtain further supporting documentation in response to a dispute, or the collector receives disputes for a significant percentage of the debt in a portfolio.

For individual consumer disputes, the CFPB is considering a proposal to require collectors to take a “time out” from ongoing collection activities until it obtains additional support before resuming collection activities. Appendix D to the outline of proposals under consideration lists specific documentation the collector would need to obtain and verify for particular types of disputes before resuming collection activities. Although some of this information may have been obtained when the debt was initially purchased or placed, pursuant to Appendix C, additional information would be required for specific types of disputes and would include “any additional information required to respond to the specific dispute.” This catch-all provision could have the practical effect to making many “time outs” permanent bars to continued collection activities.

Finally, the CFPB is proposing to require debt collectors to obtain and review all of the information specified in Appendix D before filing debt collection litigation in order satisfy their obligations to have reasonable support for litigation claims. In effect, the litigation and ongoing collections “time out” proposals essentially make Appendix D, not Appendix C, the key list of

information that debt buyers and debt collectors would likely have to obtain before purchasing or collecting on consumer debts.

### Transfers of Debt

The CFPB is also considering a proposal to require that, prior to initiating collection activities, subsequent collectors obtain and review certain information related to prior collection activities. Prior collectors would be required to transfer this information to the subsequent collector. Details about this aspect of the proposal are discussed in Appendix E to the outline of proposals.

The CFPB is considering a proposal to require debt collectors and debt buyers to transfer certain information they receive from consumers when they return the debt to the debt owner or when they sell the debt to a subsequent buyer. Such information would include: (a) payments submitted by the consumer; (b) bankruptcy discharge notices; (c) identity theft reports; (d) disputes; and (e) any exemption from garnishment asserted or implied by a consumer.

It is worth noting that the transfer of debt proposals under consideration differ from previous consent orders in [Encore Capital Group](#), [Portfolio Recovery Associates](#), and [Chase Bank](#), each of which categorically prohibited subsequent transfers of debt.

### Validation of Notice and Statement of Rights

To enhance the information provided to consumers, the CFPB is considering a proposal to require validation notices to contain additional information about the debt to help them determine if the debt is theirs and about the consumer's rights. The validation notice would also have to include a "tear-off" form that consumers can use to exercise their dispute rights and their right to request the name and address of the original creditor. The proposed contents of the revised validation notice are contained in Appendix F to the outline of proposals, along with a model form for the notice.

The proposals under consideration would also require a debt collector to provide consumers with a one-page Statement of Rights, which is found in Appendix G to the outline of proposals. A written copy of the Statement of Rights would have to be provided to consumers in the same mailing as the validation notice. The CFPB is also considering a requirement for debt collectors to offer, or in the alternative, automatically provide consumers an additional copy of the Statement of Rights in the first communication made more than 180 days after the consumer received the validation notice and initial copy of the Statement of Rights.

The CFPB is also considering alternative proposals for providing validation notices and the Statement of Rights in Spanish either automatically or upon request.

### Credit Reporting

The CFPB is also considering a proposal that would prohibit a debt collector from furnishing information about a debt to a consumer reporting agency unless the collector has communicated directly with the consumer about the debt, which usually would occur by sending a validation notice.

## Consumer Understanding Initiatives

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### Litigation Disclosure

The CFPB is considering a proposal that would require debt collectors to provide a brief “litigation disclosure” in all written and oral communications in which they represent, expressly or by implication, their intent to sue. The disclosure would inform the consumer of the collector’s intent to sue, that a court could rule against the consumer if the consumer fails to defend a lawsuit, and that additional information about debt collection litigation and available legal services programs is available from the CFPB. The CFPB has not provided model language for this disclosure.

### Time-barred and Obsolete Debt

The CFPB is considering a series of disclosures and substantive prohibitions relating to the collection of time-barred and the revival of obsolete debt.

First, the CFPB is considering a proposal to require debt collectors to provide a time-barred debt disclosure when it seeks to collect a time-barred debt. This disclosure would consist of a brief statement in the validation notice and in the first oral communication requesting payment that informs the consumer that the debt collector cannot sue to recover the debt because of its age. The CFPB is also considering requiring this disclosure at additional intervals.

Second, the CFPB is considering a proposal to prohibit a subsequent debt collector from suing on a debt when a previous collector provided a time-barred debt disclosure to the consumer. If adopted, such a rule could discourage the placement or sale of debts with subsequent debt collectors or debt buyers.

Third, the CFPB is considering a proposal to require a disclosure on the validation notice and potentially at additional intervals informing the consumer whether a particular time-barred debt generally can or cannot appear on a credit report. The CFPB has not yet developed or tested such a disclosure.

Fourth, the CFPB is considering a proposal to prohibit debt collectors from collecting on time-barred debt that can be revived under state law unless the collectors waive the right to sue on the debt. If adopted, such a rule could discourage the collection of time-barred debts.

Finally, the CFPB is also considering a proposal to prohibit a debt collector from accepting payment on a time-barred and obsolete debt until the collector obtains the consumer’s written acknowledgement of having received a time-barred debt disclosure and an obsolescence (credit reporting) disclosure.

The CFPB considered, but is not planning to proposed, an outright ban on the sale of or the collection of time-barred debt. However, given the proposals described above, outright bans may not be necessary to curtail the sale or collection of time-barred debt.

## **Collector Communication Practices**

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The CFPB is considering proposals to govern four specific aspects of credit communication practices: (1) contact frequency and the leaving of messages; (2) the time, place, and manner of collector contacts; (3) decedent debt; and (4) consumer consent.

### Contact Frequency and the Leaving of Messages

The CFPB's proposals under consideration would permit collectors to leave voicemail messages containing only the individual debt collector's name, the consumer's name, and a toll-free method the consumer can use to reply to the collector without constituting a communication under the FDCPA.

The CFPB is considering establishing a variety of different numerical caps on the number of times that collectors can contact consumers in a given week, depending on the type of contact, the contact channel, and whether the collector actually speaks to the consumer. As outlined, collector attempts to contact the consumer per each unique address or phone number would be limited to three per week if the collector does not have confirmed consumer contact or two per week if the collector has confirmed consumer contact. Total contact attempts would be limited to six per week if the collector does not have confirmed consumer contact or three per week if the collector has confirmed consumer contact. Live communications would be limited to once per week when the collector has confirmed consumer contact. In proposing these caps, the CFPB indicated that it is seeking to balance consumer interests in receiving fewer collection contacts with collector interests in continuing collection activities.

The CFPB is also considering numerical caps on the number of times that collectors can contact third parties in connection with the debt when the collector does not have confirmed consumer contact. As outlined, collector attempts to contact third parties would be limited to three attempts per week for each unique address or phone number of a third party or six total contact attempts per week for a third party. Live communications per third party would be limited to one contact (total, not weekly).

### General Time, Place, and Manner Restrictions

The CFPB is considering proposals to clarify inconvenient times for collections communications, particularly when a debt collector has conflicting information about the consumer's location and as applied to newer technologies. When a consumer's actual location is unknown, the CFPB is considering a proposal that would deem it convenient to communicate with a consumer if it would be convenient in all locations in which the collector's information indicates the consumer might be located. The CFPB is also considering a proposal that would clarify that a message sent via email or text would be deemed convenient based on the time the message was sent, not when the consumer receives or accesses the message.

The CFPB is considering a proposal that would make it presumptively inconvenient to contact a consumer at medical facilities, places of worship, places of burial or grieving, and daycare or childcare facilities. A collector would not violate the regulation if it did not know or have reason to know that the consumer was at such a location. The CFPB is also seeking feedback on presumptively inconvenient places to contact servicemembers. Significantly, the CFPB is not considering treating a consumer's workplace as a presumptively inconvenient place.

The CFPB is considering a proposal to prohibit a debt collector from contacting or attempting to contact a consumer using a method of communication the collector knows or should know is inconvenient based on the consumer's express or implied indication that such method is inconvenient. The proposal would generally prohibit debt collectors for using an email address they know or should know is the consumer's workplace email for debt collection communications.

#### Decedent Debt

The CFPB is considering a proposal that would permit debt collectors to contact surviving spouses, parents and personal representatives about the debts of decedents, but would impose a 30-day waiting period on such contacts following the debtor's death with an exception for contacting those consumers with consent. A debt collector would not violate the regulation if it communicated with such a consumer without knowing or having reason to know of the death of the indebted consumer.

#### Consumer Consent

The FDCPA permits consumers to waive by consent various restrictions on communications from debt collectors. The CFPB is considering proposing that consent is not transferable between collectors, but that each debt collector must be obtain new consent. The CFPB is also considering proposals to require debt collectors to clearly disclose to consumers the specific parameters of the consumer's consent and to memorialize such consent, as well as to permit consumers to revoke consent.

## **Debt Transfers and Recordkeeping**

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#### Debt Transfer Restrictions

The CFPB is considering a proposal to prohibit debt buyers from placing debt with, or selling debt to persons subject to a judgment, order, or similar restriction prohibiting them from purchasing or collecting debt in the state in which the consumer resides, or to persons who lack any license required to purchase or collect debt in the state in which the consumer resides. The CFPB is also considering a proposal to prohibit the sale or placement for collection of debt when the debt buyer knows or should know that the debt was paid or settled, discharged in bankruptcy, or the result of identity theft. These proposed restrictions on debt transfers are considerably narrower than the debt transfer restrictions imposed in CFPB enforcement actions against debt buyers in [\*Encore Capital Group\*](#) and [\*Portfolio Recovery Associates\*](#).

#### Recordkeeping

The CFPB is considering requiring debt collectors to retain records documenting the actions it takes regarding a debt for three years after its last communication or attempted communication with the consumer about the debt. The record retention requirement would apply to all records the debt collector relied upon for the information in the validation notice and to support claims of indebtedness, as well as records related to the collector's interactions with the consumer. The recordkeeping requirement would apply to recorded telephone calls, but would not require entities that do not record telephone calls to begin doing so.

## Summary

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Although the CFPB's proposals under consideration draw upon recent CFPB debt collection enforcement actions, the proposals under consideration are by no means identical to the requirements contained in recent CFPB debt collection consent orders. In many some respects, the CFPB is addressing the same general themes, but considering different and considerably more detailed requirements than those imposed in recent enforcement actions. Because the proposals under consideration apply only to third-party debt collection activities, the proposed regulations that result from this process will likely be promulgated largely, if not entirely, under the FDCPA. By deferring consideration of regulations governing first-party debt collection, the CFPB has put off for another day the more challenging questions of applying unfair, deceptive, or abusive acts or practices to craft regulations governing first-party debt collection.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Financial Services practice:

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