EXAMINING LEGISLATION TO PROTECT CONSUMERS AND SMALL BUSINESS OWNERS FROM ABUSIVE DEBT COLLECTION PRACTICES

HEARING

BEFORE THE

COMMITTEE ON FINANCIAL SERVICES

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

SEPTEMBER 26, 2019

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EXAMINING LEGISLATION TO PROTECT CONSUMERS AND SMALL BUSINESS OWNERS FROM ABUSIVE DEBT COLLECTION PRACTICES

Thursday, September 26, 2019

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The committee met, pursuant to notice, at 10:10 a.m., in room 2128, Rayburn House Office Building, Hon. Maxine Waters [chairwoman of the committee] presiding.

Members present: Representatives Waters, Maloney, Velazquez, Meeks, Clay, Scott, Green, Foster, Beatty, Gottheimer, Lawson, Tlaib, Porter, Axne, Pressley, Ocasio-Cortez, Adams, Dean, Garcia of Illinois, Garcia of Texas, Phillips; McHenry, Wagner, Posey, Luetkemeyer, Huizenga, Stivers, Barr, Tipton, Williams, Hill, Emmer, Zeldin, Loudermilk, Davidson, Kustoff, Hollingsworth, Rose, Steil, Gooden, and Riggleman.

Chairwoman WATERS. The Financial Services Committee will come to order.

Without objection, the Chair is authorized to declare a recess of the committee at any time.

Today's hearing is entitled, "Examining Legislation to Protect Consumers and Small Business Owners from Abusive Debt Collection Practices."

I now recognize myself for 4 minutes to give an opening statement.

Today, the committee will examine legislation to curb predatory and abusive debt collection practices. Last year alone, the Consumer Financial Protection Bureau (CFPB) received over 81,000 consumer complaints about debt collection practices.

Since the creation of the CFPB's Consumer Complaint Database, the agency has received more complaints about debt collection than any other issue.

According to a CFPB survey on debt collection, nearly one in three Americans with a credit record was contacted by at least one creditor or collector trying to collect one or more debts during the previous year.

In some instances, consumers are relentlessly pursued by debt collectors regarding debts that they no longer owe or debts that are not theirs. Some consumers are not informed of their rights under the law.

Communities of color are disproportionately affected by predatory debt collectors. The CFPB's survey on debt collection found that people of color reported being contacted by debt collectors more frequently than their white peers.

Small business owners also face predatory debt collection practices. Unlike consumers, small business owners do not currently have the same protections under the law. For instance, entities pursuing business debts are not covered or bound by the Fair Debt Collection Practices Act.

Furthermore, small business owners may also face a predatory clause buried in their debt contract called a "confession of judgment." A confession of judgment is a loan contract that forces the borrower to waive defenses they could lawfully use in court.

Predatory debt collectors have used this tactic to force courts to rule against borrowers regardless of the specifics of the case. This has resulted in garnished wages, and seized property, at times without the knowledge and consent of the small business owner.

The New York Times highlighted how this problem has impacted New York City. New York City's taxi medallion drivers have needlessly suffered at the hands of predatory debt collectors and contract agreements.

Given the impact of predatory debt collection practices on Americans across the country, it is particularly important for the CFPB to stand up for consumers. Unfortunately, the CFPB's proposal to address predatory debt collection, which was released in May of this year by Director Kraninger, fails to protect Americans from harassment by debt collectors.

Under the CFPB's proposal, debt collectors would be allowed to send unlimited emails and text messages to consumers, and to call them up to 7 times a week, per debt, to collect debts.

The rule fails to address consumer privacy concerns and fails to protect consumers against debt collection attorneys who make misleading statements in court documents. The rule also does not go far enough to create strong guidelines to ensure that consumers receive disclosures or to protect consumers against the collection of time-barred debt.

This is an unacceptable failure by our consumer watchdog, which simply must do more for hardworking American consumers.

Today, we will hear from a group of expert witnesses, and discuss several legislative proposals that have been put forth by members of the committee in order to better protect consumers and small business owners from predatory debt collection practices.

I look forward to the testimony of our witnesses, and to advancing solutions to address this pressing issue.

I now recognize the ranking member of the committee, the gentleman from North Carolina, Mr. McHenry, for 5 minutes for an opening statement.

Mr. MCHENRY. Thank you, Madam Chairwoman.

And thank you to the witnesses for being here.

A CFPB study conducted in 2017 found that 63 percent of consumers said they were contacted too frequently by debt collectors or creditors. In 2018, the Consumer Financial Protection Bureau received more than 81,000 consumer complaints related to debt collection. In some cases, the CFPB and the Federal Trade Commission received complaints from consumers being called anywhere from 7 to 20 times a day.

The data proves that consumers aren't happy with debt collectors. So, we can all agree there is a problem. The current regime does not work for the American people.

One cause could be the Fair Debt Collection Practices Act (FDCPA), the principal statute governing debt collection activity.

The FDCPA was signed into law by President Carter in 1977—1977 also is the year that Apple Corporation was incorporated. And so it is fair to say that much has changed in terms of technology and how society interacts since that time.

The CFPB recognizes the need to modernize the FDCPA and the rules surrounding debt collection. Despite what you will hear today from my friends on the other side of the aisle, the CFPB is working to fix this problem for the benefit of the American consumer.

The proposed rule addresses the use of newer technologies, establishes clear bright-line rules limiting call attempts and telephone conversations, and clarifies consumer protections, disclosure requirements, and communications with consumers. That includes opt-out instructions in every email, text message, or other electronic communication.

It also addresses the standard for contact through social media platforms and requires a collector to communicate with a consumer about a debt before furnishing information to a consumer reporting agency.

How consumers want to be contacted is different now than what was contemplated in the existing rule, so let's acknowledge that. Text messages, well, if you want to talk to a millennial, text them. Trying to get them to answer the phone, give me a break, it's not possible.

So in short, the CFPB's proposed rule offers certainty for consumers and clear rules of the road for debt collectors. Given the discussions we have had in this committee this year, I am surprised that more of my colleagues are not commending the steps taken by Director Kraninger.

This modernization isn't just important to consumers. Small businesses in America and healthcare providers across this country depend on third-party collectors to manage receivables and ensure that they are compensated for services that have been provided.

Federal, State, and local governments also depend on the collections industry for tax payments. Government-related debts represent 16 percent of all debt collections. So, we need to think about the taxpayers in this term as well, because that means that the vast majority of taxpayers are paying on time, and they would see their taxes go up if there is not a way to collect from those who are not paying.

That money, which covers everything from unpaid parking tickets to unpaid taxes, is better spent on things like infrastructure and education rather than just letting those who aren't paying, not pay.

Madam Chairwoman, the reality is that prices increase for all when some decline to pay. Methods for debt collection can and should improve. But we must allow for modernization that appropriately accounts for the vast changes in technology and the way that consumers wish to be communicated with.

I look forward to a productive hearing, and I thank our witnesses on this vast panel for appearing.

Chairwoman WATERS. I now recognize the Chair of our Subcommittee on Consumer Protection and Financial Institutions, Mr. Meeks, for 1 minute.

Mr. MEEKS. Thank you, Chairwoman Waters, for calling this important hearing.

In many ways, this hearing is an important capstone to a series of hearings held in the committee and the subcommittee this year. Indeed, in the Full Committee, the chairwoman has held hearings on the student loan crisis, which is straining an entire generation, as well as a hearing exploring a whole host of problems with credit rating agencies and the FICO score. The credit rating agencies have not only divulged data on a large share of the American population, but often report false and inaccurate data on consumers, negatively impacting millions of borrowers.

Another hearing was held on the CFPB, which, under the current Administration, is abandoning its core mission to protect vulnerable consumers.

In the subcommittee, I have chaired hearings on payday loans, as well as the Community Reinvestment Act, and ongoing discriminatory practices in lending. Across-the-board, we see how consumers and borrowers, particularly in communities of color, are vulnerable to abusive and predatory practices.

Consideration of debt collection practices is critical as we consider the circumstances of American families, 40 percent of which struggle to make ends meet on a monthly basis.

I yield back.

Chairwoman WATERS. I now recognize the ranking member of the subcommittee, Mr. Luetkemeyer, for 1 minute.

Mr. LUETKEMEYER. Thank you, Madam Chairwoman.

Before I begin, I would like to welcome my constituent, the Reverend Dr. Cassandra Gould, from the Third Congressional District of Missouri. Thank you for appearing before the committee. I look forward to discussing this important topic with you as we go forward.

Millions have forgotten that debt collectors were once the legal businesses targeted by the Obama Administration's harmful Operation Choke Point. However, just yesterday, all of the Majority members of this committee voted in support of the Safe Banking Act, which contains language to end Operation Choke Point and stop villainizing these businesses.

I think we can all agree we have a responsibility to ensure that consumers and small businesses are protected from abusive debt collection practices, but we cannot forget the important role debt collectors play in our economy and for American small business owners.

The CFPB's recent rule governing debt collection practices outlines small changes that would make a real difference to American consumers, including the ability to opt out of debt collection emails or text messages, and caps on the number of phone calls.

I thank the witnesses for appearing, and I look forward to a robust discussion on ways to modernize and responsibly regulate debt collection across the nation.

With that, Madam Chairwoman, I yield back.

Chairwoman WATERS. I want to welcome today's distinguished panel of witnesses: the Honorable Rohit Chopra, Commissioner, Federal Trade Commission; the Reverend Dr. Cassandra Gould, Pastor, Quinn Chapel A.M.E. Church in Jefferson City, Missouri, and executive director, Missouri Faith Voices; Ms. Bhairavi Desai, executive director, New York Taxi Workers Alliance; Ms. April Kuehnhoff, staff attorney, National Consumer Law Center; Professor Dalie Jimenez, professor of law, University of California, Irvine School of Law; Ms. Sarah Auchterlonie, shareholder, Brownstein Hyatt Farber Schreck; and Mr. John H. Bedard, Jr., owner, Bedard Law Group, P.C.

Without objection, each of your written statements will be made a part of the record.

For purposes of testimony, each of you will have 5 minutes to summarize your testimony. When you have 1 minute remaining, a yellow light will appear. At that time, I would ask you to wrap up your testimony so we can be respectful of both the witnesses' and the committee members' time.

Commissioner Chopra, you are now recognized for 5 minutes to present your oral testimony.

STATEMENT OF THE HONORABLE ROHIT CHOPRA, COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. CHOPRA. Chairwoman Waters, Ranking Member McHenry, and members of the committee, thank you for holding this hearing, especially as it relates to the $1.6 trillion student loan market.

Since the eruption of the financial crisis and its decimation of the U.S. economy a decade ago, unemployment has come down and the stock market is soaring. But the headline statistics obscure the serious cracks in our economy. Stagnant wages and rising costs mean that Americans are walking on an economic tightrope where even a tiny jolt can send them into a free fall.

According to multiple estimates, there are more than 70 million Americans with past-due bills in collections. Too often, our system treats these individuals as if they are morally bankrupt or free-riding, and the reality is so much different. Many are battling medical bills that they may not even owe due to a bureaucratic stalemate between their insurance company and their hospital. Others fell behind on utility bills or other household expenses after losing a shift at work. And some are even jailed for not paying fees and fines.

Many small businesses, who are looking to weather a slow season, got caught up in lending schemes that ended up destroying them and their business. And many people simply finished school at the wrong time, entering the workforce with a job that barely puts them on a path to pay off their student debt.

Prior to serving as a Federal Trade Commissioner, I was proud to be appointed by the Secretary of the Treasury as the Consumer Financial Protection Bureau's first student loan ombudsman, where I led the agency's work on behalf of student loan borrowers.

During my time at the CFPB, we published widely cited reports detailing the devastating impact of student loan debt and pursued an aggressive enforcement agenda against law-breaking companies in this industry.

Later, I served as a special adviser to the Secretary of Education, where I saw firsthand how much influence and power government contractors have over our student loan system.

There are roughly 9 million Americans in default on a Federal student loan, with many more in serious delinquency, and the Federal Government makes sure they know it. The Department of Education student loan arm is one of the largest financial institutions in the world. The government hires a squadron of financial institutions to aggressively pursue borrowers by slamming their credit, levying hefty fees, and humiliating them with their employer.

Student loan companies should be helping borrowers get back on their feet by advising them of all of the options for managing their student debt. But instead, I have seen how these companies have steered borrowers in a direction that benefits their bottom line.

And here is the irony. When student loan borrowers make a mistake, they pay dearly for it. They may not be able to pass an employment verification check or rent an apartment. But when student loan companies make mistakes and violate the law, the Department of Education often covers for them and continues lavishing them with valuable contracts and subsidies.

This is not a recent phenomenon. It has been going on for years under multiple Administrations and multiple parties. These policies are exacerbating the racial wealth gap and undermining the American Dream.

The CFPB must act to address these serious problems, too. We must ensure that companies that break the law face real consequences, just as borrowers sometimes do. Congress also needs to clean up the Department of Education's student loan branch so that it puts borrowers, taxpayers, and our economy ahead of contractors' profits.

We have to wake up to the realities of our broken student loan debt collection system and fix it. And outside of student lending, I believe the Federal Trade Commission (FTC) also needs to act, especially where the CFPB cannot.

Technology has made it easier for lenders and debt collectors to seize cars without warning. Despite receiving authority in 2010 to put common-sense rules into place to combat abuses here, the FTC has not yet made a proposal.

The FTC also has unique jurisdiction to attack debt collection and discrimination issues in the small business lending market, and we should look to restrict terms like "confession of judgment" that the FTC banned in consumer loans long ago.

And the FTC also needs to scrutinize the role of big tech on everything from algorithms to alternative currencies, like Facebook's Libra, and how ad networks can profit from debt collection scams. All of us need to act.

Thank you. And I look forward to your questions.

[The prepared statement of Commissioner Chopra can be found on page 68 of the appendix.]

Chairwoman WATERS. Thank you, Commissioner Chopra.

Reverend Gould, you are now recognized for 5 minutes to present your oral testimony.

STATEMENT OF REVEREND DR. CASSANDRA GOULD, PASTOR, QUINN CHAPEL A.M.E. CHURCH (JEFFERSON CITY, MO); AND EXECUTIVE DIRECTOR, MISSOURI FAITH VOICES

Rev. GOULD. Good morning, Chairwoman Waters, and members of the committee.

I have come to represent the faith community who is doing our part in trying to uplift the burden that many Americans face. I am a member of the Faith and Credit Roundtable Steering Committee of the Center for Responsible Lending, a founding member of Faith for Just Lending, and I come here today as a faith leader who serves on the front line of those fighting against financial predation and as a person who is often entrusted with the painful stories of shame and trauma that is experienced by hardworking individuals who are preyed upon by bad financial actors, and often seem to have their dignity disregarded by the predatory practices of debt collectors.

Prior to being called into full-time ministry, I spent approximately 17 years in the financial industry. During this time, I became painfully aware of the increasingly harmful practices of debt collectors as well as the increasingly predatory practices of lenders, especially payday lenders.

In my role as pastor, activist, and public theologian, I advocate for economic justice and racial equity. It is through this work that I have been extremely familiar with the work of the Consumer Financial Protection Bureau.

On June 2, 2016, I was a panelist at the hearing held in Kansas City to discuss what would become the payday rule. Since that time, I have been in constant communication, and have met with each of the Bureau's Directors—Director Cordray, Director Mulvaney, and now Director Kraninger—multiple times.

In each of those conversations, I have admonished them to actually just live up to their name, to be a bureau that actually protected consumers.

I am here today to express my concern and represent the faith community in our collective concerns about the current proposed rule and to share stories from families and individuals suffering in Missouri where, according to the National Consumer Law Center, 31 percent of the residents of Missouri are in debt collection. Missouri is a State that is 83 percent white, but 65 percent of the residents who are in debt collection are people of color and African Americans.

In the Book of Proverbs 22:22, we are reminded not to oppress or exploit poor people because they are poor. I believe that this proposed rule legalizes the exploitation of some of the most vulnerable members in society. The harassment and abuse hurts all families, but wreaks disproportionate harm on families of color where systemic discrimination in housing, employment, and financial services already persist. Debt collection, collection lawsuits, and judgments and wage garnishments are more common in communities of color.

Forty-five percent of borrowers living in areas that are predominantly communities of color had debt in collections versus 27 percent of those living in predominantly white areas, and that information is according to the Urban Institute.

In the State of Missouri, where I serve in Jefferson City, we suffered a tornado that damaged and destroyed over 513 residences, and it is evident even now that some people are struggling to get back into housing because of zombie debts that are coming up on their credit report because of debt collectors. And now, some of those people are facing homelessness.

And so again, I am here to represent those stories and to hold the CFPB accountable to actually protect consumers.

[The prepared statement of the Rev. Dr. Gould can be found on page 122 of the appendix.]

Chairwoman WATERS. Thank you very much, Reverend Gould.

Ms. Desai, you are now recognized for 5 minutes to present your oral testimony.

STATEMENT OF MS. BHAIRAVI DESAI, EXECUTIVE DIRECTOR, NEW YORK TAXI WORKERS ALLIANCE

Ms. DESAI. Thank you, Madam Chairwoman, and good morning, all Honorable Members of Congress.

I, myself, and 15 of my brothers drove down this morning at 3 a.m. from New York City to represent the interests of a workforce that is deeply in crisis.

Debt is basically a life sentence to poverty. And for drivers, it means that they have been handcuffed to the wheel 7 days a week, for 14-hour shifts.

Mr. MCHENRY. Madam Chairwoman, if the testimony will suspend.

Chairwoman WATERS. Thank you, Ranking Member McHenry.

He is absolutely correct. You may not display your signs in the hearing room. Would you kindly put them down, please?

Mr. MCHENRY. Thank you, Madam Chairwoman.

Chairwoman WATERS. Thank you.

Ms. DESAI. As I was saying, debt is a life sentence to poverty. And for drivers, it means that they have been handcuffed to the wheel 7 days a week, for 12- to 14-hour shifts.

There have been so many stories of drivers having multiple heart attacks and not being able to take even a day off after they have left that hospital, or going straight from chemo sessions or kidney dialysis back to the wheel, to driving. And even then, what they are facing is lifelong debt.

On average, medallion owner-drivers in New York City pay about $3,500 a month today in mortgage payments for that medallion, which is just a license from the City of New York that allows you to operate a yellow cab for commercial purposes, with the exclusive right to street hail.

Between 2004 and 2014, through 16 auctions, the City of New York made $850 million from the sale of these medallions. The City counted its money. The banks, the lenders, and the brokers that made fees from these sales from interest-only payments have also been able to count their money. Meanwhile, the men and women who entered into these agreements are all now in lifelong debt.

As the market value of the medallions has fallen—at one point, it had been a million dollars a couple of years ago, to now less than $150,000—the only negotiations we are seeing from the lenders is to reduce payments from, let's say, $3,500 a month, to $1,500 a month, with the criteria that that agreement is now extended from 15 years to 50 years.

For 50 years, you are left in debt. It is absolutely demoralizing, and you feel the weight of it.

There were 9 driver suicides in New York City in 2018. Among the drivers, 3 were owner-drivers, who represent 2 percent of the total workforce, but were among 33 percent of the drivers whose despairs has led to suicide.

And they are not alone. The real stories are the tens of thousands of drivers we see today who are really dying a slow death from despair, from stress, and from the crisis of this debt.

Confessions of judgment have basically meant that when this market started to fall, drivers were told that they had to pay the total sum of what was owed on that debt; they had to produce $350,000 to $400,000 overnight.

There are so many stories of people who went into a panic mode, afraid that if they did not pay up, they may lose their house, or they may not be able to get another loan for their kid's student loan. It is a vicious cycle.

And we need to address predatory lending practices where, in our case, brokers and lenders knew that the value was inflated. Some of these lenders were, in fact, plotting to leave the industry at the same moment in time that they were luring individual drivers, a workforce of 90 percent immigrants, into the same industry that they were trying to leave.

Banks who were no longer able to loan in the housing market because of the role they played in the mortgage crisis entered into our industry and took advantage of this workforce.

We need to address both the predatory practices, and the fact that seven government agencies knew. They made a profit for the City, they watched our people go deep into poverty and lifelong debt, and we have seen heart attacks and suicides, and they did nothing about it. And that is really at the heart of the issue today.

This is a debt that itself needs to be addressed by the City of New York. They need to put some money on the table, and buy back these loans, or refinance them at the current market value, so that individual owner-drivers are no longer in debt at an average of $600,000 while they remain in a daily, weekly debt of hundreds of dollars and an annual debt of $25,000 a year just to pay for rent and other cost-of-living expenses.

Thank you.

[The prepared statement of Ms. Desai can be found on page 75 of the appendix.]

Chairwoman WATERS. Thank you very much for your testimony.

I am going to have to say a word about the signs that are being held behind you.

The Chair is responsible under the Rules of the House and the Rules of the Committee to maintain order and preserve decorum.

In the committee room, members of the audience are reminded that disruption of congressional business is a violation of Federal law and an offense. We welcome and encourage your presence, but we cannot accept disruptions.

So, I thank you. I know that you are anxious to have your message seen by all of the Members, but if you would just keep your signs down. We do want to hear the testimony, and we are very appreciative for your patience.

With that, I want to thank you, Ms. Desai.

And, Ms. Kuehnhoff, you are now recognized to present your oral testimony.

STATEMENT OF APRIL KUEHNHOFF, STAFF ATTORNEY, NATIONAL CONSUMER LAW CENTER

Ms. KUEHNHOFF. Chairwoman Waters, Ranking Member McHenry, and members of the committee, thank you for inviting me to testify today regarding how to protect consumers and small business owners from abusive debt collection practices.

I offer my testimony here on behalf of the low-income clients of the National Consumer Law Center.

Across the United States, contact with debt collectors is a common experience for consumers. In 2017, 71 million Americans with a credit report, about one in three, had one or more debts in collection reported on that credit report. In predominantly non-white areas, that number is even higher, with 45 percent, nearly one in two consumers, with one or more debts reported on a credit report.

These numbers highlight the disproportionate and sobering role that debt plays in some communities. Indeed, consumer experiences with debt and collection vary based on income, race and ethnicity, ability to speak English, age, and military service, among other factors.

For the vast majority of consumers who are in debt, it is not an unwillingness to pay their debts but a host of other factors that leads people into debt collection, including stagnant wages, job loss, divorce, health problems, predatory lending, and a weakening financial safety net.

However, no matter how people end up in debt, they should not suffer abuse or harassment from debt collectors.

In 1977, Congress enacted the Fair Debt Collection Practices Act (FDCPA) to protect consumers from abusive debt collection practices. Unfortunately, abusive collection practices are still an issue today, despite the passage of the FDCPA, and debt collection is frequently a top source of complaints from consumers to Federal and State agencies.

Major categories of debt collection problems that consumers face include collection without adequate information, where debt collectors pursue debts without reviewing the documentation needed to ensure that they are collecting the right amount from the right person; mass filings of collection lawsuits, which frequently lead to default judgments against consumers, regardless of the merits of the case, and often being filed by large collection law mills; collection of time-barred zombie debts, which cannot be collected without mistakes or deception; harassment; threats; privacy violations; and other abuses long prohibited by the FDCPA.

The Consumer Financial Protection Bureau has the ability to address many of these problems through its debt collection rulemaking. Unfortunately, the CFPB has proposed a rule that is going to do more to protect debt collectors than consumers.

Among other problems, this rule will permit excessive calls to consumers. It will allow electronic delivery of critical written disclosures without even confirming that the consumers can receive these important messages. It will allow collectors to contact consumers by email, text, and other means without their consent. And it will permit violations of consumers' privacy.

The proposed rule will allow collection of old debts, leading to abuse, deception, and mistakes, and it will also provide safe harbors for attorneys who make false, deceptive, or misleading representations in court documents.

Congress, of course, can also address these abusive debt collection practices and can clarify and improve the FDCPA. These bills that we are going to discuss today are designed to do just that.

We support congressional actions on a variety of debt-related reforms. To name a few, updating the penalties under the FDCPA for inflation to deter abusive conduct; clarifying the FDCPA's coverage with respect to what is a debt and who is a debt collector; protecting small business owners from confessions of judgment and other abusive practices; and conducting strong oversight over the CFPB to ensure that it is living up to its mandate to protect consumers.

We are happy to work with Congress to address these and other debt collection problems. Thank you for the close attention that you are paying to these issues and for the opportunity to provide testimony. I look forward to your questions.

[The prepared statement of Ms. Kuehnhoff can be found on page 304 of the appendix.]

Chairwoman WATERS. Thank you, Ms. Kuehnhoff.

Professor Jimenez, you are now recognized to present your oral testimony.

STATEMENT OF DALIE JIMENEZ, PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA, IRVINE SCHOOL OF LAW

Ms. JIMENEZ. Thank you, Chairwoman Waters, Ranking Member McHenry, and members of the committee. Thank you for holding this hearing and allowing me to present my views on these important topics.

I am a law professor at the University of California, Irvine School of Law, but I am here in my personal capacity. I have studied consumer debt and debt collection for over a decade. In my experience, most consumers want to repay their debts. The majority feel deep shame in being unable to do so.

Debt collection is an important part of the economy. And I also think most debt collectors want to do the right thing. But the current system penalizes collectors who try to do the right thing. Regulatory compliance has costs, but in the absence of regulation, it is risky to do the right thing if your competitors will do the cheap thing instead.

The system is broken in a myriad of ways, but today I want to focus on just two of them: the structural data integrity problems in debt buying; and zombie debts.

Once a debt is sold, the integrity of the information needed to collect on it—things like how much is owed, who owes it, at what interest rate, and when the last payment was made—is always questionable. When debt buyers have to prove that they are the rightful owner of that individual's debt, and that the amount claimed is the exact amount owed, they have a lot of difficulty.

This is a classic collective action problem perfectly suited for regulation. I am not alone in saying this. Financial institutions and debt buyers have urged the same in comments to the CFPB. Unfortunately, the CFPB missed the opportunity to fix this in its current rules.

My written testimony contains a more complete proposal, but I urge this committee to consider legislation that would clarify that debt buyers are subject to the FDCPA, as you have a bill, H.R. 403, but also add original creditors to the list and require those creditors who sell debt to stand behind the accuracy of the information that they sell, and to provide account documents at the time of sale, and also to prohibit debt collectors from contacting a consumer until they have engaged in due diligence about the sales contract and account documentation.

To deter illegal conduct, I also urge this committee to favorably report H.R. 3948 (the Debt Collection Practices Harmonization Act), and adjust FDCPA statutory damages to inflation.

The second structural problem I want to urge you to fix is what is colloquially called "zombie debts." Currently, a debt can follow a consumer for way too long, in some cases practically forever, as you have heard.

My proposal here expands upon the draft bill entitled, "Strengthening Legal Protections on Debt Collection Actions." That bill prohibits the restart of the statute of limitations clock every time a consumer makes a payment or acknowledges a debt. It is a great start.

But I would urge this committee to go further and support a single Federal collection period that extinguishes consumer debts once and for all after a specified period. I suggest 7 years to comport with the Fair Credit Reporting Act.

This law would automatically extinguish not simply the legal remedy of collecting through the courts, which is what statutes of limitation do, but any kind of repayment. Judgments would get a separate statute of limitations. I also suggest 7 years, for simplicity. When the applicable period expires, the debtor's obligation to the creditor and the creditor's rights to collect cease to exist. Any judgment obtained on what would be an extinguished debt would be void and consumers would have a private right of action against the collector.

Collectors would have 14 years to collect on a consumer debt, and if they are not able to secure repayment in those 14 years, the debt would be extinguished and attempts to collect would expose them to consumer lawsuits with statutory penalties and fees.

The law in this area is too complex. I thought I was a pretty savvy consumer when I was 21 years old, and I was bullied by a debt collector into paying a debt I did not owe. I was an authorized user on a credit card debt, but the collector led me to believe that I would be sued over this debt by the end of the week.

If wasn't until years later that I learned that authorized users are not responsible for credit card charges, particularly if they never used the card. You might chalk up this incident to the naivete of youth, but I have seen many fall prey to this complexity, and not just consumers.

In 2014, I reviewed the case of Mr. Okoroafor in Massachusetts, a 73-year-old retiree who was sent to jail for 30 days for refusing to pay a $500 debt. Mr. Okoroafor had testified that his sole source of income came from a State pension, but neither he nor apparently the district judge who sent him to jail knew that State law exempted that income from collection.

Consumers and collectors, and judges, quite frankly, need simplicity. A Federal statutory collection period that cannot be restarted, and that applies to all consumer debts, would be a good start.

Thank you for the opportunity to share my thoughts with you today. I look forward to your questions.

[The prepared statement of Ms. Jimenez can be found on page 126 of the appendix.]

Chairwoman WATERS. Thank you, Ms. Jimenez.

Ms. Auchterlonie, you are now recognized to present your oral testimony.

STATEMENT OF SARAH AUCHTERLONIE, SHAREHOLDER, BROWNSTEIN HYATT FARBER SCHRECK

Ms. AUCHTERLONIE. Chairwoman Waters, Ranking Member McHenry, and committee members, thank you for inviting me to discuss accounts collections in the consumer and small business marketplaces.

Smart regulation of debt collection is essential. On the one hand, deceptive and harassing conduct must not be tolerated. On the other hand, regulation must ensure that small businesses can provide services when consumers don't have the cash, with the trust that they will later get paid.

Without a healthy collections market, consumers will lose affordable access to dentists, healthcare, housing, and traditional credit products.

Previously, I was an attorney with the U.S. Treasury's Office of Thrift Supervision, and later was a founding employee and acting Deputy Enforcement Director with the Consumer Financial Protection Bureau. For years, I led a team of enforcement attorneys in investigations and litigations, including FDCPA matters.

After moving to Denver, Colorado, I co-authored the legal treatise, "Consumer Finance Law and Compliance," and two Governors of the State of Colorado have appointed me to represent the citizens of the State at large on the Colorado Banking Board, the policy and rulemaking body for Colorado's banking system.

Congratulations on the passage of the Safe Banking Act, by the way.

At the CFPB, I observed a wide variety of debt collection practices. In private practice, I have helped the ARM (accounts receivable management) industry clients enhance their compliance systems. I have listened to probably thousands of debt collection calls in these efforts. And most recently, I worked with dozens of ARM industry members to help draft a 154-page comment to the CFPB's Regulation F to implement the FDCPA.

From these experiences, I have learned that debt collection has become increasingly a profession that provides consumers with flexible options for resolving debts. Empathy and problem-solving are key tactics. And the collections industry is one of the most diverse in financial services: 32 percent of collection agencies are woman-owned, and over 70 percent of the workforce is female.

Significantly, valid disputes are rare, and early contacts pay off for consumers. Thirty percent of all debt is early-out debt, meaning that as soon as the customer is contacted, he or she pays it. In most cases, this avoids credit reporting and collection lawsuits. It is a customer service call more than a collection call.

When those early contacts can't happen due to call blocking, call avoiding, call caps, or other impediments, consumers lose the chance for a quick, harmless fix. Limiting meaningful communication about accounts ultimately harms consumers.

Congress enacted the FDCPA in 1977, and the statute's text still refers to telegrams. Forget email and text. As you can guess, agencies struggle to meet consumer preferences for contact methods, like email or text, because the law surrounding their use is unclear. Electronic messaging is efficient, reduces third-party exposure, and is more likely to be opened and actually provide consumers information about their important statutory rights.

Email is a superior tool, but without straightforward regulations, it can't be used. Personal telephone contacts are also important. Over the phone, agents can tell consumers about how to verify coverage with health insurance companies, to apply for creditor hardship programs, or enter into an affordable payment plan.

The key here is protecting consumer choice. Consumers must participate in conversations about how to resolve their debt. And consumers should keep the choice to select the methods they want to use to talk about it: email; text; or telephone.

Fortunately, under both the CAN–SPAM Act (Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003), and the FDCPA, consumers retain their rights, respectively, to opt out of the communication method, just as they would with any other commercial message, or choose to completely cease and desist contacts from collectors. Further regulations that make consumer choice harder to implement should be discouraged.

As a former government enforcement attorney, and someone who now represents consumers pro bono, I urge everyone in this body to view with skepticism arguments from organizations against adding clarity and uniformity to the FDCPA. We need model forms, safe harbor voicemails, and uniform agreements about language where the FDCPA is ambiguous.

When the legal regime governing the ARM industry is clear, reflects consumer preferences, and is designed to give consumers control over how their debts are resolved, it benefits consumers, collectors, and creditors alike.

Thank you.

[The prepared statement of Ms. Auchterlonie can be found on page 95 of the appendix.]

Chairwoman WATERS. Thank you very much, Ms. Auchterlonie.

Mr. Bedard, you are now recognized to present your oral testimony.

STATEMENT OF JOHN H. BEDARD, JR., OWNER, BEDARD LAW GROUP, P.C.

Mr. BEDARD. Chairwoman Waters, Ranking Member McHenry, and House Financial Services Committee members, my name is John Bedard. Thank you for inviting me to testify about the work of the credit and collection industry.

This is a very important time for consumers and debt collectors in the wake of the Bureau's landmark release of the first-ever proposal for rules implementing the Fair Debt Collection Practices Act (FDCPA).

The credit and collection industry has been seeking clear regulatory guidance on the FDCPA since its enactment in 1977. The industry supported regulation in 1977, and the industry supports clear, fair regulation today.

The Federal Trade Commission, the previous primary agency with jurisdiction over the debt collection industry, did not have rulemaking authority under the FDCPA. As a result, this lack of regulatory guidance, in conjunction with Congress' failure to update the statute, has resulted in outdated requirements and a patchwork of interpretations of the FDCPA by courts throughout the country.

The absence of clear regulation has also given birth to a cottage industry of consumer attorneys who have done little to protect consumers.

The Dodd-Frank Wall Street Reform and Consumer Protection Act gave the CFPB rulemaking authority. The Bureau's proposal for implementing the FDCPA, although imperfect in many respects, is an important step forward in providing much-needed clarity to the financial services marketplace, including consumers.

I have been practicing law in Georgia for over 20 years. My practice focuses on representing debt collectors, asset buyers, creditors, and attorneys. I help clients stay in compliance with the myriad of Federal and State laws regulating their business. I also defend civil litigation and investigations brought by consumers and by government.

In my role as managing attorney at Bedard Law Group, I am a recognized authority on the FDCPA and the Fair Credit Reporting Act. I am also a former member of the board of directors of the industry's leading professional trade association, ACA International, the Association of Credit and Collection Professionals.

I serve as the State of Georgia compliance chairperson for ACA International, and I am a former chairperson and Program Designation Award recipient of ACA International's Members Attorney Program. I travel the country auditing the compliance practices of debt collectors and educating them on the requirements of consumer financial laws.

Debt collectors play a critical role in ensuring that consumers can continue to access credit and services. A healthy connection between debt collectors and consumers increases access to credit. It encourages the local appliance store to sell that washing machine on terms, it encourages the local dentist to provide those braces on the promise of future payment, and it gives comfort to the auto mechanic that they will be paid tomorrow for their repairs today.

I have seen firsthand the problems a lack of clear regulatory guidance can create for both consumers and industry, and the CFPB has at times exacerbated these problems through unfair, agenda-driven enforcement actions.

Regulation by enforcement is wrong, it is unlawful, it is happening today, and it needs to stop.

To fulfill its statutory mission and obligations properly, the Bureau must first articulate rules and then strictly adhere to fair, clear, and transparent enforcement practices.

I have represented clients and personally observed the Bureau's actions fall short of these standards. Many targets of Bureau enforcement actions have experienced one-sided Bureau interpretations of the law and are often pressured into onerous settlement terms, which impose obligations well beyond legal requirements, just to avoid the extreme cost associated with disrupting business operations and defending allegations.

The conveniences of modern technology can no longer be ignored. The Bureau's proposal appropriately acknowledges the need to bridge the communication gap between consumers and debt collectors.

There can be little dispute that clear, fair regulation of the industry helps consumers and industry. The Bureau's proposal gives unconditional control to consumers over the communication methods used by debt collectors. This control gives consumers unprecedented power over the debt collection process while at the same time building a stronger technology bridge between consumers and debt collectors.

Thank you again for the opportunity to appear before this committee. I look forward to answering your questions.

[The prepared statement of Mr. Bedard can be found on page 64 of the appendix.]

Chairwoman WATERS. Thank you very much.

I now recognize myself for 5 minutes for questions. And I am going to start with you, Mr. Chopra.

You heard what Mr. Bedard just said about the Consumer Financial Protection Bureau, an important step forward. You heard what Mr. McHenry said about the Bureau. As I understand it, you did work there. You were employed at the Consumer Financial Protection Bureau?

Mr. CHOPRA. Yes, for approximately 5 years.

Chairwoman WATERS. In what capacity?

Mr. CHOPRA. I oversaw all of the student lending and financial services work. I was also student loan ombudsman during that time.

Chairwoman WATERS. So, you know something about debt collection?

Mr. CHOPRA. Yes.

Chairwoman WATERS. All right. In your opinion, are agencies like the CFPB and the FTC taking appropriate measures and enforcing policies that can guide consumers in addressing their complaints or harassment?

Mr. CHOPRA. I think recently, enforcement has been pretty tepid, and all that does is benefit bad actors and harm those who follow the law.

Chairwoman WATERS. Ms. Desai, you were very passionate about what is going on in New York, and I think we all heard you. We have a number of New Yorkers here on the panel of members. So, I am going to skip over that and let them address what you shared with us.

But let me go to Ms. Jimenez. You talked about having been involved in researching and working in debt collection for years.

Ms. JIMENEZ. Yes.

Chairwoman WATERS. What do you think can be done to absolutely recognize that there is debt, and debt owed by individuals that oftentimes, they can't pay because they don't have the money? What do you think can be done to stop the harassment, to stop the continuous calls and emails, et cetera, and at the same time, credibly try and get your debt repaid?

Ms. JIMENEZ. I think the difficulty is in determining who can pay but doesn't want to, and who cannot pay. And I think there are a lot more "cannots" than the industry would hope.

A lot of people really simply—they may have a little money left, but it is a question of, do you use that for food or for your kids' activities or do you use that to pay off a credit card?

Chairwoman WATERS. You gave an example of the $500 of the 70-something-year-old gentleman who is excluded, who cannot be forced to pay, given his income. Are there other instances of that?

Ms. JIMENEZ. Yes, exemption laws or statutes of limitations, if they work better than they do now, would basically cut off the right and give us a specified period for only specified types of income, nonexempt income for debt collectors to seize.

The problem with many of these things is that they require the consumer to show up and to actually assert their rights. Anything that requires that, in my experience, is going to harm the consumer because they are unlikely to do it.

Chairwoman WATERS. So, there is no such thing as an ombudsman in the court to represent those who can't very well represent themselves, is that right?

Ms. JIMENEZ. This is throughout the 50 States, et cetera, and so some courts have lawyer-for-the-day or clerk's offices that try to help people.

But the vast majority of people are disheartened by their debts. They know that they have not repaid someone. The question is, is the person who is suing them the right party to pay? And that is a real question that, because they are unable to show up, they never actually get to ask.

Chairwoman WATERS. Reverend Gould, you are here from Jefferson City, Missouri, is that right?

Rev. GOULD. Yes, Chairwoman Waters.

Chairwoman WATERS. We have a Member here who represents that area.

And you talked about minorities disproportionately being harassed. Is this true in Jefferson City, and how do you know this?

Rev. GOULD. It is absolutely true. I pastor the oldest African-American entity in Jefferson City. My church is 169 years old. And we are situated down the street from an Historically Black College, Lincoln University. And so, I am the pastor of the community.

And oftentimes, my parishioners, students and others find their way to the church to share burdens and to ask for relief. Oftentimes, benevolence is extended, sometimes to help people avoid going to court.

In the aftermath of the tornado that we just had, I am thinking of a young woman by the name of Lakaisha McCaleb. She is an AfricanAmerican woman who owned the only 24-hour daycare center in Jefferson City, and took care of approximately 75 children, most of them African American and children of color. And she found herself—she did not own the building, she owned the business, and cannot get another building because of past credit issues that are in collections.

Chairwoman WATERS. Thank you very much.

I now recognize the gentleman from North Carolina, Ranking Member, McHenry, who is recognized for 5 minutes.

Mr. MCHENRY. Thank you, Madam Chairwoman.

I just have a question, leaving a voicemail, should that be a safe thing for a debt collector to do?

Commissioner Chopra?

Mr. CHOPRA. I think it depends on the specific circumstances.

Mr. MCHENRY. What do you mean? Let's say, I leave you one voicemail, once a week. Let's just try that concept. Is that acceptable?

Mr. CHOPRA. I think the challenge is that—

Mr. MCHENRY. How about a text?

Mr. CHOPRA. —if you leave the voicemail for someone who is not the actual person with the debt—

Mr. MCHENRY. Okay. So, let me give you the scenario—let's say I have your cell phone number, the cell phone number you gave me in order to get the loan, and I call you on your cell phone at the number that you gave me. Can I leave a voicemail? Should I be legally able to leave a voicemail on your cell phone that you provided me?

Mr. CHOPRA. If you provided that cell phone number—you collected it and you have validated that you got it from the right person? This is the question. The details matter.

Mr. MCHENRY. Okay. Then, let's say that in this scenario, I have communicated with you previously on this. Can I leave you a voicemail?

Mr. CHOPRA. If you have communicated previously, and you have absolute accuracy about that—

Mr. MCHENRY. Okay. The absurdity of "absolute accuracy."

How about a text, can I text you?

Mr. CHOPRA. Has the consumer opted into that?

Mr. MCHENRY. I have previously texted you, and you have paid. Can I then follow up and do that?

Mr. CHOPRA. If the consumer has opted in to what their preferences are on being communicated.

Mr. MCHENRY. Okay. So what I am saying here is under previous regimes—let's go to you, Ms. Auchterlonie. Where did you previously work?

Ms. AUCHTERLONIE. Prior to private practice, I was at the CFPB.

Mr. McHENRY. Okay. Doing what?

Ms. AUCHTERLONIE. I was an acting Deputy Enforcement Director. I led a team of 25 enforcement attorneys in the investigation of—

Mr. McHENRY. Prior to the proposed rule, how many times could debt collectors call someone?

Ms. AUCHTERLONIE. I would assume it is about the same as what it is now, which is—

Mr. McHENRY. Under the old rule, there was no cap on the number of times that a consumer could be contacted.

Ms. AUCHTERLONIE. No, no. It is very much court-driven. The FDCPA has—

Mr. McHENRY. But under the rules that are written, so we are modifying the existing rules, is texting an innately bad thing?

Ms. AUCHTERLONIE. No, texting is not an innately bad thing. We have studies showing that younger generations prefer to be communicated to by text messages.

Mr. McHENRY. Did the previous rule contemplate text messaging or using a social media platform in order to communicate with a consumer?

Ms. AUCHTERLONIE. Not at all. There were no real previous rules. It is just the FDCPA text, which was enacted in 1977.

Mr. McHENRY. Okay. So what does the proposed rule do then? How does that benefit the marketplace and the consumer?

Ms. AUCHTERLONIE. The proposed rule takes a lot of the uncertainty in the current legal scheme, which for the last 40 years has been really interpreted by the courts on a court-by-court and then circuit-by-circuit basis, and pulls all of that information and consideration together to try to create one uniform national rule.

Mr. McHENRY. And what value does that provide?

Ms. AUCHTERLONIE. It provides consistency across the United States so that particularly, the national debt collectors can do the same thing in every jurisdiction.

It also has given us, the participants in the debt collection industry, as well as you, yourself, the opportunity to evaluate, as a whole and collectively, whether or not what the Bureau is doing is a rational way to balance competing priorities in the voicemail conundrum.

Mr. McHENRY. Okay. So, that certainty provides clarity in terms of lending then, so you are better able to consistently collect debts.

Ms. AUCHTERLONIE. It would. I would also say it is very likely to reduce the number of telephone calls that a person is likely to get because—

Mr. McHENRY. Explain that. How is that the case? Because we hear the doom and gloom that if I text you, that may be a bad thing, or if I leave you a voicemail, that may be a bad thing.

Ms. AUCHTERLONIE. Yes. Currently, because of the legal concerns about leaving voicemails, when a collector gets a voicemail message or an answering machine, they often just hang up and say nothing, because that is safer from a legal perspective.

We are all accustomed to getting those types of telephone calls, and they are very annoying.

Mr. MCHENRY. Right. I think I just got one during this testimony. So, I understand. I would have preferred a text, to say what the heck they were going to ask me, so I can deal with it.

So with that, I think it is important that we modernize the rule, and give clarity to the marketplace and to consumers.

And I yield back.

Ms. AUCHTERLONIE. Thank you.

Chairwoman WATERS. Thank you.

I now recognize the gentlewoman from New York, Mrs. Maloney, who is also the Chair of our Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets, for 5 minutes.

Mrs. MALONEY. Thank you, Madam Chairwoman, for holding this very, very important hearing.

Ms. Desai, after years of predatory lending and inflated medallion prices, the Yellow Cabs of New York really turned into financial traps for thousands of mostly immigrant drivers. I think it is a New York City scandal, really. And after several years of the worst lenders failed, the NCUA and the FDIC took over their portfolios of taxi medallion loans, so the government is now the owner of a lot of these loans, is that correct?

Ms. DESAI. That is my understanding.

Mrs. MALONEY. Yes. Because a lot of these loans were predatory to begin with, I personally think the NCUA and the FDIC should put an immediate moratorium on medallion foreclosures. That would be the decent, moral, right thing to do.

But we should also look at the factors that enabled this to occur. So could you tell us more about some of the predatory lending practices—what were they, how did they occur, and the history of how this disaster happened?

Ms. DESAI. Sure. In the New York Times investigation, it had outlined that a number of the lenders knew that the value of the medallion was inflated, and, as I said earlier, there were seven government agencies that knew the value was inflated. There were reports at the State level from the Department of Financial Services for a number of years. There were reports by the NCUA itself, which oversaw the credits unions, and reports by the Taxi and Limousine Commission, which directly regulates the local industry. They knew the price was inflated, and yet they continued to auction off more medallions.

In fact, in 2014, the Taxi and Limousine Commission (TLL), which sets the opening bid at an auction, set it at $800,000. Now, mind you, the same agency officials, many of them who were involved in setting it at that rate were the same individuals who then allowed companies like Uber and Lyft to come in, completely unregulated. And, in fact, once they left their jobs at the TLC, many of them then went to work directly for those same companies. So, that really has been what has felt like the trap.

From 2002 to 2014, we also learned, primarily through the Times investigation, that many of the lenders were actually behind the scenes, plotting to leave the industry. Meanwhile, they would pick up the phone, call individual lease drivers—so drivers who had been leasing from garages, and were working 6, 7 days a week, 12-hour shifts—and would promise them the American Dream. You invest in a medallion, and within 3 or 4 or 5 years, you will be able to refinance your medallion loan and purchase a house, pay your kids' tuition for college, and so on and so forth.

And so, those lenders really actively sold this dream. And, meanwhile, the government agencies, particularly the TLC, was taking out ads on an inflated value. Some of the government ads actually showed that—the claims that the ads made were 13 percent higher in value than the actual value of the medallion.

And imagine you are a working-class person, someone just really mainly trying to get out of poverty, and you are getting a phone call from somebody that you worked for, for years, and you see ads being displayed by your very own government, you are thinking this is a safe venture for you to enter into.

Meanwhile, as the market started to crash, the lenders were not asking for credit histories. At the time that they would sign you up, they would not ask you for guaranties. But once the loans started to go underwater, when there would be a balloon payment—within 3 to 5 years, there is a balloon payment, and at that time, you are able to refinance your loan. During that period, the lenders would then ask you to put down a guaranty. They would ask you about the assets of yourself but also of other family members. And so, mid-loan, you are now finding out that everything else you own is also at risk.

It was also mid-loan that the confessions of judgment were then put on the table—

Chairwoman WATERS. The gentlewoman from Missouri, Mrs. Wagner, is recognized for 5 minutes.

Mrs. MALONEY. Thank you.

Mrs. WAGNER. Thank you, Madam Chairwoman.

Ms. Auchterlonie, following up on Ranking Member McHenry's line of questioning, are you familiar with the legislation that Barney Frank introduced in 2012 directing the CFPB to provide clarity on how debt collectors can, in fact, leave voicemails?

The bill's purpose, as officially stated, was to "amend the Fair Debt Collection Practices Act to exempt a debt collector from liability when leaving certain voicemail messages for a consumer with respect to a debt as long as the debt collector follows regulations as prescribed by the Bureau of Consumer Financial Protection on the appropriate manner in which to leave such a message, and for other purposes."

How does that differ from what the CFPB proposed for voicemails under Director Kathy Kraninger's, which many of my Democrat colleagues have opposed? I am trying to understand the difference here.

Ms. AUCHTERLONIE. Yes. Thank you. I am aware of that. And I appreciate you reading back the text.

It is really, the Bureau is following the spirit of what that bill said. They made an effort to create what is called the limited content message, which, in their view, was a statement that is spelled out with great specificity in the rule that collectors would be able to leave on voicemail machines in order to identify themselves without doing what is called third-party disclosure because the FDCPA prevents debt collectors from disclosing to third parties the existence of the debt.

The other part of the conundrum on voicemail messages is that the FDCPA also requires debt collectors to give what is called the mini-Miranda notice, which is, "This message is from a debt collector." And I think the same may be used in connection with the collection of—

Mrs. WAGNER. So Kathy Kraninger, Director of the CFPB right now, is really trying to implement the same type of legislation that Barney Frank offered in 2012, if I understand it properly, is that correct?

Ms. AUCHTERLONIE. Yes.

Mrs. WAGNER. Is there is a scenario where a consumer who has fallen into collections could benefit from a phone call or an email communication from a debt collector?

Ms. AUCHTERLONIE. Yes. The studies show that meaningful conversation between a collection agency and someone in collections gives the consumer the opportunity to avail themselves of a number of choices. Often, they can settle the debt for less than the face value. They might be able, if it is medical debt, to enter into some—

Mrs. WAGNER. And there is actually a communication—

Ms. AUCHTERLONIE. Yes.

Mrs. WAGNER. —going on. And I would assume that communication with the consumer is a good thing in that situation, correct?

Ms. AUCHTERLONIE. It is. Yes.

Mrs. WAGNER. If lenders cannot collect debt, does this have any impact on their ability to extend credit? Specifically for financial institutions, such as banks and credit unions, do their safety and soundness requirements make it important for them to be able to collect debt so that they can extend credit?

Ms. AUCHTERLONIE. Yes. There is a clear relationship between impaired debts and the amount of asset growth that the bank regulatory agencies will allow institutions to—

Mrs. WAGNER. How does the debt-collection process impact both smaller and larger businesses throughout the country and the larger economy?

Ms. AUCHTERLONIE. Particularly with small businesses, a lot of the times the reason that they hire a debt collector is because they are professionals in trades—auto mechanics, dentists, etc.—and they just don't have the infrastructure in order to collect on their own accounts. And these may be small accounts, but together they equal $40,000, $50,000, which is a lot for an auto mechanic over the course of a year.

Mrs. WAGNER. Okay.

Ms. Jimenez, I saw you nodding your head during Ranking Member McHenry's line of questioning. Do you agree with Ms. Auchterlonie's assessment, and do you see the need for modernization in this space, ma'am?

Ms. JIMENEZ. I think we have a conundrum, and I think it is not easy to solve. The problem is, we want to protect—and the FDCPA protects—consumer privacy and the avoidance of disclosure of a debt to a third party. And voicemails can be a private thing, but they can also be a public thing, and it's the same with text messages.

We also have a problem with, really, the data and the information that the debt collector has about the consumer and whether that is correct—

Mrs. WAGNER. But the collector must follow regulations prescribed by the Bureau, if I understand things correctly, and those can be laid out, correct?

Ms. JIMENEZ. Sure. But right now—

Mrs. WAGNER. So, there is an opportunity for modernization, so that we could actually communicate.

Ms. JIMENEZ. I don't think—modernization, standardization consistency, I think that is good for everybody. The—

Mrs. WAGNER. Wonderful. Great.

Ms. JIMENEZ. —question is in the details.

Mrs. WAGNER. Thank you.

I yield back.

Chairwoman WATERS. Thank you.

The gentlewoman from New York, Ms. Velazquez, is recognized for 5 minutes.

Ms. VELAZQUEZ. Thank you, Madam Chairwoman, and Ranking Member McHenry.

Ms. Desai, do you think that if these taxi drivers knew about the confession-of-judgment practice, and that their entire account could be drained, they would have still taken out these taxi medallions loans?

Ms. DESAI. I think many would not have.

Ms. VELAZQUEZ. Thank you.

Commissioner Chopra?

Mr. CHOPRA. Confessions of judgment, just for background, have actually been banned under the FTC credit practices rules for many, many years. Those rules, though, do not cover loans to small businesses. So the fact that confessions of judgment are being used, especially for small, individual businesses, including taxi drivers, is concerning.

Ms. VELAZQUEZ. Thank you.

Ms. Kuehnhoff, in response to the predatory lending practices against New York taxi drivers and the series of Bloomberg articles that ran last year, I have introduced H.R. 3490, the Small Business Lending Fairness Act, which will prohibit confessions of judgment at the Federal level in commercial lending practices.

Can you explain why this is something we need to implement at the Federal level?

Ms. KUEHNHOFF. Yes. Thank you for your question.

As we have been discussing, many important consumer protections—either protections from predatory lending practices or predatory debt collection practices—don't exist for small businesses. So this bill would be a step in the right direction to try to bring these small businesses under those same types of protections that we provide for consumers, especially small businesses that look a lot like consumers because they are also particularly vulnerable.

Ms. VELAZQUEZ. Ms. Desai?

Ms. DESAI. Yes, I would absolutely agree with that.

Ms. VELAZQUEZ. Mr. Chopra, the Federal Truth in Lending Act (TILA) requires transparent disclosures in consumer finance but does not apply to small businesses. I am currently working on legislation that will expand this coverage. How would TILA coverage to small businesses enable them to make fully informed comparisons on their financing options?

Mr. CHOPRA. Yes, small-business borrowers, particularly the smallest ones, are entrepreneurs. They would hugely benefit from some of the same protections that consumers enjoy as well.

Ms. VELAZQUEZ. And, Ms. Desai, I know that Chairman Levin on the New York City Council has been working with the industry. Has there been any resolution to your case?

Ms. DESAI. No.

And I am also a member of the city council's Medallion Task Force. We need to address the predatory lending practices, but, to be honest with you, the number-one concern for the 6,000 owner-driver families is to have the actual debt restructured.

It is, on average, $600,000, but the real market value, when hedge funds are buying off foreclosed medallions, is closer to $150,000. We want to see the current loans that the owner-driver families are under be restructured to that amount, and then their monthly mortgages, which right now average $3,500, could be reduced to even $900. With that reduction, they would no longer be in the annual debt of $25,000, that they find themselves in today.

Ms. VELAZQUEZ. Thank you.

Madam Chairwoman, I yield back.

Chairwoman WATERS. Thank you very much.

I will now yield to the gentleman from Florida, Mr. Posey, for 5 minutes.

Mr. POSEY. Thank you very much, Madam Chairwoman and Ranking Member McHenry, for working together to ensure that we guard innocent people against abusive and unfair debt-collection practices.

Although they are not here today, I want to commend the work of the Consumer Financial Protection Bureau in proposing a new rule to modernize the implementation of the Fair Debt Collection Practices Act. There may be some residual criticism of the Bureau's proposal, but I think the public comment process should bring out ideas for improving on a very good start.

As we consider further concerns today, we need to keep in mind that bad debts are a cost to lenders, either in writing them off or in collecting them. Any business must cover its costs to stay in business, and these bad-debt costs must be covered. In the long run, that means higher interest rates or finance charges for those who actually pay their debts. Higher interest rates and risk to lenders mean less available credit to those who can and do repay their debts. We all support protecting debtors, but we must be careful not to push that debt cost so high as to restrict credit access.

I have an abiding interest in protecting our servicemembers. We have a draft bill, a discussion draft, in front of us today that would prohibit debt collectors from communicating with the commanding officer or officer in charge of any servicemember regarding an outstanding debt. The bill would also strengthen related prohibitions about false or misleading representations to servicemembers.

This is based on the Military Lending Improvement Act from the 115th Congress sponsored by the former U.S. Senator from Florida, Bill Nelson.

As we look to improve this bill, what protections do we need to put in place to address the special needs of servicemembers?

And I will start with you, Mr. Bedard, and we will go to my left, your right.

Mr. BEDARD. Thank you.

I agree with you that these proposals do create a more healthy communication between consumers and debt collectors.

When I read what you have proposed here, what I did not see in that proposal was a confirmation that consumers can actually consent to those communications. Consumers can consent to those communications under the current state of the law, and to the extent any proposals that changed the law preserved those communications, I would encourage that as well.

Mr. POSEY. Thank you.

Ms. AUCHTERLONIE. When I was at the CFPB, I had the great honor of working with Holly Petraeus, and I think she would be very pleased to see that this is before the committee. I support it.

Ms. JIMENEZ. Are we going down the—

Mr. POSEY. Yes.

Ms. JIMENEZ. I am not an expert in servicemember affairs. I do think that the bill that you have proposed is a good step.

It is wholly inappropriate that debt collectors are able to talk to commanding officers. That exerts a pressure that really no one should be able to have. I think it is similar to debt collectors who could talk to employers, which really right now they should be only doing for location information, but there have been instances beyond that.

So, I support your bill.

Ms. KUEHNHOFF. I think that the protections you have proposed are important and in line with those that have been outlined by the CFPB's Office of Servicemember Affairs.

I would highlight two others that have been presented in those reports. Threatening reductions in rank and threatening revocation of security clearance are both issues that have come up in the CFPB's reports as well.

Mr. POSEY. Very good. Thank you.

Ms. DESAI. I would agree with everything that has been stated. It just is such an outrageous practice.

Rev. GOULD. I, too, concur that that is good ,but I also want to emphasize that everybody deserves that same protection. It reminds me of the payday lending rate cap that is available to servicemembers but not available to all other Americans.

And so, it is good, and a step in the right direction, but it needs to be inclusive, and everybody deserves the same protection.

Thank you.

Mr. CHOPRA. Congressman, the only thing I would add is, the Department of Defense has actually done work to show how separations from the military due to financial distress are very costly, both to the taxpayers and to our national security. So to the extent we can go after some of the worst abuses, strengthen the Military Lending Act (MLA), and look at ways to improve the Servicemembers Civil Relief Act (SCRA), those are all good steps.

Chairwoman WATERS. Thank you.

The gentleman from Georgia, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT. Thank you very much, Madam Chairwoman. And let me commend you on, again, having a very, very much-needed hearing on debt collection and the unfairness that is happening to all too many of our consumers.

Mr. John Bedard, how are you? One of my Georgia constituents—

Mr. BEDARD. Thank you.

Mr. SCOTT. —and one of our most distinguished lawyers, and owner of the highly respected Bedard Law Group—

Mr. BEDARD. Thank you.

Mr. SCOTT. —of Duluth, Georgia—

Mr. BEDARD. That is correct.

Mr. SCOTT. —in my district. Thank you, sir. It's good to have you here.

Mr. Bedard, let me ask you, we are working on this committee, under the leadership of Chairwoman Waters, on the issue of privacy, and in trying to get a good bill before the CFPB, as well as dealing with the privacy issue with our fintechs. So, it is a big issue to all of us, and certainly to the nation.

But there was a survey that the CFPB did, and 63 percent of the consumers who were contacted in that survey said they were abused by debt collectors. But, more remarkably, 90 percent of those who felt they were abused were contacted more than 3 or 4 times in a week, over and over again.

And so we have the CFPB's proposed regulation that makes changes to the frequency and manner through which debt collectors can communicate with consumers, including through social media platforms and private messaging services.

With consumers already facing these enormous challenges in safeguarding their most personal and sensitive information, do you feel that the CFPB's proposed rule adequately protects the privacy of our consumers?

Mr. BEDARD. Thank you, Representative. The answer is yes.

And the proposal goes one step further. The proposal gives control to consumers over those communication channels. Consumers have an unconditional right to opt out of those communications. So, to the extent consumers even feel at risk of privacy exposure, they can control the process and they can stop those communications by opting out, under the proposal.

Mr. SCOTT. Could you explain, when you say that the consumers will have control, how will they explicitly have this control?

Mr. BEDARD. Thank you, Representative.

Under the current draft of the proposal, every communication that is electronic between a debt collector and a consumer must contain a clear explanation of the consumer's right to opt out of electronic communications.

And the consumer has an unconditional right to opt out of those communications. That is why I described that particular rule as giving consumers control over those communication methods.

Mr. SCOTT. Okay. Thank you very much.

Identity theft and fraud is another issue with which we are very much concerned. It has come to my attention that many consumers may be facing this as a result of debts that are incorrectly attributed to them. And, in recent years, we have seen an increase of cyber attacks and breaches that have exposed the sensitive information.

So let me turn to you, Commissioner Chopra. Are consumers who have experienced identity theft at greater risk of being pursued for fraudulent debt?

Mr. CHOPRA. Yes.

Mr. SCOTT. They are. Why?

Mr. CHOPRA. There have been so many data breaches, not just Equifax, not just Marriott, not just OPM. Our data is everywhere. And consumers, even if we think we have some control over it, it is floating all over the dark web and through our economy.

Mr. SCOTT. Well, quickly, what protections do we have?

Mr. CHOPRA. Right now, there are not affirmative data security and privacy protections generally writ large. The Federal Trade Commission has talked openly about this. And this is going be a problem as Big Tech continues to suck up more and more of our data.

Mr. SCOTT. Thank you.

Chairwoman WATERS. Thank you.

The gentleman from Missouri, Mr. Luetkemeyer, is recognized for 5 minutes.

Mr. LUETKEMEYER. Thank you, Madam Chairwoman.

I have, in my lifetime, been somebody who has actually made some of these loans and then had to collect them. It is a good way to make sure you understand, when you make a loan, you better understand you have somebody across the table who can actually—you don't have to go collect it from. So, it is interesting to hear your discussion today.

Just out of curiosity, how many people on the witness panel today have been in business, where you have actually written the bottom of a paycheck, hired and fired, and also have sold your products and services and had to collect the money for those products and services? Anybody?

Great. So, you understand what I am talking about here.

It is interesting to see—I think, Ms. Jimenez or Ms. Auchterlonie, one of you made the comment a while ago about the percentage of people who pay immediately whenever they are contacted.

My experience has been that most people are good people. When they take the money out, they are there to take the loan out to purchase a good or service because it is something that they want or need for themselves or their family, and they intend to pay the money back. They are not somebody whom you have to hit over the head, drag them in, make them sign the form, and then they walk out the door, and then you use that loan form to go beat them over the head and go drag them in or go collect money from them. That is not the way the process works, which is sometimes what is inferred here by some of the discussions we have had.

These are people who come in and want to borrow money, and now they have a legal and just debt that they have to service. And most people want to pay that debt back. We talked a little bit today about a couple of instances, especially medical debt and cyber breaches, as situations where we really need to have the debt collectors and the lenders work with these people to make sure that they are not negatively impacted.

But contact is extremely important. I can tell you from personal experience that whenever somebody wants to take advantage of you or they want to make sure they don't have to make that payment on time, they will find a way not to answer the phone, or not to answer the door. So, communication is key.

And I would appreciate—Mr. Bedard, you have talked about this already quite a bit, and, Ms. Jimenez, you have talked about it a little bit. Would you like to elaborate on how important this is and where we can go with the bills that are being proposed here, to make sure that there is fair contact and that the consumer has to respond to it so that they understand they have a responsibility in the situation, just like the small business or the lender, whomever it is, has the responsibility to collect that debt as well?

Ms. AUCHTERLONIE. Yes. I do think that sometimes people with outstanding debts and budget constraints have a tendency to fall victim to the fight-or-flight syndrome and they don't respond to the messages and they avoid those communications, even when the communications can be helpful to them, which has a tendency to increase the calls, increase the contacts, and turn out some of these negative effects that we see.

What I really like about the Bureau's rule is first, that it provides the opportunity for collection agencies to use communication means that are now more predominant in our society than just telephone.

Second, they have introduced a model form that, using focus groups, they have been copy-testing for both readability and, for lack of a better word, congeniality, in order to get over that stiff statutory language that collection letters have included recently.

And the idea is to help consumers feel more comfortable engaging in the debt-collection process so that they have more control over what happens to their outstanding accounts and can engage in the settlements or receive more information or ask questions and so on.

Mr. LUETKEMEYER. Ms. Jimenez?

Ms. JIMENEZ. Yes. Thank you for the question.

I think we are talking about this as if consumers really have only one debt that they are being contacted about, but most of the time they have between 7 and 10 debts. And the Bureau's rule on the contact limitations are per debt. So imagine just being called on each debt, sort of a reasonable amount of time, but that can really overwhelm someone and lead one to realize that, "Well, I can't really pay all of these, say seven debts, and people who are contacting me. What am I supposed to do?"

On the collector's side, of course they want to be the first person to talk to you, because you are more likely to pay that person. So, it is a collective action problem. And the issue is that the debt collector may not be reaching the right consumer because the information they have is incorrect.

I think that some of the Bureau's rules are exactly right. I just think they did not fix the problem at its source, which is with creditors. And so they are fixing around the edges, when they really could have started at the beginning.

Mr. LUETKEMEYER. One of the things I see here is, most people whose debt has been referred to a debt collector, are people who, for the initial debt, refused to talk to the initial lender. At our institution, we didn't hand it over to a debt collector until we had exhausted all of the other things that we could do. So, these are folks who are kind of hardcore at this point, that you have to find a way to really come down and make sure you get some stuff collected.

Thank you very much.

Chairwoman WATERS. The gentleman from New York, Mr. Meeks, who is also the Chair of our Subcommittee on Consumer Protection and Financial Institutions, is recognized for 5 minutes.

Mr. MEEKS. Thank you, Madam Chairwoman.

I have introduced a piece of legislation, H.R. 3948, the Debt Collection Practices Harmonization Act. And what that would do is, it would extend protections of the Fair Debt Collection Practices Act to State and local debt, to broaden civil justice protections against abusive collection practices and prevent the Secretary of the Treasury from using private debt collectors to recoup debt arising out of a natural disaster.

Now, what I have found is, around the nation, States and localities employ debt collectors to collect on debts for things like speeding tickets and other things, but they are not a part of the Fair Debt Collection Practices Act. It doesn't extend to them. My bill tries to close that loophole.

So, Reverend Gould, can you think of any reason why local debt collectors should not have to comply with the basic protections provided—local government debt collectors—with the basic protections provided by the Fair Debt Collection Practices Act?

Rev. GOULD. Thank you, Congressman.

Not at all.

I spent more than 35 years of my life in St. Louis. There was a little suburb called Ferguson, that most people are now aware of. And after the killing of Mike Brown in 2014, the Department of Justice really shined the light on predatory practices by municipalities.

Of the 91 municipalities that make up St. Louis County, it discovered that more than 60 percent of them received up to 50 and 60 percent of their income from things like traffic tickets and traffic fines. People that I know personally have been sent to jail.

And so, it is all connected. It is connected to predatory lending. And I believe that your proposed bill is a bill that actually helps to bridge that gap, because it is not just private creditors that are actually putting this burden on everyday citizens; it is also municipalities and other governments.

Again, in the case of being in Jefferson City now, after a tornado, people are not exempt from any of the debt that they may owe, whether it is from a speeding ticket or from a furniture store.

Mr. MEEKS. Thank you very much.

Professor Jimenez, I know you have written about the phenomenon of "zombie debts", which stem from an unregulated industry that allows for the selling and reselling of unsecured debts with little to no evidence of the sale record.

Is mandating certification that a debt is for the right person and the right amount prior to taking a debt-collection action sufficient to protect consumers from abusive collection practices?

Ms. JIMENEZ. Thank you for the question.

I think that is a great step. I, in my written testimony, have six or seven other things that I think would also be helpful. But it starts with the seller. The seller has to be the one to provide that documentation, because if they don't, then no one else can.

And they have to make affirmative representations that they are giving true information, contrary to the contracts that have been floating around for the past 20 years, where they disclaim accuracy of the information they are providing.

I think if we start there, it would go a long way.

Mr. MEEKS. Would this type of certification regulation place an undue administrative expense or burden on the debt collectors?

Ms. JIMENEZ. Obviously, it takes some effort and some cost. However, the question is, what is that balanced by? I think having documents would help collectors collect from consumers because they would see that, actually, okay, you do own this debt, because you have some evidence.

So, I think it might balance out. It is hard to actually say. I do think it is worth it, given that it would protect consumers further than they are today.

Mr. MEEKS. Thank you.

And let me just make another quick comment, because I know a number of my colleagues have already talked about the taxi industry in New York. And I know I only have 33 seconds. I would have asked the question about a man who lives in my district, in Jamaica, Queens. His name is Mohammed Hoque.

He came to this country from Bangladesh, and settled in New York City. And in 2014, Mr. Hoque was told by a businessman that if he was able to get $50,000 that day, he could get a loan to purchase a million-dollar medallion. Long story short, he signed the papers, and found out that he was signing something in debt for $1.7 million, and couldn't pay it back, so as a result, he is suffering today.

And if I had more time—but I am out of time. But those are the kinds of issues, the small person—he is here today—the small individual.

I yield back. Thank you, Madam Chairwoman.

Chairwoman WATERS. Thank you very much.

The gentleman from Kentucky, Mr. Barr, is recognized for 5 minutes.

Mr. BARR. Thank you, Madam Chairwoman.

And thank you to our witnesses today.

I firmly believe that if someone takes out a loan or buys something on credit, he or she should pay back what is owed.

And, Reverend Gould, I appreciated your reference and citation to scripture. We see that principle of someone who borrows should pay back what is owed also in scripture, in the Book of Psalms and other places. The Bible has a lot to say about financial matters, as you well know.

But obviously, in the event that a consumer is struggling to repay, they should be treated with dignity, and they should be treated with respect during the debt-collection process.

I do think some of the modernizations under the CFPB proposal help achieve that very goal. The cost of unpaid debt does not just disappear. Someone has to bear it. And I worry that it may get passed along to other consumers, and if we don't deal with that, the cost of credit goes up.

Ms. Auchterlonie, I wanted to ask you about your written testimony in which you cite an academic study that suggests, "In a competitive market, losses from uncollected debts are passed on to other consumers in the form of higher prices and restricted access to credit."

Can you go into more detail about how modernizing debt-collection rules could reduce the frequency of consumers bearing the costs for others' unpaid debts?

Ms. AUCHTERLONIE. Thank you.

I think the principal point is working on finding comfortable, plain-language communication between the collection agencies who represent the creditors and the consumers. That is something that has been a problem recently because so much of debt collection now is—and the kind of clear, straightforward communication is stymied by fear of plaintiffs' litigation.

I spoke to a debt collector a few months ago who said, "I don't write my letters for the least sophisticated consumers. I write my letters for the most sophisticated plaintiffs' lawyers."

And that has become a real problem and is getting in the way of direct communication between consumers and the collectors, who are really just trying to care for the people that they are talking to and help them work out their debts.

Mr. BARR. And, Ms. Auchterlonie, a follow-up question about the 80,000 or so complaints in the CFPB's reporting about complaints about debt collection.

In your written testimony, you state these numbers do not correctly reflect the number of complaints about debt collection because of the way the Bureau Complaint Database is set up. Specifically, not all of those complaints are about the debt-collection industry but may capture complaints about the debt itself or other issues not fundamentally about the collection practice or the firm.

How can the Bureau improve its Complaint Database to more accurately reflect the nature and substance of the consumer complaint?

Ms. AUCHTERLONIE. The Complaint Database is set up with a number of bullet-point questions, and consumers get to categorize their complaints themselves. That effort really isn't fixed or data-checked by any human beings, and I suggest that doing so probably would be very burdensome.

I think the important point is not that the complaints aren't helpful and valid; it is just that you can't look at raw numbers and take them out of context. I think the big thing to note is that, of all of the complaints about debt collection, it actually represents less than .005 percent of all debt-collection contacts.

And that is not saying that some people haven't had a lot of bad experiences with the rogue collection agencies, inexperienced collection agencies, or agencies that don't have enough capital to invest in compliance. I am not discounting those experiences at all. They are there. And that is why we have enforcement from the FTC and the CFPB.

But when you just look at the numbers, it is not necessarily an accurate picture and doom and gloom for the whole industry.

Mr. BARR. Thank you for that insight.

Mr. Bedard, I want to get to your testimony about regulation by enforcement. I could not agree with you more. I think one of the greatest frustrations with the Consumer Financial Protection Bureau is not giving the American people the rules of the road and not giving us clarity. How can you comply when there is no due process? How can you comply with a law when you don't know what the law is? And so, I think you are spot-on. And I think the Bureau should be commended and Director Kraninger should be commended for trying to provide clarity for regulated parties in our country.

In your opinion, is the process that the Bureau used for their proposed rule a step in the right direction away from regulation by enforcement and toward a more regular, orderly, established guidance that does fulfill that promise of due process?

Mr. BEDARD. Thank you, Representative.

Yes, this proposal is a step in the right direction. It brings clarity to an area of the law which is today not clear.

And so, I do agree with you. Thank you for recognizing that. It is very important to everybody who is the subject of an inquiry of the CFPB.

Mr. BARR. Thank you.

I yield back.

Chairwoman WATERS. The gentlewoman from Ohio, Mrs. Beatty, who is also the Chair of our Subcommittee on Diversity and Inclusion, is recognized for 5 minutes.

Mrs. BEATTY. Thank you very much, Madam Chairwoman, for having this hearing today.

And let me thank all of the witnesses for being here and for your testimony.

I have several questions I am going try to get through. And for a couple of them, I am just going to ask you to go down the row and say "yes," "no," or "I don't know" or what you think.

But let me start with the first question because in Ohio, the great State that I represent, debt collection is a problem.

Ms. Kuehnhoff, according to the Consumer Financial Protection Bureau's Complaint Database, debt collection was the topic most complained about by Ohioans, with over 16,000 complaints.

More than one-third of these complaints directly address the issue of attempting to collect debt that was not owed. Is there anything that you know of in CFPB's debt-collection rule that attempts to address this issue? Because it is the number-one issue that consumers are having in the State of Ohio.

Ms. KUEHNHOFF. Thank you for your question.

I think that one concern about the proposed rule is, as originally outlined in 2016, the CFPB had a large section about what was called substantiation of information, making sure that debt collectors had the documentation to know that they were approaching the right person about the right amount, and that is not part of this proposal that is before us now with the proposed rule.

Mrs. BEATTY. Okay. Thank you.

Reverend Gould, in your testimony, you stated that the comment letter by the Faith & Credit Roundtable submitted to the Consumer Bureau regarding the debt-collection rule urged them to ban collections on time-barred zombie debts in and out of court.

Can you explain why your organization believes this is necessary to adequately protect our consumers?

Rev. GOULD. Yes. In most States, there were actually zombie laws. And so this collection of debts, like in the State of Missouri, that are older than 10 years, should already be illegal. The lack of protection around that actually opens up people who are already very vulnerable to sometimes having to pay something they don't even know about.

I went to college in 1982. My father died when I was 17 years old. About 5 years ago, I needed a transcript and was not able to get it because the school said that I owed tuition. My mother is now also deceased, 10 years next month. My parents paid for my education, so I had no way of defending that bill. I had never received anything from Southern Illinois University. And I literally could not get this transcript until a couple of years ago when somebody actually said it was a mistake.

But after me going to get my transcript, they started to send me a bill every month that I had no way to defend, because the people who were responsible for paying it 30 years ago were deceased.

Mrs. BEATTY. Okay. Thank you.

For the next question, we will start with you, Professor Jimenez, under Section 813 of the Fair Debt Collection Practices Act, if a consumer can prove a violation, they are eligible to be awarded $1,000 in damages over and above what the consumer receives for actual damages.

Do you know if this $1,000 cap has ever been updated since the FDCPA made it a rule in 1978?

Ms. JIMENEZ. It has not.

Mrs. BEATTY. Okay.

So now, let me ask you this. And just answer "yes" or "no," down the row.

We will start with you, Mr. Chopra. Do you believe this $1,000 cap sufficiently disincentivized debt collectors from engaging in this type of behavior we too often see? Is this enough?

Mr. CHOPRA. Absent indexing to inflation, just like all civil penalties, as well in the government, it may not provide that deterrent effect.

Mrs. BEATTY. Okay.

Rev. GOULD. No.

Ms. DESAI. No.

Ms. KUEHNHOFF. No.

Ms. JIMENEZ. No.

Mrs. BEATTY. Keep going. You are next. Yes or no?

Ms. AUCHTERLONIE. I am not sure. I think there is a lot of deterrent value—

Mrs. BEATTY. So, $1,000 is enough, in your mind?

Ms. AUCHTERLONIE. I think—

Mrs. BEATTY. For it to be capped at that since 1978?

Ms. AUCHTERLONIE. Well, plaintiffs' attorneys are asking for a lot more than that.

Mrs. BEATTY. It is a "yes" or "no." We know it has been since 1978. We know that it has not been.

Ms. AUCHTERLONIE. You could index it. And plaintiffs' attorneys—

Mrs. BEATTY. So, that would be a "no." Is that correct?

Ms. AUCHTERLONIE. That would be a "no."

Mrs. BEATTY. Okay.

Mr. Bedard?

Mr. BEDARD. The answer is "yes" because of the other remedies that are available under the statute.

Mrs. BEATTY. But do you think there is a difference between actual damages and punitive damages?

Mr. BEDARD. Thank you, Representative. There is a difference, yes. And the statute—

Mrs. BEATTY. Okay. I'm sorry. My time is up.

Mr. BEDARD. Thank you.

Chairwoman WATERS. Thank you.

The gentleman from Colorado, Mr. Tipton, is recognized for 5 minutes.

Mr. TIPTON. Thank you, Madam Chairwoman.

And I thank the panel for taking the time to be here.

In my real life, I am a small-business guy, and we would wholesale out product, extend credit, and hope that it would get paid back, and the vast majority of the time, it did. But we certainly had a couple of circumstances where, after we had exhausted all of our remedies, placed calls for 6 months to 9 months, trying to be able to get paid back, we had to turn to a credit collection agency.

And now, in this role, I have had the opportunity to be able to visit with a few of those folks who run those businesses. And I come from a rural part of the country, and so it is critically important for us to be able to have access to credit, to make sure the bills are paid for those small businesses. I did want to be able to point out that a lot of the credit agencies that I did visit with were pretty compassionate people who are trying to be able to figure out a way to be able to help people actually right their fiscal ship, to maintain their credit, and be able to stand up for them.

Ms. Auchterlonie, if lenders can't collect debt, does that have an impact on the ability of small-business owners and potential homeowners to be able to obtain credit?

Ms. AUCHTERLONIE. Yes, it certainly does. For highly regulated industries like banks, of course, there are limits once you have impaired debts. For small businesses, it is a cash-flow issue. If you don't have the cash coming in, you don't have the opportunity to provide services in advance. And, as we noted, services are the predominant form of debts in debt collection right now.

Mr. TIPTON. Yes, I think it is often easy to forget about some of the practical impacts that can often flow through. I cite back to my business. We used those receivables to be able to pay our employees, who had their debts. It is a little bit of a domino effect to be able to actually deal with it.

And, Mr. Bedard, if you would maybe speak—you were talking about some clarity with my colleague in terms of the rule. Would you speak—I think it would be good for the committee to hear some of that clarity on the proposed rule from Director Kraninger.

Mr. BEDARD. Thank you.

Under the current state of the law, it is not clear how consumers can utilize electronic means of communication to communicate with consumers, especially when those consumers desire those electronic communications.

One of the many things that this proposal does, is it—and I will use his term—it creates the "rules of the road" on how consumers can communicate with debt collectors using electronic methods in ways that satisfy all of us that consumers will be treated fairly. That is what this proposal does. It does it for email. It does it for text messages. We have heard a little bit today about how it does that for phone calls.

And that very clarity is what helps the collection process. It helps consumers. It helps bring access to credit and the cost of credit to consumers in ways that keep the system functioning.

Mr. TIPTON. So, it is a way to be able to collect the debt.

Ms. Auchterlonie, maybe you would like to speak to it as well? What type of borrowers are harmed most when creditors have to constrict credit because of their inability to be able to collect the debt?

Ms. AUCHTERLONIE. The riskiest borrowers.

Mr. TIPTON. Okay. So the people who may need the credit are ultimately hurt the most.

Ms. KUEHNHOFF. The people who are deemed the most risky or the least likely to pay are the ones who first get cut off the credit spectrum.

Mr. TIPTON. Okay.

Ms. Jimenez, did you have any—

Ms. JIMENEZ. I think that is right.

Although I will say that I am not sure—in fact, I don't think access to credit is something that ought to be defended at all costs, in the way that sometimes it is phrased. You know, "This is going to increase the cost or cut off access." Sometimes, it is the access to credit for the riskiest borrowers that actually sinks them further and further into debt and despair. And I think it is that easy access to credit for people, who maybe it was even known by the creditor were unlikely to repay, that actually poses a larger problem.

Mr. TIPTON. Thanks.

Ms. Auchterlonie, you came out of the CFPB. In your view, is the rulemaking in line with work previously done by the Bureau?

Ms. AUCHTERLONIE. Oh, this rule has been in progress for years.

Mr. TIPTON. Okay.

Ms. AUCHTERLONIE. The principal architects are career public servants, at this point, who have operated under several Directors. And, we have been talking about many of these issues and solving these issues for a long time.

Mr. TIPTON. Great. Thank you so much.

I yield back.

Chairwoman WATERS. The gentleman from Florida, Mr. Lawson, is recognized for 5 minutes.

Mr. LAWSON. Thank you, Madam Chairwoman.

And I welcome the witnesses to the committee.

Earlier, there was some discussion about student loan payments and so forth. Young Americans are increasingly accumulating debt for their education and student loans. They will be assessed collection fees in addition to the student loans they already owe. These fees vary, depending on who holds the loans, but they can be anywhere from 18 percent to 40 percent of the outstanding balance. To put it into perspective, to add an extra 40 percent to a student-loan balance of $30,000 would mean that the balance is $42,000.

There is currently no law capping what debt collectors can charge for collection fees on a Federal student loan. In your opinion, should there be a cap? And what percentage should the cap be?

Anyone can respond to that. And I will start off on this end here.

Mr. CHOPRA. Sure. Let's just say, Federal student loans, no one should be defaulting, because there are statutory rights to income-driven repayment, that if you can't afford it, your payment is tied to your income, and it can be as low as zero. Yet our system, how it is administered by the Department of Education under multiple Administrations, continues to favor the contractors over the borrowers and the taxpayers.

We need to completely revamp this system. And I encourage this committee, which has jurisdiction over a lot of these issues—the Treasury Department gave an exception to the Department of Education which is allowing this to go on, and I think the Treasury Secretary needs to rethink that.

But there should not be—this essentially adds insult to injury, and it does not let those people get back on their feet to participate in the economy. It actually is a sentence for them that they will never be able to essentially buy a home or, frankly, even pass an employment verification check.

Rev. GOULD. Thank you, Congressman.

It is not just young people. As a person who went back to school to get graduate degrees so that I could have a professional life in the ministry, I sit here with student-loan debt.

There are various movements across the country from faith-based organizations—I am thinking of the Samuel DeWitt Proctor Conference, with the Micah program that they have that is designed to actually help pastors and preachers who have that kind of student-loan debt.

So, there should be some limitations.

And we also have to talk about the wealth gap and the wealth gap that is disproportionate in communities of color, which then exacerbates the ability to pay.

Mr. LAWSON. Would anyone else care to respond?

Ms. JIMENEZ. Thank you for the question.

I think, like Commissioner Chopra said, we need to overhaul the system. Borrowers need to be able to have rights against their servicers so that their servicers have to do things like timely giving them a loan payment history, and if not, then they ought to have a clear private right of action against servicers for violations of those rights.

And we need to investigate why more white borrowers than Black borrowers are in income-driven repayment programs, which are the repayment programs that Commissioner Chopra talked about that would allow them to be current even if they cannot repay.

Mr. LAWSON. Okay. Thank you.

I want to try to get in one other question. Ms. Jimenez, despite the increased number of payment options available to Federal student-loan borrowers, one in every four borrowers is delinquent and in default on the Federal debt.

I introduced a bill that changes the repayment period on Stafford loans from 6 months to 1 year after graduation. Would you support this change? If not, I would like to hear your feedback on why not?

I have a large number of students in my district, over 100,000. And they, a lot of times, don't have jobs, and they have to start paying at 6 months instead of trying to get a chance to get established.

My time has run out, but I just want a quick comment from you.

Ms. JIMENEZ. I think if we could get—it is not a bad idea. I think, ultimately, if we could get those borrowers in income-driven repayment from the beginning, it wouldn't matter, it would be even more helpful. Because even if they couldn't get a job after 1 year, they would be in zero-dollar payments for however long.

So there are many, many ways that we can do that. It is too complicated to explain how, but—

Mr. LAWSON. Okay. Thank you.

And I yield back.

Chairwoman WATERS. Thank you.

The gentleman from Texas, Mr. Williams, is recognized for 5 minutes.

Mr. WILLIAMS. Thank you, Madam Chairwoman.

I, too, am a small-business owner. I sell and I finance automobiles. I have always tried to collect debts on my own. About 50 years ago, I went to a place called Whiskey Flats, Texas, to a trailer park to collect a payment on a used car I had sold. When I knocked on the individual's trailer, he told me I should leave immediately, and from the sound of his voice, I did just that. As I was walking away from the property, I noticed he had a "George McGovern for President" bumper sticker on his truck that I had sold him. So I figured that he had a little bad judgment, just for that reason. Now, this incident made me realize that sometimes I may need to turn to the pros to get the money that was rightfully owed to my business.

For small-business owners like myself, high accounts receivable balances directly reduce cash flows—it is just simple math—that are necessary to keep the doors open. In an ideal world, everyone would be financially accountable and would pay their debts like you are supposed to. But in a time where we are debating proposals to forgive student-loan debt and to remove negative information from credit reports, we cannot be demonizing this profession that holds people responsible for their financial decisions. As a business becomes more reliant on credit, we need to ensure that we have practical, modern ways to collect this debt.

So, Ms. Auchterlonie, while the new CFPB rule is a significant improvement from the initial iteration, it still misses the mark in some significant areas. Can you give us your opinion on how this proposed rule can be further improved upon?

Ms. AUCHTERLONIE. Thank you, sir.

One of the major criticisms I have about the rule is that it requires debt-collection agencies to provide itemized validation of debt, which requires essentially up to nine new data fields, when they send their letters with debt information to consumers. And for anyone who has ever had to reprogram systems that involve significant data fields, it is a big expense for the industry. And it is even a bigger expense for the creditors who send their collections accounts to debt-collection agencies.

Our concern, principally, is that the small businesses who may right now only send 25 or 30 collection accounts per year won't have the ability to provide this information to the debt-collection professionals, and, thus, they won't be able to hire a professional in order to have the debt collected in that legal, FDCPA-covered manner.

Mr. WILLIAMS. Okay. Thank you.

We have heard about the important function that debt collectors serve in our economy, and, as any industry, there are unfortunately some bad actors that need to be held accountable when they break the law.

However, we have also heard about the confusing and outdated nature of the regulations that have penalized legitimate businesses who think they are doing the right thing and they are hit with frivolous lawsuits.

If this industry had clear guidance on what is expected from the regulators, bad actors would be driven out of the marketplace through competition. That is the beauty of capitalism.

So, Commissioner Chopra, before I continue with my question, are you a capitalist or are you a socialist?

Mr. CHOPRA. I believe in markets, and I am a capitalist.

Mr. WILLIAMS. Thank you very much. So, with that, what effect do you think debt collectors have on the cost of credit?

Mr. CHOPRA. This is actually a market in which normal market forces don't work. Consumers don't get to choose who their debt collector is, so they don't actually have market power to take their business elsewhere. And often, many small businesses actually are outraged when they hear how someone is treating their customers.

So, this is actually an example where regulation helps both legitimate businesses and consumers, because you cannot vote with your feet.

When we think about how we can make the debt-collection industry work, we have to think about what is right for consumers and the honest businesses. Because, right now—and I have seen a lot of debt collectors—they are at a competitive disadvantage because of abuses in the market. So the market simply cannot work.

We should be thinking about honest businesses, about consumers, and a regulation that actually makes sure it is working for them rather than just for the ones who sidestep the law and face no real accountability for it. That is how we will make a market work here.

Mr. WILLIAMS. All right. Thank you.

Mr. Bedard, in your testimony, you mentioned that the CFPB has exacerbated the problems with the debt-collection industry through unfair, agenda-driven enforcement actions.

I have spoken to many businesses around Texas who have been bullied into settlements by this rogue agency so they will not have to spend years defending these costly, politically driven allegations.

Can you elaborate on the statement from your testimony and give us an example of where the CFPB has tried to regulate by enforcement?

Mr. BEDARD. Yes. Thank you, Representative.

The concerns of your constituents are legitimate. There are areas in the law in which there is no clarity about what the proper behavior is.

And when I talk about regulation by enforcement, what we mean is that, instead of creating a rule first and then expecting everybody to follow the rule, what has happened and what we have seen in the past is enforcement actions and investigations, which, you are correct, take years—

Chairwoman WATERS. The gentlewoman from Michigan, Ms. Tlaib, is recognized for 5 minutes.

Ms. TLAIB. Thank you, Madam Chairwoman.

And thank you all so much for being here and for testifying.

One of the things that I, as a Member of Congress, in the first 8 months, just even talking to my residents—we just passed a bill out of this committee, of which I am very proud, and with the wonderful support of our Madam Chairwoman here, H.R. 3622, the Restoring Unfairly Impaired Credit and Protecting Consumers Act, which reduces the debt on someone's credit report from 7 years to 4 years, which is a better indicator anyway, and which would be transformative for so many of our folks that we represent and advocate for.

But our residents are being scammed. And that is the part that I feel like gets missing about collection, is the ones who were unfairly targeted with high interest rates, predatory lending—unfairly, because they didn't know what their rights were before they signed. I feel like there needs to be a better balance in this conversation, in this debate, in this committee. And I feel like that gets lost.

Because I know my residents; they are not buying these expensive cars or these luxury items. It is their lives. They are trying to live. And including those who are starting a business, because it is a dream, it is a way to provide for their children and provide a better future for their family.

So, I want to thank you again for your testimony.

In my district, the 13th District of Michigan, I was really taken aback by a story of a gentleman who served our country. After graduating from college, he joined the military and served our country for a number of years. And upon returning, he faced harassment, literally harassment, from debt collectors that many Americans know all too very well—countless calls, threats. And even more shocking, he was taken to court to settle his student loan debt and so forth. Just dragged into court without any kind of agreements or discussions beforehand.

And so, Commissioner Chopra, I see CFPB as kind of a line to draw that balance, to figure out who are the ones getting abused and who are really scammed into predatory lending, probably what is illegal.

Not all of us can afford to go to court, folks. We can't afford to find a lawyer. Do you know how distressing that is? And I know my colleague from Massachusetts is going to talk about the trauma of that, because it is a trauma. It is something that for my residents, it paralyzes their lives immediately.

I want to talk to you, Commissioner. What do you think the CFPB can do better right now in regulating debt-collection practices around not only student loans but even around the other kind of predatory lending? Where is that balance? Remind us why we even created the CFPB in the first place?

Mr. CHOPRA. I agree with you. The conversation is not about an auto mechanic who couldn't get a bill paid. The reality is that people who owe debt, many of them simply cannot pay or they don't even owe it in the first place.

And that is what is missing about what the original concept of a better debt-collection rule is about. Not just third-party debt collectors; what about the first parties? And what about substantiating the fact that the debt was even owed in the first place?

I have seen it firsthand. Many of these collectors don't even have basic information to show that it is actually owed. And you know what many Americans do? They just pay it, because they are scared about what will happen to their credit, to their employment, and other things.

Ms. TLAIB. Yes, it is bullying. And they are really dismayed because they are like, "Well, this is how much I borrowed. Why is it triple the amount?" You know? They just want somebody to advocate and believe them.

Third-party debt collectors are huge corporations that profit off of intimidation, harassment, and threats to borrowers, even though the 1977 Fair Debt Collection Practices Act prohibits this type of abuse.

Ms. Kuehnhoff, what are some of the predatory practices of loan servicers that you have seen personally? If you can talk specifically about a story that is more shocking that you have—that people need to realize what the human impact of doing nothing—and this sense that this is politicized, and by having the CFPB as the front line of protecting our residents.

Can you talk about a specific case that you think would maybe shed some light on why we need this kind of advocacy within the Federal Government?

Ms. KUEHNHOFF. Sure. Thank you very much for that question, and I think it is important to keep these consumer stories at the forefront of our thinking about this issue.

I am going to really briefly try to recount the story of Ms. H., who had a payday loan that was 7 years outside of the statute of limitations, and was getting harassing calls from debt collectors for months, multiple times a day, back-to-back calls. And even though she was suffering from illness, she continued to be harassed until she finally made an agreement for a payment, which brought that whole debt back within the statute of limitations and subjected her to liability.

And I am going to stop there because my time is up, but thank you for your question.

Ms. TLAIB. Yes. Madam Chairwoman always keeps us on time. Thank you so much. I yield back.

Chairwoman WATERS. Thank you very much.

The gentleman from Georgia, Mr. Loudermilk, is recognized for 5 minutes.

Mr. LOUDERMILK. Thank you, Madam Chairwoman.

And I want to thank the panel for being here today.

This is a very important subject, from someone who has been on both sides of the debt-collection issue. When I was in the military, I experienced some debt-collection calls. Some were just because I didn't get paid very much. And then, there were those where it wasn't me, and they are calling. Ninety percent of the time, though, I said, "It is not me. You have the wrong person." Eventually, they stopped. Then, there are those that are continually harassing. We know that that happens.

On the other side of the coin, as a small-business owner with a struggling business, just getting started, I got a business opportunity with a doctor. We went in and provided him with computer systems, the network, we got his office up and running, and he didn't pay. I didn't want to go to a debt collector, because it is a close-knit community, and we were doing work with other doctors, and you don't want to get a reputation that you are turning it over to a debt collector, et cetera, et cetera.

I changed my mind when I found that the doctor was expanding his office and bought a new car. I went to a debt collector, and they were able to recover the debt. I was the one hurting because I have a small business. I am trying to keep people employed, right?

There are bad players out there. Debt collectors do provide a service. So, what we are trying to do is find a balance, strike a balance. It isn't always that they are the bad guy out there. Somebody borrowed money, somebody owes money, and they are not paying for whatever reason. So, we have to find the right balance.

Ms. Auchterlonie, can you explain what the consequences for lenders and borrowers would be if they did not have appropriate debt-collection practices in place? If we didn't have any type of debt-collection practice, would that not have a negative effect on every borrower, especially those in a lower-income level?

Ms. AUCHTERLONIE. Oh, certainly. I am having images of the movie "Deadwood," actually. No, the FDCPA has put us tremendously far ahead and has been really helpful in the field of regulating debt collection for a very long time. I am looking forward to actual thoughtful regulation that brings it up to date.

Mr. LOUDERMILK. Okay. Because my experience is, when the doctor doesn't pay my office, I have to make up that difference. So I can't pay my employees as much, or I have to charge more to other customers. And we see this.

There is a difference between the first party, the second party, and the third party in debt collection. A lot of times, it is that contractor that just gets a bulk of especially medical expenses. I have experienced that recently from hospital bills from an auto accident, that we didn't even receive the bill, and all of a sudden we are getting the calls. Right? So we know that there are some issues out there.

But aren't the first-party debt collectors already subject to a series of laws governing their debt-collection practices? I am talking about the first party.

Ms. AUCHTERLONIE. Third-party debt collectors have a much stronger regulatory scheme under the FDCPA. The first-party creditors would be subject to what we call the UDAP (unfair or deceptive acts or practices) which have been interpreted very similarly, in many respects, to the FDCPA.

Mr. LOUDERMILK. Okay.

Ms. AUCHTERLONIE. The big difference is that first-party collectors don't need to give them any Miranda notice, they don't have to do the debt validation and some of the more formulaic aspects of the FDCPA.

Mr. LOUDERMILK. Is there a reason that there is a different set of regulations for first-party and third-party collectors?

Ms. AUCHTERLONIE. Many times—and I see this a lot—a first-party creditor wants to maintain the relationship.

Mr. LOUDERMILK. Right.

Ms. AUCHTERLONIE. And, also, if you were subject to the FDCPA and you were making a call that had to say, "This call is from a debt collector; anything you say can and will be used," that wouldn't necessarily be accurate. That mandatory language itself might be deceptive.

So having those really prescriptive terms that are in the FDCPA aren't always appropriate for first-party creditors.

Mr. LOUDERMILK. In the scenario I gave with my business, I would be the first party. I am trying to be conscientious, keep that relationship going too. Hopefully, the guy just forgot.

Ms. AUCHTERLONIE. Right.

Mr. LOUDERMILK. Maybe he is still trying to get things established, would make some payments a long time. So, that makes sense.

Mr. Bedard, is it important for Congress not to establish new policies for first-party debt collectors that conflict with those already-existing requirements?

Mr. BEDARD. Yes, it is important that those rules do not conflict. I think there is universal agreement that both creditors and debt collectors, together, have a regulatory scheme that makes the process from origination to collection as smooth, as efficient, and as kind as possible to consumers. And the avoidance of conflict between creditor rules and debt collector rules, I think, is a necessary ingredient to achieve that.

Mr. LOUDERMILK. Okay.

I see my time has expired. I yield back.

Thank you all.

Chairwoman WATERS. Thank you.

The gentlewoman from Massachusetts, Ms. Pressley, is recognized for 5 minutes.

Ms. PRESSLEY. Thank you, Madam Chairwoman, for continuing to center those issues of concern to the American people on this committee.

A ringing phone is a childhood trauma trigger for me. It is one of the reasons I don't have a landline today. Raised by a single parent who was rarely home, I spent a great deal of time alone at an early age, so early that my mother feared, if authorities knew, they would take me away from her. But as a single mom, unable to afford childcare, she had no other choice. She was gone a lot, working. And we only had each other to rely upon. She was gone, working, to pay the rent on time, to keep groceries and food on the table, to pay for transportation, and, because the school in our community was underperforming, to send me to a tuition-based school.

My mother was a beautiful, bright, prideful woman with a strong work ethic who took pride in paying her bills, and paying them on time. So you can imagine how distressing it was and the shame she felt when she could no longer do that.

There were many disruptive life events, but there are two that immediately come to mind. The first is a major surgery she had, and the second is the death of her mother, who died suddenly and without life insurance.

Consequently, my mother worked and worked, and yet we still owed everybody. We owed the utility company. We owed the landlord. We owed the bank for our car. She owed the school tuition. But the ends simply wouldn't meet, and, consequently, we were faced with eviction notices and the repossession of our car.

Like many children growing up under similar circumstances and stressors, I adulted early. I managed heavy-handed knocks at our apartment door, and I managed debt-collector calls with great skill and sometimes, out of childhood desperation, emotional pleading. I also managed what my mother, without meaning to, projected onto me and what I felt: feelings of fear, vulnerability, judgment, and shame.

My mother often said, "Ayanna, don't worry. God will provide." And provide He did, through her labor, multiple jobs, and late nights spent away from her only child and baby girl. It is my belief and observation that my mother, in fact, worked her way to a premature death.

Our story is the story of millions of families. And that is why I am introducing H.R. 4664, the Monitoring and Curbing Abusive Debt Collection Practices Act, legislation that would require the Director of the CFPB to issue quarterly reports to Congress analyzing consumer complaints about abusive debt-collection practices.

We know that debt collectors are quick to employ aggressive tactics. That is why my bill would prohibit the Director from issuing rules allowing collectors to bombard consumers with unlimited text messages and emails—psychological harassment by any other name.

Research has shown that some student-loan borrowers are finding themselves physically ill as a result of the stress and anxiety associated with their loans, and we have seen an increase in suicide attributed to debt despair.

But there is not only the psychological toll and impact; it is threatening people's very professional livelihoods. In some States, including the Commonwealth of Massachusetts, there are laws on the books allowing a State to suspend and even revoke a professional license due to a defaulted student loan.

Commissioner Chopra, can you speak more to this practice, please?

Mr. CHOPRA. Yes. In 1990, the Department of Education started pushing States to pass these laws, because the assumption was that people could pay. And now we are seeing teachers, nurses, and so many other professions losing out on being able to actually earn an income to pay their debt.

This is a completely antiquated and backwards way of thinking that assumes that debtors are villains and, instead, wants to punish them, rather than actually helping them get on their feet.

Ms. PRESSLEY. Thank you, Commissioner.

Now, not only are these debts literally forcing people out of jobs and making you ineligible to work in your field, the collections industry can wield the criminal justice system to go after consumers as well. Representative Tlaib was speaking to some of this.

So, Professor Jimenez, there seems to be an increase in the industry's reliance on small claims court, particularly in States that do not have strong consumer protections. Yes or no, are criminal charges a possibility in cases of debt nonrepayment?

Ms. JIMENEZ. A form of—jail is possible.

Ms. PRESSLEY. How can a charge like contempt of court hurt a consumer's ability to secure future jobs or financing?

Ms. JIMENEZ. They can actually be sitting in court, like Mr. Okoroafor was, until somebody bails them out by paying whatever the debt is, regardless of whether they had defenses against that debt. And it can be in a criminal record.

Ms. PRESSLEY. Ms. Kuehnhoff, in more recent years, the U.S. Treasury has been seizing the—okay.

All right. Thank you, Madam Chairwoman.

Chairwoman WATERS. The gentlewoman from New York, Ms. Ocasio-Cortez, is recognized for 5 minutes.

Ms. OCASIO-CORTEZ. Thank you, Madam Chairwoman.

And I would like to thank all of our witnesses here today.

This is an extremely important issue, and I think, as my colleague from Massachusetts just described, this is a matter of life and death. And it has been a matter of life and death for our communities back home in New York, for my constituents in particular, especially when it comes to a very specific issue that Ms. Bhairavi Desai articulated earlier in her opening statement.

And I want to thank you for drawing attention to this issue and for being here representing New York taxi workers.

I sent a letter, along with several of my colleagues from New York, on August 1st, expressing my concern over the role of regulators supervising banks and credit unions involved in predatory lending and collection practices that has led many taxi drivers, including some of my constituents, to suicide. This, I think, is a matter of financial malpractice and predatory behavior that I think, in many ways, should be a national scandal. It is literally killing people. To date, we have only received two responses from those agencies.

Ms. Desai, in order for a person to own a cab, a taxi cab, in New York City, you need to own a taxi medallion, correct?

Ms. DESAI. In order to operate the car for service, you need a medallion.

Ms. OCASIO-CORTEZ. Correct. And these medallions are sold on the open market through auctions where New York City usually sets the opening bid, right?

Ms. DESAI. That is right.

Ms. OCASIO-CORTEZ. At the last auction in 2014, the City of New York set the opening bid at $800,000 for a taxi driver, correct?

Ms. DESAI. That is right.

Ms. OCASIO-CORTEZ. And the price in 2002 was $200,000. It skyrocketed to $800,000 just 12 years later. How did that happen?

Ms. DESAI. There was really a concerted effort between the lenders and the middlemen, called taxi brokers, and several government agencies. The City of New York, from 2004 to 2014, made $850 million from these auctions. I remember after 9/11, when the economy started to crash, the Bloomberg administration, at the time, had said they would auction off medallions in order to balance that budget.

Ms. OCASIO-CORTEZ. Thank you, Ms. Desai.

I think one of the things that is so important for people to realize is that these are everyday people, most of them immigrants, in New York City, trying to start their lives and live up to our country's promise.

And loans of almost a million dollars were given to drivers who are only making, sometimes, $30,000 a year. Is that correct?

Ms. DESAI. That is correct.

Ms. OCASIO-CORTEZ. I have three documents, three reports, from The New York Times on this scandal, and I would like to seek unanimous consent to submit them for the record.

Chairwoman WATERS. Without objection, it is so ordered.

Ms. OCASIO-CORTEZ. I would also like to submit for the record a document that was provided to us by one of our drivers, Mr. Mohammed Hoque.

Chairwoman WATERS. Without objection, it is so ordered.

Ms. OCASIO-CORTEZ. It shows his actual statement of a million-dollar loan given to him. And his tax records show that in 2012, he was only making $22,392 a year; and in 2013, $23,269 a year.

He was given a million-dollar loan while making $20,000 a year, and we are supposed to act as though this is his fault? This is criminal behavior.

And it has not just happened to Mr. Hoque; it has happened to immigrant taxi drivers all over the City of New York. Regulatory agencies knew. The City knew. And these suicides are not just an indirect side effect, they are a direct consequence of the neglect of a vulnerable community in New York City.

In fact, we have accounts right here reported by The New York Times. One of the drivers drove in front of City Hall himself, wrote a note on Facebook saying he could not continue to live, and killed himself right in front of City Hall. And we are ignoring this crisis.

These taxi drivers need a bailout, because this is not just about predatory collection practices, as I was discussing with my colleague here. This is manufactured financial indentured servitude. And it is wrong. We need to bail out these drivers.

And I would like to invite my colleagues here on the Federal level and our partners on the city level to make sure they get the justice they deserve.

Thank you very much.

Chairwoman WATERS. The gentlewoman from California, Ms. Porter, is recognized for 5 minutes.

Ms. PORTER. Ms. Auchterlonie, I want to read you a few statements about debt-collection rules and see if you would agree that they are consistent with your testimony.

"I believe that everyone—this is a quote—in this room shares the same ultimate goal: to end abusive debt collection in the market. Debt-collection abuse is a stain on an industry that has served consumers extraordinarily well."

Ms. AUCHTERLONIE. Agreed.

Ms. PORTER. "Debt-collection laws create a tremendous compliance burden for companies. In the best-case scenario, these burdens increase the cost of lending for consumers. In the worst case, they chase legitimate debt collectors out of the jurisdiction altogether."

Ms. AUCHTERLONIE. I don't necessarily agree with that.

Ms. PORTER. Why not?

Ms. AUCHTERLONIE. I think the debt-collection rules are essential in order to even out the marketplace.

Ms. PORTER. You do not think they create a compliance burden?

Ms. AUCHTERLONIE. Certain compliance is necessary.

Ms. PORTER. Okay. Thank you.

"While unintended, the proliferation of diverse laws has created enormous compliance burdens for debt collectors, the costs of which are necessarily passed on to borrowers, increasing the cost of credit."

Ms. AUCHTERLONIE. I think that yes, it can happen.

Ms. PORTER. Thank you.

What if I told you that the quotes I just gave were about mortgage lending, and I substituted the words, "debt collection," for "mortgage lending," and that the quotes I just read to you were from testimony provided by mortgage bankers in 2005, a few years before the crisis. They sat where you are sitting, before this very committee, convincing lawmakers to block legislation to rein in predatory consumer practices.

At the same time those mortgage bankers were here trying to get legislators off their scent, I was also testifying before this committee, trying to get the mortgage abuses and the robo-signings stopped.

Your firm represented a lot of those mortgage lenders, and you are here today on behalf of the debt-collection industry. Why should this committee find your arguments and positions on abusive debt collection credible when you are just recycling the same, tired arguments that we hear from industry over and over again?

And I illustrate—

Mr. ZELDIN. Madam Chairwoman, I raise a point of order.

Ms. PORTER. Please pause my time.

Chairwoman WATERS. A point of order has been raised.

Please do not raise your board. We have talked about this before. Thank you. Please continue with your testimony.

Ms. AUCHTERLONIE. So one of the things—

Ms. PORTER. Excuse me.

Ms. AUCHTERLONIE. —that we talked about—

Ms. PORTER. Excuse me.

Ms. AUCHTERLONIE. —is that—

Ms. PORTER. Reclaiming my time.

Ms. AUCHTERLONIE. Oh, sure.

Ms. PORTER. Parliamentary inquiry. What is the point of order being made?

Mr. ZELDIN. Madam Chairwoman, Clause 6 of House Rule XVII prohibits the use of dynamic displays as exhibits. Members are authorized for 5 minutes in hearings to hear from and question witnesses. If the committee allows whiteboards and other dynamic displays, Members can more easily manipulate the data or information in an exhibit to obtain a response that all but eliminates the witness' objective point of view and replaces it with their own. These displays are prohibited on the House Floor and should not be allowed in committee.

Ms. PORTER. Madam Chairwoman, may I respond?

Chairwoman WATERS. The gentleman is correct. Dynamic displays are not permitted.

Ms. PORTER. Madam Chairwoman, that is a rule that pertains to the House Floor, not a rule that pertains to this committee. Are we adding additional committee rules at this time?

Chairwoman WATERS. The House rules do apply.

Will the gentlelady continue with her—

Ms. PORTER. Yes, Madam Chairwoman.

I realize it is difficult for you to see, but if you could direct your attention over to that "financial services bingo" board, these are all arguments that I have heard over and over and over again in my career: frivolous lawsuits; balance costs and benefits; these are just inconsequential violations; we are going to reduce the supply of credit; there are going to be unintended consequences if we regulate.

And these are all terms that came out of your very testimony before this committee today.

You said that the debt-collection industry was—in your testimony, that it is a caring profession.

Ms. AUCHTERLONIE. Yes.

Ms. PORTER. A caring profession.

[Video shown.]

Mr. ZELDIN. Point of order, Madam Chairwoman. Point of order.

Chairwoman WATERS. The gentleman raises a point of order. What is your point of order?

Mr. ZELDIN. What was just getting played?

Chairwoman WATERS. I have no idea. The Chair was not advised of any attempt to present in any shape, form, or fashion statements, testimony, or questions by something other than her voice.

Will the gentlelady please refrain from disrupting this committee? Please continue with—

Ms. PORTER. Madam Chairwoman, I would like to lodge my own point of order.

I am not required to provide my testimony in advance to this committee. I am making an oral statement. Others have used the same technique in other committees.

Chairwoman WATERS. The gentlelady is out of order.

Would you please continue with your testimony?

Ms. PORTER. If you are not familiar, that was a clip from the movie, "Maxed Out," in which the debt collector talks about walking consumers out to the end of the plank, just like a pirate.

I had another clip that I am unable to play because of the chairwoman's objection, that describes the way in which debt collectors identify neighbors and family members and seek them out, and that that is the most effective technique they have to collect debts, which is legal under the current law, because it humiliates and shames debtors into paying.

Ms. Auchterlonie, does that sound caring to you?

Ms. AUCHTERLONIE. I was—

Mr. ZELDIN. Madam Chairwoman, point of order.

That question started with an audio that I did not—we can't assume that all of the witnesses understood what the audio said at the beginning of that question. We can't assume that all members of the committee understood what the audio said at the beginning of that question. It was a faint audio. I didn't hear the words, myself.

Point of order.

Chairwoman WATERS. The gentleman has raised a point of order relative to the origin of the question.

The gentlelady has 1 minute and 14 seconds left. I would ask the gentleman to disregard—or to not put forward his point of order, and allow the gentlelady to finish with the question. I think that would save us time and energy.

Ms. AUCHTERLONIE. I would take issue with the fact that those types of tactics are legal. They are certainly illegal. And I think everyone on this panel agrees that illegal conduct and that, sort of, cowboy debt collection needs to stop and needs to be vigorously enforced. I have done it myself, personally, when I was at the CFPB, and I continue to believe that that is the CFPB's role.

Ms. PORTER. Reclaiming my time for one second, Ms. Auchterlonie, are you suggesting that it is unlawful under current law to contact someone's neighbors or families, for a debt collector to do that?

Ms. AUCHTERLONIE. It is only lawful under specific circumstances of acquiring location, and it is very specific about what they can say. It is not to be for harassment.

Ms. PORTER. Okay. So you don't believe that practice, as currently permitted by law, is abusive?

Ms. AUCHTERLONIE. The FDCPA specifically says how you are supposed to do it, and if agencies are following those instructions, then it is not abusive.

Ms. PORTER. Thank you.

With that, I yield back.

Chairwoman WATERS. The gentlewoman from North Carolina, Ms. Adams, is recognized for 5 minutes.

Ms. ADAMS. Thank you, Madam Chairwoman. Thank you for convening this hearing.

And to all of our witnesses, thank you very much for being here, and for your testimony.

Reverend Dr. Gould, can you talk about how communities of color are disproportionately affected by excessive communication and harassment from debt collectors?

Rev. GOULD. Absolutely. Serving a Historically Black Church in an African-American community, and often being a person who is contacted to help people, but it is not just my own experiences. There is credible research.

In my opening, I talked about the National Consumer Law Center that reports in the State of Missouri, a State that has 83 percent white residents, 65 percent of the 31 percent of people in debt collection are people of color.

And so part of the issue is this wealth gap that we have, and communities of colors by and large are victim to divestment. People are not investing in our communities. They are continuing to extract wealth and bar people from actually being able to have access to the same earnings that their white counterparts have.

Ms. ADAMS. Okay. So what initiatives have churches and community organizations undertaken that can help break these debt trap cycles for the most vulnerable communities that you make reference to?

Rev. GOULD. There is an organization, RIP (Rest in Peace), in New York. Since 2018, they have had 18 churches that have actually eliminated $34.4 million of debt from people who live at or below the poverty level. I mentioned the Samuel DeWitt Proctor Conference, which is an organization that is a social justice conference of the African-American churches, and it is also positioning itself to be able to buy debt to alleviate the burden.

In my own State, a beloved sister and colleague, Reverend Traci Blackmon, is currently in a project with other United Churches of Christ to actually eliminate debt and buy the debt in her ZIP Code of people who live below the poverty level.

So faith communities are certainly doing our part, but it is also not our part to eliminate bad policies that actually burden consumers.

Ms. ADAMS. Yes, ma'am. Thank you very much.

The leading cause of bankruptcy in the U.S. isn't credit card debt, motor vehicle loans, or student loans; it is unpaid medical bills.

So, Ms. Kuehnhoff, which financial assistance policies do you recommend that Congress create, modify, or enforce to assisty the 43 million Americans who are struggling under medical debt?

Ms. KUEHNHOFF. Thank you for this important question, Representative.

I think that, first, I am primarily speaking from the debt collection side, but I do want to say that obviously solutions to expanding and improving health insurance are critical for addressing this problem, but I am going to give some solutions on the debt side of things, once medical debts exist: dealing with surprise medical bills in a way that holds consumers harmless for these disputes between insurers and providers; improving the financial assistance policies that are already provided for under the ACA (Affordable Care Act); there is a provision that requires nonprofit hospitals to provide financial assistance policies, but that provision doesn't give any specifics.

There is no minimum amount of financial assistance, no guidance as to who should be eligible. There are no requirements on for-profit hospitals. There are no private remedies under those provisions to enforce these rules. And there is no statement that underinsured people should be covered.

So, all of these improvements.

Ms. ADAMS. Thank you very much.

I want to ask a question about the student debt.

Commissioner Chopra, how can existing law protect students of color from being disproportionately targeted by debt collection lawsuits? We have 20 seconds.

Mr. CHOPRA. There are too many lawsuits that are being filed by the Department of Justice against defaulted student loan borrowers, and data shows that overwhelmingly is targeting those who live in ZIP Codes that are disproportionately minority. And I think we need to fix that.

Ms. ADAMS. Great. Thank you very much.

Madam Chairwoman, I yield back.

Chairwoman WATERS. The gentleman from Tennessee, Mr. Rose, is recognized for 5 minutes.

Mr. ROSE. Thank you, Chairwoman Waters.

I think it is important that, when possible, people fulfill their financial obligations, because when that doesn't happen, those costs are borne by someone else, by a small business in a local community or by a taxpayer who did meet his or her own credit obligations.

That said, as many of my colleagues have rightfully pointed out today, our regulations are outdated and no longer adequately serve those who need our help.

Technology exists today that did not exist in 1977 or 2006 or 2010. And in 10 years, there will be technology, no doubt, that will exist that does not exist today.

So while I believe some work remains in the CFPB's proposed rule, the longer we wait to act, the worse the problem will get.

I support the CFPB's efforts, but I do believe some important concerns have been raised about flaws with this rule, concerns I hope will be addressed.

Last week, the Small Business Administration's Office of Advocacy submitted its comments on the proposed rulemaking, and one of the concerns mentioned was with the validation notice. The office is concerned that, given the amount of medical debts collected, itemization could not only be difficult and unworkable, but it could also violate HIPAA (the Health Insurance Portability and Accountability Act).

Mr. Bedard and Ms. Auchterlonie, as attorneys who have operated in this space for some time, might this be a concern the CFPB would have to address to move forward?

Ms. Auchterlonie, if you would go first?

Ms. AUCHTERLONIE. Yes, we believe so. And in the comments that I helped write, directed towards the Bureau on their rule, we spent quite a bit of time educating them on the HIPAA applications, specifically because medical debt that is in collection is estimated to be between 47 and 58 percent of the outstanding third-party debts in the country. So, there are certainly HIPAA issues.

Mr. ROSE. Mr. Bedard?

Mr. BEDARD. I agree with those statements and with the comments that were provided.

Mr. ROSE. Are there ways to address wanting a more detailed itemized validation notice without having to amend HIPAA-permissive disclosures to include the information requested by the CFPB?

Ms. AUCHTERLONIE. One of our suggestions was that collectors have a little bit more flexibility to provide the names of creditors. And this would apply not just in the medical categories, but also financial services and other categories, because the proliferation of debt purchasing means that the institution that owns your account may be this third-party debt buyer that, when you get the letter, you don't recognize their name.

But it would be really helpful for consumers in understanding that they are actually being asked to pay for a debt that was originated by some bank or some dentist office or some creditor that they actually recognize.

So we ask for the flexibility for debt collection agencies to provide more of a description of the chain of title of the debt, which I think would also reduce a lot of the complaints that, "this debt is not mine," or "they are collecting an account that I don't own," which is really a confusion complaint and not necessarily a malfeasance complaint.

Mr. ROSE. Mr. Bedard?

Mr. BEDARD. Those specific things that Sarah just mentioned help consumers understand better who is contacting them, why they are being contacted, and the debt for which they are being contacted.

Mr. ROSE. Thank you.

Another concern raised by both the Independent Community Bankers of America (ICBA) and the Community Financial Services Association of America (CFSA) is regarding the call limitations. As ICBA notes in their comments, activities should not presumptively be deemed harassment if a debt collector wants to follow up with a consumer.

Mr. Bedard, Ms. Auchterlonie, is there a scenario where a consumer who has fallen into collections could benefit from a phone call or an email communication from a debt collector?

Mr. BEDARD. The answer is yes, especially for those consumers who may not even know that they have an account that has fallen delinquent or in default. A text message, an email, or a phone call is welcome to those consumers who are concerned about their accounts and they are interested in keeping abreast of what is happening on their credit. So the answer is, yes, it is very helpful for consumers to receive those kind of communications.

Ms. AUCHTERLONIE. And I would also add that when you are in the process of negotiating some sort of long-term payment arrangement, that often takes a couple of different calls, particularly if you are going to get bank account statements or need to talk to a spouse and whatnot.

Mr. ROSE. Okay. Thank you.

I yield back.

Chairwoman WATERS. Thank you.

The gentlewoman from Pennsylvania, Ms. Dean, is recognized for 5 minutes.

Ms. DEAN. Thank you, Madam Chairwoman, and I thank you for convening this important hearing on debt collection practices.

As I am sitting here, I am reminded of a constituent of mine, whom I believe is 100- or 101-years-old, a friend and a constituent, but he is a wonderful man, and he has talked to me for the last 10 years about something he would like to talk about. He said we name all kinds of ills in our society. We name the ill of racism. We name the ill of sexism and many other "isms." He said it is time we named "poorism," because how we treat the poor reflects how we treat the most vulnerable among us.

So, I try to use the word, "poorism." I am hoping it will catch on, on behalf of my friend, because he is darn smart.

I want to talk about something that you have talked about, Commissioner, and as most of the witnesses have talked about. With student loan debt at the rate of $1.5 trillion in this country, it is saddling our young people, it is stymieing our economy. And, of course, so many young people falling into default, delinquency. And, as you say, they look like they are the bad guy, and they are not the bad guy.

Commissioner Chopra, given your experience as the former CFPB Student Loan Ombudsman, I am wondering if you could tell me what you saw in that capacity, and if you could reflect on the fact that that space was left empty by this Administration, for I think as much as a year. What impact might that have had on protecting our student loan debt holders, that may be connected to this proposed rule.

Mr. CHOPRA. I appreciate the question.

One of the things that was terrific about what the CFPB did is we not only looked at facts and figures, but we listened to voices very clearly. And to hear about student loan borrowers who were ashamed to go back home for Thanksgiving, who felt that there was a specter over their future because of how they were being treated, I think that it hits us in the gut about what is going to happen to that person's future and, frankly, how does that affect all of us?

One of the things we are going to need the CFPB to do—it is the primary regulator of the student loan industry, so if it turns a blind eye or if it helps cover up wrongdoing, that is not just a disservice to borrowers, it is really a disservice to our American brand and our American Dream.

If people can't go to college and get ahead and instead they are worse off, if we see that minorities and women have to borrow more and then in the workforce earn less, that is just a road to disaster for all of us.

And I hope that every regulator, State and Federal, can be aggressive in cracking down on abuses.

Ms. DEAN. I thank you so much for your work in this area, and for your testimony today.

And then I wanted to turn to you, Reverend. You offered in your opening statement that you would be happy to tell some of the authentic stories that you have had to listen to, pastor to, in both of your careers, in all of your careers. And I think of the beatitudes and blessed are the poor.

Would you mind sharing with us some of those stories? I am thinking maybe whether it has to do with minority debt, whether it has to do with payday lending, or any other kinds of predatory practices.

Rev. GOULD. Certainly. And thank you for the questioning and this framework of "poorism."

I have heard testimony of people talking about—it was the doctor who bought a new car. That is not the people that I talk to, and not the people that other faith leaders encounter on a daily basis.

I'm thinking about a young woman by the name of Jennifer who lives in Springfield, Missouri. Jennifer has multiple medical problems, and receives disability. Her husband works a low-wage job at KFC. They have five children, which includes a couple of her sister's children. I think her sister passed.

Jennifer took out a payday loan to fix her car. Springfield is approximately 4 hours from St. Louis, and she was having a medical procedure and they needed reliable transportation so that she could get to St. Louis, and her family would be able to get back and forth while she was there. It was a payday loan of $500. They paid it back the best they could for 2 years and still had not finished paying it back.

And one of our programs, a program that was spurred out of Missouri Faith Voices, University Hope, a couple of churches who put some money together, ended up buying that debt. And Jennifer, the shame that she suffered and actually still suffers, and they paid it off in 2017, she went before the CFPB to share her story and was very proud of her ability to do that, but she still calls me, and inboxes me about the struggle of just being poor.

Her son turned 16 on the 25th, and because they have more car issues, she was not able to buy him a card or a cake or anything. So, some pastors helped her with that.

But that is the reality of people who are struggling because of the extraction of wealth and income out of the poorest communities.

Ms. DEAN. Thank you for sharing Jennifer's story, and tell Jennifer we are thinking of her.

Chairwoman WATERS. The gentleman from Wisconsin, Mr. Steil, is recognized for 5 minutes.

Mr. STEIL. Thank you, Madam Chairwoman, and thank you for holding today's hearing.

Ms. Desai, I appreciate you coming in and sharing your story today. In your testimony you noted that between 2004 and 2014, with the sale of medallions in New York City, that New York City made $850 million. Is that accurate?

Ms. DESAI. Yes, that is right.

Mr. STEIL. And at the last auction, they were being sold for $800,000 each?

Ms. DESAI. The opening bid.

Mr. STEIL. The opening bid. So in some instances, they are selling them beyond $800,000. The opening bid was $800,000. I appreciate you clarifying that for me.

In other words, the elected officials in New York City created a really expensive barrier to enter the market, generating enormous profits for City Hall on the backs of average American workers who are looking to enter the taxicab industry.

To me, it didn't have to be this way. If the medallions were sold to drivers who met reasonable certifications standards, we wouldn't have seen this cost drive all the way up. But effectively, in New York City, elected government officials made this decision, to the detriment of many of your members.

I am sympathetic to the hardship that many of your members are experiencing today. I appreciate you highlighting this. I know my colleague from New York had comments on this earlier, the significance of this issue.

I think, when I walk away from this, watching what New York City did in creating, in effect, a legal monopoly, driving the costs up well outside of what market rates would have been if the government didn't get involved and create a legal monopoly, is a real lesson to be learned for other government jurisdictions to not get themselves involved in the private sector in creating government monopolies and driving costs up, which would have avoided a lot of the problems that we are seeing here today.

So, I appreciate you coming and sharing that part of the story today.

I want to shift gears just a little bit to Ms. Auchterlonie.

One of the proposals discussed today would classify small business loans as personal loans for the purpose of the Fair Debt Collection Practices Act. Could you provide a little detail as to the effect that that would have on credit for small businesses?

Ms. AUCHTERLONIE. I think there is a lot of nuance to it, and, in fact, there are a lot of small businesses that end up getting personal loans in any case because they don't have enough credit or enough history as a business, so they have to rely on the personal wherewithal of the borrower. So, there is a little bit of that happening already out there in the marketplace.

In some sense, it may make some of the small business borrowing more transparent and straightforward. I do think that you would have to really parse through the Truth in Lending Act to determine which provisions of it apply to small businesses and which provisions are specifically consumer-oriented.

It is a long Act. It is very complicated. I would not recommend doing this in a couple of days. And I would also say, consult with as many experts as you can in doing so.

Mr. STEIL. Thank you very much.

Mr. Bedard, any additional comments on that topic?

Mr. BEDARD. No more, other than to emphasize the importance of the consistency between Truth in Lending and all of the other regulations that we know industry needs to comply with, including the Fair Debt Collection Practices Act, and others. Consistency among them is not an overnight proposition, as she just mentioned.

Mr. STEIL. Thank you very much. Thank you for your testimony today.

I yield back.

Chairwoman WATERS. Thank you.

The gentleman from Illinois, Mr. Garcia, is recognized for 5 minutes.

Mr. GARCIA OF ILLINOIS. Thank you, Madam Chairwoman, and, of course, thank you to all of the witnesses who are here today to further enlighten us about this pressing issue.

I would like to ask a question about zombie debt. Under the CFPB's proposed rule, debt collectors can trick consumers into initiating a debt payment on debt that previously sat outside the statute of limitations.

This is in contravention of many State protections. For example, in my home State of Illinois, the statute of limitations on most credit card and medical debt is 5 years.

What's worse, under the proposal, debt collectors are prohibited from filing or threatening a lawsuit if the collector knows or should know that the legal time limit to sue has expired.

So, I have a few questions.

Ms. Kuehnhoff, under what types of circumstances should the CFPB find a debt collector should have known that a debt was so old that it could not be pursued in court?

Ms. KUEHNHOFF. Thank you so much for your question. This is an important issue.

I want to first say that I would strongly argue that the CFPB should have a strict liability standard for being held responsible instead of a "should know," whether you knew or should have known.

However, if the CFPB does move forward with a "know or should have known" standard, then I would argue strenuously that if there is, for example, documentation that the debt collector didn't bother to obtain about the debt that would have shown that the debt was time-barred before they sued, they should be held responsible, because they should have known because they should have obtained that documentation.

I think this gets back partly to the substantiation issue as well that we have been talking about.

Mr. GARCIA OF ILLINOIS. As a follow-up, what sorts of evidence would show that a debt collector knew that a debt was so old it could not be pursued in court?

Ms. KUEHNHOFF. I think that this would get to the records that the debt collector has about the account, whether or not they have documentation. They would certainly have information that was transferred through a database or some other mechanism, that would talk about things like, typically, the date of last payment, and potentially other dates, if those are known.

Mr. GARCIA OF ILLINOIS. Commissioner Chopra, any insights as a former member of that board?

Mr. CHOPRA. One of the things I will add is we also need to think about Wall Street and debt buyers and the rising set of hedge funds that are purchasing a lot of this old debt, creating instruments and also assigning them to create value, as they say. You can buy some of this stuff for a half a penny on the dollar, and you make a 100 percent return if you can get one cent on the dollar.

So, we really have to track where is all of this debt flowing around and what are the incentives that we have to attack in order to make sure that people aren't being abused by some of the concerns you are raising?

Mr. GARCIA OF ILLINOIS. Thank you for getting the macro problem of indebtedness out there.

Last question, Ms. Kuehnhoff, many debt collectors work on a contingency basis under which fees increase with the age of the debt. In light of this fact, do you agree that this makes zombie debt more lucrative to debt collectors than newer debts?

Ms. KUEHNHOFF. I think that the rate of return would also depend on how many people pay. So if you are getting paid more per debt that is older, you would still need to convince people to pay them.

But certainly there can be problems with incentive structures, and we have called for a prohibition on the collection of time-barred debt because we think that there are a lot of concerns about not having information and documentation to prove that this amount is owed, and to make sure that you are collecting from the right person, and collecting the right amount.

So, I would be concerned about aligning incentives to encourage collection of potential accounts for which you don't have documentation.

Mr. GARCIA OF ILLINOIS. Does the proposed rule create an incentive for creditors to pursue old debt?

Ms. KUEHNHOFF. I think that by deviating from the strict liability standard, it creates an incentive to attempt to not know what the—whether or not an account is time-barred. Again, we would argue for a strict interpretation.

Mr. GARCIA OF ILLINOIS. Thank you.

I yield back, Madam Chairwoman.

Chairwoman WATERS. Thank you.

The gentleman from New York, Mr. Zeldin, is recognized for 5 minutes.

Mr. ZELDIN. Thank to you all of the witnesses who are here. And thank you to the chairwoman and the ranking member for holding today's hearing.

Before I get into some of my remarks with regards to this issue, the primary issue at hand with the list of bills being considered, rules being considered here under the committee, I just wanted to specifically touch on the issue with regards to the medallions.

I want to lend my support and concern for those who are weighing in, the lessons to be learned with regards to the rise of value and then the fall in the value of the medallions, the people who are hurt drastically in that process because of decisions made by people inside of government and out of government.

I was in the State Senate before I came here. I saw some of the decisions made up in Albany, artificially increasing and ultimately leading to the collapse that we saw of the medallion pricing.

So it is an issue that I am pleased to see in front of the committee today. I lend my support to any of my colleagues on the other side of the aisle who would be interested in working together on whatever would be appropriate here in Congress.

While no industry is immune from bad actors, debt collection agencies can provide practical options to help consumers pay off their debt. On Long Island, many of the debts being serviced by debt collectors are held by small, independent businesses that do not have the means to collect on their own debt. To have a financial system that works, both businesses and customers need to hold up their end of the bargain.

Businesses will not be able to extend credit to or provide goods and services for our nation's job creators and consumers without being repaid. However, borrowers should not be harassed or treated with harm in any debt collection practices. That is why it is important that the CFPB proposed its rule on debt collection under the Fair Debt Collection Practices Act (FDCPA).

Modernization of the FDCPA is long overdue; and this is a step in the right direction, helping to protect consumers from harmful debt collection practices.

Open communications between borrowers and debt collectors is key to a fully functioning credit system. The existing data collection rules are outdated and fail to take into account advances in communication technology.

When the FDCPA was passed in 1977, email and text messages were not even in existence. I haven't met many millennials who prefer to communicate via letters in the mail or a phone call over receiving an email or text. It is absurd that the guidelines for this industry are stuck in the 1970s.

Rules of the road for clear, modern communication are good for both consumers and businesses. Overly burdensome restrictions on debt collection practices can ultimately hinder consumers' ability to access credit products and make them more costly for everyone.

Ms. Auchterlonie, there have been many who argue that the CFPB's proposed rule will open the floodgates to abusive emails and text messages from the debt collection industry. Is that a valid concern? And are there any compliance steps that have to be completed to send emails and texts?

Ms. AUCHTERLONIE. Right. The text of the FDCPA itself prohibits abusive communications, all communications, and that is not just telephone but all communications. So, we have that inherently built into the statute.

But in addition to that, we also have the specific rules that the CFPB implemented that require opt-out mechanisms, and it is the same sort of opt-out mechanisms you get with commercial or store emails and so on. So, there is an opportunity for consumers to choose the medium in which they communicate with their collection agency.

Mr. ZELDIN. And I concur with a comment that was made a little bit earlier by my colleague from Kentucky, Mr. Barr. He was sharing his thoughts on, if you incur a debt, you have an obligation to pay it back.

And as I pointed out, a lot of the debts owed where I am from in the First Congressional District of New York are owed to small businesses, and they are desperately relying on being able to have those obligations fulfilled in order to be able to pay their bills and to be able to stay in business.

It is an important philosophy, I think, for us to understand that key part of it, and that there are debt collectors who, just like every other industry, give their industry a bad name by abusing the rules of the road, and at the same time, there are some debt collectors near and around New York 1, my congressional district, who follow the rules and, when you change the rules, they will follow the new rules. They are doing a good job, responsibly representing their industry, and I think it is also important that we work to have the right rules for them.

I yield back, and I again thank the Chair for holding today's hearing.

Chairwoman WATERS. Thank you very much.

The gentlewoman from Texas, Ms. Garcia, is recognized for 5 minutes.

Ms. GARCIA OF TEXAS. Thank you, Madam Chairwoman, and thank you for this hearing today.

I want to apologize to all of the witnesses. I did have to step out for a competing committee hearing on ICE detention centers that the Judiciary Committee was holding. But what really strikes me is how the 2 hearings are really kind of related, because there, we were talking about detention and the almost incarceration-like facilities for basically poor people and vulnerable populations and here, we are talking about debt collection of, as you said, Reverend Gould, the poorest of the poor.

So I am going to focus on racial disparities in debt collection as it impacts poor people. And, Ms. Jimenez, I wanted to start with you.

Can you talk about the relationship between the racial wealth gap and how it contributes to these debt collection practices? Because especially when we go to the courts, it hurts poor people more, doesn't it?

Ms. JIMENEZ. Absolutely. And I thank you for that question.

The racial wealth gap is something that obviously transcends debt collection. The financial position of African Americans, in particular, in this country is a product of obviously a lengthy history, beginning with slavery, exclusion from holding property and government land grants, discrimination in housing, and a litany of exclusionary policies that hindered access to home ownership and wealth building.

And so we have a situation where the median wealth of white households is 13 times the median wealth of Black households, and people of color, African Americans in particular, face basically a perfect storm of events that lead them ultimately to be collected upon, called, sued, and have judgments against them far more than their white counterparts.

Ms. GARCIA OF TEXAS. Wages garnished.

Ms. JIMENEZ. Yes, all of that.

Ms. GARCIA OF TEXAS. Do you have numbers for what the impact is on the Latino population?

Ms. JIMENEZ. I'm sorry?

Ms. GARCIA OF TEXAS. Do you have numbers for the Latino population? Are they similar, or the same?

Ms. JIMENEZ. The Latino population numbers are similar, not as stark, I guess I would say.

Ms. GARCIA OF TEXAS. Again, in another hearing that we had earlier—this is like my eighth hearing this week, so I forget which one it was—but we talked about how long it would take an African-American woman to kind of catch up with the wealth gap. And I was just completely blown away. It would take an African-American woman 100 years, and Latinas 200 years. So, none of us here will benefit from any of that. In fact, I think it probably just gets worse.

Reverend Gould, I am going go back to you. Like you, I don't wear the collar, but I am a woman of faith, and for me it is about making sure that people don't get poor. I still remember a consumer advocate commentator in one of the local broadcast stations in Houston who always used to close his program with, "It is hell to be poor." Sure is, isn't it?

What can we do to help to lift up those communities, particularly when it comes to payday lenders?

Rev. GOULD. I think we have to take—we have to actually own all of the history in this country, own what 400 years of enslavement has done to African Americans and our communities. I really think the reparations conversation is a part of this conversation as well.

Ms. GARCIA OF TEXAS. We have had a hearing in the Judiciary Committee.

Rev. GOULD. Yes.

And so, it is all connected. I spoke earlier about the community of Ferguson, outside of St. Louis, a community that is 67 percent African American, and 23 percent of the income in 2014 came from traffic stops.

So, it is all predatory. It is not just payday lenders, but there are also big businesses.

One of the things that we—

Ms. GARCIA OF TEXAS. I am glad you mentioned traffic stops, because I know that even for traffic tickets, parking tickets, ambulance fees, the public sector is not free from any of these issues either, are they?

Rev. GOULD. That is absolutely correct.

Ms. GARCIA OF TEXAS. Governments also hire outside debt collectors to collect fees.

Rev. GOULD. Yes. In Missouri, we have had for the last 19 years the attorney general's report that gives us a vehicular stops report, and it goes up every year, 4 times the number of African Americans and other people of color being stopped. Well, you are stopped and you are fined and you are fined more than your white counterpart. You work a low-wage job. So it is double, triple, quadruple jeopardy.

Ms. GARCIA OF TEXAS. Thank you, Madam Chairwoman. I yield back.

Chairwoman WATERS. Thank you.

The gentleman from Arkansas, Mr. Hill, is recognized for 5 minutes.

Mr. HILL. Thank you, Madam Chairwoman. Thank you for holding this hearing today.

And I thank the witnesses for this long engagement you have had here. We appreciate your forbearance.

As a former commercial banker and lender on and off over the years, I certainly understand the importance of these issues and how important it is to try to lend money in a fair way and collect it in a fair way. And I have really appreciated the points of view that you have brought to the hearing today.

I want to talk about H.R. 4403, the Stop Debt Collection Abuse Act, which I cosponsored with my friend, Mr. Cleaver from Missouri. This was a bill that we had in the last Congress that we worked on with Mr. Ellison and Mrs. Love, and it safeguards American consumers by strengthening consumer protections against predatory debt collection practices, but this time by the government.

It seems to me that we have talked about the Fair Debt Collection Practices Act at length today, which has been in effect since 1977, but it has always been intriguing to me that one of the ambiguities in that law, and also subsequent court cases and interpretation, has facilitated a situation where debt collection companies that work on behalf of government agencies aren't covered.

So this really kind of strikes at the heart of the fairness issue, claiming that debt with a government entity does not qualify as consumer debt.

One only has to review the consumer complaints, the lawsuits, to find records of confusing and troubling stories around many instances where this has created problems across the country. And even if you look at that as anecdotal information generally, in many instances they are hitting a tack with a sledgehammer.

A sad story that I certainly connected with, because I do so much work with our veterans, is the veteran in Houston who had a $1.25 toll debt. Now, I have two kids in college, so I know about those bills when they come in the mail. It said that someone was—it is the only way I know that they are on a toll road or where they were, is by virtue of the unpaid toll tag response that comes to Dad.

But, $1.25. And this veteran starts getting the calls. He doesn't know what is going on, and he is confused by it. He is an older man. And he ends up having to pay $300 to settle a $1.25 toll.

And that is the kind of thing, we talk about it all day, this is your world, obviously, but this is where I think Mr. Cleaver and I are trying to operate. This is the world where we are trying to simply clarify the debt collection practices for debt collection agents hired by a Federal Government agency, that this law applies to them, just like it applies to the private sector. How could that be complicated or unfair?

So, that is what this Act does. I think it is a good step. And I appreciate Mr. Cleaver partnering with me on it.

Does anyone disagree that an agent working on behalf of a government agency should be covered by the same laws that private debt collectors are?

I am going to do it in reverse. Does anybody disagree with that?

Ms. AUCHTERLONIE. No, sir.

Mr. HILL. Okay. Thank you for that.

Ms. Auchterlonie, would you speak to the benefits of clearing up some of those ambiguities? It is 40 years in the making, but it is clearly a problem. Would you give your views on that?

Ms. AUCHTERLONIE. When I was at the Bureau, I actually had an enforcement investigation that was really similar, related to district attorneys giving a collection agency the power to collect on bad checks. And we ended up settling with them for a significant amount of money and asking them to change their practices.

Because a lot of times, the government agencies are charged with the responsibility to collect these fines, but they are public servants. They are not professional bankers. They are not professional financiers or collectors. They don't understand the rules of the road. And so, they don't really have the professional expertise to oversee and ensure that the collection agencies that they are working with are using best practices and treating their constituents the way that someone else would prefer to treat a customer.

So, I can see some advantages to and where you are coming from on this.

Mr. HILL. Good.

I want to thank all of you for your testimony.

And thank you, Madam Chairwoman. And I yield back the balance of my time.

Chairwoman WATERS. Thank you very much.

Allow me to take a moment to thank all of our distinguished witnesses for their testimony here today.

The Chair notes that some Members may have additional questions for this panel, which they may wish to submit in writing. Without objection, the hearing record will remain open for 5 legislative days for Members to submit written questions to these witnesses and to place their responses in the record. Also, without objection, Members will have 5 legislative days to submit extraneous materials to the Chair for inclusion in the record.

And with that, this hearing is adjourned. Thank you all so very much.

[Whereupon, at 1:25 p.m., the hearing was adjourned.]

A P P E N D I X

September 26, 2019

TESTIMONY OF
JOHN H. BEDARD, JR.
BEDARD LAW GROUP, P.C.

BEFORE THE

COMMITTEE ON FINANCIAL SERVICES
UNITES STATES HOUSE OF REPRESENTATIVES

AT A HEARING ENTITLED,
"EXAMINING LEGISLATION TO PROTECT CONSUMER AND SMALL BUSINESS OWNER FROM ABUSIVE DEBT COLLECTION PRACTICES"

SEPTEMBER 26, 2019

Chairwoman Waters, Ranking Member McHenry, and House Financial Services Committee Members:

Thank you for inviting me to testify about the work of the credit and collection industry. This is a very important time for consumers and debt collectors in the wake of the Bureau's landmark release of the first ever proposal for rules implementing the Fair Debt Collection Practices Act (FDCPA). The credit and collection industry has been seeking clear regulatory guidance on the FDCPA since its enactment in 1977. Industry supported regulation in 1977 and industry supports clear, fair regulation today. The Federal Trade Commission (FTC), the previous primary agency with jurisdiction over the debt collection industry, did not have rulemaking authority under the FDCPA. As a result, this lack of regulatory guidance in conjunction with Congress's failure to update the statute has resulted in outdated requirements and a patchwork of interpretations of the FDCPA by courts throughout the country. The absence of clear regulation has also given birth to a cottage industry of consumer attorneys who have done little to protect consumers. Dodd Frank gave the CFPB rulemaking authority. The Bureau's proposal for implementing the FDCPA, although flawed in many respects, is an important step forward in providing much needed clarity to the financial services marketplace, including consumers.

I have been practicing law in Georgia for over 20 years. My practice focuses on representing debt collectors, asset buyers, creditors, and attorneys. I help clients stay in compliance with the myriad of federal and state laws regulating their businesses. I also defend civil litigation and investigations brought by consumers and by government. In my role as managing attorney at Bedard Law Group, I am a recognized authority on the FDCPA and the Fair Credit Reporting Act. I am also a former member of the Board of Directors of the industry's leading professional trade organization, ACA International, The Association of Credit and Collection Professionals. I serve as the State of Georgia Compliance Chairperson for ACA International and am a former Chairperson and Program Designation award recipient of ACA International's Members Attorney Program. I travel the country auditing the compliance practices of debt collectors and educating them on the requirements of consumer financial laws.

Debt collectors play a critical role in ensuring that consumers can continue to access credit and services. A healthy connection between debt collectors and consumers increases access to credit. It encourages the local appliance store to sell that washing machine on terms. It encourages the local dentist to provide those braces on the promise of future payment. And it gives comfort to the auto mechanic that they will be paid tomorrow for their repairs today.

I have seen firsthand the problems a lack of clear regulatory guidance can create for both consumers and industry, and the CFPB has at times exacerbated these problems through unfair and agenda driven enforcement actions. Regulation by enforcement is wrong. It is unlawful. It is happening today, and it needs to stop. To fulfill its statutory mission and obligations properly, the Bureau must first articulate rules, and then strictly adhere to fair, clear, and transparent enforcement practices. I have represented clients and personally observed the Bureau's actions fall short of these standards. Many targets of Bureau enforcement actions have experienced one-sided Bureau interpretations of the law and are often pressured into onerous settlement terms which impose obligations well beyond legal requirements, just to avoid the extreme costs associated with disrupting business operations and defending the allegations.

The conveniences of modern technology can no longer be ignored. The Bureau's proposal appropriately acknowledges the need to bridge the communication gap between consumers and debt collectors. There can be little dispute that clear, fair regulation of the collection industry helps consumers and industry. The Bureau's proposal gives unconditional control to consumers over the communication methods used by debt collectors. This control gives consumers unprecedented power over the debt collection process while at the same time building a stronger technology bridge between consumers and debt collectors.

Thank you again for the opportunity to appear before this Committee today. I look forward to answering your questions.

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Commissioner

Written Testimony of
FTC Commissioner Rohit Chopra[*]

Before the U.S. House of Representatives
Committee on Financial Services

"Examining Legislation to Protect Consumers and Small Business Owners from Abusive Debt Collection Practices"

September 26, 2019

Chairwoman Waters, Ranking Member McHenry, and Members of the Committee, thank you for holding this hearing on abusive debt collection, especially as it relates to the millions of Americans battling their student loan debt.

Since the eruption of the financial crisis and its decimation of the U.S. economy a decade ago, unemployment has come down and the stock market has soared. But the headlines obscure the serious cracks in our economy. Stagnant wages and rising costs mean that many Americans are walking on an economic tightrope, where even a tiny jolt can send them into freefall. According to multiple estimates, there are more than 70 million Americans with past-due bills in collections.

Too often, our system treats these individuals as if they are morally bankrupt or free riding. The reality is much different. Many are battling medical bills that they may not even owe due to a bureaucratic stalemate between their insurance company and their hospital. Others fell behind on utility bills or other household expenses after losing a shift at work. Many small businesses looking to weather a slow season were ensnared by lending schemes that ended up destroying them. And many simply finished school at the wrong time, entering the workforce with a job that barely puts them on a path to paying off their student debt.

Prior to serving as a Federal Trade Commissioner, I was proud to be appointed by the Secretary of the Treasury as the Consumer Financial Protection Bureau's first Student Loan Ombudsman, where I led the agency's work on behalf of student loan borrowers. During my time at the CFPB, we published widely cited reports detailing the devastating impact of student loan debt and pursued an aggressive enforcement agenda against lawbreaking companies in the student loan industry.

[*] This testimony reflects my own views and not necessarily those of the Commission or any other individual Commissioner.

For example, in 2012, my colleague Holly Petraeus, then the head of the CFPB's Office of Servicemember Affairs, and I published a report about unfair treatment of military families by student loan companies.[1] Under federal law, active-duty members of the military receive certain protections when companies collect on student debt. The report spurred an investigation into Navient, formerly known as Sallie Mae, and the Justice Department obtained $60 million from Navient for violating the Servicemembers Civil Relief Act in a nationwide military family scam. The Justice Department's complaint described Navient's unlawful servicing and collection practices as "intentional, willful, and taken in disregard for the rights of servicemembers."[2] The CFPB also sued Corinthian Colleges and ITT Educational Services, two publicly traded for-profit colleges that coerced students into high-rate private loans. Corinthian engaged in illegal debt collection conduct when it strong-armed struggling borrowers to squeeze more money out of them. The CFPB was able to obtain hundreds of millions of dollars in debt cancellation for the victims, and Corinthian and ITT are no longer in business.

I later served as a special adviser to the Secretary of Education, where I saw firsthand how much influence and power that Wall Street and government contractors like Navient have over our student loan system. The Department of Education had wide latitude to revoke subsidies and contracts after findings of legal violations, but the Department's student loan arm went to great lengths to protect the status quo.

The Department of Education's student loan arm is one of the largest financial institutions in the world, managing $1.5 trillion in debt. There are roughly nine million Americans in default on a federal student loan, with many more in serious delinquency. And the federal government makes sure they know it. The government hires a squadron of financial institutions to aggressively pursue borrowers by slamming their credit, levying hefty fees, and even humiliating them with their employer through wage garnishments. Student loan companies should be helping borrowers get back on their feet by advising them on all of their options for managing their student debt. But, all too often, these companies steer borrowers in a direction that most benefits their bottom line. For example, in 2015, the CFPB found that companies collecting on defaulted federal student loans misrepresented key aspects of the student loan rehabilitation program and overstated how the program would improve a borrower's credit report.[3]

And here's the irony: when student loan borrowers make mistakes, they pay dearly for them. They may not be able to pass an employment verification check or even rent an apartment. But, when student loan companies make mistakes and violate the law, the Department of Education

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[1] CONSUMER FIN. PROTECTION BUREAU, THE NEXT FRONT? STUDENT LOAN SERVICING AND THE COST TO OUR MEN AND WOMEN IN UNIFORM (2012), https://files.consumerfinance.gov/f/201210_cfpb_servicemember-student-loan-servicing.pdf.

[2] Press Release, DOJ, Justice Department Reaches $60 Million Settlement with Sallie Mae to Resolve Allegations of Charging Military Servicemembers Excessive Rates on Student Loans (May 13, 2014), https://www.justice.gov/opa/pr/justice-department-reaches-60-million-settlement-sallie-mae-resolve-allegations-charging.

[3] CONSUMER FIN. PROTECTION BUREAU, SUPERVISORY HIGHLIGHTS (2015), https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf ("In one or more examinations of debt collectors performing collection services of defaulted student loans for the Department of Education, examiners identified collections calls, scripts and letters containing various misrepresentations to consumers").

often covers for them and continues lavishing them with valuable government contracts and subsidies. This is not a recent phenomenon – it has been going on for years under multiple administrations.

There is a growing body of research and evidence that student loan distress is weighing on the economy, including papers from the Federal Reserve System about the negative impact on the housing market.[4] I fear there will be continued consequences if we fail to act.[5]

As the primary regulator of the student loan and debt collection industries, the CFPB must act to address these serious problems. The CFPB has proposed a rule on debt collection, and the agency must ensure that the rules clearly address the epidemic of student loan defaults. Attached is my formal comment to the rulemaking proceeding.[6]

Policymakers and regulators must also fix the misaligned incentives that fuel these problems and ensure that companies face real consequences for their violations, just as borrowers do. Across the country, states are enacting new protections for student loan borrowers when it comes to student loan servicers and debt collectors. I welcome this action and oppose efforts by the Department of Education to preempt these laws.

Twenty years ago, Congress established the Department of Education's student loan branch, the Office of Federal Student Aid, with new powers so it could operate more like a private business. It is time for Congress to reform it, so that it puts borrowers, taxpayers, and our economy ahead of its contractors' profits. Under the Debt Collection Improvement Act, the Secretary of the Treasury is responsible for collecting certain debt owed to the federal government that is past due. The Secretary of the Treasury granted the Department of Education a permanent exemption from transferring loans to the Department of the Treasury. Congress and the Secretary of the Treasury need to revisit this exemption, given the Department of Education's record.

In addition, the Department of Education must do more to cancel student debt. Under existing law, borrowers who have been cheated by institutions of higher education can seek relief. The law also provides for a broad "compromise and settlement" authority to renegotiate debts. Current law gives the Secretary of Education clear authority to act.

If we still believe that going to college and working hard can help an individual climb the economic ladder, we have to wake up to the realities of our broken student loan debt collection

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[4] *See, e.g.*, FED. RESERVE, VOL. NO. 1, CONSUMER & COMMUNITY CONTEXT, "RURAL BRAIN DRAIN": EXAMINING MILLENNIAL MIGRATION PATTERNS AND STUDENT LOAN DEBT (2019), https://www.federalreserve.gov/publications/files/consumer-community-context-201901.pdf?mod=article_inline and FED. RESERVE BANK OF N.Y., NO. 820, ECHOES OF RISING TUITION IN STUDENTS' BORROWING, EDUCATIONAL ATTAINMENT, AND HOMEOWNERSHIP IN POST-RECESSION AMERICA (2017), https://www.newyorkfed.org/research/staff_reports/sr820.

[5] Rohit Chopra, Consumer Fin. Protection Bureau, Keynote Remarks at the Fed. Reserve Bank of St. Louis (Nov. 18, 2013), https://www.consumerfinance.gov/about-us/newsroom/student-loan-ombudsman-rohit-chopra-before-the-federal-reserve-bank-of-st-louis/.

[6] Comment of Rohit Chopra, Fed. Trade Comm'n., in the Matter of Notice of Proposed Rulemaking on Debt Collection Practices (Regulation F) (to be codified at 12 C.F.R. pt. 1006), Docket No. CFPB-2019-0022 (Sept. 18, 2019), https://www.ftc.gov/system/files/documents/public_statements/1544795/chopra_-_comment_submission_on_cfpb_proposed_debt_collection_rule_9-18-19.pdf.

system and fix it. If we do not, we will kill the dreams of too many Americans seeking to own a home, start a small business, and raise a family.

Outside of student lending, I believe the Federal Trade Commission also needs to act on abusive debt collection and lending practices, especially where the CFPB cannot. There is $1.2 trillion in outstanding auto loan debt, as millions of families finance their primary means of getting to work, school, the doctor, and more. Technology has made it easier for lenders and debt collectors to seize cars without warning, and according to some reports, without justification. This is just one of the many issues that need government attention in this large and critical market. Yet despite receiving authority in 2010 to put commonsense rules into place to combat abuses in this market, the FTC has yet to make a proposal.

Taking out a loan as a small business owner is significantly more risky than taking out that same debt as a consumer. That is because the FTC has not banned certain predatory terms in small business loans that have long been banned in consumer loans. These terms have a significant impact on debt collection. For example, small business contracts can still contain "confessions of judgement" which essentially forces the borrower to waive any rights to defend themselves in a debt collection dispute. The FTC has unique jurisdiction to attack debt collection and discrimination issues in this market, and the agency should do so.[7]

The FTC also needs to closely study the algorithms utilized by Big Tech that promote content and ads that are profitable to tech companies and bad actors that peddle scams.[8] We will need to closely scrutinize how debt collectors are using these companies' mass accumulation of our personal data.

Thank you for the opportunity to testify and I look forward to working with the Committee on these critical issues.

[7] Rohit Chopra, Commissioner, Fed. Trade Comm'n., Prepared Remarks for the Forum on Small Bus. Financing (May 8, 2019), https://www.ftc.gov/public-statements/2019/05/prepared-remarks-commissioner-rohit-chopra-forum-small-business-financing.

[8] Four years ago, I wrote to Google, Facebook, and other tech companies to stop allowing scammers to advertise on their platform. Many problems remain. *See* Danielle Douglas-Gabriel, *Government to Google: Stop fraudsters from using your search engine for student debt scams*, THE WASHINGTON POST (June 22, 2015), https://www.washingtonpost.com/news/get-there/wp/2015/06/22/government-to-google-stop-fraudsters-from-using-your-search-engine-for-student-debt-scams/.

Before the
CONSUMER FINANCIAL PROTECTION BUREAU
Washington, DC 20552

Notice of Proposed Rulemaking on Debt Collection Practices (Regulation F)	))))))	Docket No. CFPB-2019-0022

COMMENT OF
FEDERAL TRADE COMMISSIONER
ROHIT CHOPRA*

September 18, 2019

I write to outline concerns with the Consumer Financial Protection Bureau's proposed debt collection rule and its impact on the 44 million student loan borrowers and their families.

When it comes to the companies that collect student loan payments, consumers have little to no market power. Loan servicers and debt collectors work on behalf of lenders and creditors, not on behalf of borrowers. Despite the wide availability of affordable repayment plans, there are more than 9 million borrowers in default on their student loans, with many more in severe delinquency.[1] Student loan default deeply affects Americans of all ages. As the industry's primary regulator, the CFPB must ensure that any rulemaking keeps student loan borrowers in mind.

By way of background, since May 2018, I have served as a Commissioner on the Federal Trade Commission, which also enforces the Fair Debt Collection Practices Act. In 2016, I served as Special Adviser to the Secretary of Education, where I focused on consumer protection issues affecting student loan borrowers, including oversight of servicers and debt collectors. From 2010-2015, I served in several roles at the CFPB. The Secretary of the Treasury designated me as the CFPB's Student Loan Ombudsman, pursuant to Section 1035 of the Dodd-Frank Act. While at the CFPB, I led the agency's strategy on student financial services, and I was deeply involved

*This comment letter reflects my own views and does not necessarily reflect the views of the Commission or any other individual Commissioner. While I have narrowly limited my comment to specific issues related to student debt, I also voted to authorize Commission staff to file a separate comment raising other important consumer protection issues worthy of close attention.

[1] Over the past several years, I have published several analyses of student loan default. *See e.g.*, Rohit Chopra, *A closer look at the trillion*, CONSUMER FIN. PROTECTION BUREAU (Aug. 5, 2013), https://www.consumerfinance.gov/about-us/blog/a-closer-look-at-the-trillion/, and Josh Mitchell, *Student-Loan Defaults Rose by 1.1 Million in* 2016, THE WALL STREET J. (Mar. 14, 2017), https://www.wsj.com/articles/student-loan-defaults-rose-by-1-1-million-in-2016-1489498222. I have reproduced this analysis to generate this estimate. I encourage the Consumer Financial Protection Bureau to conduct similar analyses on a routine basis and make these results available to the public.

in the agency's supervision, enforcement, and research in the student loan servicing and debt collection industries.

Federal Student Loan Servicing and Collections. Americans owe $1.5 trillion in federal student loans under Title IV of the Higher Education Act.[2] The vast majority of this debt is collected by financial institutions under contract with the U.S. Department of Education's Office of Federal Student Aid (FSA). FSA was established as a "performance-based organization," allowing it to operate more like a private sector bank. While student loan contractors must generally bid for business pursuant to federal procurement law, FSA often crafts procurement solicitations in ways that advantage politically-connected incumbents, at the expense of competition and new market entrants. Over the years, I have observed that FSA generally preferences the interests of its existing student loan contractors over the interests of student loan borrowers. For example, despite repeated violations of law[3] by one of its largest contractors, Navient (formerly Sallie Mae), FSA has never taken meaningful administrative action to hold the company accountable. Given FSA's lax oversight of its contractors, this has led the CFPB, state banking supervisors, and state attorneys general to scrutinize these firms more closely. During my time at the CFPB, the agency identified serious deficiencies in the federal student loan collections industry.[4]

FSA recently announced plans to reconfigure its ecosystem of contracted servicers and debt collectors.[5] Currently, borrowers receive bills from and make payments to a contracted servicer. If the borrower is more than 270 days delinquent, the borrower's loan is transferred to a third-party debt collector, often referred to as a private collection agency (PCA). These PCAs are typically responsible for notifying borrowers about their rights and responsibilities, including the option to "rehabilitate" their loan by making a series of affordable payments. Recent procurement notices suggest that FSA will shift to a system that will retain contractors that can conduct both pre-default servicing and post-default collections.[6]

If the CFPB plans to update debt collection rules, it must take into account how these actions by FSA will reshape student loan collections, as well as the unique features of federal student loans.

Delinquency Trigger for Consumer Protections. First, the CFPB should ensure that any new regulations arm borrowers with rights and protections after a borrower is a certain number of days past due on a Federal Direct Loan, rather than when the loan is assigned to a third-party collection firm. Given that these loans are managed by a third-party financial institution and may

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[2] FED. STUDENT AID, *Fed. Student Loan Portfolio*, https://studentaid.ed.gov/sa/about/data-center/student/portfolio
[3] https://www.consumerfinance.gov/about-us/newsroom/written-testimony-of-rohit-chopra-before-the-committee-on-the-budget/ (last visited Sept. 17, 2019).
[4] *See e.g.*, CONSUMER FIN. PROTECTION BUREAU, SUPERVISORY HIGHLIGHTS (2015), https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf ("In one or more examinations of debt collectors performing collection services of defaulted student loans for the Department of Education, examiners identified collections calls, scripts and letters containing various misrepresentations to consumers").
[5] *See* Stephanie Eidelman, *NextGen Deadline Postponed Again, and ED Considers Selling Defaulted Loans*, INSIDEARM (May 2, 2019), https://www.insidearm.com/news/00045002-nextgen-deadline-postponed-again-and-ed-c/.
[6] FED. BUS. OPPORTUNITIES, SOLIC. NO. 91003119R0008, NEXTGEN BUS. PROCESS OPERATIONS, https://www.fbo.gov/index?s=opportunity&mode=form&id=4ccf4acdbe7d196698111dc16aa94616&tab=core&_cview=1 (last visited Sept. 17, 2019).

never be reassigned to a specialty collector in FSA's new collections ecosystem, the assignment trigger may not be appropriate.

Since the delinquent loan may never be reassigned, the CFPB should assess whether protections under the regulation should be triggered when the borrower is 90 days past due. Typically, student loan servicers furnish negative credit reporting information after a borrower is more than 90 days delinquent, which can have a significant impact on the borrower's credit score. In addition, FSA contractor compensation has typically been heavily dependent on the proportion of borrowers that are fewer than 90 days past due. The CFPB should not align its definition with the Higher Education Act's definition of default, where loans are generally treated as in default after 270 days of delinquency. This definition is a vestige of a now-discontinued federal student loan program and was developed prior to the establishment of broadly available income-driven repayment programs.

Limiting Excessive Calls. Second, the CFPB should ensure that student loan borrowers are not excessively called or harassed by student loan collectors. The proposed rule sets certain frequency limits on communications with borrowers.[7] As the notice recognizes, student loan borrowers accrue multiple loans over the course of their academic programs – they rarely have just one student loan. The proposed rule sets frequently limits based on the number of accounts, rather than the number of individual loans.[8]

Student lenders have wide discretion to place multiple loans under the same account number, or to assign different account numbers depending on the type of loan. In the collection context, this can lead to disparate treatment for similarly situated borrowers, and in particular can result in excessive calls for borrowers whose loans are spread across many account numbers. Given the ambiguity in how "account" can be defined and the potential for abuse, the CFPB should consider setting frequency limits based on the definition of "accounts" found in 12 C.F.R. §1090.106, which specifically addresses the issue of student loan servicing accounts. This regulatory provision defines an individual account as one where a financial institution is serving a specific borrower for a specific stream of fees from a creditor. If the institution is receiving separate streams of fees from multiple creditors, this could be an indicator that the accounts are truly distinct from one another. This modification can help protect student loan borrowers from excessive calls related to the same account.

Every day, there are thousands of student loan defaults in our country. This has a devastating impact on a borrower, reducing the likelihood that they can pass an employment verification check or ever purchase a home. Under multiple administrations, the Department of Education's FSA has made this problem worse by placing the interests of its contractors above the interests of student borrowers. As the student loan industry's primary regulator, the CFPB must do more to safeguard our economy and protect borrowers from abuse. Thank you for considering these comments.

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[7] While this comment does not address the specific frequency limit in the proposed rule, the CFPB's proposed limits seem excessive, as my colleague, Commissioner Rebecca Kelly Slaughter, describes in more detail in her comment letter.

[8] *Id.* at 23, 320 – 21.

New York Taxi Workers Alliance
National TWA, AFL-CIO, Int'l. Transport Workers' Federation
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September 24, 2019

Honorable Chairwoman Maxine Waters
United States House of Representatives
Committee on Financial Services
212 Rayburn House Office Building
Washington, D.C. 20515

Dear Honorable Chairwoman Waters and Members of the Committee:

Greetings. My name is Bhairavi Desai and I am the Executive Director of the 22,000-member New York Taxi Workers Alliance, a grass-roots labor organization which represents, defends and secures the rights of men and women who serve over one million passengers a day in the country's biggest taxi and for-hire-vehicle industry. Drivers across the industry have been in a vicious race to the bottom. Eighty-six percent of App-dispatched Uber, Lyft, Via, Juno drivers were found by an independent study commissioned by the City of New York to be earning below Minimum Wage. Yellow cab drivers have seen a drop in revenue by 36% since 2011 to today, or 44% when adjusted for inflation.[1] In 2018, we lost nine of our driver brothers to suicide from the despair of poverty and debt.

For the purposes of this House Financial Services Committee Hearing, I write to you today regarding the conditions of our medallion owner-driver members, who are in a chokehold from life-long, astronomic debt.

Three among the drivers who committed suicide were yellow cab medallion owner-drivers. 33% representation for a segment of the workforce that is less than two percent of the driver population.

The medallion is a license issued by the City of New York to allow an exclusive right to pick up street hailing passengers across the city. While medallions can be sold on the open market, they are also auctioned by the City, with the "opening bid" set by the city's Taxi and Limousine Commission (TLC), a Mayoral agency under oversight from the City Council. Individual medallions which had a requirement that the owner must actively drive the medallion would be auctioned alongside "mini fleet medallions," medallions auctioned in sets of two with no such requirement. Between 2004 – 2014, New York City made $850 Million

[1] https://nyc.streetsblog.org/2019/05/30/komanoff-times-expose-understated-the-damage-to-yellow-cab-industry-by-uber-and-lyft/

from 16 medallion auctions.[2] At the last held auction in 2014, the TLC set the opening bid for the mini fleet medallion at $1.6 Million dollars, or $800,000 apiece. The city counted its money, the brokers who oversaw auction applications counted their fees, and lenders counted their interest. Newly minted owner-drivers counted their stars, eager to invest in capital off which they could finance other purchases such as a larger apartment or house or college tuition, or bank on for retirement. Little did they realize that within just a couple of years, that "value" would fall to below $200,000, leaving over 80% of the loans underwater and thousands of families in life-long debt.

There were more medallion bankruptcies in January 2019 than all of 2015, 2016 and 2017. Our own work on Loan Modification applications for owner-drivers, also called hardship letters, has found that their earnings are on average at a negative $25,000 for the year. That's $25,000 worth of rent/house mortgage, gas and electricity, food, medicine, healthcare that 6,000 families in this industry are being forced to live without. All the while, they are carrying an average $600,000 in debt on their medallion loans.

Most owner-drivers would have worked for years to build up their credit in order to qualify for a loan. Bankruptcy leaves them with the threat of losing that good credit rating, losing their house or another asset. Whether still in the loan, foreclosed upon or in bankruptcy, the debt becomes a prison sentence to poverty.

In our work helping driver members with "Hardship Applications," or loan modification requests, we have found that older drivers pay more in monthly mortgage, regardless of how "little" the debt may be compared to younger borrowers. Men and women in their sixties and seventies continue to drive taxis because the monthly payment they used to get from renting out the medallion to a taxi broker can't pay the mortgage anymore, let alone allow for retirement. One such member of ours drove for less than a year before he had a massive heart attack.

Retirement should not be tied up in an asset such as a medallion. There should be a universal benefit across the workforce. Once the medallion collapsed, borrowers lost their future, even if the loan repayment was completed.

Between the crushing debt and daily poverty, there is no room for basic human experience such as time off to grieve after the loss of a loved one, time off to heal after a heart attack or chemo sessions, at least one day a week off to be with your family, especially your children, or enough time everyday just to eat regular meals and sleep, let alone take care of yourself through exercise or destressing. It is heartbreaking to witness owner-drivers and their families struggle with this daily nightmare.

The stories of owner-driver hardships abound: heart attacks, strokes, depression, working round the clock, foreclosures, bankruptcies, evictions. Suicide. Something has to give and it can longer be the owner-drivers.

[2] https://www.nytimes.com/2019/05/19/nyregion/taxi-medallions.html

Like most stories of poverty and debt, ours too is not merely accidental, or personal choice. A *New York Times* investigation found medallion values were inflated so lenders – many of them involved in predatory loans in the 2008 housing crash – and middlemen called brokers could make extra profits off the drivers' backs.[3] Banks made money in 2017 and 2018 when owner-drivers were struggling with payments by using practice called confession of judgment, which was banned by Congress in consumer loans but not in business loans, which is how lenders classified taxi medallion loans; it is also banned by some states even in business loans, but is allowed in business loans in NYS. Borrowers sign papers saying the lender can get paid total loan once balloon ends.[4]

The *New York Times* further reported that seven government agencies knew about the scandal and did nothing.

The spike in medallion value started in 2004. The City advertised medallion prices on average 13 percent higher than they really were.[5] TLC staff wrote a report in 2010 that the value was inflated; but the Bloomberg Administration ignored it and the auctions continued.[6] Also in 2010, the NYS Department of Financial Services wrote warnings of inflated values and issued at least one report that the bubble would burst.[7] In 2011, the National Credit Union Administration (NCUA) wrote a paper on the risks of the industry; in 2012, 2013, and 2014 they had reports of credit unions violating lending rules.[8] NCUA never penalized or added oversight. In 2014, the state's DFS called a meeting of a dozen top officials.[9] All the while, the auctions continued. After setting the 2014 auction opening bid at $850,000, the same City, in fact some of the actual same city officials, went from directly overseeing the auction of overvalued medallions to unleashing Wall Street-backed corporate competitors such as Uber and Lyft with virtually no regulations or barriers to entry and limitless cash. They then went to work for those companies. By 2018, there were 85,000 Uber and Lyft cars competing against less than 12,000 operational yellow taxicabs.[10]

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[3] https://www.nytimes.com/2019/05/19/nyregion/nyc-taxis-medallions-suicides.html
[4] See attached, "Affidavit for Entry of Judgment by Confession"
[5] ibid
[6] ibid
[7] ibid
[8] ibid
[9] ibid
[10] Practically the only regulation in place that attempts to treat the hyper-regulated medallion yellow cab industry and Uber, Lyft, Via and Juno the same is a vehicle cap on the companies instituted after they had collectively reached 85,000 cars, compared to less than 12,000 operational yellow cabs. There are differences in vehicle retirement requirements, inspections, taxes and fees. At the airports, taxi lines outside of terminals are being erased. App-dispatched cars are allowed to drive up to terminals while street-hailing yellow cab passengers are shuttled over. After a rare joint lobbying effort by Wall Street's companies, New York State passed a congestion surcharge where yellow cabs charge $2.50 to

Between predatory loan terms, an inflated asset, and an uneven playing field, owner-drivers have been stuck in desperate poverty.

Through our members' experiences, we have identified several predatory practices in medallion lending to owner-drivers:

- Confessions of Judgment used to intimidate borrowers into making large sum payments toward outstanding loan balances or rush into refinancing agreements with interest, even interest-only, provisions.
- No requirement of attorney review of agreements (in contrast, home loans have three day window for review and final decision by buyer)
- Lack of credit review of borrower
- Requirement to provide guarantors for loans mid-loan, causing fear of loss of asset or bankruptcy filing even when meeting the loan obligation was nearly impossible.
- Lack of clear language or translated materials for a workforce that is over 90% immigrant
- Lack of disclosures by brokers and middle men used by lenders
- Interest-only payments
- Lack of full disclosure on loan terms, including interest rate and amortization schedule
- Balloon payments of three to five years used to encourage refinancing of loan during high turns, or to enforce Confessions of Judgment during downturns
- No consistency between monthly mortgage and outstanding loan balance. Appears to be that elderly owner-drivers are charged higher monthly rates even if their balance is lower.
- Tying medallion loan to insurance at high premiums.
- In determining medallion value, no consideration of healthcare, retirement, or distribution of revenue toward a livable income.
- Once credit unions – the majority lenders – were taken over by NYS Department of Financial Services, borrowers were not allowed to talk with loan managers or other personnel they had known for years. Many were left in the dark without any contact person, all the while facing a debt of $500,000 - $700,000 – some as much as $1 million. They incurred large size debt but never extended the services given to corporate holders of similar sized debt.

Since the collapse of the market and fall of medallion value, many owner-drivers have been subject to unscrupulous and unnerving debt collection practices:

- Owner-drivers have had the medallion shield confiscated by lenders without any notice. One of our members had an individual enter into his backyard one early morning, accompanied by a tow truck. When the truck couldn't enter and seize the taxicab, the individual jumped the fence to take the shield off the car. No notice was left. Our member called around to the police and the medallion broker through whom

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passengers in the zone where over 90% of their trips occur, and the App companies get to charge $0.75 as long as the passenger requests a group ride.

he had purchased the medallion and had been making payments. No one ever gave him the information on what happened to the medallion shield.

- One such debt collector, recently arrested by the city, would present false documents implying he was a sheriff in an official capacity.
- In general, owner-drivers remain unaware or uninformed of the foreclosure process and what rights they may have to avert a foreclosure or at the time of an auction.

Today, as owner-drivers fight for survival, they are at a disadvantage with a predatory debt collection industry:

- Banks have been selling loans to each other at what we believe to be marked down rates, but owner-driver borrowers are not afforded the same mark down in the form of debt forgiveness, nor are loans modified at the mark down rate. A member of ours purchased the medallion for $400,000 in 2006 with financing from Progressive Credit Union. The loan was sold to Capital One and from there to Field Point. In 2018, Field Point offered to sell him the medallion for $300,000. He hired an attorney and the attorney told him that Field Point had purchased the loan for $170,000 from Capital One. He counter offered to pay $225,000 but Field Point wanted no less than $300,000. To this day, that remains their offer.
- Some lenders have "restructured" by offering to forgive debt if large sums of money were paid upfront. For example, an owner-driver would be offered to have a $750,000 loan restructured if the owner-driver paid $200,000 at once. It would simply mean the owner-driver would go from predatory loan to another. Some of our members, desperate for the "deal," entered into loans at 16% interest rates.
- The National Credit Union Administration acknowledged they have been helping restructure loans through "payment reductions, lower interest rates and term adjustments." If the agency has extended flexibility and support to the lenders, again, the benefits have not trickled down to the actual owner-driver.[11]

SOLUTIONS

Congressional action could address a number of these systemic problems – from ending Confessions of Judgment, upping penalties against menacing debt collection practices, requiring full disclosures and legal review in contracts, to generally extending consumer protections to small business commercial borrowers.

Further, while not an exclusively Congressional matter, I would like to present you with the solutions which we have proposed to the City Council and the Mayor.

[11] https://www.cutimes.com/2019/07/09/ncua-says-its-helping-nyc-taxi-drivers-preserve-their-livelihoods/

FORGIVE DEBT	1. Restructure loans at current market value of $150,000 2. Cap medallion mortgage at $900 per month. 3. Set up Retirement Fund for all drivers, and give a payout to owner-drivers over 62 whose retirement was lost when the medallion crashed.
ADDRESS HARDSHIP caused by Falling Revenue	4. Pass a resolution to repeal the current congestion surcharge on all taxi trips and call for taxis to be exempt from a pending surcharge as owner-drivers and lease drivers work to get past our current crisis. 5. Regulate one meter rate across the industry so fares cannot be undercut and drivers can have a modest raise 6. Outlaw upfront pricing where E-hail vendors receive one amount of payment from the passenger (or contractor, such as in the case of Access-A-Ride trips) and pay the driver at a lower rate – whether off the meter or at a flat rate 7. Assist the taxi industry to meet its Accessibility Mandate by, among other things, expanding Access-A-Ride, exploring grants, and fixing airport dispatching failures which otherwise could lead to more trips, especially for drivers operating vans.
ESTABLISH PERMANENT OVERSIGHT	8. Establish a permanent medallion market regulatory board, fully authorized to cap prices, mortgages and freeze sales. 9. Stop predatory lending practices: require credit review, ban confession of judgment, ban interest only payments, and require attorney review of agreements. 10. Require banks and credit unions to report when loans are sold to other lenders and the amount of the sale so owner-drivers can negotiate over the mark-downs and lease drivers who rent taxis and medallions can benefit from lower leases 11. Investigate predatory practices with liability insurance premiums 12. Mandate practice that in setting medallion prices, the board must consider the cost of healthcare, retirement, and paid-time off. 13. Explore other ways of organizing the medallion market: in San Francisco, the city sets the amount and then buyers are decided by lottery so there is no "bidding" to raise up values; in Toronto there is an ambassador medallion given to drivers at no cost through a lottery of veteran drivers.

Owner-Driver Medallion Debt Forgiveness. A public-private temporary entity can buy underwater loans at reduced rates which banks are now offering to hedge funds. We estimate this cost will be no more than **$900 Million.**

Current Market Value	$150,000	$200,000.00	$250,000.00
Number of medallions	6,000	6,000	6,000
Total Cost	**$900,000,000**	$1,200,000,000	$1,500,000,000

The entity would restructure loan agreements with owner-drivers at fair market value, reflecting the new loan amount. At a current market value of $150,000, a mortgage should not be more than **$900 per month**, allowing owner-driver families to end the year without debt. And the public-private temporary entity would not lose money. Once stabilized, the loans can then be transferred to more permanent lenders.

The $2.7 Billion Question:

Our study shows that the average outstanding debt among owner-drivers is $600,000. If the current market value of the medallion is determined to be $150,000 then the balance to be forgiven by the lenders is $450,000. With 6,000 individual medallion loans, that amounts to $2.7 Billion loan restructuring.

Average Debt	$ 600,000
Current Market Value	$150,000
Balance to be forgiven	$ 450,000
Number of medallions	6,000
Outstanding Debt to be forgiven	$2,700,000,000

MONTHLY MORTGAGE MUST BE SET AT $900: It is not enough to have debt be forgiven. We have found there to be no correlation between the debt amount and the monthly mortgage. That is, an owner-driver with less than $100,000 may pay more each month than an owner-driver with $700,000 debt.

Setting the monthly mortgage at $900 will allow owner-drivers to wipe out the current average annual debt of $26,000.

	Average
Month Medallion Financing	$2,811
NEW RATE	$ 900
Savings	$ 1,911
Annual Savings	$ 22,932
CURRENT Annual Household Debt	($24,904)
NEW Balance	$ (1,972)

Below is a profile of one of our members. He, his wife and their three children – aged 20, 12 and eight - live in a one family home in Queens.

Medallion	
Medallion Type	Individual
Loan Amount	$851,000.00
Balance	$719,093.33
Medallion Purchase	2014
Medallion Type	WAV
Vehicle Type	Toyota Sienna 2014
Vehicle Retirement	2021 but too many mechanical problems, so most likely 2020
Driver Status	Lease driver works 2 days double shift per week; Owner-driver works 5 days double shift

EXPENSES		
MEDALLION EXPENSES	**MONTHLY**	**AT REDUCED MORTGAGE**
Medallion Financing	$3,194.60	$900.00
Liability Insurance	$649.00	$649.00
Workers Comp.	$217.00	$217.00
Car Payment	$-	$ -
Car Maintenance	$650.00	$650.00
Gasoline	$600.00	$600.00
TPEP	$40.00	$40.00
Car Parking (Garage)	$ -	$ -
Toll to and from work	$ -	$ -
Cell Phone and Other	$34.00	$34.00
Medallion Renewal	$68.75	$68.75
Tax Stamp	$83.33	$83.33
TLC Hack Renewal	$7.00	$7.00
Lab Corp.	$2.08	$2.08
Vehicle Registration	$4.72	$4.72
TOTAL	**$5,550.48**	**$ 3,255.88**

After modest cost of living, and despite having additional income from a tenant, medallion lease, and income from the spouse's job, the family still ends the year with a negative $34,000. At the reduced monthly mortgage, they would reduce the annual debt to $6,000. With additional gain of fares, the family could break even.

Attached, you will find the full economic profile.

NYTWA Survey of Owner-Drivers:

Based on 32 in-depth interviews for owner-drivers seeking hardship letters

TABLE A: Medallion Loan	Average	Median	Min	Max
Loan Amount	$490,023	$413,500	$84,000	$1,091,000
Balance	$595,284	$630,588	$92,000	$907,878
Driver Age				
Driver Age	57	59	41	71
Medallion Financing				
Month Medallion Financing	$2,811	$2,794	$1,563	$4,508
Month TOTAL Medallion Operating Expenses	$5,003	$5,381	$2,773	$7,432
Annual Medallion Financing	$33,727	$33,528	$18,751	$54,096
Annual TOTAL Operating Expenses	$60,034	$64,576	$33,276	$89,184
Living Expenses				
Month Total, Living Expenses	$5,849	$6,072	$1,403	$13,039
Annual Total, Living Expenses	$69,981	$72,860	$16,839	$156,466

TABLE B: Annual Driving Income and Expenses 2018	Average	Median	Min	Max
Driving Income				
Driving Income Cash	$18,700	$19,495	$0	$29,031
Driving Income Credit Cards	$56,889	$60,464	$0	$95,275
Driving Income Total	$75,829	$82,139	$0	$124,306
FARE Expenses				
Credit Card Processing Fee	$3,211	$3,254	$0	$5,899
Toll	$1,870	$1,550	$0	$5,163
MTA	$2,835	$2,909	$0	$4,990
Improvement Surcharge	$1,945	$1,481	$0	$7,673
Total	$10,243	$9,413	$0	$41,667
Net DRIVING INCOME	**$67,170**	**$73,026**	**$0**	**$110,505**
Other Income				
Tot LEASE REVENUE	$11,736	$12,480	$0	$33,600

WAV Maintenance and Driver TIF	$3,722	$2,960	$1,757	$6,452
Tot OTHER INCOME	**$27,484**	**$26,000**	**$0**	**$72,713**
Net Total Annual Income				
INCOME, TOTAL	$101,208	$102,293	$28,248	$140,496
EXPENSES, TOTAL	$126,112	$120,660	$41,107	$177,216
BALANCE	**-$24,904**	**-$19,891**	**-$66,361**	**$1,304**

RETIREMENT Fund
And other Benefits

One of, if not the, primary reasons that lease drivers pulled money together through savings and personal loans to invest into a medallion has always been to have a retirement. If the market value goes up, a retired owner-driver could cash in by selling or could make money from leasing to a broker who in turn would finance the vehicle and lease the medallion to a driver, or lease both the medallion and vehicle. Many owner-drivers forego life insurance plans and instead rely solely on the medallion as a safety net for their surviving family. That safety net is no more.

The spouse of one of our members who passed away now finds herself in debt of $13,000 per year as she doesn't earn enough leasing revenue to cover the mortgage, but depends on the revenue as cash flow support. They never bought a house or invested in another business. The medallion went underwater before they thought to sell it. She lives in a modest one-bedroom apartment, with barely any leisure and no luxury.

EXPENSES		
Medallion Financing		1,562.62
TOTAL	**$**	**1,562.62**
Annual	**$**	**18,751.44**
Living Expenses:		
House Mortgage		773
Gas and Electric		150
Telephone		91
Health Care		79
Food and Household Supplies		400
Cell Phone		20
Subway		100
Funeral Expenses + Other		250
Total, Living Expenses	**$**	**1,863.00**
Annual	**$**	**22,356.00**

INCOME		
Social Security		904.00
Medallion Rental Income		1,450.00
OTHER, Total Income	**$**	**2,354.00**
Annual	**$**	**28,248.00**
SUMMARY		
INCOME, TOTAL	$ 28,248.00	
EXPENSES, TOTAL	$ 41,107.44	
BALANCE	**$ (12,859.44)**	

Lack of retirement savings and pensions is a growing problem across the country. 29% of households aged 55 and older have neither.[12] An American worker who accrued social security through employer contribution is expected to average $17,500 per year in social security. Meanwhile, cost of living is on average $38,600 for US cities. That leaves a shortfall of $21,100.[13]

A Retirement Fund for yellow cab drivers with immediate cash out of $15,000 for those over 62 who have not yet been able to retire, assuming such a population is no more than 20%, could cost $60 Million.

Number of owner-drivers	6,000
Number of lease drivers	14,000
Percentage at 62 or older	20%
Total	4000
Pension Immediate Cash Out	$15,000
Total Cost	**$60,000,000**

The entity which purchases underwater loans could calculate such expense while restructuring loans with borrowers. At just $5,500 per year, a pension could be established for drivers and their families.

Further, an industry-wide health and other benefits fund for up to 95,000 full-time yellow cab, green cab, livery, black car, and App drivers could be established through as little as 32 cents per fare by converting the city's Health and Hospital Corporation's sliding scale, pay as you use Options Program, into a low-cost premium program.

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[12] https://www.bloomberg.com/opinion/articles/2019-04-10/employers-can-buy-retirement-security-for-2-64-an-hour?srnd=opinion&utm_content=view&utm_source=twitter&cmpid%3D=socialflow-twitter-view&utm_campaign=socialflow-organic&utm_medium=social

[13] ibid

Monthly Premium	$350	$450	$550	**HHC Options Program**
Annual Cost	$4,200	$5,400	$6,600	$920
Health Insurance total cost	$399,000,000	$513,000,000	$627,000,000	$87,400,000
Other Services (vision, dental, hearing, mental health hotline, life insurance + more)	$30,000,000	$30,000,000	$30,000,000	$30,000,000
Total	**$429,000,000**	**$543,000,000**	**$657,000,000**	**$117,400,000**
Over 365 days	$1,175,342	$1,487,671	$1,800,000	$321,644
Number of Trips per day	1,000,000	1,000,000	1,000,000	1,000,000
Cost of surcharge to cover plan	**$1.18**	**$1.49**	**$1.80**	**$0.32**

Combining the cost of a pension fund with the Health and Other Benefits utilizing HHC Options Program would bring the total cost to $1.75 per fare. Over 48 weeks of the year, the cost for healthcare, other benefits, and retirement per driver would be between $140 to $233 per week, or $23 to $39 per shift over six shifts. Returning this revenue to yellow cab drivers would allow for a healthy life with the dignity of retirement.

Cost Per Individual Driver

Health Care	$920.00	$5,400.00
Other Benefits	$315.79	$315.79
Retirement	$5,500.00	$5,500.00
Total	$6,735.79	$11,215.79
Hours per week	60	60
Weeks per year	48	48
Total hourly cost	$2.34	$3.89
Per 48 weeks	$140.33	$233.66
Per 6 shifts per week	$23.39	$38.94

ADDRESSING Hardship, Predatory Lending And Long-Term Oversight

While this paper is meant to provide a sense of the numbers involved, we reiterate our proposals to address the hardship from loss of revenue, along with proposals to establish long-term oversight and an end to predatory practices:

- Pass a resolution to repeal the current congestion surcharge on all taxi trips and call for taxis to be exempt from a pending surcharge as owner-drivers and lease drivers work to get past our current crisis.

- NYTWA submitted a Petition to Initiate Rulemaking to the TLC toward these proposals:
  - Regulate one meter rate across the industry so fares cannot be undercut and drivers can have a modest raise
  - Outlaw upfront pricing where E-hail vendors receive one amount of payment from the passenger (or contractor, such as in the case of Access-A-Ride trips) and pay the driver at a lower rate – whether off the meter or at a flat rate
- Assist the taxi industry to meet its Accessibility Mandate by, among other things, expanding Access-A-Ride, exploring grants, and fixing airport dispatching failures which otherwise could lead to more trips, especially for drivers operating vans.
- Establish a permanent medallion market regulatory board, fully authorized to cap prices, mortgages and freeze sales.
- Stop predatory lending practices: require credit review, ban confession of judgment, ban interest only payments, and require attorney review of agreements.
- Require banks and credit unions to report when loans are sold to other lenders and the amount of the sale so owner-drivers can negotiate over the mark-downs and lease drivers who rent taxis and medallions can benefit from lower leases
- Investigate predatory practices with liability insurance premiums
- Mandate practice that in setting medallion prices, the board must consider the cost of healthcare, retirement, and paid-time off.
- Explore other ways of organizing the medallion market: in San Francisco, the city sets the amount and then buyers are decided by lottery so there is no "bidding" to raise up values; in Toronto there is an ambassador medallion given to drivers at no cost through a lottery of veteran drivers.

On behalf of the 22,000-plus members of the New York Taxi Workers Alliance, I thank you for this opportunity to discuss the issues of debt and poverty effecting thousands of our families. Debt and poverty are inextricably connected on our members' lives and the presence of debt – a life sentence to poverty – serves as a reminder that the future for an indebted borrower is dark, with little protections and rights. Poor people struggle everyday to see the light at the end of that tunnel, and debt is the bolder that blocks the exit. The hopelessness, helplessness and anxiety can build into a despair that is life-threatening. Congressional action to ensure borrowers are protected against predatory lending and menacing debt collection, and a rapacious debt purchasing industry could save lives.

Respectfully Submitted:

Bhairavi Desai

Bhairavi Desai, Executive Director
New York Taxi Workers Alliance

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

NEW YORK COMMUNITY BANK
Plaintiff,

-against-

[redacted]

Defendants.

Index No.

AFFIDAVIT FOR ENTRY OF
JUDGMENT BY CONFESSION

State of New York):
):
County of QUEENS):

[redacted], each being duly sworn, says:

1. That I am an officer of the above named defendant limited liability company, a New York limited liability company, with its principal place of business at [redacted] and I am duly authorized to make this affidavit on behalf of said defendant limited liability company. Defendant limited liability company maintains an address at

2. Each deponent, as an authorized officer of defendant limited liability company, authorizes the entry of judgment by plaintiff, its successor and assigns, against the defendant limited liability company in the county(s) in which the defendant limited liability company does business and in such places or counties as the plaintiff may deem necessary or appropriate.

3. The defendant limited liability company confesses judgment and authorizes entry of judgment in favor of the above named plaintiff against the defendant limited liability company, in the sum of **$584,068.32** plus interest as hereinafter stated, and reasonable attorneys fees' as hereinafter provided.

4. This confession of judgment is for a debt justly to become due arising from the following facts:

i. On the date of the loan, the defendant limited liability company borrowed from plaintiff the sum of **$584,068.32** payable in accordance with the terms of a certain promissory note made by the defendant limited liability company to the order of the plaintiff executed on even date herewith. The terms of the note stated that each installment of payment would be applied first to the payment of interest on said principal sum, or on so much thereof as shall from time to time remain unpaid, and the balance to the payment of said principal sum.

ii. In addition, defendant limited liability company agreed to pay one payment of interest only on the first day of the first month following the date of the loan. The foregoing is evidenced by defendant limited liability company's installment promissory note payable to the order of plaintiff.

iii. The promissory note contains clauses accelerating installments in the event of default and for payment of reasonable attorneys' fees and for collection fees, which are to be added thereto. A copy of the promissory note is annexed hereto and made a part hereof.

5. The purposes for the sums borrowed were to pay off certain existing obligations and/or to provide working capital and/or to purchase certain assets for the use of the defendant limited liability company.

6. The sums set forth in the promissory note are justly owed to plaintiff.

7. Defendant limited liability company recognizes that the court must hold an inquest with respect to reasonable attorneys' fees and defendant limited liability company authorizes that part of the judgment respecting attorneys' fees be severed and sent to inquest.

8. Defendant limited liability company agrees that the execution and delivery of this confession of judgment and entry of judgment thereon shall be without prejudice to any and all rights of plaintiff by virtue of any and all collateral security plaintiff holds and/or any guaranties of the obligations of defendant limited liability company delivered to plaintiff, and acknowledges that plaintiff reserves all of its rights and remedies against all collateral security and guaranties it holds and that plaintiff's rights and remedies shall always be and be deemed to be cumulative and not exclusive.

9. This confession of judgment is not for the purpose of securing plaintiff against a contingent liability.

IN WITNESS WHEREOF, each of the undersigned has signed his name on behalf of the defendant limited liability company.

[redacted]

By: ______________________________

Name: [redacted]

Title: MANAGER

Sworn to before me this [redacted]2019

____

Notary Public

Medallion	
Medallion Type	Individual
Loan Amount	$851,000.00
Balance	$719,093.33
Date	11/1/2018
Agreement Date	2014
Medallion Type	WAV
Vehicle Type	Toyota Sienna 2014
Vehicle Retirement	2021 but too many mechanical problems, so most likely 2020
Driver Status	Lease driver works 2 days double shift per week; He works 5 days double shift

EXPENSES		
MEDALLION EXPENSES	**MONTHLY**	**AT REDUCED MORTGAGE**
Medallion Financing	$ 3,194.60	$ 900.00
Liability Insurance	$ 649.00	$ 649.00
Workers Comp.	$ 217.00	$ 217.00
Car Payment	$ -	$ -
Car Maintenance	$ 650.00	$ 650.00
Gasoline	$ 600.00	$ 600.00
TPEP	$ 40.00	$ 40.00
Car Parking (Garage)	$ -	$ -
Toll to and from work	$ -	$ -
Cell Phone and Other	$ 34.00	$ 34.00
Medallion Renewal	$ 68.75	$ 68.75
Tax Stamp	$ 83.33	$ 83.33
TLC Hack Renewal	$ 7.00	$ 7.00
Lab Corp.	$ 2.08	$ 2.08
Vehicle Registration	$ 4.72	$ 4.72
TOTAL	**$ 5,550.48**	**$ 3,255.88**
Annual	**$ 66,605.80**	**$ 39,070.60**

HOUSEHOLD: 2 ADULTS AND THREE CHILDREN (20, 12, 8 years of age)

LIVING EXPENSES	MONTHLY		ANNUAL	
House Mortgage	$	2,378.72	$	28,544.64
House Repairs	$	600.00	$	7,200.00
Gas and Electric and Water	$	1,000.00	$	12,000.00
Medicine and Healthcare	$	20.00	$	240.00
Telephone, Internet, Cable	$	136.00	$	1,632.00
Car Payments	$	-	$	-
Car Insurance	$	100.00	$	1,200.00
Gasoline	$	200.00	$	2,400.00
Food	$	1,300.00	$	15,600.00
Student Schooling Fees	$	83.33	$	1,000.00
Other	$	200.00	$	2,400.00
Cell Phone	$	-	$	-
2nd Home	$	-	$	-
Property Taxes	$	-	$	-
Subway	$	121.00	$	1,452.00
Credit Card / Loan Repayment	$	1,383.33	$	16,600.00
Total, Living Expenses	**$**	**7,522.39**	**$**	**90,268.64**

DEBT	Balance		Monthly	
Student Loan		7000		583.3333333
Met Life Life Insurance				300
Personal Loans		50000		500
Total	**$**	**57,000.00**	**$**	**1,383.33**

INCOME	
2018 DRIVING INCOME	
WAV Money	$ 1,757.00
Cash	$ 20,781.94
Credit	$ 60,459.83
Total	**$ 82,998.77**
Fare Expenses	
Credit Card Processing Fee for self and lease driver	$ 3,022.99
Toll	$ 4,127.48
MTA	$ 2,817.10
Improvement Surcharge	
Total	**$ 9,967.57**
DRIVING INCOME	**$ 73,031.20**

Lease Income	
Weekly	$ 260.00
On average number of weeks	48
LEASE REVENUE	**$ 12,480.00**

OTHER	
Other Household Income	$ 19,200.00
Rental Income	$ 18,000.00
OTHER INCOME	**$ 37,200.00**

SUMMARY		AT REDUCED MORTGAGE
INCOME, TOTAL	$ 122,711.20	$ 122,711.20
EXPENSES, TOTAL	$ 156,874.44	$ 129,339.24
BALANCE	**$ (34,163.24)**	**$ (6,628.04)**

DEBT	Balance	Monthly
Student Loan	7000	583.3333333
Met Life Life Insurance		300
Personal Loans	50000	500
Total	**$ 57,000.00**	**$ 1,383.33**

TESTIMONY OF
SARAH J. AUCHTERLONIE
SHAREHOLDER
BROWNSTEIN HYATT FARBER SCHRECK, LLP

BEFORE THE

COMMITTEE ON FINANCIAL SERVICES
UNITES STATES HOUSE OF REPRESENTATIVES

AT A HEARING ENTITLED,
"EXAMINING LEGISLATION TO PROTECT CONSUMER AND SMALL BUSINESS OWNERS FROM ABUSIVE DEBT COLLECTION PRACTICES"

SEPTEMBER 26, 2019

Testimony of Sarah J. Auchterlonie
Shareholder
Brownstein Hyatt Farber Schreck, LLP

Before the

Committee on Financial Services
United States House of Representatives

at a hearing entitled,

"Examining Legislation to Protect Consumers and Small Business Owners from Abusive Debt Collection Practices"

September 26, 2019

Chairwoman Waters, Ranking Member McHenry, and Committee Members:

Thank you for the opportunity today to discuss the work of the accounts receivable management ("ARM Industry") in the consumer and small business marketplaces. The time is ripe for this august body to consider the need to modernize the statutory landscape concerning accounts receivable management. New communication technologies, the increasing amount of unpaid consumer debt, and the Bureau of Consumer Financial Protection's ("CFPB" or "Bureau") pending Regulation F rulemaking to implement the Fair Debt Collection Practices Act ("FDCPA") provide the opportunity for you to consider the important balance of policies concerning debt collection in the U.S.

The Bureau's proposed Regulation F will be the first of its kind since the FDCPA was enacted in 1977. Accordingly, the CFPB's proposal will shape the future of the industry and the larger economy. Members of the ARM industry have long sought clarity surrounding the use of new technologies, including several that are now decades old—like voicemail, that have altered how consumers communicate. Consumers have also indicated preferences for being contacted in more convenient ways, through newer communication channels such as email. Small businesses and creditors also need clarity on their rights for payment as they continue to serve their communities across the country by providing goods and services and employ millions of Americans.

I am a regulatory relations advisor to the Association of Credit and Collection Professionals ("ACA International" or "ACA") and a shareholder in the Denver office of the law firm Brownstein Hyatt Farber Schreck. I was previously an attorney with the U.S. Department of the Treasury's Office of Thrift Supervision (OTS) and later was a founding employee and Acting Deputy Enforcement Director with the Bureau of Consumer Financial Protection's Office of Enforcement. In that capacity, I led a team of enforcement attorneys in the investigation and litigation of matters involving the federal consumer financial protection laws. My notable work includes handling the CFPB's first administrative proceeding and appeal to the bureau director, *In the Matter of PHH Corp.*, as well as Equal Credit Opportunity Act (ECOA) settlements with mortgage lenders, Fair Credit Reporting Act (FCRA) investigations of lenders and credit reporting agencies, and FDCPA matters with debt collection firms.

After leaving the Bureau to move to Denver, Colorado in 2015, I co-authored the legal treatise, *Consumer Finance Law and Compliance* (bna 2017). Two governors of the state of Colorado have appointed me to represent the citizens of the state at-large on the Colorado Banking Board, the policy and rulemaking body governing the state's banking system. In addition, I have advised the start-up or acquisition of dozens of financial technology companies, each with unique regulatory, compliance, and licensing requirements. I represent both consumers and companies in litigation involving consumer finance issues. Finally, I have helped several American Indian tribal governments to build and expand their consumer financial protection regulation, supervision, and enforcement regulatory agencies.

Most saliently for today's purposes, I consulted with ACA to draft its 154-page comment letter and criticisms of the CFPB's Proposed Regulation F concerning debt collection.[1]

EXECUTIVE SUMMARY

Overall, the Bureau's efforts in Proposed Regulation F will resolve ambiguities in the FDCPA and help create uniform national standards. After more than seven years of work on this rule, throughout two Administrations, the Bureau's proposal

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[1] Comments of ACA International on CFPB Proposed Regulation F, available at https://www.acainternational.org/assets/advocacy-resources/aca-comment-cfpb-reg-f-9.17.19.pdf (Sep. 17, 2019).

addresses both consumer and industry concerns by providing transparency to consumers seeking to understand their rights under the law, and provides guidance to help avoid benign technical errors that can lead to frivolous litigation. The limited content message in the proposal is a common-sense solution for both consumers and industry to address a statutory catch-22, which has harmed the ability to leave voicemail messages, increased call volumes, and has warranted regulatory guidance for several decades. The Bureau's efforts also provide clarity to the practice of sending electronic communications. Furthermore, the proposal for a model validation notice to address the plethora of ambiguities in FDCPA §809 concerning the validation of debts is also a step in the right direction toward providing some important clarifications.

Efforts to delay or eliminate conversations between consumers and creditors' collection agents do not help consumers. Rather, preventing communication about collection options will enhance consumer harm by increasing incentives for creditors to file collection suits because they are stymied in their ability to settle debts outside of court.

- **Clear and Plain Language Communication is Best for Consumers and Industry.** Despite the offensive rhetoric of certain interest groups, the accounts receivable management industry is a "caring" profession. The industry is majority female—27 percent of collection agencies are woman-owned, and women comprise 70 percent of the total collections workforce. Further, the ARM industry represents a diverse segment of the United States across a broad range of sociodemographic groups.[2]

  The individuals who contact consumers about debts want to help consumers find the best possible solution to their debt that allows those consumers to continue to access credit and services in the future. Empathy and understanding are key components of these conversations. But fear of plaintiff's litigation and the "overshadowing" doctrine force collection agencies to use stiff and confusing statutory language that consumers deem intimidating. Any efforts to update debt collection should allow (and protect from vexation litigation) collection firms

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[2] ACA, SMALL BUSINESS IN THE COLLECTIONS INDUSTRY IN 2019, (ACA International White Paper April 2019), available at https://www.acainternational.org/assets/advocacy-resources/aca-wp-smallbusiness-2019-002.pdf

to use clear and plain language so they can provide better customer service to consumers.

- **The U.S. economy depends on collected debt.** Debt collection returned $67.6 billion of funds in 2016 to US businesses—that's an average savings of $579 for every American household. Laws and regulations should not incentivize consumers to shirk legal and valid debts at the expense of honest businesses and other consumers seeking affordable credit. Small and medium-sized business owners and their employees will stop providing services in advance of payment if collections become less certain.

- **To have a functioning credit-based economy in the United States, consumers have some responsibility to pay their debts and to participate in the discussions about how to pay them.** Consumers benefit when they take part in the process of resolving debt. Through open communications, they can obtain the best results by working out payment plans, fee waivers, identify other parties responsible for paying the debt, or even defer payments if they are facing a hardship or are truly unable to afford to repay the debt. The ability to collect on unpaid debt is an important part of a functioning economy and a safe and sound banking system. The work of the ARM Industry has proven to keep the price of credit more affordable for consumers and has allowed creditors to continue to lend.

- **The CFPB's Complaint Database Data Paints an Inaccurate Portrait of the Accounts Receivable Management industry.** The Bureau and organizations connected to plaintiffs' litigation refer to complaint data about the accounts receivable management industry to justify new interventions. However, the Bureau's complaint data is not designed to be irrefutable or read without context. The most troubling aspects of using the complaint database to make broad or generalized conclusions are: (1) the Bureau has a broad definition of a complaint, (2) the Bureau does not verify the accuracy of the complaints it receives, and (3) that the number of complaints versus the number of overall contacts are not standardized. Notably, debt collection complaints account for only 0.005% of all consumer contacts made in a given year by the accounts receivable management industry.

ABOUT THE ARM INDUSTRY

The ARM industry includes the smallest of businesses that operate within a limited geographic range of a single state, and the largest of publicly held, multinational corporations that operate in every state. The majority of debt collection companies, however, are small businesses. According to a recent survey, 44 percent of polled organizations (831 companies) have fewer than nine employees. About 85 percent (1,624 companies) have 49 or fewer employees and 93 percent (1,784) have 99 or fewer employees.

As part of the process of attempting to recover outstanding payments, collection firms are an extension of every community's businesses. they work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. In years past, the combined effort of the ARM industry has resulted in the annual recovery of billions of dollars – dollars that are returned to and reinvested by businesses and dollars that would otherwise constitute losses on the financial statements of those businesses. Without an effective collection process, the economic viability of these businesses and, by extension, the American economy in general, is threatened. Recovering rightfully owed consumer debt enables organizations to survive, helps prevent job losses, keeps credit, goods, and services available, and reduces the need for tax increases to cover governmental budget shortfalls.

An academic study about the impact of debt collection confirms the basic economic reality that losses from uncollected debts are paid for by the consumers who meet their credit obligations:

> In a competitive market, losses from uncollected debts are passed on to other consumers in the form of higher prices and restricted access to credit; thus, excessive forbearance from collecting debts is economically inefficient. Again, as noted, collection activity influences on both the supply and the demand of consumer credit. Although lax collection efforts will increase the demand for credit by consumers, the higher losses associated with lax collection efforts will increase the costs of lending and thus raise the

> price and reduce the supply of lending to all consumers, especially higher-risk borrowers.[3]

In short, consumer harm can result in several ways when unpaid debt is not addressed, and the ARM industry works to help consumers understand their financial situation and what can be done to address it and improve it.

The debt collection market is extremely varied in the types of debts being collected and the nature and size of the accounts receivable management industry encompasses a broad scope. Although the credit and collections industry comprises a relatively small space in the entire consumer financial services arena, the client base serviced by industry members is highly diverse, from large corporations to local Main Street service providers — all of whom have a vested interest in customer retention, particularly in the case of small business creditors.

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[3] Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, MERCATUS WORKING PAPER, MERCATUS CTR AT GEORGE MASON UNIV., at 47 (Sep. 2015), *available at* https://www.mercatus.org/system/files/Zywicki-Debt-Collection.pdf.

I. INTRODUCTION

Congress enacted the FDCPA in 1977 to protect consumers from abusive, threatening, and unfair collection practices. At the time, abuses that needed to be curbed included: intimidation by individuals claiming to be part of the debt collection profession, threats of imprisonment, publication of debtor lists in local newspapers, repeated harassment, the placement of hundreds of telephone calls to consumers (often at work or in the middle of the night), as well as blatant misrepresentations to consumers regarding their debt and the creditor's legal recourses.

The most outrageous actions referenced above are extreme exceptions. Dialing technology, creditor's increased focus on the customer-service aspects of collections, and the professionalization of the collections industry has made these situations extremely rare. In today's world with a severely outdated FDCPA, despite some bad actors that are present in every industry and every profession, rarely does a case involve actual damages or serious harm to a consumer. Egregious violations are increasingly rare, and the industry has worked with the Bureau to identify bad actors and has applauded its enforcement actions against them.[4]

Although the legislative history of the FDCPA included a call for it to be revisited and modernized as appropriate, the law has not been significantly updated or modernized since that time more than 40 years ago. As a result, where regulatory uncertainty exists within the statute, the judicial arm, charged with interpreting and applying the FDCPA, has rendered a legal patchwork of federal and state case law that is highly inconsistent among jurisdictions.

A. Significant Ambiguities in the FDCPA cause Unnecessary Litigation.

There are nearly 12,000 annual plaintiff litigation filings under the FDCPA. Also, the threat of FDCPA filings imposes significant costs for the accounts receivable management industry (see, 84 FR at 23370). Most notably, given the mechanical language and requirements under the FDCPA, self-described "consumer protection"

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[4] ACA International, *CFPB Alleges Large Credit Repair Companies Violated Consumer Laws* (May 2, 2019), available at https://www.acainternational.org/news/cfpb-alleges-large-credit-repair-companies-violated-consumer-laws.

attorneys have generated unnecessary litigation based on technical, inconsequential, non-abusive violations.[5] Many consumer attorneys throughout the country coordinate with their clients to call collectors with the intent of eliciting a response that will form the basis of an FDCPA suit.

These attorneys burden collection agencies (which as noted are often small businesses)[6] with demands for tens of thousands of dollars to resolve claims arising from hyper-technical violations of the law. Moreover, they and their clients openly invoke the FDCPA as a pretext for avoiding the repayment of lawful debt. Some attorneys even use the FDCPA to drive their bankruptcy law practices. Many go so far as to search public court databases for newly filed collection actions to recruit new clients. Most importantly, these attorneys thrive on the mere threat of litigation, knowing that most agencies will pay $5,000 to settle a frivolous case instead of spending $50,000 to successfully defend one.

Notably, the FDCPA does not require consumers to show that a debt collector's misconduct was intentional. *See, e.g., Russell v. Equifax A.R.S.*, 74 F.3d 30, 33 (2d Cir. 1996) ("Because the Act imposes strict liability, a consumer need not show intentional conduct to be entitled to damages."); *Beuter v. Canyon State Prof 'l Servs., Inc.*, 261 F. App'x 14, 15 (9th Cir. 2007) (holding that the FDCPA imposes strict liability on debt collectors and that they "are liable for even unintentional violations of the FDCPA"). Likewise, the FDCPA incentivizes consumers and their attorneys to diligently monitor the accounts receivable management industry's behavior by allowing the recovery of "any actual damage," statutory damages up to $1,000, as well as the consumers' attorney's fees and costs. 15 U.S.C. § 1692k.

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[5] *See, e.g., Anenkova*, 201 F.Supp.3d at 636-39 (granting summary judgment against plaintiff who sued a debt collector because a barcode was visible on the envelope); *McShann v. v. Northland Grp., Inc.*, Case No. 15-00314-CV-W-GAF, 2015 WL 8097650 (W.D. Mo. Dec. 1, 2015) (granting a motion to dismiss where a plaintiff sued because a demand letter with a "window" displayed the plaintiff's name, address, and account number); *Simmons v. Med-I-Claims*, No. 06-1155, 2007 WL 486879, at *9 (C.D. Ill. Feb. 9, 2007) (granting summary judgment where plaintiff sued because the return address listed in the envelope was listed for "Med-I-Claims" instead of "Med-I-Claims Services Inc."); *Masuda v. Thomas Richards & Co.*, 759 F.Supp. 1456, 1466 (C.D. Ca. 1991) (rejecting plaintiff's argument that debt collector violated FDCPA by including in an envelope language like "PERSONAL & CONFIDENTIAL" and "Forwarding and Address Correction Requested.").

[6] ACA, SMALL BUSINESS IN THE COLLECTIONS INDUSTRY IN 2019 (ACA International White Paper April 2019), available at https://www.acainternational.org/assets/advocacy-resources/aca-wp-smallbusiness-2019-002.pdf.

B. Courts have developed FDCPA "Policy" without the Benefit of Regulatory Tools

Courts have created their own unintended consequences with their interpretations of the FDCPA over the last 40 years of litigation. Judicial constructs like the least sophisticated consumer are nowhere in the FDCPA text.[7] Likewise, courts made up the doctrine of "overshadowing," which is now being used to attack anything that deviates from mechanical statutory language and that might be considered "congenial."[8] And, even when agencies utilize the FDCPA's statutory language, such as by including in their letters the validation notice language found in Section 1692g(a), they get penalized by courts. Indeed, courts have muddied the waters about how to describe "in writing" dispute requirements in *g notices (*despite the fact that the required language is spelled out in the FDCPA) and whether a collector can encourage a telephone call to dispute or ask questions.[9] These and other judicial rewrites to the FDCPA have effectively promulgated rules and regulations with no notice, no opportunity to comment, and no coherent public policy to balance the costs and benefits of the rulings.

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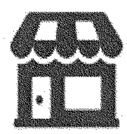
[7] *See Lait v. Medical Data Systems, Inc.*, No. 18-12255, 2018 WL 5881522, at *1-2 (11th Cir. Nov. 9, 2018) (noting the decisions of different courts on whether to apply the least sophisticated debtor standard in different provisions of the FDCPA).

[8] *See, e.g., Gruber v. Creditors' Prot. Servs., Inc.*, 742 F.3d 271 (7th Cir. 2014) (affirming dismissal of the claim that the statement immediately preceding the § 1692g(a) disclosure that "[w]e believe you want to pay your just debt" overshadowed and was otherwise inconsistent with the verification disclosure because the statement does not contradict any of the required disclosure and instead is merely "a congenial introduction to the verification notice and is best characterized as 'puffing'.")

[9] *Hooks v. Forman Holt Eliades & Ravin L.L.C.*, 717 F.3d 282 (2d Cir. 2013) (holding that a verification notice violated the FDCPA by stating that the consumer must dispute the debt in writing); *Riggs v. Prober & Raphael*, 681 F.3d 1097 (9th Cir. 2012) (stating that "[w]e have previously held that a collection letter, called a 'validation notice' or 'Dunning letter,' violates § 1692g(a)(3) of the FDCPA 'insofar as it state[s] that [the consumer's] disputes must be made in writing.'") *compared to Caprio v. Healthcare Revenue Recovery Group*, L.L.C., 709 F.3d 142 (3d Cir. 2013) (letter containing the § 1692g verification notice was deceptive in that it urged the consumer to telephone the debt collector if the consumer felt he did not owe the amount claimed by the collector, when telephoning would not entitle the consumer to the verification of the debt if the consumer disputed the debt in writing. "More is required than the mere inclusion of the statutory debt validation notice in the debt collection letter—the required notice must also be conveyed effectively to the debtor. . . . More importantly for present purposes, the notice must not be overshadowed or contradicted by accompanying messages from the debt collector.")

Lawmaking should provide clarity and safe harbors that allow collectors to use plain language and interpretations where ambiguity has created differences between courts and circuits. Stifling communication and allowing outdated precedent to continue to govern the marketplace is not the answer to consumer protection, and alternatively has led to consumer harm.

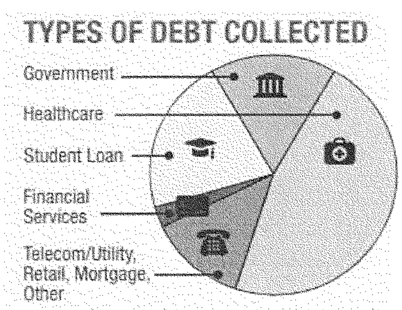
II. REGULATORY OVERREACH PARTICULARLY HARMS MEDICAL CARE PROVIDERS, GOVERNMENT AND SMALL BUSINESSES



The majority of ACA-member debt collection companies are small businesses with nearly 85 percent maintaining fewer than 49 employees. Additionally, 45% of ACA members have indicated that between 50%-100% of their customers are small business clients.

Raising barriers for essential service providers—like healthcare providers, pest control companies, or car mechanics—to collect past due accounts has serious consequences to society.

There is a collective "speed bump" effect when regulations slow or impede contacts with consumers. These impossible speed bumps will decrease meaningful consumer communication, which will drive creditors to litigation and ultimately harm the ability of consumers to access credit and services.



Most of the accounts receivable management industry collects debt owed to medical providers or small and mid-sized companies. Financial services firms make up only about 10% of total debt collections activities. Health care related debt (from hospitals and non-hospitals) is the leading debt category collected by debt collection professionals, accounting for nearly 47% of all debt collected in the industry, followed by student loan debt, which makes up 21% of all debt collected. Government-related debt makes up 16% of all debt collected, while credit card, retail, telecom, utility, mortgage, and other debt each make up less than 10% all of debt collected.[10]

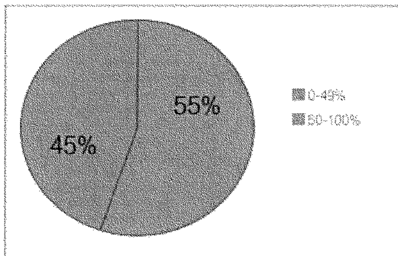
Government-related debt collection (16% of all debt collected) fuels American communities. This includes local government utility services, court fees, traffic tickets, tolls, and state-issued student loans.

A significant majority of small businesses that rely on collection agencies (e.g., dentists, plumbers, lawn care, pest control, or heating/cooling repair companies) are not financial services businesses. They have trades or professions that require their personal time and attention. As such, hiring an ARM company to manage their uncollected receivables is necessary to keep their business operating, pay their employees, and continue to provide services.

Over 45% of ACA members indicated that between 50%-100% of their customers are small business clients.

[10] *Cf.* CONSUMER FINANCIAL PROTECTION BUREAU, MARKET SNAPSHOT: THIRD-PARTY DEBT COLLECTIONS TRADELINE REPORTING 5 (July 2019) (stating that "[m]edical debt accounted for 58 percent of total third-party collections tradelines in Q2 2018" and "[m]ore than three out of four (78 percent) total third-party debt collections tradelines were for medical, telecommunications, or utilities debt in Q2 2018]," available at: https://files.consumerfinance.gov/f/documents/201907_cfpb_third-party-debt-collections_report.pdf.

Figure 3. Percentage of Member Responses to the Question "What percentage of your business serves small business clients?"



Source: ACA International; N=185

Notably, laws and regulations that impact how much and how quickly debt is collected directly impacts the services provided by these medical, government, and small business creditors. Any policy discussions must consistently keep the important work of these economic participants in mind.

III. RELIANCE ON CFPB COMPLAINT DATA OFTEN LACKS RIGOR

We caution this Committee and its staff to probe with skepticism statements and conclusions based only on counts of consumer complaints in the CFPB database. For the reasons below, fully described in an industry White Paper, [11] neither Congress nor the CFPB should not be relying on its complaint data as an accurate portrayal of the industry when formulating rules and laws.

- Debt collection complaints account for only 0.005% of all consumer contacts made in a given year by the accounts receivable management industry.
- 84% of debt collection complaints are closed "with explanation."
- The Bureau's broad definition of a complaint sweeps in mere inquiries or unhappiness that a debt is owed.
- The Bureau fails to verify the accuracy of the complaints it receives before including the complaint in its counts.
- The Bureau does not differentiate between contacts vs. complaints.
- Many complaints address issues that are not fundamentally about the collection firm. For example, a consumer may submit a complaint that his or her insurance company should have paid a medical bill or that the debt was a result of identity theft.

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[11] ACA, A REVIEW OF DEBT COLLECTION COMPLAINTS SUBMITTED TO THE BUREAU OF CONSUMER FINANCIAL PROTECTION'S COMPLAINT DATABASE IN THE FIRST HALF OF 2018, 2-7 (ACA International White Paper November 2018), available at https://www.acainternational.org/news/aca-releases-new-white-paper-reviewing-debt-collection-complaints.

A. Legitimate Disputes Comprise Less than ½ Percent of All Accounts

ACA conducted a macro analysis of its members' dispute data and determined that only 0.15% of disputed accounts have a basis in fact. These legitimate disputes comprise less than 4.5% of all disputes submitted. And, of those legitimate disputes, 69% were valid because the borrower paid the debt in full prior to the collection agency making its initial contact. This is a time-lag problem, not a compliance issue.

					"Legitimate" Disputes		
	Total Accts.	Total Disputes	Duplicative Dispute	Validated Acct. or Duplicative Dispute	Error/No media	Acct. Paid in Full	TOTAL
Total	2,263,845.	77,124	15,463	74,487	1,049	2,343	3,392
OF Total Disputes		3.41%	20.05%	96.58%	1.36%	3.04%	4.40%
OF Total Accts.	.	3.41%	0.683%	99.850%	0.046%	0.103%	0.150%
Of "Legit." Disputes					30.9%	69.1%	100.0%

* Duplicative disputes are defined somewhat consistent with NPRM §1006.38(a)(1) as: a dispute submitted by the consumer in writing that is substantially the same as a dispute previously submitted by the consumer in writing for which debt collectors already has satisfied the requirements of paragraph (d)(2)(i). Many collection agencies record and respond to disputes outside the validation period for customer service purposes.

<u>Conclusion</u>

In fact, from a 2018 and 2019 sample set of over 2.2 million accounts, ACA determined that the data supporting collections on those accounts is accurate over 99.85 percent of the time.

This study provides three key takeaways:

- **Anecdotes that indicates malfeasance by the ARM industry are dramatically inflated when compared to actual data.**

- **Concerns about consumers not exercising their right to dispute debts are unfounded, as invalid accounts are very rare.**

- **Duplicate disputes comprise over 20 percent of all disputes.**

IV. DATA FROM STATE REGULATION ADVISES EXTREME LAWMAKING CAUTION

The Bureau must carefully balance new collections requirements with market incentives. For creditors, the alternative to debt collection is litigation. For many reasons, consumers who have breached credit contracts are much better off communicating privately with debt collectors than being sued by creditors in state or local courts:

- Consumers must often pay attorneys' fees and costs of collections litigations,
- Consumers may lose chances to settle debt for less than face value, and
- When a lawsuit is filed in state or county court, the lawsuit filing, and defaulted debt becomes a matter of public record with all the attendant reputational harm.

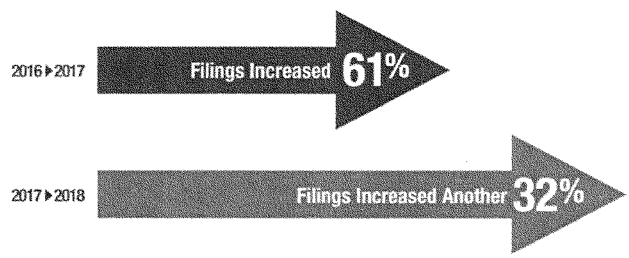
Too much regulatory burden or frivolous plaintiffs' class action risk, however, negates the advantages of debt collection and will drive more creditors to elect litigation sooner or more frequently, particularly for certain riskier classes of debt.

Creditors prefer out-of-court resolution through debt collection because it usually is faster, predictable, is private, avoids attorney fees, and typically maintains the goodwill of the consumer. But where regulatory hurdles increase capital costs, on-going burdens, or regulatory risk, creditors and collection agencies may choose to file collections actions where notice pleading rules and medical information privacy rules are clear and a 100 percent recovery is more likely.

A. The 2015 New York DFS Debt Collection Rules Increased Collection Litigation by 93%

Following the enactment of new debt collection regulations in 2015, in New York State, collections lawsuit filings rose 32% in 2018 and 61% in 2017 from pre-2015 levels.[12] ACA believes that this is an overall bad outcome for consumers, and advises the Bureau to avoid tipping the trend toward litigation at a national level.

Over Regulation of Communication Drives Creditors to Litigation*



Source: Yuka Hayashi, *Debt collectors wage comeback*, Wall Street Journal, July 5, 2019.
**Numbers based on New York state filings following enactment of 2015 DFS Debt Collection Rules*

The New York Department of Financial Services issued regulations that took effect on March 3, 2015, except for certain provisions relating to itemization of the debt to be provided in initial disclosures and relating to substantiation of consumer debts, which were effective Aug. 3, 2015.

1. *Itemization on Validation Notices*

The DFS' regulations require that the validation notice or "g notice" contain a written notification that includes: (1) disclosure that debt collectors are prohibited from engaging in abusive, deceptive and unfair debt collection; (2) notice of the types of income that may not be taken to satisfy a debt; and (3) itemization similar to that proposed by the Bureau, *i.e.*, detailed account-level information, including the name of the original creditor and an itemization of the amount of the debt. That itemization must include the debt due as of charge-off, total amount of interest

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[12] Yuka Hayashi, *Debt collectors wage comeback*, WALL STREET JOURNAL, July 5, 2019 (crediting New Economy Project, a consumer advocacy group).

accrued since charge-off, total amount of noninterest fees or charges accrued since charge-off and total amount of payments made since charge-off.[13]

2. Disclosures About Debts for Which the Statutes of Limitations May be Expired

The DFS rules also require certain disclosures about statutes of limitations if the debt collector "knows or has reason to know" that the statute of limitations has expired. This section also mandates that collection firms maintain "reasonable procedures" for determining whether the statute of limitations has expired.

3. Increased Substantiation of Consumer Debts

If a consumer disputes a debt, collection firms may treat the dispute as a request for substantiation or must provide instructions as to how to make a written request for substantiation of the debt. Collection firms must provide substantiation within 60 days of receiving a consumer's request and must cease collection efforts during that time.

DFS defined documentation required for substantiation as including either a copy of a judgment against the consumer or: (1) the signed contract or some other document provided to the alleged consumer while the account was active demonstrating that the debt was incurred by the consumer; (2) the charge-off account statement (or equivalent document) issued by the original creditor; (3) a description of the complete chain of title, including the date of each assignment, sale and transfer; and (4) records reflecting any prior settlement agreement reached under the regulations. Collection firms must retain all evidence of the request, including all documents provided in response, until the debt is discharged, sold or transferred.[14]

4. Debt Payment Procedures

If an agreement to a debt payment schedule or settlement is reached, the collection firm must provide written confirmation of the agreement and notice of exempt income. The collection firm must also provide a quarterly accounting statement while the consumer is making scheduled payments.

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[13] 23 NYCRR § 1.2(b)(2).

[14] 23 NYCRR § 1.4

5. Communication through Email Restricted

After mailing the initial required disclosures, debt collectors may communicate with a consumer through email upon receipt of consumer consent, provided the email account is not owned or provided by the consumer's employer.

B. Over-Regulation of Communications Drives Creditors to Litigation

In New York City courts, account collection filings in year 2017 rose 61% from 2016 levels. In 2018, account collection filings rose another 32% from 2017 levels.[15] Prior to the New York DFS rules, lawsuit filings to collect debts had declined for nearly a decade due to tougher court requirements imposed on collectors.[16]

ACA members explain the reasons for this:

- Creditors did not want to invest the money to update systems in order to provide the data required to meet the itemization requirements (Rule 1); lawsuit filings shift the document preparation burden to attorneys;

- The new substantiation requirements (Rule 3) were as burdensome as litigation document preparation, so debt collection and non-litigation based communications lost an advantage.

- Collectors who formerly used email in New York stopped because the risk was too high.

- Collectors who adopted email strategies across the U.S. did not adopt them in New York.

- Most debt collection agencies give consumers a discount on the debt. In contrast, the added cost of litigation discourages creditors from agreeing to the amount of discounts offered by a collection agency. In addition, creditors know they usually win judgments for the full amount further dissuading them from offering debt reductions or payment plans as favorable as accepted

[15] Yuka Hayashi, *Debt collectors wage comeback*, WALL STREET JOURNAL, July 5, 2019.

[16] Yuka Hayashi, *Debt collectors wage comeback*, WALL STREET JOURNAL, July 5, 2019.

by collection agencies. As the conveniences of non-litigation-based debt collection decline, the recovery advantage of litigation will prevail.

V. ARM INDUSTRY VIEWS ON KEY ASPECTS OF THE BUREAU'S PROPOSED REGULATION F

A. The "Limited-Content Message" is an Essential Modernization of the FDCPA

ACA applauds the Bureau's proposed new term as it believes that the proposed limited-content message provides a uniform interpretation of the FDCPA that alleviates the need for collectors to decide between different circuit court opinions.

The Bureau has proposed to include, in § 1006.2(j), a new term, "limited-content message."

> (j) *Limited-content message* means a message for a consumer that includes all of the content described in paragraph (j)(1) of this section, that may include any of the content described in paragraph (j)(2) of this section, and that includes no other content.
>
> (1) *Required content.* A limited-content message is a message for a consumer that includes all of the following: (i) The consumer's name; (ii) A request that the consumer reply to the message; (iii) The name or names of one or more natural persons whom the consumer can contact to reply to the debt collector; (iv) A telephone number that the consumer can use to reply to the debt collector, and (v) If applicable, the disclosure required by § 1006.6(e).
>
> (2) *Optional content.* In addition to the content described in paragraph (j)(1) of this section, a limited-content message may include one or more of the following: (i) A salutation; (ii) The date and time of the message; (iii) A generic statement that the message relates to an account; and (iv) Suggested dates and times for the consumer to reply to the message.

1. *When it comes to leaving messages, the FDCPA lacks clarity and is in desperate need of interpretation.*

The FDCPA was drafted before voicemail existed and is ambiguous about how one can simultaneously comply with its provisions when leaving a voice message. As currently defined in the FDCPA, a communication "means the conveying of information regarding a debt directly or indirectly to any person through any medium."[17] The FDCPA is clear in Section 805(b) that a debt collector may not communicate with a person other than the consumer in connection with the collection of any debt, with certain exceptions. Yet, in Section 807(11) the FDCPA requires that a debt collector identify itself as a debt collector, inform the consumer that the debt collector is attempting to collect a debt, and that any information obtained will be used for that purpose. Since the passage of the FDCPA there has been uncertainty surrounding the intersection of these two provisions in the FDCPA because if a debt collector leaves such disclosures on a voicemail or other message system, they risk violating the prohibition against revealing information about a debt owed by a consumer to a third party. This has led to some debt collectors deciding not to leave messages at all and instead hanging up when reaching a voicemail.

In the NPRM, the CFPB has identified that consumers are frustrated when a collector calls and doesn't leave a voicemail. The CFPB's proposed definition of a limited content message attempts to resolve both sides of this equation. It provides a method whereby debt collectors may leave a message for a consumer and not risk violating the statute, which would reduce the number of calls a debt collector would need to make to reach the consumer and resolve the outstanding debt.

There currently is a split among circuits about how collectors should leave recorded or live messages.[18] Additionally, as noted in the NPRM, the FTC and the U.S. Government Accountability Office have previously identified the need to clarify a

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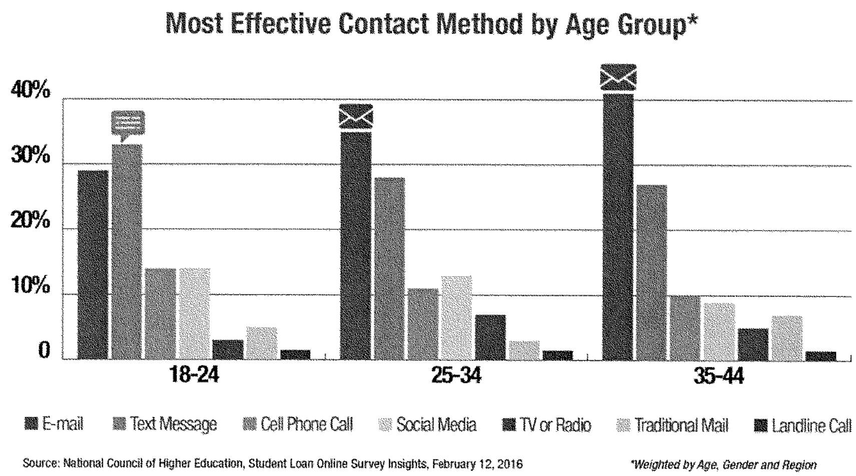
[17] 15 U.S.C. § 1692b(2)

[18] *Compare Foti v. NCO Fin'l Sys's, Inc.*, 424 F.Supp.2d 643 (S.D.N.Y. 2006) (holding that a pre-recorded message stating "calling . . . regarding a personal business matter" was a "communication" under the FDCPA) *with Zortman v. J.C. Christensen & Associates, Inc.*, 870 F.Supp.2d 694 (D. Minn. 2012) (holding that voicemail stating "[t]his is a call from a debt collector" was not a third-party communication violating the FDCPA).

debt collectors' ability to leave voicemail messages for consumers.[19] Moreover, the CFPB noted that the SBREFA process demonstrated overwhelming support from small business representatives for a rule that clarified a debt collector's ability to leave a message for a consumer.[20]Reasonable minds differ on how to interpret the FDCPA. This area is ripe for agency rulemaking under the *Chevron* factors.[21]

B. Consumers prefer Email and Text Message Communications

Abundant evidence supports the benefits of increased email use in debt collection communications. Consumers prefer email. Borrowers in all age groups, 18-24, 25-34 and 35-44, indicate that email is one of the most desired and effective method of communication.[22]



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[19] *See* NPRM, at 61; *see id.* at 61, fns. 176 & 177.

[20] *See id.* at 67, fn. 179.

[21] *See* Infra Section IV.B.

[22] NATIONAL COUNCIL OF HIGHER EDUCATION LOAN RESOURCES (NCHER), STUDENT LOAN ONLINE SURVEY RESULTS (February 12, 2016), available at https://cdn.ymaws.com/www.ncher.us/resource/resmgr/NCHER_Poll/01_NCHER_Survey_Insights.pdf

In a study by Katabat Digital Collections platform worldwide, collection firms deploying its digital collections platform saw a 33% increase in customer satisfaction measured by net promoter score. Email reduces telephone calls and costs to agencies. In that same study, digital self-service and reduced outbound calls cut telephone-related charges 7%.

These results make intuitive sense. Email is more likely to be read than U.S. mail, which means consumers are more likely to be informed of their rights. Email is passive and non-intrusive. Email is less likely to be opened by someone other than the addressee. Email moves with consumers when they change residences, thus avoiding "location" calls that increase third-party contacts. Email is superior to regular U.S. mail in many respects.

Approximately 15% of ACA's membership surveyed in 2017 communicated through email. The relatively low percentage of email use is primarily due to concerns about liability. However, according to one debt collection firm that specializes in electronic collections, "Email response rates in the debt collection process are better than the industry average for any email communication," finding that up to 68% of consumers will open an email, ultimately leading to 55% clicking the link provided, and over 32% initiating payment.[23] Email significantly expands the potential for the debt to get resolved prior to initiating more time-consuming means of collection and credit reporting.

In Proposed Regulation F, the consumer retains control of communication methods. Both proposed §1006.6(e) and §1006.6(c)(1)(ii) permit the consumer to electronically notify the collector to cease communications through a particular media. The consumer may ensure that the collector does not use a non-preferred address or phone number for further communications through opting out of communications using the email address or phone number after receiving the notice in proposed §1006.6(d)(3)(i)(B)(1), or through opting out of further electronic communications per proposed §1006.6(e). Moreover, the consumer can effectively prevent use of a work email or phone number for debt communications by simply not providing that information to the original creditor.[24] The Bureau itself recognizes, the consumer

[23] True Accord, *Debt Collection The new frontier in financial services digitization,* available at www.trueaccord.com/resources/downloads.

[24] ACA recognizes that this may entail requiring original creditors to clearly and conspicuously disclose that contact information may be used to communicate regarding payment.

has better information about the risk of third party disclosure with a particular email address or phone number. [25] Contact information on credit applications is obviously provided so the consumer can be contacted about the account. Interfering in that basic understanding will cause more harm than good.

C. Numerical Call Frequency Limitations do not Help Consumers

The FDCPA §806(5) limits repetitive calls made with the "intent" to harass, annoy, or abuse. However, limiting contact between consumers and collectors turns "early out" debt into "bad debt" and increases the potential for litigation. Nearly 1/3 of collection contacts resolve the debt within 90 days. Once an account ages past 90 days, it is more likely to be considered for legal collections. As discussed above, collection lawsuits are the least desirable outcome for the consumer. Lawmaking must consider the risk and likelihood that limiting constructive communications to resolve debts will increase litigation[26]—a result that causes harms the FDCPA meant to prevent and is therefore manifestly contrary to the statute.[27]

<u>Frequency limits increase the cost and length of time to resolve debts</u>

The Bureau must consider the economic effects of a proposed rule.[28] A decrease in direct contact between consumers and collection firms will cause an increase in alternative contacts (letters, texts, emails, etc.), and ultimately increase costs and the length of time it takes to resolve a debt. Professionals in the field and common sense predict increased costs to the industry and reduced effectiveness in reaching

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[25] NPRM at 100. Similarly, the consumer will have better information about whether his or her employer permits debt communications at work. *See* proposed §1006.6(b)(3).

[26] JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 164, at 449 (5th ed. 2012); *See* AMERICAN BAR ASS'N, SECTION OF ADMIN. LAW & REGULATORY PRACTICE, A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW 34 (2d ed. 2013).

[27] *Chevron*, 467 U.S. at 844 ("A permissible construction is one that is not "arbitrary, capricious, or manifestly contrary to the statute.")

[28] *See* Exec. Order 12,866 § 3(f), 58 Fed. Reg. 51,735 (Sept. 30, 1993) (stating that agencies must consider economic effects of proposed rule); *see also* LUBBERS, *supra* note 26, at 223, 476.

consumers due to the call limits. Moreover, the Bureau's own Calling Data study predicted the same impacts.[29]

2. The Prospect of "Unlimited Email and Text Messages" is a Chimera

The call-frequency limitation has been justified by the thought that the Bureau is now widening the doors to unlimited email and text messaging use. That is nonsense. Less than 15% of collectors use email now. It will be new to most, and it is expensive to implement, particularly for small businesses in the accounts receivable management industry.

Digital collection software needs to integrate with existing systems and strategies. Not every collector has the right setup, or the budget to switch technology. Implementing fully-functional software that operates with legacy systems and meets security requirements can be daunting. Deployments consume financial and human capital, tying up resources that small businesses may need elsewhere. Tasking a strategist and compliance officer to rebuild agent workflows from scratch for a digital debt collection solution may not be an option. In addition, this assumes that existing call center workforces can be trained to execute a digital strategy.

The cost for an email collections system is high and may exceed $80,000 in some cases. Since most accounts receivable management agencies are small (roughly 98 percent are small businesses as defined by the Small Business Administration), the estimated cost to small businesses just to invest in the technology (not training, lawyers, or compliance personnel) to create an email collections campaign is in the millions. Thus, lawmaking should not stifle certain modes of communication with consumers based on a hunch rather than known facts. It is also important to note that the CFPB's proposal includes an opt-out mechanism for email. This in conjunction with the time and resources spent to create a compliance program to send emails, make it unlikely that industry participants will use email in such a manner that pushes consumers to the point that they want to exercise their right to opt-out.

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[29] *See generally* CONSUMER FINANCIAL PROTECTION BUREAU, STUDY OF THIRD-PARTY DEBT COLLECTION OPERATIONS (July 2016), available at https://www.consumerfinance.gov/documents/755/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf; *see also* NPRM, at 370 (noting that "the proposed frequency limits could affect when and if [debt collectors] establish communication with consumers).

Similarly, the rhetoric about costly unlimited text messages likely being sent to consumers as a result of the CFPB's proposal is not based on fact and does not account for the complex compliance programs that must be created to even send a text message in the first place. Furthermore, the notion that text messages would come at a significant cost to consumers is not based on the reality of today's marketplace for telecommunications. With the widespread availability of unlimited call and text plans, the number of consumers who continue to pay for individual text messages is a very small segment of the marketplace and becoming even smaller each year. Notably, virtually all postpaid plans include unlimited texting.

D. Comments on §1006.34(C)(3)- Form Validation Notice.

The Bureau has proposed in Regulation F section 34 to create a standard form for the validation of debts as prescribed under the FDCPA Section 809 (15 U.S.C. 1692g), a form known colloquially as the "*g notice*" or "validation notice".[30] A single national standard is necessary to resolve the many inconsistent holdings across federal district and circuit courts regarding the contents and emphasis of disclosures on the *g notice*.

The Bureau's proposed model validation notice is a single page and is written in plain English. Further, the model validation notice was crafted after focus group copy testing, which found that the focus group understood and trusted sample validation forms that were written in "plain language" rather than those that used "statutory language" from the FDCPA.

Decades of inconsistent rulings, circuit splits, and court-created doctrines like "overshadowing" evidence the ambiguous construction of FDCPA §809.[31]

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[30] *See* NPRM, at 474 Proposed §1006.34(d)(2) ("*Safe harbor*. A debt collector who uses Model Form B–3 in appendix B of this part complies with the requirements of paragraphs (a)(1)(i) and (d)(1) of this section.")

[31] *See, e.g.*, *Caceres v. McCalla Raymer, L.L.C.*, 755 F.3d 1299, 1304, fn.5 (11th Cir. 2014) (recommending that debt collectors include the substance of § 1692g(c) (failure to dispute validity) in their validation notice).

VI. CONGRESS AND THE BUREAU MUST URGE THE FCC TO PROVIDE CLARITY ON THE DEFINITION OF WHAT IS CONSIDERED AN AUTODIALER

Congress provided the CFPB, not the FCC, with rulemaking and supervisory authority over the accounts receivable management industry. Yet the FCC is making policy decisions impacting the financial services industry without consulting with or working closely with the CFPB. The FCC's refusal to clarify onerous interpretations under the TCPA has a direct impact on whether agencies can develop compliance programs for sending text messages. The FCC's refusal to act is despite the fact that the D.C. Circuit recently struck down the FCC's 2015 Order and remanded key questions to it including asking it to define what is considered an autodialer.[32]

CONCLUSION

Congress, in the Dodd Frank Wall Street Reform and Consumer Protection Act charged the CFPB with considering "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from [rulemaking.]"[33] This wise direction should be a guiding light for any consideration of policies and law concerning debt collection.

The ARM Industry is an essential component of our consumer and small business credit system. A change to ARM requirements will impact creditors, consumers, and the availability of credit or essential services.

I appreciate the opportunity to provide you this testimony, which outlines the views of ACA, and look forward to continue working with you in future endeavors.

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[32] Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, CG Docket Nos. 18-152, 02-278 (rel. May 14, 2018).

[33] 12 U.S.C. § 5512(b)(2)(A)(i).

Testimony of the Reverend Dr. Cassandra Gould D. Min.

Pastor, Quinn Chapel A.M.E. Church, Jefferson City, Missouri

Executive Director, Missouri Faith Voices

Before the U.S. House Committee on Financial Services

Examining Legislation to Protect Consumers and Small Business Owners from Abusive Debt Collection Practices

September 26, 2019

Good morning Chairwoman Waters, Ranking Member McHenry, and Members of the House Committee on Financial Services. Thank you for inviting me to testify today.

I am the Reverend Dr. Cassandra Gould, Pastor of Quinn Chapel A.M.E. Church in Jefferson City, Missouri. I also serve as the Executive Director of Missouri Faith Voices, a statewide and non-partisan organization comprised of multi-faith and multi-racial members committed to empowering and transforming the lives of ordinary citizens. We are a federation of the Faith in Action National Network. We serve and champion those who are oppressed by racial and economic injustice as we oppose unfair policies and practices.

As a member of the Faith & Credit Roundtable, we join with others who share our stated concerns as a key national coalition organized by the Center for Responsible Lending. Our coalition works tirelessly to eliminate predatory lending.

Last week our advocacy against abusive debt collection practices was expressed in a comment last week to the Consumer Financial Protection Bureau. In that comment, we urged the Bureau to issue a debt collection rule that would do two things: 1) protect consumers and 2) sanction abusive debt collectors. With the closing of public comment on this important regulation, the CFPB faces an important choice between the welfare and health of individuals and families and exploitative financial practices of debt collection abuse. The Faith & Credit Roundtable believes that it is immoral and should be illegal to craft regulation that clearly harms those with the fewest financial resources.

The CFPB's Proposed Debt Collection Rule Will Harm Already Struggling Families

Despite clear evidence that abusive debt collection is a real problem, the CFPB proposed rule will not lessen the harms my community faces. The Faith & Credit Roundtable urged major changes to the proposed rule to ensure families are not subjected to unnecessary debt collection abuse and harassment that denies them basic dignities.

In our comment letter to the Bureau, the Faith & Credit Roundtable urged the CFPB to:

- Limit debt collection calls to one conversation and three calls per individual, not per debt, per week;
- Require collectors to secure consumer consent before using any electronic communications;
- Ban collections on time-barred "zombie" debts, in or out of court, to free people from the burden that insurmountable debt creates;
- Require debt collection attorneys to review supporting documents for alleged debts before filing any lawsuit; and
- Provide consumers with limited-English language proficiency necessary information about the debt in languages they can understand.

Jeremiah 29:11 states that God's vision for families and individuals is to give them "a future of hope."

There is no hope or future found in unlimited contact via text, email, and all forms of private social media messages, which practically would interrupt parents' engagement with kids at soccer games, parent-teacher meetings, grocery store excursions, or even conversations at the dinner table after long days of work and school. These practices violate the dignity of God's children. We pray that the CFPB will take its mission and commitment seriously as outlined in the Dodd-Frank Act and protect American families and individuals.

Abusive Debt Collection Disproportionately Harms Communities of Color

Like many pastors, I witness first-hand the predatory financial practices that take advantage of the poor just because they are poor. Proverbs 22:22 reminds us "not to exploit the poor because they are poor." Hardworking families want to meet their financial obligations but are often met with harassment and abuse from debt collectors.

The harassment and abuse hurt all families; but wreaks disproportionate harms on families of color where systemic discrimination in housing, employment, and financial services already persists. Debt collection, collection lawsuits and judgments, and wage garnishments are more common in communities of color. Forty-five percent of borrowers living in areas that are predominantly communities of color had debt in collections versus 27 percent of borrowers living in predominantly white areas.[1] In 2017 a CFPB survey found that 44 percent of borrowers of color reported having been contacted about a debt, compared to 29 percent of white respondents.[2]

Even when differences in income are considered, communities of color are still disproportionately impacted by debt collection litigation. One investigation revealed that in St. Louis, Chicago, and Newark, the rate of judgments for debt collection lawsuits was twice as high in mostly Black neighborhoods as in mostly white neighborhoods.[3]

Student loan debt is another distressing dilemma for communities of color. The nation's racial wealth gap means that in most cases, families of color have less income and family wealth to pay for college. Hence, they are more likely to need to borrow for higher education, and generally have less cushion to absorb future financial shocks.[4] These factors contribute to a higher likelihood of delinquency and default on student loan debt that financially derails their personal lives and finances. As families are subjected to harsh collection practices, the hopes of a college

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[1] Ratcliffe, C., et. Al. (2017). Debt in America: An Interactive Map. *Urban Institute*. Retrieved from https://apps.urban.org/features/debt-interactive-map/.

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

[3] Kiel, P. & Waldman, A. (2015, October 8). The Color of Debt: How Collection Suits Squeeze Black Neighborhoods. *ProPublica*. Retrieved from https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods.

[4] Center for Responsible Lending and the National Association for the Advancement of Colored People. (2019, July). *Quicksand: Borrowers of Color and the Student Debt Crisis.* Retrieved from https://www.responsiblelending.org/research-publication/quicksand-borrowers-color-student-debt-crisis.

education being a bridge to achieve wealth gains is jeopardized. With no possible financial relief in bankruptcy, and no statute of limitations, unlimited interest accrues and traps families in debt.

Medical debt is also having a damaging effect, particularly for families of color. Nearly one in three African Americans ages 18 to 64 have past-due medical bills.[5] This has enormous consequences for both physical and financial health. For instance, one study has found "support for credit card debt and medical debt as particular potent predictors of forgone medical care."[6]

Behind these statistics are people doing the best they can to take care of their families. Yet they are hounded by abusive collection practices. Abusive debt collection is harming entire communities. Failing to rein in the abuse will only widen an already staggering racial wealth gap.

My presence here today underscores our biblical mandate for financial justice that grounds both my ministry and community endeavors. Across this country, the rippling and impacts of abusive debt collection have created yet another burden for America's working poor. Already these consumers struggle to find a balance between rising housing costs and other life necessities against stagnant wages. Effective regulation is not only fair, it provides protections for consumers and businesses that respect our laws.

I implore this Committee to initiate legislative reforms that will protect already struggling families from the damage of abusive debt collection practices – particularly if the CFPB is unwilling to do so.

Thank you for the opportunity to share my experiences with you. I look forward to your questions.

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[5] McKernan, S., et. al. (2017, March 26). Past-due Medical Debt a Problem, Especially for Black Americans. *Urban Institute*. Retrieved from https://www.urban.org/urban-wire/past-due-medical-debt-problem-especially-black-americans.
[6] Kalousova, L. & Burgard, S.A. (2013). Debt and Forgone Medical Care. *Journal of Health and Social Behavior* 54(2), 204-220.

UCI University of California, Irvine

Dalié Jiménez
Professor of Law

Written Testimony of

Dalié Jiménez
Professor of Law
University of California, Irvine School of Law

Before the:

U.S. House of Representatives Committee on Financial Services

September 26, 2019

10 a.m.

Rayburn House Office Building, Washington, D.C.

Witness Background Statement

Dalié Jiménez is a Professor of Law at the UC Irvine School of Law where she teaches courses on bankruptcy, consumer financial regulation, and contracts.

Professor Jiménez is one of three principal investigators in the Financial Distress Research Project, a large-scale, longitudinal, randomized control trial evaluating the effectiveness of legal and counseling interventions to help individuals in financial distress. The project has received generous financial support from the National Science Foundation, the American Bankruptcy Institute, the National Conference of Bankruptcy Judges, and the Arnold Foundation, among others. Individuals enrolled in the study have all been sued in a debt collection proceeding in Connecticut small claims court.

A member of the American Bankruptcy Institute's Consumer Bankruptcy Commission, Professor Jiménez has published half a dozen articles examining debt collection, bankruptcy, and student loans.

Professor Jiménez spent a year as part of the founding staff of the Consumer Financial Protection Bureau working on debt collection, debt relief, credit reporting, and student loan issues. Prior to her academic career, she clerked for the Honorable Juan R. Torruella of the United States Court of Appeals for the First Circuit, was a litigation associate at Ropes & Gray in Boston, and managed consumer protection issues for a Massachusetts state senator.

A *cum laude* graduate of Harvard Law School, Professor Jiménez also holds dual B.S. degrees in electrical engineering/computer science and political science from the Massachusetts Institute of Technology.

Chairwoman Waters, Ranking Member McHenry, and members of the Committee:

Thank you for the opportunity to speak to you today.

My name is Dalié Jiménez. I am a tenured professor at the University of California, Irvine School of Law, where I teach courses in bankruptcy, consumer financial protection, and contracts. The views I express here are my own, however.

I am grateful that this Committee is examining these issues. I have been studying consumer debt for over a decade and have published multiple articles examining these issues.[1] I have observed many small claims court proceedings in Maine, Connecticut, and Massachusetts, and have represented debtors in bankruptcy and small claims court.

In my limited time, I want to make three main points:

(1) The debt collection ecosystem is broken. No one player in the system has the ability to fix this because it will be disadvantageous to them individually. This is a classic collective action problem perfect for regulation. Only a regulatory solution can fix it.
(2) Current law makes it next to impossible for a collector (let alone a consumer) to know whether they are collecting a debt that is not "out of statute." As a result, zombie debts abound. Congress should enact a federal statutory period that would extinguish consumer debts once and for all.
(3) The CFPB missed a number of opportunities to protect consumers and assure the integrity of the debt collection system. Instead, the proposed rule favors debt collectors and attorneys over consumers when it comes to documentation and the collection of old debts.

I. Systemic Documentation Problems Plague the Debt Collection Ecosystem[2]

Consumer debts are created out of a contractual transaction: an unpaid credit card, car loan, or a medical bill. Consumers chose to do business with the creditor, but they cannot choose their debt collector or debt buyer, or what happens to their debt after they stop paying. Unfortunately, the debt collection ecosystem is currently broken.

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[1] I attach some of these articles as Exhibits to this testimony. Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARVARD JOURNAL ON LEGISLATION 41 (2015), available at https://ssrn.com/abstract=2250784; Dalié Jiménez, *Ending Perpetual Debts*, 55 HOUSTON LAW REVIEW 609 (2017), *available at* https://ssrn.com/abstract=3152256; Comments of 31 Consumer Law Scholars on Proposed Debt Collection Rule, CFPB-2019-0022-9568 (Sep. 19, 2019), https://www.regulations.gov/searchResults?rpp=25&po=0&s=1k3-9c98-p8hg.

[2] This section borrows from and expands upon my article *Dirty Debts Sold Dirt Cheap, supra* note 2.

A. The Problems with Debt Sales

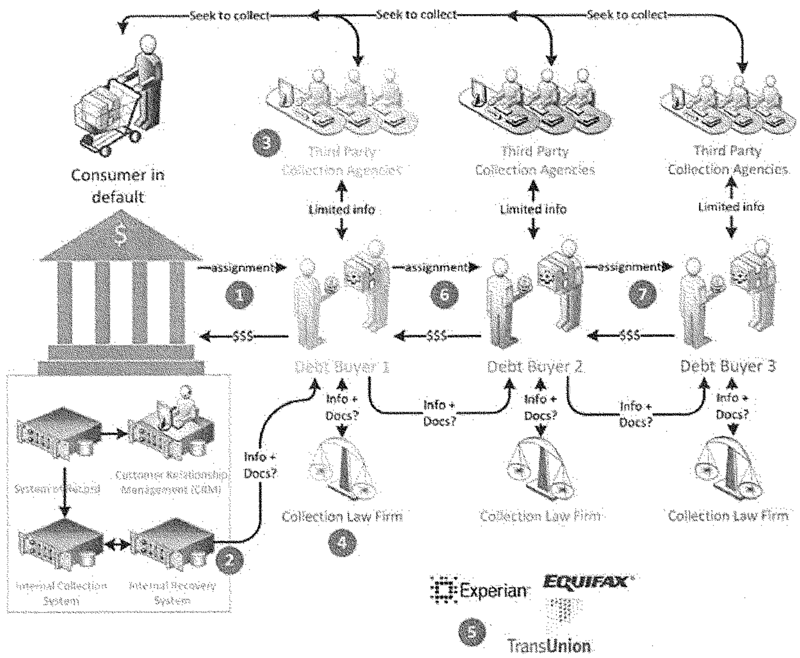
A debt sale, at its essence, is an assignment from a seller to a buyer of "any legal interest" the seller has against the account holder. Consumers have no say in whether their debt is sold, and often have no knowledge of it. Consumer debts are sold many times, sometimes more than a decade after the first default.

In the context of a sale of consumer debts, the buyer at a minimum should want the seller to promise that (1) it owns the accounts it is selling, (2) it has complied with applicable consumer protection laws, and that (3) the information it is providing about the debt and debtor is accurate. Separately, a rational buyer should want to obtain some documentation regarding the debt so that they can prove to the debtor and potentially to a court the amount and nature of the debt.

If the seller does not own the debts she sells, the buyer has paid money for nothing. Even if the seller owns the accounts, without accurate information about the identity of the account holders, the amount owed, and relevant dates, the buyer may have trouble collecting or may face liability under the Fair Debt Collection Practices Act ("FDCPA"). Not having documents such as account statements, contracts between the consumer and the creditor, or other documentary evidence of the debt puts the debt buyer in a difficult position: she may not be able to convince a consumer with the ability to pay that the consumer owes the debt and that the debt buyer is the right party to pay. Worse, she may not be able to sue consumers who refuse to pay, for if she sues without documentary evidence of the debt, she risks losing the suit and subjecting herself to FDCPA liability.

These issues are exacerbated by the fact that debts are often sold multiple times with the same incomplete information or lack of documentation, as shown in Figure 1 below.

Figure 1 - Data flows once a debt is purchased[3]



Unfortunately, debts are often sold without documentation and sometimes even without enough information to enable debt buyers to determine important dates such as the date that starts the statute of limitations period.[4] The largest source of consumer debt sales are financial institutions selling defaulted credit card and other financial accounts. While there are issues with information integrity throughout the life of a debt, these financial institutions are the source of documentation and information troubles for the debts they sell. The debt sale contracts sometimes allow debt buyers to request documentation from the creditor after a sale, but every contract I have seen disclaims any duty by the creditor to actually provide that documentation.

It gets worse: debts are typically sold more than once, but subsequent buyers do not have a contractual relationship with the creditor. This means that if a debt buyer wants documentation or further information on an account, they must request it from the previous debt buyer (the person who sold them the account) and on and on. If Debt

[3] Reprinted from *Dirty Debts Sold Dirt Cheap*, *supra* note 2, at 53.

[4] FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 23 (2013) [hereinafter FTC DEBT BUYER REPORT [http://perma.cc/XSN6-XXSD]. *See also Dirty Debts Sold Dirt Cheap*, *supra* note 2, at 76-83 (analyzing these issues).

Buyer 2 in Figure 1 goes out of business or ignores requests, Debt Buyer 3, the current owner of the debt, will be unable to obtain any documentation *even if the creditor was willing to provide it*. This means that documentation and information problems can only get *worse* as time goes on.

For decades, financial institutions have failed to provide documentation of the debts sold. Debt buyers typically receive nothing more than a few data fields with information about the debtor and the debt.

Despite widespread knowledge of these issues and even some regulatory guidance by the Office of the Comptroller of the Currency (OCC) requesting that regulated institutions do better,[5] this behavior continues.[6] In a 2016 report, the CFPB found that more than half of surveyed debt buyers "rarely" or "never" receive account documentation or billing statements.[7]

Instead of providing documentation, some financial institutions sell these debts under contracts that disclaim all warranties and representations regarding essential information, including in some cases, that they own the accounts being sold.[8] I've collected over 100 of these debt sale agreements, a typical contract clause reads:

> Bank has not and does not represent, warrant or covenant the nature, *accuracy, completeness*, enforceability or validity *of any of the Accounts and supporting documentation* provided by Bank to Buyer . . .[9]

With these contracts and what little information they receive from sellers, debt buyers call, mail, and sue consumers to collect on debts. In the overwhelming majority of cases, debt buyers win these lawsuits because the consumer defaults.[10] In most jurisdictions, all the collector had to do to win was file a lawsuit with basic allegations. Even in

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[5] BUREAU OF CONSUMER FINANCIAL PROTECTION, STUDY OF THIRD-PARTY DEBT COLLECTION OPERATIONS at 23, Table 8 (July 2016) [https://perma.cc/LC54-FJ6F].

[6] Note that even if all original creditors began to provide full documentation and information on debts, there would still be billions of dollars in outstanding consumer debts that lacked such documentation or information.

[7] Consumer Debt Sales/Risk Management Guidance, Office of the Comptroller of the Currency (Aug. 4, 2014), *available at* http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-37.html.

[8] *Dirty Debts Sold Dirt Cheap*, *supra* note 2, at 59-60 (18% of contracts disclaimed all representations, including any representation regarding title to the accounts).

[9] (emphasis added). *Id.* at 61 (citing agreements). A more specific (and more egregious) contract used by Bank of America entities

> [S]eller has not made . . . any representations . . . as to . . . the *accuracy or completeness of any information* provided by the seller to the buyer, *including* without limitation, the *accuracy of any sums shown as current balance or accrued interest* amounts due under the loans [or] any other matters pertaining to the
> Loans.

Id. at 62 (emphasis added).

[10] Consumers default for many reasons. In my experience, a combination of feeling like it is futile to contest the lawsuit, difficulties getting to court, or procedural defaults are the most likely culprit.

jurisdictions that have changed their rules to require more proof, this is often all that is provided. With judgment in hand, collectors can garnish a bank account or the consumer's wages. In some circumstances, the lawsuit starts a chain of events that may end with the consumer in jail.[11]

B. We Need a Regulatory Fix

The problems just identified will not change on their own. The market forces at play here combine to create a collective action problem that cannot be solved by even the most well-meaning market players. Regulation is needed.

Creditors who no longer wish to collect on their own defaulted debt need to find willing buyers. One might expect that debt buyers, as the bank's customers, have an incentive to demand more documentation, evidence, and positive warranties from banks. This would enhance recoveries because consumers are more likely to pay if they can trust that the person calling or writing about the debt—someone they did not initiate a relationship with—is the correct party. Enhanced evidence of the underlying debt would also enhance the debt buyer's ability to collect via the court system.

But in order for debt buyers to have the incentive to push for more documentation and warrants from sellers, these items must be needed to make debt buying profitable. Instead, the public filings of debt buyers demonstrate that no matter how broken the current system may be, it still allows them to obtain a very healthy profit. Despite all the bad press, debt buyers have been able to collect enough to accrue substantial profits from consumers directly as well as through the courts. If debt buyers can collect with the current level of information and documentation and without requiring that the creditor stand by the material aspects of the debts they are selling, they have no incentive to ask for anything more. Indeed, they have a disincentive to ask for more since this would increase the purchase price immediately with only a theoretical possibility that it would also mean increased recoveries in the future. Receiving more documentation would also mean needing to put a system in place to deal with the documents. This is costly and—so far—has been unnecessary.

Thus, any improvement in procedures a creditor undertakes will result in added costs, with little upside. This presents a collective action problem: if a creditor increases prices to cover the increase in costs, it risks losing customers. Since consumers do not choose their bank based on their collection or debt sale practices, the bank that does not implement these costly upgrades is better positioned to offer lower-priced products to consumers and poised to increase its customer base.

Without regulatory or other external pressure, individual creditors lack the incentives to "throw good money after bad" and invest in systems required to make sure that they can comfortably warrant title, legal compliance, and accuracy. An intervention is needed to spur change and solve this collective action problem. Both banks and debt buyer industry players recognize this. At a workshop held by the FTC and the CFPB in advance

[11] ACLU Report

of a debt collection rule, industry panelists repeatedly requested regulation and clarity in documentation requirements. For instance, Larry Tewell, Senior Vice President at Wells Fargo stated, "if we could have uniform national standards relative to data and media, that would go a long way toward fixing this."[12] An attorney for the collections industry echoed this sentiment "[i]f there's a mandate, a national standard, you sell an account, these are the things you will transmit. I think it helps everybody. That's a quality improvement standard and it'd be a very good thing."[13]

In response to the Bureau's notice of proposed rulemaking in 2014, both consumers and industry players identified documentation and substantiation issues as critically important to a well-functioning debt collection ecosystem.[14] JP Morgan Chase stated that the bank "would be interested in guidance from the Bureau on what information and documentation should be required to transfer with a charged-off debt when it is assigned to a collection agency or sold to a debt buyer."[15] The Bureau's own study on this issue conducted after these comments found that 36.5% of respondents "rarely" or "never" had access to an account's chain of title.[16]

C. The CFPB Rule Protects Collection Attorneys at the Expense of Consumers3

Industry comments to the CFPB rule recognized the earlier point: debt originators will not retain or pass on all the relevant information unless required to do so by federal law.[17] The Bureau's own study confirmed this to still be an issue. Unfortunately, the

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[12] Larry Tewell, Senior Vice President, Consumer Credit Solutions Division, Wells Fargo, comments at Life of a Debt: Information Available to Debt Collectors at Time of Assignment of Sale – Panel I, at 119, Fed. Trade Comm'n & Consumer Fin. Prot. Bureau (June 6, 2013), http://www.ftc.gov/news-events/audio-video/ video/life-debt-data-integrity-debt-collection-part-2, archived at http://perma.cc/T7YK-LYUA.
[13] Life of a Debt: Data Integrity and Debt Collection – Part 3, Fed. Trade Comm'n (June 6, 2013), http://www.ftc.gov/news-events/audio-video/video/life-debt-data-integrity-debt-col- lection-part-3, archived at http://perma.cc/8WKF-Z6M6. At this roundtable discussion regard- ing debt collection and data integrity, Manuel Newberger, Partner, Barron & Newberger, P.C., who represents creditors and debt buyers, said, "the more information that we can have rela- tive to charge-off dates, balances, last payments . . . would be extremely relevant . . . . [T]he idea that information can be passed from agency to agency . . . that this account was disputed . . . that would be helpful." The TransUnion representative agreed: "[M]ore standardized data reporting on the front end will reduce the errors and reduce the questions consumers get. We won't be putting accounts on the wrong file or matching information correctly."
[14] Encore Capital Group Response to Consumer Financial Protection Bureau's Advanced Notice of Proposed Rulemaking, February 28, 2014 at 6.
[15] J.P. Morgan Chase & Co., Response to Advance Notice of Proposed Rulemaking at 3, Debt Collection, Docket No. CFPB-2013-0033, RIN 3170-AA41 (Feb. 28, 2014), available at http://www.regulations.gov/#!documentDetail;D=CFPB-2013-0033-0304, archived at http:// perma.cc/3GAP-QHYZ.
[16] Bureau of Consumer Financial Protection, Study of Third-Party Debt Collection Operations at 23, Table 8 (July 2016).
[17] Encore Capital Group Response to Consumer Financial Protection Bureau's Advanced Notice of Proposed Rulemaking, February 28, 2014 at 6; Commercial Law League response to question 9; Collections Marketing Center, Response to CFPB ANPR, January 13, 2014, at 2-3; *Dirty Debts Sold Dirt Cheap*, *supra* note 2, at 110 et. seq. (arguing that the "CFPB should clarify that the practice of selling debts

Bureau missed the opportunity to protect both consumers and the integrity of the debt collection system in its recent proposed rule. The proposed rules do nothing to require that original creditors maintain records or transfer them to subsequent debt buyers. More troublingly, the proposal would give debt collection attorneys a safe harbor from litigation if they "personally ... review" unspecified "information" regarding the debt.[18]

While the rules are silent on requiring that debt collectors have sufficient information and documentation before collecting, they propose giving debt collection attorneys a "safe harbor" from litigation for engaging in minimal review of whatever documentation or information there is. In my comment with 30 other consumer law professors, we explained our two major concerns with this proposal:

> First, a safe harbor provides sweeping protection for debt collectors. It would be pleaded as an affirmative defense to a consumer claim, thereby providing the collector with a complete defense to a consumer claim that a communication falsely represented the debt.
>
> Second, such a sweeping protection should contain clear and specific standards. The language of the rule is broad, potentially allowing collection attorneys to claim that superficial review of a client's claim satisfies the safe harbor requirements.
>
> Debt collection litigation is, perhaps, the setting where the disparity in power and knowledge between consumers and debt collectors is the most one-sided in favor of the collector. As little as 1-2% of consumers are represented by counsel in collection lawsuits. In many cases, consumers do not appear in the lawsuit, resulting in default judgments. In our adversarial system of justice, presided over by a "neutral" judge, collection attorneys take full advantage of this power disparity. They churn out large volumes of lawsuits, knowing that the chances of a consumer actually defending the action are slim. Even if a consumer appears, the consumer's ability to defend the action or even negotiate a favorable settlement is weak. For various reasons, including the sheer volume of collection cases, judges do not examine pleadings for sufficiency and cases rarely reach the point where a plaintiff will be required to prove its case. When consumers do have representation, they usually succeed in the lawsuit. Those of us who represent consumers in law school clinics almost always win dismissal of the collection suit, or defeat summary judgment motions. We win because debt buyers lack the evidence needed to prove their cases in court.
>
> The safe harbor for meaningful attorney involvement does little to remedy the problem it attempts to address. While the defense is available to an attorney who "personally" "review[s]" pleadings (for example), there are many qualifications. The attorney must determine that the claims are supported "to the best of the

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with little information, no warranties, and no account documents as a violation of the prohibitions against unfairness and deception").

[18] Proposed 1006.18(g).

> attorney's knowledge, information, and belief," that claims and contentions are warranted by existing law and "factual contentions have evidentiary support." This is a broad and vague standard, easily manipulated by some attorneys. The rule imports some of the standard from Rule 11 of the Federal Rules of Civil Procedure, but the setting of debt litigation is far different from federal court. Indeed, given the contrast in representation and judicial management of cases, the settings could not be more different.
>
> Since the Bureau's draft rule does nothing to alleviate the documentation and inaccurate information problems in the debt collection ecosystem, this safe harbor is especially problematic.[19]

The comment urged the Bureau to instead use the blueprint it created for this issue in its Consent Decree with Fred J. Hannah & Associates, et al.[20] In that case, the Bureau required the lawyers in the firm to review, at minimum, certain information and documentation on a consumers' case before a lawsuit could be filed.

D. What Congress Can Do

The CFPB received over 80,000 complaints about debt collection in 2018.[21] The largest share, 40%, were complaints that the debt collectors were attempting to collect a debt that was not owed.[22] Fixing the documentation issues would go a long way towards ensuring that consumers can and sh

This Committee should report legislation that:

1. Provides that original creditors and debt buyers are all subject to the Fair Debt Collection Practices Act. **I wholly support H.R. 4403 which would clarify that debt buyers are subject to the Act, but would also go further and include original creditors.**
2. Requires creditors to only sell debts if they can stand behind them: the contracts should guarantee that the information and documentation provided to debt buyers or collectors is accurate.
3. Requires creditors to provide at least one year's worth of account documentation to debt buyers.
4. Prohibits debt collectors from contacting a consumer about a debt or initiating a lawsuit unless they have read the debt sale contract and it contains affirmative

[19] Comments of 31 Consumer Law Scholars on Proposed Debt Collection Rule, CFPB-2019-0022-9568 (Sep. 19, 2019), https://www.regulations.gov/searchResults?rpp=25&po=0&s=1k3-9c98-p8hg.
[20] *See* Consumer Financial Protection Bureau v. Frederick J. Hannah & Associates, No. 14-02211, Stipulated Final Judgment and Order at 7-9 (D.N.D. Ga. Jan. 6, 2016), *available at* https://files.consumerfinance.gov/f/201512_cfpb_proposed-stipulated-final-judgment-and-order-hanna-frederick-j-hanna.pdf.
[21] CFPB FDCPA Annual Report 2019, https://www.consumerfinance.gov/data-research/research-reports/fair-debt-collection-practices-act-annual-report-2019/.
[22] *Id.* at 16.

representations of the information and documentation provided (as per the second point) as well as viewed account documentation provided under #3.

5. Increases the statutory damages in the FDCPA to properly deter conduct. **I wholly support H.R. 3948's proposal to index these numbers to inflation since the FDCPA was enacted.**

II. End Zombie Debt: Enact A Federal Debt Extinguishment Statute[23]

Consumers and debt collectors ought to know how long they have to try to collect on a debt, but right now that question is often impossible to answer due to conflicting legal rules. We need a federal statute of limitations for consumer debts that abolishes the debtor's personal liability on those debts and puts an end to them once and for all. **The discussion draft bill, "Strengthening Legal Protections on Debt Collections Act" is a great start, but I urge this Committee to go further.**

If a debt is not repaid in full, it will likely grow significantly over time.[24] The creditor will also be able to attempt to collect by filing a lawsuit against the consumer. Across the country, hundreds of thousands of such lawsuits are filed every year in state courts. The overwhelming majority of these suits are won by the creditor as a result of the debtor's default. Once a creditor obtains a judgment, they can pursue the debtor for 10 or 20 years in most states, sometimes longer.

The possibility (indeed likelihood) that a debts will continually resurface in an individual's life can only increase these psychic and social burdens, as over-indebted individuals are forced to remain in a debt trap potentially forever. This debt trap disincentivizes work. As the Supreme Court has noted, "[f]rom the viewpoint of the wage earner, there is little difference between not earning at all and earning wholly for a creditor. Pauperism may be the necessary result of either."[25] These psychic costs may be impossible to quantify, but that does not make them unimportant.

The only two (potential) solutions that consumers have are bankruptcy and statutory limitations period. Bankruptcy can be a great tool for consumers, but it is a very drastic one. We ought to encourage other solutions. However, current limitations period statutes incapable of stopping the tide of zombie debts.

A. Statutes of limitation fail to protect consumers

Statutes of limitation fail to protect consumers. First, in most states, statutes of limitations are only an affirmative defense to a civil action. Failing to raise the

[23] This section borrows from and expands upon my article *Ending Perpetual Debts*, 55 HOUSTON LAW REVIEW 609 (2017), *available at* https://ssrn.com/abstract=3152256.

[24] Many contracts creating debts include provisions for adding interest and fees to a delinquent obligation. Even if there was no such provision, however, many states allow creditors to collect a statutory amount of interest.

[25] Local Loan Co. v. Hunt, 292 U.S. 234, 245 (1934).

defense early enough in a case typically waives it.[26] Second, not all debts have a corresponding limiting statute. Third, it is difficult to know which statute applies to a particular situation. Oftentimes there are good legal arguments for applying statutes of different lengths. Fourth, most statutes of limitations only extinguish the legal remedy, not the right to collect. Expiration of the statute does not prevent a creditor from calling or writing the debtor seeking to collect. Finally, in most states and circumstances it is very easy for a consumer to restart the statute by doing something as simple as acknowledging the debt or making a small payment.

With the exception of when Mississippi or Wisconsin law applies, every other state law allows debt collectors to continue to pursue debtors outside of the courts past the limitations period.[27] Creditors also attempt to persuade debtors to make a small payment or acknowledge the debt and thus restart the limitations period, even if that period had expired long before. This "reset" would once again allow a creditor to use the court process to collect from the debtor. This effectively extends debts forever, harming debtors.

Difficulty repaying one's debts is associated with a plethora of negative outcomes for consumers.[28] One study links an inability to make minimum payments and default to increased anxiety.[29] Multiple studies find an association between debt and depression.[30] A high debt-to-income ratio, defaulting on a mortgage, and foreclosure are also each associated with more negative health outcomes.[31] Financial stress has also been linked

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[26] The FDCPA covers some consumer debt cases; in those situations, debt collectors who file a lawsuit past the statute of limitations do so in violation of the Act. This may be little consolation for the consumer who's been sued, however. She will still need to raise the defense in the state court debt action. If she does so successfully, the lawsuit should be dismissed. If she does not raise it or does not raise it on time, the lawsuit will proceed.

[27] *See, e.g.*, Thomas R. Dominczyk, *Time-Barred Debt: Is It Now Uncollectable?*, BANKING & FIN. SERVICES POL'Y REP., August 2014, at 13.

[28] *See, e.g.*, Eva Selenko & Bernad Batinic, *Beyond debt. A moderator analysis of the relationship between perceived financial strain and mental health*, 73 SOC. SCI. & MED. 1725, 1725 (2011) ("Heavy debt not only has economic consequences, but has also been related to severe psychological and physical distress."). However, note that it is difficult for most of these studies to perfectly tease out the causal relationship between financial distress and the negative outcome.

[29] Patricia Drentea, *Age, Debt and Anxiety*, 41 J. OF HEALTH AND SOC. BEHAV. 437 (2000).

[30] *See, e.g.*, Sarah Bridges & Richard Disney, *Debt and Depression*, 29 J. OF HEALTH ECON. 388 (2010); Frederick J. Zimmerman & Wayne Katon, *Socioeconomic Status, Depression Disparities, and Financial Strain: What Lies Behind the Income-Depression Relationship?*, 14 HEALTH ECON. 1197 (2005); Richard Reading & Shirley Reynolds, *Debt, Social Disadvantage and Maternal Depression*, 53 SOC. SCI. & MED. 441 (2001).

[31] *See, e.g.*, Sarah L. Szanton et al., *Effect of Financial Strain on Mortality in Community-Dwelling Older Women*, 63 THE JOURNALS OF GERONTOLOGY SERIES B: PSYCHOLOGICAL SCIENCES AND SOC. SCI. 369 (2008); Angela C. Lyons & Tansel Yilmazer, *Health and Financial Strain: Evidence from the Survey of Consumer Finances*, 71 SOUTHERN ECONOMIC JOURNAL 873 (2005); Patricia Drentea & Paul J Lavrakas, *Over the Limit: The Association Among Health, Race and Debt*, 50 SOC. SCI. & MED. 517, 527 (2000); Carolyn C. Cannuscio et al., *Housing Strain, Mortgage Foreclosure and Health in a Diverse Internet Sample*, 60 NURSING OUTLOOK (2012), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3816996/.

to work absenteeism,[32] lower graduation rates,[33] and childhood obesity.[34] Some have gone as far as to argue "that debt may be a factor in social isolation, feelings of insecurity and shame, self-harm and suicidal ideation."[35] Research on scarcity also suggests that financial distress causes lower mental function, leading to bad decisions that in turn lead to other problems, including eviction, divorce, and a need for government benefits.[36] In these cases, individual costs can quickly become costs borne by society in the form of social benefits or health care costs.

B. The CFPB's Rule Is Wholly Inadequate

The CFPB's proposed rule would permit the collection of out of statute debt. At minimum, the CFPB should require debt collectors to ensure that the debt they are collecting is within the statutory period and prohibit the collection of out of statute debt (whether that collection is via a phone call, letter, lawsuits, or threats of a lawsuit). The collector should have a reasonable basis to believe that the debt is within the applicable statutory period before attempting to collect.

C. The Better Solution

Congress should enact a single federal collection period applicable to consumer debts.[37] To harmonize with the Fair Credit Reporting Act, this collection period should run for seven years. This proposed federal law would go further than the current concept of a statute of limitations. It should automatically extinguish not simply the legal remedy of collecting through the courts, but any right of repayment.[38] This proposal could build upon the draft bill circulated for this hearing entitled "Strengthening Legal Protections on Debt Collections Act."

Specifically, Congress should enact a federal statute that covers all consumer debts and

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[32] Jinhee Kim & E. Thomas Garman, *Financial Stress and Absenteeism: An empirically Derived Research Model*, 14 FINANCIAL COUNSELING AND PLANNING 31 (2003).
[33] Graduation rates for students from the bottom of the income distribution are reduced significantly when students owe more than $10,000 in debt. Rachel E. Dwyer et al., *Debt and Graduation from American Universities*, 90 SOCIAL FORCES 1133 (2012).
[34] Steven Garasky et al., *Family Stressors and Child Obesity*, 38 SOC. SCI. RESEARCH 755 (2009).
[35] Chris Fitch et al., *Debt and Mental Health: The Role of Psychiatrists*, 13 ADVANCES IN PSYCHIATRIC TREATMENT 194, 195 (2007).
[36] *See, e.g.*, SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH (2013); Virginia Graves, *Does Poverty Really Impede Cognitive Function? Experimental Evidence from Tanzanian Fishers*, (2015) (unpublished Master's Thesis, University of San Francisco), http://repository.usfca.edu/thes/129/ (last visited Jul 10, 2015).
[37] The clock on this collection period should start on the moment in which the creditor could have sued in state court under the contract.
[38] As in Wisconsin and Mississippi, the statute would create a new property right for the debtor: that be to be free from the debt. The main difference between the laws in these states and my proposal is that in Mississippi, the statute explicitly permits an extinguished obligation to serve as consideration for a new promise, Miss. Code Ann. § 15-1-3, and the Wisconsin statute does not make clear that this is not the case.

(1) Extinguishes all consumer debts after seven years, with the clock beginning to run 180-days after the consumer's behavior that gave rise to the cause of action.
(2) Clarifies that any payments (or acknowledgments of the debt) made after the 180-day period would not restart the collection clock.[39]
(3) Extinguishes judgments based on consumer debts seven years after a court issues them.[40]
(4) Clarifies that when the applicable 7-year period expires, the debtor's obligation to the creditor and the creditor's right to collect cease to exist.[41] Any judgment obtained on an extinguished debt would be void and could be collaterally attacked in a different proceeding.
(5) Modifies the Consumer Financial Protection Act to clarify that attempting to collect on an extinguished debt is an unfair practice giving rise to a private right of action against the collector, with statutory financial penalty, attorney's fees, and actual costs (including disgorgement of any payments made by the consumer) obtainable from the collector. Regulators such as the Consumer Financial Protection Bureau and states' attorneys general could also enforce the statute.
(6) Clarify that the two extinguishment periods would preempt contrary state law to the extent it is less protective of consumers and that this statute could not be waived by the consumer.

A federal law is needed because a state-by-state implementation would leave in place the crushing complexity of a system in which few can be certain which statutory period applies. Even if all states adopted statutes that extinguished all rights and remedies upon the expiration of the statute of limitation, debt owners and consumers would still find it difficult to determine which statutory period applied to a particular debt.

The effect of this proposal is to give creditors a defined amount of time in which to attempt to collect from consumers. This time can be extended by obtaining a judgment on a debt; but the time to collect on that judgment would also be limited. If the creditor is not able to secure repayment during seven years, the debt will automatically discharge at the end. The aim is to encourage creditors to act diligently in attempting to secure payment.

Seven years is a reasonable amount of time; most states limit collection on contract debts to six years or less.[42] In fact, sixteen states have only "a three-year statute of

[39] This is similar to the draft discussion bill.
[40] In other words, the initial seven-year extinguishment period can be extended if a court renders a judgment in a lawsuit filed before. The automatic discharge federal law I am proposing would not only automatically extinguish the legal remedy of collecting through the courts, but also any right of repayment.
[41] This is similar to the current statutes in Mississippi and Wisconsin, but unlike Mississippi, this proposal would not allow for a restart of the statute of limitations after it had expired under any circumstances.
[42] *See, e.g.,* Wash. Stat. §4.16.040(1) (6 years); Wisc. Stat. §893.43 (6 years); Arkansas Stat. §16-56-111 (5 years); Cal. Stat. §337 (4 years).

limitations for written contracts, oral contracts, or both."[43] While the modal number of years to collect on a judgment is longer than seven,[44] empirical evidence suggests that most judgments go unsatisfied.[45] It is likely that an empirically-derived time limit on satisfying judgments would be significantly lower than the 10 or 20 year limit that is the norm in most states.

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There are many issues this Committee is considering today that I do not have time to discuss here. I thank you for the attention you are paying to these critical problems and for the opportunity to testify today. I look forward to answering your questions.

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[43] APRIL KUEHNHOFF & MARGOT SAUNDERS, NAT'L CONSUMER L. CTR., MODEL STATUTE OF LIMITATIONS REFORM ACT, 19 (Dec. 2015), https://www.nclc.org/images/ pdf/debt_collection/statute-of-limitations-reform-act.pdf [https://perma.cc/HZ9F-KC8T]. The model statute proposed in this report recommends a private right of action for violations and prohibits extending the limitations period in certain circumstances. *Id.*

[44] Nationwide, statutes of limitation on judgments are lengthy: typically between ten and twenty years. Most states allow some form of renewal of judgments. Richard M. Hynes, *Why (consumer) bankruptcy*, 56 ALA. L. REV. 121 (2004).

[45] Richard M. Hynes, *Broke but not Bankrupt: Consumer Debt Collection in State Courts*, 60 FLA. L. REV. 1 (2008).

ARTICLE

DIRTY DEBTS SOLD DIRT CHEAP

Dalié Jiménez*

More than seventy-seven million Americans have a debt in collections. Many of these debts will be sold to debt buyers for pennies, or fractions of pennies, on the dollar. This article details the perilous path that debts travel as they move through the collection ecosystem. Using a unique dataset of eighty-four consumer debt purchase and sale agreements, it examines the manner in which debts are sold, oftentimes as simple data on a spreadsheet, devoid of any documentary evidence. It finds that in many contracts, sellers disclaim all warranties about the underlying debts sold or the information transferred. Sellers also sometimes refuse to stand by "the accuracy or completeness of any information provided." After discussing potential explanations for these issues, the article suggests that lax regulation and a collective action problem prevents the market from self-correcting. It concludes by recommending that the Consumer Financial Protection Bureau declare the collection of consumer debts sold in this way as an unfair or deceptive act or practice.

I. Introduction

Imagine you get a call from a debt collector. She tells you she is calling about your $1,000 balance on a GE Capital credit card. You had no idea the company that makes your refrigerator also issued credit cards, but you are certain you never had one with it. The collector explains that she is calling regarding a GAP credit card.[1] You cannot remember the last time you stepped into a GAP store, but you vaguely recall getting a card a few years back, when you were in college. It was a long time ago, but you feel pretty certain you would have paid your bill.

You have no idea who ABC Debt Collection is, and that's where the collector tells you she is calling from. She also tells you she is collecting on

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[1] This is an entirely fictional scenario, but GAP Cards are issued by Synchrony Bank (formerly GE Capital). *See* Charmaine Ng, *It's Official: GE Capital Retail Bank Is Now Synchrony Bank*, Credit Karma (June 11, 2014), http://blog.creditkarma.com/news-trends/its-official-ge-capital-retail-bank-is-now-synchrony-bank/, *archived at* http://perma.cc/T7EW-KF6F.

behalf of XYZ Debt Buyer. This alphabet soup gives you a headache; you are certain you have had dealings with only *one* of those four companies—GAP. You want to know whether you really owe this money and who you should pay, but you worry about those scams you hear about on the news. A few days later, a letter arrives from ABC requesting payment. The letter says you can request a validation of the debt within 30 days, so you write a letter back asking for proof that this is your debt. It never comes. You still get calls and letters about this debt, but it is not ABC calling anymore. It seems like every few months the calls come from a different company altogether.

This sketch represents one of the many ways the more than 77 million Americans who have a debt in collection experience the collection system.[2] When consumers fail to repay their financial obligations—credit cards, auto loans, medical bills, or even gym memberships—creditors seek to collect on the debts. They can try to collect themselves, or they can retain a third party firm (collection agency) to collect. Often, they sell the debts to firms who specialize in collections (debt buyers). These firms, including four publically traded companies, buy these debts for pennies—or fractions of pennies—on the dollar.[3] For example, the $1,000 balance on a GAP-branded, GE Capital credit card might have been sold to XYZ Debt Buyer for $40. It is also likely that when XYZ purchased the debt, they only bought the assignment of the right to collect and a spreadsheet with some information about you and the debt. XYZ Debt Buyer is unlikely to have purchased underlying documents like account statements. XYZ Debt Buyer might have then hired ABC Debt Collection to collect the $1,000 plus interest and fees from you, sometimes as much as a decade or more after the obligation was incurred.[4] After some time, XYZ Debt Buyer may also decide to sell the debt to QRS Debt Buyer who may try to collect the debt itself or hire DEF Collection Agency. In

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[2] Caroline Ratcliffe & John Chalekian, Urban Institute, Delinquent Debt in America 7 (July 30, 2014), *available at* http://www.urban.org/UploadedPDF/413191-Delinquent-Debt-in-America.pdf, *archived at* http://perma.cc/F48P-SWMJ. This number is based on individuals who have a credit file with TransUnion. *See id.* at 8. The average debt was $5,178 and the median debt was $1,349. *Id.* at 9, 11.

[3] While the debt purchasing market can include the purchase of non-delinquent consumer or commercial receivables, the discussion in this Article is limited to the purchase of delinquent or defaulted consumer accounts. The CFPB estimates that debt buyers and debt collectors, combined, totaled approximately 4,500 firms in 2007. Defining Larger Participants in Certain Consumer Financial Product and Service Markets, 77 Fed. Reg. 9592, 9599 (proposed Feb. 17, 2012) (citing U.S. Census Bureau, Economic Census (2007)).

[4] Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry 23 (2013) [hereinafter FTC Debt Buyer Report], *available at* http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf, *archived at* http://perma.cc/XSN6-XXSD ("On average, debt buyers paid 4.0 cents for each dollar of debt."); *id.* at T-8 (regression model includes debts between 6-15 years and 15+ years); Encore Capital Group Inc., Annual Report (Form 10-K) 36 (Feb. 13, 2013), *available at* https://www.sec.gov/Archives/edgar/data/1084961/00011931251 3055397/d443977d10k.htm, *archived at* http://perma.cc/JJ2M-QAXP (stating that in 2012, Encore invested $562.3 million in portfolios to acquire 562 million defaulted consumer accounts with face value of $18.5 billion, at average cost of 3.0 cents per dollar of face value).

some cases, the debt may be placed with a collection law firm at some point, who can collect via calls or dunning letters or file a lawsuit against you.

The low cost at which XYZ Debt Buyer purchased the debt from GE Capital reflects the risk the buyer is taking that the debt will ultimately be uncollectible.[5] The price also reflects the documentation and information (or lack thereof) about the debt that the seller provides to the buyer. Finally, the cost of the debt reflects the underlying contract language: in particular, the representations and warranties made by the seller regarding the accounts sold. The less the seller is willing to "stand by" the accounts it sells—for example, if the seller disclaims all warranties of title or accuracy of the information provided—the cheaper the debt. Debt buyers purchase billions of dollars of delinquent debts annually, sometimes from creditors, oftentimes from other debt buyers.[6] The existence of this secondary market for consumer debts lowers the overall cost of credit and, some argue, is critical to our credit economy.[7]

In recent years, however, the debt collection industry has been the subject of much criticism.[8] The Federal Trade Commission ("FTC" or "Com-

[5] Professor Mann hypothesized in 2007 that the "developing market [in the sale and purchase of consumer debt] appears to suggest that the debt is more valuable in the hands of the smaller companies that can collect more aggressively than reputable large companies." Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 391 (2007) [hereinafter *Sweat Box*].

[6] *See, e.g.*, ENCORE CAPITAL GROUP INC., ANNUAL REPORT (FORM 10-K) (Feb. 13, 2013), *supra* note 4, at 36 (describing that during 2012, Encore invested $562.3 million in portfolios to acquire 562 million defaulted consumer accounts with a face value of $18.5 billion, at an average cost of 3 cents per dollar of face value, which represented a 45.3% increase over the previous year's investment); SQUARETWO FIN. CORP., ANNUAL REPORT (FORM 10-K) 35 (Mar. 1, 2013), *available at* https://www.sec.gov/Archives/edgar/data/1505966/000150596613000008/squaretwo-20121231 10k.htm, *archived at* http://perma.cc/8JB2-TXC9 ("From 1999, our first full year of purchasing debt, to December 31, 2012, we have invested approximately $2.2 billion in the acquisition of charged-off receivables, representing over $33.9 billion in face value of accounts. The combination of our historical and future recovery efforts is expected to result in cumulative gross cash proceeds of approximately 2.2x our invested capital. From 1999 to December 31, 2012, we have grown our business from $8.7 million to $608.0 million of annual cash proceeds on owned charged-off receivables, representing a compound annual growth rate of approximately 35%.").

[7] The CFPB notes that "[c]ollection of consumer debts serves an important role in the functioning of consumer credit markets by reducing the costs that creditors incur through their lending activities. Collection efforts directly recover some amounts owed to owners of debts and may indirectly support responsible borrowing by underscoring the obligation of consumers to repay their debts and by incenting consumers to do so. The resulting reductions in creditor's losses, in turn, may allow them to provide more credit to consumers at lower prices." Debt Collection (Regulation F), 78 Fed. Reg. 67848, 67849 (proposed Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006) [hereinafter CFPB ANPR] (footnotes omitted); Clinton W. Francis, *Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740-1840*, 80 NW. U. L. REV. 807, 907 (1986) (arguing that "common-law debt collection fostered the development of capitalism" and "the rise of the English credit economy").

[8] *See CFPB Files Suit Against Debt Collection Lawsuit Mill*, CONSUMER FIN. PROT. BUREAU (July 14, 2014), http://www.consumerfinance.gov/newsroom/cfpb-files-suit-against-debt-collection-lawsuit-mill/, *archived at* http://perma.cc/5EDR-NZ8E (describing CFPB lawsuit alleging that collection law firm filed lawsuits based on faulty evidence); *At FTC's Request, Court Orders Halt to Collector's Illegal Practices, Freezes Assets*, FED. TRADE COMM'N

mission"), historically the chief federal regulator of debt collectors, has referred to debt buying and debt collection as a "broken system."[9] A number of commentators have argued that attorneys suing to collect on a debt often do not have the necessary documentation to prove to the court that they own the debt or the amount owed.[10] As this article goes to press, a new mass-

(Aug. 1, 2013), http://www.ftc.gov/news-events/press-releases/2013/08/ftcs-request-court-orders-halt-debt-collectors-illegal-practices, *archived at* http://perma.cc/7AFD-DUE4 (alleging that debt collector extorted payments out of consumers by using false threats and communicating with family members, friends, and co-workers of consumers); *Attorney General Kamala D. Harris Announces Suit Against JPMorgan Chase for Fraudulent and Unlawful Debt Collection Practices*, STATE OF CAL. DEP'T OF JUSTICE, OFFICE OF THE ATT'Y GEN. (May 9, 2013), http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-suit-against-jpmorgan-chase, *archived at* http://perma.cc/E8B6-5WBP ("The suit alleges that Chase engaged in widespread, illegal robo-signing, among other unlawful practices, to commit debt-collection abuses against approximately 100,000 California credit card borrowers over at least a three-year period."); *Attorney General Lori Swanson Obtains Consent Judgment in "Robo-Signing" Lawsuit Against One of the Country's Largest Debt Buyers*, OFFICE OF THE MINN. ATT'Y GEN. (Dec. 12, 2012), http://www.ag.state.mn.us/Consumer/PressRelease/121212DebtBuyers.asp, *archived at* http://perma.cc/4R8N-9G5Z (describing consent order with Midland Funding meant to address issues with robo-signed affidavits); *Under FTC Settlement, Debt Buyer Agrees to Pay $2.5 Million For Alleged Consumer Deception*, FED. TRADE COMM'N (Jan. 30, 2012), http://www.ftc.gov/news-events/press-releases/2012/01/under-ftc-settlement-debt-buyer-agrees-pay-25-million-alleged, *archived at* http://perma.cc/7JCL-59BL (describing consent order with Asset Acceptance settling charges that the debt buyer made "misrepresentations when trying to collect old debts"); Jamie Smith Hopkins, *Md. Court Freezes 900 Debt-Collection Lawsuits*, BALTIMORE SUN (July 20, 2011), http://articles.baltimoresun.com/2011-07-20/business/bs-bz-debt-collection-suits-20110720_1_cases-against-maryland-consumers-mann-bracken-debt-collection-lawsuits, *archived at* http://perma.cc/J4JT-SSWF ("Last year, [Judge] Clyburn dismissed more than 27,000 Maryland cases handled by Mann Bracken after the Rockville debt-collection law firm collapsed. In March, debt buyer Midland Funding [a subsidiary of Encore Capital] agreed to drop just over 10,000 cases against Maryland consumers to settle a class-action lawsuit, though it admitted no wrongdoing."); Beth Healy et al., *Dignity Faces a Steamroller: Small-Claims Proceedings Ignore Rights, Tilt to Collectors*, BOS. GLOBE, July 31, 2006, at A1, *available at* http://www.boston.com/news/specials/debt/part2_main/, *archived at* http://perma.cc/7AC3-9B9K (describing examples of individuals coming to court and finding collection attorneys unprepared); Complaint, Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assoc., P.C., No. 14-02211 (N.D. Ga. July 7, 2014), *available at* http://files.consumerfinance.gov/f/201407_cfpb_complaint_hanna.pdf, *archived at* http://perma.cc/MU7K-XAU6; Emanuel J. Turnbull, *Account Stated Resurrected: The Fiction of Implied Assent in Consumer Debt Collection*, 38 VT. L. REV. 339 (2013) [hereinafter *Account Stated Resurrected*]; Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355 (2012) (describing preliminary results of a small study of debt collection cases in Indiana) [hereinafter *Do We Have a Debt Collection Crisis?*]; Mary Spector, *Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 258 (2011) [hereinafter *Debts, Defaults, and Details*]; Sam Glover, *Has the Flood of Debt Collection Lawsuits Swept Away Minnesotans' Due Process Rights?*, 35 WM. MITCHELL L. REV. 1116 (2009) [hereinafter *Flood of Debt Collection*]; *cf.* FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 5 (2009) [hereinafter REPAIRING A BROKEN SYSTEM], *available at* http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf, *archived at* http://perma.cc/5WG4-QLB3.

[9] REPAIRING A BROKEN SYSTEM, *supra* note 8, at 5.

[10] *See, e.g.*, Complaint, *supra* note 8, at 9; *Debts, Defaults, and Details*, *supra* note 8, at 269; *Flood of Debt Collection*, *supra* note 8, at 1118; *Account Stated Resurrected*, *supra* note 8, at 343–44; *Do We Have a Debt Collection Crisis?*, *supra* note 8, at 361. "[I]t is equally

market non-fiction book has just been released delving into the world of debt collectors.[11] The Consumer Financial Protection Bureau ("CFPB" or "Bureau"), a federal agency with freshly-minted authorities to regulate the entire debt collection ecosystem, is poised to propose debt collection rules in early 2015.[12] This article details the alarming and systemic issues that affect the information in the current debt collection and debt buying system. In doing so, it exposes the difficulties consumers face in verifying that they are paying the right amount to the right party when contacted by a collector, as well as the hurdles debt buyers face in collecting. The article ultimately argues that without regulatory intervention, these issues will continue because no one player in the debt collection ecosystem—not creditors, debt buyers, or even consumers—has the incentive to change their behavior and internalize the costs of these changes.

A debt sale, at its essence, is an assignment from a seller to a buyer of "any legal interest" the seller has against the account holder. In most commercial sales, what is conveyed is more than a quitclaim deed from the seller.[13] Many commercial contracts include warranties from the seller "be-

clear that in the debt buyer context, 'small claims courts' have in reality become 'creditor's courts,' devoid of the hallmark characteristics of an adversary system." Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 272 (2011) [hereinafter *The One Hundred Billion Dollar Problem*]; *see also* Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 186 (2014) [hereinafter *Junk Justice*].

[11] *See* JAKE HALPERN, BAD PAPER: CHASING DEBT FROM WALL STREET TO THE UNDERWORLD (2014).

[12] The CFPB sought comments through an Advanced Notice of Proposed Rulemaking on the topic of debt collection in late 2013. The comment period closed in February 2014. *See* CFPB ANPR, *supra* note 7. Along with Patricia McCoy, the author filed a comment urging the CFPB to impose greater documentation and information requirements. Patricia A. McCoy and Dalié Jiménez, Advance Notice of Proposed Rulemaking, Debt Collection (Regulation F), Docket No. CFPB-2013-0033, Regulatory Identification Number (RIN) 3170-AA41 (Feb. 28, 2014), *available at* http://www.creditslips.org/files/jimenez-mccoy-comment-in-response-to-cfpb-anpr-on-debt-collection-final-1.pdf, *archived at* http://perma.cc/3T7J-ZDED.

[13] *See* K. A. Drechsler, *Rights or Interests Covered by Quitclaim Deed*, 162 A.L.R. 556 (1946) ("[A] quitclaim deed passes all the right, title, and interest which the grantor has at the time of making the deed and which is capable of being transferred by deed, unless a contrary intent appears, and it transfers nothing more."). Quitclaim language is frequently used in real estate transactions. *See* BLACK'S LAW DICTIONARY 712 (9th ed. 2009) (defining "quitclaim deed" as "[a] deed that conveys a grantor's complete interest or claim in certain real property but that neither warrants nor professes that the title is valid"); American Law Institute—American Bar Association Continuing Legal Education, *Modern Real Estate Transactions: Sample Purchase and Sale Agreement*, SU006 ALI-ABA 83, July 18–20, 2012. In real estate transactions, however, quitclaim deeds are most often used by people who know each other. *See generally* SEAN WILKEN & THERESA VILLIERS, THE LAW OF WAIVER, VARIATION AND ESTOPPEL (2d ed. 2002). Conveyance of property by a quitclaim deed in a real estate transaction "means that the person who signs the deed is conveying whatever interest—if any—he or she has in the property . . . . If the person doesn't own an interest in the property, the recipient gets nothing" and has no recourse against the seller. MARY RANDOLPH, DEEDS FOR CALIFORNIA REAL ESTATE 72 (8th ed. 2010).

cause they are often in the interests of both the buyer and the seller."[14] In the context of a sale of consumer debts, a rational buyer at a minimum would want the seller to warrant that (1) it has title to the accounts it is selling, (2) it has complied with applicable consumer protection laws, and that (3) the information it is acquiring about the debt and debtor is accurate.[15] Finally, separate from warranties, a rational buyer would want to obtain some documentation regarding the debt to show the debtor and induce payment.

If the seller does not have unencumbered title to the accounts she bought, the buyer has paid money for nothing. What's more, if the seller manages to sell the accounts but did not comply with the Fair Debt Collection Practices Act ("FDCPA") and other relevant laws, the buyer may be held liable when she attempts to collect. Moreover, without accurate information about the identity of the account holders, the amount owed, and relevant dates regarding the account, the buyer may have trouble collecting or may face FDCPA liability. Not having documents such as account statements, contracts between the consumer and the creditor, or other documentary evidence of the debt puts the debt buyer in a difficult position: she may not be able to convince a consumer with the ability to pay that the consumer owes the debt and that the debt buyer is the right party to pay. Worse, she may not be able to sue consumers who refuse to pay, for if she sues without documentary evidence of the debt, she risks losing the suit and subjecting herself to FDCPA liability. That these features are crucial to a consumer debt sale transaction is fairly sensible; this article details the surprising finding of how often sale transactions lack one or more of these.

Part II of this article describes the mechanics of debt collection and debt buying by detailing how creditors attempt to collect when accounts go delinquent. It uses a sample of eighty-four purchase and sale agreements between large banks and debt buyers, along with data from the FTC to examine the prototypical consumer debt sale transaction.[16] This is the first time such a collection has been made public and analyzed; these agreements are

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[14] Kabir Masson, *Paradox of Presumptions: Seller Warranties and Reliance Waivers in Commercial Contracts*, 109 COLUM. L. REV. 503, 507 (2009) (arguing that this solves "the adverse selection problem" sometimes known as "lemons problem" because "[f]or buyers, a seller warranty lends credibility to a product and reduces the risks related to a possible product defect. For sellers, a warranty can help distinguish the object of sale from others on the market that might look as good, but not function as well (so called 'lemons')").

[15] That is not to say that warranties are a master cure. As Bruce Mann has noted in the context of automobile sales, "[d]efects will exist even in vehicles sold with warranties." Bruce Mann & Thomas J. Holdych, *When Lemons Are Better Than Lemonade: The Case Against Mandatory Used Car Warranties*, 15 YALE L. & POL'Y REV. 1, 3 n.11 (1996) (describing the "lemons" problem).

[16] The contracts are all available at http://dalie.org/contracts, *archived at* http://perma.cc/6Y96-3B8N.

closely-guarded by the industry and are only made public under a court order.[17]

These contracts reveal that an alarming number of transactions lack many of the basic elements a rational debt buyer should want. Instead of warranties, most contracts contain "reliance waivers," a declaration from the buyer that it has not relied on any statements or representations the seller may have made at any point.[18] Instead of affirmative representations, the contracts specifically disclaim material aspects of the transaction and provide little to no evidence of the underlying accounts. For example, sellers (1) do not warrant that they have title to the accounts they sell, (2) disclaim that the amounts listed as owed by account holders are correct, (3) sometimes disclaim compliance with applicable laws, and (4) provide little to no documentation during a sale. Finally, in an apparent attempt to ensure that the "reliance waivers" stick, most of the contracts contain "Big Boy" clauses akin to those used in securities transactions.[19] This Part also examines the very limited information available to debt buyers regarding the delinquent accounts and discusses the (in many cases) near impossibility of obtaining documentation about the accounts after a sale.[20]

Part III catalogues the problems that arise for both debt buyers and consumers as a result of this ecosystem. It begins with the possibility that errors are introduced in the system because of the way that information about debts is transferred among multiple systems during collections. It then

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[17] *See, e.g.*, Gold v. Midland Credit Mgmt. Inc., No. 13-cv-02019-WHO, 2014 WL 767732, at *1 (N.D. Cal. Feb. 20, 2014) (ordering defendants to produce purchase and sale agreement).

[18] Masson, *supra* note 14, at 512.

[19] "Big boy letters are agreements between parties to a securities transaction where one party, typically the seller, has material, nonpublic information that it does not want to disclose, but both parties want to complete the transaction and preclude any claims based on the nondisclosure." Edwin D. Eshmoili, *Big Boy Letters: Trading on Inside Information*, 94 CORNELL L. REV. 133, 135 (2008) (footnotes omitted). The clauses here are similar to those found in securities transactions, where standard provisions include representations by the signatory that: it is financially sophisticated; it is aware that the counterparty may have material, nonpublic information that may affect the value of the traded securities; it realizes that it is not privy to any such information, if there is any; it is not relying on any of its counterparty's nondisclosures, if there are any; it is not relying on any representations not expressly set forth in the big boy letter; it is waiving all claims against its counterparty arising out of the nondisclosure; and finally, it realizes the effect of this waiver and elects to proceed with the transaction, essentially stating, "I am a big boy." *Id.*

[20] An example clause from several of the debt purchasing agreements is instructive: "Buyer expressly acknowledges that . . . documentation may not exist with respect to the Loans purchased by Buyer." Loan Sale Agreement between FIA Card Servs., N.A. and Cavalry SPV I, L.L.C. (Oct. 29, 2008), at 31, *available at* http://dalie.org/wp-content/uploads/2014/10/2008.10.29-FIA-Card-Services-to-Cavalry-SPV-I-LLC.pdf, *archived at* http://perma.cc/6TZE-X7CN; Loan Sale Agreement between FIA Card Servs., N.A. and CACH, L.L.C. (Apr. 14, 2010), at 31, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.04.14-FIA-to-CACH-LLC.pdf, *archived at* http://perma.cc/993G-8EN8; Loan Sale Agreement between FIA Card Servs., N.A. and CACH, L.L.C. (Aug. 11, 2009), at 29, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.08.11-FIA-Card-Services-to-CACH-LLC.pdf, *archived at* http://perma.cc/GQ6U-9NVT.

details specific problems consumers and debt buyers can encounter as a result of missing information and a lack of documentation regarding the debts. Spillover effects from these problems harm consumer confidence in the banking and judicial systems.

Part IV suggests potential explanations for the puzzling manner in which these transactions are structured. Part V discusses two types of potential solutions. It begins with thoughts on the roles industry can play in self-regulation, including steps that some players have started to take in this direction. The article closes by proposing that the CFPB use its powers to regulate both creditors and debt buyers by declaring the sale and collection of consumer debts without documentation and material warranties unfair or deceptive under both the FDCPA and the Consumer Financial Protection Act ("CFPA").

II. Lifecycle of a Debt: A Primer

Creditors use a variety of approaches to recover on delinquent accounts. This Part details the movement of a typical delinquent account from delinquency until it is purchased. It describes the "how" of a debt assignment as well as the "what"—what contract language governs the assignment as well as what information or documentation regarding the debt moves with the assignment. The discussion focuses primarily on credit card debts because they comprise the largest portion (by dollar amount) of consumer debt purchased by debt buyers.[21] A great deal of the issues identified in this article involve the software and systems that store account-level information. These are critical systems, to be sure, but as the next sub-part details, they are not the same systems that house transaction-level information when an account is current. When non-performing accounts are segregated into separate sys-

[21] While anthropological research has shown that credit predates even money itself, and that debt buying and debt trading has been around since antiquity, *see* David Graeber, Debt: The First 5,000 Years 18 (2012), the modern iteration of the bulk debt purchasing business model developed over thirty years ago, as a result of the savings and loans crisis, *see* Fed. Deposit Ins. Corp., Managing the Crisis: The FDIC and RTC Experience 433 (1998) [hereinafter FDIC, Managing the Crisis]. *See generally* Lee Davison, *Politics and Policy: The Creation of the Resolution Trust Corporation*, 17 FDIC Banking Rev. 17 (2005), *available at* http://www.fdic.gov/bank/analytical/banking/2005jul/article2.pdf, *archived at* http://perma.cc/N26B-KXKC. The Federal Deposit Insurance Corporation (FDIC) and the Resolution Trust Corporation (RTC) "became custodians of an unprecedented number of assets from failed banks and thrifts" following the crisis. FDIC, Managing the Crisis 433. The FDIC established the Judgments, Deficiencies, and Charge-offs (JDC) equity partnership program in 1993 whereby select private entities were conveyed unsecured assets and proceeds were split with the RTC. *Id.* After the RTC assets dried up, the JDC entities found other sources of defaulted accounts from credit card companies, which were ready to sell their delinquent assets given how successful they had seen the practice would be. FTC Debt Buyer Report, *supra* note 4, at 12 (citing Robert J. Andrews, Debt Collection Agencies in the US, IBISWorld Indus. Rep. 56144 14 (2010)).

tems, the incentives to make sure those systems perform in top shape dramatically decrease.[22]

A. Flow and Integrity of Information

When a bank-issued credit card account goes unpaid for the first time, rendering it "delinquent," the card company will typically attempt "soft" methods to attempt to collect. This generally involves an email, letter, or phone call from internal collection staff reminding the consumer that the payment is late. The outreach steps up as time passes and the account becomes severely delinquent (more than thirty days past due) and more so after ninety days past due, when it becomes categorized as severely derogatory.

Before the account is severely derogatory, the bank has been storing all of the information pertaining to the person's account—payments, charges, biographical information—in their "system of record" ("SOR").[23] An SOR "is an information storage system . . . which is the authoritative data source for a given data element or piece of information."[24] "The system of record for the banking environment states that you have your balance for your account in exactly one place."[25] Sometimes dubbed a "golden copy," the idea is that in a world in which "data is extracted, merged, massaged, replatformed, and reported many times over[,] [i]dentifying a 'system of record' establishes which source is official for each element (or chunk) of data."[26] In a banking environment, information about the customer's conversations with customer representatives, disputes and complaints, and the like

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[22] Although some have argued that even when we might think software is mission-critical, the incentives to produce quality software are lacking. James Kwak, *Software Runs the World: How Scared Should We Be That So Much of It Is So Bad?*, THE ATLANTIC (Aug. 8, 2012), *available at* http://www.theatlantic.com/business/archive/2012/08/software-runs-the-world-how-scared-should-we-be-that-so-much-of-it-is-so-bad/260846/?single_page=true, *archived at* http://perma.cc/K6W8-DLF6 ("[A]s computer programs become more important to the financial system and hence the economy, there is insufficient incentive for trading firms to make sure their software works properly . . . . [T]he question is how much you're willing to sacrifice in the name of quality.").

[23] John Tonetti, Collections Program Manager, Consumer Fin. Prot. Bureau, Presentation at FTC/CFPB Life of a Debt Conference: How Information Flows Throughout the Collection Process (June 6, 2013) (transcript available at http://www.ftc.gov/sites/default/files/documents/videos/life-debt-data-integrity-debt-collection-part-1/130606debtcollection1.pdf, *archived at* http://perma.cc/52W-CSAZ).

[24] *System of Record*, DECISION SUPPORT GLOSSARY, UNIVERSITY OF WASHINGTON, http://www.washington.edu/uwit/im/ds/glossary.html (last visited Aug. 16, 2014), *archived at* http://perma.cc/4J5Y-Z44H.

[25] Bill Inmon, *The System of Record in the Global Data Warehouse*, INFORMATION MGT. (May 1, 2003), http://www.information-management.com/issues/20030501/6645-1.html.

[26] Ronald G. Ross, *'Rules of Record'—Why 'System of Record' Isn't Enough*, 9 BUS. RULES J. 1 (2008) (internal quotation marks omitted), *available at* http://www.BRCommunity.com/a2008/b385.html, *archived at* http://perma.cc/964Y-FC6N.

is maintained in the bank's customer relationship management ("CRM") system, separate from the SOR.[27]

At some point after the account becomes severely derogatory, the bank will likely move the account information from its SOR to its collection system. Typically, the bank's SOR will not receive much information about anything that happens in the collection system.[28] Depending on the card issuer, the debt may be placed with one or more collection agencies that will work on contingency to try and recover what is owed.[29] Once a consumer's debt is placed with a collection agency, she will begin receiving phone calls or letters from an entity with which she has no prior relationship, seeking to collect on her credit card debt.[30]

If the consumer does not pay after an agency has "worked" the account, it is likely that the account will be recalled and placed with a second collection agency. Information that may have been gathered by one collection agency—such as notes describing why the consumer is not paying—is not generally transmitted to the subsequent collection agency nor is it incorporated in the bank's SOR.[31] What is sent to collection agencies is the bare minimum to enable the collector to seek payment on the bank's behalf: "demographic and financial information so the consumer can be contacted, the balance on the account, and perhaps some information on the collection process such as a recovery score."[32] Information gathered in the lender's CRM—dispute information, notes about what conversations with customer service representatives, etc.—will not be shared with the collection agency.[33] This means that the consumer will be contacted by a second previously un-

[27] *See* Tonetti, *supra* note 23, at 34. ("Most often there may be some limited fee[d] between the system of record and the CRM, but if you want the full story, you'll likely have to review the CRM.").

[28] *See id.*

[29] Collection agencies work on contingency collecting debts on behalf of both creditors and debt buyers. They generally engage in the same type of collection efforts that the original creditor would have engaged in, but collect using their own name. *See* General Accounting Office, Credit Cards: Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology 29 (2009) [hereinafter GAO Debt Collection Report], *available at* http://www.gao.gov/assets/300/295588.pdf, *archived at* http://perma.cc/XBN8-NQW8; Robert Hunt, *Collecting Consumer Debt in America*, Q2 2007 Fed. Reserve Bank of Philadelphia Bus. Rev. 11, 12 (2007).

[30] Sometimes this collection agency also reports to one or more credit reporting bureaus, which might confuse consumers and certain users of credit reports, such as landlords. "Some consumers seemed to have difficulty in understanding the reporting of collections because items that were reported as tradelines of collection agencies did not generally identify the specific creditor or delinquent account that was involved." Fed. Trade Comm'n, Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 121 (2012) [hereinafter FTC Credit Report Accuracy], *available at* http://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf, *archived at* http://perma.cc/6N78-GR5V.

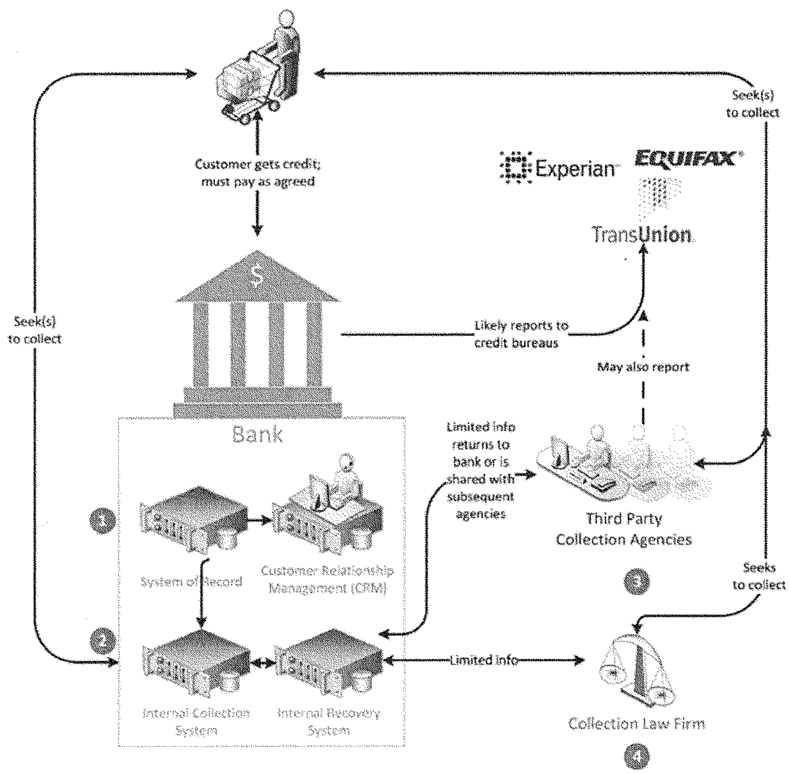
[31] *See* Tonetti, *supra* note 23, at 34–36.

[32] *Id.* at 36.

[33] *See id.*

known entity that will have no record of information the consumer gave to the first agency.

FIGURE 1: DATA FLOWS WHILE DEBT IS OWNED BY CREDITOR.[34]



At point (1) the information regarding the consumer and her account is maintained in two systems at the bank; the system of record (which contains transaction information) and the customer relationship management system, which contains notes on the customer's interactions with customer service representatives. As shown in (2), sometime after 30+ days of delinquency, banks will typically move the account to their internal collection system, and if the account continues past due for a few months, to their internal recovery system. At some point, one or more collection agencies may be used, as in

[34] This diagram is adapted from the presentation given by the CFPB's John Tonetti at the FTC/CFPB Life of a Debt event. *See* Tonetti, *supra* note 23. The diagram was designed using Microsoft Visio. Mr. Tonetti's PowerPoint is on file with the author.

(3). Finally, some creditors choose to sue on their own delinquent accounts and in those cases hire a collections law firm, as in (4).

If the consumer does not repay, eventually the card issuer is required by banking regulations to "charge-off" the account—declare it as unlikely to be collected. For credit cards, the Office of the Comptroller of the Currency ("OCC") generally requires that the charge-off occur within 180 days of the account being past due.[35] A charge-off has no effect on the validity or enforceability of the debt; it is simply an accounting procedure. Credit card contracts allow issuers to continue charging interest and fees after a charge-off, although most banks do not do so.[36] This practice avoids the cost of sending periodic statements, a requirement under the Truth in Lending Act, if the account continued to accrue interest or fees.[37]

At the point of charge-off, many lenders move the borrowers to a recovery system.[38] The recovery system does not always receive all of the information from the collection system.[39] This is the second place where information about the account may fall through the cracks: first, when the debt is placed with a collection agency and second, when it is moved to the recovery system. It is typically soon after charge-off—although this varies a great deal by issuer—that the account will be sold.[40] Debt is sold by credit card issuers in pools of accounts (portfolios) that are described as having particular characteristics important for valuation—e.g., average amount outstanding, date of last payment.[41] Most debts are sold through a bidding process, and bidders may be restricted by the seller depending on the size of the potential purchaser and its financials.[42]

Debt buyers also act as resellers of accounts to other debt buyers.[43] A debt may be sold again and again, as can be seen in Figure 2 and described

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[35] *See* OCC Bull. No. 2000-20, Policy Implementation, Uniform Retail Credit Classification and Account Management Policy, Office of the Comptroller of the Currency (2000), *available at* http://www.occ.gov/news-issuances/bulletins/2000/bulletin-2000-20.html, *archived at* http://perma.cc/ZU2P-LZVR; Uniform Retail Classification and Account Management Policy, 65 Fed. Reg. 36903, 36904 (June 12, 2000).

[36] *See, e.g.*, McDonald v. Asset Acceptance L.L.C., 296 F.R.D. 513, 525 (E.D. Mich. 2013) (describing deposition testimony from bank witnesses asserting that as a matter of business practices most banks do not charge interest or fees after charge-off).

[37] The current regulation requiring periodic statements is 12 C.F.R. § 1026.5(b)(2) (2012).

[38] *See* Tonetti, *supra* note 23, at 35.

[39] *See id.*

[40] The information sold with the debt will generally come from the recovery system. An account may be sold as "fresh" debt if it had never been placed with a collection agency or as primary, secondary, or tertiary debt if it has been "worked" by a collection agency before sale. "Fresh" debt carries a higher price. *See generally* GAO Debt Collection Report, *supra* note 29, at 18–30.

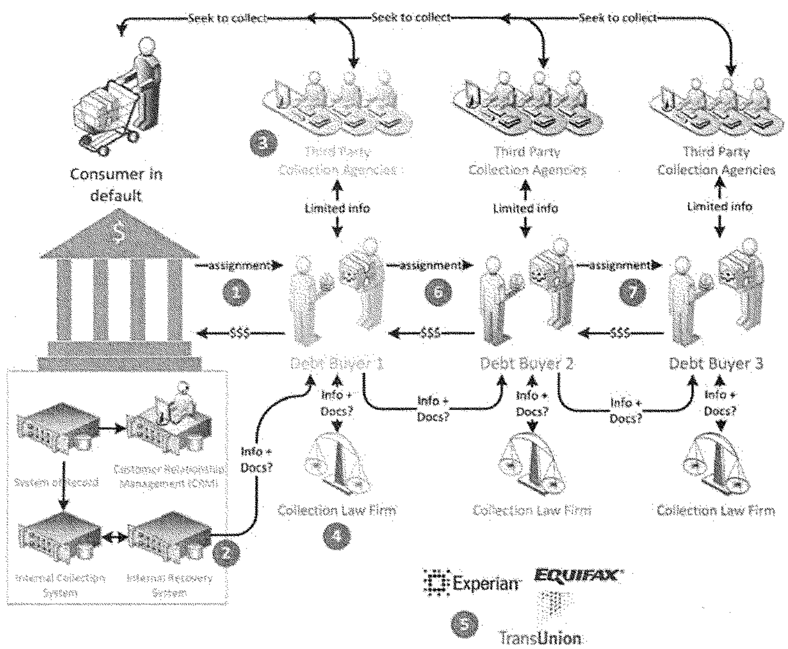
[41] FTC Debt Buyer Report, *supra* note 4, at 17–19.

[42] "Debt buyer industry representatives report that some large sellers (e.g., major credit card issuers) sell debts only to purchasers with well-established reputations and demonstrated financial strength. Large sellers apparently employ these selection criteria to decrease their risk of reputational harm as a result of the conduct of the debt buyers in collecting on debts as well as to decrease the sellers' credit risk." *Id.* at 20; *see also* Tonetti, *supra* note 23, at 34–36.

[43] *See* FTC Debt Buyer Report, *supra* note 4, at 19–20.

further below. Debt buyers (here acting as resellers) may sell an entire portfolio they have just purchased from a creditor, repackage previously purchased portfolios, or attempt to collect on purchased debts and sell the ones that they could not collect.[44] Subsequent debt buyers of an account have no relationship to the original creditor.

FIGURE 2: DATA FLOWS ONCE DEBT IS PURCHASED.[45]



A debt purchase is an assignment of rights under the original contract (e.g., credit card) between the consumer and the bank. At point (1), the bank assigns the first debt buyer the right to collect on a pool of accounts, for which the debt buyer pays money. Information about the accounts, typically in the form of an Excel spreadsheet is given to the debt buyer as in (2). This diagram does not include the situation in which documentation is not sold with the debt and instead is requested later by the first or a subsequent debt buyer. *See* Figure 3. The debt buyer will typically hire a third party debt collection agency, as in (3) to collect from the consumer. It may also seek to collect directly from the consumer (not shown). The first debt buyer (or one of its

[44] *See id.* at 19.
[45] This diagram was designed by the author. It depicts the same data flow as the one presented by Mr. Tonetti at the Life of a Debt event. *See* Tonetti, *supra* note 23.

collection agencies) may report to the credit reporting agencies in (5). At some point, a collection law firm may get involved, (4), whether it is to act as a collector or to initiate a lawsuit in state court. At some point, the consumer's obligation may be repackaged and sold to another debt buyer, as in (6). This may happen even after a judgment has been entered against a consumer. The same cycle will repeat again in very much the same way for any subsequent buyer.

Accounts are sold based on "face value," the amount of the debt due at time of charge-off, minus any payments that have been credited. After purchasing a charged-off debt, debt buyers may seek to collect interest on the charged-off amount.[46] When a debt buyer resells accounts, the second debt buyer will "roll back" the accumulated interest and may add it anew. If the debt buyers calculated the interest differently, a consumer may receive dunning letters requesting different amounts from different debt buyers about the same debt.

When purchasing consumer debts, buyers look for portfolios that meet their business model criteria (some debt buyers specialize in accounts in bankruptcy, for example).[47] Before bidding, the buyer will analyze the portfolio using credit reporting information[48] and may use analytical models to calculate expected recovery rates.[49] The first debt buyer may further parcel out pieces of the portfolios they have acquired and place the parceled-out accounts for sale with other, more specialized debt buyers who may be willing to pay more for them—for example, debt buyers who only collect in a particular state or region. It is not uncommon for subsequent debt buyers to purchase accounts originated by multiple creditors in one transaction.

For the accounts they keep, debt buyers may use their own collectors or place them with collection agencies that will contact the debtors via phone

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[46] *See* McDonald v. Asset Acceptance L.L.C., 296 F.R.D. 513, 517 (E.D. Mich. 2013). Conversations with consumer lawyers and debt collectors, as well as a review of court files, suggest that when debt collectors charge interest, they do so at the prevailing pre-judgment interest rate in the state, typically compounded annually. This is puzzling because there is no credit card agreement that compounds interest annually (as opposed to daily). In a number of instances, consumer lawyers have reported that debt buyers charged interest when seeking to collect from the consumer via letter—pre-litigation—and did not seek interest when they filed a lawsuit.

[47] FTC Debt Buyer Report, *supra* note 4, at 18.

[48] The Fair Credit Reporting Act specifically permits pulls of credit reports for debt buyers who have not yet purchased a consumer's debt. *See* Pub. L. No. 91-508 (2004); 15 U.S.C. § 1681b(a)(1)(E) (stating that a consumer reporting agency may furnish a consumer report to someone who "intends to use the information, as a potential investor or servicer . . . in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation").

[49] *See, e.g.*, *Evaluate A Debt Portfolio Before You Buy Or Sell*, Experian, http://www.experian.com/consumer-information/portfolio-evaluator.html (last visited Feb. 24, 2014), *archived at* http://perma.cc/LZJ7-WERC; Enhancing delinquent debt collection using statistical models of debt historical information and account events, U.S. Patent No. 7,191,150 B1 (filed June 30, 2000); Software solution for debt recovery, U.S. Patent No. 20,060,143,104 A1 (filed Dec. 23, 2005).

or mail and try to obtain payment.[50] Some debt buyers place accounts with law firm debt collectors who may first try to collect by sending letters or making phone calls, but who may eventually file a lawsuit. All of these collection entities—the debt buyer, its internal collection group, the collection agency, and the collection law firm—are regulated under the FDCPA as debt collectors and banned from engaging in the prohibited practices described earlier.

B. The Debt Sale Transaction: The Language of Purchase and Sale Agreements

Delinquent accounts are sold through purchase agreements that specify the relationships between the parties. Thousands of debt collection lawsuits are filed every day, most of them by debt buyers. Debt buyers carry the burden of proof in these lawsuits, so one might expect that that there would be a broad range of debt sale contracts to examine. But that has not been the case. There was very little indication of the content of these contracts until 2013, when the FTC issued a report on the debt buying industry.[51]

There are probably a few reasons for this. First, most of this litigation happens in small claims or other state courts which generally do not make their dockets available electronically. Second, no evidence of ownership is required in the vast majority of cases: between 70–90% of cases filed result in default judgments and when consumers come to court, they do so without an attorney, not knowing that they can ask for proof of ownership. Third, and anecdotally, in many circumstances debt buyers contest any motions to compel the contracts and will often dismiss a lawsuit if it looks like they may have to release the contract. Before the FTC report was released, only a handful of debt sale contracts had been publically released.[52]

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[50] The sale and collection on an account may continue, depending on the debt buyer's business model, either until the debt is paid or the cost of collection exceeds its expected value.

[51] In December 2009, the FTC issued orders to the nine largest debt buyers in the United States requesting a variety of information. *See* FTC Debt Buyer Report, *supra* note 4, at 7. The orders "required that the recipients produce extensive data about their business practices and how they receive, acquire, and transfer information about consumer debts." *Id.* at 8.

[52] Some contracts were made available as part of news stories. *See* Jeff Horwitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, Am. Banker (Mar. 29, 2012), http://www.americanbanker.com/issues/177_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html, *archived at* http://perma.cc/U6NX-9U9X; *see also* Receivable Purchase Agreement between HSBC Card Services (III), Inc. and Main Street Acquisition Corp. (Feb. 20, 2009), at 9–10, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.02.20-HSBC-Card-to-Main-Street-Acq.pdf, *archived at* http://perma.cc/D57F-HMBC (redacting, *inter alia*, information about the cost and availability of documents); Flow Agreement for Purchase and Sale between Wells Fargo Bank, N.A. and Purchasers Advantage, L.L.C. (June 21, 2011), at 7–8, *available at* http://dalie.org/wp-content/uploads/2014/10/2011.06.21-Wells-Fargo-to-Purchasers-Advantage-Flow-Agreement-as-is-type-language-but-limited-reps.pdf, *archived at* http://perma.cc/8JA3-B3B7 (redacting, *inter alia*, the percentage of accounts for which Wells Fargo was representing it could provide documentation under the agreement); Purchase and Sale Agreement between Citibank, N.A. and CACH, L.L.C. (Aug.

The remainder of this section adds one more data set to the discussion: it identifies the structure and terms in eighty-four consumer debt sale and purchase agreements collected over the past two years. This compilation is referred to as the "Litigation Sample," since all of the contracts were released in litigation. The following section compares the language in the Litigation Sample to that in the FTC sample. There are many similarities: most contracts disclaim all warranties and representations, many disclaim the accuracy of the information provided, and a few disclaim that the accounts comply with relevant consumer laws. In addition, most transactions do not include any documentation on the debts at the time of sale and severely limit its availability post-sale.

Before proceeding, it is helpful to compare some characteristics of the samples. In its report, the FTC obtained a collection of 350 contracts involving six large debt buyers.[53] In contrast, the Litigation Sample is comprised of contracts between seventy-eight different entities—listed in Table 3 in the Appendix—at least half of which are smaller debt buyers.[54] The FTC sample included primarily credit card portfolios (62%) but also involved a great deal of medical debts (17%).[55] The vast majority of contracts in the Litigation Sample deal with the sale of credit card debts. The time span of the samples also differs dramatically. The contracts the FTC examined were signed during a three-year period between July 2006 and June 2009. The contracts in the Litigation Sample span over a decade, from July 2001 to August 2013, as shown in Figure 3.[56] In contrast to the Litigation Sample,[57] the debt buyers themselves chose the contracts that the FTC examined.[58]

17, 2011), at 8–10, *available at* http://dalie.org/wp-content/uploads/2014/10/2011.08.17-Citi bank-to-CACH.pdf, *archived at* http://perma.cc/L5RG-Y93W (redacting two and a half pages).

[53] While the original request for information went to the nine largest debt buyers, the contracts only came from six. This was because one debt buyer exited the market in the middle of the collection period and two others specialized in the purchase of bankruptcy debt. *See* FTC Debt Buyer Report, *supra* note 4, at 8–9.

[54] The FTC noted in its report that "smaller debt buyers are a frequent source of consumer protection complaints." FTC Debt Buyer Report, *supra* note 4, at i. A list of all the entities involved in the contracts sample is at *Table 2 – Exemplar Contract Language from Litigation Sample*, and at *Table 3 – Companies Represented in Litigation Sample* in the Appendix. All contracts are available at www.dalie.org/contracts.

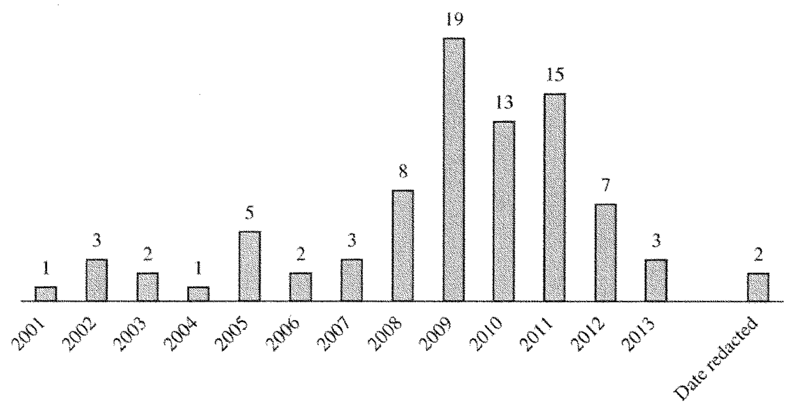
[55] *See* FTC Debt Buyer Report, *supra* note 4, at D-4.

[56] Not all contracts are signed, and some may not have been involved in a deal.

[57] *See, e.g.*, Purchase and Sale Agreement between Sagres Co. and Gemini Capital Group, L.L.C. (Apr. 9, 2009), *available at* http://dalie.org/wp-content/uploads/2014/10/2009.04.09-Sagres-Co-to-Gemini-Capital-Group-LLC.pdf, *archived at* http://perma.cc/37CU-7PA4.

[58] The FTC's request was that debt buyers provide "one example of each type or variety" of contracts they entered into between July 2006 and June 2009. FTC Debt Buyer Report, *supra* note 4, at C-1. Nonetheless, this directive was "interpreted in a variety of ways, such that many of the sellers from whom debt buyers purchased portfolios were not represented among the contracts submitted." *Id.*

FIGURE 3: THE 84 CONTRACTS IN THE LITIGATION SAMPLE SPAN FROM 2001 TO 2013.



The final significant difference between the samples relates to the availability of contracts. The FTC quoted the language of some of the contracts in their sample, but it did not release the identities of the parties involved in the contracts. It also did not tally the number of contracts that contained particular language. The contracts in the Litigation Sample, in contrast, are publicly available, which makes it possible to analyze their terms.[59]

It is important to remember that neither sample discussed here was randomly selected; leaving uncertain the extent to which these transactions are representative.[60] Nonetheless, given how they were chosen, one might expect the FTC contracts to be favorably inclined towards the industry. The contracts in the Litigation Sample were typically released under a court order, so one might expect any bias to run in the opposite direction—that is, towards including contracts that would give rise to greater concerns. Even so, in most cases a debt buyer would have been free to dismiss a case rather than produce the contract, lessening the concern that the contracts in the Litigation Sample are particularly problematic. As discussed below, with one exception, the language in the FTC and the Litigation Sample is strikingly similar.

The evidence indicates that credit issuers typically set the terms and conditions of contracts. The contract language and formatting of documents are remarkably similar across banks and their subsidiaries, across many

[59] They are available at www.dalie.org/contracts.

[60] Nonetheless, at least one bank executive opined that the contract language the FTC study discussed "represents the industry as a whole." Larry Tewell, Senior Vice President, Consumer Credit Solutions Division, Wells Fargo, comments at *Life of a Debt: Information Available to Debt Collectors at Time of Assignment of Sale – Panel I*, FED. TRADE COMM'N & CONSUMER FIN. PROT. BUREAU (June 6, 2013), http://www.ftc.gov/news-events/audio-video/video/life-debt-data-integrity-debt-collection-part-2, *archived at* http://perma.cc/T7YK-LYUA.

years.[61] This is consistent with the FTC's finding that "many of the terms and conditions governing the sale of consumer debts may largely be set by credit issuers."[62]

This analysis focuses on four types of terms recurring in most contracts. TABLE 1 in the Appendix gives an exemplar of the variety of combinations of terms in the contracts in the Litigation Sample. The first term in the table, and the first term analyzed, describes the nature of the sale.

Three contracts in the Litigation Sample state that the sale is made "without recourse,"[63] meaning the seller disclaims any liability if the accounts sold do not yield any returns.[64] The rest of the contracts (81) go beyond this qualification. They disclaim not just liability in case the debtors never repay (recourse), but go on to waive any and all warranties, implied or otherwise, unless something is specifically warranted elsewhere in the agreement.[65] For example:

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[61] *Compare* Loan Sale Agreement between MBNA America Bank, N.A. and Hilco Receivables II, L.L.C. (Sept. 30, 2004), *available at* http://dalie.org/wp-content/uploads/2014/10/2004.09.30-MBNA-America-Bank-NA-to-Hilco-Receivables-II-LLC-.pdf, *archived at* http://perma.cc/W7S3-4ZUW, *with* Loan Sale Agreement between FIA Card Servs., N.A. and CACH, L.L.C. (Apr. 14, 2010), *available at* http://dalie.org/wp-content/uploads/2014/10/2010.04.14-FIA-to-CACH-LLC.pdf, *archived at* http://perma.cc/G4FH-5E9F, *and* Loan Sale Agreement between FIA Card Servs., N.A. and CACH, L.L.C. (May 15, 2013), *available at* http://dalie.org/wp-content/uploads/2014/10/2013.05.15-FIA-Card-Svcs-to-CACH-LLC.pdf, *archived at* http://perma.cc/S2UA-NR4N. MBNA merged with Bank of America in 2006 and subsequently changed its name to FIA Card Servs. FIA Card Servs., N.A. 8-K (Oct. 20, 2006), *available at* https://web.archive.org/web/20070716133759/http://biz.yahoo.com/e/061020/8384408-k.html, *archived at* http://perma.cc/4QN5-3TGL. The contracts have a standard structure with sections that describe: (1) definition and terms, (2) a description of the transaction and types of accounts being sold, (3) information about the purchase price (almost always redacted in the contracts in the Litigation Sample), (4) representations and warranties of seller, (5) indemnification provisions, (6) representations and warranties of buyer, and (7) confidentiality requirements.

[62] FTC DEBT BUYER REPORT, *supra* note 4, at C-2.

[63] Second Amended and Restated Receivables Purchase Agreement between Household Bank and Household Receivables Acquisition Co. II (July 1, 2002), at 8, *available at* http://dalie.org/wp-content/uploads/2014/10/2002.07.XX-Household-Bank-to-Household-Receivables-Acquisition-Company-Forward-Flow-Agreement.pdf, *archived at* http://perma.cc/57X7-ALQC; Receivables Purchase Agreement between Household Receivables Acquisitions Co. II and Metris Receivables, Inc. (Dec. 1, 2005), at 9, *available at* http://dalie.org/wp-content/uploads/2014/10/2005.12.01-Household-Receivables-Acquisition-Company-to-Metris-Receivables-Forward-Flow-Agreement.pdf, *archived at* http://perma.cc/X5ES-X2PS; Receivables Purchase Agreement between CompuCredit International Acquisition Co. and Partridge Funding Co. (Apr. 4, 2007), at 10, *available at* http://dalie.org/wp-content/uploads/2014/10/2007.04.04-Compucredit-to-Partridge-Forward-Flow-few-reps-no-as-is.pdf, *archived at* http://perma.cc/8CL3-3FY7.

[64] LifeWise Master Funding v. Telebank, 374 F.3d 917, 925 (10th Cir. 2004) (quoting Thomas E. Plank, *The True Sale of Loans and the Role of Recourse*, 14 GEO. MASON L. REV. 287, 289 (1991)). "The term 'no recourse' or 'without recourse' in an assignment does not, without more, evidence an intent to disclaim the implied warranty of genuineness and validity, but is meant only to make clear that the assignor does not guarantee the debtor's solvency or that the debtor will fulfill the obligation." 6 AM. JUR. 2D *Assignments* § 126 (2014).

[65] Ordinarily, a non-recourse assignment still contains implied warranties. These implied warranties include, *inter alia*, that (1) the accounts are valid and the true obligations of the consumer debtors, (2) there are no known defenses unless they are stated or known at the time

> Except as provided in this section, the charged-off accounts are being sold "as is" and "with all faults," without any representation or warranty whatsoever as to either condition, fitness for any particular purpose, merchantability or any other warranty, express or implied, and seller specifically disclaims any warranty, representation, oral or written, past or present, express or implied, concerning the charged-off accounts . . . .[66]

All eighty-one contracts with similar language did include some affirmative representations and warranties. Below, the focus is on three types of representations that go to material elements of the purchase: (1) an affirmative representation that the seller has unencumbered title to the accounts, (2) affirmative representations that the seller and anyone who owned the account previously has complied with the relevant consumer laws, and (3) affirmative representations as to the accuracy and completeness of the information the debt buyer is purchasing.

1. Title Warranties

Representations about title are material because the buyer can only buy what the seller owns. If the accounts have been sold to another buyer or they are subject to a security interest and the buyer is purchasing them "as is" and "with all faults," she may be purchasing nothing.[67] It is unclear how many contracts in the FTC sample had this language, because the FTC did not discuss this type of representation in their report.

Most sellers (82%) in the Litigation Sample affirmatively represented that they had unencumbered title to the accounts they were selling. Puzzlingly, two contracts in the sample affirmatively represented that they had title to the accounts while at the same time disclaiming any "warranties pertaining to title."[68] The remaining contracts (18%) state that they transfer "all

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of the assignment, and (3) any documents or other evidence about the accounts provided by the seller is true and correct. 6 AM. JUR. 2D *Assignments* § 125 (2014).

[66] *See, e.g.*, Credit Card Account Purchase Agreement between Chase Bank USA, N.A. and Midland Funding, L.L.C. (Nov. 30, 2010), at 7, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.11.30-Chase-Bank-USA-NA-to-Midland-Funding-LLC-.pdf, *archived at* http://perma.cc/LE2K-JZEF. In many contracts, the waiver of warranties is written in all capital letters so as to contrast with the rest of the document. For readability, this example is not in the original capital letters.

[67] The U.C.C. "regards 'as is' . . . and 'with all faults' as synonymous invocations signaling that the buyer takes the entire risk as to the quality of the goods." Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 282 n.58 (1985) (citing U.C.C. § 2-316(3)(a) & comment 7 (1978)). These transactions are not covered by Article 2 of the U.C.C but the language is nonetheless instructive.

[68] Forward Flow Receivables Purchase Agreement between GE Capital Retail Bank, General Electric Capital Corp., GEMB Lending, Inc., Monogram Lending Servs., L.L.C., RFS Holding, L.L.C., & GEM Holding, L.C.C. and Portfolio Recovery Assocs., L.L.C. (Dec. 20, 2011), at 5, 8, *available at* http://debtbuyeragreements.com/wp-content/uploads/2014/03/GE-Capital-Retail-Bank-to-Portfolio-Recovery-Associates-LLC-12-20-2011.pdf, *archived at* http:/

of Seller's right, title and interest to the Loans" but make no affirmative representations as to whether the seller has any title to transfer or whether the accounts are unencumbered.[69]

2. *Compliance with Laws*

About a third of the contracts in the Litigation Sample are contracts in which a bank or other originator of accounts explicitly represents that it complied with applicable consumer laws in the creation and servicing of the accounts it is selling.[70] Another 10% are resale contracts where the debt buyer reseller represents that someone (sometimes the reseller, sometimes the original creditor) complied with applicable laws.[71] These representations are material because when the accounts are sold without recourse (as many of these are), the buyer may be liable for previous noncompliance. About another third of the contracts, include positive representations that the seller (either a debt buyer or the original creditor) complied with consumer laws but qualify the statement with a "to the best of seller's knowledge" caveat. This kind of representation "is significantly less meaningful than a representation as to the existence of a fact."[72]

Shockingly, six contracts explicitly disclaim compliance with one or more laws. A few disclaim compliance with "usury laws," but there are three contracts that disclaim "all representations, warranties, and guarantees of any type or nature, express or implied [with respect to] the *compliance of the Accounts with any state or federal rules, statutes, and regulations*."[73]

/perma.cc/B66-HQR2. It would seem that the "mystical . . . essence known as Title, which is hung over the buyer's head *or* the seller's like a halo . . . ." about which Karl Llewellyn wrote may be even more difficult to locate in this case. *See* Karl N. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L. Q. REV. 159, 165 (1938) (noting that "[h]alos are . . . indivisible[ ] [a]nd there is only one halo for buyer and seller to make out with").

[69] *See, e.g.*, Loan Sale Agreement (May 15, 2013), *supra* note 61, at 11.

[70] *See, e.g.*, Account Purchase Agreement between Chase Bank USA, N.A. and Global Acceptance Credit Co., LP (Dec. 22, 2010), at 7, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.12.22-Chase-to-Global-Acceptance-Credit-Company-Agmt-RAB-Simmens-as-is-and-reps-about-maintenance-and-service.pdf, *archived at* http://perma.cc/UB6K-2EBR. ("Each of the Charged-off Accounts has been maintained and serviced by Seller in compliance with all applicable state and federal consumer credit laws, including, without limitation, the Truth-in-Lending Act, the Equal Credit Opportunity Act, and the Fair Credit Billing Act."). It is important to note, however, that even when banks are selling their own accounts, a representation that the "seller" has complied with all applicable laws may not cover every entity in the chain. This is especially true if the accounts were originated by an acquired entity but may also be true if they were placed for collection with collection agencies. The language is very explicit in most of these contracts and applies only to the seller.

[71] *See, e.g.*, Receivables Purchase Agreement (Apr. 4, 2007), *supra* note 63, at 22.

[72] MICHAEL A. EPSTEIN & FRANK L. POLITANO, DRAFTING LICENSE AGREEMENTS § 15.04 (4th ed. Supp. 2014). *See also* Karl N. Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 724 n.79 (1936) (citing *Wood v. Smith*, 5 M. & R. 124 (K.B. 1829), where seller sold a horse under the representation that it was "sound, to the best of my knowledge" but otherwise did not provide any warranties, and seller was held liable because he knew horse was not sound).

[73] *See, e.g.*, Purchase and Sale Agreement between Credigy Receivables, Inc. and Newport Capital Recovery Grp. II, L.L.C. (May 29, 2009), at 4, *available at* http://debtbuyeragree-

Despite this unqualified renunciation, these same contracts include language requiring the buyer to comply "with all state and federal laws, rules, statutes, and regulations applicable to debt and credit collection . . . ."[74] This is a second major difference between the Litigation Sample and the FTC's: there was no indication in the FTC's report that the contracts it examined included language disclaiming compliance with the law.

The rest of the contracts (about one-fifth) do not mention compliance one way or the other but do some times repudiate all representations that are not made expressly. In effect, they implicitly disclaim compliance with applicable laws.

3. *Accuracy and Completeness*

About a quarter of the contracts in the Litigation Sample explicitly warrant that the information the seller is providing is accurate or complete. One-fifth warrant the information was accurate "to the best of Seller's knowledge," which as described earlier, is a problematic representation.[75]

Over a third of the contracts in the Litigation Sample go further than disclaiming all warranties generally; they explicitly disclaim any representations as to the accuracy or completeness of the information provided.[76] For example, one contract states that:

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ments.com/wp-content/uploads/2014/03/Credigy-Receivables-Inc-to-Newport-Capital-Recovery-Group-II-LLC-05-29-2009.pdf, *archived at* http://perma.cc/C9JX-TRBZ (emphasis added). One of the sales was made by a receiver in a bankruptcy proceeding. *See* Purchase Agreement between Nat'l Credit Acceptance, Inc. and Sacor Fin., Inc. (Oct. 14, 2010), at 6, *available at* http://debtbuyeragreements.com/wp-content/uploads/2014/03/National-Credit-Acceptance-Inc-to-Sacor-Financial-Inc-10-14-2010.pdf, *archived at* http://perma.cc/5G84-BG95 (disclaiming the seller's or originator's "compliance with applicable law including, without limitation, the Fair Debt Collection Practices Act").

[74] Purchase and Sale Agreement (May 29, 2009), *supra* note 73, at 10 (specifically listing "the Consumer Credit Protection Act, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act and the Gramm-Leach-Bliley Act").

[75] *See* DENNIS L. GREENWALD, STEVEN A. BANK, & CAROL M. CLEMENTS, REAL PROPERTY TRANSACTIONS (THE RUTTER GROUP CALIFORNIA PRACTICE GUIDE) Ch. 4-E (2014) (recommending that, in context of "best of knowledge" provisions, contract drafters negotiate definition of "knowledge" in each context because it "may refer to 'actual' and 'constructive' knowledge—i.e., both that which a party actually knows *and should have known* under the circumstances").

[76] A contract that both disclaimed accuracy of the information and later warranted it is not included above. *See, e.g.*, Lot Fresh Charged-Off Account Resale between Platinum Capital Invs., Ltd. and Redacted Buyer (2011), at 4, *available at* http://debtbuyeragreements.com/wp-content/uploads/2014/03/Template-V2-Purchase-and-Sale-Agreement-Platinum-Capital-Investments-Ltd-2011.pdf, *archived at* http://perma.cc/9UCH-GF4F ("[S]eller warrants and represents[:] . . . [t]he integrity and accuracy of the balances on the [a]ccounts supplied to [the] [b]uyer is true and accurate and has not been intentionally altered in any way [and also that] [t]his purchase is made without recourse. No representation as to the character, accuracy or sufficiency of the information furnished to [the] [b]uyer has been made by [the] [s]eller, either expressed or implied, except that [the] [s]eller warrants that the [p]ool shall not include Unqualified Accounts."). For another instance in which sophisticated parties (this time in the private equity context) wrote contracts with two important conflicting provisions see Stephen M. Davidoff, *The Failure of Private Equity*, 82 S. CAL. L. REV. 481, 503 (2009).

> [The sale is made] without any representation or warranty whatsoever as to enforceability, collectability, *accuracy or sufficiency of data* . . . . Seller specifically disclaims any warranty, guaranty or representation, oral or written, past or present, express or implied, *concerning the Charged-off Accounts and the Account Documents*.[77]

Or more typically,

> Bank has not and does not represent, warrant or covenant the nature, *accuracy, completeness*, enforceability or validity *of any of the Accounts and supporting documentation* provided by Bank to Buyer . . .[78]

Four agreements involving Bank of America entities contain the same language specifically disclaiming the current balance on the accounts, referring to the amounts that the debt buyer will ask consumers to repay:

> [S]eller has not made . . . any representations . . . as to . . . the *accuracy or completeness of any information* provided by the seller to the buyer, *including* without limitation, the *accuracy of any sums shown as current balance or accrued interest* amounts due under the loans [or] any other matters pertaining to the loans.[79]

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[77] Purchase and Sale Agreement Sherman Acquisition, L.L.C. and Gemini Capital Grp., L.L.C. (Mar. 3, 2009), at 8, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.03.03-Sherman-Acquisition-LLC-to-Gemini-Capital-Group-LLC.pdf, *archived at* http://perma.cc/YA5U-ZG2F (emphasis added); *see also* Forward Flow Receivables Purchase Agreement among Arrow Fin. Servs, L.L.C., Arrow Receivables Master Trust 2000-1 and CACH, L.L.C. (Nov. 9, 2007), at 4, *available at* http://debtbuyeragreements.com/wp-content/uploads/2014/03/Arrow-Financial-Services-LLC-to-CACH-LLC-11-09-2007.pdf, *archived at* http://perma.cc/T27X-BM5X (same language).

[78] Purchase and Sale Agreement between Riverwalk Holdings, Ltd., and Wayric Srvs. (Mar. 24, 2009), at 8, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.03.24-Riverwalk-Holdings-Ltd-to-Wayric-Services-Inc-as-is-but-affirmative-reps.pdf, *archived at* http://perma.cc/ETU6-XXPF (emphasis added); *see also* Purchase and Sale Agreement between Citibank, N.A. and Unifund CCR Partners (Feb. 28, 2005), at 7, *available at* http://dalie.org/wp-content/uploads/2014/10/2005.02.28-Citibank-to-Unifund-CCR-some-affirmative-reps-but-FCRA-issue-without-recourse-no-warranty.pdf, *archived at* http://perma.cc/PA67-6GPJ; Account Purchase Agreement between Routhmeier Sterling Inc. and Royal Fin. Grp., L.L.C. (July 1, 2008), at § 7.8, *available at* http://dalie.org/wp-content/uploads/2014/10/2008.07.01-Routhmeir-Sterling-Inc-to-Royal-Financial-Group-LLC.pdf, *archived at* http://perma.cc/HHD6-T5YA. Note that the FTC report also cited this language and noted that the language was found in "numerous spot sales of bank receivables; numerous spot resales of various consumer debts, including private label credit card accounts." FTC Debt Buyer Report, *supra* note 4, at C-14.

[79] Loan Sale Agreement between MBNA Bank of America, N.A. and Hilco Receivables II, L.L.C. (Sept. 30, 2004), at § 9.4, *available at* http://dalie.org/wp-content/uploads/2014/10/2004.09.30-MBNA-America-Bank-NA-to-Hilco-Receivables-II-L.L.C.-.pdf, *archived at* http://perma.cc/KRF4-YXMB (emphasis added); *see also* Loan Sale Agreement (Oct. 29, 2008), *supra* note 20, at § 9.4.

This is not to claim that the ratios observed in this sample are representative of the industry as a whole; there is no way to know that. However, there is much to indicate that these contracts are not entirely aberrational. Much of the language in the Litigation Sample contracts is the same as (or very similar to) language from the FTC sample. The striking similarities among the contracts in these very different samples lend credence to the notion that these are not anomalous characteristics.

C. *Information and Documentation Regarding Debts Purchased*

This section discusses the information and documentation regarding the debts purchased that are available to debt buyers. The FTC's report went beyond contracts; the Commission also obtained account-level information for a multitude of deals and described it all at an aggregate level. This subpart describes the information and documentation that a debt buyer receives when she buys a pool of accounts from a creditor (or another debt buyer), as well as what documents might be available after the purchase. Because of the limitations of the Litigation Sample, this subpart relies heavily on the Commission's findings.

1. *Information Obtained by Buyers at the Time of Sale*

The FTC examined data for over five million consumer credit accounts and found that at the time of sale, most buyers received a data file (typically in spreadsheet form) that contained information about the accounts the buyer was purchasing. The vast majority of accounts they examined included the:

(1) name, street address, and social security of the debtor (found in 98% of accounts);
(2) creditor's account number (found in 100% of accounts);
(3) outstanding balance (found in 100% of accounts);
(4) date the debtor opened the account (found in 97% of accounts);
(5) date the debtor made his or her last payment (found in 90% of accounts);[80]
(6) date the original creditor charged-off the debt (found in 83% of accounts);
(7) amount the debtor owed at charge-off (found in 72% of accounts); and
(8) debtor's home phone number (found in 70% of accounts).[81]

Many accounts were sold without some critical information—in particular, the

[80] Some dates may be missing because a payment was never made in an account.
[81] FTC DEBT BUYER REPORT, *supra* note 4, at 34–35.

(1) principal amount was missing (from 89% of accounts);
(2) finance charges and fees were missing (from 63% of accounts);
(3) interest rate charged on the account was missing (from 70% of accounts);
(4) date of first default was missing (from 65% of accounts); and
(5) name of the original creditor was missing (from 54% of accounts).[82]

These five commonly absent pieces of information may be important to the debt buyer's ability to legally collect, as described further in Part III.

The Litigation Sample of purchase and sale agreements is just that—the contracts themselves. As such, it is impossible to know precisely what documentation may have been provided at the time of sale.[83] There is evidence, however, that some of the same information the FTC found was missing in their contracts was also missing from the Litigation Sample transactions. For example, a series of three contracts stemming from the same original sale of debts by Chase Bank state that a number of data fields will not be provided on the date of the sale and instead "will be provided when and if available."[84] The missing data fields included: the co-debtor's social security number, the debtor's phone number, the date of last payment, the amount of the last payment, the contract date, and the first date of delinquency.[85]

[82] *Id.* at 35. The FTC believes that buyers will generally know the name of the original creditor because "buyers were likely to receive this information in other ways as well." *Id.*

[83] Some contracts provide that within a specified period of time of the closing, available documents will be transferred to the buyer, but these contracts do not typically promise any particular set of documents. *See, e.g.*, Purchase and Sale Agreement between Juniper Bank and LHR, Inc. (Feb. 28, 2006), at § 6.1, *available at* http://dalie.org/wp-content/uploads/2014/10/2006.02.28-Juniper-Bank-to-LHR-Inc-.pdf, *archived at* http://perma.cc/LHU3-4HBF ("Within three (3) business days from the Closing Date, Seller shall deliver to Buyer only such information specifically set forth in *Exhibit B* if available for each Account in the form and format as set forth in *Exhibit B* in the form of PGP encrypted media.").

[84] Credit Card Account Purchase Agreement between Chase Bank, USA, N.A. and Turtle Creek Assets, Ltd., by and through its general partner Forward Properties Int'l, Inc. (May 7, 2009), at 21, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.05.07-Chase-Bank-USA-NA-to-Turtle-Creek-Assets-Ltd-limited-as-is.pdf, *archived at* http://perma.cc/3TA-YU57. This language appears in three contracts in the Litigation Sample. From the dates and language, it appears that Chase Bank sold a number of accounts (face value of at least $71,271,881) to Turtle Creek Assets, Ltd., a debt buyer from Texas, in 2009. About two months later, Turtle Creek sold some of those accounts to at least two other debt buyers. The language in all three contracts is the same. *Id.*; Credit Card Account Purchase Agreement between Turtle Creek Assets, Ltd. and Pasadena Receivables (July 16, 2009), at 20, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.05.07-Chase-Bank-USA-NA-to-Turtle-Creek-Assets-Ltd-limited-as-is.pdf, *archived at* http://perma.cc/R3SJ-XL4J; Credit Card Account Purchase Agreement between Turtle Creek Assets, Ltd. and Matrix Acquisitions, L.L.C. (July 29, 2009), at 20, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.07.29-Turtle-Creek-Assets-Ltd-to-Matrix-Acquisitions-L.L.C..pdf, *archived at* http://perma.cc/B44M-VC4K.

[85] *See* Credit Card Account Purchase Agreement (May 7, 2009), *supra* note 84, at 21; Credit Card Account Purchase Agreement (July 16, 2009), *supra* note 84, at 20; Credit Card Account Purchase Agreement (July 29, 2009), *supra* note 84, at 20.

2. *Availability of Account Documents*

The information provided to the debt buyer detailed above is distinguished from the documentation about the account that the debt buyer acquires as part of the sale transaction. The industry refers to account documentation—i.e., monthly statements, contracts, and the account application—as "media." This media could be transferred at the time of the sale or could be available to access post-sale. In the overwhelming majority of cases, there is no media to be found at all—whether at the sale or after.

Most contracts in the Litigation Sample discuss the availability (or lack thereof) of media on the accounts sold. The language in these contracts comports with the FTC's finding that "account documents typically remained the property of the issuing creditor after the accounts were sold."[86]

When examining a subset of 3.9 million accounts, the FTC estimated that only between 6–12% of accounts were sold with any kind of media at all at the time of sale.[87] When documents were provided as part of the sale, it was typically in the form of account statements (in the FTC sample, 6% of accounts), "terms and conditions" documents (6%),[88] and account applications (less than 1%).[89] In other words, in the vast majority of cases, all the debt buyer obtained at the time of purchase was an assignment of overdue accounts, some information about the accounts (with the caveats of subpart 1 above), and nothing else.

If not transferred at the time of the sale, account documents are sometimes available from the original creditor. However, a number of issues severely limit their availability. First, the purchase and sale contracts between original creditors and debt buyers govern whether media can ever be transferred, how much of it can be sent, and the cost to the debt buyer. Second, depending on where in the "assignment chain" a debt buyer is, the current owner of the debt may not have the right to obtain media from the original creditor, as seen in Figure 4. Finally, even if the current debt owner has the

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[86] FTC Debt Buyer Report, *supra* note 4, at C-9.

[87] *Id.* at 35 n.150 and accompanying text. One should note that this sample is even less likely to be representative. The FTC requested information from the then nine largest debt buyers for accounts purchased between March and August 2009. For purposes of calculating this percentage, the majority of the information (87%) came from two debt buyers. *Id.* at 35 n.149.

[88] This term refers to documents evidencing the contract terms between the issuer and account holder.

[89] FTC Debt Buyer Report, *supra* note 4, at 35. Applications may be especially difficult to obtain, as it appears that most creditors do not keep credit card applications originated electronically or via phone. As might be expected, whether documentation is provided depends on the particular portfolio of accounts sold. The FTC found that "[o]nly 13% of the portfolios contained any account documents, but overall within this set of portfolios, documents were received for 90% of the accounts." *Id.* at 35–36. At least one debt buyer admitted to the FTC that the majority of her documentation is obtained by "requesting them from the reseller after the time of purchase." *Id.* at 37 n.156.

right to obtain media, it may have been destroyed or inaccessible by the time she requests it. These issues are discussed in more detail below.

As described in Part A above, a debt buyer may choose to sell portions of its portfolio, sometimes combining portions of portfolios from different creditors. Most contracts in the Litigation Sample permitted resale, typically with the express permission of the original seller.[90] Resale contracts tended to account for the fact that the debt buyer would have to seek documents from the original creditor and include caveats to that effect, but there is similar language in contracts between original creditors and debt buyers.[91] Many contracts even forbid a subsequent purchaser from contacting the original creditor to obtain documents without the reseller's express written permission.[92]

[90] The FTC found similarly. *See* FTC Debt Buyer Report, *supra* note 4, at C-24. A few contracts prohibited resale to specific companies, generally listed under an exhibit to the contract that was not included. *See, e.g.*, Purchase and Sale Agreement between Providian Nat'l Bank and Asset Acceptance, L.L.C. (Jan. 28, 2003), at § 5.10(b), *available at* http://dalie.org/wp-content/uploads/2014/10/2003.01.28-Providian-National-Bank-to-Asset-Acceptance-L.L.C.-.pdf, *archived at* http://perma.cc/Q2SG-3PUB; Flow Purchase and Sale Agreement between Citibank USA, Nat'l Ass'n and Sherman Originator, L.L.C. (May 24, 2005), at § 9.1, *available at* http://dalie.org/wp-content/uploads/2014/10/2005.05.24-Citibank-USA-NA-to-Sherman-Originator-L.L.C.-.pdf, *archived at* http://perma.cc/S2L5-FAD6 ("Buyer shall not resell, transfer, convey or assign the ownership of any Account to Providian Financial Corporation, First Select Corporation (a Providian Financial Company) or Capital One Financial Corporation, for a period of one (l) year from the applicable Closing Date.").

[91] For example, some of the contracts between two debt buyers contain the following:

> Seller makes no guaranty that account applications, account statements, affidavits of debt, or any other documents ('Account Documents') shall be able to be provided . . . . Generally, once requested, delivery of Account Documents can take 120 days or more, if available. In many instances, the original issuer does not respond if it is unable to provide the requested Account Document. Therefore, it is Buyer's responsibility to track requests for and receipt of Account Documents. The failure of Seller to obtain in any Account Documents requested by Buyer will not be a breach of this Agreement.

Avid Accounts Receivable Purchase Agreement between Unifund CCR Partners and CUDA & Ass'n (Apr. 18, 2008), at 5, *available at* http://dalie.org/wp-content/uploads/2014/10/2008.04.18-Unifund-to-Cuda-Assoc-as-is-no-rep-of-compl-with-laws.pdf, *archived at* http://perma.cc/Z3UA-E63V (regarding sale of 70 accounts totaling $702,172.54 in face value of debt owed by residents in Connecticut). The last sentence in particular was also common in other contracts. *See, e.g.*, Confidential Agreement for Sale and Purchase of Receivable between Dodeka, L.L.C. and Convergence Receivables, L.L.C. (May 16, 2008), at § 5.7, *available at* http://dalie.org/wp-content/uploads/2014/10/2008.05.16_-Dodeka-L.L.C.-to-Convergence-Receivables-L.L.C.-.pdf, *archived at* http://perma.cc/T8UQ-W3MJ ("The failure of the Sellers to provide Account Documents for any given account will not constitute a breach of this Agreement."); Credit Card Account Purchase Agreement between Platinum Capital Invs., Ltd. and Unknown (July 2012), at 8, *available at* http://dalie.org/wp-content/uploads/2014/10/2012.07-Platinum-Capital-Investments-to-unknown-as-is.pdf, *archived at* http://perma.cc/X9E2-DCQ7; Credit Card Account Purchase Agreement between Chase Bank USA, N.A. and Global Acceptance Company, LP (Dec. 22, 2010), at 9, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.02.22-Chase-Bank-USA-NA-to-Global-Acceptance-Credit-Company-LP-.pdf, *archived at* http://perma.cc/WE9S-99NB.

[92] *See, e.g.*, Avid Accounts Receivable Purchase Agreement between Unifund CCR Partners and CUDA & Assocs. (Apr. 18, 2008), at 3, *available at* http://dalie.org/wp-content/uploads/2014/10/2008.04.18-Unifund-to-Cuda-Assoc-as-is-no-rep-of-compl-with-laws.pdf,

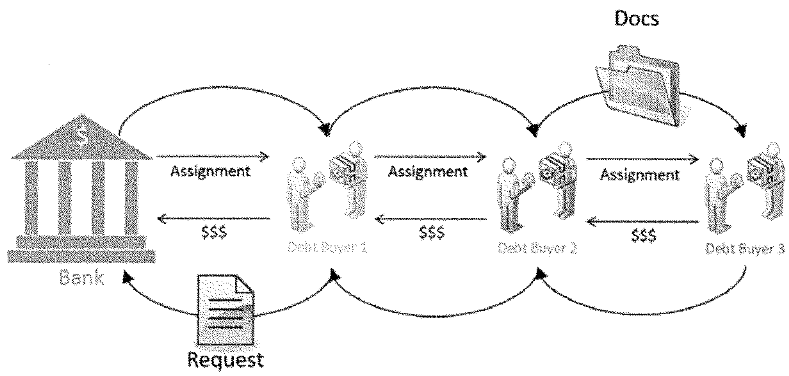
Debt buyers purchasing from reseller buyers face an additional hurdle to obtaining account documents post-sale. Figure 3 is a graphical representation of the "chain of assignment" when a debt is resold. The issue here is that subsequent purchasers have no contractual relationship with the original creditor, and thus cannot require the original creditor to provide them with account documents.[93] Subsequent purchasers must request that the debt buyer or reseller they purchased from go back to the entity from whom they purchased until the request reaches the original creditor.[94]

archived at http://perma.cc/UM8Z-Y5HM ("Under no circumstances shall Buyer be permitted to contact the originator or prior owner of any Receivable without first receiving Seller's express written consent, which consent may be withheld in its sole discretion."). Perniciously, similar to the FTC's findings, one contract "expressly prohibited a debt buyer from reselling any documents previously acquired from a creditor when reselling debts." FTC DEBT BUYER REPORT, *supra* note 4, at C-25 n.53; Loan Sale Agreement between FIA Card Servs. and Asset Acceptance, L.L.C. (Aug. 26, 2011), at § 3.1(g)–(h), *available at* http://dalie.org/wp-content/uploads/2014/10/2011.08.26-FIA-Card-Svcs-to-Asset-Acceptance.pdf, *archived at* http://perma.cc/LUZ6-E7TA (requiring that before buyer transfers or resells an account, buyer is "required to destroy, and shall cause others under its control to destroy, all acquired account documents within its possession, custody or control . . . . [and] Buyer shall not provide . . . any account document (whether or not for monetary consideration) . . . to any subsequent purchaser or owner of the account").

[93] *See, e.g.*, Account Purchase Agreement between Chase Bank USA, N.A. and Global Acceptance Company, LP (Dec. 22, 2010), at 16, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.02.22-Chase-Bank-USA-NA-to-Global-Acceptance-Credit-Company-LP-.pdf, *archived at* http://perma.cc/WE9S-99NB (no third-party beneficiaries); Purchase Agreement between Wells Fargo and Unknown (Jan. 6, 2010), at 28, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.01.06-Wells-Fargo-to-blank-buyer-as-is-to-best-of-seller-knowledge-disclaims-accuracy-and-completeness.pdf, *archived at* http://perma.cc/JRT2-EGHM ("Nothing in this Agreement, express or implied, is intended to confer upon any person or entity other than the Parties hereto or their respective successors any rights or remedies under or by reason of this Agreement."); Receivable Purchase Agreement between HSBC and Main Street Acquisition (Feb. 20, 2009), at 20, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.02.20-HSBC-Card-to-Main-Street-Acq.pdf, *archived at* http://perma.cc/5BXM-7PBT ("Nothing in this Section 20 shall be interpreted as limiting Purchaser's ability to . . . sell the Purchased Receivables, and in such case Seller shall have no obligation to such person or entity under this Agreement.").

[94] *See, e.g.*, Credit Card Account Purchase Agreement between Chase Bank, NA and Palisades Collection, L.L.C. (Feb. 15, 2008), at 13, *available at* http://dalie.org/wp-content/uploads/2014/10/2008.02.15-Chase-to-Palisades.pdf, *archived at* http://perma.cc/6GS4-5AYM ("Notwithstanding the foregoing, Seller shall have no obligation to retrieve or provide any documents to any assignee of the Purchaser without Seller's prior written consent.").

FIGURE 4: HOW ACCOUNT DOCUMENTS ARE OBTAINED BY SUBSEQUENT DEBT BUYERS.[95]



Whether this can be done at all depends first on the agreements between the original creditor and the reseller as well as between the reseller and the subsequent purchaser. The more links in the chain that documents must cross, the higher the transaction costs.[96] The contracts in the Litigation Sample describe how in almost every case the document requester (Debt Buyer 3 in Figure 4) will have to pay a fee to the previous debt buyer (Debt Buyer 2) in order to request documents. In most of the contracts in the Litigation Sample, most reseller debt buyers charged subsequent debt buyers the same fee as the creditor charged them to obtain documents. The FTC found in their sample that "[s]ome debt resellers added fees to cover their administrative costs when passing documents up and down the ownership chain."[97]

The relay that must occur between debt buyers in the chain and the original creditor in order to obtain documents is complex. The consequence of all of this is that it will likely be extremely difficult—not to mention time-consuming and costly—for a debt buyer to obtain account documentation if they did not receive it at the time of the purchase. It will become even more difficult as the debt is sold and resold.[98] Moreover, since only buyers and

[95] Figure adapted from GAO DEBT COLLECTION REP., *supra* note 29, at 45.

[96] *See* Robert E. Scott, *Rethinking the Regulation of Coercive Creditor Remedies*, 89 COLUM. L. REV. 730, 735 n.13 (1989) ("Any contractual remedy that requires a transfer of assets from one party to another will cause the loss of value, since the transaction costs of effecting the transfer always will be positive.").

[97] FTC DEBT BUYER REPORT, *supra* note 4, at C-25 n.53.

[98] It is also unclear whether a bank that is sharing documentation with a purchaser of its accounts violates privacy laws if the bank knows the affiliate is obtaining the information in order to forward it to a subsequent buyer. Virtually all banks' privacy policies detail that they will share information with affiliates—the purchaser—but it is not clear whether the downstream sharing could be a violation of the Graham-Leach Bliley Act. *See* BUREAU OF CONSUMER PROT. BUS. CTR., IN BRIEF: THE FINANCIAL PRIVACY REQUIREMENTS OF THE GRAMM-

sellers have a relationship, if one debt buyer in the chain goes out of business, the chain will be broken and the document request will go unfulfilled.

Over three quarters of contracts in the Litigation Sample discuss the topic of account documents.[99] The language varies widely in whether or how much account documents are available, when, and at what cost. One contract between Capital One and a commodities trading firm specifically stated that Capital One would not provide buyers with "documentation relating to any Account, including without limitation any application, agreement, [or] billing statement . . . regardless of whether such documents are in Seller's possession or could be obtained from a third party."[100] In a number of cases, the contracts included language making clear that it may not be possible for debt buyers to obtain account documents[101] or simply that "documentation may not exist with respect to the Loans purchased by Buyer."[102]

Many contracts do contemplate the possibility that account documents may be provided to the buyer after the sale. However, in these cases, most

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LEACH-BLILEY ACT (2002), *available at* http://business.ftc.gov/documents/bus53-brief-financial-privacy-requirements-gramm-leach-bliley-act, *archived at* http://perma.cc/9MP4-VXWX.

[99] *But see* Second Amended and Restated Receivables Purchase Agreement between Household Bank, Nat'l Ass'n and Household Receivables Acquisition Co. II (July 1, 2002), *available at* http://dalie.org/wp-content/uploads/2014/10/2002.07.XX-Household-Bank-to-Household-Receivables-Acquisition-Company-Forward-Flow-Agreement.pdf, *archived at* http://perma.cc/S4QE-WFUD (omitting discussion of account documents); Receivable Purchase Agreement between Household Receivables Acquisitions Co. II and Metris Receivables, Inc. (Dec. 1, 2005), *available at* http://dalie.org/wp-content/uploads/2014/10/2005.12.01-Household-Receivables-Acquisition-Company-to-Metris-Receivables-Forward-Flow-Agreement.pdf, *archived at* http://perma.cc/6F94-C3CU (same); Receivables Purchase Agreement between CompuCredit Int'l Acquisition Corp. and Partridge Funding Co. (Apr. 4, 2007), *available at* http://dalie.org/wp-content/uploads/2014/10/2007.04.04-Compucredit-to-Partridge-Forward-Flow-few-reps-no-as-is.pdf, *archived at* http://perma.cc/8YP9-FEGW (same).

[100] The same contract did "not represent, warrant or insure the accuracy or completeness of any information provided to Buyer or in the Sale File or any other Account Files." Account Sale Agreement between Capital One F.S.B. and Centurion Capital Corp. (Dec. 8, 2005), at §§ 4.3, 6.4, *available at* http://dalie.org/wp-content/uploads/2014/10/2005.12.08-Capital-One-FSB-to-Centurion-Capital-Corporation-.pdf, *archived at* http://perma.cc/4EGX-9J8A.

[101] "The Buyer acknowledges Seller was not the original credit grantor for the accounts, and may not have in its possession account documents that may be requested by the Buyer." Purchase and Sale Agreement between Global Acceptance Credit Co. and RAB Performance Recoveries, L.L.C. (Feb. 18, 2011), at § 10(k), *available at* http://dalie.org/wp-content/uploads/2014/10/2011.02.18-Global-Acceptance-Credit-Company-to-RAB-Account-Purchase-Agmt-as-is-limited-representations.pdf, *archived at* http://perma.cc/Y3KF-6HNM; Template Purchase and Sale Agreement of Global Acceptance Credit Co. (undated), at § 10(m), *available at* http://dalie.org/wp-content/uploads/2014/10/Date-Unknown-Global-Acceptance-Credit-Company-Purchase-Agreement.pdf, *archived at* http://perma.cc/QTY9-539B.

[102] Loan Sale Agreement (Oct. 29, 2008), *supra* note 20, at Ex. E; Loan Sale Agreement (Aug. 11, 2009), *supra* note 20, at Ex. E; Loan Sale Agreement (Apr. 14, 2010), *supra* note 20, at Ex. E; *see also* Purchase and Sale Agreement (Mar. 3, 2009), *supra* note 77, at § 10(a) ("[M]any of the Charged-off Accounts do not have Account Documents available and that some Charged-off Accounts have only partial Account Documents available . . . . Seller only has such Account Documents as were provided to it by the Originating Creditors and access to additional Account Documents . . . may be limited or prohibited pursuant to the terms of Seller's contracts with such parties."); FTC DEBT BUYER REPORT, *supra* note 4, at C-13.

contracts severely limit the number of documents a buyer can obtain.[103] The terms varied widely here. A number of contracts only allowed buyers to request documents on between 2.5 to 20% of all accounts purchased per month and charged a fee after documents had been provided on more than 10% of the accounts.[104] The fees ranged from $5-$50 per document and sometimes included additional "search fees."[105] Many contracts also limited the number of documents that could be provided at any given time.[106] Most included a window during which the documents would be provided—from as few as fifteen to as many as ninety-five days to deliver the documents, if found.[107] Aside from these stipulations, most contracts contained language to the effect that "Seller shall have no obligation to retrieve or provide any

[103] *But see* Flow Purchase Agreement between Wells Fargo Bank, N.A. and Autovest, L.L.C. (Jan. 6, 2011), at § 12, *available at* http://dalie.org/wp-content/uploads/2014/10/2011.01.06-Wells-Fargo-to-Autovest-L.L.C.-as-is-also-says-unsecured-even-tho-secured.pdf, *archived at* http://perma.cc/S365-A2N9 ("[Seller] shall provide Buyer with an electronic format of imaged Receivables Documents related to no less than seventy-five percent (75%) of the Receivables accounts being purchased by Buyer hereunder within thirty (30) calendar days following the applicable Closing Date, with the remainder (but not less than eighty-five percent (85%) of available Receivable Documents) to be provided to Buyer within ninety (90) calendar days of each Closing Date.").

[104] *See, e.g.*, Credit Card Account Purchase Agreement (Feb. 15, 2008), *supra* note 94, at § 6(a); Template Credit Card Account Purchase Agreement of Platinum Capital Invs., *supra* note 91, at § 6(a); Credit Card Account Purchase Agreement between Chase Bank USA, N.A. and Midland Funding, L.L.C. (Nov. 30, 2010), at § 6(a), *available at* http://dalie.org/wp-content/uploads/2014/10/2010.11.30-Chase-Bank-USA-NA-to-Midland-Funding-L.L.C.-.pdf, *archived at* http://perma.cc/MV7D-VVBR; Closing Statement between Platinum Capital Invs. and Redacted Buyer (2011), *supra* note 76, at § 12 (providing for documentation on up to 15% of accounts without a fee, and $10/document and $10 search fee after); Flow Agreement for Purchase and Sale between Wells Fargo, N.A. and Security Credit Servs. L.L.C. (Apr. 15, 2011), at Ex. 3, *available at* http://dalie.org/wp-content/uploads/2014/10/2011.04.15-Wells-Fargo-Bank-NA-to-Security-Credit-Services-L.L.C..pdf, *archived at* http://perma.cc/K3KK-5PX7 (providing for 20% of documents without fee, and a $5 fee for more than 20%). In their review of debt purchasing contracts, the FTC found that the contracts generally allowed debt buyers to request between 10 to 25% of documentation in a given portfolio for free, with a time limit on the request between six months and a year. FTC Debt Buyer Report, *supra* note 4, at 39.

[105] *See, e.g.*, Credit Card Account Purchase Agreement (Feb. 15, 2008), *supra* note 94, at § 6(a) (providing for $10 per month for any requests for documents between 10 to 25% of accounts, $50 per document thereafter). The FTC reported findings of $10 to $15 per document. FTC Debt Buyer Report, *supra* note 4, at 40.

[106] *See, e.g.*, Purchase and Sale Agreement (Mar. 3, 2009), *supra* note 77, at § 10(b) ("Purchaser shall make requests for Account Documents no more than once per month.").

[107] *See, e.g.*, Flow Purchase Agreement (Jan. 6, 2011), *supra* note 103, at § 12, (15 days); Purchase Agreement among HSBC Bank Nevada, N.A. & HSBC Receivables Acquisition Corp. and CACH, L.L.C. (May 18, 2011), at § 9.1, *available at* http://dalie.org/wp-content/uploads/2014/10/2011.05.18-HSBC-to-CACH-as-is-positive-material-representations-11-cents-on-dollar.pdf, *archived at* http://perma.cc/H6FM-3GX5 (20 days); Purchase and Sale Agreement (Feb. 28, 2005), *supra* note 78, at § 6.2 (60 days); Purchase and Sale Agreement between First Select, Inc. and Credigy Receivables, Inc. (Dec. 27, 2002), at § 5.5(a), *available at* http://dalie.org/wp-content/uploads/2014/10/2002.12.27-First-Select-Inc-to-Credigy-Receivables-Inc-.pdf, *archived at* http://perma.cc/U7BF-PEKM (95 days for information in the possession of "Original Seller;" 25 days for information in the possession of seller in this transaction). *But see* Flow Purchase and Sale Agreement (May 24, 2005), *supra* note 90, at § 6.2 (redacting the number of days).

documents to any assignee of the Purchaser without Seller's prior written consent."[108]

One problem that may arise for debt buyers seeking documentation on an account is whether the original creditor maintains the documentation for a sufficient amount of time after it sells the account. The majority of the contracts in the Litigation Sample "specified a date beyond which the credit issuer was no longer obligated to provide any account documents to the debt buyer," often two to three years after the accounts were sold.[109] After that time, the agreements contemplate that there would be no documents available.[110] Almost all of the contracts explicitly absolved the seller of liability in the event that they failed to provide documents.[111]

Given all of these obstacles to obtaining documentation both at the time of sale and after, it is not surprising that the FTC found that debt buyers in its sample never received documents for the vast majority of the accounts they purchased. The FTC examined a subset of almost 1.5 million accounts and found that post-sale "[d]ebt buyers obtained account statements . . . for 6% of accounts, account applications for 6% of accounts, and terms and conditions documents for 8% of accounts. Payment history documents and affidavits each were obtained for less than 1% of accounts, as were all other types of documents combined."[112]

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[108] Credit Card Account Purchase Agreement (Feb. 15, 2008), *supra* note 94, at § 6(a).

[109] *See, e.g.*, Purchase and Sale Agreement (Mar. 3, 2009), *supra* note 77, at 9 ("Seller shall use reasonable efforts to deliver documentation to Purchaser for a period of one year following the applicable Closing Date."); FTC Debt Buyer Report, *supra* note 4, at C-13 ("Nothing . . . shall create an obligation on the part of Seller to maintain any current servicing relationships or system of record . . . . Buyer understands that at any time following three years after each Closing Date Seller may cease having the ability to obtain any Account Document using commercially reasonable efforts.").

[110] "[I]t is Seller's policy not to retain all Account Documents . . . . [S]ome of the Accounts do not have an original application or a copy thereof . . . . To what extent applications are or are not available, is not known by the Seller nor represented to Buyer." Loan Sale Agreement (Oct. 29, 2008), *supra* note 20, at 6.

[111] *See, e.g.*, Purchase and Sale Agreement (Mar. 24, 2009), *supra* note 78, at § 6.3 ("The failure of the Seller to provide an Account Document requested by Buyer will not be a breach of this Agreement."); Credit Card Account Purchase Agreement (Feb. 15, 2008), *supra* note 94, at § 6(a) ("Seller shall, to the extent such documents are reasonably available, provide Purchaser with copies of . . . media . . . . Seller may in its sole discretion honor such request and charge Purchaser fifty dollars ($50.00) for each document provided."); Credit Card Account Purchase Agreement (Dec. 22, 2010), *supra* note 91, at § 6(a); Flow Agreement for Purchase and Sale (June 21, 2011), *supra* note 52, at § 6.2(b) (limiting request of documents to 100 accounts per month).

[112] FTC Debt Buyer Report, *supra* note 4, at 40. Although not typically included in the industry's definition of media, the FTC included affidavits from the creditor attesting to material aspects of the debt (<1% in the FTC sample) as "account documents." *Id.* The FTC found that the contracts they examined "routinely indicated that sellers would provide affidavits when account documents were unavailable, and indicated that those affidavits would generally attest to the existence of a consumer debt account, its chain of ownership, and the balance on those accounts in the seller's records on the date of sale." *Id.* at C-14. The contracts in the Litigation Sample are fully congruent with that statement; a number of the contracts contain blank affidavits that the buyer is supposed to fill out and send to the seller to sign. *See* Purchase and Sale Agreement (Feb. 28, 2005), *supra* note 78, at § 6.2 ("Buyer may, in addi-

The FTC study has many limitations. Nonetheless, its findings allow an estimate of the upper bound of the percentage of accounts for which debt buyers in the study ever obtained any "account documents." For argument's sake, assume that every time the FTC counted a document as "obtained" post-purchase, it was the only type of document obtained for that account. For example, if debt buyers obtained account statements and account applications for 6% of accounts each, assume that buyers never obtained both an account statement and an application for any one account. The FTC also estimated that at the time of purchase, debt buyers obtained account documents for between 6% to 12% of all accounts.[113] Further assume that a debt buyer would never request additional documents for one of those accounts. Adding these numbers together gives us an estimate of the maximum number of accounts for which debt buyers received any documentation either at the time of sale or after. This calculus reveals that the maximum number of accounts for which debt buyers obtained documentation at any time was between 29% to 35% of the accounts examined by the Commission.[114] In other words, debt buyers in the FTC study lacked documents of any kind (including affidavits) for at least 65% to 71% of the accounts they purchased.

III. Concerns with the Debt Sale Transaction

It is not surprising to see contract language that includes a waiver of warranties; it seems perfectly natural for sellers to want to protect themselves from liability.[115] In fact, this type of language likely provides a high level of liquidity that would not be possible without it. As Professor Edward Janger has noted, "[l]iquidity enhancement through negotiability is a key device for facilitating the trading of debt."[116] Liquidity in the market keeps

tion to its request for Account Documents, request an Affidavit from Bank, in the form shown in Exhibit 3, *indicating the date the Account was opened, the Account number and the balance existing as of a specified date*. The Bank will provide a total number of affidavits equal to two percent (2%) of the total accounts purchased. The Buyer shall be limited to one request for affidavits per week with a maximum of 200 accounts per request." (emphasis added)); Purchase and Sale Agreement (Mar. 24, 2009), *supra* note 78, at § 6.3 (same).

[113] FTC Debt Buyer Report, *supra* note 4, at 35 n.150.

[114] By adding all the percentages the report lists as including "Documents Obtained After Sale" and rounding up, this yields a maximum 23% of accounts for which debt buyers in the study could have received documentation post-sale. Other estimates from the Commission were that buyers obtained account documents for between 6% to 12% of accounts at the time of sale. These together yield 29% to 35%. *See id.* at T-15.

[115] The "no recourse" language is eminently reasonable. The entire purpose of these agreements is that the buyer is taking a chance on the collectability of the accounts.

[116] Edward J. Janger, *The Costs of Liquidity Enhancement: Transparency, Risk Alteration and Coordination Problems*, 4 Brook. J. Corp. Fin. & Com. L. 39, 39–40 (2009) (noting that a number of techniques have been developed, such as holder in due course, buyer in the ordinary course of business, and good faith purchaser, which "enhance the liquidity of, and hence create a market for, a particular type of asset").

the cost of credit down and ensures availability of—in particular—subprime credit.

There are plausible reasons why these contracts might waive warranties that have little to do with the confidence the seller has in the underlying information and more to do with the lawyers who drafted the contracts.[117] Perhaps such language is merely the result of prudent drafting and variations amongst creditors' attorneys. Disparities in attorney advice might also explain the range of explicit disclaimers in the contracts. The debts in most of these contracts were originated by banks. There is an existing and complex regulatory scheme that might foster trust in the information provided by banks, even if the banks themselves deny that they are trustworthy on these matters.[118] At least one judge believes that "bank records are inherently reliable 'because banks depend on keeping accurate records.'"[119] Further, as the FTC notes, language disclaiming warranties does not "necessarily mean that information inaccuracies were prevalent."[120] There is very little information about the incidence of mistakes.

By themselves, the lack of representations might seem harmless. But it is not simply the disclaimers of representations and warranties in these contracts that trigger concern. The probability of harm increases when one combines the lack of representations—and indeed the explicit disclaimers—with the structure of a consumer debt sale. Of particular concern is the way that account information typically flows through several systems of record, the fact that many debt buyers are only provided a spreadsheet with limited account information, the lack of critical documentation to verify accuracy of the information, and the uncertainty about title as accounts repackaged and sold multiple times. This Part describes issues that may arise for consumers and debt buyers as a result of the way information is transferred when a debt goes to collections. It also attempts to quantify—to the extent data is available—the potential contours of the problem.

A. *Synchronization, Systems of Record, and Accuracy*

Figure 1 describes what happens to information about an account once it becomes severely delinquent: the information the creditor has about that

[117] *See, e.g.*, Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 Wash. U. L. Q. 347, 366 (1996) (suggesting that institutional norms such as lawyer-designed contract terms can themselves reflect the cognitive biases of practicing lawyers).

[118] Note that the FTC found similar language in contracts for the sale of car loans, not necessarily originated by banks, and telecom accounts. *See* FTC Debt Buyer Report, *supra* note 4, at C-8.

[119] United States v. Bertoli, 854 F. Supp. 975, 1031 (D.N.J. 1994) (quoting United States v. Miller, 830 F.2d 1073, 1077 (9th Cir. 1987)), *rev'd on other grounds*, 40 F.3d 1384 (3d Cir. 1994).

[120] FTC Debt Buyer Report, *supra* note 4, at iii. The FTC goes on to note, "it does raise concerns about how debt buyers handled purchased debts when such inaccuracies became apparent, and for which they had no recourse available from the seller." *Id.*

account moves from the collection system to the recovery system and eventually to collection agencies. Because there are now two systems of record (the collection agency's and the bank's), and these systems do not talk to each other in real time, it becomes difficult to ascertain which system contains the "authoritative" record regarding the amount owed and any other information gathered about the account.[121]

The CFPB has noted that "when there are two systems of record, the timeliness and financial and demographic updates is [sic] often dependent on how sophisticated the players are. The more sophisticated the lenders and agencies, the more likely these updates are timely and accurate."[122] The timing of these updates can be an issue, especially if debts are placed with a second collection agency but the first one to work the account receives a payment.[123] This requires reconciliation among all three parties so that "the lender gets paid and [Collector 2] gets paid and the information reported to the reporting agencies and the balance [Collector 2] is trying to collect is accurate."[124]

The time an account is placed with a collection agency varies, but can be as little as a month. This means that the number of SORs keeping track of a delinquent account balance grows as more collection agencies become involved. As described below, dispute information and other notes may also not be passed from collector to collector. Given the system, one CFPB official noted, "[i]t is easy to see the potential for errors and certainly the difficulty collectors, attorneys, and debt buyers can have in obtaining information and documentation to ensure that the consumer can identify the debt as being theirs."[125] These errors can be costly to collectors and debt buyers. The FDCPA makes them strictly liable for falsely representing the "character, amount, or legal status of any debt."[126]

Figure 5 highlights five categories of consumer complaints submitted to the CFPB in the one-year period beginning July 1, 2013.[127] These five cate-

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[121] *See supra* note 24 and accompanying text. *See also* Tonetti, *supra* note 23, at 37 ("[I]n most cases it is [sic] the system of record is now that of the collection agency as well as the creditor. Synchronization and updating of these two systems of record is important and may be subject to time lags.").

[122] Tonetti, *supra* note 23, at 38.

[123] *See id.* at 38–39.

[124] *Id.*

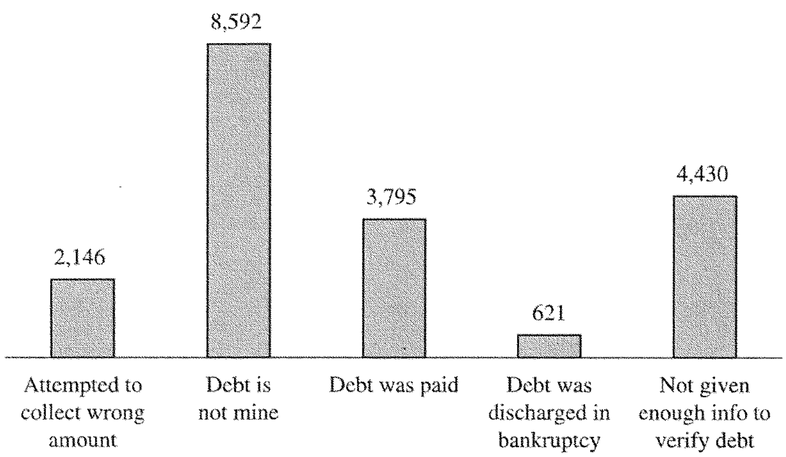
[125] *Id.* at 43.

[126] 15 U.S.C. § 1692e(2)(A) (2012).

[127] For the database of consumer complaints, see *Consumer Complaint Database*, Consumer Fin. Prot. Bureau, http://www.consumerfinance.gov/complaintdatabase/ (last visited Oct. 18, 2014), *archived at* http://perma.cc/4Z2Z-RLCF. Note that the CFPB began to officially take complaints on debt collection on July 10, 2013. Nonetheless, the Bureau did record complaints it received on the topic before then. *See* Consumer Fin. Prot. Bureau, Consumer Response: A Snapshot of Complaints Received July 21, 2011 through June 30, 2014 (2014), *available at* http://files.consumerfinance.gov/f/201407_cfpb_report_consumer-complaint-snapshot.pdf, *archived at* http://perma.cc/M7EX-QPJV [hereinafter CFPB Consumer Complaints].

gories relate to the quality and availability of information the collector or debt buyer has to collect from the consumer.

FIGURE 5: CONSUMER COMPLAINTS SUBMITTED TO THE CFPB.[128]



Most complaints concerned collectors' "continued attempts to collect a debt that is not owed."[129] Complaints to the CFPB are not an ideal estimate of how often these issues arise: not all consumers complain and for those who do, the CFPB does not ascertain the validity of the complaints.[130] The consumer reporting that the collector is attempting to collect the wrong amount or that the debt was paid may be mistaken, or worse.[131] Nonetheless, the number of complaints is an indicator of the potential scope of the problems identified. It is significant that these five categories made up 56% of all debt collection complaints submitted about debt collection during this time period.[132]

[128] These five categories made up 56% of all complaints submitted during the period. The source of this graph is data downloaded from the CFPB Complaint Database on August 19, 2014. *See* CFPB CONSUMER COMPLAINTS, *supra* note 127.

[129] CFPB CONSUMER COMPLAINTS, *supra* note 127, at 15.

[130] For a critique about the complaint system from the financial services industry, see *CFPB Rumors*, FIN. SERVS. ROUNDTABLE, http://fsroundtable.org/cfpbrumors/ (last visited Aug. 18, 2014) , *archived at* http://perma.cc/3G6M-FXNE .

[131] The CFPB does not "verify all the facts alleged in [consumer] complaints," but they attempt to confirm a commercial relationship between the consumer and company." *Consumer Complaint Database*, CONSUMER FIN. PROT. BUREAU, *supra* note 127.

[132] Other complaint categories include: "improper contact or sharing of information," issues with "communication tics," or "taking/threatening illegal action." *Id.*

B. Missing Information and Documentation

Part II.B.2 detailed a number of pieces of information that the FTC found were missing for the accounts they examined. This missing information may be material to consumers and can also hamper the ability of a debt buyer to legally collect. In particular, as explained below, a consumer (and in many cases a debt buyer) would want to know some of this information, including: the dates needed to calculate both the period during which a debt buyer may report to a credit reporting agency as well as the limitations period; information the consumer may have shared with the creditor or a collection agency; documentation of standing and changes in ownership of the account; and other documentation sufficient to prove the material elements of their claim in court.

1. Dates Needed to Calculate Limitations and Credit Reporting Periods

The FTC found that some "key dates relating to the debts" were missing from the accounts it examined, including when the original creditor charged off the debt (missing in 17% of accounts) and when the consumer went delinquent (missing in 65% of accounts).[133] These dates are significant for purposes of calculating when a debt buyer must stop reporting a debt to the credit bureaus as well as the statute of limitations period. Not having these dates exposes the debt buyer to liability under the FDCPA if she violates the Fair Credit Report Act ("FCRA") by reporting outside the correct period or if she files a lawsuit outside of the limitations period.[134]

The FCRA requires that most negative information be removed from a consumer's credit report after seven years.[135] For purposes of collection items, the seven years begins to run 180 days after the delinquency that sent the consumer to collections or that resulted in the account being charged-off.[136] Debt buyers and anyone else who furnishes information to a credit bureau must report the date of delinquency so that the credit bureau may delete the negative information from the consumer's account at the appropriate time. This can prove difficult for the debt buyer who purchased an account without information about the date of delinquency. One possibility, available only if the seller included the date of charge-off for the account, is to treat the charge-off date as if it were the date of delinquency and count 180 days from charge-off for purposes of reporting to the FCRA. This re-

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[133] The FTC terms this the "date of first default." FTC DEBT BUYER REPORT, *supra* note 4, at 35.

[134] The FCRA prohibits furnishers like debt buyers from providing "any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate." 15 U.S.C. § 1681s-2 (a)(1)(A) (2012).

[135] 15 U.S.C. § 1681c(a)(4) (2012).

[136] 15 U.S.C. §§ 1681c(c)(1), (a)(4) (2012).

porting would not violate the FCRA, but it would reduce the amount of time that the debt be reported beyond what is required by the FCRA. The other alternative is not to report to the credit bureaus at all.[137]

These missing dates are also problematic for purposes of calculating the limitations. Statutes of limitation vary by state, but typically, the period to collect on a debt begins to run from the date on which the consumer breached the credit card agreement.[138] The date of breach is what the FTC calls the "date of first default," which was missing in 65% of accounts in the FTC Sample. The statute of limitations is typically an affirmative defense.[139] However, in the consumer debt collection context, the overwhelming majority of courts have found that the act of filing a time-barred lawsuit is a violation of the FDCPA, regardless of whether the consumer asserts the defense.[140] Some courts have found that even threatening to file a lawsuit is a violation.[141] Further complicating matters for collectors, the FTC has taken

[137] Recall that OCC guidelines require national banks to charge-off revolving accounts within 180 days after the account is past due. *See Uniform Retail Credit Classification and Account Management Policy*, *supra* note 35 and accompanying text. The OCC policy, however, "does not preclude an institution from adopting a more conservative internal policy," which means that the charge-off time could be shorter than 180 days. Uniform Retail Credit Classification, 65 Fed. Reg. 36903, 36905 (June 12, 2000). Because of this, a debt buyer cannot simply rely on the date of charge-off and count back 180 days to calculate the date of delinquency needed for FCRA purposes.

[138] *See, e.g.*, Citibank S.D., NA v. Sawant, 2012 Mass. App. Div. 79, at *2 (Dist. Ct. 2012); Knighten v. Palisades Collections, L.L.C., 721 F. Supp. 2d 1261, 1269 (S.D. Fla. 2010); Dodeka, L.L.C. v. Campos, 377 S.W.3d 726, 731 (Tex. App. 2012); Anderson v. Neal, 428 A.2d 1189, 1191 (Me. 1981); Kasu Corp. v. Blake, Hall & Sprague, Inc., 582 A.2d 978, 980 (Me. 1990) (noting that a contract cause of action accrues at the time of breach); Isaacson, Stolper & Co. v. Artisan's Sav. Bank, 330 A.2d 130, 132 (Del. 1974).

[139] *See* Day v. McDonough, 547 U.S. 198, 199 (2006); Gonzalez v. Hasty, 651 F.3d 318, 322 (2d Cir. 2011); Rodriguez-Perez v. Clark, 423 F. App'x 118, 120 (3d Cir. 2011); DeTata v. Rollprint Packaging Products Inc., 632 F.3d 962, 970 (7th Cir. 2011); Export-Import Bank of U.S. v. Advanced Polymer Sci. Inc., 604 F.3d 242, 248 (6th Cir. 2010); Santana-Castro v. Toledo-Davila, 579 F.3d 109, 133 (1st Cir. 2009).

[140] *See, e.g.*, Phillips v. Asset Acceptance, L.L.C., 736 F.3d 1076, 1083 (7th Cir. 2013); Huertas v. Galaxy Asset Mgmt., 641 F.3d 28, 33 (3d Cir. 2011); Herkert v. MRC Receivables Corp., 655 F. Supp. 2d 870, 875–76 (N.D. Ill. 2009); Larsen v. JBC Legal Group, P.C., 533 F. Supp. 2d 290, 302 (E.D.N.Y. 2008); Goins v. JBC & Assoc., 352 F. Supp. 2d 262, 266, 276 (D. Conn. 2005); Freyermuth v. Credit Bureau Servs., Inc., 248 F.3d 767, 771 (8th Cir. 2001); Stepney v. Outsourcing Solutions, Inc., No. 97 C 5288, 1997 WL 722972, at *4 (N.D. Ill. Nov. 13, 1997); Beattie v. D.M. Collections, Inc., 754 F. Supp. 383, 393 (D. Del. 1991); Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480, 1487 (M.D. Ala. 1987).

[141] *See, e.g.*, *Kimber*, 668 F. Supp. at 1488 ("By threatening to sue Kimber on her alleged debt, FFC violated § 1692e(2)(A) & (10)."); *Freyermuth*, 248 F.3d at 771 (finding that it is a violation of the Act to threaten to take "any action that cannot legally be taken"); *Herkert*, 655 F. Supp. at 875–76 ("Numerous courts, both inside and outside this District, have held that filing or threatening to file suit to collect a time-barred debt violates the FDCPA."); *Larsen*, 533 F. Supp. at 302; *Beattie*, 754 F. Supp. at 393 ("[T]he threatening of a lawsuit which the debt collector knows or should know is unavailable or unwinnable by reason of a legal bar such as the statute of limitations is the kind of abusive practice the FDCPA was intended to eliminate."). A number of courts have declined to extend the *Kimber* reasoning to letters sent by the debt collector, although the holdings largely depend on the content of the letters. *Huertas*, 641 F.3d at 33 ("Even the least sophisticated consumer would not understand [plaintiff's] letter to explicitly or implicitly threaten litigation."); Brown v. Card Serv. Ctr., 464 F.3d

the position that for any debts which the debt collector "knows or should know may be beyond the applicable statute of limitations," it is unfair for a collector to attempt to collect without notifying the consumer that the debt is time-barred and the debt collector has no legal remedy.[142] Without this date, collectors and debt buyers risk violating the FDCPA if they collect close to or past the statute of limitations.[143] Absent this date to calculate the statute of limitations period, the debt buyer may perhaps choose to use another date that may be available for that account, perhaps by choosing the date that the creditor charged-off the account, available in 83% of accounts the FTC examined. Depending on how risk-averse the debt buyer is—the FTC's statement regarding out of statute debts is not a rule—it may have to forego some of the time it might have been able to collect on an account.

2. *Itemization of Interest and Fees*

The FTC found that most debt buyers did not obtain information regarding the amount of the debt that was made up of principal versus interest. A breakdown between the amount of principal (missing from 89% of accounts) and the total amount of finance charges and fees (missing from 63% of accounts) could help the consumer determine whether the debt is hers. It could also help consumers whose debts were sold under contracts that spe-

450, 453 (3d Cir. 2006) ("Whether a debt collector's communications threaten litigation in a manner that violates the FDCPA depends on the language of the letter, which should be analyzed from the perspective of the 'least sophisticated debtor.'"); Shorty v. Capital One Bank, 90 F. Supp. 2d 1330, 1331–33 (D.N.M. 2000) (finding that sending a debt validation notice regarding a time-barred debt, without notifying the consumer that the debt was time-barred did not violate the FDCPA).

[142] Consent Decree at 11, United States v. Asset Acceptance, L.L.C., No. 8:12-cv-00182-JDW-EAJ (M. D. Fla. Jan. 31, 2012), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2012/01/120131assetconsent.pdf, *archived at* http://perma.cc/U3S4-2XFS; *see also id.* at 13 (providing specific disclosure language). In addition, in at least three states, when a debt falls out of statute, it is extinguished. *See* Miss. Code Ann. § 15-1-3 (extinguishing all debts after statute expires); Wis. Stat. Ann. § 893.05 (mirroring the Mississippi statute); N.C.G.S. § 58-70-115(4), 155(b)(7) (prohibiting debt buyers from attempting to collect past the statute of limitations and requiring evidence establishing the date of last payment in order to calculate the date the statute would expire). In those states, any attempt to collect on a debt outside of the limitations period would likely violate the FDCPA. *See* 15 U.S.C. §§ 1692e(2)(B)(5) (prohibiting the collector from threatening "to take any action that cannot legally be taken or that is not intended to be taken") and 1692f(1) (prohibiting the collection of any amounts unless it is permitted by law); Dodeka, L.L.C. v. Cobb, No. 09 CvD 94, 2011 WL 10549927 (N.C. Dist. Mar. 8, 2011) ("[F]iling a lawsuit on a debt that is barred by the applicable statute of limitations further constitutes a misrepresentation of the legal status of such debt and violates 15 U.S.C. § 1692e and § 1692f when suit is threatened or initiated on a time-barred debt."). The "likely" caveat refers to the fact that depending on the contract there is still the question of which statute applies.

[143] How long a state allows collection on a debt depends on state statutes, on what law is applied to the issue, and on whether the plaintiff is suing on a contract theory or some other basis. Pennsylvania has the shortest limitations period at two years, 42 Pa. Cons. Stat. § 5524, but limitations periods can range from the more typical three years to fifteen years, *see, e.g.*, Ariz. Rev. Stat. Ann. § 12-543(2) (3 years); D.C. Code § 12-301(8) (3 years); W. Va. Code § 55-2-6 (10 years); Ky. Rev. Stat. Ann. § 413.090(2) (15 years); Ohio Rev. Code Ann. § 2305.06 (15 years).

cifically disclaimed, *inter alia*, "the accuracy of . . . accrued interest amounts due under the loans."[144] Given that language, a consumer would want to know what exactly was being claimed as interest in the amount allegedly due. It is almost impossible for a consumer to separate interest and fees herself on a revolving account, even if she has her entire history of account statements. Credit issuers are in the best position to separate interest and fees. Separately itemizing these would help consumers as well as debt buyers.[145]

3. *Sharing of Dispute History and Other Information*

The FTC study found that sellers did not typically include any specifics about the collection history of accounts sold, so this potentially valuable information about interactions of previous collectors with the consumer, written disputes, or attempts at verification of a debt were not forwarded to the debt buyer.[146] The majority of accounts were also sold without any information about whether the purported account holder disputed the amount, validity, or anything else about the account.[147]

The lack of dispute history information is problematic for both consumers and debt buyers. Consumers may have to provide the same information more than once and may become frustrated in explaining their situation multiple times. As the FTC noted, "[k]nowing the dispute history of debts could be very relevant to debt buyers in assessing whether consumers in fact owe the debts and whether the amounts of the debts are correct."[148]

Interactions with previous collectors would also be helpful to the debt buyer because they may contain information that can save both time and potential FDCPA liability. For example, it would be helpful for both consumers and collectors if notes indicating the consumer is represented by an attorney were passed to subsequent debt buyers or their collectors. Debt buy-

[144] *See* Loan Sale Agreement (Oct. 29, 2008), *supra* note 20, at § 9.4; Loan Sale Agreement (Apr. 14, 2010), *supra* note 20, at § 9.4; Loan Sale Agreement Aug. 11, 2009), *supra* note 20, at § 9.4.

[145] "The FTC has said that debt collectors should be required to include this information in validation notices to assist consumers in determining whether the amount owed is correct." FTC Debt Buyer Report, *supra* note 4, at 36. For an example of how this might be done, see Nat'l Consumer L. Ctr., Comments to the Bureau of Consumer Financial Protection (Feb. 28, 2014), at 63, *available at* http://www.nclc.org/images/pdf/debt_collection/comments-cfpb-debt-collection-anprm-2-28-14.pdf, *archived at* http://perma.cc/6TJQ-CKHE.

[146] FTC Debt Buyer Report, *supra* note 4, at 36. The FTC believes that when selling to a subsequent debt buyer, "initial debt buyers generally do not discard any information they receive from the original creditor, but also that they typically do not supplement the information they provide to secondary debt buyers to reflect their experience in collecting on debts." *Id.* at 37 (citations omitted).

[147] Note that only four out of nine debt buyers were able to provide data on disputes. *Id.* at 37.

[148] *Id.*

ers who communicate with represented consumers after the consumer has notified a collector of the representation risk violating the FDCPA.[149]

In addition, these notes may also help ensure that the collector has made what the industry calls a "right party contact." As a debt ages, collectors turn to "skip-tracing" methods to help locate consumers who have moved or changed phone numbers.[150] Many skip-tracing methods rely on public information to associate phone numbers or other contact information with consumers. Individuals with common names or family members who have similar names may be confused for debtors and be contacted by debt collectors.[151] Once a collector finds that a skip-traced phone number or address does not belong to the person who defaulted on their account, notating that information and forwarding it to the next collector or debt buyer would help those consumers whose contact information had been wrongly associated with a debt. It would also help the next collector in ensuring she is speaking to the right party.

4. *Standing, Title, and Affidavits*

The issues around title and assignment are significant for both debt buyers and consumers. Proving ownership of a debt or standing in a lawsuit can be a challenge for debt buyers. A number of courts have found that debt buyers could not prove their standing to sue.[152] One issue is that the consumer debt transaction does not include proof of assignment at the account-level; this gets more complicated as the debt gets sold and resold. Another issue relates to the admissibility of affidavits.

Recall that during a typical debt sale, most of the time the buyer only gets some information about the debtor and the debt, as detailed in Part II.C.A. As part of the contract, the buyer and seller also sign a one-page Bill

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[149] 15 U.S.C. § 1692c(a)(2) (2012).

[150] FTC Debt Buyer Report, *supra* note 4, at 36.

[151] "In our case, a gentleman named Willie Graham, had his phone number scored as a high score letter, as a possible target. He has no connection with the three different people that the—I'll say rogue's gallery of established debt collection companies have assigned obligation for the debt. But he has received calls from, I'd say, at least half of the top ten debt buyers, all because there's an inaccurate Accurint file on him." Fed. Trade Comm., Debt Collection 2.0—Draft—Protecting Consumers as Technologies Changes [sic] 47–48 (2011), *available at* http://www.ftc.gov/sites/default/files/documents/public_events/debt-collection-2.0-%E2%80%93-protecting-consumers-technologies-change/transcript.pdf, *archived at* http://perma.cc/R6JE-5C65.

[152] *See* MBNA Am. Bank, N.A. v. Nelson, No. 13777/06, 2007 WL 1704618, at *5 (N.Y. Civ. Ct. May 24, 2007) ("It is imperative that an assignee establish its standing before a court . . . an assignee must tender proof of assignment of a particular account . . . . Such assignment must clearly establish that Respondent's account was included in the assignment. A general assignment of accounts will not satisfy this standard and the full chain of valid assignments must be provided, beginning with the assignor where the debt originated and concluding with the Petitioner.") (citations omitted); In re Leverett, 378 B.R. 793, 800 (Bankr. E.D. Tex. 2007); Unifund CCR Assignee of Providian v. Ayhan, No. 36151-5-II, 2008 Wash. App. LEXIS 1922, at *21 (Ct. App. Aug. 5, 2008); Nyankojo v. North Star Capital Acquisition, 679 S.E.2d 57, 58 (Ga. Ct. App. 2009); Wirth v. Cach, L.L.C., 685 S.E.2d 433, 435 (Ga. Ct. App. 2009).

of Sale which makes recitals to the effect that: Seller, for value received and pursuant to the terms and conditions of the Purchase and Sale Agreement, hereby assigns all rights, title and interest of Seller to those receivables identified in the Sale File.[153] This one-page document is what is typically produced when proof of standing is requested. However, the Bill of Sale never references the individual account being sued on; at most, it references a spreadsheet or electronic exhibit that is almost never produced.[154]

If the plaintiff debt buyer did not purchase the account directly from the creditor, she may have to produce multiple Bills of Sale as evidence of the chain-of-title. Producing and authenticating these can present a problem. More often, what is produced instead is an affidavit from an agent of the debt buyer (or of the original creditor) stating that the consumer's account was bought from the Seller referenced in the Bill of Sale. But an affidavit is not enough in most jurisdictions, especially when it was prepared in anticipation of litigation.[155] Many state court rules of civil procedure require some evidence of the facts alleged in the affidavit be included.[156] In cases where debt buyers do not have account documents, this requirement can be difficult to meet.[157] This is perhaps one of the reasons regulators and consumer law-

[153] This phrasing is a composite of various Bills of Sale *available at* www.dalie.org/contracts, *archived at* http://perma.cc/74LP-VJHN.

[154] Some debt buyers have produced redacted printouts of spreadsheet documents: essentially one line on a sheet of paper that otherwise looks blank and spans multiple rows. *But see* Dahl v. Bain Capital Partners, L.L.C., 655 F. Supp. 2d 146, 150 (D. Mass. 2009) (finding that parties should produce Excel documents in their "native" format, that is where search and formulae capabilities are left intact). *See also* Fed.R.Civ.P. 34(b)(2)(E)(i).

[155] "[W]hen a document is created for a particular use that lies outside the business's usual operations—especially when that use involves litigation—neither of [Federal Rule 803(6)'s] justifications for admission holds . . . . [W]e adhere to the well-established rule that documents made in anticipation of litigation are inadmissible under the business records exception." Ortega v. Cach, L.L.C., 396 S.W.3d 622, 630 (Tex. Ct. App. 2013) (quoting United States v. Blackburn, 992 F.2d 666, 670 (7th Cir. 1993)) (internal quotation marks omitted).

[156] *See, e.g.*, N.D. R. Civ. P. 56(e) ("If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit."); Neb. Rev. Stat. § 25-1334 ("Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."); Me. R. Civ. P. 56(e) (same); Cach, L.L.C. v. Kulas, 21 A.3d 1015, 1019 (Me. 2011) ("To comply with Rule 56(e), however, it is not enough to merely rely on the affidavit: 'Sworn or certified copies of all papers or parts thereof referred to in an affidavit *shall be attached* thereto or served therewith.' Me. R. Civ. P. 56(e) (emphasis added)."); Arrow Financial Services, L.L.C. v. Guiliani, 32 A.3d 1055, 1058 (Me. 2011) (noting that the debt buyer did not provide (1) any evidence as proof that the original creditor owned an account in the consumer's name, such as the original contract between the original creditor and the consumer or (2) the account records and information supplied by the original creditor to the debt buyer as proof that the consumer entered into a contract for a credit card, as referenced in the affidavit).

[157] *See, e.g.*, Asset Acceptance v. Lodge, 325 S.W.3d 525, 528 (Mo. Ct. App. 2010) (reversing decision by trial court to accept testimony of debt buyer's representative to establish details of the original loan agreement because debt buyer did not originate the loan); Mfrs. & Traders Trust Co. v. Medina, No. 01C768, 2001 WL 1558278, at *1 (N.D. Ill. Dec. 5, 2001) (finding affidavits by attorneys and others lacking personal knowledge insufficient); Topps v. Unicorn Ins. Co., 648 N.E.2d 214, 217 n.1 (Ill. App. Ct. 1995) ("[U]nder the business record exception to the hearsay rule, only the business record itself is admissible into evidence rather than the testimony of the witness who makes reference to the record."); N. Ill. Gas Co. v.

yers claim that so many lawsuits are dismissed if the consumer shows up to court.[158] The lack of availability of documents is a top priority for the collections industry; so much so that the main trade associations for collection agencies listed this issue among the top four things they would like to see Congress or regulatory agencies tackle.[159] The inability to prove ownership in court has negative ramifications for consumers as well. Standing is an element of the plaintiff's *prima facie* case, but the overwhelming majority of collection cases are won by default—the consumer just never shows up.[160] In most default situations, the debt buyer will win a lawsuit without having to present documents evidencing their ownership of the debt. Even when consumers come to court, most do so without an attorney and fail to request

Vincent DiVito Constr., 573 N.E.2d 243, 252 (Ill. App. Ct. 1991) ("The business records exception to the hearsay rule (. . .) makes it apparent that it is only the business record itself which is admissible, and not the testimony of a witness who makes reference to the record.") (citations omitted); Grant v. Forgash, 1995 Ohio App. LEXIS 5900, at *13 (Ohio Ct. App. Dec. 26, 1995) ("There is no hearsay exception . . . that allows a witness to give hearsay testimony of the content of business records based only upon a review of the records.").

[158] *See Junk Justice*, *supra* note 10, at 208 (noting that 90% of consumers don't show up to court and, of those who showed, 2% had an attorney); *Debts, Defaults, and Details*, *supra* note 10, at 296 (noting that 50% of cases were dismissed without prejudice). The Maryland Rules Committee stated in its report that the proposed rule changes (now enacted) were made because

> [p]roblems with the cases filed by [consumer debt purchasers, or CDPs] have arisen, including: failure of the CDP to be licensed, the wrong party being named as plaintiff, filing after the statute of limitations period has run, lack of personal knowledge by the affiant, lack of supporting documentation containing sufficient detail as to liability and damages, failure of the CDP to prove it owns the debt, and incorrect identification of the amount claimed.

Standing Committee on Rules of Practice and Procedure, Ct. of Appeals of Md., Notice of Proposed Rules Changes 41 (2011), *available at* http://www.courts.state.md.us/rules/reports/171stReport.pdf, *archived at* http://perma.cc/AJ77-C9MC.

[159] The availability of documents alone will not solve this problem, however. The problem stems from lack of account-level evidence of ownership. *See* ACA Int'l, The Path Forward: ACA International's Blueprint for Modernizing America's Consumer Debt Collection System 7 (2011), *available at* http://www.acainternational.org/files.aspx?p=/images/18898/finalblueprint-designedversion.pdf, *archived at* http://perma.cc/N858-AS7W (stating that "collectors can have a difficult time providing documentation responsive to the consumer's dispute because creditors may not maintain the appropriate documentation to verify the debt during the collection process").

[160] *See Debts, Defaults, and Details*, *supra* note 8, at 296 (finding 68% no appearance rate, 8.68% attorney representation rate among those who showed, and 40% default rate); *Do We Have a Debt Collection Crisis?*, *supra* note 8, at 377, 381 (finding 83% no appearance rate, 73% default judgment rate, 4% attorney representation rate, and no cases resulting in trial); Consumers Union & East Bay Community Law Center, Past Due: Why Debt Collection Practices and the Debt Buying Industry Need Reform Now 1 (2011) (describing stories of individuals who did not show up to court), *available at* http://defendyourdollars.org/pdf/Past_Due_Report_2011.pdf, *archived at* http://perma.cc/KD4K-F5NA; National Consumer Law Center, The Debt Machine: How the Collections Industry Hounds Consumers and Overwhelms Courts 4 (2010), *available at* http://www.nclc.org/images/pdf/debt_collection/debt-machine.pdf, *archived at* http://perma.cc/33BU-U4UB; New York Appleseed & Jones Day, Due Process and Consumer Debt: Eliminating Barriers to Access to Justice in Consumer Credit Cases 2 (2010), *available at* http://appleseednetwork.org/wp-content/uploads/2012/05/Due-Process-and-Consumer-Debt.pdf, *archived at* http://perma.cc/FWB7-6LY8.

proof of ownership.[161] This can also have a deleterious effect on consumers if they end up with a judgment from the wrong debt buyer.[162]

It is unclear how often this happens, but there are at least a handful of examples.[163] In one case in 2009, a court found that debt buyer Goldberg & Associates, L.L.C. entered into a contract to purchase debts from another debt buyer but never paid for them.[164] Despite that, Goldberg used the information it acquired during the transaction to collect debts that it did not own from consumers.[165] Recently, the FTC obtained a preliminary injunction against a debt broker that the FTC alleges "posted the sensitive personal information of more than 70,000 consumers online . . . in the course of trying to sell portfolios of past-due payday loan, credit card, and other purported debt."[166] The defendants had posted the debt portfolios in the form of Excel spreadsheets on a publically available website without any protection.[167] Any visitor to the website could download "consumers' bank account and credit card numbers, birth dates, contact information, employers' names, and information about debts the consumers allegedly owed."[168] Here is where the language of the debt sale agreements becomes significant: recall that 18% of the contracts in the Litigation Sample that disclaimed all warranties and representations failed to represent that the seller had title to the accounts. In a world in which it is next to impossible to verify whether a debt buyer has title to an account, a contract that disclaims title is a red flag.

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[161] The author, along with Jim Greiner and Lois Lupica, is working on a study that attempts to understand, *inter alia*, the reasons consumers default. *See* Dalié Jiménez, D. James Greiner, Lois R. Lupica, Rebecca Sandefur, *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 GEO. J. ON POVERTY & L. POL'Y 449 (2013) (describing the study).

[162] There are many instances where the admissibility of affidavits could be successfully challenged. *See, e.g.*, Midland Funding L.L.C. v. Brent, 644 F. Supp. 2d 961 (N.D. Ohio 2009), *infra* note 225.

[163] *See, e.g.*, Miller v. Wolpoff & Abramson, L.L.P., No. 1:06-CV-207-TS, 2008 U.S. Dist. LEXIS 12283, at *5 (N.D. Ind. Feb. 19, 2008) (describing consumer's allegation that two debt buyers sued him on the same debt); Wood v. M & J Recovery L.L.C., No. CV 05-5564, 2007 U.S. Dist. LEXIS 24157, at *4 (E.D.N.Y. Apr. 2, 2007) (describing a dispute over who owned the fifth of a portfolio that included the debtor's account).

[164] Hudson & Keyse, L.L.C. v. Goldberg & Associates, L.L.C., No. 9:2007-81047-CIV, 2009 WL 790115, at *2 (S.D. Fla. Mar. 24, 2009) (finding that Goldberg breached the contract by not paying for the debts).

[165] *See id.* Goldberg was also sued by a third debt buyer who bought debts that Goldberg sold but to which it did not have title. American Acceptance Co. v. Goldberg, No. 2:08-CV-9 JVB, 2008 U.S. Dist. LEXIS 39418, at 1 (N.D. Ind. May 14, 2008) (alleging that Goldberg sold accounts to which it did not have title).

[166] *FTC Alleges Debt Brokers Illegally Exposed Personal Information of Tens of Thousands of Consumers on the Internet*, FED. TRADE COMM'N (Nov. 12, 2014), *available at* http://www.ftc.gov/news-events/press-releases/2014/11/ftc-alleges-debt-brokers-illegally-exposed-personal-information, *archived at* http://perma.cc/7A3B-6D3H.

[167] *Id.*

[168] *Id.*

C. *Uncertainty, Legitimacy, and Trust*

This Part has so far described a litany of problems with the way consumer debts are sold in America. These issues are problematic for collectors and consumers alike, not just in and of themselves, but collectively. The lack of information collectors receive about alleged debtors, the lack of documents that can be used to find the consumer or prove in court how much she owes, the failure to share information with subsequent buyers or collectors, the difficulty proving to consumers and the courts who has title to an account; these are systemic problems. Together, they make collection more difficult for honest collectors and prevent consumers from being able to trust they are paying the right person the right amount. It is very likely that they also raise the cost of credit.

Consumers can find it difficult to identify the right person to pay, whether or not they have been sued. This article opened with a hypothetical setting: you receive a collection call. Many questions arise. How can you know whether XYZ Debt Buyer is really the owner of your debt, or that ABC Debt Collection, the company the collector tells you she is calling from, is an agent of XYZ? You remember having a GAP account, but how do you know this is *your* GAP account? How do you know $1,000 is the correct amount? Can you tell whether this debt is past the statute of limitations? Perhaps you have a common name and are being confused for someone else who also had a GAP card. Or maybe the woman calling you is a bogus collector, a scam-artist who has gotten a hold of you information through stolen data or other means.[169] The FTC has sued or shut down many debt collectors in the last few years; it may be difficult to know whether you can trust a disembodied voice on the phone.[170]

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[169] *See, e.g.*, Jake Halpern, *Paper Boys: Inside the Dark Labyrinthine, and Extremely Lucrative World of Consumer Debt Collection*, N.Y. Times (Aug. 15, 2014), http://www.nytimes.com/interactive/2014/08/15/magazine/bad-paper-debt-collector.html, *archived at* http://perma.cc/FW3G-TMD5.

[170] The FTC has produced so many press releases on this topic in the last couple of years that a number of them have the exact same headline. *See, e.g.*, *Debt Collectors in Memphis and New York State Settle with FTC Concerning Multiple Federal Law Violations*, Fed. Trade Comm'n (Aug. 7, 2014), http://www.ftc.gov/news-events/press-releases/2014/08/debt-collectors-memphis-new-york-state-settle-ftc-concerning, *archived at* http://perma.cc/CB79-VLNC; *At the FTC's Request, Court Halts Collection of Allegedly Fake Payday Debts*, Fed. Trade Comm'n (July 1, 2014), http://www.ftc.gov/news-events/press-releases/2014/07/ftcs-request-court-halts-collection-allegedly-fake-payday-debts, *archived at* http://perma.cc/39Y6-3HNR; *FTC Continues Crack Down on Deceptive Debt Collection; Houston-based Defendants Agree to Stop Deceptive Fees and Practices*, Fed. Trade Comm'n (June 25, 2014), http://www.ftc.gov/news-events/press-releases/2014/06/ftc-continues-crack-down-deceptive-debt-collection-houston-based, *archived at* http://perma.cc/SZL4-E2AC; *FTC Puts Texas-based Operation Permanently Out of the Debt Collection Business After It Allegedly Used Deception, Insults, and False Threats against Consumers*, Fed. Trade Comm'n (May 19, 2014), http://www.ftc.gov/news-events/press-releases/2014/05/ftc-puts-texas-based-operation-permanently-out-debt-collection, *archived at* http://perma.cc/95CX-CU7R; *At FTC's Request, Court Halts Debt Collector's Allegedly Deceptive and Abusive Practices, Freezes Assets*, Fed. Trade Comm'n (Mar. 13, 2014), http://www.ftc.gov/news-events/press-releases/2014/03/ftcs-request-court-

In addition, the combination of the "no warranties about accuracy" and unavailability of documentation in some of these transactions poses an almost existential crisis: how is it possible to know that the amount quoted as owed is the correct amount? If the buyer never obtains documentation—worse yet, if the documentation does not exist—there is nothing with which to verify the spreadsheet information.[171] Spreadsheets are problematic for other reasons. They are easy to alter, even accidentally, as economists Carmen Reinhart and Kenneth Rogoff[172] and JP Morgan Chase found last year.[173] In James Kwak's words: "While all software breaks occasionally, Excel spreadsheets break all the time. But they don't tell you when they break: they just give you the wrong number."[174]

Without documentary evidence, all a debt buyer can do is create an affidavit that quotes the amount on the spreadsheet. If the account was sold with disclaimers of accuracy, however, the consumer (and regulators) may reasonably want verification that the amount is correct. But the debt buyer,

halts-debt-collectors-allegedly-deceptive, *archived at* http://perma.cc/Z6PP-CY82; *At the FTC's Request, Court Halts Collection of Allegedly Fake Payday Debts*, Fed. Trade Comm'n (Oct. 24, 2013), http://www.ftc.gov/news-events/press-releases/2013/10/ftcs-request-court-halts-collection-allegedly-fake-payday-debts, *archived at* http://perma.cc/N5DN-JXZQ; *FTC Settlement Bans Defendants from Engaging in Debt Collection and Interest Rate Reduction Schemes*, Fed. Trade Comm'n (Sept. 10, 2013), http://www.ftc.gov/news-events/press-releases/2013/09/ftc-settlement-bans-defendants-engaging-debt-collection-and, *archived at* http://perma.cc/6YBY-GRGZ; *U.S. Defendants Who Allegedly Abetted Fake Debt Collector Calls from India Agree to Settle FTC Charges*, Fed. Trade Comm'n (Oct. 23, 2012), http://www.ftc.gov/news-events/press-releases/2012/10/us-defendants-who-allegedly-abetted-fake-debt-collector-calls, *archived at* http://perma.cc/5KMQ-X2Q5; *Court Halts Alleged Fake Debt Collector Calls from India, Grants FTC Request to Stop Defendants Who Posed as Law Enforcers*, Fed. Trade Comm'n (Apr. 11, 2012), http://www.ftc.gov/news-events/press-releases/2012/04/court-halts-alleged-fake-debt-collector-calls-india-grants-ftc, *archived at* http://perma.cc/FYD3-LK4V.

[171] At most there may be some data in the creditor's records (perhaps a copy of the spreadsheet they sent the buyer), but this is the same data that the creditor disclaimed would be correct.

[172] Reinhart and Rogoff's paper had been used by politicians and policy makers to support the austerity measures that were implemented world-wide in the wake of the Great Recession. John Cassidy, *The Reinhart and Rogoff Controversy: A Summing Up*, The New Yorker (Apr. 26, 2013), *available at* http://www.newyorker.com/news/john-cassidy/the-reinhart-and-rogoff-controversy-a-summing-up, *archived at* http://perma.cc/M464-RZ24. Attempting to replicate their work, other researchers found that the spreadsheet contained an error which led Reinhart and Rogoff to conclude that the average real GDP growth rate for certain countries was -0.1% instead of the 2.2% one finds when the error is corrected. This difference calls into question the conclusions of the earlier paper. Mike Konczal, *Researchers Finally Replicated Reinhart-Rogoff, and There Are Serious Problems*, The New Deal: The Blog of the Roosevelt Institute (Apr. 16, 2013), *available at* http://www.nextnewdeal.net/rortybomb/researchers-finally-replicated-reinhart-rogoff-and-there-are-serious-problems, *archived at* http://perma.cc/S3RN-9FBK. *See also* James Kwak, *More Bad Excel*, The Baseline Scenario (Apr. 18, 2013), *available at* http://baselinescenario.com/2013/04/18/more-bad-excel/, *archived at* http://perma.cc/9ANY-5MS6.

[173] JP Morgan Chase's investigation revealed that part of the issue with the so-called "London Whale" trades was as a result of mistakes with Excel spreadsheets. *See* James Kwak, *The Importance of Excel*, The Baseline Scenario (Feb. 9, 2013), *available at* http://baselinescenario.com/2013/02/09/the-importance-of-excel/, *archived at* http://perma.cc/K5HW-SRXW.

[174] *Id.*

without documents for the account, only has the spreadsheet she obtained at the sale to go by. This presents a problem because it is not clear how one could ever know whether the spreadsheet was changed between the time it was created and when a debt buyer wants to use it in court.[175] The consumer may have the last statement mailed to her by the creditor (the charge-off statement in the case of a credit card), which would yield an ideal comparison.[176] However, the debt buyer (and not the consumer) carries the burden of proof in these cases, and consumers in financial distress are arguably not well positioned to keep records of a debt that may be many years old. Further, as banks continue to promote paperless billing, it will become more difficult for consumers who have been charged-off to obtain their statements.[177] This all means that the correct amount owed may be unknowable. Without documentary evidence, there is uncertainty as to the amount owed—uncertainty which may not be possible to resolve if account documents no longer exist. How big of a problem is this lack of documentation? The calculations from Part II.C.2 yield a rough estimate: debt buyers never obtained documentation on 65% to 71% of the accounts examined by the FTC, whether at the time of sale or subsequently. There is reason to think that this estimate may be low. The FTC Sample only included accounts for a specific time period from the nine largest debt buyers. Further, the buyers in the study "purchased many of their debts from original creditors," so that they were closest in the chain of title to the source of documents—the original.[178] As mentioned earlier, subsequent debt buyers face additional challenges in obtaining account documentation, making it likely that the percentage of accounts for which subsequent debt buyers lack account documentation is even greater. All of this leads to the hypothesis that the 65% to 71% estimate is a lower bound for the percentage of accounts that lack documentation industry-wide, especially in the case of resales.

Because of the contractual agreements between creditors and debt buyers, the more times a debt is sold, the greater the difficulties obtaining documentation (even if it exists). Multiple sales of the same debt (purchased

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[175] For an argument that evidentiary standards should require that "[w]here computer information is offered for its truth, some showing of testable reliability should be required in order to minimize the likelihood of easy admissibility of potentially undetectable, manipulated, or fabricated digital evidence," see Stephen W. Teppler, *Testable Reliability: A Modernized Approach to ESI Admissibility*, 12 Ave Maria L. Rev. 213, 256 (2014).

[176] Note that while this would help verify the correct charge-off amount, this would not resolve the issue of proving standing in court.

[177] *See, e.g.*, LaToya Irby, *Pros and Cons of Paperless Billing Statements*, AboutMoney.com, *available at* http://credit.about.com/od/creditcardbasics/qt/Pros-And-Cons-Of-Paperless-Billing-Statements.htm (last visited Nov. 15, 2014), *archived at* http://perma.cc/C2H3-D5U7 (listing as a "con" of paperless statements and noting that "you may have to go through a few extra steps (and could even have to pay a fee) to access older statements"); Hank Coleman, *Why I Hate Paperless Credit Card Statements*, AllBusiness.com, *available at* http://www.allbusiness.com/print/15445167-1-9a0bs.html (last visited Nov. 15, 2014), *archived at* http://perma.cc/VGM2-SBB9 (noting that it is easy to forget about paperless statements).

[178] FTC Debt Buyer Report, *supra* note 4, at 38.

without documentation) also increase the length of time it will take for a debt buyer to obtain that documentation, as detailed in Part II.C.2. Multiple sales also mean multiple transfers of the same account information—perhaps updated to include contact information and partial payments. These transfers introduce further complexity and increased possibility of errors.[179]

The FDCPA was enacted because Congress recognized that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."[180] One of the stated purposes of the statute was "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."[181] These disclaimers (and the lack of documentation) may drive down the cost of credit in the form of increased liquidity (and cheaper costs), but they do so at a cost. Consumer confusion and mistrust in the system may ultimately reduce collections and thereby increase the cost of credit.

IV. Explaining Irrational Contracting Behavior

A. *Prudent Drafting or Back-Office Failures*

Before proposing solutions, it is helpful to try to think through the reasons why transactions for the sale of consumer debts might have evolved to contain the contractual features described in Part III. This subpart posits a few interconnected potential explanations.

The FTC and Litigation Samples both suggest that creditors set the majority of contract terms. To a large extent, creditors control the transaction because they create and possess the information and documentation regarding the underlying debts.[182] One potential explanation for the contract language in particular—the reliance waivers, specific disclaimers of representations, and "big boy" clauses—is that this is perhaps a few zealous attorneys wanting to minimize their client's exposure to litigation from debt buyers.

This is likely true to some extent; as others have noted, there are multiple reasons why a seller may want to include these clauses.[183] The seller may want to minimize the chance that "innocent representations made ex ante could be turned against her ex post."[184] Another possibility is that the seller

[179] In the context of financial innovation and system risk, others have noted the increased potential for costs and errors to be introduced as the ownership chain increases. Kathryn Judge, *Fragmentation Nodes*, Stanford L. Rev. 685 (quoting Henry T.C. Hu & Bernard Black, *Debt, Equity and Hybrid Decoupling: Governance and Systemic Risk Implications*, 14 Eur. Fin. Mgmt. 663, 691 (2008)).

[180] 15 U.S.C. § 1692 (2012).

[181] *Id.*

[182] *See generally supra* note 62 and accompanying text.

[183] *See* Masson, *supra* note 14, at 513.

[184] *Id.*

is concerned about a potential agency problem—being "held accountable for a misrepresentation or misinterpretation by one of her agents during the course of the negotiation."[185]

But these explanations are not satisfying in this context. The contracts in the Litigation Sample are roughly uniform; very little changes from deal to deal. They do not only include reliance waivers but also specifically include positive disclaimers—going into specifics about the things that the seller is not representing to the buyer and on which the buyer is not relying. This specificity would not seem necessary if the worry were merely about "innocent representations." The agency problem would also not seem as pronounced where the contract language remains almost the same from deal to deal. As described below, where the Litigation Sample includes multiple contracts from the same seller, oftentimes the language and formatting is exactly the same. The primary way in which the language changes is in minor individual clauses that disclaim representations as to a material aspect of the debt. For example, as between two almost identical Citibank contracts signed in 2005 with two different buyers, only one of the contracts contains additional language regarding the fact that Citibank did not provide the date of first delinquency to the buyer in that contract.[186] The contract with this additional language was signed three months before the contract that did not include it.[187]

Another hypothesis is that sellers use "waiver of warranties" clauses when they are not confident in the "paper" (accounts) they are selling. As described above in Part I, each individual bank may have one or more systems where information regarding delinquent consumers is stored—i.e., the original SOR used before delinquencies and the internal collection or recovery system used later.[188] The rapid expansion of credit combined with the equally speedy consolidation of card originators (banks and nonbanks) could have led to poor handling of data and information on accounts, especially as that data might have been stored in different custom-made systems by different banks.[189] Depending on the sophistication of the bank (and perhaps the sophistication of the bank that originated the account if that bank was pur-

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[185] *Id.* at 514.

[186] *Compare* Purchase and Sale Agreement between Citibank, N.A. and Unifund CCR Partners (Feb. 28, 2005), at § 2.1, *available at* http://dalie.org/wp-content/uploads/2014/10/2005.02.28-Citibank-to-Unifund-CCR-some-affirmative-reps-but-FCRA-issue-without-recourse-no-warranty.pdf, *archived at* http://perma.cc/PA67-6GPJ *with* Flow Purchase and Sale Agreement between Citibank USA, Nat'l Ass'n and Sherman Originator, L.L.C. (May 24, 2005), at § 2.1, *available at* http://dalie.org/wp-content/uploads/2014/10/2005.05.24-Citibank-USA-NA-to-Sherman-Originator-L.L.C.-.pdf, *archived at* http://perma.cc/S2L5-FAD6.

[187] *Id.*

[188] *See generally supra* note 24 and accompanying text (discussing systems of record (SOR)).

[189] For an account of how custom-made systems can limit a bank's ability to grow, see MICHAEL LEWIS, FLASH BOYS 135–37 (W.W. Norton & Company 2014) (describing the little documentation that developers had left for Goldman Sachs' trading systems, which were acquired from a previous firm).

chased), the different systems may or may not be able to communicate with each other. Merging these SORs successfully likely posed some challenges.[190]

There is at least one concrete example of these accuracy issues at the bank-level. Multiple federal and state regulators have looked or are looking at JP Morgan Chase's internal collections as well as its practices selling delinquent accounts. Lawsuits and investigations are pending from the CFPB and the Attorneys General of California, Mississippi, and Massachusetts.[191] The allegations include robo-signing, bad record-keeping, and fraudulent court filings. As of 2013, some believed that Chase had stopped selling consumer debts[192] and, at around the same time, the company closed an internal unit tasked with suing consumers over credit card debts.[193] In its own internal investigation, Chase determined that nearly one in ten of its collection accounts had errors.[194] "The errors ranged from inaccurate interest and fees applied by outside law firms to a 'small number of instances' in which lawsuits listed higher balances than the amounts owed by borrowers."[195] At least a few dozen cases allege that debt buyers sought to collect on debts that the

[190] Many travelers are all-too-familiar with these problems, most recently if they traveled during the months in which United Airlines was merging with Continental, or American Airlines with US Airways.

[191] *See* Jesse Hamilton, *JPMorgan Agrees to Repay Customers in Credit-Card Settlement*, BLOOMBERG (Sept. 19, 2013), http://www.bloomberg.com/news/2013-09-19/jpmorgan-agrees-to-repay-customers-in-occ-credit-card-settlement.html, *archived at* http://perma.cc/8EJ4-7DT2; Jessica Silver-Greenberg & Edward Wyatt, *U.S. Vows to Battle Abusive Debt Collectors*, N. Y. TIMES, July 10, 2013, at B1, *available at* http://dealbook.nytimes.com/2013/07/10/u-s-vows-to-battle-abusive-debt-collectors/, *archived at* http://perma.cc/6Z2X-GUCU; Stephanie Levy, *California Lawsuit over Chase's Debt Collection Practices is Still On*, INSIDEARM (Jan. 8, 2014), http://www.insidearm.com/daily/debt-collection-news/accounts-receivables-management/california-lawsuit-over-chases-debt-collection-practices-is-still-on/, *archived at* http://perma.cc/NW4F-QCH5 ; Jonathan Stempel, *JPMorgan sued by Mississippi AG over credit card misconduct*, REUTERS (Dec. 17, 2013), http://www.reuters.com/article/2013/12/17/us-jpmorgan-lawsuit-creditcards-mississi-idUSBRE9BG1EO20131217, *archived at* http://perma.cc/TA8T-9H4J; Andrew R. Johnson, *Massachusetts Probes J.P. Morgan's Debt-Collection Practices*, WALL ST. J. (Sept. 20, 2013), http://online.wsj.com/news/articles/SB10001424127887323808204579087643404839638, *archived at* http://perma.cc/QK7S-85NU.

[192] *See* Maria Aspan & Jeff Horwitz, *Chase Halts Card Debt Sales Ahead of Crackdown*, AM. BANKER (July 1, 2013), http://www.americanbanker.com/issues/178_126/chase-halts-card-debt-sales-ahead-of-crackdown-1060326-1.html, *archived at* http://perma.cc/B75C-KW38.

[193] *See* Chris Cumming, *JPM to Shutter Litigation Group for Consumer Debt Collection*, AM. BANKER (Oct. 17, 2013), http://www.americanbanker.com/issues/178_201/jpm-to-shutter-litigation-group-for-consumer-debt-collection-1062882-1.html, *archived at* http://perma.cc/7AXW-RMHW.

[194] *See Nearly 1 in 10 JPMorgan debt collection lawsuits had errors*, REUTERS (July 10, 2013), http://articles.chicagotribune.com/2013-07-10/business/chi-nearly-1-in-10-jpmorgan-debt-collection-lawsuits-had-errors-20130710_1_credit-card-debt-collection-jpmorgan-chase-co, *archived at* http://perma.cc/AW7L-U8X4.

[195] Dan Fitzpatrick, *J.P. Morgan Review Finds Errors in Debt-Collection Lawsuits: Errors Occurred as the Bank Sued Its Credit-Card Users*, WALL ST. J. (July 9, 2013), http://online.wsj.com/articles/SB10001424127887324867904578595963522586162, *archived at* http://perma.cc/DP76-UGAY.

consumer had already paid; in some instances, the court found as much.[196] A few months later, the bank entered into a consent order with the OCC in which it "neither admit[ed] nor denie[d]" that "it filed false affidavits, filed false documents that resulted in financial errors in favor of the bank, and failed to have in place processes and systems to ensure the accuracy and integrity of accounts sold to debt buyers."[197]

Against this background, it is useful to examine the seven Chase contracts in the Litigation Sample and note the wide variety of representations. The seven contracts include one contract with an unknown (redacted) date; the rest are from 2008, 2009, and 2010. The overall language and formatting of the agreements is strikingly similar. Looking at them together, they all seem to originate from the same template. All seven use the same exact ALL-CAPS language to disclaim warranties and representations and also explicitly represent that Chase has unencumbered title to the accounts. All seven were signed by the same Chase executive.[198] But that is where the similarities end.

Five of the seven contracts (including contracts signed in 2008, 2009, and 2010) affirmatively represent that Chase complied with all applicable laws when originating or servicing the accounts. A sixth, signed in 2009, represents compliance with laws but adds a caveat that the representation is made "to the best of seller's knowledge."[199] The seventh contract, a 2009 sale of judgments Chase had obtained against delinquent customers, does not make any representations about whether Chase complied with the law.[200] The only contract from 2008 specifically warrants the accuracy of the information; one contract from 2010 warrants the accuracy "to the best of seller's books and records."[201] The remaining five contracts (from 2009, 2010, and an unknown date) do not discuss accuracy at all.

[196] *See The One Hundred Billion Dollar Problem*, *supra* note 10, at 270 nn. 75–76, 78–79 (collecting eleven cases); Cooper Fin., L.L.C. v. Frost Nat'l Bank, No. 1:12-cv-00295-HJW, 2012 WL 5902909, at *1 (S.D. Ohio Nov. 26, 2012) (alleging that debt buyer sold accounts to another debt buyer without disclosing it did not have title to accounts, which have since been collected upon by the debt buyer without title and resold multiple times); MBNA Am. Bank, N.A. v. Nelson, No. 13777/06, 2007 WL 1704618, at *5 (N.Y. City Civ. Ct. May 24, 2007); Overcash v. United Abstract Group., Inc., 549 F. Supp. 2d 193, 196 (N.D.N.Y. 2008) (attempting to collect in excess of the balance of a previously settled debt); Miller v. Wolpoff & Abramson, L.L.P., No. 1:06-CV-207, 2008 U.S. Dist. LEXIS 12283, at *5 (N.D. Ind. Feb. 19, 2008) (recounting consumer's allegations that two debt buyers sued him on same debt); Wood v. M & J Recovery L.L.C., No. CV 05-5564, at 4 (E.D.N.Y. Apr. 2, 2007).

[197] *Junk Science*, *supra* note 10, at 185.

[198] All seven contracts were signed by Chris Schuck as President of Chase Bank.

[199] *E.g.*, Credit Card Account Purchase Agreement between Chase Bank, N.A. and Turtle Creek Assets (May 7, 2009), at 25, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.05.07-Chase-Bank-USA-NA-to-Turtle-Creek-Assets-Ltd-limited-as-is.pdf, *archived at* http://perma.cc/V4MH-LCZ6.

[200] *See* Judgments Purchase Agreement between Chase Bank, N.A. and Debt One L.L.C (Dec. 10, 2009), *available at* http://dalie.org/wp-content/uploads/2014/10/2009.12.10-Chase-Bank-USA-NA-to-DebtOne-LLC-.pdf, *archived at* http://perma.cc/66Z8-H4JZ.

[201] Credit Card Account Purchase Agreement between Chase Bank, N.A. and Palisades Collection, L.L.C. (Feb. 15, 2008), at 8, *available at* http://dalie.org/wp-content/uploads/2014/

The similarity in the overall terms, structure, and "look" of the contracts all suggest that these differences in material terms (accuracy and compliance) may have had something to do with the specific portfolios being sold. The variability in contract terms used within a year also supports the theory that the contract language varied with the portfolio. In 2009, for example, Chase signed contracts that (1) affirmatively represented that the bank complied with applicable laws, (2) represented the same "to the best of seller's knowledge," and (3) did not make any affirmative representations about compliance with laws (thereby implicitly disclaiming compliance). This argument, that contract terms took into account the underlying accounts sold, is in line with the FTC's statement that in their sample "both sellers and buyers knew that some accounts included within a portfolio might have incomplete or inaccurate data, including data on important information such as the then-current balances on accounts."[202]

Why might banks not be confident about the accuracy of specific portfolios? Waivers of warranties and disclaimers about material aspects of the sale may have gained popularity for two reasons: the great number of bank mergers leading to the crisis which accelerated during the Great Recession, and the large wave of charge-offs and subsequent debt sales during the recession.

Integrating information systems can be a herculean task taking many months (think of airline mergers). It is similar when large banks acquire others, except that rapid acquisitions is much more common in the banking sector. For example, between 1997 and 2007, Bank of America and its predecessor (Nations Bank) acquired or merged with seven large banks.[203] The financial crisis accelerated the already ongoing, rapid consolidation in the financial services industry. Large banks like Washington Mutual and Wachovia were bought on the cheap by even larger banks (JP Morgan Chase and Wells Fargo, respectively).[204] As these banks were acquired, all of their SORs had to be brought in alignment. Data is not available to truly discern

10/2008.02.15-Chase-to-Palisades.pdf, *archived at* http://perma.cc/8ZR3-ACH4; Chase, N.A. to Midland Funding, L.L.C. (Nov. 30, 2010), at 7, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.11.30-Chase-Bank-USA-NA-to-Midland-Funding-LLC-.pdf, *archived at* http://perma.cc/UNV6-MZTR.

[202] FTC Debt Buyer Report, *supra* note 4, at C-7-8.

[203] *See Merger History*, Bank of America, http://message.bankofamerica.com/heritage/#/merger-history/ (last visited Nov. 3, 2014), *archived at* http://perma.cc/4WSM-6SVY (noting that: in 1997 Nations Bank merged with Barnett Bank and Boatmen's Bank; in 1998 it acquired Bank of America ("BoA") and took its name; in 2004 BoA purchased Fleet Boston; in 2006 BoA purchased MBNA, making BoA the largest credit card issuer in the country; and in 2007 BoA acquired U.S. Trust and La Salle Bank Corp). BoA is represented in the litigation sample as FIA Card Servs., its credit card subsidiary.

[204] Eric Dash & Andrew Ross Sorkin, *Government Seizes WaMu and Sells Some Assets*, N.Y. Times, Sept. 26, 2008, at A1, *available at* http://www.nytimes.com/2008/09/26/business/26wamu.html?_r=0, *archived at* http://perma.cc/84G9-B4N6; *Wells Fargo Completes Wachovia Purchase*, Thomson Reuters (Jan. 1, 2009, 1:13 PM), http://uk.reuters.com/article/2009/01/01/wellsfargo-wachovia-idUKN0133136720090101, *archived at* http://perma.cc/992E-JPHV.

what happened as smaller banks with legacy systems were swallowed up by larger ones, but conversations with industry insiders suggest that getting the systems to talk to each other was not an easy task.

To add to this story, the liquidity crisis at the end of 2008 caused banks to severely curtail credit lines for their customers to limit their risk as the crisis wore on.[205] A year later, charge-offs began to skyrocket.[206] In 2007, $40 billion in credit card debt was charged-off by banks; that number had risen to $75 billion by 2009.[207] These massive charge-offs in the midst of a liquidity crisis meant that banks sought to convert their portfolio of delinquent or charged-off cards into ready cash that could be put to work quickly. Sales of consumer debt portfolios skyrocketed and prices dropped as delinquent debts flooded the market.[208]

This story is reminiscent of the back-office failures that brought down a number of broker-dealers in the 1960s.[209] The rapid growth of credit before the crisis, the large mergers before and during, and the subsequent meltdown and fast pace of new delinquencies may have overwhelmed some banks.[210] One aspect of the Litigation Sample lends some credence to this story: the "worst" agreements (those disclaiming accuracy and compliance with the FDCPA) were signed in 2009 and 2010, during the financial crisis.[211] But

[205] "The majority of credit card pricing is determined by factors unrelated to an individual borrower's risk profile and is instead based on factors such as cost of funds, cost of operations, and the aggregated risk profile of the card issuer's borrower pool." Adam J. Levitin, *Rate-Jacking: Risk-Based & Opportunistic Pricing in Credit Cards*, 2011 UTAH L. REV. 339, 343 (2011).

[206] For credit cards, charge-offs must occur within 180 days of the date of the last major delinquency. *See supra* note 35 and accompanying text.

[207] FICO, BOOST COLLECTIONS AND RECOVERY RESULTS WITH ANALYTICS 1 (Feb. 2010), http://brblog.typepad.com/files/31_boost_collections_recovery_analytics_2644wp.pdf, *archived at* http://perma.cc/LC3Z-DH64.

[208] In 2008, "fresh debt" costs for some accounts dropped from "approximately 9 to 16 cents on the dollar to below 4 cents." *See Our Industry*, SUNLAN CORP., http://www.sunlancorporation.com/industry-facts.php (last visited Nov. 4, 2014), *archived at* http://perma.cc/4BY3-PXXE.

[209] *See generally* U.S. SEC. & EXCH. COMM'N, STUDY OF UNSAFE AND UNSOUND PRACTICES OF BROKERS AND DEALERS: REPORT AND RECOMMENDATIONS OF THE SECURITIES AND EXCHANGE COMMISSION (1971). The 1960s was "a period of tremendous growth in the securities industry." Barry P. Barbash, Dir., Div. of Inv. Mgmt., U.S. Sec. and Exch. Comm'n, Remembering the Past: Mutual Funds and the Lessons of the Wonder Years at the ICI Securities Law Procedures Conference (Dec. 4, 1997), *available at* www.sec.gov/news/speech/speecharchive/1997/spch199.txt, *archived at* http://perma.cc/P2N3-9JM5.

[210] As analysts at the Bank for International Settlements have written, "the paper crunch of the 1960s serves as a reminder that weak back office procedures could have serious implications not only for market efficiency but also for the financial health of firms active in the market." Elisabeth Ledrut & Christian Upper, *The US Paper Crunch, 1967–1970*, BANK FOR INT'L SETTLEMENTS (Sept. 1, 2008), *available at* http://www.bis.org/publ/qtrpdf/r_qt0712z.htm, *archived at* http://perma.cc/T84C-BSP3.

[211] *See, e.g.*, Purchase and Sale Agreement between Credigy Receivables, Inc. and Newport Capital Recovery Group II, L.L.C. (May 29, 2009), at § 2.1(c)–(d), *available at* http://dalie.org/wp-content/uploads/2014/10/2009.05.29-Credigy-Receivables-Inc-to-Newport-Capital-Recovery-Group-II-LLC-.pdf, *archived at* http://perma.cc/5ZDF-DL9F. One of the sales was made by a receiver in a bankruptcy proceeding. Purchase Agreement between Nat'l Credit Acceptance, Inc. and Sacor Financial, Inc. (Oct. 14, 2010), at § 3(b), *available at* http://dalie

while the glut of charge-offs that entered the market after the crisis may have led to more errors, it doesn't explain why many pre-crisis contracts also include the "waiver of all warranties" language. Take, for example, a 2004 contract between MBNA and a debt buyer which disclaims everything not specifically represented, says nothing about title, and disclaims both "the accuracy of any sums shown as current balance or accrued interest amounts due under the loans" as well as the compliance of the loans with state or federal usury laws.[212] In 2004, MBNA was a large bank, second only to Citibank in issuances of credit cards, but it had not merged with any entities of significant size.[213]

Rapid consolidation and the search to liquidate charge-offs may have been a contributing factor, but they do not satisfactorily explain the 2002-2007 agreements in the Litigation Sample that include disclaimers of accuracy of information and title.[214] A separate explanation, perhaps complementary to the merger and charge-offs stories, is that regulatory failure allowed creditors and debt buyers to externalize the costs of illegal collection.

B. *Laissez-Faire Failure*

The problems with lack of documentation and warrantless contracts begin with the banks who originate the debts. Until recently, bank regulators paid little attention to the manner in which banks were selling debts.[215] This laissez-faire attitude has left the market to decide how much effort banks should take in conducting debt sales. For a variety of reasons, the way in which a bank handles collections is neither very visible to consumers nor very salient for choosing a product. Debt buyers or collectors may be able to exert pressure on banks to improve their practices (since this should increase returns), but they would have had little incentive to do so if they were still profitable without changes. The fragmentation in the collections industry makes it even less likely. Without regulatory or other external pressure, individual banks lack the incentives to "throw good money after bad" and invest in systems required to make sure that they can comfortably warrant title, legal compliance, and accuracy. In a nutshell, bank regulators' permissive attitude toward how the banks conducted these sales coupled with a lack of

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.org/wp-content/uploads/2014/10/2010.10.14-National-Credit-Acceptance-Inc-to-Sacor-Financial-Inc-.pdf, *archived at* http://perma.cc/DAV7-8PRJ.

[212] Loan Sale Agreement (Sept. 30, 2004), *supra* note 61.

[213] CHARLES AUSTIN STONE & ANNE ZISSU, THE SECURITIZATION MARKETS HANDBOOK: STRUCTURES AND DYNAMICS OF MORTGAGE- AND ASSET-BACKED SECURITIES 2165 (2d ed. 2012).

[214] *See, e.g.,* Loan Sale Agreement (Sept. 30, 2004), *supra* note 61.

[215] This started to change in 2010 with the OCC's investigation into Chase. *See generally* Jeff Horwitz, *OCC Probing JPMorgan Chase Credit Card Collections*, AM. BANKER (Mar. 12, 2012, 9:24 PM), http://www.americanbanker.com/issues/177_49/chase-credit-cards-collections-occ-probe-linda-almonte-1047437-1.html?zkPrintable=1&nopagination=1, *archived at* http://perma.cc/W46Y-TKQC.

market incentives for credit issuers to change exacerbated any issues that consolidations and charge-offs may have created.

When shopping for credit products, consumers have no incentive to care about a bank's collection practices.[216] Optimism bias leads individual consumers to believe that they will not have to deal with a collector; default only happens to other people.[217] Stated differently, "[p]eople prefer to believe that their risk is below average and are reluctant to believe anything else."[218] A bank will not gain customers by touting its punctilious collection practices because consumers are not selecting their bank based on these practices. Once they are delinquent, consumers do not have a choice in who their collector is or who their debt is sold to. It is the bank that chooses what collection agencies to use and who to sell their debt to. As a result, consumers do not exert pressure to clean up questionable practices.[219] In fact, the pressure may actually go in the opposite direction: in favor of cutting costs, to the extent that the bank is competing for customers. Once the customer is delinquent, the incentives are even more perverse. The bank has little reason to throw out "good money after bad" in keeping up their collections or recovery systems; after all, the accounts in these systems belong to non-paying customers.[220]

When a bank decides to sell their debt, they enter a different market. The bank has to find willing buyers for their defaulted debts. When billions of dollars in face-value of defaulted accounts are available on the market, they have to compete with other banks for the sale of those debts. Correcting the problematic practices described previously is costly, and the market pressure in this case is relentlessly to drive costs down. Nonetheless, one might expect that debt buyers, as the bank's customers, have an incentive to de-

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[216] Bill Whitford made a similar argument in the context of first party collections in 1979. He framed it as an "imbalance of knowledge" between creditors and collectors. William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 WIS. L. REV. 1047, 1074 (1979) ("Because consumers only occasionally enter into credit contracts, and only a very few of those result in a delinquency, debtors are typically uninformed about the risks and harms associated with various types of coercive execution. Consequently, they cannot bargain knowledgeably about these matters, particularly at the time of contract formation."). *See also* CFPB ANPR, *supra* note 7, at 67849 (positing that competitive forces will not necessarily correct the collections market because consumers do not choose creditors based on collection activities).

[217] Whitford, *supra* note 216, at 1074 (noting that "consumers have a propensity to underweigh long term risks, such as the risk of delinquency, when making credit or other decisions").

[218] Neil D. Weinstein & William M. Klein, *Resistance of Personal Risk Perceptions to Debiasing Interventions*, 14 HEALTH PSYCHOL. 132, 139 (1995).

[219] Consumer insurance markets have similar features in that they are "ultra-competitive with respect to price" but "remarkably noncompetitive with respect to claims handling quality." Daniel Schwarcz, *Differential Compensation and the "Race to the Bottom" in Consumer Insurance Markets*, 15 CONN. INS. L.J. 723, 726 (2008). Both claims handling and debt sales are low incidence events that typically occur much later than the moment at which the consumer purchases insurance or obtains a credit card.

[220] As Stephen Davidoff has noted, "reputation is a 'less active influence' constraining behavior when a nefarious deed is done by many." Davidoff, *supra* note 76 (quoting THE FEDERALIST NO. 15, at 72 (Alexander Hamilton)).

mand more documentation, evidence, and positive warranties from banks. This would enhance recoveries because consumers are more likely to pay if they can trust that the person calling or writing about the debt—someone they did not initiate a relationship with—is the correct party. Enhanced evidence of the underlying debt would also enhance the debt buyer's ability to collect via the court system.

But in order for debt buyers to have the incentive to push for more documentation and warrants from sellers, these items must be needed to make debt buying profitable.[221] Instead, the public filings of debt buyers demonstrate that no matter how broken the current system may be, it still allows them to obtain a very healthy profit.[222] Despite all the bad press, debt buyers have been able to collect enough to accrue substantial profits from consumers directly as well as through the courts. In 2008, debts were quite cheap: four cents on the dollar on average according to the FTC, and in some cases "virtually zero."[223] If buyers can collect with the current level of information and documentation and without requiring that the creditor stand by the material aspects of the debts they are selling, they have no incentive to ask for anything more. Indeed, they have a disincentive to ask for more since this would increase the purchase price immediately with only a theoretical possibility that it would also mean increased recoveries in the future. Receiving more documentation would also mean needing to put a system in place to deal with the documents. This is costly and—so far—unnecessary.

Thus, any improvement in procedures a bank undertakes will result in added costs to the bank, with little upside. This presents a collective action problem: if a bank increases prices to cover the increase in costs, it risks losing customers. Since consumers do not choose their bank based on their collection or debt sale practices, the bank that does not implement these costly upgrades is better positioned to offer lower-priced products to consumers and poised to increase its customer base.

But consumers are not the banks' only customers. Debt buyers are also customers, and they may also be able to absorb the increased costs. However, as discussed earlier, debt buyers and collectors who are making good returns under the current system would naturally be reluctant to accept the additional costs. In a fragmented market like this one—an estimated 4,500 firms buy and collect debts in the United States—and with insufficient regulatory oversight, there should always be debt buyers willing to buy bargain-

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[221] Or that, on the margin, the costs of documentation and warrants increase overall profits.

[222] *See, e.g.*, SQUARETWO FINANCIAL, FINANCIAL RESULTS: YEAR END 2011 12 (2012), *available at* http://www.squaretwofinancial.com/wp-content/uploads/2012/06/SquareTwo-Financial-Q4YE-2011-Financial-Results-Presentation.pdf, *archived at* http://perma.cc/4Y29-NWSK (reporting that "[r]eturns on 2009, 2010, and 2011 purchase years average 2.4x compared to 1.5x for purchase years 2007 and 2008, an increase of over 60%"). Public debt buyers generally are not very diversified; their entire business model usually consists of purchasing and collecting on different kinds of debts.

[223] FTC DEBT BUYER REPORT, *supra* note 4, at ii.

priced debts.[224] This is especially true if despite the issues identified in this article sufficient consumers pay so as to make the pennies or fractions of pennies paid for the debts worth the investment.

Another potential source of market pressure, outside of regulators, are consumer lawsuits. While a few class actions have attempted to address some of these issues, it is important to note that the FDCPA's remedies are very limited.[225] The Act provides attorney's fees for prevailing plaintiffs and recovery of actual damages, but the total statutory damages for a class action are capped at "the lesser of $500,000 or 1 per centum of the net worth of the debt collector [or debt buyer]."[226] Even if this small amount could serve as a deterrent, it can only be used against debt buyers or collectors. It cannot be used to deter banks since originating creditors are not subject to the FDCPA.[227] Consumer lawyers have increased the number of individual and class actions filed under the FDCPA,[228] much to the industry's chagrin, but they are necessarily knocking on the wrong door.

An equilibrium seems to have developed around the problematic practices described in Parts II and III. Without outside pressure, any given bank has a disincentive to spend money to improve its practices. An intervention is needed to spur change and solve this collective action problem. Both the bank and debt buyer industries recognize this. At a workshop held by the FTC and the CFPB, industry panelists repeatedly requested regulation and

[224] *See* Bureau of Consumer Financial Protection Rule, 12 C.F.R. § 1090.105 (2012), *infra* note 253; Joe Mont, *CFPB Considers Debt Collection Rules, Releases Complaint Data*, Compliance Week (Nov. 6, 2013), http://www.complianceweek.com/blogs/the-filing-cabinet/cfpb-considers-debt-collection-rules-releases-complaint-data#.VEDjUha9bCA, *archived at* http://perma.cc/PM3N-VGTM.

[225] *See, e.g.*, Class Action Complaint at 3-8, Vassalle v. Midland Funding L.L.C., No. 3:11-CV-00096, 2011 WL 231969 (N.D. Ohio Jan. 17, 2011) (challenging practice of "robo-signing" affidavits used in debt collection lawsuits); Midland Funding L.L.C. v. Brent, 644 F. Supp. 2d 961, 966–69 (N.D. Ohio 2009) (describing the challenged affidavit production practice). The FTC filed an amicus brief in the Midland lawsuit opposing a proposed settlement because it provided only a small payment to consumers (capped at $10), and consumers would surrender their rights under the FDCPA and state laws to challenge Midland's actions related to the company's use of affidavits in debt collection lawsuits. FTC's Brief as Amicus Curiae, Vassalle v. Midland Funding L.L.C., No: 3:11-CV-00096, at 1 (N.D. Ohio June 21, 2011), *available at* http://www.ftc.gov/os/2011/06/110621midlandfunding.pdf, *archived at* http://perma.cc/B8KF-NJRY . The court ultimately approved the settlement agreement in Midland without making changes to the agreement. Vassalle v. Midland Funding L.L.C., No: 3:11-CV-00096, 2011 WL 3557045, at *1 (N.D. Ohio Aug. 12, 2011).

[226] 15 U.S.C. § 1692k(a)(2)(B) (2012).

[227] 15 U.S.C. § 1692(a)(6)(F) (2012) ("The term 'debt collector' . . . does not include any person collecting or attempting to collect any debt . . . to the extent such activity concerns a debt which was originated by such person."). Note, however, that a handful of states have enacted state versions of the FDCPA, which include original creditors within their coverage. *See, e.g.*, Ca. Civ. Code § 1788.

[228] In 2012, consumers filed 10,320 lawsuits alleging violations of the FDCPA. This was slightly lower than the number in each of the previous three years. Jack Gordon, *Debt Collection Litigation & CFPB Complaint Statistics, December 2013 & Year in Review*, Interactive Credit: The Debt Collection Industry's Defense Blog (Jan. 22, 2014), http://interactivecredit.com/?p=2101, *archived at* http://perma.cc/Q22B-4U9M.

clarity in documentation requirements.[229] An attorney for the collections industry echoed this sentiment "[i]f there's a mandate, a national standard, you sell an account, these are the things you will transmit. I think it helps everybody. That's a quality improvement standard and it'd be a very good thing."[230] In recent comments to the CFPB, JP Morgan Chase stated that the bank "would be interested in guidance from the Bureau on what information and documentation should be required to transfer with a charged-off debt when it is assigned to a collection agency or sold to a debt buyer."[231]

V. Cleaning the Dirt: Towards an Improved Collection Ecosystem

This Part considers possible solutions to the problems outlined in this article. It discusses potential industry-led solutions and potential market options, before ending with a regulatory solution which could help effectuate Ronald Mann's "distressed debt tax" to help lenders internalize the true cost of collecting (that which includes the cost of complying with the law).

A. *Industry Self-Regulation*

Lacking incentives from their consumer or debt buyer customers, banks might still respond to pressure from their regulators to increase the amount and quality of information they sell. That pressure began with the passage of the 2010 Dodd-Frank Wall Street Consumer Protection Act ("Dodd-Frank") and the inception of the CFPB.[232] While still in its infancy, the CFPB made it

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[229] For instance, Larry Tewell, Senior Vice President at Wells Fargo stated, "if we could have uniform national standards relative to data and media, that would go a long way toward fixing this." Tewell, *supra* note 60, at 119.

[230] *Life of a Debt: Data Integrity and Debt Collection – Part 3*, Fed. Trade Comm'n (June 6, 2013), http://www.ftc.gov/news-events/audio-video/video/life-debt-data-integrity-debt-collection-part-3, *archived at* http://perma.cc/8WKF-Z6M6. At this roundtable discussion regarding debt collection and data integrity, Manuel Newberger, Partner, Barron & Newberger, P.C., who represents creditors and debt buyers, said, "the more information that we can have relative to charge-off dates, balances, last payments . . . would be extremely relevant . . . . [T]he idea that information can be passed from agency to agency . . . that this account was disputed . . . that would be helpful." The TransUnion representative agreed: "[M]ore standardized data reporting on the front end will reduce the errors and reduce the questions consumers get. We won't be putting accounts on the wrong file or matching information correctly."

[231] J.P. Morgan Chase & Co., Response to Advance Notice of Proposed Rulemaking at 3, Debt Collection, Docket No. CFPB-2013-0033, RIN 3170-AA41 (Feb. 28, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=CFPB-2013-0033-0304, *archived at* http://perma.cc/3GAP-QHYZ.

[232] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Soon after Dodd-Frank was passed, the FTC sought public comments on a proposed policy statement for how debt collectors should handle consumer debts. *FTC Proposes Policy Statement Clarifying How to Collect Decedents' Debts*, Fed. Trade Comm'n (Oct. 4, 2010), http://www.ftc.gov/news-events/press-releases/2010/10/ftc-proposes-policy-statement-clarifying-how-collect-decedents, *archived at* http://perma.cc/EV68-CKUM; Statement of the Office of the Comptroller of the Currency, Provided to the Subcomm. on Fin. Inst. and Consumer Protection, Senate Comm. on Banking, Hous. and Ur-

publically known that debt collection issues were among its top priorities. Naturally, this spurred some action on the part of industry. As this article goes to print, the Bureau is expected to propose draft debt collection rules in early 2015.[233] This section proposes that banks begin sending "goodbye packets" to their customers when they sell their debts, a simple (partial) solution that banks could implement fairly quickly. It also discusses a longer-term potential solution in the form of a debt registry.

1. Moves in the Right Direction

Amidst mounting pressure from federal and state regulators, various players in the industry have realized they have an opportunity to design self-imposed obligations that might solve some of the problems described earlier and reduce liability as well as regulator intermeddling. For instance, there is anecdotal evidence that large banks have started to change their record-keeping and debt sales practices. At the joint FTC/CFPB "Life of a Debt" event, a regulator discussed reports that banks were exerting greater control over collection agencies, sometimes allowing them to interphase with the bank's SOR. There is also evidence that creditors are being more selective with to whom they sell accounts.[234] New contract language purportedly includes resale and potentially outsourcing restrictions. These are all steps in the right direction, but as of yet, the extent of these changes is not known.

Debt buyers have also begun to move toward reform. DBA International, the largest trade association for debt buyers, recently enacted a na-

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ban Affairs: "Shining a Light on the Consumer Debt Industry," at 13 (July 17, 2013), *available at* http://www.occ.gov/news-issuances/congressional-testimony/2013/pub-test-2013-116-oral.pdf, *archived at* http://perma.cc/U6BY-WLJ8; Jeff Horwitz & Maria Aspan, *OCC Pressures Banks to Clean Up Card Debt Sales*, AM. BANKER (July 2, 2013), *available at* http://www.americanbanker.com/issues/178_127/occ-pressures-banks-to-clean-up-card-debt-sales-1060353-1.html, *archived at* http://perma.cc/8CFD-NYCA; John L. Culhane, Jr., *No backseat for FTC in FDCPA enforcement*, CFPB MONITOR (Mar. 6, 2014), http://www.cfpbmonitor.com/2014/03/06/no-backseat-for-ftc-in-fdcpa-enforcement, *archived at* http://perma.cc/P6RY-7AG2; *Federal Trade Commission Increases Enforcement Of FDCPA*, AGRUSS LAW FIRM L.L.C. (Feb. 27, 2013), http://www.agrussconsumerlaw.com/federal-trade-commission-increases-enforcement-of-fdcpa/, *archived at* http://perma.cc/997E-AL8A.

[233] Jake Halpern, *The big, debt-collection shakedown: The need to reform an industry that recovered $55.2 billion from Americans last year*, BOSTON GLOBE (Oct. 12, 2014), http://www.bostonglobe.com/magazine/2014/10/11/the-big-debt-collection-shakedown/REmoHeNzXm2d2tK7m42dzI/story.html, *archived at* http://perma.cc/H6VQ-QV27 ("Starting in 2015, the Consumer Financial Protection Bureau is expected to unveil fairly comprehensive rules governing how debt can be collected."); Debt Collection Rule, RIN 3170-AA41 (proposed Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006), *available at* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201404&RIN=3170-AA41, *archived at* http://perma.cc/UE9M-Z466.

[234] Wolters Kluwer Fin. Services, Response to Advance Notice of Proposed Rulemaking, Debt Collection, Docket No. CFPB-2013-0033-0001, RIN 3170-AA41 (Feb. 27, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=CFPB-2013-0033-0239, *archived at* http://perma.cc/GA2Q-734J; *The New Norm in Debt Buying*, KAULKIN GINSBERG (Feb. 14, 2014), http://www.kaulkin.com/connect/2013/02/the-new-norm-in-debt-buying/, *archived at* http://perma.cc/98KK-34WX.

tional "Certification Program."[235] All DBA International members will have to become certified under the program by March 2016 or lose their membership. Part of the certification requires that "on all new debt portfolios purchased after becoming certified, the Certified Debt Buyer shall require in the purchase agreement (i.e. the contract) those data elements required to sufficiently identify the consumers on the associated accounts."[236]

According to the certification requirements, this means the debt buyer must "use commercially reasonable efforts to negotiate the inclusion" of things such as name, last known address, last payment date, charge-off balance, and the current balance.[237] The certification standards do not require anything else in the language of contracts. After becoming certified, debt buyers are also required to "maintain an accurate listing for chain of title on debts purchased after certification." The standards make clear that this is not a retroactive requirement and only applies to debts purchased after certification.[238]

This is a positive move, but the program will necessarily have a limited effect. First, it does not address many of the issues discussed in Parts II and III. For example, the program does not require certified debt buyers to purchase account documents when they purchase a portfolio; or even to make sure that the seller has the media available.[239] It would be implausible to think that such a program could fix all of these problems, however, because so many of them begin with the creditor. Second, debt buyers are certainly not required to become DBA members, so the program will not reach those debt buyers who do not want to play by the rules. This may turn out to be a blessing in disguise: it could be a relatively costless way for regulators to separate those buyers who are taking active steps towards compliance and those who are not, and to spend their resources appropriately.

What these two sets of industry-led reforms have in common is that they will likely lead to a consolidation of players in the debt buying and collection agency industry. This is already happening, as increased regulatory scrutiny brings increased compliance costs and not all players can absorb them. This is not necessarily a bad thing; a smaller number of collection

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[235] The DBA Int'l Board adopted the program in February 2012. *DBA Debt Buyer Certification Update*, DBA INT'L (July 25, 2012), http://www.dbainternational.org/members_only/DBADebtBuyerCertificationUpdate.pdf, *archived at* http://perma.cc/69LU-HUA8. The first DBA member was certified under the program on May 14, 2013. *First DBA Member Completes Debt Buyer Certification Program*, DBA INT'L (May 14, 2013), http://www.dbainternational.org/memberalerts/Alert-FirstCertification_051413.pdf, *archived at* http://perma.cc/4LZQ-RV5K.

[236] DBA INT'L, DEBT BUYER CERTIFICATION PROGRAM, APPENDIX A: CERTIFICATION STANDARDS MANUAL 7 (Feb. 2, 2013), *available at* http://www.dbainternational.org/certification/certificationstandards.pdf, *archived at* http://perma.cc/82NC-WZW5.

[237] *Id.* at 6.

[238] *See id.* at 7.

[239] *See* DBA INT'L, DBA INTERNATIONAL DEBT BUYER CERTIFICATION PROGRAM, APPENDIX D – AUDIT REVIEW MANUAL 13 (Feb. 7, 2013), *available at* http://www.dbainternational.org/certification/auditreview.pdf, *archived at* http://perma.cc/XFS3-7762.

agencies and debt buyers—rather than the thousands currently in operation—would make it easier for consumers to identify a real company from a fly-by-night bogus debts operation.

The next section suggests another potential step creditors can take to improve the flow of information and trust in the collection system.

2. *Goodbye Packets*

One of the issues that arise when debts are sold multiple times is that consumers may not know or be able to determine who currently owns their debt. A related problem is that Bills of Sale are not individualized at the account or debt level, they merely state that "[Seller] sold Accounts to [Buyer]" on a specified debt. This causes problems when a buyer seeks to collect through courts, as discussed in Part III.B.4. It also means that consumers have no way to verify that the person calling or writing is the legitimate owner of their debt. One partial solution to this would be for sellers (creditors or debt buyers) to send a "goodbye packet" to the consumer whenever her account is sold.[240]

The packet should include a letter from the creditor (when the debt is first sold) summarizing what happened to the consumer's account: the creditor sold it to XZY Debt Buyer. The letter should include contact information for the debt buyer and any account or reference number needed for the debt buyer to find the consumer's account. Besides the letter, the packet should also include the charge-off statement—the last statement ever mailed from the bank to the consumer—and attach a ledger accounting of the last twelve months of purchases, payments, and interest or fee charges, or a way for the consumer to access the ledger or statements online for period of time.[241] The letter need only be one page; the charge-off statement typically is as well, since it does not include any new purchases. Depending on how long ago the consumer stopped incurring charges or making payments on the credit card, the ledger may be very brief. The entire packet could be as little as four pages, though more likely an average of five to seven.

This packet could "travel with the debt;" every seller would provide to subsequent buyers the documents sent to consumers, as well as when they were sent and to what address. Every subsequent buyer could also send a version of this letter, taking care to add whatever credits and charges were added to the account in the previous twelve months. This conceptually simple (though no doubt logistically difficult) solution would go a long way

[240] Full credit for this idea goes to Samantha Koster, while she was a student in the author's Consumer Law / Debt Collection seminar.

[241] Nothing like this is currently required by regulations. However, some current state laws and some proposed ones require evidence that the consumer used the card before a court may enter a judgment. *See, e.g.*, Debt Buying, S.B. 233, 2013-2014 Leg., 2013-2014 Sess. (Cal. 2013), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB233, *archived at* http://perma.cc/CTU6-H9PH. *See* NCLC comments to the CFPB's debt collection ANPR, *supra* note 145.

toward ameliorating the chain-of-title and standing problems in state court.[242] It would also be helpful to consumers who might wish to pay their obligations, or who wish to learn who currently owns their debt and how to get in touch with them.[243]

The industry recognizes the role notification of a sale could play in both improving collections and alleviating many of the problems described in Part III. Many of the contracts in the FTC sample required debt buyers to notify consumers that their accounts had been sold, typically within 30-60 days after the sale. However, the contracts specified that the notification would come in the form of a letter from the debt buyer, an entity the consumer does not know. Some contracts provided that at the debt buyer's request, and at a cost of $10 per individual letter, the bank would "provide a form letter on an individual basis . . . that Buyer may send to a Cardholder to confirm that the Bank sold the Cardholder's Account to Buyer."[244] However, those letters would still be sent on the debt buyer's letterhead and envelope.[245] One possible reason the contracts are structured this way is that banks have an incentive to have the buyer be the one to tell the consumer about the sale because it may reduce the bank's reputational concerns.

3. *Debt Registry*

Some of the problems described in this article might sound eerily similar to the documentation and robo-signing issues in the mortgage markets. A great deal of those problems concern the mortgage industry's registry, the Mortgage Electronic Registration System, or MERS, which came under significant attack for its actions during the foreclosure crisis.[246] By inserting

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[242] That is because each subsequent buyer would acquire a record of an individualized letter sent by the creditor to the consumer reporting that the account had been sold and would acquire it *at the moment of sale*. In states that recognize the incorporation doctrine, a debt buyer's record custodian could satisfy the business records exception to the hearsay rule. If the original debt buyer sold the account again, then the subsequent buyer would have multiple letters evincing the chain of title.

[243] Instead of a goodbye letter, however, most debt sale contracts explicitly prohibit debt buyers from providing information about the original credit issuer. FTC DEBT BUYER REPORT, *supra* note 4, at C-20. The reason for this is presumably to avoid communications with the consumer since the seller no longer owns the account, however, this policy might make it harder for consumers to figure out whether the debt buyer contacting them legitimately owns their debt. The fact that some sale contracts "expressly prohibited debt buyers from using the credit issuer's name in the subject line of notification . . . and limited usage of the seller's name to the body of such letters" further adds to the possibility of consumer confusion. *Id.*

[244] *Id.*

[245] *Id.*

[246] MERS is a computer database, established by the residential mortgage industry, which is designed to track the servicing rights on the majority of U.S. home loans. It has approximately 5,000 members—consisting of mortgage originators and secondary market participants including Fannie Mae, Freddie Mac, and Ginnie Mae—who pay MERS membership fees and fees on specific transactions in order to use the information filed with MERS. *See An Introduction to the MERS® System, MERSCORP Holdings, Inc., and Mortgage Electronic Registration Systems, Inc.*, MERS®WORKS (Sept. 2014), http://www.mersinc.org/media-room/press-kit, *archived at* http://perma.cc/5PSS-Y932?type=pdf.

itself as the owner of record or owner's nominee in foreclosure actions, MERS foreclosed on homes under its own name, even though it was not entitled to any of the proceeds because it did not own the mortgage or the note.[247] Because recordation of assignments in MERS was voluntary, oftentimes consumers could not ascertain who owned their mortgages. This exposed some consumers to double foreclosure actions—and their attendant fees—because they could not determine exactly who owned their loans. In the most egregious cases, fraudsters became authorized officers of MERS and initiated foreclosure. In other cases, consumers could not find out whom to contact to settle the foreclosure case when MERS was the one that initiated the proceedings.

Given all of these issues, it may seem surprising that, for example, the CFPB recently highlighted the idea of a debt registry in its advanced notice of proposed rulemaking by asking a series of questions to the public about its potential benefits and drawbacks.[248] At least two companies have been endeavoring for a few years to interest a critical mass of creditors and debt buyers to adopt their registry solution for unsecured consumer debts.[249] Both aim to do this by serving as a "middle man registry," a way for documentation and chain of title information regarding an individual debt to live with a third party (the registry) and remain there regardless of current ownership of the debt. What would change would be the registered owner.
As one of these companies frames the issue in a whitepaper:

> Businesses and individuals would not dream of buying real property, automobiles, or anything else of value without first having its ownership status verified by a third party. If one would not buy a car or house without title confirmation, why would one spend thousands or millions buying debt without the same protection?[250]

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[247] *See* Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 Duke L.J. 637, 713–15 (2013); Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 Wm. & Mary L. Rev. 111, 114–125 (2011); Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. Cin. L. Rev. 1359, 1370–71 (2010). *See also* Mortg. Elec. Registration Sys., Inc. v. Chong, Order, Nos. 2:09-CV-00661-KJD-LRL, BK-S-07-16645-LBR, 2009 WL 6524286, at *2 (D. Nev. Dec. 4, 2009); Mortg. Elec. Registration Sys., Inc. v. Graham, 247 P.3d 223, 228–29 (Kan. Ct. App. 2010); In re Agard, 444 B.R. 231, 235 (Bankr. E.D.N.Y. 2011) ("This Court does not accept the argument that because MERS may be involved with 50% of all residential mortgages in the country, that is reason enough for this Court to turn a blind eye to the fact that this process does not comply with the law.").

[248] *See* CFPB ANPR, *supra* note 7, at question 12. Some of the discussion here was included in the author's joint comment letter with Patricia A. McCoy, *supra* note 12.

[249] *See Who We Are*, GlobalDebtRegistry.com, http://www.globaldebtregistry.com/who-we-are (last visited Oct. 23, 2014), *archived at* http://perma.cc/5R3K-CZ2L; *About Convoke*, ConvokeSystems.com, http://www.convokesystems.com/company (last visited Oct. 23, 2014), *archived at* http://perma.cc/NE76-UQ8Z.

[250] Daniel J. Langin, *Introducing Certainty to Debt Buying: Account Chain of Title Verification for Debt*, Global Debt Registry (Jan. 5, 2011), *available at* http://ftc.gov/os/comments/debtcollecttechworkshop/00027-60064.pdf, *archived at* http://perma.cc/9YPA-7J6V.

Why indeed? While the MERS scars are still recent, there are some differences between the unsecured consumer debt context and the mortgage registry system. Unlike unsecured consumer debts, mortgages have had a registry system for hundreds of years. The county recording has been a very successful system of establishing title and recording changes in the ownership of real property. MERS was developed to supplant this already-existing registry system. Part of the reason it caused problems was because the local land records were no longer the authoritative source of title ownership. In effect, MERS added a separate SOR to the structure. In the unsecured debt context, there is nothing to supplant, and indeed, there is a need for consumers to be able to verify who owns their debts so that they may pay the right party.

This "chain of title" record-keeping and account document storage could be the most helpful features in a repository. Unless it is serving as the real-time SOR for every collector or debt owner, however, a repository would not be an appropriate place to keep the current amount owed on a debt, or the itemization between interest and fees past charge-off. This is because any information stored in the repository about the amount owed or the payments made will necessarily be out of date and in no way verifiable since they were created by a third party.

Nonetheless, a "chain of title registry" could offer advantages to both consumers and industry participants. Consumers targeted for debt collection would have a place to turn to examine the facts alleged regarding their debts.[251] If reporting to a repository were required, consumers could easily verify that the party contacting them actually owns the debt, or alternatively, that they have been called by a scammer.

To alleviate the issues around the lack of documentation, at the time that a delinquent account is entered into a repository, underlying debt contracts, the last account statement, the amount owed at charge-off, and the date of first default could be obtained from the original creditor. While only the original creditor could speak to the truth and reliability of those documents in court, outside of court, storing this documentation and information could help consumers ascertain whether the alleged principal, interest, and fees being charged were excessive and evaluate any defenses to collection. A repository could also protect against potential double recovery and fraudulent collection by helping consumers to identify the rightful owner of their debts and the debt collector or servicer who is authorized to collect on them.

To the extent that courts have held back from strictly applying evidentiary and standing rules to debt buyers out of a concern that this may increase the cost of credit, the ready availability of this information might inspire them to insist that debt holders and collectors prove a *prima facie* case before obtaining a default judgment. Although here it is important to note that a repository is not a panacea. While it can serve a very useful

[251] This positive, however, disappears if there are too many registries.

purpose in identifying the owner of the debt and the entity authorized to collect on it, data stored in a repository should be used to substantiate the amounts owed on a debt. This is because the repository is not itself the source of business records regarding the debt. The only thing an agent of a repository could testify to in court is that documents were placed with it at a particular time by a particular entity. The repository cannot speak to the validity or contents of those documents or even about how they were created. It can only speak to the integrity of those documents—that is, that they were not changed—after they were stored with the repository. An agent of a debt registry could not testify in court as to whether the amounts on account statements were correct, as they would not have personal knowledge of the creation of those amounts.[252]

Many of the advantages that a centralized repository (or a handful of repositories) could offer to consumers flow from the fact that it would be relatively easy to publicize its existence and that it could be closely supervised by the CFPB.[253] In addition, as an entity in a "business the principal purpose of which is the collection of any debts," a repository would come within the ambit of the FDCPA and be accountable to consumers who were hurt by their practices.

However, there remain unresolved issues of how a repository would fit with current law. Depending on the exact way the company operates, a centralized repository might be considered a "consumer reporting agency" under the Fair Credit Reporting Act ("FCRA").[254] This might involve some additional consumer protections such as the requirement of "maximum pos-

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[252] For a discussion of hearsay issues in debt buyer cases see Holland, *supra* note 10, at 272–80.

[253] Repositories would be subject to CFPB supervision if they met the Bureau's definition of a "larger participant" in the market for consumer reporting or debt collection. *See* Bureau of Consumer Financial Protection Rule, 12 C.F.R. § 1090.103 (2014); Bureau of Consumer Financial Protection Rule, 12 C.F.R. § 1090.105 (2014). They may also qualify for supervision as service providers of depository institutions. *See* 12 U.S.C. § 5515 (2012).

[254] 15 U.S.C. § 1681a(f) (2012) states that a "'consumer reporting agency' means any person who for monetary fees . . . regularly engages in whole or in part in the practice of assembling . . . consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." A "consumer report" in turn is defined in § 1681a(d)(1) as including any type of communication that bears on a consumer's credit-worthiness or credit capacity which is used or expected to be used with any of the permissible purposes of consumer reports in § 1681b(a). Under § 1681b(a), there are three ways in which a centralized repository would furnish reports that would bring it within the ambit of the FCRA. To the extent that the repository makes information available to potential collectors or debt purchasers, it would be furnishing it under § 1681b(a)(3)(E) since the repository would be sharing the information with someone who "intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation." Similarly, the repository could trigger the FCRA by furnishing the information to someone (a debt buyer or collector) who "has a legitimate business need for the information [] in connection with a business transaction that is initiated by the consumer [the original credit agreement]." 15 U.S.C. § 1681b(a)(3)(F) (2012). And finally, the repository would come under FCRA for furnishing the information "[t]o a person which [the repository] has reason to believe . . . intends to use the information in connection with a credit transaction involving the consumer on

sible accuracy,"[255] correction or deletion of disputed information,[256] and free consumer disclosures every twelve months,[257] as well as potential direct supervision by the CFPB.[258] But it would also cause additional concerns. The FCRA is ill fitted to the notion of a repository, and as currently written, it could do nothing to stop a repository from sharing this newly collected information with third parties, a development that has many potential negative consequences for consumers' privacy.

In addition, the FCRA's seven-year limit on reporting would also present a problem, as one of the most useful features of a repository would be its ability to report whether a debt has been paid or extinguished much longer than seven years since charge-off.[259] While the FCRA's provisions provide some threshold consumer safeguards, it has a mixed track record of empowering consumers to correct inaccurate credit reports. The consumer safeguards for any repository should be even stronger than those afforded by FCRA to safeguard the accuracy of and access to the information contained therein.

Given the MERS experience, there is also a real concern that agents of the repository would be called to testify in court about things of which they do not have personal knowledge—for example, the amount of the debt or the underlying terms of the agreement between the creditor and debtor. It would be crucial for the CFPB and other regulators to clarify that all a repository could verify is the assignment chain—that is, that creditor and XYZ Debt Buyer entered into an agreement that was deposited with the depository involving a particular set of consumer debts. The repository does not have personal knowledge of whether those debts are valid or correct, just that the creditor turned over documents about them to the repository for safe-keeping and that, for example, Buyer 1 sold a particular account to Buyer 2 who is now its only owner. In other words, a centralized debt repository could not satisfy (by itself) a debt owner's *prima facie* case in court.

All of this begs the question—is a repository necessary? While not strictly necessary, the idea of repositories is likely to grow in popularity in the future if regulators begin to require more from creditors, as the next subpart suggests they should. First, as to necessity: if the analysis is constrained to banks, the same beneficial functions outlined above could be accomplished if the creditor simply retained all of the information and

whom the information is to be furnished [for the] collection of an account of the consumer." 15 U.S.C. § 1681b(a)(3)(A) (2012) (emphasis added).

[255] 15 U.S.C. § 1681e(b) (2012).

[256] 15 U.S.C. § 1681i (2012).

[257] 15 U.S.C. § 1681j (2012).

[258] Repositories would be subject to CFPB supervision if they met the Bureau's definition of a "larger participant" in the market for consumer reporting. *See* 12 C.F.R. § 1090.103. They may also qualify for supervision as service providers of depository institutions. 12 U.S.C. § 5515 (2012).

[259] *See* 15 U.S.C. § 1681c(a)(4) (2012).

documentation needed.[260] The creditor itself could keep a record of ownership, and only allow proper parties (current owners of the debt or their authorized servicers) to access this data. This starts to sound an awful lot like just placing a debt with a collection agency. If you retain liability and record-keeping, there would be little reason not to retain the upside (any eventual payment). Thus, some banks may react to stricter documentation and information rules from the CFPB by ceasing to sell debt. Nonetheless, others may find that even with the new regulatory attention, debt sales continue to make sense. Despite increased regulation, a secondary market for consumer debts will continue to exist if debt buyers are willing to purchase debts at a cost where it is better for the bank to sell rather than attempting to collect itself or placing the debt with a collection agency.[261] In these cases, a debt registry may facilitate debt sales by allowing banks to focus their due diligence and audits on the debt registry provider rather than on all subsequent debt buyers who may own the debts.[262] In other words, forcing banks to increase their diligence around charged-off accounts may in turn drive some banks to use a debt registry.[263]

C. *Regulatory Action*

Until recently, regulation of the entire collection ecosystem (creditors, debt buyers, collection agencies, and collection law firms) was distributed among multiple regulators who had many other priorities.[264] No single regulator had authority over both debt originators (creditors, in many cases banks) and debt collectors. The FTC gained primary enforcement power over the FDCPA in 1977, but it was (and is) prohibited from writing rules to interpret the Act, and so none have been written since.[265] The FDCPA prohibits debt collectors from, *inter alia*, using "unfair or unconscionable

[260] If we expand to non-bank delinquent debts, such as medical debts, a repository becomes a more useful concept because, among other things, it would allow consumers to check their outstanding debts with one of a handful or repositories as opposed to all potential creditors.

[261] This in turn, depends on the return to capital from collection recoveries. As the economy recovers it is more likely that collectors will see increased returns.

[262] *See Bulletin No. 2014-37, Consumer Debt Sales/Risk Management Guidance*, Office of the Comptroller of the Currency (Aug. 4, 2014), *available at* http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-37.html, *archived at* http://perma.cc/8EBH-WUVD [hereinafter OCC Bulletin].

[263] It may also change the *ex ante* calculus of offering accounts to certain customers, reducing the supply of credit. As discussed in Part V.B., it may also have the effect of ameliorating the "sweat box" problem Ronald Mann has identified. *See infra* note 324 and accompanying text.

[264] *See* 15 U.S.C. § 1692l (2012) (describing how the Federal Trade Commission, Federal Deposit Insurance Corporation, Federal Reserve, National Credit Union Administration, Secretary of Transportation, and the Secretary of Agriculture all share enforcement responsibility over the FDCPA). After Dodd-Frank, the CFPB was added to the list of agencies with enforcement authority over the FDCPA. *See id.* The CFPB also gained rule-writing authority. 15 U.S.C. § 1692l(d) (2012).

[265] *See* 15 U.S.C. § 1692l (2012).

means" or making "false, deceptive, or misleading representation[s]" in connection with the collection of a debt.[266] It applies to "debt collectors," which include debt buyers, collection agencies, and collection law firms, but crucially *not* creditors who collect on their own debt.[267] The FTC can also prevent unfair and deceptive practices through the FTC Act, but banks and many other types of creditors collecting on their own debt are not covered by the Act.[268]

This fragmented authority changed in 2011 with the Dodd-Frank Act, which gave the CFPB a broad mandate over all players in the debt collection ecosystem—banks and other creditors, debt buyers, debt collectors, and collection law firms.[269] The Bureau can enforce both the FDCPA as well as the Consumer Financial Protection Act ("CFPA").[270] Similar to the FDCPA, the CFPA prohibits "unfair, deceptive, or abusive acts and practices" ("UDAAPs"); it applies to all players in the debt collection ecosystem.[271]

The Bureau's authority over both of these statutes is far-reaching: it is the first and only agency with authority to enact rules implementing both statutes.[272] It can supervise creditors as well as the largest debt buyers, collection agencies, and collection law firms; and it can enforce the FDCPA against collectors and the CFPA against creditors and collectors.[273] The Bu-

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[266] 15 U.S.C. § 1692e (2012).

[267] The FDCPA generally prohibits "debt collectors" from engaging in abusive practices. *See generally* 15 U.S.C. §§ 1601–1692o (2012); 15 U.S.C. § 1692a(6) (2012) ("The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."). The FDCPA does not apply to "original creditors" collecting their own debt—e.g., CapitalOne calling a consumer about her overdue credit card bill—but for purposes of the Act, debt buyers are regulated as debt collectors. *See, e.g.*, Schlosser v. Fairbanks Capital Corp., 323 F.3d 534, 536 (7th Cir. 2003) (holding that the FDCPA "treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignee, and as creditors if it was not").

[268] *See* 15 U.S.C. § 45 (2012).

[269] Dodd-Frank was enacted on July 21, 2010, but the authorities granted to the CFPB did not take effect until 2011. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111–203, 124 Stat. 1376 (2010).

[270] The FTC retains its enforcement powers under the FDCPA, *see* 15 U.S.C. § 1692l(a) (2012), and has significantly increased its activities in this area in the last few years. "In its two civil penalty cases [in 2012] . . . the FTC obtained $2.8 million and $2.5 million, respectively, the two largest civil penalty amounts the agency has ever obtained in cases alleging violations of the FDCPA." Consumer Fin. Prot. Bureau, Fair Debt Collection Practices Act Annual Report 2012, at 14 (2012), *available at* http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf, *archived at* http://perma.cc/KX4B-GY5N. *See also In Settlement with FTC, Debt Collectors Agree to Stop Deceiving Consumers and Pay Nearly $800,000*, Fed. Trade. Comm'n (Mar. 23, 2013), *available at* http://www.ftc.gov/news-events/press-releases/2013/03/settlement-ftc-debt-collectors-agree-stop-deceiving-consumers-pay, *archived at* http://perma.cc/576V-RLLV.

[271] *See* 15 U.S.C. § 1692 (2012); 12 U.S.C. § 5531 (2012).

[272] 15 U.S.C. § 1692l(a) (2012).

[273] The CFPB has authority to supervise the "larger participants" in the debt collection markets. It defined the term in a rule in 2012, deciding that debt buyers, collection agencies, and collection attorneys whose revenue as a result of debt collection of a consumer financial product or service exceeds $10 million in annual receipts would be covered. The Bureau esti-

reau is expected to publish the first set of draft rules covering the entire debt collection market in early 2015.[274] This comprehensive authority is long overdue, and as this subpart argues, the CFPB's has the authority to declare the problematic practices described earlier as unfair or deceptive and to implement new rules to ameliorate most if not all of the issues identified in this article.

As described in the previous section, the industry has taken some steps towards correcting these problems; steps spurred perhaps by the almost inevitability of regulation in this area. However, without added regulatory pressure, it is unlikely that these reforms will go far enough since the incentives to "'race to the bottom' corrupting standards for everyone else remain."[275] Regulatory pressure to improve the processes around debt sales is increasing, and it is not coming just from the usual suspects. After an investigation into the practices around debt collection and debt sales of its regulated banks, the OCC recently elevated bank debt sales to a safety and soundness issue.[276] The regulator first issued a list of "Best Practices" around debt sales, followed closely by a Bulletin.[277] The Bulletin warns banks that they "face increased operational risk when they sell debt to debt buyers."[278] In particular, the regulator is worried about "[i]nadequate systems and controls [that] can place the bank at risk for providing inaccurate information regarding the characteristics of accounts, including balances and length of time that the balance has been overdue."[279]

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mates that this will cover 175 out of approximately 4,500 debt collection entities nationwide. Bureau of Consumer Financial Protection Rule (Oct. 31, 2012), *supra* note 253. In the interest of full disclosure, the author worked on this rulemaking as a CFPB staffer.

[274] *See supra* text accompanying note 12.

[275] *See* John D. Ayer, *The Role of Finance Theory in Shaping Bankruptcy Policy*, 3 AM. BANKR. INST. L. REV. 53, 58 (1995) (attributing the term to Louis Brandeis).

[276] *See* OCC Bulletin, *supra* note 262. "Two major focuses of banking supervision and regulation are the safety and soundness of financial institutions." *Banking Supervision & Regulation*, FEDERALRESERVEEDUCATION.ORG, http://www.federalreserveeducation.org/about-the-fed/structure-and-functions/banking-supervision/ (last visited Oct. 18, 2014), *archived at* http://perma.cc/TJ3C-NU3N. "To measure the safety and soundness of a bank, an examiner performs an on-site examination review of the bank's performance based on its management and financial condition, and its compliance with regulations." *Id.*

[277] *See* OCC Bulletin, *supra* note 262; *Debt Sales/Best Practices*, OFFICE OF THE COMPTROLLER OF THE CURRENCY 3–4, *available at* http://www.americanbanker.com/pdfs/occ-debt sales-bestpractices.pdf (last visited Nov. 9, 2014), *archived at* http://perma.cc/9ZYB-3X2T [hereinafter *OCC Best Practices*]. The OCC first got involved in these issues in 2011 after a whistleblower complaint against J.P. Morgan Chase alleging that Chase "used faulty account records in suing tens of thousands of delinquent credit card borrowers for at least two years." *See* Jeff Horwitz, *OCC Probing JPMorgan Chase Credit Card Collections*, AM. BANKER (Mar. 12, 2012, 9:24 PM), http://www.americanbanker.com/issues/177_49/chase-credit-cards-collections-occ-probe-linda-almonte-1047437-1.html, *archived at* http://perma.cc/5C28-F5LX; David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, N.Y. TIMES, Nov. 1, 2010, at A1, *available at* http://www.nytimes.com/2010/11/01/business/01debt.html, *archived at* http://perma.cc/9YRC-RSKV.

[278] OCC Bulletin, *supra* note 262.

[279] *Id.*; *see also Shining a Light on the Consumer Debt Industry: Hearing Before the S. Subcomm. on Fin. Inst. and Consumer Prot.*, 113th Cong. 36 (2013) (statement of the Office of

Among the new supervisory expectations listed in the Bulletin is a requirement that banks provide "detailed and accurate information to debt buyers at the time of sale (to enable them to pursue collections in compliance with applicable laws and consumer protection requirements)."[280] The regulator also requires that "for each account, the bank should provide the debt buyer with copies of underlying account documents, and the related account information."[281] It then outlines eight points of specific information (and documents) that must be provided at the time of sale:

- A copy of the signed contract or other documents that provide evidence of the relevant consumer's liability for the debt in question.
- All account numbers used by the bank (and, if appropriate, its predecessors) to identify the debt at issue.
- Copies of all, or the last 12 (whichever is fewer), account statements.
- An itemized account of all amounts claimed to be owed in connection with the debt to be sold, including loan principal, interest, and all fees.
- The name of the issuing bank and, if appropriate, the store or brand name.
- The date, source, and amount of the debtor's last payment and the dates of default and amount owed.
- Information about all unresolved disputes and fraud claims made by the debtor. Information about collection efforts (both internal and [collection agency] efforts, such as by law firms) made through the date of sale.
- The debtor's name, address, and Social Security number.[282]

Complying with these and other provisions in the Bulletin should go a long way towards correcting the problems identified in this article, at least at the creditor level.[283] But it will not necessarily solve the downstream problems as debts get sold and resold. As a regulator of both banks and debt collectors, the CFPB has the opportunity to affect all players in this area.[284] The rest of this section argues that a rule requiring a minimum level of information, documentation, and contractual representations is a natural best-fit solution for these problems since it has the potential to fix the collective action problem identified earlier.

Dodd-Frank gives the CFPB the authority to prohibit covered entities from engaging in unfair, deceptive, or abusive acts or practices. It also authorizes states' Attorneys General to bring civil actions enforcing the prohibition against UDAAPs on behalf of their state "with respect to any entity

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the Comptroller of the Currency), *available at* http://www.occ.gov/news-issuances/congressional-testimony/2013/pub-test-2013-116-oral.pdf, *archived at* http://perma.cc/U6BY-WLJ8.

[280] OCC Bulletin, *supra* note 262.

[281] *Id.*

[282] *See id.*

[283] *See id.*

[284] *See supra* text accompanying note 12.

that is State-chartered, incorporated, licensed, or otherwise authorized to do business under State law."[285] The CFPB should clarify that the practice of selling debts with little information, no warranties, and no account documents as a violation of the prohibitions against unfairness and deception.[286]

Both the FDCPA and the CFPA prohibit unfair and deceptive practices. The FDCPA does so generally, stating that a debt collector "may not use unfair or unconscionable means to collect or attempt to collect any debt."[287] It then lists eight non-exhaustive examples of an unfair practice. The FDCPA also prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt" generally, then lists sixteen specific situations that fall within the prohibition.[288] The rest of this subpart focuses on the CFPA analysis, since it is more restrictive than the FDCPA's.[289] As a result, much of this analysis can be imported into the FDCPA, which can be used by consumers as well as Attorneys General.

1. Unfairness

Unfairness is defined in Dodd-Frank as an act or practice that:

(1) Causes or is likely to cause substantial injury to consumers;
(2) The injury is not reasonably avoidable by consumers; and
(3) The injury is not outweighed by countervailing benefits to consumers or to competition.[290]

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[285] 12 U.S.C. § 5552 (2012); *see also* Alan Kaplinsky, *Illinois AG Files Lawsuit Asserting Dodd-Frank UDAAP Enforcement Authority*, CFPB MONITOR (Mar. 27, 2014), http://www.cfpbmonitor.com/2014/03/27/illinois-ag-files-lawsuit-asserting-dodd-frank-udaap-enforcement-authority/, *archived at* http://perma.cc/AR65-BKDT. National banks are excluded from this provision, except to the extent that the Attorney General is "enforcing a regulation prescribed by the Bureau." *See* 12 U.S.C. § 5552 (2012).

[286] In the interest of brevity, this Article focuses on unfairness and deception because these are sufficient grounds for a CFPB action and are not as controversial as the "abusive" authority held by the CFPB. *See, e.g.*, George F. Will, *Consumer Financial Protection Bureau Abusive in its Mission to Stop Abuse*, POSTBULLETIN.COM (Nov. 19, 2012, 7:03 AM), http://www.postbulletin.com/opinion/consumer-financial-protection-bureau-abusive-in-its-mission-to-stop/article_e70969a5-e43e-5ddf-a874-7229d6492616.html, *archived at* http://perma.cc/B6BA-7TW6; *House Republicans Struggle to Control CFPB*, HOUSING WIRE (May 21, 2014, 4:20 PM), http://www.housingwire.com/articles/30081-house-republicans-struggle-to-control-cfpb, *archived at* http://perma.cc/8Q9X-P7PZ. *But see* Jean Braucher, *CFPB's Anti-Abuse Authority: A Promising Development in Substantive Consumer Protection*, CREDIT SLIPS (Nov. 21, 2012, 2:06 AM), http://www.creditslips.org/creditslips/2012/11/cfpbs-anti-abuse-authority-a-promising-development-in-substantive-consumer-protection.html, *archived at* http://perma.cc/5C2R-QE8X.

[287] 15 U.S.C. § 1692f (2012).

[288] 15 U.S.C. § 1692e (2012).

[289] For example, the definition of "deception" under the CFPA requires that the act or practice have a material effect on the consumer. This is not required by the FDCPA. *See* 15 U.S.C. § 1692e (2012).

[290] 12 U.S.C. §§ 5531, 5536 (2012); *see also* U.S. BUREAU OF CONSUMER FIN. PROT., *CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the*

To help understand what qualifies as unfair practices, the CFPB looks to the standards for the same terms under Section 5 of the Federal Trade Commission Act ("FTC Act"), the language of which is very similar.[291]

Injury to the consumer is a central and determinative factor in defining unfairness under modern FTC case law.[292] A substantial injury "typically takes the form of monetary harm, such as fees or costs paid by consumers because of the unfair act or practice" but, importantly, "actual injury is not required; a significant risk of concrete harm is sufficient."[293] Courts have found that an act or practice can cause substantial injury even when only "doing a small harm to a large number of people."[294] As an example, the CFPB has found that "using inadequate compliance monitoring, service provider management, and quality assurance systems that failed to prevent, identify or correct" improper charges to a consumer was an unfair practice.[295]

The practice of selling consumer debts as described in this article poses a significant risk of concrete harm to consumers. To wit, selling debts with little information about the consumer, without documentation, and without representation as to accuracy, title, or compliance with law is troubling. This practice discourages careful and accurate recordkeeping, exposes consumers to inaccurate credit reports (which can harm them in a myriad of ways), may expose them to judgments (and post-judgment remedies) for out-of-statute debts, debts that are not theirs, and multiple lawsuits for the same debt, and may also result in the collection of inaccurate amounts or from the wrong consumer. All of these present significant risks of harm to consumers.

The second prong of the unfairness analysis focuses on whether a consumer could avoid the injury. "An injury is not reasonably avoidable by consumers when an act or practice interferes with or hinders a consumer's

Collection of Consumer Debts 2 (July 10, 2013), http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf, *archived at* http://perma.cc/8JHG-JV4V.

[291] *See* 15 U.S.C. § 45(n) (2012); *CFPB Bulletin 2013-07*, *supra* note 290, at 1; CONSUMER FIN. PROT. BUREAU, CFPB SUPERVISION AND EXAMINATION MANUAL, at UDAAP 1 (2012), http://files.consumerfinance.gov/f/201210_cfpb_debt-collection-examination-procedures.pdf, *archived at* http://perma.cc/K9CU-SW6H [hereinafter CFPB MANUAL].

[292] Letter from Michael Pertschuk, Chairman, Fed. Trade Comm'n, et al., to Senator Wendell H. Ford & Senator John C. Danforth (Dec. 17, 1980), *available at* http://www.ftc.gov/ftc-policy-statement-on-unfairness, *archived at* http://perma.cc/T3G6-LHKQ ("[U]njustified consumer injury is the primary focus of the FTC Act."). According to the FTC, consumer injuries can take a number of forms—monetary, health, safety, or otherwise—and are to be measured by a cost-benefit analysis of their net effects. *See id. But see* Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U. L. REV. 349, 354 (1988) (criticizing the FTC's definition of unfairness).

[293] *CFPB Bulletin 2013-07*, *supra* note 290, at 2; *see also* In the Matter of International Harvester Company, 104 F.T.C. 949, 1061 (1984) (requiring for a finding of unfairness that there be consumer injury that is "substantial; not outweighed by any offsetting consumer or competitive benefits that the practice produces; and not reasonably avoidable by consumers.").

[294] FTC v. Neovi, Inc., 604 F.3d 1150, 1157 (9th Cir. 2010) (citing Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 972 (D.C. Cir. 1985)).

[295] *See* J.P. Morgan Chase Bank, N.A., 2013 WL 9008326 (Sept. 19, 2013).

ability to make informed decisions or take action to avoid that injury."[296] An injury "caused by transactions that occur without a consumer's knowledge or consent is not reasonably avoidable."[297] The question is "whether an act or practice hinders a consumer's decision-making. For example, not having access to important information could prevent consumers from . . . choosing those that are most desirable to them, and avoiding those that are inadequate or unsatisfactory."[298]

Consumers cannot reasonably avoid the harm caused by the manner in which their accounts are bought and sold. Consumers are not a party to the sale transaction. Consumers also do not choose their debt buyer or their debt collector. Most consumers do not request the agreements between buyers and sellers, and those that do generally have to pay attorneys to obtain them. Consumers are unlikely to realize, for example, that a debt buyer may not know the appropriate date from which to calculate the statute of limitations or the credit reporting period for their debt. They are also unlikely to know that a debt buyer who sues them in court may not have admissible documentary evidence of their debt.[299]

Reasonable consumers can be expected to retain some account documents for some period of time. However, debt collection of an unpaid account can occur practically forever: a debt is only extinguished upon payment, bankruptcy, or the expiration of the statute of limitations in only three states. To discover a discrepancy, consumers would have to keep account records for an equally long period of time.[300] Moreover, consumers who are wrongly collected upon because they have similar names or other features to account-holders cannot reasonably avoid this.

The third prong requires a cost-benefit analysis; it excludes acts or practices that are not "outweighed by its consumer or competitive benefits."[301] Lower prices or increased availability of products may be countervailing benefits.[302] Costs required to prevent the injury are also considered here.[303] These include "an assessment of the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and similar matters."[304]

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[296] *CFPB Bulletin 2013-07*, *supra* note 290, at 3.

[297] *Id.*

[298] CFPB MANUAL, *supra* note 291, at UDAAP 2.

[299] In a separate project, the author is documenting the difficulties that consumers who are sued in court have in understanding that the debt collector may not have evidence to prove their debt. *See supra* text accompanying note 161.

[300] *See supra* note 177 and accompanying text for an argument that consumers are not well-placed to bear this burden.

[301] *CFPB Bulletin 2013-07*, *supra* note 290, at 3.

[302] *See* CFPB MANUAL, *supra* note 291, at UDAAP 3.

[303] *See id.*

[304] Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 993 (D.C. Cir. 1985) (quoting Letter from Michael Pertschuk et al., *supra* note 292) (internal quotation marks omitted).

There are many benefits of a rule requiring that debt sales include sufficient information to allow the collector to locate a consumer and follow the law in collecting, sufficient documentation to allow the collector to prove the amount of the debt in court, and warrants about title, accuracy, and compliance with the law. It would increase trust in the collection system, allowing consumers to feel more confident that they are paying the right party. It would also increase collections from the right consumer of the right amount owed. In addition, when a collector filed a lawsuit against a consumer, she would have substantiating evidence to prove in court that the consumer owed that amount. This would ensure debt buyers only obtain judgments against consumers who truly owe the debt, for the right amount.

One potential downside is an increase of the cost of credit or a reduction of its availability to certain (e.g., subprime) consumers.[305] But creditors may not need to pass on the increased costs to consumers; debt buyers are also customers here. The increased collectability of delinquent accounts that are sold with complete information and documentation would offset some of the increased costs. Debt buyers should be willing to pay more for more collectible debts, in particular because they would also come with a decreased risk of exposure to consumer lawsuits for unfair and deceptive acts and practices under the FDCPA. Sloppy recordkeeping does not benefit consumers or competition; on the contrary, it hurts the ability of collectors to do their jobs and minimizes the likelihood that careful records and affirmative representations will become the norm.

Finally, public policy considerations established by any "statute, regulation, judicial decision, or agency determination may be considered," although they are not sufficient to declare an act unfair.[306] Public policy considerations weigh heavily for this rule. The FDCPA, the federal law focused on debt collection, is "designed to protect consumers from abusive debt collection practices and to protect ethical debt collectors from competitive disadvantage."[307] As argued in Part IV.A, ethical debt buyers[308] who want to purchase debts that include sufficient information and documentation and positive warrants as to title, accuracy, and compliance with laws, are disadvantaged by a system in which that is not the rule that regulators enforce.

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[305] While economic theory may predict this, it is not always a given in practice. For example, after Congress made private student loans presumptively nondischargeable in bankruptcy, the costs of those loans increased, contrary to economic theory. Xiaoling Ang & Dalié Jiménez, *Private Student Loans and Bankruptcy: Did Students Benefit from the Increased Collectability of Student Loans?*, UPJOHN INST. PRESS (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2332284, *archived at* http://perma.cc/D76W-TD7Y.

[306] CFPB MANUAL, *supra* note 291, at UDAAP 3.

[307] Quinn v. Ocwen Fed. Bank FSB, 470 F.3d 1240, 1246 (8th Cir. 2006).

[308] Recall that debt buyers are also considered debt collectors under the FDCPA. *See supra* note 267 and accompanying text.

2. *Deception*

The CFPB can also ban deceptive practices. Deception is not defined in the Dodd-Frank Act, but the CFPB has issued guidance that an act or practice is deceptive when:

(1) The act or practice misleads or is likely to mislead the consumer;
(2) The consumer's interpretation is reasonable under the circumstances; and
(3) The misleading act or practice is material.[309]

Deceptive practices can "take the form of a representation or omission."[310] In a compliance bulletin, the Bureau noted that it "also looks at implied representations, including any implications that statements about the consumer's debt can be supported."[311] "[I]f a representation conveys more than one meaning to reasonable consumers, one of which is false, the speaker may still be liable for the misleading interpretation."[312] In other words, the representation need not be actually false for it to be misleading. "Material information is information that is likely to affect a consumer's choice of, or conduct regarding, the product or service."[313]

The CFPB notes that "[e]nsuring that claims are supported before they are made will minimize the risk of omitting material information and/or making false statements that could mislead consumers."[314] In the FDCPA context, there are cases establishing that it is misleading for an attorney to send a dunning letter on attorney letterhead without "having meaningfully reviewed the case."[315] Courts have permitted attorneys to send dunning letters without review if the letters include "a clear disclaimer explaining the limited extent of the law firm's involvement in the collection action."[316] In a recent case, the CFPB has found that when attorney collectors file lawsuits without meaningfully reviewing the case, they represent "directly or indirectly, expressly or by implication, that attorneys were meaningfully in-

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[309] *See CFPB Bulletin 2013-07*, *supra* note 290, at 3.

[310] *Id.* "A practice is considered deceptive if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." FTC DEBT BUYER REPORT, *supra* note 4, at 4 (quoting Letter from James C. Miller III, Chairman, Fed. Trade Comm'n, to Representative John D. Dingell, Chairman, House Committee on Energy and Commerce (Oct. 14, 1983), *available at* http://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception, *archived at* http://perma.cc/VSH7-LWBF) (internal quotation marks omitted).

[311] FDC DEBT BUYER REPORT, *supra* note 4, at 32.

[312] CFPB MANUAL, *supra* note 291, at UDAAP 5.

[313] *CFPB Bulletin 2013-07*, *supra* note 290, at 4. Perhaps counter-intuitively, debt collection is a "product or service" under Dodd-Frank. *See* 12 U.S.C. § 5481(15)(A)(x) (2012).

[314] *CFPB Bulletin 2013-07*, *supra* note 290, at 3.

[315] *See* Lesher v. Law Offices of Mitchell N. Kay, P.C., 650 F.3d 993, 1001–03 (3d Cir. 2011).

[316] *Id.* at 1001; Greco v. Trauner, Cohen & Thomas, L.L.P., 412 F.3d 360, 364 (2d Cir. 2005).

volved in preparing and filing the complaint."[317] This, the CFPB finds, is deceptive under the CFPA.[318]

The deceptive act takes place when a collector requests that a consumer repay a debt without disclosing that (1) the debt was purchased subject to a contract that disclaimed all warranties, including those of accuracy, title, or compliance with laws and (2) the collector could not verify the amount claimed and other material aspects of the debt with account documents. This act is misleading because the consumer will reasonably believe that the information communicated is accurate and that the debt buyer has sufficient evidence to prove it.

It is reasonable for a consumer to interpret a collector's letter or statement about the debt as a statement that the collector has reasonable confidence in the amount she is representing the consumer owes. It is also reasonable for the consumer to believe that some form of evidence backs this statement. This interpretation is reasonable under the circumstances because the consumer is not privy to the contract and is unlikely to be able to obtain it even if she asks. Without disclosure by the debt collector, the consumer cannot know that the contract language casts doubt on the certainty of the information the collector is conveying to the consumer and the collector does not have documentation to corroborate material information about the debt.

The failure to disclose the underlying contract terms and to verify the amounts claimed is material because a consumer would change her behavior if she learned of the circumstances. For example, with this information the consumer may request verification of the amount sought in the form of account documents or other proof. If the debt buyer cannot provide this proof, the consumer could refuse to pay and seek a declaratory judgment pronouncing that she does not owe the debt. She may also request that the debt buyer prove that it is the owner of the debt by documenting the chain of title and assignment for her account. Debt buyers may have difficulty doing that, as described in Part III.B.4, which may mean the consumer could obtain a declaratory judgment in her favor.

In short, the CFPB has the authority to ban unfair and deceptive acts or practices. One solution to the problems identified in this article would be to declare these acts as unfair or deceptive practices. More specifically, creditors subject to the CFPB's UDAAP authority should be prohibited from selling a consumer debt with contract language that disclaims material aspects of the debt (e.g., title, compliance, accuracy). In addition, creditors should be prohibited from selling consumer debts without providing the buyer documentary evidence regarding the amount, type of debt, and date of last delinquency. The CFPB could detail examples of the kinds of documents and

[317] Complaint at 33, Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assoc., P.C., No. 14-02211 (N.D. Ga. July 14, 2014).

[318] *See id.* at 10.

information that should be kept by the creditor in order to avoid UDAAP liability.[319] It could also clarify minimal and best practice record retention policies.[320]

For debt buyers or their collectors, it would be a UDAAP (and a violation of the FDCPA) to attempt to collect on a debt without (1) obtaining documentary evidence regarding the amount, type of debt, date of last delinquency, and dispute history *at the time of purchase*, and (2) without obtaining specific and affirmative warrants from the seller regarding the material information and documentation provided about the debts. Concomitantly, debt owners and debt collectors would be required to verify the existence of a debt, its amount, the identity of the debtor, the limitations period status of the debt, the fact that the debt is in default, and the company's chain of title—based on the original information and underlying documentation in the company's own possession and that of the creditor—before any attempt to collect a debt. In the case of a debt sale, the contracts underlying each sale should be retained by the debt buyer and available to the consumer if she requests them. Terms that describe conditions of the receivables/accounts sold should not be redacted since they may provide a defense to the consumer.[321] Finally, the CFPB could require that debt buyers maintain account level proof-of-ownership information when they purchase an account. Debt buyers can only collect upon an account that they own, and having a spreadsheet of information (or even account statements) is not proof of ownership. Chain-of-title information should be kept at the account level.

After such a rule, consumer debts could not be collected upon without this information and consumers would have a right to request it from the purported debt owners. As a practical matter, creditors and collectors could maintain all of this documentary evidence themselves, or choose a third party to house it for them (as described earlier in the discussion on a debt registry). The responsibility would rest on creditors and debt collectors subject to the rule to ensure that this information was kept in a secure manner that minimized unauthorized access and tampering.[322] However, before *any-*

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[319] This could be a sort of safe harbor. For example, the Bureau could require creditors to keep copies of the twelve most recent account statements showing purchases/charges and payments, if any, made by the consumer, including the date, source, and amount of the most recent payment.

[320] *See* DBA INT'L, THE DEBT BUYING INDUSTRY 7 (Apr. 11, 2014), *available at* http://masonlec.org/site/rte_uploads/files/DBA%20International%20Paper%202014.pdf, *archived at* http://perma.cc/PEM6-6MXB ("The challenge, however, is that frequently this information is not available. The original creditor is not required by law to itemize a debt when it's written off. Having no obligation to do so, most creditors do not maintain these records beyond legal document retention requirements. It is a legal inconsistency that cannot be reconciled.").

[321] *See* McCoy & Jiménez, *supra* note 12, at 20; Purchase Agreement (Jan. 6, 2010), *supra* note 92, at 5 (stating that "Seller has made no representation, and now makes no representation, with respect to any of the Receivables or with respect to the completeness and accuracy of any Receivables Documents").

[322] This is especially necessary as documents are originated and kept in electronic form and there is never a hard copy "original." Private (and opaque) implementations of data compression algorithms have been found to alter numbers in a document without any way to tell

one could collect on the debt, she would have to possess or have immediate access to this information (such that, for example, the collector can have procedures in place to verify the spreadsheet information with account statements).[323]

As Ronald Mann has observed, "[t]he successful credit card lender profits from the borrowers who become financially distressed."[324] In fact, in some cases lenders themselves may have helped drive consumers over the edge, particularly before the CARD Act.[325] Mann argues that the "standard" way to increase profits after a consumer has obtained a credit card is to "focus on those customers who are unable to take their business elsewhere" (because they are having financial difficulties).[326] "If the customers do not have realistic options, lenders are free to raise the interest rates and fees that they charge to those borrowers."[327] And this "rate-jacking"[328] increases the risk of default by the consumer "as the cardholder is now faced with a higher interest rate and greater monthly payment demands."[329]

Professor Mann's solution to this problem is a move to "allocate the losses between borrowers and lenders in a way that minimizes the net costs of financial distress."[330] His suggestion is to place more risks on lenders, "so that they will have an incentive to use information technology to limit the costs of distress."[331] A CFPB rule as described above could have this effect. Up until now, creditors have been able to charge debts off and obtain additional funds from selling them. But in doing so in the ways described in this

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that this had happened from looking at the document itself. *See* David Kriesel, *Xerox Scanners and Photocopiers Randomly Alter Numbers in Scanned Documents*, D. KRIESEL, http://www.dkriesel.com/en/blog/2013/0802_xerox-workcentres_are_switching_written_numbers_when_scanning (last visited Feb. 28, 2014), *archived at* http://perma.cc/4TL6-ELZ5?type=source; TerraHertz, *An Actual Knob (and a rack)*, EVERIST.ORG (Nov. 11, 2013), http://everist.org/NobLog/20131122_an_actual_knob.htm#jbig2, *archived at* http://perma.cc/J36U-G3LF?type=source.

[323] The Bureau could also require that in cases in which the creditor, debt buyer, or debt collector files a lawsuit to collect on the debt, the complaint should incorporate and attach as exhibits copies of the relevant account statements, a copy of the original debt contract and all amendments, and documentary evidence sufficient to establish the putative debt owner's chain of title and the standing of the plaintiff.

[324] *Sweat Box*, *supra* note 5, at 379.

[325] The CARD Act banned rate-jacking as described below. *See* Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (to be codified in scattered sections of 15 U.S.C.).

[326] *Sweat Box*, *supra* note 5, at 388.

[327] *Id.*

[328] "'Rate-jacking' [is] the phenomenon of a credit card issuer suddenly raising the interest rates or fees on an account, often applying the new rate retroactively to existing balances." Levitin, *supra* note 205, at 339.

[329] *Id.* at 364. Professor Levitin argues that "rate-jacking is detrimental to consumers because it allows riskier credit card products (from a consumer perspective) to crowd out less risky credit card products, much as nontraditional mortgages that featured low initial teaser rates (and then later reset to much higher rates) started to crowd out traditional fixed rate mortgages during the housing bubble." *Id.* at 366.

[330] Ronald Mann, *Optimizing Consumer Credit Markets*, 7 THEORETICAL INQUIRIES IN L. 395, 399 (2006).

[331] *Id.*

article, creditors have been externalizing the true costs of collection. Increasing the documentation and information requirements—as well as the regulatory oversight—could have the effect of just the kind of "distressed debt tax" that Professor Mann proposed by forcing creditors and debt buyers to internalize the costs of compliance with the law.

VI. Conclusion

This article examines the life cycle of a delinquent debt as it moves through collection and is purchased by a debt buyer. It describes how little information and documentation debt buyers obtain about the debts they buy and the obstacles to obtaining more. Analyzing a rare collection of consumer debt purchase and sale agreements, it finds that many contracts disclaim warranties and representations that go to the very nature of the debts being bought and sold. Selling consumer debts through contracts that disclaim that the seller had title, that the seller and applicable servicers complied with the law, and that the account information is correct poses a variety of problems, least of which is the amount of uncertainty and lack of legitimacy it introduces into the system.

Some consumers whose debts were sold under these contracts may have had a judgment entered against them by a court of law—a judgment that in many states will follow them for decades.[332] Perhaps the amount these individuals owed was correct, perhaps the interest calculation was as well, and perhaps the statute of limitations had not yet expired. The problem is, however, that it may be impossible to know whether any of these speculations are true. The creditor's warranty disclaimers and numerous examples of malfeasance should make us question these facts, but the systemic lack of information and documentation means that in a large number of cases, more documents or information about debts sold may no longer exist. The system is broken.

After positing a few reasons that might explain the nature of these transactions (without warranties, without documents), this article ultimately concludes that it is primarily a result of a regulatory failure. It argues that the CFPB should declare the practice of selling debts with inadequate information, no documentation, and disclaiming warranties as unfair and deceptive and write new rules requiring creditors and collectors to possess minimum levels of information and documentation before they can collect in compliance with the law. Clarifying these practices as unfair or deceptive will ap-

[332] *See, e.g.*, N.J. Rev. Stat. § 2A:14-5 (2014) (20 years); N.Y. C.P.L.R. § 211(b) (McKinney 2010) (20 years); R.I. Gen. Laws Ann. § 9-1-17 (West 2014) (20 years); Ala. Code § 6-2-30 (2014) (20 years); Ky. Rev. Stat. Ann. § 413.090 (West 2014) (15 years); Ohio Rev. Code Ann. § 2305.06 (West 2014) (15 years); 735 Ill. Comp. Stat. 5/13-206 (2014) (10 years); La. Civ. Code Ann. art. 3499 (2014) (10 years); W. Va. Code § 55-2-6 (2014) (10 years); Wyo. Stat. Ann. § 1-3-105(a)(i) (West 2014) (10 years).

ply to all players, helping to stem a collective action problem that has prevented the market from self-correcting these issues.

Changing these practices will no doubt involve costs. But those costs will be offset by the increased capability of debt buyers to collect legitimate debts and the right amounts from the right consumers. As Douglas Baird has noted, "[t]here is nothing foreordained about the extent to which creditors should be able to call upon the state to collect their debts, and the rights extended here have always been carefully limited."[333] Improving the information and documentation included in a debt sale and warrantying material aspects of the debts such as warranty and title will not only help consumers, but the market as well.

[333] Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 942 (2006).

Appendix

Table 1: This is an exemplar of the variety of contract terms in the Litigation Sample.[334]

Contract type[335]	1	2	3	4	5	6
Disclaimers						
Accounts are sold without recourse but no waiver x of warranties	👍					
Accounts are sold "as is," "with all faults," without recourse or any warranties unless explicitly stated		👎	👎	👎	👎	👎
Ownership of Accounts						
Seller warrants it has title to the accounts	👍					
Seller states that *to the best of its knowledge* it has title to the accounts it is selling		👎	👎			
Nothing said about whether seller owns accounts				👎	👎	👎
Accuracy of Information						
Nothing said about accuracy					👎	
Seller warrants that (some or all) information is accurate and complete in all material respects	👍					
Warrants that information is accurate *to the best of seller's knowledge*			👎			
Specifically *disclaims* representations as to accuracy of interest, amounts due, or date of first delinquency				👎		

[334] A "thumbs up" indicates positive representations about the debts.

[335] There are exactly three Type 1 contracts in the Litigation Sample: Second Amended and Restated Receivables Purchase Agreement (July 1, 2002), *supra* note 63; Receivables Purchase Agreement (Dec. 1, 2005), *supra* note 63; Receivables Purchase Agreement (Apr. 4, 2007), *supra* note 63. An example of a Type 3 contract is Lot Fresh Charged-Off Account Resale (2011), *supra* note 76. There are exactly four Type 8 contracts, and all four involve the FIA entity (previously MBNA Bank)—a subsidiary of Bank of America. *See generally supra* note 20; *but see* Loan Sale Agreement between FIA Card Servs., N.A. and Asset Acceptance, L.L.C. (Aug. 1, 2011), at §§ 4.2 & 8.3(g), *available at* http://debtbuyeragreements.com/archives/316, *archived at* http://perma.cc/T7DV-Q2C3 (agreeing to an "as is" sale, but representing that the loans were originated and serviced in compliance with all laws).

Specifically *disclaims* representations as to accuracy or completeness of *all* information		👎		👎		👎
Compliance with Laws						
Nothing is said about compliance with laws					👎	
Seller is original creditor and warrants that it has complied with applicable consumer laws	👍	👍				
Debt buyer warrants that *one* owner/ servicer (itself or original creditor) has complied with applicable consumer laws (silent as to other owners)				👎		
Seller (original creditor or debt buyer) states that it has complied *to the best of seller's knowledge* with applicable consumer laws			👎			
Specifically *disclaims* compliance with one or more laws						👎

TABLE 2: EXEMPLAR CONTRACT LANGUAGE FROM LITIGATION SAMPLE

No recourse sale but does not disclaim warranties and includes affirmative representations	"As is," "No warranties" and . . . positive representations	specific disclaimers
Seller has good and marketable title [to the Receivables] free and clear of all Encumbrances[336]	Seller has good and marketable title to each Charged-off Account to be sold hereunder and each such Charged-off Account shall be transferred free and clear of any lien or encumbrance.[337]	Most contracts make *no* affirmative representations about having title, but some do: [at closing] Seller will have good and marketable title to the

[336] Receivables Purchase Agreement between CompuCredit Int'l Acquisition Corp. and Partridge Funding Corp. (Apr. 4, 2007), at 4, *available at* dalie.org/wp-content/uploads/2014/10/2007.04.04-Compucredit-to-Partridge-Forward-Flow-few-reps-no-as-is.pdf, *archived at* http://perma.cc/8HZD-CHN4.

[337] Credit Card Account Purchase Agreement between Turtle Creek Assets, Ltd. and Matrix Acquisitions, L.L.C. (July 29, 2009), at 5, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.07.29-Turtle-Creek-Assets-Ltd-to-Matrix-Acquisitions-LLC.pdf, *archived at* http://perma.cc/LSU9-58TB.

		Accounts, free and clear of all liens, charges, encumbrances or rights of others (other than the Purchaser).
[E]ach Receivable existing as of the Cut-Off Time . . . was created in compliance in all material respects with all Requirements of Law applicable to the institution which owned such Receivable at the time of its creation and pursuant to a Credit Card Agreement which complies in all material respects with all Requirements of Law[338]	Each of the Charged-off Accounts has been maintained and serviced by Seller in compliance with all applicable state and federal consumer credit laws, including, without limitation, the Truth-in-Lending Act, the Equal Credit Opportunity Act, and the Fair Credit Billing Act.	Seller makes <u>no representations</u> as to . . .the *compliance of the Accounts with any state or federal laws, rules, statutes, and regulations* . . .[339]
The Account Schedule list of Excluded Accounts is *accurate and complete in all material respects* . . . .[340]	This sale is made only with the representations and warranties that the balances set forth in Exhibit "A" and reflected as the principal balance of the Loans purchased hereunder *represent an accurate accounting of the actual outstanding balances* as of the Cut-Off Date, and that Seller owns the Loan.[341]	Seller makes <u>no representations</u> as to the *accuracy of any sums shown as current balance or accrued interest* amounts due under the loans [or] any other matters pertaining to the loans . . . .[342]

[338] Receivables Purchase Agreement (Apr. 4, 2007), *supra* note 336, at 4.
[339] Purchase and Sale Agreement between Credigy Receivables Inc. and Newport Capital Recovery Group II, L.L.C. (May 29, 2009), at 4, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.05.29-Credigy-Receivables-Inc-to-Newport-Capital-Recovery-Group-II-LLC-.pdf, *archived at* http://perma.cc/XWG2-RYLX.
[340] Second Amended and Restated Receivables Purchase Agreement between Household Bank (SB), National Association and Household Receivables Acquisition Company II (July 1, 2002), at 13, *available at* http://dalie.org/wp-content/uploads/2014/10/2002.07.XX-Household-Bank-to-Household-Receivables-Acquisition-Company-Forward-Flow-Agreement.pdf, *archived at* http://perma.cc/T36W-2EBU (emphasis added).
[341] Purchase and Sale Agreement between CashCall, Inc. and GCFS, Inc. (Mar. 26, 2010), at 8, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.03.20-CashCall-Inc-to-GCFS-Inc-.pdf, *archived at* http://perma.cc/A8SA-MM83.
[342] *See* 2008, 2009, 2010 FIA Card Servs., N.A. Loan Agreements, *supra* note 20, at § 9.4.

TABLE 3: COMPANIES REPRESENTED IN LITIGATION SAMPLE

No.	Company Name	Number of Contracts	Roles
1	Turtle Creek Assets	10	seller (9), buyer (1)
2	CACH, LLC	8	buyer
3	Chase Bank USA, N.A.	7	seller
4	HSBC Bank / Household	7	seller
5	MBNA America Bank / FIA Card Services	7	seller
6	Wells Fargo	6	seller
7	Global Acceptance Credit Company	5	seller (2), buyer (3)
8	Cash Call, Inc.	4	seller
9	Citibank, N.A.	4	seller
10	Mountain Lion Acquisitions	4	seller (1), buyer (3)
11	Unifund CCR Partners	4	seller (3) and buyer (1)
12	Credigy	3	seller (2), buyer (1)
13	Midland Funding LLC	3	buyer
14	Ozark Financial Group	3	buyer
15	Asset Acceptance	2	buyer
16	Capital One	2	seller (1), buyer (1)
17	Cavalry SVP I, LLC	2	seller (1), buyer (1)
18	Cuda & Associates	2	buyer
19	GCFS, Inc.	2	seller (1), buyer (1)
20	GE Capital Bank/ Money Bank	2	seller
21	Genesis Financial Services/ Recovery Systems	2	seller (1), buyer (1)
22	Main Street Acquisitions	2	buyer
23	Platinum Capital Investments	2	seller
24	Riverwalk Holdings	2	seller
25	Sherman Originator USA/Sherman Acquisition	2	seller (1), buyer (1)
26	US Bank	2	seller
27	Wireless Receivables Acquisition Group	2	buyer
28	Accelerated Financial Solutions	1	buyer
29	Account Resolution Finance	1	buyer
30	Amos Financial	1	buyer
31	Arrow Financial Services	1	seller
32	Autovest LLC	1	buyer
33	BH Financial Services	1	buyer
34	Capital Debt Solutions	1	seller
35	Centurion Capital Corp.	1	buyer
36	CJMA Financial Corporation	1	buyer
37	Collect America	1	seller
38	CompuCredit International	1	seller
39	Covergence Receivables	1	buyer
40	Cuzco Capital Investment	1	seller
41	Debt One LLC	1	buyer
42	Dodeka LLC	1	seller
43	First Financial Portfolio Management	1	seller
44	First Select	1	seller
45	Hilco Receivables	1	buyer
46	Hudson Keyse LLC	1	buyer
47	Jefferson Capital Systems	1	seller

48	Juniper Bank	1	seller
49	LHR, Inc.	1	buyer
50	Livingston Financial	1	buyer
51	LP Investments	1	seller
52	Metris Receivables	1	buyer
53	MRC Receivables Corp.	1	buyer
54	National Credit Acceptance	1	seller
55	National Loan Exchange	1	seller
56	Newport Capital Recovery Group	1	buyer
57	NLEX LLC	1	seller
58	Northstar Capital Acquisitions	1	seller
59	Palisades Collection	1	buyer
60	Partridge Funding Corporation	1	buyer
61	Portfolio Recovery Associates	1	buyer
62	Providian National Bank	1	seller
63	Purchasers Advantage	1	buyer
64	RAB Performance Recoveries	1	buyer
65	Retailer Credit Services	1	buyer
66	Routhmeir Sterling	1	seller
67	Royal Financial Group	1	buyer
68	Sacor Financial	1	buyer
69	Security Credit Services	1	buyer
70	Sovereign Bank	1	seller
71	Sunlan Corp.	1	buyer
72	Target National Bank	1	seller
73	TD Bank USA	1	buyer
74	The 704 Group	1	buyer
75	The Bureaus Investment Group	1	buyer
76	United Credit Recovery	1	buyer
77	US National Bank	1	buyer
78	Zenith Acquisitions	1	buyer

ARTICLE

ENDING PERPETUAL DEBTS

Dalié Jiménez*

ABSTRACT

Consumer debts in the United States can effectively live (and grow) forever: most statutes of limitations do not extinguish them; they can morph into relatives' obligations after the debtor's death; and they sometimes rise from the grave even after they have been paid. All the while, interest and fees accrue. There is one sure way to extinguish most debts, however, and that is by filing bankruptcy. This Article explores the practical, philosophical, and economic effects of the current system. It proposes a form of "automatic bankruptcy" for consumer debts: a federal discharge that, by operation of law, would extinguish debts (roughly) seven years after a default, or seven years after a judgment. The Article explores additional features of this proposal including ones designed to ensure it is self-executing, and others that mirror features of the Fair Credit Reporting Act and the discharge provisions of the Bankruptcy Code.

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I. INTRODUCTION

For human beings, death is certain; but this is not so for debts. This Article argues that law and practice conspire to create a class of virtually perpetual debts that psychologically and actually burden those individuals for much longer than economically and socially justified. It argues for an automatic form of debt discharge to occur after a period of time during which creditors have been unsuccessful in extracting payment from a debtor.

As far back as the Bronze Age, Babylonian kings periodically issued proclamations cancelling all their subjects' debts.[1] In biblical times, these "Clean Slate" proclamations were codified into law and occurred regularly.[2] This was known as the Jubilee year; an "occasion of joyful celebration," since this was a time when many peasants returned home from serving as debt peons.[3] Despite calls for a Jubilee in modern times, it remains something ancient.

Today's debts can grow and persist seemingly forever. Paying the debt in full should suffice, but sometimes even this is not

1. DANIEL C. SNELL, A COMPANION TO THE ANCIENT NEAR EAST 206 (2006).
2. MARC VAN DE MIEROOP, KING HAMMURABI OF BABYLON: A BIOGRAPHY 12 (2005).
3. JUDY BARNES ET AL., COASTING: AN EXPANDED GUIDE TO THE NORTHERN GULF COAST 241 (4th ed. 2003).

enough. The well-documented problem of "zombie debts" stems from the larger practice of selling and reselling unsecured debts with little to no evidence of the sale record and creates a world in which individuals may be contacted about a debt many years after it is paid and required to provide evidence that they indeed paid it. The death of the debtor also fails to extinguish the debt, and it may instead turn into the obligation not just of the estate of the deceased—the legal rule—but of the survivors for failure to know about their lack of obligation under the law.

It is common to think that statutes of limitations can kill debts.[4] But this is not the case in most states. Generally, these statutes only provide a defense to a civil action.[5] If the debtor fails to raise the defense in a timely manner, the creditor may obtain a judgment against her, and enjoy another ten or twenty years in which to collect.[6] In most states outside of Mississippi and Wisconsin, creditors can continue to pursue debtors outside of the courts past the limitations period.[7] Creditors may also attempt to persuade debtors to make a small payment or acknowledge the debt and thus restart the limitations period, even if that period had expired long before. This "reset" would once again allow a creditor to use the court process to collect from the debtor.

Debtors in the United States do have one escape from immortal obligations: they can avail themselves of bankruptcy protection. A bankruptcy discharge renders the debt uncollectible

4. LaToya Irby, *What to Know About the Statute of Limitations on Debt*, THE BALANCE (May 31, 2017), https://www.thebalance.com/statute-of-limitations-on-debt-960565 [https://perma.cc/Q3DM-9F3S]; *see also* Timothy E. Goldsmith & Nathalie Martin, *Testing Materiality Under the Unfair Practices Acts: What Information Matters When Collecting Time-Barred Debts?*, 64 CONSUMER FIN. L.Q. REP. 372 (2010) (noting that "[m]any lawyers are surprised to learn that a creditor or debt collector is allowed to collect on a time-barred debt. After all, it may seem that this is the point of having a statute of limitations.").

5. *See* Jeanine Skowronski, *50 Things Anyone Dealing with a Debt Collector Should Know*, CREDIT.COM (Apr. 5, 2017), http://blog.credit.com/2017/04/50-things-anyone-dealing-with-a-debt-collector-should-know-168944/ [https://perma.cc/7Z7A-9YEB]. The exception to this rule only applies in two states. In Mississippi and Wisconsin, the passing of the statute of limitations period extinguishes the right as well as the remedy. MISS CODE ANN. § 15–1–29 (1976); Thomas J. Watson, *Bankruptcy Cases: Proceed with Caution*, WIS. LAW., July/Aug. 2016, at 56. In those states, once the statutory period expires, the debtor no longer owes the debt. This is essentially the proposal of this Article. Unfortunately, I have found no economic studies of the impact of these rules on the availability or cost of lending in Mississippi or Wisconsin.

6. The creditor may open itself to liability under the Fair Debt Collection Practices Act (FDCPA) in this situation, and perhaps to the state analog to the FDCPA. However, these would be separate actions that could be pursued by the debtor against the creditor. 15 U.S.C. § 1692k(a), (d) (2012).

7. *See, e.g.*, Thomas R. Dominczyk, *Time-Barred Debt: Is It Now Uncollectable?*, BANKING & FIN. SERVS. POL'Y REP., Aug. 2014, at 13.

from the individual and protects the debtor from future attempts at collection, making it a violation of a court order to do so.[8] But not all debts are dischargeable, and the process is costly and underused. Bankruptcy can also be overkill, like amputating a limb when a more exacting surgical procedure would do.

If a debt is not repaid in full, it will likely grow significantly over time.[9] The creditor will also be able to attempt to collect by filing a lawsuit against the consumer. Across the country, hundreds of thousands of such lawsuits are filed every year in state courts.[10] The creditor, as a result of the debtor's default, wins the overwhelming majority of these suits.[11] Once a creditor obtains a judgment, they can pursue the debtor for ten or twenty years in most states, sometimes longer.[12] This means that the idea is that even if the debtor is judgment-proof at the time of the judgment, the debt owner may continue to "follow" the debtor and recover if the debtor's situation improves.[13] But how long should this be allowed? What is the cost of this system, economically and socially? Should the system change? In what way? What are the implications of such a change?

This Article explores these questions. It ultimately argues for a debt Jubilee of sorts: a statutory procedure under federal law whereby individual consumer debts are automatically and regularly extinguished and cannot be revived. Akin to an "automatic" bankruptcy discharge, this system would unequivocally "kill" unsecured consumer debts seven years and 180 days after the consumer ceased paying, or seven years after they were reduced to a valid judgment. My proposal creates a uniform federal law applicable to consumer debts owed to private,

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8. Steven H. Resnicoff, *Interactions Between Bankruptcy Law and State Law: What Illinois Judges Need to Know*, 24 LOY. U. CHI. L.J. 437, 453 (1993).

9. Many contracts creating debts include provisions for adding interest and fees to a delinquent obligation. Even if there was no such provision, many states allow creditors to collect a statutory amount of interest. Rachel Marin, *Collecting Interest on Charged Off Debts and How Debt Collectors Must Disclose the Accrual of Interest to the Debtor Collecting Interest on Charged Off Debts and How Debt Collectors Must Disclose the Accrual of Interest to the Debtor*, BUS. L. TODAY, April 2014, https://www.americanbar.org/publications/4blt/2014/04/04a_marin.html [https://perma.cc/2SD3-ESZM].

10. Richard M. Hynes, *Broke but not Bankrupt: Consumer Debt Collection in State Courts*, 60 FLA. L. REV. 1 (2008).

11. *Rubber Stamp Justice: U.S. Courts, Debt Buying Corporations, and the Poor*, HUMAN RIGHTS WATCH (Jan. 20, 2016), https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor [https://perma.cc/5AUP-PJ6Z].

12. Gerri Detweiler, *Creditor Gets a Judgment Against You—Now What?*, CREDIT.COM (Apr. 20, 2017), http://blog.credit.com/2017/04/creditor-gets-a-judgment-against-you-now-what-51696/ [https://perma.cc/QMX2-9XT3].

13. In reality, it appears that most judgments go unpaid. Hynes, *supra* note 10, at 19–20, 56–57.

nongovernmental entities.[14] This goes beyond the typical "statutes of repose" and extinguishes both the right as well as the remedy and provides the former debtor affirmative statutory rights against someone who attempts to collect an extinguished debt.

Part II gives an overview of the laws governing different types of debts—how long a creditor must use legal process to collection for various debts and in what ways can debts be extinguished. It details how and when debts can become perpetual obligations. Part III discusses the benefits, consequences, and costs of these lasting debts. Part IV proposes and explores a solution: requiring that no matter what else happens, debts be automatically discharged after a (roughly) seven-year period of nonpayment. This Part also explores the likely effects of this proposal, addresses some likely objections, and discusses theoretical justifications. Part V concludes.

II. PERPETUAL OBLIGATIONS: THE LIFE OF DEBTS

My contention that most debts are effectively perpetual rests on a combination of formal law and law-in-action. This Part describes how debts are born, grow, and how they die. It then turns to explain how debts are like a cancer—perpetually growing—often even in cases in which one might think they die, such as when they are paid in full, the debtor dies, or the statute of limitations expires. Finally, I argue that in most cases, consumer debts can only meet their "true death" through a bankruptcy discharge.

A. Birth and Development

Debts can be born in many ways. They might come about as a result of a contractual agreement a consumer failed to honor: failing to pay a credit card bill, writing a check that bounces, or failing to pay a cell phone bill. A government may impose debts for late or nonpayment of taxes, tickets, fines, or other assessments.[15] Debts may be incurred after medical treatment if the insurance company refuses to pay the whole bill. If a debt is not repaid in full, the amount due will likely increase through interest rates and

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14. I specifically carve out debts owed to individuals—such as child support and alimony—and debts owed to governmental entities (e.g., taxes, fines, etc.). These items deserve special consideration and are beyond the scope of this Article.

15. Government debts can include fines, fees, orders of restitution, taxes, and federally guaranteed student loans, among others. U. S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/W35J-AX49].

fees. This growth can be quite substantial. Whether and how much interest accrues depends on the type of debt. If the debt was created by a contract, the contract probably included a provision for interest that compounds on a daily or monthly basis until it is repaid in full. If not, many states statutes allow creditors who did not provide for interest in their contract to charge simple or sometimes compound interest on delinquent debts.[16] Similarly, fees are typically spelled out in a contractual agreement, but may be added by operation of law in the form of, for example, court costs.

When a debt is delinquent, the creditor has a few options. Calling or writing the debtor are usually at the top of the list. If these tactics fail to produce payment, the remaining options depend on the type of debt.

If attempting to collect from the consumer proves unsuccessful, a creditor may hire a third-party collection agency to attempt to collect or may choose to recoup some of the loss by selling the obligation to a debt buyer.[17] Interest can continue to accrue on the debt if allowed by law or contract. After some time, the debt owner may choose to sue the consumer in state court.[18] Winning a debt collection lawsuit allows the debt owner to essentially turn an unsecured debt into a secured one by way of a judgment.[19] Since most cases are won by default, it is often the case that the plaintiff will not need to offer any proof—that the defendant owes the debt, the amount is correct, or the plaintiff is the current owner of the debt—because the allegations in the complaint are sufficient.[20] If the debt owner wins a lawsuit, court costs and judgment interest—plus attorney's fees if permitted by the contract—will be added to the debt.[21]

16. CONN. GEN. STAT. § 31-1 (2015), 815. ILL. COMP. STAT. 205/2 (2016), MASS. GEN. LAWS ch. 107, § 3 (2016), FLA. STAT. § 687.01 (2016), TEX. FIN. CODE § 302.002 (2016).

17. *See* Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. LEGIS. 41, 42 (2015).

18. Debts owed to the government operate a little differently. While the government (state or federal) can obtain a judgment and satisfy it using the same court processes as a private creditor, in practice this is rare. The reason is that in most cases the government enjoys extraordinary powers of collection. Danielle Douglas-Gabriel, *Trump Administration Welcomes Back Student Debt Collectors Fired by Obama*, WASH. POST (May 3, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/05/03/trump-administration-welcomes-back-student-debt-collectors-fired-by-obama/?utm_term=.639cbcfe21a1.

19. Kristi Welsh, *What's the Difference Between Secured Debt and Unsecured Debt?*, CREDIT.COM (Oct. 31, 2016), http://blog.credit.com/2016/10/whats-the-difference-between-secured-debt-unsecured-debt-161871/.

20. Danning v. Lavine, 572 F.2d 1386, 1388–89 (9th Cir. 1978).

21. Margaret Reiter, *What is a Money Judgement?*, NOLO, https://www.nolo.com/legal-encyclopedia/what-is-money-judgment.html [https://perma.cc/RTB8-K6TA] (last visited Oct. 4, 2017).

Once a judgment is entered, the plaintiff–creditor—now a "judgment creditor"—can initiate supplementary proceedings to collect on that judgment. These proceedings vary significantly state by state. In some states, a plaintiff–creditor will need to first obtain a "writ"—court order—before executing in any of the defendant–debtor's property.[22]

The defendant–debtor may or may not be given notice of this writ, or a notice to appear to supplementary proceedings where the debtor is supposed to explain whether they have any non-exempt property that could be used to satisfy the judgment. Once issued, the writ orders the sheriff or marshal to look for non-exempt property of the debtor,[23] seize it, sell it, and pay the proceeds to the judgment creditor until the judgment is fully paid.[24]

In most states, a judgment creditor can garnish the debtor.[25] A garnishment is a legal means of collecting a monetary judgment

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22. *In re* Wilson, 38 B.R. 940, 941–42 (Bankr. W.D. Ky. 1984); Asher v. United States, 570 F.2d 682, 683–84 (7th Cir. 1978).

23. Each state has exemption laws which list precisely what kind or amount of property cannot be seized by judgment creditors and the process which must be taken before doing so. A debt collector is bound by the requirements of the FDCPA for it post-judgment collection activities. *See* Richard H. Hynes, *Bankruptcy and State Collections: The Case of the Missing Garnishments*, 91 CORNELL L. REV. 603, 632, 647–48 (2006) (finding that garnishments are extremely common in Virginia).

24. Writs are routinely issued and delivered to sheriffs for "execution." Once the sheriff receives a writ, he or she will go looking for the debtor's property. In practice, the lawyer for the judgment–creditor may tell the sheriff exactly where to find the property of the debtor (such as a car, a stereo, a home, etc.). In most cases, the sheriff will take physical possession of the property (termed "to levy upon the property"); take it to the courthouse; advertise it; and sell it to the highest bidder. In the case of real property, a notice of seizure and sale will be posted, or potentially a judgment lien will be entered in the property record at the registry of deeds such that the property cannot be sold without taking account of the judgment. Any proceeds obtained from the sale of the property will go to pay the judgment creditor. *Construction Law Survival Manual: Ch 17—Enforcement of Judgment*, FULLERTON & KNOWLES, http://www.fullertonlaw.com/enforcement-of-judgment#f [https://perma.cc/HC9Y-CG3G] (last visited Feb. 4, 2018). An entry is made in the judgment record noting the partial or complete satisfaction of the judgment. If the proceeds are insufficient to pay the judgment in full, the sheriff will be commanded to look for other of the debtor's property to seize and the process will start again. In many of these cases, this process will stop with the sheriff because no non-exempt property is found or known about. While the sheriff has authority to go into a person's home and seize any property that is non-exempt—e.g., jewelry, flat-screen televisions, etc.—in practice this probably rarely happens unless someone knows specifically that the debtor has high value items in his home. If the debtor owns a car outright, or has equity in it, seizure will likely occur, since many states do not exempt cars from seizure. Justin Harelik, *What Can Creditors Take in a Bankruptcy?*, BANKRATE, http://www.bankrate.com/finance/debt/what-can-creditors-take-in-a-bankruptcy.aspx [https://perma.cc/4ZQ2-DAFT] (last visited Oct. 6, 2017).

25. *See, e.g.*, FLA. STAT. § 77.01 (2016); ALA. CODE § 5-19-15 (1975); ALASKA STAT. § 09.40.010 (2015); ARIZ. REV. STAT. § 12-1598 et seq. (2007); ARK. CODE ANN. § 16-110-402 (2015); CAL. CIV. PROC. CODE § 706.050 (West 2016); COLO. REV. STAT. § 13-54-104 (2015); CONN. GEN. STAT. § 52-361a (2015); GA. CODE ANN. § 18-4-20 (2016), KY. REV. STAT. § 425.506 (2016).

against a judgment debtor by ordering a third-party—the garnishee—to pay money, otherwise owed to the defendant-debtor, directly to the judgment creditor.[26] A judgment creditor will typically seek to garnish a debtor's bank account or wages from his employer.[27]

A minority of states do not allow wage garnishment to satisfy unsecured consumer debts—but do for debts related to taxes, child support, federally-guaranteed student loans, and court-ordered fines or restitution.[28] Several other states observe maximum thresholds that are lower than the 25% maximum provided by federal law.[29] Some states prohibit garnishment altogether in certain circumstances.[30]

Once a creditor obtains a judgment, she has much longer than the original statute of limitations period to pursue the debtor: 10 or 20 years in most states, sometimes longer.[31] In New York, for example, a judgment creditor may initiate a collection proceeding up to 20 years after a judgment has been issued.[32] This means that a consumer may be obligated to pay up on a debt up to 26 years after she ceased paying.[33] During those 26 years, post-judgment interest continues to accrue.[34] In most states, post-judgment

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26. 32 CFR § 935.97 (2016).

27. *Garnishment: Forcing Debtors to Pay Involuntarily*, HIDAY & RICKE, P.A., https://www.dropbox.com/s/zrzxrzd38rd7nw3/Hiday-Ricke-Garnishment-Forcing-Debtors-to-Pay-Involuntarily.pdf?dl=1 (last visited July 26, 2015) [http://perma.cc/9FXZ-ZT8U] (noting that "garnishments can be an extremely effective recovery tool [and that] they account for a large percentage of the funds that we collect on behalf of our clientele")

28. With the exception of Pennsylvania, North Carolina, South Carolina, and Texas, all states allow some form of garnishment. to satisfy unsecured consumer debts. PA. CONS. STAT. § 8127 (2005); N.C. GEN. STAT. § 110-136 (2015); N.C. GEN. STAT. § 120-4.29 (2015); S.C. CODE ANN. § 37-5-04 (2016); TEX. CONST. ART. 16, § 28 (2017).

29. DEL. CODE ANN. tit. 10, § 4913 (2003); 735 ILL. COMP. STAT. 5/12-803 (2006).

30. The other type of garnishment, also known as attachment (or attachment of earnings), requires the garnishee to deliver all the defendant's money and/or property in the hands of the garnishee at the time of service of process to the court, to be paid over to the judgment creditor. Since this type of garnishment is not continuing in nature, but is not subject to the type of restrictions that apply to wage garnishment, it is most often used to levy bank accounts. William T. Plumb, Jr., *Federal Liens and Priorities—Agenda for the Next Decade II*, 77 YALE L.J. 605, 608–09 (1968).

31. *See, e.g.*, N.J. REV. STAT. § 2A:14-5 (2014) (20 years); N.Y. C.P.L.R. § 211(b) (McKinney 2010) (20 years); R.I. GEN. LAWS ANN. § 9-1-17 (West 2014) (20 years); ALA. CODE § 6-2-32 (2014) (20 years); KY. REV. STAT. ANN. § 413.090 (West 2014) (15 years); OHIO REV. CODE ANN. § 2305.06 (West 2014) (15 years); 735 ILL. COMP. STAT. 5/13-206 (2014) (10 years); LA. CIV. CODE ANN. art. 3499 (2014) (10 years); W. VA. CODE § 55-2-6 (2014) (10 years); WYO. STAT. ANN. § 1-3-105(a)(i) (West 2014) (10 years).

32. *In re* Ballenzweig's Estate, 22 N.Y.S.2d 541 (1940).

33. This assumes the consumer was sued on the debt just before the six-year statute of limitations expired. *See* N.Y. CIV. PRAC. LAWS & RULES § 201 et seq.

34. David Gray Carlson & Carlton M. Smith, *New York Tax Warrants: In the Strange World of Deemed Judgments*, 75 ALB. L. REV. 671, 692–93 (2012).

interest is set by statute or by the court with a statutory maximum. A maximum of 8–12% is not uncommon.[35]

Exacerbating the problem, some states allow post-judgment interest to compound, typically annually. As an example, in Michigan, the post-judgment interest rate for a defaulted credit card debt is 12%, compounded annually.[36] If a creditor obtained a $1,000 judgment in Michigan, she could be entitled to collect as much as $3,105.85 from the debtor through legal proceedings for up to 10 years after the judgment.[37] In contrast, the same debt in a state using simple interest would only rise to $1,900 after 10 years of remaining unpaid. After the expiration of the judgment (10 years in Michigan, longer in many other states), the creditor may still contact the debtor to obtain payment of whatever is left on the debt, although she would not have any legal means to coerce the debtor into paying.[38]

Why might a creditor wait to collect from a debtor? Sometimes it is because the debtor does not have any assets that could be seized to pay his creditors—that is, the debtor is judgment proof. The creditor might also determine that although collection costs are added to the debt, it is too costly to attempt to collect. The creditor might also hope that the debtor repays voluntarily—through phone calls or the like.

B. Cancerous Growth

Cancer cells are immortal.[39] They replicate endlessly; growing and growing perpetually.[40] My contention is that in important ways, in the United States, debts function the same way. At bottom, a debt is an obligation to pay a sum to another party. The sum itself is often changing; growing as interest accumulates,

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35. But note that the Supreme Court of Connecticut recently decided that courts do not have discretion to award post-judgment interest in a situation where the contract involved a loan and the parties agreed to a post-maturity interest rate. Sikorsky Fin. Credit Union, Inc. v. Butts, 108 A.3d 228, 233 (Conn. 2015).

36. MICH. COMP. LAWS ANN. § 600.6013 (West). This 9% compounds annually. The formula is Principal x (1 + interest rate) $^{\text{time (in years)}}$.

37. These numbers would be different if the debtor made any payments towards the debt. Michigan has a ten-year statute of limitation for collecting on a judgment. MICH. COMP. LAWS ANN. §600.5809(3) (West).

38. Depending on the interest rate, there may be incentives for a creditor to wait to get paid. AJ Walker, *Old Debt Can Take a Chunk out of Your Paycheck*, NBC CONN. (May 14, 2015, 7:12 AM), http://www.nbcconnecticut.com/troubleshooters/Old-Debt-Can-Take-a-Chunk-Out-of-Your-Paycheck-303688231.html [https://perma.cc/5T43-GV8G].

39. *Cancer Cells*, CANCER RESEARCH UK (Oct. 28, 2014), http://www.cancerresearchuk.org/about-cancer/what-is-cancer/how-cancer-starts/cancer-cells [https://perma.cc/SHY2-WLAK].

40. *Id.*

decreasing if the debtor makes a payment. In many important ways, however, consumer debts refuse to die.

Even when repaid in full, some debts may return, like zombies rising from the grave. The debtor's death does not kill her debts; they survive and may haunt the debtor's family members for months or years after.[41] At first blush, the expiration of the statute of limitations may seem to spell the end for a debt. However, in most circumstances these statutes are not meant to be debt-killers; they merely lessen the debt owner's remedies. In practice, they may have no effect unless the debtor explicitly asserts her rights. The only way to ensure a debt truly dies is through a bankruptcy discharge. Obtaining a discharge is akin to achieving permanent remission. Like with cancer, however, remission comes at a cost.

1. Full Payment. Full payment of a debt would seem like a very good way to kill it entirely. Paying it in full ostensibly extinguishes it. The debtor fulfills her obligation and the creditor is made whole. This is true for many debts, but today individuals must worry about debt zombies rising from the full payment grave to haunt the former debtor.[42]

Most unsecured consumer debts that remain unpaid are sold to debt buyers after a few months or a year of nonpayment.[43] In these situations, the buyer buys the rights that the creditor had to collect from the debtor. In many cases, that is all they buy.

As I have described elsewhere, the contracts selling these debts do not purport to sell much else—many disclaim all warranties of title or accuracy.[44] Few include any documentation about the debt.[45] All that is transferred between creditor and buyer is information about a debt (the debtor's name, address, amount of the debt, when it was incurred, etc.).[46] This is the same information that is transferred between debt buyers when the debt is sold multiple times, as often happens when it remains unpaid.

Because all that is transferred during a debt sale is information, the theft or disclosure of this information to third

41. *In re* Marriage of D'antoni, 125 Cal. App. 3d 747, 749 (1981).

42. *See, e.g.*, Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. REV. 327, 330 (2014).

43. Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, 11 HARV. L. & POL'Y REV. 91, 96 (2017).

44. Jiménez, *supra* note 17, at 59.

45. Brian Burnes, *Jackson County Jury Assesses $82 Million Verdict Against Debt Collection Firm*, KAN. CITY STAR (May 15, 2015, 8:48 AM), http://www.kansascity.com/news/local/article21073359.html [https://perma.cc/M5C9-M2YP].

46. *In re* Pursley, 451 B.R. 213, 217 (Bankr. M.D. Ga. 2011).

parties means that those third parties would have the same information as the debt buyer and could pursue the debtor despite the fact that they do not own the debt.[47] Thus, payment in full may not extinguish the debt: the debtor may have paid the wrong party,[48] or the debt buyer may have sold the same debt to two different parties,[49] or sold it without disclosing that it had already been paid in full.[50] The longer a debt goes unpaid, the more times it is sold and resold, and the more likely it will turn into a zombie.

2. Death of the Obligor. Another natural way that debts should die is if the obligor dies. But this is often an imperfect death. Debts survive the death of the obligor.[51] Creditors can seek payment from the assets of the estate of the deceased.[52] In the ideal world, the estate has a trustee who liquidates assets to repay creditors and then under the supervision of a probate court, doles out any remaining assets to the estate's beneficiaries.

The reality for most Americans is much more muddled. Most individuals are insolvent—or close to it—upon their death.[53] In these situations, there is little reason for survivors to pay expensive trustee or probate fees. Instead, the survivors—typically the spouse or children—do what they can, all the while grieving for their family member.[54] Most estates have such few assets that they do not go through probate, leaving the deceased relatives to figure out what to do about the phone calls they receive from creditors about their relative's debts.[55] Survivors sometimes pay debts out of their own pocket because they do not understand the law. Eventually these debts die when the estate is administered, but before doing so, they may morph into debts of the spouse or children.[56]

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47. JAKE HALPERN, BAD PAPER: CHASING DEBT FROM WALL STREET TO THE UNDERWORLD 5–7 (2015).

48. Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 270 n. 75 (2011).

49. *Id.* at 271 n.76.

50. *Id.* at 271 n.78.

51. Bill Fay, *Debt of Deceased Relatives*, DEBT.ORG, https://www.debt.org/advice/deceased-relatives/ [https://perma.cc/276R-HQW2] (last visited Oct. 10, 2017).

52. *Id.*

53. *Id.*

54. *See FTC Statement of Policy Regarding Communications in Connection with the Collection of Decedents' Debts*, 76 FED. REG. 44915 (July 27, 2011).

55. *See* Concurrence of Commissioner Julie Brill, FDCPA Enforcement Policy Statement Matter No. P104806 (Jul. 20, 2011), https://www.ftc.gov/sites/default/files/documents/federal_register_notices/statement-policy-regarding-communications-connection-collection-decedents-debts-policy-statement/110720fdcpa.pdf [https://perma.cc/A8WE-9BNN].

56. Paul Muschick, *Debt Collector Sued for Pursuing People for Relatives' Debts*, THE

3. Statutes of Limitations (SOLs). Statutes of limitations "are, and have been, considered basic in our legal system, as well as in others."[57] They have existed for almost four hundred years in Anglo-American law.[58] Sometimes called "statutes of repose," the often-repeated justification is that "they are designed to protect against stale claims after evidence has been lost, memories have faded and witnesses have disappeared."[59]

Some have argued that "the word 'repose' can be taken literally in this situation—that relief of individuals from worry over past events is a proper public purpose."[60] In their current form, however, statutes of limitations do not serve that purpose. First, in most states, statutes of limitations are only an affirmative defense to a civil action.[61] Failing to raise the defense early enough in a case typically waives it.[62] Second, not all debts have a corresponding limiting statute.[63] Third, it is difficult to know which statute applies to a particular situation. Oftentimes there are good legal arguments for applying statutes of different lengths. Fourth, most statutes of limitations only extinguish the legal remedy, not the right to collect.[64] Expiration of the statute does not prevent a creditor from calling or writing the debtor seeking to collect.[65] Finally, in most states and circumstances it is very easy

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MORNING CALL (June 10, 2015), http://www.mcall.com/news/local/watchdog/mc-hamilton-law-group-james-havassy-filial-responsibility-law-watchdog-20150610-column.html [https://perma.cc/M7X8-KS2U].

57. Charles C. Callahan, *Statutes of Limitation—Background*, 16 OHIO ST. L.J. 130, 131 (1955).

58. "The Limitation Act of 1623 marks the beginning of the modern law of limitations on personal actions in the common law." *Developments in the Law—Statutes of Limitation*, 63 HARV. L. REV. 1177, 1178 (1950).

59. Callahan, *supra* note 57, at 133. Typically, the concern is about the defendant being unable to produce old evidence, not the plaintiff. *Id.*

60. *Id.* at 136.

61. *See* Sobol, *supra* note 42, at 346.

62. *See* Dominczyk, *supra* note 7, at 13.

63. Some debts do not even enjoy the imperfect "repose" provided by a limitations period. All civil actions between private parties have a limitation period, but not all actions that could be brought by a government (state or federal) do. For example, federally-backed student loans have no statute of limitations. *See* 20 U.S.C. § 1091a(a) (2012). Also, willfully failing to file tax returns means that there is no statute of limitation on how far back the IRS or many state equivalents might reach. *See* Robert W. Wood, *Even the IRS Has Time Limits*, FORBES (Oct. 8, 2009, 12:00 PM), http://www.forbes.com/2009/10/08/IRS-tax-audits-statute-limitations-personal-finance-wood.html [https://perma.cc/XC2Y-M99Z].

64. *See* FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 45 (2013), http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf [https://perma.cc/929N-EUCB].

65. *See* FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 22–23 (2010), https://www.ftc.gov/reports/repairing-broken-system-protecting-consumers-debt-

for a consumer to restart a statute by something as simple as making a small payment.[66]

a. Affirmative Defense Must Be Asserted or Waived. Most statutes of limitations merely provide a defense to a civil action.[67] The creditor can sue, and in most cases does not even have an obligation to plead that the lawsuit was filed within the limitations period.[68] If the debtor does not affirmatively raise the limitations defense early enough in the case, she will waive the defense and the lawsuit will continue.[69] Raising the defense shifts the burden to the plaintiff to prove they sued within the limitations period, but the consumer first has to know that this is an option. The overwhelming number of debt collection cases today are decided not on the merits but through a default judgment.[70] When consumers do appear in court to contest, they often do so without a lawyer.[71]

The Fair Debt Collection Practices Act (FDCPA or "Act") covers some consumer debt cases; in those situations, debt collectors who file a lawsuit past the statute of limitations do so in violation of the Act.[72] This may be little consolation for the consumer who's been sued, however. In the state court debt lawsuit—these are invariable in state court—she will still need to raise the affirmative defense of the statute of limitations. If she does so successfully, the lawsuit should be dismissed. If she does not raise it or does not raise it on time, the lawsuit will proceed

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collection-litigation [https://perma.cc/FK4G-8GEB].

66. *See* Sobol, *supra* note 42, at 347.

67. This is true around the world also. *See* 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 4–121 (Mauro Cappelletti ed., 2014).

68. FED. R. CIV. P. 8. This was not always the case. For example, adversary possession cases in England in the 1400s and up to at least 1540 placed the burden on "the plaintiff to show that the action was started within the limitation period. . . ." Thomas E. Atkinson, *Some Procedural Aspects of the Statute of Limitations*, 27 COLUM. L. REV. 157, 162–64 (1927).

69. "When the statute runs, a power is created in the debtor to bar any action commenced by the creditor, by pleading the statute." Albert Kocourek, *Comment on Moral Consideration and the Statute of Limitations*, 18 ILL. L. REV. 538, 540 (1923).

70. *See* Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 208 (2014); Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355, 362–63 (2012); Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 271–72 (2011).

71. *See* Jiménez, *supra* note 17, at 55. The creditors also often dismiss these cases because they are not prepared to proceed despite having filed the case. *See* Spector, *supra* note 70, at 295–97 (stating that in cases in which defendant debtors appeared, plaintiff creditors often opted for dismissal without prejudice).

72. Jiménez, *supra* note 17, at 77 & n.140.

and she might be found liable.[73] She will then have an independent cause of action under the FDCPA—and perhaps analogous state laws—against the debt collector.[74] There are limits, however. She will need to bring this claim within one year of the collector's lawsuit—due to the FDCPA's own statute of limitations—and her maximum recovery will be limited to $1,000 for the violation, any proved actual damages, and attorney's fees for the FDCPA case.[75] While there are generally more attorneys who take FDCPA cases than debt collection cases, the consumer who fails to raise her limitations defense still has to know that she has a possible cause of action under federal law.

b. Difficult to Ascertain. In the United States, state legislatures set most periods of limitation. These typically vary by type of action.[76] For example, actions based on written contracts tend to have limitations between 3–10 years; oral contracts between 3–6 years.[77] There is even wider variety. Besides written and oral contracts, many states have different limitations periods for implied account stated,[78] sales of goods, leases, dishonored checks, and promissory notes. It is critical for a consumer to determine which limitation period applies to the debt.[79] Figuring out which statute applies to a particular debt can sometimes be a very

73. *See* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 495–96 (1997) ("While the sanction is certainly severe (the defense of limitation, if successful, completely bars the plaintiff's claim), there are currently so many exceptions to limitation of actions that many prospective plaintiffs will be tempted to file anyway.").

74. *See* Jiménez, *supra* note 17, at 77 & n.140; *see also* FED. TRADE COMM'N, *supra* note 65, at 6.

75. 15 U.S.C. § 1692k(a), (d) (2012).

76. *See generally 50 State Statutory Survey: Civil Statutes of Limitation*, WEST (2016). Federal law sets the limitations period for debts that arise out of federal obligations—taxes for example. South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 518 (1986) (stating "statute of limitations is thus a matter of federal law" when federal claims are at issue).

77. *See 50 State Statutory Survey: Civil Statutes of Limitation*, WEST (2016).

78. *Id.*; Emanwel J. Turnbull, *Account Stated Resurrected: The Fiction of Implied Assent in Consumer Debt Collection*, 38 VT. L. REV. 339, 340 (2013) ("Implied account stated is a cause of action, pled when a creditor sues to recover a debt."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 282 (AM. LAW INST. 2017); 1 AM. JUR. 2D ACCOUNTS & ACCOUNTING § 26 (2017).

79. This assumes the consumer first understands that there is such a thing as the statute of limitations. In other research interviewing debt collection defendants in small claims courts in Connecticut, Maine, and Massachusetts, researchers have encountered defendants who had difficulty believing there was such a law. *See* D. James Greiner, Dalié Jiménez & Lois Lupica, *Self-Help, Reimagined,* 92 IND. L.J. 1119, 1168, 1171 & nn. 237–38 (2017).

complex undertaking and one not easily resolvable without a court's involvement.[80]

First, one needs to categorize the type of limitation that applies. Consider the purchase of a washing machine on credit in New York. Is the transaction governed by a "contract" or is it a "sale of goods?" Oral and written contracts have a six-year limitation period in New York.[81] However, the Uniform Commercial Code Article 2—applicable in New York and every other state save Louisiana—places a four-year limitations period on a collection claim where the original contract was one for the sale of goods.[82] This supersedes state laws that are specific to statutes of limitation, but it would not be something that even a savvy consumer is likely to know about. To complicate matters further for consumers, courts have held that the Uniform Commercial Code governs transactions that are not obviously sales of goods, such as a collection action on a store credit card or actions to collect delinquent utility bills for water, electricity, and gas.[83]

What about a "simple" credit card debt? Federal law requires that credit card agreements be in writing and contain certain disclosures.[84] But if the creditor cannot produce the written contract or evidence that the consumer agreed to the contract terms, she will likely sue under an "account stated" theory—if the state allows it.[85] Indeed, many debt collection lawsuits today are filed on that theory, despite most being made up of credit card debts owed originally to large national banks.

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80. Paul D. Rheingold, *Solving Statutes of Limitation Problems*, *in* 4 AM. JUR. TRIALS 441, 449–51 (1966). ("Nothing short of a treatise could cover all the problems attending the application of the statutes of limitations of the fifty states and of the federal jurisdiction, and such treatment would not be of direct interest to the practicing attorney."); Brief of ACA Int'l as Amicus Curiae in Support of Petitioner at 4, LVNV Funding, LLC v. Crawford, No. 14-858 (U.S. Feb. 19, 2015) ("Whether a debt is time-barred is not always a simple question, and sometimes requires an analysis that goes far beyond any duty that Congress has imposed on debt collectors under the Fair Debt Collection Practices Act.").

81. N.Y. C.P.L.R. § 213 (McKinney 2017).

82. U.C.C. § 2-725 (Am. Law Inst. & Unif. Law Comm'n 2014).

83. *See generally* NAT'L CONSUMER LAW CENTER, COLLECTION ACTIONS: DEFENDING CONSUMERS AND THEIR ASSETS § 3.75 (1st ed. 2008) (stating that UCC Article 2 statute of limitations applies to collection actions on store credit cards and delinquent utility bills).

84. *See* 12 C.F.R. § 226.6 (2017); *see also Credit Card Agreement Database*, CONSUMER FIN. PROTECTION BUREAU, http://www.consumerfinance.gov/credit-cards/agreements/ [https://perma.cc/D4XL-VUXE] (last visited Oct. 14, 2017).

85. *See* Turnbull, *supra* note 78, at 343–44, 370–71 (stating that debt buyers often plead under an account stated theory due to difficulties obtaining required documents, such as the original contract, from original creditors).

Another difficulty with limitations periods is that it not always clear which state's limitation period applies. Imagine a consumer who, while a resident of state A, obtained a credit card issued by a bank incorporated in state B. The agreement contained a choice-of-law clause selecting state C as the state whose law governs. The consumer now lives in state D and is sued there.[86] Which state's limitations period applies? Does it matter where the consumer resided when the contract was first breached? The answer depends entirely on state D's statutory and common law. It is not always possible to analyze with certainty.

Debt collectors frequently criticize the complexity of statutes of limitation,[87] and with good reason.[88]

c. Debt Remains Due and Payable Past Expiration of Statute. In most cases, statutes of limitations only extinguish the legal remedy, but they do not extinguish the "right" to collect.[89] In those circumstances, creditors can continue to dun debtors outside of court past the limitations period.[90] Creditors can also nudge a debtor to restart the limitations period by persuading her to make a small payment towards the debt, or in some states, by simply acknowledging the debt.[91] If the debtor made such a payment or

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86. If the lawsuit was for a "consumer debt," the creditor or debt buyer should file suit in the jurisdiction in which the consumer lives. 15 U.S.C. § 1692i (2012). If it is a business debt, no such requirement would apply. Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 719 (stating that the FDCPA specifically excluded the collection of debts from businesses and does not apply).

87. *See* NARCA, POLICY POSITIONS ADOPTED BY THE NARCA BOARD OF DIRECTORS, (June 27, 2011), http://c.ymcdn.com/sites/www.narca.org/resource/resmgr/About_NARCA/NARCAPolicyPositions.pdf [https://perma.cc/5KWZ-BXYH] ("NARCA concurs with the FTC that, ideally, statutes of limitations for consumer debt should be clear, simple and uniform."); FED. TRADE COMM'N, *supra* note 64 at 49 (noting that "[t]he debt collection industry claims it is difficult to determine whether a debt is time-barred because different statutes of limitations could apply and there could be facts that tolled or restarted the statute of limitations.").

88. *See* Ochoa & Wistrich, *supra* note 73, at 496. ("[I]t has become increasingly difficult to dispose of time-barred claims as a threshold or preliminary matter (that is, by demurrer or summary judgment) rather than at trial . . . . This difficulty also means that the legal system spends considerable time and resources in determining which claims are barred and which are not.").

89. Campbell v. Holt, 115 U.S. 620 (1885). *But see* Sprecher v. Wakeley, 11 Wis. 432, 433, 438–41 (1860) ("It is an error to suppose that a statute of limitations affects the remedy only . . . . The statute of limitations is not only a bar to the remedy, but it takes away the legal right.").

90. *See, e.g.*, Buchanan v. Northland Grp., Inc., 776 F.3d 393, 396–97 (6th Cir. 2015) ("Under Michigan law, as under the law of most states, a debt remains a debt even after the statute of limitations has run on enforcing it in court.") (citing De Vries v. Alger, 44 N.W.2d 872, 876 (Mich. 1950)).

91. In many cases, filing this lawsuit might be a violation of the Fair Debt Collection Practices Act (FDCPA), or even state laws. However, the FDCPA and state statutes tend to

acknowledgment, courts treat it as a waiver of the previous limitations period and allow creditors to pursue the debtor as if the limitation had not run.[92] This is so even if the debtor restarted the clock unwittingly.

This is not the case in Mississippi or Wisconsin. In these two states, the expiration of the limitations period on a debt means "the right is extinguished as well as the remedy."[93] In other words, once the expiration period passes, the creditor loses all rights it had to the debt—the debtor is fully released. The Wisconsin Supreme Court explained that in their view, the expiration of the statute creates a new property right in the debtor.[94] This is precisely my proposal in this Article: a way to kill debts definitively and completely.

In Mississippi, the limitations period for written contracts is three years, among the shortest in the country.[95] In Wisconsin, it is six years, a more typical length. The Mississippi statute has been the law of the land since 1880.[96] The Wisconsin statute was

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have a one-year statute of limitations, have limited (typically $1,000) damages, and will not erase the underlying obligation. *See generally* 15 U.S.C. §§ 1692–1692p (2012); *Improving Relief from Abusive Debt Collection Practices*, 127 HARV. L. REV. 1447, 1452–54, 1460–62 (2014); Sobol, *supra* note 42, at 345, 347, 349 & n.128.

92. *See* Sobol, *supra* note 42, at 347, 349.

93. WIS. STAT. ANN. § 893.05 (West 2017); Heritage Mut. Ins. Co. v. Picha, 397 N.W.2d 156 (Wis. Ct. App. 1986) ("Wisconsin may be unique in holding that the running of a statute of limitations not only extinguishes the remedy to enforce a right but also destroys the right itself.").

94. *In re* Hoya's Will, 180 N.W. 940, 944 (Wis. 1921) (stating that Wisconsin considers "that the statute of limitations destroys the right of action itself and gives rise to a new property right in the debtor" although many states and the Supreme Court hold otherwise). *See also* Charles V. Gall, *Proceeding with Caution: Collecting Time-Barred Debts*, 56 CONSUMER FIN. L.Q. REP. 244, 247-48 (2002) (discussing a Wisconsin case that found a collector liable under the FDCPA and Wisconsin statutes for attempting to collect an out-of-statute debt).

95. MISS. CODE ANN. § 15-1-49 (2013); *see 50 State Statutory Survey: Civil Statutes of Limitation*, WEST (2016). Mississippi also has one of the shortest limitations periods for judgments: 7 years. *Id.*; MISS. CODE ANN. § 15-1-43, 45 (2013).

96. The current version of the statute can be found at section 15-1-3 of the Mississippi Code. This section has identical language to section 2685 in the Code of 1880. *See* MISS. CODE ANN. § 15-1-3 (2013); MISS. CODE § 2685 (1880). Interpreting the 1880 enactment, the Mississippi Supreme Court stated that the section on limitations on action "declares that 'the completion of the period of limitation herein prescribed to bar any action, shall defeat and extinguish the right as well as the remedy; but the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon.'" Proctor v. Hart, 16 So. 595, 596 (Miss. 1895). The court went on to note that "[t]he change wrought by this new statute is radical. Not only the remedy is denied, the action barred, but the right itself is extinguished upon the completion of the period of limitation. The remedy and the right, whatever it was, are alike destroyed. There remains nothing to revive." *Id.* The Code of 1880 was a revision of the Code of 1871. It modernized the law in some ways, and although it purported to use the statutes in effect at the time as its basis, the section in question did not exist in the 1871 Code, nor was it passed as a session law in the intervening years. *See* Michael Hoffheimer et al.,

first enacted in 1979, but it codified common law that dated as far back as 1860.[97] Astonishingly, I have not been able to find any empirical or other analysis in the legal or economics literature discussing the effects of these laws.[98]

d. Easy to Restart the Limitations Period. The statute of limitations period is shockingly easy to restart. The most common way is through a partial payment of the debt.[99] This heavily incentivizes creditors to contact consumers about stale debts in order to restart the limitations period.[100] The older a debt, the cheaper it is to buy, but there are debt buyers who specialize on buying exactly this kind of debt. Although consumer protections exist in principle, in practice they are difficult to access.

Most states allow a creditor to restart the limitations period by securing a payment or a promise of payment on the debt, or sometimes by obtaining oral acknowledgment from the debtor that the debt exists.[101] The creditor can try to persuade the consumer to do any of these things any time after the expiration of the limitations period, even if many years have passed.[102] In most

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Pre-1900 Mississippi Legal Authority, 73 MISS. L.J. 195, 217 (2003); RH Thompson, Mississippi Codes: An Address (1926) (address given at the annual meeting of the Miss. Bar Association), *available at* https://library.courts.ms.gov/thompsononcodes.htm#1840 [https://perma.cc/8KJE-R4C5].

97. Sprecher v. Wakeley, 11 Wis. 432, 433, 438–41 (1860) ("It is an error to suppose that a statute of limitations affects the remedy only. . . . The statute of limitations is not only a bar to the remedy, but it takes away the legal right."); Daniel J. La Fave, *Remedying the Confusion Between Statutes of Limitations and Statutes of Repose in Wisconsin—A Conceptual Guide*, 88 MARQ. L. REV. 927, 933–34(2004).

98. The Author, a research assistant, and an extremely able librarian performed an exhaustive search of the economics, social science, interdisciplinary, and legal databases available to us as well as the Proquest dissertation database and only turned up a handful of articles that mentioned the different rules in Mississippi and Wisconsin. None analyzed them in any great detail. *See, e.g.*, Sobol, *supra* note 42, at 345; Dominczyk, *supra* note 7, at 13; Victoria J. Haneman, *The Ethical Exploitation of the Unrepresented Consumer*, 73 MO. L. REV. 707, 735 (2008).

99. "Partial payment of a debt is regarded as equivalent to an admission of the debt and, therefore, a new promise is implied from it." 31 WILLISTON ON CONTRACTS § 79:85 (4th ed. 2004). But note that "[i]f there are any words or circumstances tending to negate the implication of a new promise naturally to be drawn from a partial payment, the debt will not be revived." *Id.*; *Contra* Midland Funding LLC v. Thiel, 144 A.3d 72, 78 (N.J. Super. Ct. App. Div. 2016).

100. As noted in Part III.A, some debt buyers specialize in purchasing "out of statute" debts. *See infra* notes 156–160 and accompanying text.

101. *Developments*, *supra* note 58, at 1254 ("It has long been recognized that the expiration of the statutory period does not bar the claim if the plaintiff can prove an acknowledgment, a new promise, or part payment made by the defendant either before or after the statute has run.").

102. *See, e.g.*, Young v. Sorenson, 47 Cal. App. 3d. 911, 914 (Ct. App. 1975) ("[P]art payment of a debt or obligation is sufficient to extend the bar of the statute. The theory on

cases, the creditor does not have an obligation to notify the consumer that making a small payment or acknowledging the debt will enable the creditor to use legal means to collect, and that those means would not be available otherwise.[103]

Consumers do have some limited protections here, but like with much else regarding the statute of limitations, they have to be aware of them and assert them. The FDCPA gives the consumer the right to request that the collector cease all communications with the consumer.[104] The request must be in writing.[105] In situations where the debt is out-of-statute, if the collector does not want to run afoul of the FDPCA, this should mean that after sending a written cease-and-desist letter, the consumer will no longer hear from this collector about the debt. That said, the collector can sell the debt and the consumer will once again be dunned by a new party. She will then have to notify that party in writing that it should cease communicating with her. She will also have to understand that a debt is out-of-statute in the first instance.

More consumer protections may be forthcoming. In recent years, Maine[106] and Connecticut[107] enacted statutes that prevent the limitations period from restarting after it has expired.[108] In

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which this is based is that the payment is an acknowledgment of the existence of the indebtedness which raises an implied promise to continue the obligation and to pay the balance.") (internal citations omitted).

103. *See* Thomas R. Dominczyk, *Collecting Time-Barred Debt: Is it Worth the Risk?*, BUS. L. TODAY, Apr. 2014, at 1, 2–3 (stating that most courts treat filing lawsuits and explicitly threatening to sue as violations of the FDCPA without requiring further disclosure from debt collectors, but noting that some courts have required debt collectors to disclose that they are unable to compel payment or sue to collect the debt).

104. *See* 15 U.S.C. § 1692(c) (2012). If the consumer is being dunned by the original creditor, the law is much less clear. The CFPB has taken the position that this would be an unfair practice and that they could regulate it under their UDAAP authority. However, this authority does not provide for a right of action by consumers. *See* Joint Consent Order, Joint Order for Restitution, and Joint Order to Pay Civil Money Penalty at 6–7, *In re* Am. Express Centurion Bank, Salt Lake City, Utah, FDIC-12-315b, FDIC-12-316k, 2012-CFPB-0002 (Oct. 1, 2012) (stating that dunning letters that fail to disclose the nature of time-barred debt can be regulated under the UDAAP).

105. *See* 15 U.S.C. § 1692(c) (2012).

106. *See* ME STAT. tit. 32 § 11013(8) ("Notwithstanding any other provision of law, when the applicable limitations period expires, any subsequent payment toward, written or oral affirmation of or other activity on the debt does not revive or extend the limitations period.").

107. CONN. GEN. STAT. § 36a-814.

108. Massachusetts' attorney general promulgated a rule requiring collectors attempting to collect on a time-barred debt to provide a notice to consumers about their rights. 940 MASS CODE REGS. 7.07(24). Unfortunately, the safe harbor notice provided under the regulations is a 159-word all-caps block of text, a presentation which is likely to make it very difficult for self-represented individuals to understand. *See* Greiner et al., *supra* note 79, at 1135 (citing studies about the difficulty of reading all-caps sentences).

litigation, the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB) have taken the position that attempting to collect an out-of-statute debt without disclosing that the debt collector does not have the right to sue the consumer on that debt is a deceptive statement in violation of the FDCPA.[109] This position is not binding on the industry, although the CFPB will soon propose new debt collection rules which might include this.[110] For now, although a few courts have agreed with the consumer agencies, not all who dun consumers are subject to the FDCPA.[111] Unless and until laws or rules prohibit this behavior industry-wide, creditors will have an incentive to continue dunning consumers past the limitations period in an attempt to restart the clock.[112]

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109. *See* Brief of Amici Curiae Federal Trade Commission and Consumer Financial Protection Bureau Supporting Affirmance at 12–19, Delgado v. Capital Mgmt. Servs., LP, No. 13-2030 (7th Cir. Aug. 14, 2013); Brief of Federal Trade Commission and Consumer Financial Protection Bureau Supporting Reversal at 13–20, Buchanan v. Northland Grp., Inc., No. 13-2523 (6th Cir. Mar. 5, 2014); *Under FTC Settlement, Debt Buyer Agrees to Pay $2.5 Million For Alleged Consumer Deception*, FED. TRADE COMM'N (Jan. 30, 2012), http://www.ftc.gov/news-events/press-releases/2012/01/under-ftc-settlement-debt-buyer-agrees-pay-25-million-alleged [https://perma.cc/6EH4-RRF3] (describing consent order with Asset Acceptance settling charges that the debt buyer made "misrepresentations when trying to collect old debts").

110. FED. TRADE COMM'N, SMALL BUSINESS REVIEW PANEL FOR DEBT COLLECTOR AND DEBT BUYER RULEMAKING: OUTLINE OF PROPOSALS UNDER CONSIDERATION AND ALTERNATIVES CONSIDERED 20 (2016), http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf [https://perma.cc/G23W-64B2].

111. The CFPB also has authority to regulate many original creditors not subject to the FDCPA, namely banks. 12 U.S.C. § 5481(6), (15) (2012). Its authority in those circumstances covers what would be considered "unfair, deceptive, or abusive acts or practices" (UDAAP). 12 U.S.C. § 5531(a). The CFPB has not, however, clarified that misleading a consumer about collecting past the statute of limitations is a UDAAP. *See* Kathlyn L. Farrell, *Managing UDAAP Compliance Risks in Financial Institutions*, J. TAX'N & REG. FIN. INSTITUTIONS, Nov.–Dec. 2013, at 21, 28–30 (stating that the CFPB has the authority to regulate bank and non-banks for abusive practices, but that what constitutes an abusive practice has not yet been delineated). *But see* Joint Consent Order, Joint Order for Restitution, and Joint Order to Pay Civil Money Penalty at 6–7, *In re* Am. Express Centurion Bank, Salt Lake City, Utah, FDIC-12-315b, FDIC-12-316k, 2012-CFPB-0002 (Oct. 1, 2012), http://files.consumerfinance.gov/f/2012-CFPB-0002-American-Express-Centurion-Consent-Order.pdf [https://perma.cc/6EY6-39SY] (stating that dunning letters that fail to disclose the nature of time-barred debt can be regulated under the UDAAP).

112. *But see* FTC DEBT BUYER REPORT, *supra* note 87, at 48 n.198 (2013) (describing how New York, New Mexico, and Massachusetts have all enacted statutes or regulations that require debt collectors who attempt to collect on out of statute debts to disclose to consumers that the collector cannot initiate a legal proceeding against them).

C. True Death: Bankruptcy Discharge

Outside of Mississippi and Wisconsin, the only true death[113] for a debt is after a bankruptcy discharge.[114] This is so partly because the nature of bankruptcy as a court proceeding that catalogues and adjudicates individual debts. But a bankruptcy discharge is a superior method of killing debts for two principal reasons: (1) the bankruptcy discharge comes with a perpetual injunction against any attempt at collection of a discharge debt, and (2) the Bankruptcy Code does not permit the revival of a discharged debt outside of a bankruptcy proceeding.[115] The discharge injunction is actually a relatively new innovation: its current iteration is barely 40 years old.[116] Even so, bankruptcy also has some drawbacks: it does not discharge all debts, some consumers may be more hurt by filing bankruptcy than by abstaining, the process is costly, and it is underused.[117]

When an individual receives a bankruptcy discharge, the court issues (1) a judgment and (2) an automatic and permanent injunction declaring that the debtor no longer has any responsibility to pay for the debts included in the discharge.[118] After, creditors are barred by the injunction from pursuing the debtor for those debts.[119] Any judgments obtained in violation of

113. "'True Death' is a term that refers to the ultimate destruction of a vampire . . . ." *True Death*, TRUE BLOOD WIKI, http://trueblood.wikia.com/wiki/True_Death [https://perma.cc/4AWL-2N77] (last visited Oct. 14, 2017).

114. The current version of the bankruptcy discharge is fairly new. *See generally* Vern C. Countryman, *The New Dischargeability Law*, 45 AM. BANKR. L.J. 1–56 (1971) (discussing effects of 1970 amendments to bankruptcy code on dischargeability of debts); Doug R. Rendleman, *The Bankruptcy Discharge: Toward a Fresher Start*, 58 N.C. L. REV. 723, 723–67 (1979) (noting of evolution of discharge from 1970 amendments to 1978 bankruptcy code); Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1047–88 (1987) (evaluating changes in the bankruptcy code through 1984 amendments); Brief of Amici Curiae Professors Ralph Brubaker et al. in Support of Appellee at 5–12, Anderson v. Credit One Bank, N.A., No. 16-2496 (S.D.N.Y. Feb. 27, 2017) Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 325–71 (1991) (detailing the evolution of discharge in the United States from prior to 1800 to 1898); Charles Jordan Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*, 59 GEO. WASH. L. REV. 56, 56–113 (1990) (discussing the evolution of the malicious and willful injury exception to discharge).

115. In bankruptcy, this is called a "reaffirmation" and there are strict procedural and disclosure requirements for it to be effective. *See* 11 U.S.C. § 524(c), (d), (k) (2012).

116. *See* 11 U.S.C. § 524.

117. Joseph J. Rifkind, *Bankruptcy Law: Non-Dischargeable Debts*, 45 A.B.A. J. 685, 688 (1959).

118. 11 U.S.C. § 524.

119. This wasn't always the case. The 1976 Bankruptcy Code added the injunction. 11. U.S.C. § 32(f) (1976).

the injunction are void *ab initio*.[120] Since the proceeding is public and provides notice to creditors, it also makes it clear that an unsecured debt that was incurred prior to the bankruptcy is discharged—so long as that debt was eligible for a discharge.[121]

Bankruptcy provides a finality that nothing else can. If a consumer is contacted about a debt discharged in bankruptcy, she has the power of a federal court behind her when she tells the creditor to stop the contact. Unlike the FDCPA cease-and-desist option, the consumer does not have to do this in writing and the bankruptcy discharge injunction will work even against subsequent debt buyers.[122] Bankruptcy even supersedes state laws that say that an obligation discharged in bankruptcy can nonetheless serve as "moral consideration" for a new, enforceable obligation.[123]

However, not all debts can be discharged in bankruptcy. There are nineteen enumerated exceptions to the bankruptcy discharge.[124] Most have to do with debts owed to the federal or state governments.[125] Many others involve various types of fraud or defalcation,[126] certain kinds of injuries caused to persons or property,[127] debts that were not disclosed by the debtor[128] or were not discharged in a previous bankruptcy,[129] or debts owed to a

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120. *See generally* 11 U.S.C. § 524(a)(1) ("A discharge in a case under this title--(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged . . . .").

121. Eligibility here will depend on a few things, such as whether the debt was listed in the bankruptcy schedules and whether it was not one of the debts barred from discharge. 11 U.S.C. § 523 (2012).

122. In most cases, it will also work even if the debtor failed to include the debt in her bankruptcy schedules. If the debtor is one of the 93% of Chapter 7 bankruptcy filers who did not have any assets to distribute to her creditors, the creditor would not have received anything under the bankruptcy anyway, so has no cause for complaint. Their debt is also discharged. *See Debt Collection*, FED. TRADE COMM'N (May 2015), https://www.consumer.ftc.gov/articles/0149-debt-collection [https://perma.cc/DK3J-XP6M]; *Can a Debt Collector Try to Collect on a Debt that was Discharged in Bankruptcy?*, CFPB, https://www.consumerfinance.gov/ask-cfpb/can-a-debt-collector-try-to-collect-on-a-debt-that-was-discharged-in-bankruptcy-en-1425/ [https://perma.cc/E9WZ-P3RC] (last updated Oct. 25, 2017).

123. Douglass G. Boshkoff, *The Bankrupt's Moral Obligation to Pay His Discharged Debts: A Conflict Between Contract Theory and Bankruptcy Policy*, 47 IND. L.J. 36, 56, 59, 60–61 (1971).

124. *See* 11 U.S.C. § 523 (2012).

125. 11 U.S.C. §§ 523(a)(1), (a)(7), (a)(8), (a)(13), (a)(14), (a)(14A), (a)(14B), (a)(15), (a)(17).

126. *See id.* §§ 523(a)(1), (a)(4), (a)(11), (a)(12), (a)(18), (a)(19).

127. *See id.* § 523(a)(6) (willful and malicious injury to another or property of another); *see also id.* at (a)(9) (death or injury caused while under the influence).

128. *See id.* § 523(a)(3).

129. *See id.* § 523(a)(10).

spouse or child in connection with a divorce or separation agreement.[130] Finally, student loan debts are only dischargeable in bankruptcy if the debtor files a separate lawsuit within the bankruptcy case in which she is able to prove that it would be an "undue hardship" to repay her student loans.[131] A miniscule number of bankrupt individuals with student loans—by one estimate 0.1%—attempt to discharge their student loans in this fashion.[132] Although about half of them succeed, these numbers mean that student loans are practically non-dischargeable.[133]

In addition, filing bankruptcy can turn out to be a losing proposition for some consumers. In a Chapter 13 bankruptcy, the debtor makes payments for three or five years to her creditors according to a court-approved plan.[134] Nationwide, about 37% of consumers file for bankruptcy under Chapter 13; only 30% of those succeed in obtaining a discharge.[135] For the 70% who do not obtain a discharge, some successfully convert their case to a Chapter 7 bankruptcy;[136] the rest simply go back to their lives and continue to owe the debts they did not repay in full during their bankruptcy. Some of these individuals may find that filing bankruptcy but failing to obtain a discharge means that they are now responsible for debts that had previously been out-of-statute.[137] Creditors are generally allowed to file proofs of claim for out-of-statute debts.[138] Doing so does not violate the Bankruptcy Code, although upon objection by any party in interest, the claim should be disallowed.[139] Other creditors whose payout is reduced because the

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130. *See id.* §§ 523(a)(5), (a)(15).

131. *See id.* at § 523(a)(8).

132. Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 495, 499, 505, 525 (2012).

133. *Id.* at 505.

134. *See* 11 U.S.C. § 1322 (2012).

135. United States Bankruptcy Courts, *Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2016* at Table F-2; Ed Flynn, *Chapter 13 Revisited: Can It Help Solve the Judiciary's Fiscal Problems?*, ABI J. (Dec. 20, 2013).

136. In a Chapter 7, the debtor gives up her nonexempt assets in exchange for a discharge of all debts that can be discharged. Her nonexempt assets are sold and the proceeds are distributed to creditors under a priority scheme dictated by the Bankruptcy Code. In the overwhelming majority of consumer Chapter 7 cases (93%), creditors do not receive any payment from the bankruptcy estate. Dalié Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795 (2009).

137. Deborah Swann, *Debt-Buyers Face Many Land Mines, Panelists Say*, BLOOMBERG BNA (Sept. 30, 2015), https://www.bna.com/debtbuyers-face-land-n57982059000/.

138. 11 U.S.C. Rule 3001 (2012).

139. 15 U.S.C. § 502(b)(1).

stale debt is being paid, the bankruptcy trustee,[140] and the debtor herself[141] have a theoretical incentive to investigate all proofs of claims for the possibility of stale claims.[142] But anecdotal evidence from judges and attorneys, however, indicates that very few objections are filed.[143] Last term, the Supreme Court ruled in *Midland v. Johnson* that it is not a violation of either the Bankruptcy Code or the FDCPA to file a proof of claim for a facially out-of-statute debt.[144] After this decision, a debtor who does not obtain a discharge in a Chapter 13 bankruptcy may exit bankruptcy owing not just the same debts she did before, but having restarted the limitations period and now being at risk for a lawsuit on debts that were previously legally uncollectable.[145]

Bankruptcy is also costly—so costly that it often takes consumers considerable time to get together the filing costs and attorney's fees.[146] It was previously thought that excessive, abusive, or otherwise oppressive debt collection may have triggered bankruptcy filings by consumers seeking to take advantage of the automatic stay to stop the phone calls.[147]

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140. The trustee is supposed to work for the benefit of all unsecured creditors. Bankruptcy FAQ, NAT'L ASS'N OF BANKR. TRS., http://www.nabt.com/faq.cfm [https://perma.cc/HH66-GPMB].

141. The debtor has a strong incentive to object in some cases. For example, if she has student loans they will not be discharged through the bankruptcy so any extra money that goes towards the student loans will reduce the debtor's future liability. Xiaoling Ang & Dalié Jiménez, *Private Student Loans and Bankruptcy: Did Four-Year Undergraduates Benefit from the Increased Collectability of Student Loans?*, in STUDENT LOANS AND THE DYNAMICS OF DEBT 175, 180 (Brad Hershbein & Kevin M. Hollenbeck, eds., Upjohn Press 2015), http://papers.ssrn.com/abstract=2332284.

142. The POCs themselves should have enough information on their face to be able to figure this out. BANKR. R. FED. PROC. 3001. As the Debt Buyer's Association points out in a brief on this issue, the statute of limitations is an affirmative defense (everywhere but within the ambit of the FDCPA) and thus it is up to a party to in interest to object to the POC. This objection must be done in writing and unless the claim is withdrawn, the court must hold a hearing on the matter. If no one objects to the claim, the debt buyer can collect a distribution from the estate, at the expense of other creditors whose claims were enforceable outside of bankruptcy.

143. Deborah Swann, *Debt-Buyers Face Many Land Mines, Panelists Say*, BLOOMBERG BNA (Sept. 30, 2015), https://www.bna.com/debtbuyers-face-land-n57982059000/.

144. Midland Funding, LLC v. Johnson, 137 S. Ct. 1407, 1415–16 (2017).

145. About 70% of debtors who file a Chapter 13 bankruptcy do not obtain a Chapter 13 discharge. Ed Flynn, *Chapter 13 Revisited: Can It Help Solve the Judiciary's Fiscal Problems?*, ABI J. (Dec. 20, 2013).

146. Daniel Bortz, *Are You Too Broke to Go Bankrupt?*, U.S. NEWS (July 26, 2012, 10:00 AM), https://money.usnews.com/money/personal-finance/articles/2012/07/26/are-you-too-broke-to-go-bankrupt.

147. In a nationwide sample of bankrupt debtors, more than four in five consumers had been contacted by a debt collector either at home or at work, and that the typical consumer "received an average of thirteen debt collection calls in each of the weeks just prior to their bankruptcy filing. The median respondent reported receiving six calls each

However, in a recent study from a nationwide sample, Professors Mann and Porter found that what "triggers" the actual bankruptcy filing is when a debtor has enough money to pay his lawyer and the filing fees.[148] These fees increased dramatically in 2005.[149] They conclude, "[c]reditor collection activity does not force people into an immediate bankruptcy. On the contrary, it wears them down slowly but ineluctably, like water dripping on a stone."[150]

Finally, bankruptcy is underused. Only a fraction of consumers in serious financial distress ever file for bankruptcy.[151] According to a 1998 study of a national sample of American households, bankruptcy relief would have provided an economic benefit to "15% of the sample, but only about 0.66–1% sought relief any given year."[152] There is some evidence this has not changed much.[153] Despite the vast number of individuals currently in financial distress in the United States—upwards of 77 million by one count[154]—very few choose to file bankruptcy. In 2014, less than one million bankruptcy cases were filed throughout the country: the highest one-year filing rate ever was in 2006 at just over two million bankruptcies.[155]

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week, more than one per business day." Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289, 306–07 (2010).

148. *Id.* at 323.

149. *Id.* at 324, n.136.

150. *Id.* at 292.

151. Amanda E. Dawsey et al., *Non-Judicial Debt Collection and the Consumer's Choice Among Repayment, Bankruptcy and Informal Bankruptcy*, 87 AM. BANKR. L.J. 1, 18–19 (2013).

152. Mann & Porter, *supra* note 147, at 290; Michelle J. White, *Why Don't More Households File for Bankruptcy?*, 14 J.L. ECON. & ORG. 205, 206 (1998). *But see* Richard M. Hynes, *Optimal Bankruptcy in a Non-Optimal World*, 44 B.C. L. REV. 1 (2002) (arguing that "The truly destitute have little to fear from their creditors. Their poverty prevents their creditors from seizing anything of value, and the days when default meant imprisonment, enslavement, or even death have long since passed. Bankruptcy protects those with something left to lose. . . .").

153. Mann & Porter, *supra* note 147, at 290 n.3.

154. More than 77 million have at least one account reported as "in collection" on their credit report, owing an average of $5,178. Caroline Ratcliffe et al., DELINQUENT DEBT IN AMERICA 7 (2014), www.urban.org/publications/413191.html. The median debt is $1,349. *Id.* at 11 n.16.

155. The exact number of filings in 2014 was 936,795, which included cases filed by individuals, corporate entities, and even municipalities. United States Courts, *Bankruptcy Filings Drop Nearly 13 Percent in Calendar Year 2014*, U.S. COURTS (Jan. 28, 2015), http://www.uscourts.gov/news/2015/01/28/bankruptcy-filings-drop-nearly-13-percent-calendar-year-2014 [https://perma.cc/BT5S-MDRB]. It is difficult to count how many *individuals* file bankruptcy every year. The United States Courts only keeps track of bankruptcy filings, which could be made by one person or jointly between two married debtors. In addition, the numbers are broken up between "business" and "non-business" filings, which do not correspond to "corporate entities" and "individuals." Even so, one can make some crude estimates. Even assuming each case filed in 2014 included two married

Bankruptcy kills debts. But with some important caveats: not all debts are dischargeable, some consumers may end up owing more if they fail to obtain a discharge in bankruptcy, the bankruptcy process is costly and underused. More importantly, one must file for bankruptcy in order to obtain this discharge.

III. BENEFITS, COSTS, AND CONSEQUENCES OF PERPETUAL DEBTS

The previous Part made the case that debts can act like immortal obligations, surviving past payment, the debtor's death, limitations periods, and sometimes (if not discharged), bankruptcy. This Part turns to the consequences of this system. It begins by outlining the mostly economic benefits of a system in which debts may be recoverable many years after they were incurred. It then describes what I view as the heavy costs and consequences of this system to individuals and the community.

A. *Benefits*

The current system has potentially substantial economic benefits. Perpetual debts mean that creditors have an opportunity to wait out the debtor until her financial circumstances improve. The ability to do this means that secondary markets for debts can flourish.[156] The complexity of the system itself, not just the perpetual nature of debts, also increases the collectability of debts. This in turn may have the effect of decreasing the overall cost of credit in the economy.

Three related industries exist primarily as a result of the current effectively perpetual nature of debts: debt buyers who only buy debts that have been reduced to judgment, debt buyers who specialize in purchasing debts past the statute of limitations,[157] and analytics companies who specialize in helping debt owners "wait the debtor out."[158] Alerts are sent to creditors when it is more

debtors, that would mean that less than 1.9 million individuals filed bankruptcy in 2014. The numbers are similar if slightly higher in previous years. *Id.*

156. *See generally* Jiménez, *supra* note 17.

157. Andrew Martin, *Old Debts Never Die; They Are Sold to Collectors*, N.Y. TIMES (Jul. 30, 2010), http://www.nytimes.com/2010/07/31/business/31collect.html?_r=0 [http://perma.cc/LW9H-EXG9] ("Such claims are routinely sold on debt collection Websites, where out-of-statute debt is for sale for a penny or less on the dollar."); *see also Portfolios*, CREDIT CARD RESELLER, LLC, http://www.creditcardreseller.com/portfolio.htm [https://perma.cc/9LHJ-EVXQ] (listing portfolios for sale whose statute of limitations began to run as far back as 2006).

158. *Locate Debtors*, EXPERIAN, http://www.experian.com/business-services/find-debtors.html [https://perma.cc/RU96-7UJ7] (last visited Jan. 16, 2017).

likely debtors can be reached for payment because, for example, they moved to a state that allows garnishment, bought a car or home, opened a new line of credit, etc. Through these companies, debt owners can passively keep track of debtors until something happens that increases the likelihood the debtor can be reached for payment: something such as moving to a state that permits garnishment, subscribing to the Wall Street Journal or New York Times, or opening a new line of credit, etc. These benefits are not insubstantial. The fact that there are businesses that specialize in older debts and that these debts continue to be traded for many years after they have remained unpaid is evidence that there are profits to be made.[159]

There is an additional benefit that results from the complexity of the current system. That is, the uncertainty for the debtor who is not likely to know about statutes of limitations or that making even a small payment past the statutory period revives the debt. For the debt owner, the ambiguity increases the likelihood that she will be able to obtain payment from the debtor or that another debt buyer will think he has the right strategy to obtain payment, and she will be able to at least resell the debt to someone else.[160]

The ability to continue to collect from debtors virtually forever may also have the benefit of lowering the cost of credit for everyone else.[161] An increased ability to collect on a debt decreases the cost of default to the creditor.[162] This may result in lower cost or more widely available credit for everyone. A number of studies have found an association between laws restricting collection remedies and "higher interest rates and increased probabilities of denials of credit."[163]

However, this is not the same as saying that less regulation necessarily equals cheaper or more available credit. In an analogous situation, one of de-regulation, Xiaoling Ang and I found the opposite effect than one might expect.[164] In 2005, Congress

159. *See* Josh Adams, *The Role of Third-Party Debt Collection in the U.S. Economy* (ACA INT'L WHITE PAPER 2016), http://www.acainternational.org/files.aspx?p=/images/38130/aca-wp-role3rdparty.pdf [https://perma.cc/S6EG-KEPD].

160. *See* Jiménez *supra* note 17, at 42; *see also* FTC DEBT BUYER REPORT, *supra* note 87, at i.

161. Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation* 18 (2015), http://works.bepress.com/todd_zywicki/6/ [https://perma.cc/4YMD-LGJF] (last visited Oct 11, 2015) (arguing that "lenders will respond to [an] increased risk of loss by raising prices to compensate or by reducing risk exposure").

162. *See* Adams, *supra* note 159, at 4.

163. Richard M. Hynes & Eric A. Posner, *Law and Economics of Consumer Finance*, 4 AM. L. & ECON. REV. 168, 185 (2002) (collecting studies).

164. Ang & Jimenez, *supra* note 141, at 175.

amended the Bankruptcy Code to, among other things, make it nearly impossible to discharge private student loans.[165] This change meant that suddenly, all outstanding and future private student loans could no longer be killed by a bankruptcy discharge—truly perpetual debts as it were. Theoretically, this change increased the expected returns of outstanding and future private student loans. In a neoclassical economics model, this kind of regime change should lead to a decrease in the cost of loans for students, assuming competition. But that did not happen. The availability of private student loans increased, to be sure, but so did the cost.[166]

It might be possible to test this proposition empirically. As previously noted, Mississippi and Wisconsin have statutes that purport to automatically extinguish debts after the statute of limitations has expired.[167] These laws date back to 1880 and 1879, respectively, making it difficult to design a study to determine the effects of the statutes.[168] Nonetheless, it is surprising that the economics and legal literature appear devoid of any discussion—theoretical or empirical—about the effects of these statutes on the cost or availability of consumer credit.[169]

There is a little we can glean from the available data, however. The Federal Reserve tracks credit card debt balance per capita and reports it by state as of the end of the year.[170] Although Mississippi had the lowest per capita outstanding credit card debt balance every year from 2003–2015, Wisconsin's credit card balances were less than a standard deviation below the national average.[171] As an example: Indiana, Iowa, and Missouri all have lower average per capita credit card balances than Wisconsin.[172] When other types of credit get lumped together, West Virginia takes the crown with the lowest level of per capita credit

165. *Id.* at 180. Federal student loans already received that treatment from previous changes to the Code. *Id.*

166. *Id.* at 179.

167. *See supra* notes 93–95.

168. *See supra* notes 96–97.

169. *See supra* note 98.

170. *Quarterly Report on Household Debt and Credit: Q2 2010 to Date*, FEDERAL RESERVE BANK OF NEW YORK, https://www.newyorkfed.org/microeconomics/databank.html [https://perma.cc/EZW3-WTBP].

171. FEDERAL RESERVE BANK OF N.Y., CENTER FOR MICROECONOMIC DATA, STATE LEVEL HOUSEHOLD DEBT STATISTICS 2003–2015, February, 2016, https://www.newyorkfed.org/microeconomics/data.html [https://perma.cc/JL2Z-52KZ].

172. *Id.* Sadly, Mississippi has long ranked at the bottom of many lists that proxy for quality of life. *See, e.g.*, Emily Le Coz, *Kids Count Report: Miss. on Bottom of List Again*, CLARION LEDGER (Jul. 22, 2014), http://www.clarionledger.com/story/news/local/2014/07/21/kids-count-report-miss-bottom-list/12975235/ [https://perma.cc/5SUU-4YDF].

outstanding for almost all the years from 2003–2015—Mississippi comes in second.[173] Wisconsin is again below average, but above states like Texas, Nebraska, North Dakota, and Oklahoma.[174] This is not conclusive evidence of much more than more research needs to be done: there are many laws that affect the ability to collect from a defaulted obligation and outstanding credit per capita is at best a crude measure of the availability of credit.

It is plausible that the current system—by virtue of the ability of debts to remain collectible almost indefinitely—lowers the overall cost of credit or even increases access to credit. The more relevant question, however, is whether that decrease in cost or increase in access is large enough to justify the additional social costs caused by a system of perpetual debts.[175]

B. Costs

We are a nation of debtors: many of us are delinquent in our obligations and most depend on credit to absorb financial shocks. Nearly a third of Americans have at least one account reported as "in collection" on their credit report, owing an average of $5,178.[176] Almost half lack a financial cushion sufficient to survive for three months without income.[177] What are the costs of the practically perpetual nature of debts to the human beings who owe them? Or on the systems that exist to support such a regime? This Section identifies some of the psychological, regulatory, and other costs individuals and society as a whole experience as a result of the current system of nearly perpetual obligations.

It is important to separate the costs of "simple" over-indebtedness from the costs created by the almost perpetual nature of debts. Over-indebtedness undoubtedly exacts a

173. FEDERAL RESERVE BANK OF N.Y., CENTER FOR MICROECONOMIC DATA, *supra* note 171.

174. *Id.*

175. William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 WIS. L. REV. 1047, 1081 (1979) ("Even where regulation has impact on the profitability of collection and therefore on interest rates or credit availability, there may be circumstances in which the benefits to delinquent debtors are so great that most persons would be reasonably confident that the regulation is efficient in the wealth maximization sense and worth the liberty costs.").

176. 77 million Americans have an account in collections; the median debt is $1,349. Carolyn Ratcliffe et al., DELINQUENT DEBT IN AMERICA (2014), www.urban.org/publications/413191.html. Percent of adults calculated using 2010 Census numbers. UNITED STATES CENSUS BUREAU, STATE & COUNTY QUICK FACTS (2010), https://www.census.gov/quickfacts/fact/table/US/PST040216 [https://perma.cc/Z4GR-DHSB] (estimating that 76% of the population is 18 years or older, and that the US population in 2010 was 308,758,105).

177. PROSPERITY NOW, CFED ASSETS & OPPORTUNITY SCORECARD—LIQUID ASSET POVERTY RATE 2006–10, http://scorecard.prosperitynow.org/data-by-issue#finance/outcome/liquid-asset-poverty-rate [https://perma.cc/WLJ8-MC35] (last visited Feb. 4, 2018).

psychological and sometimes physical cost on individuals and society.[178] Difficulty repaying one's debts is associated with a plethora of negative outcomes.[179] One study links an inability to make minimum payments and default to increased anxiety.[180] Multiple studies find an association between debt and depression.[181] A high debt-to-income ratio, defaulting on a mortgage, and foreclosure are also each associated with more negative health outcomes.[182] Financial stress has also been linked to work absenteeism,[183] lower graduation rates,[184] and obesity in children[185] and adults.[186] Some have gone as far as to argue "that debt may be a factor in social isolation, feelings of insecurity and shame, self-harm and suicidal ideation."[187] Research on scarcity also suggests that financial distress causes lower mental function, leading to bad decisions that in turn lead to other problems,

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178. *See, e.g.*, Eva Selenko & Bernad Batinic, *Beyond Debt. A Moderator Analysis of the Relationship Between Perceived Financial Strain and Mental Health*, 73 SOC. SCI. & MED. 1725, 1725 (2011) ("Heavy debt not only has economic consequences, but has also been related to severe psychological and physical distress.").

179. It is difficult for most of these studies to perfectly tease out the causal relationship between financial distress and the negative outcome. *Id.* at 1731 ("[T]he causal direction from perceived financial strain to mental health . . . is uncertain").

180. Patricia Drentea, *Age, Debt, and Anxiety*, 41 J. HEALTH AND SOC. BEHAV. 437, 445 (2000).

181. *See generally* Sarah Bridges & Richard Disney, *Debt and Depression*, 29 J. HEALTH ECON. 388 (2010); Frederick J. Zimmerman & Wayne Katon, *Socioeconomic Status, Depression Disparities, and Financial Strain: What Lies Behind the Income-Depression Relationship?*, 14 HEALTH ECON. 1197 (2005); Richard Reading & Shirley Reynolds, *Debt, Social Disadvantage and Maternal Depression*, 53 SOC. SCI. & MED. 441 (2001).

182. *See, e.g.*, Sarah L. Szanton et al., *Effect of Financial Strain on Mortality in Community-Dwelling Older Women*, 63 J. GERONTOLOGY SERIES B: PSYCHOL. SCI. & SOC. SCI. 369 (2008); Angela C. Lyons & Tansel Yilmazer, *Health and Financial Strain: Evidence from the Survey of Consumer Finances*, 71 S. ECON. J. 873 (2005); Patricia Drentea & Paul J Lavrakas, *Over the Limit: The Association Among Health, Race and Debt*, 50 SOC. SCI. & MED. 517, 527 (2000); Carolyn C. Cannuscio et al., *Housing Strain, Mortgage Foreclosure and Health in a Diverse Internet Sample*, 60 NURSING OUTLOOK 134 (2012).

183. Jinhee Kim & E. Thomas Garman, *Financial Stress and Absenteeism: An Empirically Derived Model*, 14 FIN. COUNSELING & PLANNING 31 (2003).

184. Graduation rates for students from the bottom of the income distribution are reduced significantly when students owe more than $10,000 in debt. Rachel E. Dwyer et al., *Debt and Graduation from American Universities*, 90 SOC. FORCES 1133 (2012).

185. Steven Garasky et al., *Family Stressors and Child Obesity*, 38 SOC. SCI. RES. 755, 757 (2009).

186. Eva Münster et al., *Over-indebtedness as a Marker of Socioeconomic Status and Its Association with Obesity: a Cross-sectional Study*, 9 BMC PUB. HEALTH (2009), https://bmcpublichealth.biomedcentral.com/track/pdf/10.1186/1471-2458-9-286 [https://perma.cc/RSA2-Y2UV] (concluding that "[o]ver-indebtedness was associated with an increased prevalence of overweight and obesity that was not explained by traditional definitions of socioeconomic status.").

187. Chris Fitch et al., *Debt and Mental Health: The Role of Psychiatrists*, 13 ADVANCES IN PSYCHIATRIC TREATMENT 194, 195 (2007).

including eviction, divorce, and a need for government benefits.[188] In these cases, individual costs can quickly become costs borne by society in the form of increased taxes or health care costs.[189]

The ability of debts to continually resurface in an individual's life can only increase these psychological and social burdens, as over-indebted individuals are forced to remain in a debt trap almost eternally. This debt trap disincentivizes work.[190] As the Supreme Court has noted, "[f]rom the viewpoint of the wage earner, there is little difference between not earning at all and earning wholly for a creditor. Pauperism may be the necessary result of either."[191] These psychological costs may be difficult to quantify, but that does not make them unimportant.[192]

There are other social costs. The current system with all its complexity incurs significant regulatory costs.[193] The uncertainty over which type of statute of limitation might apply to a particular debt incurs costs for debt owners, regulators, and consumers. Confusing matters further, the Fair Credit Reporting Act (FCRA) provides a different time period during which a debt can be reported to credit bureaus that is unrelated to the limitations period.[194]

Debt buyers face the risk of FDCPA liability and the attendant necessity to have systems in place to attempt to avoid it.[195] This increases legal costs, especially for anyone who operates in multiple jurisdictions. Regulators incur increased monitoring and oversight costs as a result of the complexity. Society may also

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188. *See, e.g.*, SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH 13–14 (2013); Virginia Graves, *Does Poverty Really Impede Cognitive Function? Experimental Evidence from Tanzanian Fishers*, (2015) (unpublished Master's Thesis, University of San Francisco), http://repository.usfca.edu/thes/129/ [https://perma.cc/6MRF-75FH]; DAVID CAPLOVITZ, MAKING ENDS MEET: HOW FAMILIES COPE WITH INFLATION AND RECESSION 155 (1979) (finding that "[t]hose whose incomes had fallen behind rising prices were much more likely to show mental stress . . . than those whose incomes kept up with rising prices.").

189. *See* Katherine Porter, *The Damage of Debt*, 69 WASH. & LEE L. REV. 979, 1007 (2012) (positing that "[e]xcessive debt may be associated with underutilization of medical treatment[,]"" which might lead to more severe and expensive consequences).

190. *Id.* at 988.

191. Local Loan Co. v. Hunt, 292 U.S. 234, 245 (1934).

192. *See* Porter, *supra* note 189, at 1003–22 (proposing a framework for understanding the harms of overindebtedness and urging further empirical research).

193. *See generally* LUIGI ZINGALES, A CAPITALISM FOR THE PEOPLE: RECAPTURING THE LOST GENIUS OF AMERICAN PROSPERITY (2012).

194. 15 U.S.C. § 1681c(a)(4) (2012).

195. Creditors collecting on their own debts (or debts acquired before they were delinquent) are not subject to the FDCPA. Nevertheless, they may be legitimately concerned that the CFPB will find that collecting on time-barred debt is an unfair or deceptive practice as prohibited by Dodd–Frank. 12 U.S.C. § 5531 (2010).

bear some costs in the form of increased social safety nets required to cope with consumers who get further mired in debt.[196] To be clear, the argument is not that these costs would not exist in a system where debts were automatically discharged: it is that the complexity of the current system gratuitously increases regulatory costs.

C. *Consequences*

A system in which debts are practically immortal creates a number of perverse incentives. One is an increase in the creditor's moral hazard at the time it grants credit when it may continue to pursue the debtor for decades after a default. Similarly, creditors have an increased incentive to try to at least delay the consumer's bankruptcy decision in order to ensure that more can be collected from them. Finally, in a system in which only bankruptcy can truly kill debts and creditors are otherwise permitted to continue dunning for many years, consumers have strong incentives to file bankruptcy. Despite this and the willingness of creditors to continue to offer credit even after bankruptcy, fewer consumers file than would economically benefit.[197] Combined, these consequences of perpetual debts disproportionally affect the most vulnerable consumers: those too poor to file bankruptcy, those who refuse to do so on ethical grounds, and those least sophisticated who reaffirm out-of-statute debts.

Imagine a world in which creditors could always be certain that they would be repaid in full. In that world, creditors would have little incentive to withhold lending from even very risky customers.[198] Collection would be risk-free, albeit not necessarily cost-free.[199] That is an extreme example, of course, but my contention is that our system of perpetual debts likewise reduces the creditor's incentive to underwrite more carefully. The ability of debt owners to "wait out" the debtor for decades increases the creditor's moral hazard as it encourages riskier lending. In 2007, Ronald Mann argued that some credit card issuers depended on what he called a "sweat box" model of credit.[200] In Mann's model,

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196. *See, e.g.*, Whitford, *supra* note 175, at 1075.

197. *See generally* Hynes, *supra* note 13; White, *supra* note 152.

198. *See* DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS 3 (2011) (explaining the role of financial institutions as "directing resources toward profitable investments," and the disastrous result should lenders be guaranteed recovery on even the most foolish loans).

199. *Id.* Increased costs might be tacked on to the debt itself, however, in the form of social costs as debtors lean on illegitimate modes of repayment facing such a guaranteed debt payment. *Id.*

200. Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*,

"lenders are not just indifferent to default, they actually rely in part upon it to turn on the sweatbox's heat switch for their most lucrative constituency."[201] As Andrea Freeman has noted, "the ideal credit card user maintains only enough financial stability to avoid bankruptcy proceedings."[202]

In Mann's model, the breakeven period for consumers in the sweat box may be as short as two years.[203] In other words, after two years "an issuer can profit even on loans that wind up being written off entirely; every payment after that point is gravy."[204] My argument is that this gravy is enhanced by our system of perpetual debts. Not only can an issuer break even after only a few years, but after charge-off, the ability to continue to pursue the debtor for the rapidly growing debt turns that debt into an asset that can be sold to debt buyers. Until recently, that sale could be done quite straightforwardly—no underlying documentation evidencing the debt was required—and the issuer often washed its hands of any problems by disclaiming accuracy, title, and other warranties during the sale.[205] Part of the reason this system has worked is lax oversight by bank regulators; the other part is that debt buyers continued—indeed many still continue—to profit from the system by being able to pursue the debtors for many years after default and even collect default judgments in state courts.[206]

Our system of perpetual debts combined with the sweat box model may also explain the initially puzzling finding that bankrupt debtors are a highly sought-after segment for consumer credit.[207] One study found that "individuals with the lowest credit score and a lower propensity to repay as proxied by income, race[,] and education are . . . offered more credit after bankruptcy."[208] Given that bankruptcy is the only method that can truly discharge a debt, and that those who obtain a bankruptcy discharge are

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2007 U. ILL. L. REV. 375, 379 (2007).

201. John A. E. Pottow, *Private Liability for Reckless Consumer Lending*, 2007 U. ILL. L. REV. 405, 417 (2007).

202. Andrea Freeman, *Payback: A Structural Analysis of the Credit Card Problem*, 55 ARIZ. L. REV. 151, 162 (2013).

203. Pottow, *supra* note 201, at 416.

204. *Id.*

205. Jiménez, *supra* note 17, at 61.

206. *Id.* at 95–96; *see also* Whitford, *supra* note 175, at 1064–66 (discussing the limits of debtors' leverage in debt collection).

207. Katherine Porter, *Bankrupt Profits: The Credit Industry's Business Model for Postbankruptcy Lending*, 93 IOWA L. REV. 1369, 1391–92 (2007) (finding that "just one year after bankruptcy, 96.1% of debtors were recipients of credit solicitations").

208. Ethan Cohen-Cole et al., *Forgive and Forget: Who Gets Credit After Bankruptcy and Why?* (Working Paper, July 23, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1341856.

barred from obtaining another one for eight years,[209] creditors can be sure that they can keep a debtor in the sweat box for at least that period of time.

Not all individuals who have trouble repaying their debts will suffer these consequences, however. For some, the financial struggles may be temporary: a new job, completing an educational program, or a myriad of other happy circumstances could turn things around, partially or completely. Others may temporarily be better off: receiving a large tax refund, bonus at work, or a short-term increase in wages during the holiday season. This temporary improvement might be enough to pay down some debts.[210] But this may not happen to all, or even many, over-indebted individuals. For these "poor but unfortunate" debtors,[211] the U.S. legal system provides a way in which to avoid or reduce these costs: personal bankruptcy.[212]

But when debts are effectively immortal, creditors and debt owners have an incentive to attempt to delay the bankruptcy filing decision as long as possible.

In 2005, Congress amended the Bankruptcy Code.[213] The stated purpose of the amendments was to thwart what some argued was "rampant abuse" of the bankruptcy system: too many people filing strategically, despite an ability to repay.[214] Proponents of this hypothesis attributed the previous decades' increase in filings to a relaxation of bankruptcy rules and a decline in the "stigma" associated with filing bankruptcy.[215] The empirical

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209. 11 U.S.C. § 727(a)(8) (2012).

210. Indeed, if the debt has been sold, the new debt owner might be eager to settle for a fraction of what is owed. Debt buyers pay less than a dime for most debts purchased. That fact may not be known to the individual, however. More perversely, individuals who are not yet on firm financial footing but could repay some debts might be concerned about getting in touch with debt collectors to offer any kind of payment. They may (reasonably) fear that exposing themselves to a garnishment or lawsuit. The uncertainty over what might happen creates additional emotional costs.

211. "The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (quoting Grogan v. Garner, 498 U. S. 279, 286, 287 (1991)).

212. To be clear, not all can be avoided. As discussed in Part III.B, not all debts are dischargeable in bankruptcy.

213. Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8 (2005).

214. *See, e.g.*, Judge Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 193, 204 (1999).

215. *See, e.g.*, Michelle J. White, *Chapter 14 Bankruptcy Law*, 2 *in* HANDBOOK OF LAW AND ECONOMICS 1013–1072, 1068 http://www.sciencedirect.com/science/article/pii/S1574073007020142 [https://perma.cc/S3WN-969X] (last visited Aug. 21, 2015) ("The empirical work on bankruptcy suggests that the increase in the number of personal bankruptcy filings that occurred over the past 20 years could have been due to a combination of households gradually learning how favorable Chapter 7 is and bankruptcy

support for the proposition that bankruptcy filers were (or are) largely strategic players was and remains scant at best.[216] At the time, Professor Mann argued that "the important effect [of the changes would] be to slow the time of inevitable filings by the deeply distressed, allowing [credit] issuers to earn more revenues from these individuals before they file."[217] While it is impossible to know precisely why, since 2005, consumer bankruptcy filings have decreased steadily, despite the Great Recession.[218]

A system of perpetual debts also incentivizes debt owners to dun debtors excessively and inefficiently. As Professors Mann and Porter have noted, "[b]ecause each creditor has an incentive to be first in line to collect, and because the creditors can dun their debtors at little or no cost to themselves, creditors as a group engage in dunning activities that individual debtors find intolerable."[219] These dunning activities may compel some debtors to file bankruptcy, even if mostly to be rid of particularly aggressive creditors. In some cases, this may lead to bankruptcies that would not have happened but for the excessive dunning.[220]

And yet, not everyone who could benefit files bankruptcy.[221] Empirical research after The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) suggests that the amendments created both structural and procedural barriers that may prevent some worthy individuals from filing.[222] A major barrier is cost: after BAPCPA was enacted, the costs of filing

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becoming less stigmatized as filing became more common."); Teresa A. Sullivan et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 216 (2006) (quoting a number of elected and other officials denouncing the lack of bankruptcy stigma) (quoting Federal Reserve Bank Chairman Alan Greenspan as saying: "[p]ersonal bankruptcies are soaring because Americans have lost their sense of shame"); Rafael Efrat, *The Evolution of Bankruptcy Stigma*, 7 THEORETICAL INQUIRIES L. 365 (2006).

216. *See* Kartik Athreya, *Shame as It Ever Was: Stigma and Personal Bankruptcy*, 90 FED. RES. BANK RICHMOND ECON. Q. 1, 2 (2004); Marianne B. Culhane & Michaela M. White, *Creighton: Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 31 (1999) (finding that "can pay" debtors as screened out by the 2005 "means test" constituted less than 3.6% of random sample).

217. Mann, *Sweat Box*, *supra* note 200, at 379.

218. *See, e.g.*, Robert M. Lawless, *Bankruptcy Filings Drop 10% in 2015*, CREDIT SLIPS (Jan. 7, 2016, 4:37 PM), http://www.creditslips.org/creditslips/2016/01/bankruptcy-filings-drop-10-in-2015.html [https://perma.cc/NAU2-L9R8].

219. Mann & Porter, *supra* note 147, at 292.

220. *Id.* at 330. *But see* Hynes, *supra* note 13, at 57 (finding that few judgment debtors file for bankruptcy).

221. White, *supra* note 152; Hynes, *supra* note 13.

222. LOIS R. LUPICA, THE CONSUMER BANKRUPTCY FEE STUDY: FINAL REPORT 3–4 (2011).

bankruptcy increased between 24% and 51%, depending on the type of bankruptcy.[223] Given findings that the biggest determinant of when a consumer files for bankruptcy is when they have amassed enough money to pay for the attorney and filing fee, bankruptcy is now more expensive than ever.[224] Since the Great Recession, the trend is decidedly for fewer bankruptcies: filings decreased almost 42% between 2010 and 2014 and decreases again in 2015.[225]

These consequences of a system of perpetual debts combine to hurt the most vulnerable individuals: those too poor to file bankruptcy, those who refuse to do so on ethical grounds, and those least sophisticated who reaffirm out-of-statute debts.

IV. AUTOMATIC DISCHARGE

The rest of this Article explores a proposal to ameliorate the social and economic costs of our current system of perpetual debts. My purpose is to explore the ways in which this proposal could reduce some of the regulatory and psychological costs of the current system without creating (too many) additional problems.

A. *A Simplifying Proposal*

I propose a form of automatic bankruptcy for individual debts: a federal law providing for the automatic discharge of consumer debts after a seven-year period.[226]

My aim is to articulate the simplest rule that would address most of the concerns from the previous pages.[227] "The simpler a

223. Chapter 7 no asset cases, the simplest bankruptcy cases of all, increased an average of 51%. *Id.* at 6. Chapter 7 asset cases (those in which the debtor thought she would have assets to distribute to her creditors) increased 37%. *Id.* In Chapter 13, cases that completed with a discharge increased an average of 27%. *Id.* Dismissed chapter 13's—where the debtor did not obtain a discharge—increased 24%. *Id.*

224. Mann & Porter, *supra* note 147, at 292.

225. Robert M. Lawless, *Bankruptcies Down 12% in 2014, Forecast Predicts the Same Decline for 2015*, CREDIT SLIPS (Jan. 8, 2015, 3:25 PM), http://www.creditslips.org/creditslips/2015/01/bankruptcies-down-12-in-2014-forecast-predicts-the-same-for-2015.html [https://perma.cc/HY6M-D8GH].

226. For the definition of consumer debt, I borrow the one from the Fair Debt Collection Practices Act: "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5) (2012).

227. As the National Consumer Law Center ("NCLC") has noted in their proposal to adopt a uniform statute of limitations, doing so "would promote clarity for all, avoid loopholes, and empower consumers to more easily identify and defend themselves from lawsuits that

rule is, the fewer provisions there are and the less it costs to enforce them."[228] This principle goes to both the necessity that this be a federal law and one that takes effect automatically. "The simpler [a rule] is, the easier it is for voters to understand and voice their opinions accordingly. Finally, the simpler it is, the more difficult it is for someone with vested interests to get away with distorting some obscure facet."[229]

In brief, the proposed statute would have the following five features:

(1) Owners of unsecured consumer debts would have seven years in which to collect those debts, with the clock beginning to run 180-days after the consumer's behavior that gave rise to the cause of action. Payments made during this period do not restart the collection clock.

(2) Judgments based on consumer debts would have a separate, non-renewable, seven-year clock. In other words, the initial seven-year extinguishment period can be extended if a court renders a judgment in a lawsuit filed before. The automatic discharge federal law I am proposing would not only automatically extinguish the legal remedy of collecting through the courts, but also any right of repayment.[230]

(3) When the applicable seven-year period expires, the debtor's obligation to the creditor and the creditor's concomitant right to collect cease to exist. Similar to the bankruptcy discharge, a judgment obtained on an extinguished debt is void and can be collaterally attacked in a different proceeding.

(4) Attempting to collect on an extinguished debt would be an unfair practice giving rise to a private right of action against the collector, with statutory financial penalty, attorney's fees, and actual costs (including disgorgement

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are filed after the statute of limitations has expired." My proposal differs significantly from the NCLC, who recommends a three-year period for unsecured debts not reduced to judgment and five years after a judgment. *Id.* at 6, 12–15.

228. Luigi Zingales, *Why I Was Won Over by Glass-Steagall*, FIN. TIMES (June 10, 2012) https://www.ft.com/content/cb3e52be-b08d-11e1-8b36-00144feabdc0?mhq5j=e5; *see also* ZINGALES, *supra* note 193, at 207.

229. ZINGALES, *supra* note 193.

230. As in Wisconsin and Mississippi, the statute would create a new property right for the debtor: that be to be free from the debt. The main difference between the laws in these states and my proposal is that in Mississippi, the statute explicitly permits an extinguished obligation to serve as consideration for a new promise, MISS. CODE ANN. § 15-1-3(1) (West 2013), and the Wisconsin statute does not make clear that this is not the case, WIS. STAT. ANN. § 893.05 (West 1997).

of any payments made by the consumer) obtainable from the collector. Regulators such as the Consumer Financial Protection Bureau and states' attorneys general could also enforce the statute.

(5) The two extinguishment periods would preempt contrary state law and could not be waived by the consumer.

Statutes of limitations for debts have typically been creatures of state law, and it is possible for much of this proposal to be implemented at the state level.[231] Indeed, the National Consumer Law Center has proposed a model state statute of limitations that "creates a single 3 year statute of limitations for all consumer debts being collected in the state," ensures that the enacting state's citizens would not be subject to longer statutes of limitation, extinguishes the debt upon expiration of the three years, and limits collection of judgments to five years.[232]

My proposal requires a federal law, however, because a state-by-state implementation would leave in place the crushing complexity of a system in which few can be certain which statutory period applies. Even if all states adopted statutes that extinguished all rights and remedies upon the expiration of the statute of limitation, debt owners and consumers would still find it difficult to determine which statutory period applied to a particular debt. A state-by-state enactment would retain many of the regulatory costs of the current system. That is, the costs of time spent by debt owners deciding which statute of limitation is likely to apply, time spent by courts deciding that issue, and costs of regulatory supervision over debt owners' procedures for calculating limitations periods would all remain. This means that many of the potential cost savings to creditors in Part IV.B would be non-existent.

In a state-by-state implementation, consumers would also continue to be hurt for two reasons. To the extent that a consumer

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231. The Contracts Clause does not have to be a bar to such legislation, so long as it only applies to debts that were not in default when the statute is enacted. *Developments*, *supra* note 58, at 1190 ("It has long been settled that legislatures may prospectively limit the time within which actions may be brought, and alter existing periods at will as to obligations not yet ripened into causes of action."); *see also* U.S. CONST. art. I, § 10, cl. 1 (restricting the states from coining money, but not limiting state authority to establish statutes of limitations for debts).

232. APRIL KUEHNHOFF & MARGOT SAUNDERS, NAT'L CONSUMER L. CTR., MODEL STATUTE OF LIMITATIONS REFORM ACT, 2 (Dec. 2015), https://www.nclc.org/images/pdf/debt_collection/statute-of-limitations-reform-act.pdf [https://perma.cc/HZ9F-KC8T]. The model statute also proposes a private right of action for violations and prohibits extending the limitations period in certain circumstances. *Id.*

knows what a statute of limitations is, she would likely still encounter difficulty selecting the relevant statute.[233] Second, a complex state-by-state system would continue to make it difficult for consumer advocates to communicate the concept of statutes of limitations to consumers effectively.[234] Simply put, the simplest and most efficient implementation of this proposal requires a Congressional statute.

The first substantive part of the proposal envisions a single federal collection period of seven years applicable to unsecured consumer debts, running from 180 days after a default. Seven years to collect on an unsecured debt is longer than most states' limitations periods,[235] and almost double what the NCLC has proposed.[236] Choosing this number has the advantage of simplicity.

The seven-year period purposely mirrors the Fair Credit Reporting Act's (FCRA) reporting period. The FCRA currently permits credit reporting agencies to report the existence of delinquent accounts for up to seven years from the date in which they were first sent to collections.[237] The current provision is agnostic as to whether the debt is legally collectible. A bankruptcy discharge has no effect on the reporting period; credit bureaus can continue to report discharged debts for the same FCRA-prescribed period as any other delinquent debt.[238] Because this can be confusing, credit bureaus report the debt as "included in bankruptcy" or "discharged in bankruptcy."[239] Without such a notation, third parties obtaining the consumer's credit report would assume that the debt is legally owed and the consumer has

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233. *See* Fred O. Williams, *Expiration Dates Fuzzy On Old Credit Card Debt*, CREDITCARDS.COM (Mar. 22, 2013), https://www.creditcards.com/credit-card-news/collectible-expiration-date-old-debt-statute-1282.php [https://perma.cc/RW94-P7MG].

234. *See id.*

235. Sixteen states "provide a three-year statute of limitations for written contracts, oral contracts, or both." NCLC, *supra* note 242, at 13. Many others limit collection on contractual debts to six years or less. *See, e.g.*, WASH. REV. CODE ANN. § 4.16.040(1) (West 2016) (6 years); WIS. STAT. § 893.43 (2016) (6 years); ARK. CODE ANN. § 16-56-111 (2005) (5 years); CAL. CIV. PROC. CODE § 337 (West 2006) (4 years).

236. In its model legislation, NCLC has proposed a three-year limitations period for consumer debt, and five years for judgments. *Id.*, at 2–3.

237. 15 U.S.C. § 1681c(c)(1) (2012).

238. *See* Stephanie Lane, *Can Debts Discharged in Bankruptcy Appear on My Credit Report?*, NOLO, https://www.nolo.com/legal-encyclopedia/can-debts-discharged-bankruptcy-appear-my-credit-report.html [https://perma.cc/BGM2-DWQG].

239. *See id.* This notation is not enshrined in a statute or regulation; it is the credit bureaus' interpretation of what the FCRA requires them to do to ensure "maximum possible accuracy of the information . . . ." 15 U.S.C. § 1681e(b) (2012).

failed to pay.[240] Mirroring the FCRA provision in this proposal simplifies its implementation. Assuming the underlying information is correct, if a delinquent debt is reported without a bankruptcy notation, the consumer is liable for the debt.[241]

In contrast with the first proposal, a seven-year period for judgments is significantly lower than the 10 or 20-year limit that is the norm in most states.[242] The difference here is partly balanced by the (also) significant time-difference between the proposal and current law for pre-judgment debts. Furthermore, empirical evidence suggests that most judgments go unsatisfied.[243] It is thus likely that an empirically derived time limit on satisfying judgments would be significantly lower than the current statutory period in most states. The most valuable part of a seven-year limit on collecting judgment is in its simplicity. Similar as above, a seven-year period harmonizes with the FCRA's requirement that civil judgments can only remain in a credit report for up to "seven years or until the governing statute of limitations has expired, whichever is the longer period."[244]

The third element of this proposal is critical for its function: once the applicable seven-year period expires, the debt is automatically extinguished and cannot be revived. Because the extinguishment periods cannot restart, once one knows the date of default, calculating whether a debt is still valid becomes simple arithmetic. If more than seven years (and 180 days) have passed after the default, it is as if that debt never existed. The debt owner no longer owns anything.[245] Thus, a judgment purportedly declaring that the defendant was liable for a discharged debt would be invalid and void and could be collaterally attacked in a separate proceeding.[246]

240. *In re* Haynes v. Chase Bank USA, 2015 WL 862061, at *1 (S.D.N.Y. 2015).

241. The Consumer Financial Protection Bureau has authority to issue regulations interpreting the FCRA. Fair Credit Reporting (Regulation V) 12 C.F.R. 1022 (2011).

242. Nationwide, statutes of limitations on judgments are lengthy: typically between ten and twenty years. Richard M. Hynes, *Why (Consumer) Bankruptcy*, 56 ALA. L. REV. 121, 143 (2004). Most states allow some form of renewal of judgments. *See id.* at 142.

243. Hynes, *supra* note 13.

244. 15 U.S.C. § 1681c(a)(2) (2012). The only applicable period under my proposal would be seven years.

245. As in Wisconsin and Mississippi, the statute would create a new property right for the debtor: that be to be free from the debt. The main difference between the laws in these states and my proposal is that in Mississippi, the statute explicitly permits an extinguished obligation to serve as consideration for a new promise, MISS. CODE ANN. § 15-1-3(1) (West 2013), and the Wisconsin statute does not make clear that this is not the case, WIS. STAT. ANN. § 893.05 (West 1997).

246. *See also In re* Gurrola, 328 B.R. 158, 164 (B.A.P. 9th Cir. 2005) (explaining that in the context of the Bankruptcy Code, the term "'void' . . . unambiguously connot[es] a

Laws aimed at helping the unsophisticated (and unrepresented) consumer face a familiar stumbling block if they require that the consumer know or exercise their statutory rights in order to work. While perhaps "good on paper," such laws expose consumers to unscrupulous actors who exploit their lack of sophistication. Statutes of limitations are an apt example.[247]

The bankruptcy discharge works well because most consumers who obtain one are represented by counsel and are presumably advised on its power and reach. But it also works well because it has some "teeth" in the form of a federal injunction against collection of discharged debts (and possible money penalties). This is why we need the fourth element of my proposal: a strict liability statutory declaration that attempting to collect on an extinguished debt is an unfair practice giving rise to a private right of action against the collector.[248] The consumer would have not just the ability to collect a statutory financial penalty (similar to the FDCPA) for each attempt to collect but could also recover actual costs, including any payments made to the collector after the debt was discharged. To encourage the consumer bar to bring these cases, the consumer could also recover reasonable attorney's fees for a successful suit. Lastly, regulators such as the Consumer Financial Protection Bureau and states' attorneys general could enforce this statute. The aim here is to increase the costs to bad actors.

The final and important requirement of this proposal is to prohibit the enforcement of any waivers with regards to any of the previous provisions. Thus, similar to a bankruptcy discharge (and unlike the Wisconsin or Mississippi statutes), there could be no "revival" of the debt once the debt was automatically discharged. The previous obligation could not be reinstated even if both parties agreed and even if the debtor made a payment towards the debt.[249] A judgment issued on a debt that had been discharged would be

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judgment rendered without subject-matter jurisdiction that could be ignored as a nullity and collaterally attacked").

247. Sometimes it's not only the consumer who is exploited, but the system itself, as with the practice of using bankruptcy to collect on time-barred debts.

248. I use the word "collector" here simply to mean the entity that attempted to collect, whether that entity is the original creditor, a subsequent debt owner, or a third party hired to collect the debt.

249. The bankruptcy provision, 11 U.S.C. § 524 (2012), was intended to overturn the common law rule that a prior obligation, though discharged in bankruptcy, was enough to support consideration for a new commitment to repay. *See* RESTATEMENT (SECOND) OF CONTRACTS § 83 cmt. b (AM. LAW INST. 2017) (providing that an express promise to pay a debt could remain binding even if it was discharged during a bankruptcy proceeding). If the debtor made the payment erroneously, not knowing the law, she might even be entitled to recover that payment, depending on state law.

void and could be collaterally attacked in a separate proceeding. The most typical one would be a lawsuit under the FDCPA.

A comparison of the major differences between my proposal and the existing bankruptcy discharge might be helpful. Table 1 lays out the major features.

Table 1 - Comparing the bankruptcy discharge to the "automatic discharge" proposal

Similarities	**Differences**
Both would be federal statutes.	Debt discharge is automatic once collection period expires; debtor need not do anything.
Debts are extinguished by operation of law.	Debtor may not be aware debt has been discharged.
Debts cannot be resurrected after the discharge, even if both parties agree.[250]	No public record of which debts have been discharged.
Record-keeping of discharged debts may be available.[251]	Timing of automatic discharge could be extended if debt owner sues before debt is extinguished and obtains a judgment.
Affects most kinds of unsecured consumer debts, including those that have been reduced to judgment.	Creditor knows when the discharge will occur.[253]
Judgments involving discharged debts are void and can be collaterally attacked.	Debts are discharged individually.
	Private student loans are automatically discharged; no proof of undue hardship needed.

250. Bankruptcy has a procedure for reaffirmation of a debt but most reaffirmations must happen under the supervision of the bankruptcy judge. 11 U.S.C. § 524(a)(1)–(2), (k)(3)(J)(i)(7) (2012); Baran Bulkat, *Reaffirmation Agreements in Chapter 7 Bankruptcy*, THE BANKRUPTCY SITE, https://www.thebankruptcysite.org/resources/bankruptcy/state-bankruptcy-law/will-chapter-7-trustee-agree-my-reaffirmation-request [https://perma.cc/5XXZ-YML6].

251. In bankruptcy, the record-keeping happens when the debtor fills out her schedules listing all of her debts. These schedules become part of the public record once the bankruptcy case is filed. The analogous situation in the proposal is the debtor's credit report and its listing of outstanding debts. The analogy is not perfect. The bankruptcy filing remains a public record forever; whereas debts do not need to be listed in a credit report and will only remain there for a certain period of time. 11 U.S.C. § 521(a) (2012); MARGARET C. JASPER, HOME MORTGAGE LAW PRIMER 93 (3d ed. 2009).

253. As opposed to not knowing whether there will be a bankruptcy filing at all, let alone a discharge.

Former debtor can pursue violations through federal statutes.[252]	Private right of action against those attempting to collect, including costs, fee-shifting, and a statutory penalty.

The objective of this proposal is to give creditors a clear and defined amount of time in which to attempt to collect an unsecured debt from a consumer. This time can be extended by obtaining a judgment on a debt, but the time to collect on that judgment would also be limited and non-renewable. In effect, this proposal limits the length of an unsecured consumer obligation to 7–14 years, depending on if and when a creditor obtains a judgment. It is a clock against which the collector is racing to persuade the debtor to repay or to use legal process to force repayment. The dual goals are to encourage creditors to act diligently in attempting to secure payment and to allow debtors to easily know when they are no longer burdened by a debt.

B. *Effect on Creditors, Collectors, and the Cost of Credit*

One of the posited benefits of the current perpetual system is that the ability to continue collecting for lengthy periods from delinquent debtors may lower the overall cost of credit. It is often stated that increased regulation will tend to increase the cost of credit or decrease its availability.[254] However, as Bill Whitford and Harold Laufer found, the answer is not necessarily black or white: "regulation may sometimes induce creditors to adopt more efficient collection techniques without adversely affecting their net income."[255] Further, because creditors compete amongst each other for a small or non-existent pool of funds from the debtor, regulation may also reduce collection costs on all creditors.[256] Finally, knowing that *ex post* remedies are limited may discipline

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252. In the case of a bankruptcy discharge violation, debtors have the option to enforcing the discharge through the Bankruptcy Court (who may impose penalties for the violation of the discharge injunction) or they may sue under the FDCPA for attempting to collect a debt not legally owed. *See* Randolph v. IMBS, Inc., 368 F.3d 726, 728 (7th Cir. 2004). In the case of my automatic discharge proposal, debtors may sue under the FDCPA for the same principle.

254. *E.g.*, Zywicki, *supra* note 161.

255. Whitford, *supra* note 196, at 1077 (citing William C. Whitford & Harold Laufer, *Impact of Denying Self-Help Repossession of Automobiles: A Case Study of the Wisconsin Consumer Act*, 1975 WIS. L. REV. 607, 649 (1975) (noting that collectors had further routinized and streamlined their collection procedures following increased regulation).

256. *Id.* at 1077–78. Bankruptcy also arguably serves this function.

some creditors to make sure they are lending to those who are likely to repay.[257] Thus, it does not necessarily follow that costs would increase or availability of credit would decrease with additional regulation.[258]

On the contrary, a uniform federal law might reduce the overall cost of collection: calculating the appropriate period becomes a simple matter of addition.[259] Such a law would reduce the uncertainty caused by the current patchwork of state statutes and differing interpretations of the appropriate state law to apply. For the law-abiding debt collector, it would also reduce the probability of a FDCPA and FCRA lawsuits, a significant cost-saver.[260]

Another likely consequence of this proposal is the further consolidation of the debt collection and debt buying industry.[261] This consolidation is not new. It is currently occurring largely as a result of increased enforcement the Federal Trade Commission, the Office of the Comptroller of the Currency, the Consumer Financial Protection Bureau (CFPB), and states attorneys general.[262] Looming new regulations by the CFPB, increasing numbers of FDCPA lawsuits, and intensified scrutiny in the academic and popular press are likely also to blame.

But consolidation in this space should not be feared. Commentators tend to attribute the bulk of debt collection abuses to smaller debt collectors.[263] Without regulation, there are few

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257. *See, e.g.*, Ronald J. Mann, *Optimizing Consumer Credit Markets and Bankruptcy Policy*, 7 THEORETICAL INQUIRIES L. 395, 399 (2006) (proposing rules that place more of the risk of financial distress on lenders, "so that they have an incentive to use information technology to limit the costs of distress"); Viktar Fedaseyeu, *Debt Collection Agencies and the Supply of Consumer Credit* at 20–21, FEDERAL RESERVE BANK OF PHILADELPHIA (June 19, 2015), https://www.philadelphiafed.org/-/media/research-and-data/publications/working-papers/2015/wp15-23.pdf [https://perma.cc/5A8S-ZPJH].

258. *Accord* Zywicki, *supra* note 161, at 2 ("In theory, well-designed debt collection rules can aid both borrowers and lenders by increasing access to and reducing prices for consumer credit.").

259. As one commentator has noted, "[n]o one can tell, of course, how much additional judicial effort would be required if there were no statutes of limitations; but it may well be that it would not exceed that expended in deciding legal questions engendered by the statutes themselves." *Developments*, *supra* note 58, at 135.

260. WebRecon reports that, since 2010, there have been over 10,000 FDCPA lawsuits annually with 10,402 in 2016. *2016 Year in Review: FDCPA Down, FCRA & TCPA Up*, WEBRECON LLC (Jan. 24, 2017), https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/ [https://perma.cc/G5E2-YZVE].

261. *See Study: Over-Regulation of Debt Collectors by CFPB Could Harm Consumers and Credit Economy*, ACA INT'L, (Sept. 30, 2015) (quoting Zywicki, *supra* note 161).

262. Michael R. Flock, *Debt Buyers—Shrinking Opportunities Amid Regulatory Reform*, ABF J. (Sept. 2014), http://www.abfjournal.com/articles/debt-buyers-shrinking-opportunities-amid-regulatory-reform/ [https://perma.cc/SV3J-Q3G7].

263. *See* Halpern, *supra* note 47, at 158 (suggesting that small-time debt collection

barriers to entry to purchase or collect debt.[264] Smaller collection operations have fewer resources and are more likely to violate the law for lack of knowledge or ability to train their employees. They are also more likely to "work" older debt, or debt that has changed ownership multiple times, both circumstances which increase the likelihood of consumer harm. Industry consolidation should also increase efficiency of collections, and allow collectors and debt buyers to use their increased market power to create more complex and accurate analytical models of whether a debtor is likely to repay. This should in turn decrease the cost of collections, which may trickle up to a decrease in the cost of credit, all else being equal.[265]

Nevertheless, this statute would undoubtedly incur some costs. State courts dockets across the United States are already filled with debt collection lawsuits, most of which are resolved upon the debtor's default.[266] This proposal might have the effect of forcing creditors to sue more often, to obtain the additional seven-year period in which to collect. It might also increase the number of lawsuits, although whether it does would depend on whether the expected value of collecting on a judgment, conditional on winning the lawsuit, is large enough to make it worthwhile. Indeed, instead of an increase in the total number of lawsuits, we might observe a substitution effect, as some lawsuits would no longer be brought.

A potential critique of this proposal is that it will reduce the availability of credit as lenders may not be able to legally charge sufficiently high prices to compensate for the lower probability of recovery upon default. Riskier consumers will suffer disproportionately, as lenders would still be willing to offer credit to those with a low probability of default. First, to the extent that an automatic discharge would discourage lenders from granting loans to those who will be unable to repay them, this may not be a

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agencies are successful because they induce psychological anxiety in debtors).

264. *Id.*; *see* Fedaseyeu, *supra* note 259, at 20.

265. In addition, better analytics would help collectors identify those consumers who truly cannot pay (and who only own exempt assets) and should decrease the likelihood of those consumers being contacted. *See* Tom Groenfeldt, *Bank Reduces Debt Collection Costs Through Big Data Analytics*, FORBES (July 8, 2015, 7:25 AM), https://www.forbes.com/sites/tomgroenfeldt/2015/07/08/bank-reduces-debt-collection-costs-through-big-data-analytics/#20b6436379b3 [https://perma.cc/3PSM-92WE]; *Debt Management and Collection Analytics (Customer Segmentation)*, SCOREDATA, http://scoredata.com/debt-management-and-collection-analytics-customer-segmentation/ [https://perma.cc/VY4E-AWGV] (last visited Jan. 11, 2018).

266. For decades, commentators have noted that the majority of lawsuits in state court dockets involve the collection of consumer debts. *Cf.* D. CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 220 (1974).

great loss.[267] As Heidi Hurd has noted, "there is no virtue in allowing creditors to extend credit to those who can be reliably predicted to default on its terms."[268]

But note that independent of this proposal, the more time passes from the moment of default, the lower the probability of collecting.[269] In other words, as time passes, the recovery curve inexorably approaches zero.[270] At some point, the likelihood of recovery is so miniscule that it may be possible to set a long enough period for the automatic discharge that the diminishing returns of collection after that time would not be worthwhile. An automatic discharge rule reduces creditors' ability to collect. How *much* it reduces it, however, depends on *when* the automatic discharge happens. I have proposed setting a seven-year statutory period that could not be revived by a promise or even subsequent payments.

Another likely criticism is that an automatic discharge of debts may incentivize debtors to hide from their creditors for the statutory period in an effort to get away with not repaying their debts. While there may be some debtors who make this choice, it

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267. This may force some consumers to substitute towards other types of credit products. *See* Zywicki, *supra* note 161, at 22.

268. Heidy M. Hurd, *The Virtue of Consumer Bankruptcy* in A DEBTOR WORLD: INTERDISCIPLINARY PERSPECTIVES ON DEBT 234 (Ralph Brubaker, Robert M. Lawless, and Charles J. Tabb, eds., 2012). Discussing theological reasons for forgiving debts, Simon Taylor notes:

> The mutual recognition of sinfulness is significant because it implies that both debtors and creditors have a responsibility in the problems that have arisen over debt in the current context. Loans must not only be asked for, they must be granted. Responsible borrowing finds its counterpart in responsible lending. An acknowledgement of the odious nature of some debts is an essential part of this responsible lending. There is an element of risk in the creation of debt and this must be shared between creditor and borrower. It is not responsible to lend when it is clear that the debt will not be able to be repaid and that a situation of deepening indebtedness will result. Nor, however, is it responsible to simply allow debtors who have squandered their loans to be given more money to squander. The issues of moral hazard here must be addressed by any proposed debt forgiveness, but it must be addressed in both directions.

Simon J. Taylor, *Forgiving Debts: A Theological Contribution*, 41 MODERN BELIEVING 3, 11 (2000).

269. *See* Margaret Reiter, *What to Expect When Your Debt Goes to Collection*, NOLO, https://www.nolo.com/legal-encyclopedia/what-expect-when-your-debt-goes-collection.html [https://perma.cc/Y6NR-GHDR] (last visited Oct. 4, 2017). We can see this somewhat on the price of charged-off receivables, which start at cents on the dollar for "fresh" charge-offs and go to fractions of pennies for debts that are past the statute of limitations. *See* FED. TRADE COMM'N, *supra* note 64, at ii, iv–v, 23–24, 42.

270. *See, e.g.*, OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS, *Chart 7: Recovery Distributions Depending Date of Default*, *in* ACTUARIAL REPORT ON THE CANADA STUDENT LOANS PROGRAM 2011 (June 1, 2012), http://www.osfi-bsif.gc.ca/eng/oca-bac/ar-ra/cslp-pcpe/Pages/CSLP_2011.aspx#cht-7 [https://perma.cc/YY23-2MVQ].

is unlikely many would do so. First, in this age of hyper-connectivity, it is increasingly hard to hide from anyone without incurring significant costs, such as changing one's name or identity.[271] Second, this proposal does not change the current cost of defaulting. The debtor's credit report would still suffer, as would her opportunity to obtain more credit. Third, and most importantly, seven years is a *long* time. If the aim of the strategic consumer is to avoid repaying creditors, bankruptcy is a far more attractive option.[272]

In my view, this proposal is not likely to increase bankruptcy filings. In effect, debtors receive bankruptcy-like protections without having to do anything. To be sure, filing bankruptcy also means receiving the protection of the automatic stay and a court-managed process. However, in most cases, it means hiring and paying for a lawyer and paying substantial fees. More likely, enactment of this proposal would tend to decrease filing rates. In particular, debtors who would have had to save to file "no asset" Chapter 7 cases might prefer waiting out the clock, especially in jurisdictions in which wage garnishment is limited. For some creditors, a system of automatic discharge could prove to be a better deal than if the debtor filed bankruptcy.

C. *Effect on Consumers*

A federal statute that definitively and automatically discharges of consumer debts would go a long way towards ameliorating the social costs and negative economic consequences discussed in the previous Part. Even if restricting creditors remedies in this way does not increase "consumer welfare" in the strictly economic sense,[273] my argument is that it would be justified to fulfill objectives that go beyond wealth maximization,

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271. *See, e.g.*, Jessica Winch, '*Changing My Name Was the Only Way to Escape Debt Hell*', TELEGRAPH (Apr. 26, 2014, 7:34 AM), http://www.telegraph.co.uk/finance/personalfinance/borrowing/10787200/Changing-my-name-was-only-way-to-escape-debt-hell.html.

272. The exception here might be with regards to private student loans, which are presumptively non-dischargeable in bankruptcy but would be automatically dischargeable under my proposal. *See* Ang & Jiménez, *supra* note 144 at 175–76, 186, 195.

273. Zywicki, *supra* note 161, at 20 (noting that "it is unclear as an *a priori* matter whether tighter restrictions on creditor collection remedies will increase consumer welfare" and cautioning against regulating without a full understanding of the costs and benefits of the potential regulation).

for example, reducing "mental anguish"[274] caused by perpetual debts.[275]

Implementation of this proposal would dramatically decrease the time during which a creditor could dun a consumer. Debt owners who continue to attempt collection from debtors after extinguishment of the debt would do so without legal basis.[276] Legally, it would be as if a debt had never existed in the first place. In the case of a debt collector, they would be violating the FDCPA's prohibition against making false or misleading representations. Specifically, the collector would be falsely representing "the character, amount, or legal status of any debt" by arguing that the consumer owed them anything.[277] An originating creditor—that is, a bank or other entity that extended credit to the consumer—is not subject to the FDCPA, but would arguably violate the CFPA prohibition against deceptive acts or practices.[278] Either party would likely violate state consumer protection statutes.

A single national law that automatically discharges debts after a unified time and which does not allow the clock to restart even when a payment is made after a default greatly reduces the power of zombie debts. Such a system greatly simplifies the message that regulators and consumer advocates would have to communicate to consumers about their rights. All they would need to explain is when to begin counting the limitations period and how long it is. The FTC may not be able to prevent scammers from calling a consumer about a debt she already repaid, but after the appropriate amount of time has passed, the consumer would be much more likely to understand that this zombie could not hurt her.[279]

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274. Whitford, *supra* note 196, at 1081 ("Even if regulation is not efficiently wealth maximizing, it might be seen as justifiable to fulfill other regulatory objectives, such as avoidance of mental anguish.").

275. Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 462 (1996) (arguing that "promoting peace of mind benefits all members of society, including the innocent and the risk-averse, not just those who actually have committed a legal wrong"); Lawrence B. Solum, *Virtue as the End of Law: An Aretaic Theory of Legislation*, JURISPRUDENCE, at 6 (forthcoming 2018), http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2563233 (noting that "the kind of prosperity that enables human flourishing might differ from simple maximization of gross domestic product").

276. Naturally, just like in a bankruptcy, nothing prohibits a former debtor from giving money to a former creditor, but the creditor would have no basis to seek payment. *See* Catherine E. Vance, *Till Debt Do Us Part: Irreconcilable Differences in the Unhappy Union of Bankruptcy and Divorce*, 45 BUFFALO L. REV. 369, 374 (1997).

277. 15 U.S.C. 1692e(2)(A) (2012).

278. Nevertheless, a few states have enacted their own FDCPA statutes and some do cover original creditors. *See, e.g.*, CAL. CIV. CODE § 1788 et seq.

279. *See* Irby, *supra* note 6. In fact, if she can find the scammer she might even be able to hurt *him* by suing for a violation of the FDCPA. *See* Lisa Lake, *Stop a Debt Collector's*

An automatic discharge of debts would also likely reduce the emotional and social toll that perpetual debts can cause a debtor who continues receiving phone calls and letters for many years while she is unable to repay. This will also assist people who are aware that there is a debt out there that is growing interest and could resurface at an untimely moment to garnish her wages or take her assets.

This proposal does have potential downsides for consumers, however. As discussed earlier, the automatic discharge and inability to restart the clock after a default might cause a debt owner to sue a consumer she otherwise might not have. This might lead to more consumers being sued, or to a different composition of the kinds of lawsuits brought.[280] Bringing the lawsuits earlier would benefit consumers at least to the extent that they are more likely to have evidence available to defend themselves against it.[281] In addition, as Mann and Porter have noted, "losses can be minimized by a process that limits the time and expense consumed by the period of distress and returns the household to productive economic activity."[282]

V. CONCLUSION

This Article has argued that consumer debts in the United States can effectively live—and grow—forever: statutes of limitations do not extinguish them; they can morph into relatives' obligations even after the debtor's death; and sometimes rise from the grave even after they have been paid. All the while, interest and fees accrue. There is one sure way to extinguish most debts, however, and that is by filing bankruptcy. But bankruptcy is both costly and in some cases, overkill, in that it can extinguish debts that a debtor was able to and perhaps even willing to pay.

As an alternative, this Article has explored a proposal for a type of "automatic bankruptcy" of consumer debts: a debt discharge that would take effect by operation of federal law after roughly seven years from the date of default, or, in the case of a judgment, seven years after its issuance. The proposal combines features from traditional statutes of limitation (a statutory period that generally extinguishes the legal remedy) with the bankruptcy

Empty Threats, FED. TRADE COMM'N (July 21, 2014), https://www.consumer.ftc.gov/blog/2014/07/stop-debt-collectors-empty-threats [https://perma.cc/5JY4-MAPY].

280. *See supra* note 33 and accompanying text.

281. Although it is certainly true that "for the ordinary individual, the financial and emotional burden of potential litigation cannot be underestimated." Ochoa & Wistrich, *supra* note 304, at 462.

282. Mann & Porter, *supra* note 151, at 296.

discharge (the complete extinguishment of all collection rights and remedies). The aim is to reduce the psychological and economic weight of debts that can be collected forever while limiting the potential economic downsides.

Consumer Law Scholars' Response to Proposed Rules on Debt Collection Practices (Reg F)

Docket no. CFPB-2019-0022/RIN 3170-AA41

We, the undersigned consumer law professors, write in response to the Consumer Financial Protection Bureau's ("CFPB" or "the Bureau") Notice of Proposed Rulemaking, Debt Collection Practices (Regulation F), docket 2019-022. We are all legal academics who regularly teach, research, practice, and advocate for policy reforms in the area of consumer protection and consumer debt collection. Some of us teach consumer law clinics, where we and our students have direct contact with low-income consumers, debt collectors, and debt collection law firms, often in the context of court litigation. These experiences are reflected in the comments, which include observations from collection cases in the courts of New York City, New York; South Bend, Indiana; and Dallas, Texas.

We appreciate the opportunity to submit these comments for your consideration and are at your disposal should you wish to discuss any of these comments further.

Gina M. Calabrese, Professor of Clinical Education & Associate Director, Consumer Justice for the Elderly: Litigation Clinic, St. John's University School of Law

Judith Fox, Clinical Professor and Director of the Economic Justice Clinic, Notre Dame Law School

Dalié Jiménez, Professor of Law, University of California, Irvine School of Law

Neil L. Sobol, Professor of Law, Texas A&M University School of Law

Jeff Sovern, Professor of Law, St. John's University School of Law

Mary Spector, Professor of Law and Director of the Civil/Consumer Clinic, SMU Dedman School of Law

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I. Introduction and Suggestions About the Rule's Scope

On May 7, 2019, the CFPB posted its Proposed Rules for Debt Collection Practices (Regulation F). We appreciate the substantial time and effort that has been expended in the creation of these rules. In November 2013, the Bureau submitted an Advanced Notice of Proposed Rulemaking and request for comments (docket CFPB-2013-26875). The Bureau received 399 comments at that time. Following this event, many meetings were held, research compiled, and reports written. Throughout the numerous events held by both the FTC and the CFPB, it was clear that both industry and consumer advocates wanted regulations that would clarify a statute that had not been significantly updated for more than forty years.

For more than a decade, stakeholders have recognized that developments in the collection industry along with ever-evolving technology created new questions that the FDCPA could not always resolve. While new business models (e.g., debt buying and securitization) and new modes of communication are major drivers of the need for updated legal rules, so is the growth in U.S. consumer debt. As the FTC observed in a 2009 publication, Collecting Consumer Debts: The Challenges of Change: A Federal Trade Commission Workshop Report, "Since the enactment of the FDCPA, consumer debt has risen dramatically."[1] The FTC also noted that the nature of consumer debt had changed, with growth in revolving credit, educational loans, and personal property, as well as mortgage loans.[2] Given the deregulation trends of the 1980s and 1990s, national banks offered more credit cards to individuals and were permitted to charge interest rates exceeding 25% in some cases (which would be usurious under some states' laws, such as New York), as well as various fees and penalties. Credit card balances quickly "snowballed" to sums consumers would never be able to pay and often, could not recognize as accurate after a long period of default.[3] By the 2000s, local courts were overwhelmed by a surge in lawsuits to collect defaulted debts, even before the recession of 2008. In New York City, for example, the number of debt collection cases filed against consumers (typically, credit card debt) climbed precipitously, peaking at over 300,000 in 2008.[4] That exceeded the number of civil lawsuits filed in every U.S. District Court that year (267,000).[5] As these numbers reflect, nowadays, "The debt collection experience is a common one—approximately one in three consumers with a credit record reported having been contacted about a debt in collection in 2014."[6] This is also reflected in the size of the debt collection industry, which "is estimated to be an $11.5 billion-dollar industry employing nearly 118,500 people across approximately 7,700

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1 FED. TRADE COMM'N, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE 11 (2009).

2 *Id.* at 11-12.

3 For example, one of us assisted a client whose credit card debt grew from $5,000 at the time of default to $20,000 by the time she was sued. Another client's retail card's charge-off statement showed that she had purchased $750 of goods and owed about $2000 at charge-off. This was after making at least $1400 of payments toward the account. A debt buyer ultimately sued her for over $3,000. Several years later, when she needed to replace a large household appliance that had broken down, the same store offered her a new credit card account. She declined.

4 Shirin Dhanani, et al., Ticking *Time Bombs: Consumer Credit Default Judgments and the Role of Judges in Ensuring the Fair Administration of Justice*, N.Y. L. J. (May 23, 2019 12:15 PM), https://www.law.com/newyorklawjournal/2019/05/23/ticking-time-bombs-consumer-credit-default-judgments-and-the-role-of-judges-in-ensuring-the-fair-administration-of-justice/.

5 *Id.*

6 Debt Collection Practices (Regulation F), 84 Fed. Reg. 23274, at 23277 (proposed May 21, 2019) (to be codified at 12 C.F.R. pt. 1006).

collection agencies in the United States."[7] Finally, a significant factor contributing to the growth of the debt collection industry is the emergence of debt buying businesses. The sale and re-sale of debt can result in debt collection activities lasting over a decade, beyond any statute of limitations, as the account is passed along to multiple debt buyers (sometimes referred to as "zombie debt").

Moreover, in the 40 years since the enactment of the FDCPA, consumer credit reports have been put to many new purposes beyond the original purpose of evaluating one's ability to pay a new loan. One's ability to rent an apartment, obtain and/or afford insurance, and secure employment are all impacted by one's credit report. In this context, debt collectors are able to wield considerable power over consumers, particularly those who have defaulted on debt.[8] Accuracy of debt information and prohibitions against the collection of time-barred debt (including tactics that mislead unwitting consumers to make small payments that restart the statute of limitations) are more important than ever.

Thus, significant debt burdens and debt collection now appear to be mainstream experiences for most U.S. residents. The reasons for this development are not the subject of the current Debt Collection Rule, but it seems that indebtedness is "the new normal" as Americans rely on debt to sustain a basic standard of living. Indebtedness might no longer carry the stigma it once did. Given these developments, regulations should be designed to provide strong protections to U.S. consumers from deceptive, unfair, and abusive debt collection tactics. Instead, the rules as proposed are disappointing in their lack of comprehensive coverage. When issues are addressed, the rules tip heavily in favor of the debt collection industry and not consumer protection. We address selected aspects of the Proposal below.

A. Documentation of the debt

In hearings before the CFPB, which took place in early 2014, both industry and consumer groups expressed the need for better documentation of the debt. Specifically, debt buyers complained of being unable to obtain documents from original creditors, especially as they pertained to disputes and payments. As evidenced by the comments responding to the Advanced Notice of Proposed Rulemaking, at the time of the 2014 hearings, downstream debt buyers *might* have information about the chain of title or the bill of sale (usually only by request), but not other very important information.[9] The missing information often

[7] *Id.* at 23276.

[8] Anecdotally, at least one of us has paid a debt they did not actually owe just to resolve the matter. Others of us have encountered consumers in similar situations. Incidents like these speak volumes to the disparity of negotiating power between the typical consumer debtor and debt collectors.

[9] The Bureau's own study on this issue found that 36.5% of respondents "rarely" or "never" had access to an account's chain of title. Bureau of Consumer Financial Protection, Study of Third-Party Debt Collection Operations at 23, Table 8 (July 2016),

includes the final charge-off statement.[10] As one industry respondent noted, "at the time an account is sold, all the electronic records pertaining to that account, including images, statements and cardholder agreements, should be transferred."[11] The Bureau's own study found that, for example, less than half of respondents reported receiving account agreement documentation at the time of sale or acquisition.[12]

In August 2014, the Office of the Comptroller of the Currency ("OCC") took steps to remedy the documentation problem. It issued Bulletin 2014-37, a guidance entitled Consumer Debt Sales: Risk Management Guidance, directed to all of the entities that it regulates ("the OCC Guidance").[13] Financial institutions that are regulated by the OCC were now expected to provide accurate and complete account information at the time of a debt sale.

Overall, the OCC's concern was the risk that debt-sale arrangements posed to financial institutions. The OCC identified four categories of risk within its authority: operational risk, reputational risk, compliance risk, and strategic risk. Tellingly, and "based on its supervisory process," the OCC was concerned with the transfer of bank customer files that "lack information as basic as account numbers or customer payment histories." The OCC found that there was a direct relationship with the lack of information transferred in debt sales and inappropriate collection practices, stating:

> [B]ecause the debt buyers pursue collection without complete and accurate customer information, the debt buyers may employ inappropriate collection tactics or engage in conduct that is prohibited based on the facts of a particular case (e.g., pursue collection on a debt that was previously discharged in bankruptcy or after the applicable statute of limitations).

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https://files.consumerfinance.gov/f/documents/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf [hereinafter Bureau Collector Survey]

[10] Unifund, Response to Encore Capital Group Response to Consumer Financial Protection Bureau's Advanced Notice of Proposed Rulemaking, February 28, 2014 at 6., February 28, 2014 at 2.; Encore Capital Group Response to Consumer Financial Protection Bureau's Advanced Notice of Proposed Rulemaking, February 28, 2014, at 6.

[11] Commercial Law League of America, Response to Encore Capital Group Response to Consumer Financial Protection Bureau's Advanced Notice of Proposed Rulemaking,

[12] 28 respondents reported always or often receiving documentation while 30 reported receiving it rarely or never. *See* Bureau Collector Survey, *supra* note 9, at 23. The 2016 study also states that "There is considerable variation in whether respondents receive documentation such as account agreements or billing statements" and that "More than one respondent indicated that they prefer not to obtain documentation unless and until a consumer submits an FDCPA dispute or there is another reason to review the documentation." *Id.* at 23-24. These statements are entirely contrary to the Bureau's argument for proposed 1006.26. *Id.* at 23-24.

[13] *Consumer Debt Sale: Risk Management Guidance*, Office of the Comptroller of the Currency (Aug. 4, 2014), https://www.occ.treas.gov/news-issuances/bulletins/2014/bulletin-2014-37.html [hereinafter *Risk Management Guidance*].

To reduce the various risks debt-sales pose to banks, the OCC Guidance included several expectations, including the expectation that at the time of a debt sale, regulated entities provide debt buyers "accurate and comprehensive information regarding each debt sold." Specifically, the OCC Guidance stated that:

> For each account, the bank should provide the debt buyer with copies of underlying account documents, and the related account information, as applicable and in compliance with record retention requirements, including the following:
>
> - A copy of the signed contract or other documents that provide evidence of the relevant consumer's liability for the debt in question.
> - Copies of all, or the last 12 (whichever is fewer), account statements.
> - All account numbers used by the bank (and, if appropriate, its predecessors) to identify the debt at issue.
> - An itemized account of all amounts claimed to be owed in connection with the debt to be sold, including loan principal, interest, and all fees.
> - The name of the issuing bank and, if appropriate, the store or brand name.
> - The date, source, and amount of the debtor's last payment and the dates of default and amount owed.
> - Information about all unresolved disputes and fraud claims made by the debtor. Information about collection efforts (both internal and third-party efforts, such as by law firms) made through the date of sale.
> - The debtor's name, address, and Social Security number

OCC-regulated banks should be complying with this guidance to meet supervisory expectations. According to the CFPB's 2017 credit card report,[14] all survey respondents that sold debt reported that they provide several key documents and account information, including an itemized account of all amounts claimed, mirroring the OCC Guidance.

The proposed rules fail to require essential documentation of the debt when both consumers and industry identified this need in their comments to the Advanced Notice of Proposed Rulemaking.[15] The rule fails to address credit originators. As several industry comments pointed out, the originators will not retain or pass on all the relevant information unless

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[14] Consumer Financial Protection Bureau, The Consumer Credit Card Market 29 (2017), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2017.pdf.

[15] Encore Capital Group Response to Consumer Financial Protection Bureau's Advanced Notice of Proposed Rulemaking, February 28, 2014 at 6. *See also*, Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J, LEGIS. 41, 109 (2015) (arguing that "a rule requiring a minimum level of information, documentation, and contractual representations is a natural best-fit solution for these problems since it has the potential to fix the collective action problem identified earlier.").

required to do so by federal law.[16] Despite this, the rules do nothing to require that original creditors maintain records or transfer them to subsequent debt buyers.

This failure to require complete and accurate account information has already been found by another federal agency (the OCC) to lead to inappropriate debt collection practices is troublesome. Omitting such a requirement from these rules becomes more problematic when it interacts with some of the proposed rules, as described further in the discussion of 1006.30(b) in Part V.

B. Retention of Information

As one industry respondent noted, "[t]he Bureau should mandate that debt issuers maintain account records for the entire time the data evidenced by such records can be reported under the FCRA."[17] The respondent explains that original creditors, not just debt buyers, should be mandated to retain that information because banks will not do so unless required by federal regulation.[18]

C. Litigation activity

The Bureau's Proposal also fails to address the important issue of litigation activity, except in the narrow situation of limited attorney involvement addressed below. Deceptive acts during the litigation process are important, and the courts have been divided on how to address these issues. Failing to have consistent rules has led to some very unfortunate activity. Take, for example, the decision in *O'Rourke v. Palisades Acquisition.*[19] The debt collector made an account stated claim in a state court collection proceeding. As evidence, it submitted a statement, claiming that because the consumer had not objected the presumption arose that the debt was legitimate. In fact, the statement was never sent to the consumer. The *O'Rourke* court found that because this action was meant to deceive the court and not the consumer, it was not a violation of the Fair Debt Collection Practices Act.[20]

Let us set aside the fact that the pleading was sent to a consumer and could well have confused the consumer regarding the ability to defend this action. As a result of this action, debt collectors in Indiana began printing on their statements "not sent to consumer." This

[16] Commercial Law League response to question 9; Collections Marketing Center, Response to CFPB ANPR, January 13, 2014, at 2-3. Jiménez, , note 15, at 110 et. seq. (arguing that the "CFPB should clarify that the practice of selling debts with little information, no warranties, and no account documents as a violation of the prohibitions against unfairness and deception").

[17] Commercial Law League response to question 9.

[18] *Id.*

[19] O'Rourke v. Palisades Acquisition, 635 F.3d 938 (7th Cir. 2011).

[20] *Id.* at 944.

cause of action gave the entire industry a free pass to use and then file deceptive documents. The Bureau should expand the rules to prohibit this kind of activity.

II. Communication in Connection with Debt Collection

The Fair Debt Collection Practices Act was enacted in 1978, which is also the year of the first commercial cellular network. Cell phones would not become available at a reasonable cost for another twenty years. Smartphones, with their email and text messaging, followed and changed the way we communicate. Unfortunately, Congress has done nothing in the ensuing forty years to update the way the FDCPA handles communications. It is certainly true that many consumers prefer to communicate by email or text message. There are also benefits to such communications, such as the ability to read and respond on your own schedule and to maintain a complete written record of the transactions. We applaud the CFPB for addressing the serious need to update the law to more closely ally with how modern consumers and debt collectors communicate. At the same time, several portions of the proposed rules raise concerns for consumers.

A. Proposed § 1006.2 – Limited-Content Messages

The FDCPA provides a number of protections for consumers in connection with "communications." Communications are defined in FDCPA § 1692a(2) as "the conveying of information regarding a debt directly or indirectly to any person through any medium." Proposed § 1006.2(d) provides in pertinent part that "A debt collector does not convey information regarding a debt directly or indirectly to any person if the debt collector provides only a limited-content message, as defined in paragraph (j) of this section." Thus, the Proposal would enable debt collectors to leave limited-content messages without triggering the protections accorded to consumers in connection with "communications." We urge the Bureau to abandon its Proposal to enable collectors to leave limited-content messages for consumers as currently defined because the messages would invade consumer privacy, in conflict with the FDCPA.

1. The Purpose of Limited-Content Messages

Limited-content messages are intended to deal with a Catch-22 that had arisen under the FDCPA when debt collectors wished to leave messages—either on recordings or with third parties—for consumers. If a message qualifies as a communication, the collector must identify herself as a debt collector under § 1621e(11). On the other hand, under § 1692c(b), debt collectors are largely prohibited from communicating with third parties about a debt. In other words, if a collector tells a third party taking a message that she is a debt collector, she presumably violates 1692c(b), but if she doesn't and the message is a "communication," she violates § 1621e(11). A collector leaving a recorded message also runs the risk of violating one or the other provision because under the Proposal, "[d]ebt collectors cannot be certain that a voice message will be heard only by the consumer for whom it was left."[21] This problem has become known as the Foti problem after a case in which a collector was found to have violated the FDCPA when leaving the message: "Good day, we are calling from NCO Financial Systems regarding a personal business matter that requires your immediate attention. Please call back 1-866-701-1275 once again please call back, toll-free, 1-866-701-1275, this is not a solicitation."[22]

The Proposal attempts to resolve the Foti problem by creating what it labels limited-content messages,[23] and providing as noted above, that limited content messages are not communications.[24] Put another way, collectors could leave messages without violating the FDCPA as long as those messages do not stray beyond the definition of a limited-content message.

2. Limited-Content Messages Risk Invading Consumer Privacy, Contrary to the Purpose of the FDCPA

We do not object in principle to the Bureau's goal of enabling debt collectors to leave oral messages for individual consumers without violating the FDCPA. But we also agree with the statement in *Edwards v. Niagara Credit Solutions, Inc.* that the FDCPA "does not guarantee a debt collector the right to leave answering machine messages."[25] A collector may leave a message as long as the message does not conflict with the FDCPA, but we believe limited-content messages as described in the Bureau's Proposal would violate the FDCPA's key goal of preventing third parties from learning that a consumer has a debt in collection.

Congress was so concerned about this privacy invasion that it enacted numerous provisions to prevent it, in addition to § 1692c(b). Thus, Section 1692f(8) bars collectors from using language or symbols on envelopes, including the business's name if that name would indicate that the business is engaged in debt collection. Debt collectors may not communicate with consumers by post-cards;[26] of course, post-cards may be read by anyone who sees them. The theme of privacy even found its way into the congressional findings that inspired the FDCPA.[27] Accordingly, the Bureau should be especially vigilant to avoid undermining Congress's clearly-expressed goal of protecting consumers with debts in

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[21] Proposal at p. 381.

[22] Foti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643, 655-56 (S.D.N.Y. 2006).

[23] *See* Proposed Regulation § 1006.2(j).

[24] *See* Proposed Regulation § 1006.2(d).

[25] Edwards v. Niagara Credit Solutions, Inc., 584 F.3d 1350, 1354 (11th Cir. 2009)

[26] *See* § 1692f(7).

[27] *See* §1692(a) ("There is abundant evidence of the use of abusive . . . collection practices by many debt collectors. Abusive debt collection practices contribute . . . to invasions of individual privacy.").

collection from discovery by others. Unfortunately, the limited-content message vastly increases the likelihood of that occurrence.

To explain why the limited-content message would have such an effect, we turn to its definition. Under Section 1006.2(j) of the Proposal:

> [A l]imited-content message means a message for a consumer that includes all of the content described in paragraph (j)(1) of this section, that may include any of the content described in paragraph (j)(2) of this section, and that includes no other content.
>
> (1) Required content. A limited-content message is a message for a consumer that includes all of the following: (i) The consumer's name; (ii) A request that the consumer reply to the message; (iii) The name or names of one or more natural persons whom the consumer can contact to reply to the debt collector; (iv) A telephone number that the consumer can use to reply to the debt collector; and (v) If applicable, the disclosure required by § 1006.6(e).
>
> (2) Optional content. In addition to the content described in paragraph (j)(1) of this section, a limited-content message may include one or more of the following: (i) A salutation; (ii) The date and time of the message; (iii) A generic statement that the message relates to an account; and (iv) Suggested dates and times for the consumer to reply to the message.

To make the definition more concrete, the Proposal helpfully supplies examples of a limited-content message.[28] Decades ago, many consumers received messages of that sort. The problem is that other forms of communication have largely supplanted such phone messages, with a few exceptions we discuss below. The Proposal attempts to address this concern when it states on page 68 that "the Bureau understands that the content required by § 1006.2(j)(1) often is included in a voicemail or other message for a person in a wide variety of non-debt collection circumstances, so a third party hearing or observing the message may not infer from its content that the consumer owes a debt."[29]

In fact, our experience with phone messages is different, and we believe that the types of messages the Bureau describes, with the exceptions discussed below, are rarely left orally today. We are not aware of any empirical evidence of how common such messages are today, and in fact, the Proposal does not cite any source, empirical or otherwise, for the

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[28] *See* Comment 2(j)-1, 2 ("This is Robin Smith calling for Sam Jones. Sam, please contact me at 1-800-555-1212." and "Hi, this message is for Sam Jones. Sam, this is Robin Smith. I'm calling to discuss an account. It is 4:15 p.m. on Wednesday, September 1. You can reach me or, Jordan Johnson, at 1-800-555-1212 today until 6:00 p.m. eastern, or weekdays from 8:00 a.m. to 6:00 p.m. eastern.").

[29] Proposal at p. 68.

proposition quoted above. At a minimum, we urge the Bureau, if it intends to move forward with this Proposal, to conduct the empirical research needed to determine if its claim is correct. To the best of our knowledge, the type of request the Bureau describes is not likely to be conveyed via a phone message. Consequently, if the Bureau adopts its Proposal, a strong possibility exists that third parties overhearing such messages will recognize that the recipient has a debt in collection, especially as limited-content messages come into broader use. That is particularly likely to be so if the collector says, as the Proposal would permit, that the message relates to an account. Messages that say that they relate to an account without identifying with whom the account is held are, we believe, exceedingly rare.

The problem would grow worse as consumers accumulated experience with limited-content messages. As the Bureau recently reported, more than one-in-four consumers has a third-party collections tradeline on their credit file.[30] Consequently, if the Bureau adopts the Proposal, we can expect many consumers to receive limited-content messages from debt collectors, and so, as time passes, to recognize them when they hear others receive them. In short, the limited-content message would soon become a badge of consumers with debts in collection.

As noted above, consumers do sometimes receive messages asking them to return phone calls. But for many consumers, these messages fall into patterns that are readily distinguishable by third parties from limited-content messages. Some messages are from businesses with whom the consumer has a relationship, but these messages usually identify the business—something the collector leaving a limited-content message is precluded from doing ("Hello, this is Star Toyota calling to confirm your service appointment"). Or they are from telemarketers, but those also do not sound like the limited-content messages ("Call now to take advantage of our low prices."). Or a friend or family member might leave a message. But in our experience, these calls too rarely resemble the limited-content message. A close friend or family member might not even identify himself, assuming that the recipient will be able to recognize his voice. Or they might give a name but not a number because, in these days of smartphones, most consumers simply click on a name in a list of contacts rather than manually dialing a number. And those regularly overhearing such messages for others will often be able to recognize the caller themselves.

In short, we believe that few consumers receive enough calls that sound like limited-content messages to provide the camouflage that such calls need so as not to convey that they are calls from debt collectors. As a test of this proposition, one of us wrote a blog post making this point and invited those who did receive phone messages resembling the limited-content message to so indicate in the comments to the post. No one did, and after a month the blog

[30] *See* CFPB, Market Snapshot: Third-Party Debt Collections Tradeline Reporting 5 (2019).

automatically closed the post to comments.[31] Though this is hardly a scientific survey, it is nevertheless suggestive.

The Proposal states that limited-content messages can be left "orally with a third party who answers the consumer's home or mobile telephone."[32] We strongly oppose this provision because it exposes the consumer to exactly what the FDCPA was enacted to prevent. For example, what happens if the person taking the message asks with whom the consumer has the account? The collector can't answer, because that will take the message out of the limited-content message safe harbor. Most of what the collector might be tempted to say is likely to have that effect. The collector can't say, for example, that it's a "personal business matter," because that was the language used in *Foti*. The Bureau's decision not to permit the use of similar words under the safe harbor makes clear that it regards that language as out of bounds for the limited-content message (The Bureau considered, but rejected the use of "personal," "business," "confidential," "private," "important," and "time-sensitive."[33]) In fact, when consumers inevitably come to understand that debt collectors can't answer such questions but that others can, consumers can be expected to pose such questions if only to determine if the caller is a debt collector—which again will frustrate the FDCPA's purpose of protecting consumers from the embarrassment of having others know they have a debt in collection.

If the Bureau is not prepared to abandon the limited-content message, as suggested above, we urge the Bureau to prohibit debt collectors from leaving limited-content messages with third parties.[34] In the alternative, we urge the Bureau to survey consumers to ascertain how many already receive many messages resembling the limited-content message. The Bureau should not disrupt Congress's scheme to prevent disclosure that consumers have debts in collection without verifying that the assumptions accurately reflect reality. If, as we anticipate based on our experience, the numbers of such phone messages are small, we urge the Bureau to forego this aspect of the Proposal.

If, however, the Bureau ultimately adopts the limited-content message, we recommend that it preclude the use of the word "account" because the use of that word increases the likelihood that those overhearing the message will recognize that it originates with a debt

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[31] *See* Jeff Sovern, *Some big problems with the CFPB's proposal to allow debt collectors to leave limited-content messages over the phone*, Consumer Law & Policy Blog (June 7, 2019), https://pubcit.typepad.com/clpblog/2019/06/some-big-problems-with-the-cfpbs-proposal-to-allow-debt-collectors-to-leave-limited-content-messages.html .

[32] Proposal, at 62. See also Proposed Comment 2(j)–3 ("A debt collector may transmit a limited-content message to a consumer by, for example, leaving a voicemail at the consumer's telephone number, sending a text message to the consumer's mobile telephone number, or leaving a message orally with a third party who answers the consumer's home or mobile telephone.").

[33] Proposal, at 70.

[34] In our view, a conversation with a third party should be limited to asking to speak to the person (e.g., "Is Jane Smith there?") and nothing more.

collector, as reflected by common understanding of that word. Thus, the first two definitions provided by the Merriam-Webster Dictionary for "account" are: "a: a record of debit ... and credit . . . entries to cover transactions involving a particular item or a particular person or concern; b: a statement of transactions during a fiscal period and the resulting balance;" the referenced definition of debit includes "a record of an indebtedness . . . ."[35] Consequently, limited-content messages are likely to convey to third-parties that the recipient is in debt.

We also believe that the alternative words the Bureau considered suffer from the same defects as the word "account" in that (1) at least over time, they will become associated with debt collectors, and (2) when the collector leaves a message with a live person, they are likely to prompt further questions. Before the Bureau permits the use of any such words, it should again conduct empirical research to determine first, whether they convey to third parties overhearing or taking down such messages that the caller is a debt collector and second, whether third parties copying down such messages would ask follow-up questions that collectors cannot answer.

Even if the Bureau finds that third parties do not understand the messages as being from debt collectors before the Proposal is adopted, that understanding may change over time as consumers with debts in collection receive them and then overhear them left for others. Accordingly, we further suggest that the Bureau monitor whether consumers become aware after the limited-content message safe harbor takes effect that such messages are being left by debt collectors, and if consumers do become so aware, that the Bureau rescind that portion of the regulation.

The Proposal as written also increases the risk that third-parties will learn of the consumer's indebtedness, in contravention of the congressional goal, in other ways. The Proposal does not block debt collectors from leaving limited-content messages with third-parties, such as neighbors, employers, friends, and family members, acts which are not only intrusive but can even be threatening.[36] If the Bureau moves forward with the limited-content message, it should limit the use of the messages to recordings left on a device owned by the debtor. While such recordings could still be overheard by third-parties, there would not be a certainty that third-parties would learn of the message, as is the case when messages are left with live persons or numbers belonging to others.

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[35] *See* Merriam-Webster, Account, https://www.merriam-webster.com/dictionary/account; Debit, https://www.merriam-webster.com/dictionary/debit#h2.

[36] *See, e.g.*, Statement of Richard Bell, Former Debt Collector, Hearings on the Fair Debt Collection Practices Act before the U.S. House Subcom. on Consumer Protection of the Com. on Banking and Housing (Sept. 10, 1992) ("A block party is where the collector contacts handfuls of neighbors close to or far away from the consumer, depending how mad the collector is. Block parties are often held for consumers who hang up on bill collectors . . . .").

B. Proposed § 1006.6(e) – Opt-Out Provision

The proposed regulation allows a consumer to opt out of email communications.[37] However, it does not specify how that opt-out option must be provided. Anyone who has ever tried to cancel an automatic subscription knows the problem this creates. The rule allows debt collectors to create impossible opt-out methods such as calling numbers that no one answers or submitting written requests to addresses that are hard to locate. At the very least, the rule should allow an opt-out option to be transmitted through the same medium as the original communication. If a consumer gets an email from a debt collector, he should be able to hit reply and opt out of further messages. The rule should set some ground rules for the opt-out beyond simply not allowing a fee (which we support).

The rule opens up numerous ways in which private information is likely to be conveyed to third parties through unwanted emails and text messages to not only the debtor but numerous others. Unlike phone numbers, many people share very similar email addresses. Many of us have experienced getting emails meant for someone else. Although the rule requires "reasonable procedures" to ensure the email address or cell phone number is correct, there is no guidance as to what constitutes a reasonable procedure. "Reasonable procedures" relating to telephone calls already result in mistaken identities all too often.

Section 1006.6(d)(3)(C) allows for communication to a telephone number or email address that was previously given to the creditor. This rule will certainly prompt creditors to include email addresses on their applications. While many people may have an email address, many do not check emails regularly in the same way that they answer the telephone or receive mail. This is especially true for the elderly and low-income families, many of whom only have internet access through their local library. Many consumers, especially elderly ones, may have a cell phone but either have no idea how to receive or send a text message or may have phones that do not allow them to access documents sent electronically. This will undoubtedly cause problems, especially if the opt-out provisions are contained in an attached document. The CFPB should mandate that all such disclosures be in the body of any message.

Another problem is the combination of the opt-out rule with email. We have experienced many instances where the debt collector contacts the wrong individual regarding a debt. There is simply no way for a debt collector to know if a consumer is "opting out" because this is not their debt or because they don't want to be contacted by email. Let us walk through a real case to illustrate the problem:

Ms. Martinez lives in Arizona and owed a debt. She had been in somewhat regular contact with the debt collector but had not paid the debt. She speaks English. Another woman with

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[37] Proposed 1006.6(e).

the identical name lives in Kansas City. She only speaks Spanish. In the real situation, the non-debtor Ms. Martinez was contacted by mail. She called in to ask what the letter was about. The debt collector refused to talk to her because she could not verify the social security number of the debtor. Instead of registering that as a denial that this was her debt, the debt collector sued her. It was a mistake that even a cursory view of the record could have prevented.

Now look at that fact scenario through the new rule. The debt collector emails the wrong Ms. Martinez. She opts out. There is no way to verify if she opted out because she is a non-debtor or because she is the debtor and does not want to use email. There is no way to know the obvious: this is a Spanish speaking only woman and not the English-speaking only debtor. If Ms. Martinez responds with an email, how do you verify that it is the debtor to whom you are communicating? The only way is to divulge sensitive, confidential information or have the debtor (or mistaken debtor in this case) do the same. It is not a workable situation. The idea of an opt-out option is well-intended, but it needs to be narrower and apply only to instances involving actual voice communications.

Even with disclosures buried in the document, consumers applying for loan are not thinking about what will happen when they default.[38] They do not plan to default.[39] Instead, they are providing information they believe has to be provided—email addresses and cell phone numbers—in order to get the credit they seek. It is not informed consent. A better rule would provide an opt-in as opposed to an opt-out option for email and text messages.

C. Privacy Concerns

Electronic communication opens consumers to a number of privacy concerns, not the least of which is a data breach. Debt collectors who send sensitive information by electronic means need to ensure that they have secure systems. Consumers should be protected against embedded cookies that either track their information or subject them to targeted ads. The Bureau should prohibit debt collectors from using such technology in their websites.

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[38] William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 WIS. L. REV. 1047, 1074 (1979) ("Because consumers only occasionally enter into credit contracts, and only a very few of those result in a delinquency, debtors are typically uninformed about the risks and harms associated with various types of coercive execution. Consequently, they cannot bargain knowledgeably about these matters, particularly at the time of contract formation.").

[39] "Optimism bias leads individual consumers to believe that they will not have to deal with a collector; default only happens to other people." Jiménez, *supra* note 15, at 94.

III. Proposed § 1006.18(g) – Meaningful Attorney Involvement

Section 1006.18(g) affords debt collection attorneys a "safe harbor" to defend against claims that a communication sent under an attorney's name is false, deceptive, or misleading if there was no "meaningful attorney involvement."[40] There are two concerns with this provision. First, a safe harbor provides sweeping protection for debt collectors. It would be pleaded as an affirmative defense to a consumer claim, thereby providing the collector with a complete defense to a consumer claim that a communication falsely represented the debt. Second, such a sweeping protection should contain clear and specific standards. The language of the rule is broad, potentially allowing collection attorneys to claim that superficial review of a client's claim satisfies the safe harbor requirements.

Debt collection litigation is, perhaps, the setting where the disparity in power and knowledge between consumers and debt collectors is the most one-sided in favor of the collector.[41] As little as 1-2% of consumers are represented by counsel in collection lawsuits.[42] In many cases, consumers do not appear in the lawsuit, resulting in default judgments.[43] In our adversarial system of justice, presided over by a "neutral" judge, collection attorneys take full advantage of this power disparity. They churn out large volumes of lawsuits, knowing that the chances of a consumer actually defending the action are slim. Even if a consumer appears, the consumer's ability to defend the action or even negotiate a favorable settlement is weak. For various reasons, including the sheer volume of collection cases, judges do not examine pleadings for sufficiency and cases rarely reach the point where a plaintiff will be required to prove its case. When consumers do have representation, they usually succeed in the lawsuit. Those of us who represent consumers in law school clinics almost always win dismissal of the collection suit, or defeat summary judgment motions. We win because debt buyers lack the evidence needed to prove their cases in court.

The safe harbor for meaningful attorney involvement does little to remedy this problem it attempts to address. While the defense is available to an attorney who "personally" "review[s]" pleadings (for example), there are many qualifications. The attorney must determine that the claims are supported "to the best of the attorney's knowledge, information, and belief," that claims and contentions are warranted by existing law and "factual contentions have evidentiary support." This is a broad and vague standard, easily manipulated by some attorneys. The rule imports some of the standard from Rule 11 of the

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[40] FDCPA 807(3).

[41] Peter A. Holland, The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases, 6 J. BUS. & TECH. L. 259, 272 (2011);

[42] Human Rights Watch, Rubber Stamp Justice (2016) at 62.

[43] Federal Trade Commission, Repairing a Broken System at 7.

Federal Rules of Civil Procedure, but the setting of debt litigation is far different from federal court. Indeed, given the contrast in representation and judicial management of cases, the settings could not be more different.

Since the Bureau's draft rule does nothing to alleviate the documentation and inaccurate information problems in the debt collection ecosystem, this safe harbor is especially problematic.

Rather than a safe harbor, the rule should instead, contain a specific prescriptive requirement of information and documents an attorney must review before filing a collection lawsuit. The Bureau has already created a good blueprint for this. In its Consent Decree with Fred J. Hannah & Associates, et al., the Bureau required "the person who will serve as the Defendants' attorney of record (including Outside Counsel) in the Collection Suit" to abide by the following markers of meaningful attorney involvement:[44]

a. Log into the Consumer's account on CLS or any other software that would create an electronic record that the attorney of record has accessed a Consumer's file;
b. Review Original Account-Level Documentation reflecting, at a minimum, the Consumer's name, the last four digits of the account number associated with the Debt at the time of Charge-off, the claimed amount, excluding any post Charge-off payments, and if Defendants are suing under a breach of contract theory, the contractual terms and conditions applicable to the Debt;'
c. Confirm, based upon methods or means proven to be historically reliable and accurate that the applicable statute of limitations has not run on the Consumer's Debt;
d. Confirm, based upon methods or means proven to be historically reliable and accurate that the Consumer's Debt was not discharged in bankruptcy or subject to a pending bankruptcy proceeding;
e. Confirm, based upon methods or means proven to be historically reliable and accurate the Consumer's correct identity and current address to determine the appropriate venue for a Collection Suit; and
f. Certify in writing or in CLS or any other software that would create an electronic record noting that the initiation of the Collection Suit complies with the terms and conditions of this Order.[45]

[44] The Consent Decree phrases these in the negative since the paragraph that precedes it talks about how the parties would be violating the Consent Decree. For ease of reading, we have translated them to the positive here.

[45] *See* Con. Fin. Prot. Bureau v. Frederick J. Hannah & Associates, No. 14-02211, Stipulated Final Judgment and Order at 7-9 (D.N.D. Ga. Jan. 6, 2016).

Note that a-f would need to be performed by the attorney on a particular case and cannot be delegated to others.

In either event, the safe harbor should make clear that, for example, the practices listed in the consent order with Pressler & Pressler, et al., would not constitute meaningful attorney involvement.[46] At the very least the safe harbor should clearly require that "[a]t the time of the signing attorney's review, the signing attorney ... have access to sufficient documentation to confirm the validity of the summary data provided by the client."[47]

IV. Proposed § 1006.26 – Statute of Limitations

The proposed rules suggest that debt buyers receive enough information to determine the statute of limitations on a debt because debt buyers have the proper documentation of the debt.[48] However, the Bureau's own study and a prior FTC study belie that statement as a factual matter, and the complexity of statutes of limitations lead to the opposite conclusion as a legal matter.[49]

The draft rule characterizes the 2016 study as finding that "the majority of respondents reported always or often receiving...billing statement."[50] In fact, the opposite is true. The Bureau's own study found that the majority of respondents do not receive a billing statement. Twenty-five respondents replied that they received the billing statement always or often, while 32 responded that they received billing statements rarely or never.[51]

As a legal matter, the issue of which statute of limitations applies is often a complex calculation that requires knowing more than the dates the Bureau cites in the rule comments. The relevant date in most states is the last date in which the creditor's breach of

[46] *In the matter of Pressler & Pressler, et.al.,* Administrative Proceeding No. 2016-CFPB-0009, Consumer Financial Protection Bureau, Consent Order (Apr. 25, 2016) ("The signing attorney generally spent less than a few minutes, sometimes less than 30 seconds, reviewing each summons and complaint before approving the filings and directing that a lawsuit be initiated").

[47] *Id.* at 7.

[48] "The information that debt buyers generally receive when bidding on and purchasing debts, and the information that other debt collectors generally receive at placement, should allow them to determine whether the applicable statute of limitations has expired." Proposal at 195.

[49] *See* Dalie Jimenez, *Ending Perpetual Debts*, 55 HOUS. L. REV. 609, 620-624 (2017) ("[i]t is difficult to know which statute applies to a particular situation. Oftentimes there are good legal arguments for applying statutes of different lengths")

[50] § 1006.26 Collection of Time Barred Debts, Comments to 26(b) at p..195 n.374.

[51] Bureau of Consumer Financial Protection, Study of Third-Party Debt Collection Operations at 23, Table 8 (July 2016), https://files.consumerfinance.gov/f/documents/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf.

contract cause of action arose.[52] Unfortunately, the Bureau did not survey collection firms to know how many of them receive that date from clients.[53] In an earlier study, however, the FTC found that the "date of first default was missing (from 65% of accounts)."[54]

Dates aren't the only important fact that a collector needs to calculate the limitations period. As one of us has written

> Another difficulty with limitations periods is that it not always clear which state's limitation period applies. Imagine a consumer who, while a resident of state A, obtained a credit card issued by a bank incorporated in state B. The agreement contained a choice-of-law clause selecting state C as the state whose law governs. The consumer now lives in state D and is sued there.86 Which state's limitations period applies? Does it matter where the consumer resided when the contract was first breached? The answer depends entirely on state D's statutory and common law. It is not always possible to analyze with certainty.[55]

Another variation on identifying which state's statute of limitation to apply is the existence of "borrowing statutes," such as New York's.[56] Because breach of contract is an economic injury, the injury is deemed to have occurred in the state where the issuing creditor was located at the time the consumer defaulted. New York then applies the shorter of the "borrowed" statute of limitations or New York's own statute of limitations, which is six years. Many banks are "domiciled" in Delaware, where there is a 3-year statute of limitations for breach of contract. That is the limitations period that would apply in New York.

Less than half of respondents to the Bureau's survey reported receiving account agreement documentation or billing statements.[57] These are the most likely sources of information that might help a collector calculate the applicable statute of limitations.

We have two further concerns with the Proposal as drafted. Proposed § 1006.26(b) prohibits a debt collector from suing or threatening to sue on a debt that the debt collector "knows or should know" is time-barred. The burden of determining the limitation period should be on the debt collector so that the modifier that the collector "knows or should know" be removed. Additionally, the Proposal should forbid debt buyers from restarting of the statute

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[52] This date is also significant for purposes of reporting to credit bureaus. 15 U.S.C. § 1681c(a)(4).

[53] *Id.* The only date the Bureau reports receiving is the debtor's date of birth. *Id.*

[54] Federal Trade Commission, Collecting Consumer Debts: The Structure and Practices of the Debt Buying Industry 35 (2013) (hereinafter, the FTC Debt Buyer Report).

[55] Jiménez, *supra*note 49, at 624.

[56] N.Y. C.P.L.R §213.

[57] CFPB Collection Study, *supra* note 9, at 23, Table 8.

of limitations clock if an alleged debtor makes a payment on or acknowledges a debt for which is the limitations period has already expired.[58]

V. Section 1006.30(b) - Prohibition Against the Sale of Certain Debts

Proposed section 1006.30(b) addresses the concern that debt collectors may attempt to collect a debt that the consumer does not owe. The proposed section applies to debts that have been paid or settled, discharged in bankruptcy, or that are subject to an identity theft report. We concur with the Bureau's assessment that collection of these debts would be an unfair practice under the FDCPA and the Dodd-Frank Act since collectors would be attempting to collect debts that the consumer does not owe. But this section does not go far enough. We urge the Bureau to expand this section to protect consumers further.

In providing a justification for the rule, the Bureau cited a 2014 OCC Bulletin for supervised financial institutions.[59] In that bulletin, the OCC recommended that supervised entities ought not to sell certain debts because they "likely fail[] to meet the basic requirements to be an ongoing legal debt."[60] The subsequent list included debts that have been settled or in process of settlements, "debts incurred as a result of fraudulent activity," and "debts of borrowers that have sought or are seeking bankruptcy protection."[61] The OCC Bulletin went even further by including "accounts lacking clear evidence of ownership" and those "close to the statute of limitations,"[62] as noted earlier in this comment.

The Bureau specifically requested comments "on whether additional categories of debt, such as debt currently subject to litigation and debt lacking clear evidence of ownership, should be included in any prohibition adopted in a final rule."[63]

We strongly urge the Bureau to include both debts currently subject to litigation and debts with insufficient documentation to section 1006.30(b)(1).

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[58] Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M.L. REV, 327 (2014).

[59] Proposal, at 207 (citing Bulletin No. 2014-37, Consumer Debt Sales/Risk Management Guidance, OFFICE OF THE COMPTROLLER OF THE CURRENCY (Aug. 4, 2014), available at http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-37.html).

[60] Bulletin No. 2014-37, Consumer Debt Sales/Risk Management Guidance, OFFICE OF THE COMPTROLLER OF THE CURRENCY (Aug. 4, 2014), available at http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-37.html.

[61] *Id.*

[62] *Id.*

[63] Proposed Regulation § 1006.30(b)(1).

We also oppose 1006.30(b)(2)(ii), the exception that would allow a transfer of an uncollectible debt if the collector is using it as a pledge of collateral. The Bureau provides two rationales for this: (1) that it mirrors the Fair Credit Reporting Act's 615(f)(3) exceptions, and that (2) "the debt collector may be unable to exclude the debts described in proposed 1006.30(b)(1)(i) from the portfolio."[64] Neither rationale is particularly convincing. First, the FCRA's section 615(f)(3) covers only identity theft debts, whereas here the Bureau would be transplanting it to the debt collection context to include debts that are not owed by the consumer (because they've been paid or settled or have been discharged in bankruptcy). Second, as debt collectors have ample time to prepare for the adoption of a new rule, they can insist that any security agreements exclude as collateral uncollectible debts. Finally, an uncollectible debt has zero to negligible value as an asset. It follows that it should not be used as collateral to secure a loan to a debt collector; such use would appear to be misleading to the creditor.

Whether or not the Bureau keeps (b)(2)(ii), we strongly urge that a final rule explicitly require the debt collector transfer all of the information it knows about the debtor and the debt so that the previous owners also know that they cannot seek to collect on this debt.[65]

VI. Proposed § 1006.34 - Validation Notices

Section 1692g obliges debt collectors to send consumers written validation notices. Congress described this provision as a "significant feature" of the FDCPA.[66] The Bureau's Proposal includes a safe harbor model form, App. B-3, and also includes provisions governing the validation notice, chiefly § 1026.34. Some of the Bureau's Proposal regarding validation notices merits adoption, but we urge the Bureau to reconsider other aspects of its Proposal, as discussed below.

A. Model Validation Notice

We support the Bureau's Proposal to adopt a model validation form, though we think the content of that form can be improved. We endorse the decision to include in the form the statement that "If you write to us by November 12, 2019, we must stop collection on any amount you dispute until we send you information that shows you owe the debt."[67] The Bureau is wise to permit the use of oral disputes. The decision to include a "tear-off" in the model form to make it easier for consumers to invoke their validation rights also seems like an important step forward.

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[64] Proposed Regulation § 1006.30(b)(2)(iii).

[65] *See* discussion about what information is transferred in Part VI.C ("Dispute Prompts").

[66] See S. Rep. No. 95-382, at 4 (1977).

[67] *See* Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997) (adopting similar disclosure in a safe harbor validation notice).

We applaud the Bureau for testing the efficacy of validation notices, both in qualitative and quantitative studies. We look forward to learning of the findings of the Bureau's quantitative survey. Such surveys do, however, have one big drawback. Because the respondents have not actually received the disclosures as part of a debt collection effort, it is impossible to determine from their responses how they would respond in a genuine debt collection situation. Accordingly, we urge the Bureau to monitor how consumers respond to debt collection notices when they receive them from debt collectors trying to collect an actual debt. If possible, in advance of the adoption of a rule, we recommend that the Bureau field test various versions of its validation notices by arranging with debt collectors to use them in their debt collection efforts. That should shed considerable light on the extent to which consumers take in the disclosures contained in the validation notices and actually use them.

The Bureau should amend the model validation notice in Appendix B-3 to notify consumers that failure to meet the deadline for disputing the debt does not prevent them from disputing the debt later or in court. A study of consumers who were shown a validation notice found that "more than a third of the respondents believed that if they failed to meet the thirty-day deadline, they would either have to pay a debt they did not owe or would not be able to argue in court that they didn't owe the debt."[68] Failure to include such a statement risks leaving many consumers who miss the deadline worse off than if they have not been given a validation notice, because they may mistakenly believe that they have lost the opportunity to challenge the debt if they don't act within thirty days.

B. Verification

Section 1692g(a)(4) of the FDCPA states that validation notices must include "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." Proposed § 1006.34(c)(3)(i) provides for the validation notice to include a "statement that specifies . . . that, if the consumer notifies the debt collector in writing before the end of the validation period that the debt, or any portion of the debt, is disputed, the debt collector must cease collection of the debt, or the disputed portion of the debt, until the debt collector sends the consumer either the verification of the debt or a copy of a judgment." But the model form does not refer to verification. Because the model form is a safe harbor under § 1006.34(d)(2), a collector which uses the model form need not otherwise comply with § 1006.34(c)(3)(i). We recommend that the Bureau revise its model form to refer to verification.

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[68] See Jeff Sovern & Kate Walton, Are Validation Notices Valid? An Empirical Evaluation of Consumer Understanding of Debt Collection Validation Notices, 70 SMU L. REV. 63, 128 (2017) (hereinafter, Sovern & Walton).

It may be that the Bureau sees other portions of the model form as incorporating consumers' verification rights. This view is supported by the statement at page 253 of the Proposal that "While Model Form B–3 would alert consumers to an oral dispute option, the form would clarify that only a written dispute would invoke verification rights pursuant to FDCPA sections 809(a)(4) and (5)." One possibility is that the following language in the model form is intended to refer to the right to verification:

> Write to ask for the name and address of the original
>
> creditor. If you write by November 12, 2019, we will stop
>
> collection until we send you that information. You may use the
>
> form below or write to us without the form. We accept such
>
> requests electronically at www.example.com/request.
>
> * * *

But that seems intended to implement § 1692g(a)(5)'s requirement that the consumer can request the original creditor's name and address, rather than the (a)(4) verification requirement. Verification must mean more than that because otherwise, (a)(4) would have no independent meaning and so would be surplusage.

Such a limited definition of verification also seems inconsistent with what at least some courts say verification means. For example, in *Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC*, 758 F.3d 777, 783–86 (6th Cir. 2014) (per curiam), the court wrote that a verifying collector:

> [S]hould provide the date and nature of the transaction that led to the debt, such as a purchase on a particular date, a missed rental payment for a specific month, a fee for a particular service provided at a specified time, or a fine for a particular offense assessed on a certain date.[69]

Alternatively, it may be that the model form is intended to subsume the right to obtain verification in the following language:

> How can you dispute the debt?
>
> Call or write to us by November 12, 2019, to dispute all

[69] *See generally* Jeff Sovern, Kate Walton, & Nathan Frishberg, *Validation and Verification Vignettes: More Results from* an *Empirical Study of Consumer Understanding of Debt Collection Validation Notices*, 71 RUTGERS L. REV. (2019) (reviewing validation cases and results of consumer survey).

> or part of the debt. If you do not, we will assume that our information is correct. If you write to us by November 12, 2019, we must stop collection on any amount you dispute until we send you information that shows you owe the debt.

But the invitation to call in that paragraph seems inconsistent with the requirement in (a)(4) that consumers are entitled to verification only when they write. While we would support a law that enabled consumers to obtain verification upon oral requests, instead of solely when they write, the Proposal does not otherwise indicate that the Bureau intended so to modify the requirement of a writing. In addition, the second sentence refers only to "information that shows you owe the debt," which would be a more modest interpretation of what consumers are entitled to than *Haddad* contemplates. While some other courts have interpreted consumers' verification rights more narrowly than *Haddad*, the Proposal does not purport to resolve that disagreement, nor is it clear that the Bureau has the authority to do so.

In short, the model form does not tell consumers that they have a right to demand verification in writing, and the Bureau should revise the form to make clear that consumers have such a right, in conformity with the FDCPA.

C. Dispute Prompts

The model validation notice includes a list of dispute prompts to help consumers identify and express disputes they might have concerning a debt. A similar type of form was created in New York State to make it easier for consumers whose bank accounts are restrained to assert their rights to have exempt funds released.[70] The final form should retain the dispute prompts. Given the unsophisticated consumer standard the rule adopts, and what is generally known about American consumers' literacy levels (including those for whom English is not their native language) it is important that consumers who have disputes are able to clearly assert them. Moreover, most U.S. consumers have become accustomed to forms with prompts, such as drop-down menus common to online consumer transactions ranging from shopping to paying parking tickets.

Consumer advocates have strongly supported the prompts, while debt collectors are concerned that the prompts will cause disputes to proliferate, increasing collection costs. To the extent that prompts facilitate valid disputes or decelerate the collection process so that a consumer can have time to investigate and assure herself that the debt or the amount is valid, the prompts are a positive development. No one—including debt collectors who

[70] N.Y. C.P.L.R. §5222-a (b)(4).

conduct business lawfully—should want a consumer to pay a sum she or he does not actually owe.

Easing the burden on consumers to file disputes is even more important given the evidence that the Bureau has collected about how debt collectors and debt buyers often *do not* share dispute information with subsequent servicers/owners.[71] In its own survey, the CFPB found that "[m]any respondents said that they do not track disputes."[72] This is not much different from the 2013 FTC Debt Buyer Report where only four out of nine debt buyers provided data on disputes to the FTC.[73] "As the FTC noted, '[k]nowing the dispute history of debts could be very relevant to debt buyers in assessing whether consumers, in fact, owe the debts and whether the amounts of the debts are correct."[74] As we suggest in Part I.A., the Bureau should require that, at minimum, collectors transfer any and all information that they have on a debt or a consumer to a subsequent collector or debt buyer.

Debt collectors—and especially debt buyers—make business decisions about the quality of debt they collect and the documentation they require of creditors. Debt that is likely to be disputed or remain unpaid is acquired for fractions of pennies on the dollar; for true third-party collectors, commissions can be negotiated accordingly if collection costs increase. If more consumers dispute debts, then perhaps fewer invalid debts will enter the collection market, which is a positive development. If it must make a choice between indirectly increasing the cost of business to debt collectors or facilitating consumers' exercise of their right to validly dispute a debt, the choice should favor consumers. The U.S. consumers' ability to assert their rights is far more valuable to individuals and our society, even if a minor increase in disputes that lack merit generates some minimal costs.

D. Statement of Rights

We agree with the Bureau's decision to create a "reference document" to assist consumers in identifying their rights,[75] but in our view, this document would be much more helpful to consumers if collectors were obliged to furnish it to them, as contemplated by the Bureau's original SBREFA Outline. Informing consumers that they may find useful information on the Bureau's web site, with a link to the generic Bureau web site rather than to pages specifically addressing debt collection,[76] will be less helpful to many consumers because

[71] Bureau of Consumer Financial Protection, Study of Third-Party Debt Collection Operations at 30 (July 2016)

[72] *Id.*

[73] FTC Debt Buyer Report, *supra* note 54. at 37.

[74] Jiménez, *supra* note 15, at 79 (citing FTC Debt Buyer Report, *supra* note 54, at 37).

[75] Proposal, at p. 254.

[76] *See* Proposed § 1006.34(c)(3)(iv).

first, some will not visit the Bureau web site; and second, even some who do may give up before locating the particular pages that explain their rights.

E. Delivery of Validation Notice by Hyperlinks

Proposed § 1006.42(c)(2)(ii) would allow collectors to satisfy the requirement that they provide consumers with validation notices by providing hyperlinks to the notice. This provision is objectionable both because it is not consistent with the statutory text and because it reduces the likelihood that consumers will actually read the disclosure. As for the statutory text, § 1692g(a) obliges collectors to "send the consumer a written notice containing" the validation information. In *Lavallee, v. Med-1 Solutions, LLC*, --- F.3d ---, 2019 WL 3720875 (7th Cir. 2019), the court ruled that an email that included a link that ultimately led to the validation notice did not contain the validation notice. While the email, in that case, did not refer to the debt, and the Bureau's Proposal would require such a reference, the presence or absence of such a reference does not affect whether the email is a notice "containing" the validation information.

The *Lavallee* interpretation is supported by the ordinary understanding of the word "containing." For example, the Merriam-Webster Dictionary defines "containing" as "to have within: HOLD" and gives as an example "The box contains old letters."[77] An email with a hyperlink does not "have within" or "hold" the information at the hyperlink, and no one would say that an email including a hyperlink contains the information available at the hyperlink. Accordingly, as a matter of textual interpretation, the Bureau should not interpret the FDCPA to permit debt collectors to provide validation notices through hyperlinks.

The Proposal would also make it far less likely that consumers would actually see the validation notice. Some consumers might not be able to read the validation notice if they employ antivirus software or browsers that would disable such links. But even consumers who can click on the hyperlink still might not. As Professor David Vladeck, formerly the director of the Federal Trade Commission's Bureau of Consumer Protection, has noted:

> The Federal Trade Commission (FTC) has repeatedly cautioned Americans to be wary of malware and phishing expeditions. Last year, the Federal Communications Commission (FCC) alerted consumers to a new cyber threat it dubbed "smishing"—targeting consumers with deceptive text, or SMS,

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[77] *See Contain*, Merriam-Webster, https://www.merriam-webster.com/dictionary/contain (emphasis in original).

> messages—and urged consumers to "never click links, reply to text messages or call numbers you don't recognize.[78]

On top of that, consumers often ignore disclosures, and the harder it is to access the disclosure, the less likely it is that consumers will actually read it. End User License Agreements (EULA), which are often accessed by clicking, provide a useful analogy. When a computer game company inserted in its EULA a term explaining that those agreeing to it would have to surrender their "immortal soul" to the company, 88% of the consumers agreed to do so. The company did offer consumers the ability to retain their souls, as well as to receive a small payment, but it required clicking on a box—which few did.[79]

Empirical research has also demonstrated that consumers rarely click on such disclosures.[80] Indeed, even consumer law professors often ignore disclosures. When one of us polled attendees at a pair of consumer law conferences "Do you read required disclosures before entering into consumer transactions?," none of the 38 respondents replied that they always read disclosures, 53% said they rarely or never read them, and only 21% said they usually read them.[81] Increasing the number of steps required to see a disclosure seems like a recipe for obscuring disclosures. It may be that consumers receiving demands to pay debts are different, but until the Bureau can verify that empirically, it should not assume that they are.

Nor is the problem of hyperlinks solved by giving consumers a right to opt out.[82] Consumers have a strong tendency to stay with the default choice, no matter what it is. For example, in one notable experiment, testers gave consumers a coffee mug and told them they could swap it for candy; 89% stayed with the default. When the experimenters gave other consumers candy and offered to trade it for the mugs, an almost identical 90% declined the offer.[83] A similar tendency to stay with the default has been observed with consumer

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[78] *See* David Vladeck, *The Consumer Bureau's Reckless Plan for Debt Collection*, WIRED (Aug. 23, 2019), https://www.wired.com/story/the-consumer-bureaus-reckless-plan-for-debt-collection/.

[79] *See* Fox News, 7,500 *Online Shoppers Unknowingly Sold Their Souls* (Apr. 15, 2010), https://www.foxnews.com/tech/7500-online-shoppers-unknowingly-sold-their-souls.

[80] *See* Florencia Marotta-Wurgler and Daniel L. Chen. *Does Contract Disclosure Matter? [with Comment],* 168 JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS (JITE) / ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 94 (2012): 94-123. http://www.jstor.org/stable/41474939. (a study of clickstream data on web sites found that 0.05% of consumers read EULAs for at least one second).

[81] See Jeff Sovern, Another Survey of Consumer Law Professors Fails to Ffnd Any Who Always Reads Consumer Contracts Before Signing Them, Consumer Law & Policy Blog ((June 17, 2019), https://pubcit.typepad.com/clpblog/2019/06/another-survey-of-consumer-law-professors-fails-to-find-any-who-always-reads-consumer-contracts-befo.html (June 17, 2019).

[82] *See* Proposed § 1006.42 (d).

[83] *See* Jack Knetsch, The Endowment Effect and Evidence of Nonreversible Indifference Curves, 79 AM. ECON. REV. 1277-, 1278 (2000).

protections.[84] Existing data does not permit us to be certain that consumers will not opt out of the use of hyperlinks to provide validation notices when that is desirable, but until the Bureau conducts empirical research to verify that consumers will, in fact, opt out when appropriate, we urge the Bureau to refrain from allowing collectors to use hyperlinks to convey validation notices.

If the Bureau nevertheless moves forward with allowing the use of hyperlinked disclosures, it should require collectors to maintain records of how many consumers click on the disclosures, how long they view them for, and how many opt out. It should also require collectors to send written validation notices in another form to those who do not spend as much time on the web site displaying the validation notice as would be required to read it.

F. Overshadowing

The Bureau should limit debt collector communications to consumers during the validation period to avoid overshadowing the validation notice, except for those responding to consumer-initiated communications. Collectors, who want to be paid, have several incentives to obscure the validation notice.[85] When consumers dispute a debt, collectors must interrupt collection activities until they respond, 15 U.S.C. § 1692g(b), and if the collector reports the debt to a consumer reporting agency, the collector must also report the debt as disputed.[86] Finally, the collector would rather the consumer pay the debt than dispute it.[87] Congress recognized as much when it codified the court-created overshadowing doctrine in 15 U.S.C. § 1692g(b). And no doubt, similar thinking is behind the requirement in the Proposed Regulation limiting validation notices to the required and optional items specified in Proposed 1006.34(c), (d)(3). But the Proposed Regulation does not prevent debt collectors from communicating in other ways that might cause consumers to pay less attention to the validation notice. To be sure, collectors are still subject to the overshadowing doctrine. But courts, lacking the resources to conduct empirical research to determine what might overshadow a validation notice and what might not, have interpreted that doctrine in ways unmoored from how actual consumers behave.[88] Accordingly, the Bureau should test empirically what communications will overshadow validation notices, and then adopt rules limiting debt collectors to those that do not.

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[84] *See* Congressional Budget Office, Cost Estimate S. 2155 Economic Growth, Regulatory Relief, and Consumer Protection Act 13 (2018) (reporting that only 0.3% of Americans with credit files had used credit freeze laws to block access to their credit reports).

[85] See Sovern & Walton, supra note 67, at 70-71.

[86] *See* 15 U.S.C. § 1692e(8).

[87] *See* Elwin Griffith, *The Role of Validation and Communication in the Debt Collection Process*, 43 Creighton L. Rev. 429, 468 (2010). ("[T]he collector will do its utmost to ensure that its demand for payment will have a greater impact on the consumer than the statutory right to dispute its debt.").

[88] *See* Sovern & Walton, *supra* note 67, at 113-21.

VII. Proposed § 1006.30(d) – Venue

The Bureau requested comment on Proposed Rule § 1006.30(d) which designates the proper venue for bringing a legal action to collect a debt. Specifically, the Bureau asked if "additional clarification is needed." We believe it is. The proposed regulation mirrors the statute in defining the proper venue for a debt collection action as being the "judicial district or similar legal entity" that meets the other qualifications of the statute. There has been a significant amount of litigation trying to explain what "judicial district or similar legal entity" actually means.

As the court in *Suez v. Med-1 Solutions, LLC*[89] pointed out:

> Unfortunately, the key statutory term— "judicial district"—is vague. The FDCPA does not define it, and ... the phrase has no general definition of meaning that can resolve this dispute. In Indiana, Illinois and most other states, state trial courts usually are organized by county for purposes of both court administration and venue. When that is so, it may seem natural to interpret the statutory terms as referring to the county in which the debtor lives or the contract giving rise to the debt was signed. But terms that seem plain and easy to apply to some situations can be ambiguous in other situations.

The court explains that, in some cases, a county-wide venue rule may actually allow a debt collector to choose the most inconvenient court for the debtor among several. As the court describes, such a rule would "undermine the venue provisions of the Fair Debt Collection Practices Act. It would amount to saying that Congress had created the provision with one hand and simultaneously nullified it with the other."[90] The court went on to suggest that the proper definition of "judicial district or similar legal entity" should be "the smallest geographic area relevant to venue in the court system in which the case is filed."[91] We encourage the Bureau to adopt this standard.

VIII. Conclusion

For the foregoing reasons, we urge the Bureau to revise its Proposed Debt Collection Regulations.

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[89] Suez v. Med-1 Solutions, LLC, 757 F.3d 636, 639 (7th Cir. 2014).

[90] *Id.* at 640.

[91] *Id.*

Testimony of April Kuehnhoff, National Consumer Law Center
Before the U.S. House of Representatives Committee on Financial Services

regarding

"Examining Legislation to Protect Consumers and Small Business Owners from Abusive Debt Collection Practices"

September 26, 2019

Table of Contents

I. Introduction and Summary

Chairwoman Waters, Ranking Member McHenry, and Members of the Committee on Financial Services, thank you for inviting me to testify today regarding protecting consumers from abusive debt collection practices. I am a staff attorney at the National Consumer Law Center (NCLC), [1] where my work focuses on consumer debt and fair debt collection. I offer my testimony here on behalf of the low-income clients of NCLC.

Americans are struggling under very high debt burdens. An estimated one in every three adults with a credit report has a debt in collection. For the vast majority of these consumers, it not an unwillingness to pay their debts but a host of other factors that lead people into the hands of debt collectors, including stagnating wages, job losses, divorce, health problems, predatory lending, and a weakening financial safety net. Americans of all stripes face debt collection, but those with lower incomes, those who live in communities of color, limited English speakers, older Americans, and servicemembers face special challenges.

Unfortunately, despite the passage of the 1977 Fair Debt Collection Practices Act (FDCPA), abusive debt collection practices remain common, although they have – in some cases – taken new forms due to the advent of the debt buyer industry and other factors. Debt collectors are routinely the first or second category of complaints received by the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB). Major categories of debt collection problems that consumers face include:

- **Collection without information**, meaning that debt collectors pursue debts without reviewing the documentation needed to ensure they are collecting the right amount from the right person or that they have authority to collect the account.

- **Mass fillings of collection lawsuits by collection mills,** which frequently lead to default judgments against consumers regardless of the merits of the case.

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1 The National Consumer Law Center is a nonprofit organization specializing in consumer issues on behalf of low-income and elderly people. Since 1969, we have worked with thousands of legal services, government, and private attorneys and their clients, as well as community groups and organizations that represent low-income and older individuals on consumer issues. As a result of our daily contact with these advocates, we have seen many examples of the damages wrought by debt collection from across the nation. This testimony is presented on behalf of our low-income clients.

- **Collection of time-barred "zombie" debt,** which cannot be collected without mistakes or deception.

- **Harassment, threats, privacy violations, and other abuses** long prohibited by the FDCPA.

The CFPB has the ability to address many of these problems through rulemaking. Unfortunately, the CFPB has proposed a rule that will do more to protect abusive debt collectors than consumers. Among other problems, the proposed rule will:

- permit excessive calls to consumers and potentially third parties and businesses;

- prevent people from receiving information they are entitled to under the law by allowing for electronic delivery of written notices without E-SIGN Act compliance;

- provide new vehicles to harass consumers by email, text, and other means;

- permit violations of consumers' privacy;

- allow collection of old debts, leading to abuse, deception, and mistakes; and

- protect attorneys who make false, deceptive, or misleading representations in court documents.

Congress, of course, can also address these abusive debt collection practices and can clarify or improve the FDCPA to better protect consumers, as the bills that will be discussed during this hearing seek to do. We support Congressional actions on a variety of debt-related reforms, including: updating the penalties under the FDCPA for inflation to deter abusive conduct; clarifying the FDCPA's coverage with respect to what is a debt and who is a debt collector; protecting small businesses from abusive confessions of judgment; and conducting strong oversight over the CFPB to ensure that it is living up to its mandate to protect consumers. We are also happy to work with Congress to address these and other debt collection problems.

Below I will provide background on the problem of debt collection in the United States, discuss the major problems posed by debt collectors, review the CFPB's proposed rule, and briefly comment on some of the proposed legislation to be discussed at this hearing.

II. Americans are Struggling under High Debt Burdens.

A. Current Consumer Debt Levels are at an All-Time High and Continue to Grow.

Consumer debt reached $13.86 trillion in the second quarter of 2019, which was the 20th consecutive quarter for an increase.[2] The Federal Reserve Bank of New York reports that "the total is now $1.2 trillion higher, in nominal terms, than the previous peak of $12.68 trillion in the third quarter of 2008."[3] The percentage of non-housing balances that were at least 90 days past due was: 10.8% for student loans, 8.3% for credit cards, 7.2% for other non-housing debts, and 4.6% for auto loans.[4] Moreover, the Federal Reserve Bank of New York reports that "the share of credit card balances transitioning into 90+ day delinquency has been rising since 2017."[5]

B. Debt Collection Impacts Millions of Americans.

In 2017, seventy-one million Americans – nearly one in three adults in the United States - had a debt in collection reported on their credit reports.[6] It is estimated that the collection industry contacts Americans more than a billion times a year.[7]

Americans are struggling with debt for several reasons. Wages have stagnated[8] and wealth and income inequality has grown[9] while costs for housing, medical care, education and other

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2 Federal Reserve Bank of N.Y., Household Debt and Credit Report: Q2 2019, *available at* https://www.newyorkfed.org/microeconomics/hhdc.html. The non-housing balances of consumer in second quarter of 2019 broke down into: $1.48 trillion for student loans, $1.3 trillion for auto loans, $0.87 trillion for credit cards, and $0.41 trillion for other, non-housing debts.

3 *Id.*

4 *Id.*

5 Quarterly Report on Household Debt and Credit, Center for Microeconomic Data (Aug. 2019), *available at* https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc_2019q2.pdf.

6 Hannah Hassani & Signe-Mary McKernan, Urban Inst., *71 million US adults have debt in collections* (July 19, 2018), *available at* www.urban.org/urban-wire/71-million-us-adults-have-debt-collections.

7 Robert M. Hunt, Understanding the Model: The Life Cycle of a Debt 10, presented at FTC-CFPB Roundtable "Life of a Debt: Data Integrity in Debt Collection" (June 6, 2013) *available at* www.ftc.gov/sites/default/files/documents/public_events/life-debt-data-integrity-debt-collection/understandingthemodel.pdf. Indeed, Encore Capital Group, one of the many debt buyers operating in the United States, claims that 20% of American consumers either owe money currently or have owed money in the past. Chris Albin-Lackey, Human Rights Watch, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor 11 (Jan. 2016) *available at* www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor#.

expenses continue to escalate. A credit industry that pushes unsustainable debt loads, predatory lending, and the continuing impacts of the financial crisis have taken their toll. Wealth has been stripped from low-income communities, and saving is difficult for families that can barely make ends meet.

C. Low- to Moderate-Income Consumers Face High Levels of Debt Collection.

Low- and moderate-income consumers are disproportionately impacted by debt collection activity.[10] In one national survey, consumers in the lowest income group were three times more likely to have been contacted about a debt in collection than consumers in the highest income group[11] and also more likely to have been sued.[12]

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[8] *See, e.g.,* Drew DeSilver, Pew Research Center, *For most U.S. workers, real wages have barely budged in decades* (Aug. 7, 2018) *available at* https://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/; Jay Shambaugh et al., The Hamilton Project, Thirteen Facts about Wage Growth, at i (Sept. 2017), *available at* https://www.hamiltonproject.org/assets/files/thirteen_facts_wage_growth.pdf ("After adjusting for inflation, wages are only 10 percent higher in 2017 than they were in 1973, with annual real wage growth just below 0.2 percent.").

[9] *See, e.g.,* Estelle Sommeiller & Mark Price, Economic Policy Institute, The New Gilded Age: Income inequality in the U.S. by state, metropolitan area, and county (July 19, 2018), *available at* https://www.epi.org/publication/the-new-gilded-age-income-inequality-in-the-u-s-by-state-metropolitan-area-and-county/; Urban Inst., Nine Charts about Wealth Inequality in America (Oct. 5, 2017), *available at* http://apps.urban.org/features/wealth-inequality-charts/.

[10] *See* National Consumer Law Center, Fair Debt Collection § 1.3.1.4 (9th ed. 2018), *updated at* www.nclc.org/library.

[11] Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 15, 28 (Jan. 2017) (52% of consumers with annual household incomes of less than $20,000, compared to 16% of respondents with household incomes over $70,000). *See also* FINRA Investor Educ. Found., Financial Capability in the United States 2016, at 27 (July 2016) (25% of respondents to the 2015 National Financial Capability Study with incomes of less than $25,000 reported being contacted by a debt collection agency in the past year, compared to 18% of all survey respondents).

[12] Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 15, 20, 22, 28 (Jan. 2017), *available at* https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf (20% of consumers with annual household incomes of less than $20,000 and 16% of consumers with household incomes between $20,000 to $39,999 that had been contacted about a debt in collection were sued, compared to 12% of respondents with household incomes over $70,000). *See also* Kate Owen, Legal Aid of Nebraska, Presentation at the University of Nebraska at Omaha on *The High Cost of Being Poor* (Oct. 21, 2016) (reporting that 56.3% of all judgments in Douglas County, Nebraska were against individuals residing in high-poverty zip codes); Peter A. Holland, Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers (Mar. 2014) ("In Maryland, debt buyers disproportionately sued in jurisdictions with larger concentrations of poor people and racial minorities. For example, Prince

To cover all of their financial needs, low-income consumers try to cover bills by borrowing, rotating payments, paying less than the minimum, paying one bill by taking out a loan, or even ignoring debts that are simply unaffordable.[13] About 40% of Americans would struggle to pay a $400 unexpected expense.[14] The result is that any unexpected event such as a medical emergency, job loss, or even a furnace or car that needs repair, can send these families into a financial tailspin. It is these problems, not an unwillingness to pay their debts, that lead most people into the hands of debt collectors.[15]

George's County has only 15% of the [sic] Maryland's population, yet 23% of all debt buyer complaints were filed against Prince George's County residents."); Claudia Wilner & Nasoan Sheftel-Gomes, Neighborhood Economic Development Advocacy Project, Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Low Income New Yorkers 10 (May 2010) ("91% of people sued by debt buyers and 95% of people with default judgments entered against them live in low- or moderate-income communities."); Richard M. Hynes, *Broke but Not Bankrupt: Consumer Debt Collection in State Courts*, 60 Fla. L. Rev. 1, 42 (2008) (civil filings in Virginia were positively correlated with poverty).

13 *See* Laura M. Tach & Sara Sternberg Greene, *"Robbing Peter to Pay Paul": Economic and Cultural Explanations for How Lower-Income Families Manage Debt*, 61 Social Problems 1 (Feb. 2014).

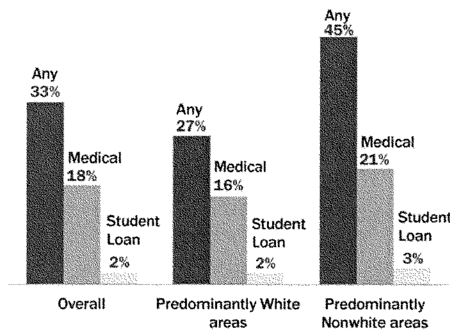
14 Board of Governors of the Fed. Reserve Sys., Report on the Economic Well-Being of U.S. Households in 2017, at 2 (May 2018), *available at* https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf.

15 *See, e.g.,* David U. Himmelstein et al., *Medical Bankruptcy: Still Common Despite the Affordable Care Act,* Am. J. of Pub. Health, vol. 109, no. 3, at 432 (Mar. 2019) (top three contributors to bankruptcy were income loss, medical-related reasons, and unaffordable mortgage or foreclosure according to survey respondents); Office of Pol'y Dev. & Res., U.S. Dept. of Housing & Urban Dev., Report to Congress on the Root Causes of the Foreclosure Crisis 15 (2010) ("It is generally understood that most borrowers become delinquent due to a change in their financial circumstances that make[s] them no longer able to meet their monthly mortgage obligations. These so called 'trigger events' commonly include job loss or other income curtailment, health problems, or divorce."). *See also* National Consumer Law Center, Fair Debt Collection § 1.3.1.1 (9th ed. 2018), *updated at* www.nclc.org/library.

D. Debt Collection Disproportionately Impacts Communities of Color.

An interactive map created by the Urban Institute in 2017 highlighted that in predominantly nonwhite zip codes, the share of individuals with one or more debts in collection reported on their credit reports is higher than in predominantly white zip codes.[16] (See Chart 1.)

CHART 1
Percentage of People in the U.S. with Debt in Collections



Source: Urban Institute, Debt in America: An Interactive Map (Dec. 6, 2017).

Studies have found racial and ethnic disparities with respect to who is contacted about a debt,[17] the filing of collection lawsuits,[18] the quality of claims filed in those lawsuits,[19] the likelihood

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16 Urban Institute, Debt in America: An Interactive Map (Dec. 6, 2017), *available at* https://apps.urban.org/features/debt-interactive-map/?type=medical&variable=perc_debt_collect. For more information, see National Consumer Law Center, Fair Debt Collection § 1.3.1.5 (9th ed. 2018), *updated at* www.nclc.org/library.

17 Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 17-18 (Jan. 2017) *available at* s3.amazonaws.com/files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf (44% of non-white respondents were contacted about a debt in collection, compared to 29% of white respondents, and 39% of Hispanic respondents were contacted about a debt in collection, compared to 31% of non-Hispanic respondents).

18 Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 Loyola L. Rev. 179, 218 (Mar. 2014) (reporting that "[d]ebt buyers sued disproportionately in jurisdictions with larger concentrations of poor people and racial minorities. For example, Prince George's County has only 15% of the [sic] Maryland's population, yet 23% of all debt buyer complaints were filed against Prince George's County residents."); Richard M. Hynes, *Broke but Not Bankrupt: Consumer Debt Collection in State*

of obtaining default judgments,[20] the risk of judgment,[21] the likelihood of being subject to garnishment proceedings;[22] and who is able to successfully discharge debt in bankruptcy.[23]

E. Consumers with Limited-English Proficiency Have Challenges in Dealing with Debt Collectors.

Borrowers facing delinquency and default too often face an English-only system, creating additional barriers to responding to debt collection efforts, overcoming financial distress, and filing complaints regarding debt collection abuses. [24] The CFPB's survey of consumer experiences with debt collection showed that only 79% of consumers contacted about a debt in collection were able

Courts, 60 Fla. L. Rev. 1, 3 (2008) (concluding that "civil litigation is disproportionately concentrated in cities and counties with lower median income and homeownership rates; higher incidences of poverty and crime; and higher concentrations of relatively young and minority residents").

19 The Legal Aid Society et al., Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers 1-2 (May 2010) *available at:* mobilizationforjustice.org/wp-content/uploads/reports/DEBT-DECEPTION.pdf (reporting that, in a sample of 451 legal hotline calls, 66% of debt collection cases against black and Latino clients were "clearly meritless," as compared to 35% of all cases).

20 *See, e.g.,* Mary Spector and Ann Baddour, "*Collection Texas-Style: An Analysis of Consumer Collection Practices in and out of the Courts*," 67 Hastings L.J. 1427, 1458 (June 2016) (finding "a somewhat higher likelihood of default judgments in precincts with a higher non-White population"); Annie Waldman & Paul Kiel, ProPublica, Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas 22 (Oct. 8, 2015), *available at* static.propublica.org/projects/race-and-debt/assets/pdf/ProPublica-garnishments-whitepaper.pdf ("Data from St. Louis indicated that suits against residents of majority black census tracts were more likely to result in default judgments or consent judgments and residents of majority black census tracts were less likely to be represented by an attorney when they were sued.").

21 Annie Waldman & Paul Kiel, ProPublica, Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas 1 (Oct. 8, 2015), *available at* static.propublica.org/projects/race-and-debt/assets/pdf/ProPublica-garnishments-whitepaper.pdf (analysis of collection actions in St. Louis, Chicago, and Newark found that the risk of judgment was twice as high in majority black census tracts compared to majority white census tracts, holding income constant).

22 *Id.* (reporting that in St. Louis, holding income constant, defendants living in majority black census tracks were 20% more likely to be subject to garnishment proceedings after obtaining a judgment).

23 Paul Kiel & Hannah Fresques, ProPublica, Data Analysis: Bankruptcy and Race in America 11 (Sept. 27, 2017), *available at* static.propublica.org/projects/bankruptcy-methodology/BankruptcyAndRaceInAmerica.pdf (reporting that a study of national bankruptcy data found that "for debtors living in black areas, the odds of having a case dismissed [failing to achieve a bankruptcy discharge] were about twice as high as those of debtors living in white areas, controlling for the court district where the case was filed, income, and other financial characteristics of the debtor").

24 For more information, see National Consumer Law Center, Fair Debt Collection § 1.3.1.8 (9th ed. 2018), *updated at* www.nclc.org/library.

to communicate in their preferred language.[25] CFPB[26] and FTC[27] enforcement actions have highlighted abusive debt collection practices targeting LEP consumers.

F. Older Americans Face Increasing Levels of Debt and Debt Collection.

Among families headed by older Americans, both the percentage that is in debt[28] and the amount of their indebtedness have increased in recent years.[29] Consumers aged 62 or older file thousands of complaints about debt collection with the CFPB.[30] In the CFPB's survey, 59% of those

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[25] Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 46 n.34 (Jan. 2017), *available at* s3.amazonaws.com/files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf (the CFPB did not release the data for responses to the question "Is English your preferred language?"). The joint FTC-CFPB Debt Collection and the Latino Community Roundtable in October 2014 identified debt collection challenges in LEP communities, such as reports that LEP debtors tend to be less likely to challenge any representations made by a debt collector. Federal Trade Comm'n & Consumer Fin. Prot. Bureau Roundtable, Debt Collection & the Latino Community (Oct. 9, 2014), *available at* https://www.ftc.gov/news-events/events-calendar/2014/10/debt-collection-latino-community-roundtable.

[26] Consumer Fin. Prot. Bureau, *In re* American Express Centurion Bank and American Express Bank, FSB Civ. Action No. 2017-CFPB-0016, Consent Order (Aug. 23, 2017) (respondents did not make the same collection offers available to customers with Spanish language preferences that they did to consumers who did not express a Spanish language preference).

[27] FTC v. 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); 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); FTC v. Rincon Mgmt. Servs., L.L.C., 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).

[28] Federal Reserve Bd., 2016 Survey of Consumer Finances Chartbook 837 (Sept. 20, 2017), *available at* https://www.federalreserve.gov/econres/files/BulletinCharts.pdf (49.8% of families headed by someone aged 75 or older were in debt in 2016 compared to 21% in 1989. 70.1% of families headed by someone 65–74 were in debt in 2016 compared to 49.6% in 1989). For more information, see National Consumer Law Center, Fair Debt Collection § 1.3.1.6 (9th ed. 2018), *updated at* www.nclc.org/library.

[29] Meta Brown, Federal Reserve Bank of N.Y., The Graying of American Debt 10 (Feb. 12, 2016), *available at* www.newyorkfed.org/medialibrary/media/newsevents/mediaadvisory/2016/Graying-of-American-Debt-02122016.pdf (reporting that, from 2003 to 2015, the amount of real per capita debt at age sixty-five increased over eight-fold (886%) for student loans, 47% for debt secured by a home, and 29% for auto loans, while staying the same for credit card debt).

[30] Consumer Fin. Prot. Bureau, Monthly Complaint Report, vol. 23, at 6 (May 2017), *available at* s3.amazonaws.com/files.consumerfinance.gov/f/documents/201705_cfpb_Monthly_Complaint_Report.pdf (showing 26,452 total complaints about mortgages and 25,561 total complaints about debt collection filed by those aged 62 or older).

aged 62 or older who were contacted about a debt cited an issue with a debt in collection, 40% disputed a debt, and 20% had been sued on a debt.[31] For older adults seeking assistance from legal hotlines, collection-related matters were the second most common type of case in 2017.[32]

G. Debt Collection Has a High Impact on Servicemembers and Veterans.

Consumer debt has a negative impact on the careers of military servicemembers, and some collectors attempt to use this information to coerce payments from servicemembers.[33] Abusive collection tactics include:

- contacting the servicemember's chain of command;
- threatening punishment under the military's justice system;
- threatening reductions in rank; and
- threatening revocation of security clearance.[34]

Approximately two out of every five complaints filed by servicemembers with the CFPB were about debt collection, and servicemembers were more likely to complain about debt collection than all consumers filing complaints at the CFPB.[35] Debt collection was the fifth most common type of complaint reported by military consumers in the 2017 CSN Data Book.[36]

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31 Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 25 (Jan. 2017), *available at* s3.amazonaws.com/files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

32 Center for Elder Rights Advocacy, Senior Legal Helplines Annual Report 2017, at 8 (Oct. 2018), *available at* legalhotlines.org/resource/2017-senior-legal-helplines-annual-report/.

33 Holly Petraeus, Consumer Fin. Prot. Bureau, *Are unpaid debts a military career-killer?* (Jan. 9, 2015), *available at* www.consumerfinance.gov/about-us/blog/are-unpaid-debts-a-military-career-killer/. For more information, see National Consumer Law Center, Fair Debt Collection § 1.3.1.7 (9th ed. 2018), *updated at* www.nclc.org/library.

34 Consumer Fin. Prot. Bureau, Written Testimony of Holly Petraeus before the Senate Committee on Banking, Housing and Urban Affairs (Jun. 26, 2012), *available at* www.consumerfinance.gov/about-us/newsroom/written-testimony-of-holly-petraeus-before-the-senate-committee-on-banking-housing-and-urban-affairs/.

35 Consumer Fin. Prot. Bureau, 50 State Snapshot of Servicemember Complaints: A Nationside Look at Complaints 2 (Oct. 2017), *available at* https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_monthly-complaint-report_50-state-snapshot-servicemembers_102017.pdf (39% of complaints by servicemembers, veterans, and their families are about debt collection, compared to 26% of complaints from non-servicemembers).

36 Federal Trade Comm'n, Consumer Sentinel Network: Data Book 2017, at 18 (Mar. 2018), *available at* www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-

H. Medical Debt Impacts Millions of Americans.

Medical debt is an enormous problem for both low-income and middle-class American consumers. Medical debt is especially onerous because it is often sudden and unavoidable, and consumers with medical debts may be especially vulnerable due to illness or infirmity.[37]

While the number of uninsured adult Americans has been dropping, still twenty-three million or 12% of adult Americans lacked health insurance in a 2016 survey, and another eighteen million or 10% of adult Americans were uninsured at some point in 2016.[38] Moreover, uninsured consumers are often charged several times more for the same medical services as private insurers or Medicaid.[39]

Having health insurance is no guarantee against medical debt. Insured consumers are regularly faced with unmanageable debt,[40] often because of large deductibles, co-insurance, and out-of-network charges. Even when consumers believe they are receiving in-network services, there is a risk of large out-of-network charges, as one of the participants in a medical service may be out of the network while other hospital and physician services are within the network. For example, one study found that 22% of visits to in-network emergency departments involved out-of-network physicians.[41]

The Centers for Disease Control found that 43.8% of Americans under the age of sixty-five in 2016 had trouble paying medical bills in the previous twelve months.[42] According to the CFPB, in

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2017/consumer_sentinel_data_book_2017.pdf.

37 *See* Mark A. Hall & Carl E. Schneider, *Patients As Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 Mich. L. Rev. 642 (Feb. 2008) (discussing special vulnerability of patients as consumers due to illness and reliance upon advice of doctors).

38 Sarah R. Collins et al., The Commonwealth Fund, How the Affordable Care Act Has Improved Americans' Ability to Buy Health Insurance on Their Own (Feb. 2017), *available at* www.commonwealthfund.org.

39 *See* National Consumer Law Center, Collection Actions § 9.1.3 (4th ed. 2017) (discussing chargemaster pricing).

40 *See, e.g.,* Christopher Garmon & Benjamin Chartock, *One in Five Inpatient Emergency Department Cases May Lead to Surprise Bills*, 36 Health Affairs 177–181 (Jan. 2017). *See also* Chad Terhune, *The $109K Heart Attack Bill is Down to $332. What About Other Surprise Bills?*, Kaiser Health News (Aug. 31, 2018), *available at* https://khn.org (noting the limited reach of state laws intended to restrict surprise bills).

41 Zack Cooper & Fiona Scott Morton, *Out of Network Emergency-Physician Bills—an Unwelcome Surprise*, New Eng. J. of Med. (Nov. 17, 2016).

42 Robin A. Cohen & Emily P. Zammitti, National Ctr. for Health Statistics, Problems Paying Medical Bills Among Persons Under Age 65: Early Release of Estimates From the National Health Interview Survey, 2011-June 2017 (Nov. 2016), *available at* www.cdc.gov.

the second quarter of 2018, 58% of accounts reported by third-party debt collectors were for medical debts,[43] and the Urban Institute reported that, in 2016, 18% of consumers with a credit report had a medical debt in collection.[44] In a survey of randomly sampled bankruptcy filers from 2013-2016, published in the American Journal of Public Health, 58.5% of respondents very much agreed or somewhat agreed that medical expenses were a contributor to their bankruptcy.[45] In its survey of consumer experiences with debt collection, the CFPB found that 59% of consumers who were contacted about a debt in collection were contacted about a medical bill.[46]

I. Student Loan Debt is Reaching Crisis Levels.

Currently, nearly forty-five million people in the United States owe more than $1.5 trillion on their student loans. Roughly one quarter of federal loan borrowers are delinquent or in default.[47]

There are extraordinary penalties for borrowers who go into default on a federal loan. When a borrower has a defaulted federal student loan (a loan that is more than 270 days past due), the government can seize certain income and assets from the borrower without a court order. Low-income borrowers are especially harmed because the government often seizes benefits, such as the Earned Income Tax Credit ("EITC"), that are aimed at promoting economic security and mobility.

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43 Consumer Fin. Prot. Bureau, Market Snapshot: Third-Party Debt Collections Tradeline Reporting 13 (July 2019), *available at* https://files.consumerfinance.gov/f/documents/201907_cfpb_third-party-debt-collections_report.pdf.

44 Urban Inst., Debt in America: An Interactive Map (Dec. 6, 2017), *available at* https://apps.urban.org/features/debt-interactive-map/?type=medical&variable=perc_debt_collect.

45 David U. Himmelstein et al., *Medical Bankruptcy: Still Common Despite the Affordable Care Act,* Am. J. of Pub. Health, vol. 109, no. 3, at 432 (Mar. 2019).

46 Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 21 (Jan. 2017), *available at* s3.amazonaws.com/files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

47 *See* U.S. Dep't of Educ., Federal Student Aid Data Center, Federal Student Loan Portfolio. *See also*, Consumer Fin. Prot. Bureau, Student Loan Servicing: Analysis of Public Input and Recommendations for Reform (Sept. 2015).

In addition to these powerful collection tools, both the government and guaranty agencies rely heavily on private collection agencies and other, more "traditional" collection efforts in dealing with borrowers who have defaulted. According to a Department of Treasury report in 2009, the Department of Education refers every eligible defaulted debt to one of its private collection agencies.[48] Unfortunately, oversight of collection agencies has been insufficient to protect student loan borrowers. For example, in its testimony to Congress, the GAO stated that the Department's oversight provides "little assurance that borrowers are provided accurate information."[49] The GAO documented a range of errors for each of the six collection agencies visited, including providing borrowers with inaccurate or misleading information about rehabilitation program requirements and other repayment options for emerging out of default.

In early 2015, the Department canceled the contracts of five of its private collection agencies after finding that "agents of the companies made materially inaccurate representations to borrowers about the loan rehabilitation program."[50] However, some of these companies had been top performers under the existing review process, indicating that the process failed to adequately detect or protect against conduct that harms defaulted borrowers.[51]

Private student loan creditors do not have the same range of powerful collection tools as the government.[52] Generally, they hire third-party debt collectors to pressure borrowers to pay. It is particularly common for collectors of private student loans to claim that they can use collection tools unique to federal loans, such as Social Security offsets. If unsuccessful with private debt collectors, or if they choose not to use collectors, the creditors can sue and attempt to obtain

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48 U.S. Dep't of the Treasury, U.S. Government Receivables and Debt Collection Activities of Federal Agencies: Fiscal Year 2009 Report to the Congress 15 (Mar. 2010), *available at*/www.fiscal.treasury.gov.

49 Federal Student Loans: Oversight of Defaulted Loan Rehabilitation Needs Strengthening: Testimony Before the H. Subcomm. on Higher Educ. and Workforce Training, Comm. on Educ. and the Workforce, 113th Cong. 8 (2014), *available at* www.gao.gov (statement of Melissa Emrey-Arras, Dir., Educ., Workforce, and Income Sec., U.S. Gov't Accountability Office).

50 Press Release, U.S. Dep't of Educ., U.S. Department of Education to End Contracts with Several Private Collection Agencies (Feb. 27, 2015), *available at* www.ed.gov. The five agencies with canceled contracts were: Coast Professional, Enterprise Recovery Systems, National Recoveries, Pioneer Credit Recovery, and West Asset Management.

51 See National Consumer Law Center, Pounding Student Loan Borrowers: The Heavy Costs of the Government's Partnership with Debt Collection Agencies Appx. A (Sept. 2014), *available at* www.nclc.org.

52 National Consumer Law Center, Student Loan Law § 12.6.3 (5th ed. 2015), *updated at* www.nclc.org/library.

judgments. The main difference between private student loans and other unsecured debts is the heightened bankruptcy dischargeability standards for private loans.[53]

III. Abusive Debt Collectors Have Been a Persistent Source of Problems for Consumers.

A. Congress Has Long Recognized the Problems with Debt Collectors.

The Fair Debt Collection Practices Act (FDCPA) was enacted by Congress in 1977—with bipartisan support—[54] "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection practices."[55] Congress found that abundant evidence existed of the use of "abusive, deceptive, and unfair debt collection practices by many debt collectors."[56] Congress further recognized that regulating debt collection was critically important because "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."[57]

While Congress granted the FTC the authority in 1977 to enforce the FDCPA and to address unfair and deceptive practices, it had no authority to examine debt collectors or to write rules governing debt collection. In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which created the CFPB. The CFPB now not only shares enforcement power over the FDCPA with the FTC, but it also has supervision and rulemaking authority over debt collectors.[58]

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[53] *See id.*

[54] 15 U.S.C. §§ 1692–1692p.

[55] 15 U.S.C. § 1692(e).

[56] 15 U.S.C. § 1692(a).

[57] 15 U.S.C. § 1692(a).

[58] Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010); 15 U.S.C. § 1692l(d).

B. Federal, State, and Private Enforcement Actions Illustrate the Continuing Problems with Debt Collectors.

Both the FTC and the CFPB have enforcement authority to investigate and penalize bad actors and conduct. In the CFPB and FTC's most recent report to Congress,[59] the FTC reported that, in 2018, it had obtained more than $58.9 million in judgments, and secured bans against 32 companies from working in the debt collection industry.[60] In the same report, the CFPB indicated it was engaged in six public enforcement actions arising from alleged FDCPA violations.[61]

State attorneys general also have brought numerous enforcement actions against debt collectors over the years.[62]

Congress intended the FDCPA to be "primarily self-enforcing" by private attorneys general.[63] Therefore, in addition to enforcement actions against debt buyers by the CFPB and FTC, consumers have brought numerous cases alleging various debt collection abuses since the FDCPA was enacted.

Government and private enforcement actions show only the tip of the iceberg of debt collection problems.[64] The vast majority of debt collection abuses go unaddressed, as consumers do not know their rights, do not know whom they can complain to, or lack access to counsel.

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59 Consumer Fin. Prot. Bureau, Fair Debt Collection Practices Act (Mar. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2019.pdf.

60 *Id.* at 3.

61 *Id.* at 23.

62 *See, e.g.,* Letter from Donald S. Clark, Secretary, Federal Trade Comm'n, to Mick Mulvaney, Acting Director, Consumer Fin. Prot. Bureau, at 3 n.11 (Feb. 8, 2018), *available at* https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-enforcement-fair-debt-collection-act-calendar-2017-report-consumer/p064803_ftc_report_to_cfpb_re_fdcpa_calendar_2017_02082018_2.pdf (discussing Operation Collection Protection, in which the FTC cooperated with state and local law enforcement and regulatory agencies to target illegal debt collection).

63 S. Rep. No. 382, 95th Cong., 1st Sess., at 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696. *See also* 15 U.S.C. § 1692k (providing for a private right of action, statutory penalties, and attorney's fees).

64 *See* Section III(C) of this testimony for more about the volume of debt collection complaints by consumers, which vastly outnumber the number the amount of enforcement actions that are brought in a given year.

C. Consumers Routinely Complain about Abusive Debt Collection Practices.

Despite the enactment of the FDCPA, abusive debt collection practices have remained a problem. Debt collection has been consistently near the top – and usually at the top – of complaints at the FTC[65] and now at the CFPB.[66]

D. The Emergence of Debt Buyers Has Contributed to Debt Collection Abuses.

Debt buyers are companies that purchase debts from original creditors, intermediaries, or other debt buyers. Debt buyers either try to collect the debts themselves, place debts with collection agencies for collection, or sell the debts to other debt buyers. The face value of defaulted consumer debt purchased by debt buyers increased from $6 billion in 1993 to $98 billion in 2013.[67] Some debt buyers purchase vast amounts of debt. For example, in 2017, Encore Capital Group, Inc. purchased portfolios of debt with a face value of $10.1 billion and PRA purchased portfolios of debt with a face value of $7.5 billion.[68]

Debt buyers purchase debt for pennies on the dollar.[69] However, despite paying just a small fraction of the amount owed to purchase consumer debts that were written off by the original lender, debt buyers aggressively seek to collect the full amount of the debt – and may also seek to collect interest, costs, and attorney's fees in many cases.

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65 *See* Federal Trade Comm'n, Consumer Sentinel Network: Data Book 2018, at 7 (Feb. 2019), *available at* https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2018/consumer_sentinel_network_data_book_2018_0.pdf (reporting that, with more than 475,000 complaints generated in 2018, debt collection was the second leading source of complaints collected by the FTC).

66 Consumer Fin. Prot. Bureau, Consumer Response Annual Report: January 1–December 31, 2018, at 1 (Mar. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2019.pdf (reporting that the CFPB received approximately 81,500 complaints about debt collection in 2018, making it one of the most common topics of consumer complaints regarding financial products and services that year).

67 The Nilson Report, Issue 792 (July 2003) and Issue 1041 (May 2014). *See also* National Consumer Law Center, Fair Debt Collection § 1.3.4.2 (9th ed. 2018), *updated at* www.nclc.org/library (collecting data from 1993 to 2013 about consumer debt sales).

68 Encore Capital Group, Inc., Form 10-K (Dec. 31, 2018), *available at* https://www.sec.gov/Archives/edgar/data/1084961/000108496119000020/ecpg-20181231x10k.htm; PRA Group, Inc., Form 10-K (Dec. 31, 2017), *available at* https://www.sec.gov/Archives/edgar/data/1185348/000118534818000008/praa-20171231x10k.htm.

69 National Consumer Law Center, Fair Debt Collection § 1.3.4.3 (9th ed. 2018), *updated at* www.nclc.org/library (collecting data about the price that debt buyers pay to purchase debts).

Debt buyers may obtain very little information about the consumer debts that they buy. The FTC reviewed the types of information transferred in 3,400 debt portfolios sales between 2006 and 2009, finding that important pieces of information were not transferred with the data file.[70] While credit card issuers now report transferring key documents when they sell debts,[71] the information appears to be self-reported rather than verified by the CFPB. Moreover, other types of debts are still sold or resold, and old credit card debts are still resold without accompanying documentation.[72]

Each time a debt changes hands, there is an increased likelihood for records to be lost or erroneously changed, undermining the reliability of the collection process for those debts. A CFPB report about online debt sales found that 78% of portfolios available to be sold had been placed with two or more debt collectors or debt buyers.[73] Moreover, sellers may not guarantee the accuracy of the data that they transfer.[74]

When problems like inability to verify a debt after a dispute arise, debt buyers may sell the problematic accounts to other debt buyers, transferring a disputed debt without noting the dispute or whether it is resolved in the information transferred to a subsequent debt buyer.[75]

Debt buyers also buy, sell, and collect on time-barred debts. Collecting on debts that are so old that the statute of limitations has passed exposes consumers to harmful errors, as older debts often lack documentation to prove the amount of the debt is correct and that the consumer actually owes it. Moreover, consumers may lack the records to show that they have paid the debts, especially for older debts. A study by the FTC found that nearly 25% of debt acquired from the original

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70 Federal Trade Comm'n, The Structure and Practices of the Debt Buying Industry, at T-9 to T-10 (Jan. 2013), *available at* https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf. *See also* National Consumer Law Center, Fair Debt Collection § 1.4.7.3 (9th ed. 2018), *updated at* www.nclc.org/library.

71 Consumer Fin. Prot. Bureau, The Consumer Credit Card Market 164-165 (Aug. 2019), *available at* https://www.consumerfinance.gov/documents/7926/cfpb_consumer-credit-card-market-report_2019.pdf ("[a]ll survey respondents that sold debt reported that they provide buyers with key documents and account information at the time of sale").

72 *See* Consumer Fin. Prot. Bureau, Market Snapshot: Online Debt Sales 6 (Jan. 2017), *available at* https://files.consumerfinance.gov/f/documents/201701_cfpb_Online-Debt-Sales-Report.pdf (only some of the online portfolios were listed as including account documentation or "media").

73 *Id.* at 8.

74 *See* Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 Harv. J. on Legis. 41 (2015); Federal Trade Comm'n, The Structure and Practices of the Debt Buying Industry (Jan. 2013).

75 Federal Trade Comm'n, The Structure and Practices of the Debt Buying Industry 37 (Jan. 2013), *available at* https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

creditor, and more than 60% of debt purchased from other debt buyers was over three years old at the time of purchase.[76] A CFPB report about online debt sales found that the median age of the debt listed for sale was five years after charge-off.[77] Regardless of the age at the time of purchase, debts continue to age throughout the course of the collection process. Filings with the Security and Exchange Commission demonstrate that some debt buyers are collecting on debts for a decade or more.[78]

Debt buying touches many aspects of modern life. A wide variety of consumer debts are sold, including: credit cards, medical, telecomm, automobile, home equity, mortgage, utility, payday loans, and student loans.[79]

IV. Major Problems Persist in the Debt Collection Market.

A. Debt Collectors Pursue Debts, and Obtain Default Judgments, Without Information to Ensure that they Have the Right Person and the Right Amount.

The single most significant problem in debt collection is the dangerously incomplete or inaccurate information that 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,[80] and

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76 *Id.* at T-7.

77 Consumer Fin. Prot. Bureau, Market Snapshot: Online Debt Sales 11 (Jan. 2017), *available at* https://files.consumerfinance.gov/f/documents/201701_cfpb_Online-Debt-Sales-Report.pdf.

78 PRA Group, Inc., Annual Report, Form 10-K for 2016, at 35 (showing nearly $12 million collected in 2016 for accounts purchased between 1996 and 2006); Encore Capital Group, Inc. Annual Report, Form 10-K for 2013, at 66 (company received payments on collection accounts purchased prior to 1999). See also Encore Capital Group, Inc. Annual Report, Form 10-K for 2016, at 43 (showing more than $2 million collected in 2016 for accounts purchased in 2007).

79 National Consumer Law Center, Fair Debt Collection § 1.3.4.2 (9th ed. 2018), *updated at* www.nclc.org/library.

80 Consumer Fin. Prot. Bureau, Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered, Appendix B (July 28, 2016), available at: https://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf (showing 28% of survey participants were contacted about debts they did not owe and 33% were contacted for the wrong amount).

its reports about consumer debt collection complaints,[81] as well as reports by the Federal Trade Commission[82] and others.[83]

Recognizing these serious problems, the Office of the Comptroller of the Currency ("OCC") has brought enforcement actions against banks that sold debts without adequate documentation,[84] and has issued guidance for banks selling their debt to debt buyers regarding what documentation should be provided at sale.[85]

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[86] the CFPB has identified the collection of debts without a "reasonable basis" as a violation of the FDCPA's prohibition on the use of false, deceptive, or misleading representations[87] and the use of any false representation or deceptive means to collect a

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81 *See, e.g.,* Consumer Fin. Prot. Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2019, at 16 (Mar. 2019) ("the most common debt collection complaint is about attempts to collect a debt that the consumer reports is not owed [40%]").

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

83 *See, e.g.,* Chris Albin-Lackey, Human Rights Watch, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor (Jan. 2016); Rick Jurgens & Robert J. Hobbs, The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts (July 2010). *See also* National Association of Consumer Advocates, An Online Survey Snapshot: Consumer Attorneys Report on How Debt Collectors Treat Their Clients 6 (Sept. 2019), *available at* https://www.consumeradvocates.org/sites/default/files/naca_report_survey_debtcollectionpractices092019.pdf ("89% of attorneys represented consumers in the past two years who were contacted by a collector after the consumer told the collector that s/he did not owe the debt. The 132 attorneys responding to this survey question represented at least 748 consumers in the past two years (not including consumers in related class actions) who experienced this issue.");

84 *See*, Statement of Thomas J. Curry, Comptroller of the Currency, On Civil Penalties Assessed Against JPMorgan Chase Bank (July 8, 2015), available at: https://www.occ.gov/news-issuances/news-releases/2015/nr-occ-2015-98b.pdf ("Our action in 2013 was aimed at ensuring that affidavits and other sworn documents are accurate, based on the knowledge of the person signing the document, and properly notarized.").

85 Office of the Comptroller of the Currency, Consumer Debt Sales: Risk Management Guidance, Bulletin 2014-37 (Aug. 4, 2014), *available at* http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-37.html.

86 *In re* Portfolio Recovery Assocs., File No. 2015 CFPB 0023, Consent Order (Sept. 9, 2015); *In re* Encore Capital Group, 2015-CFPB-0022, Consent Order (Sept. 9, 2015).

87 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.").

debt.[88] 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.[89]

The CFPB's outline of potential debt collection proposals for the Small Business Review Panel[90] recognized 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 identified "substantial deficiencies in the quality and quantity of information collectors receive at placement or sale of the debt"[91] as key causes of these problems.

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.[92] Some states have considered reforms but have not yet enacted them,[93] and reform efforts are anticipated in other states.

B. Mass Filings of Collection Lawsuits by Collection Mills

In a national survey conducted by the CFPB, 15% of all consumers who were contacted about a debt in collection were sued.[94] Combined with the estimate that seventy million Americans

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88 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.).

89 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.)

90 Consumer Fin. Prot. Bureau, Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered (July 28, 2016).

91 *Id.* at 6.

92 *See, e.g.,* Cal. Civ. Code § 1788.50-1788.64; Md. R. Civ. P. 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.

93 *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).

94 Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB Survey of Consumer Views on Debt 27 (Jan. 2017) *available at* s3.amazonaws.com/files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

were contacted about a debt in the one-year period covered by that survey,[95] 15% translates into an estimate of more than ten million Americans being sued in debt collection lawsuits each year.[96]

Some debt collection law firms specialize in filing a high volume of consumer collection suits with minimal if any review of the allegations or evidence for the lawsuits they are filing.[97] The robo-signing deficiencies that came to light during the 2009 foreclosure crisis also infiltrated the debt collection industry. In one case, the court found that an affidavit signed by a "specialist" who signed 200 to 400 affidavits per day, falsely claiming to have personal knowledge of its contents, was misleading and violated the FDCPA.[98]

Most of these lawsuits result in default judgments, without consideration of the merits of the case.[99] The FTC reported that, at a forum in 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."[100] One reason for default judgments is because consumers do not receive actual notice of the lawsuits, which can be caused by problems with service of process, another prevalent problem in debt collection cases.[101]

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95 Consumer Fin. Prot. Bureau, CFPB Survey Finds Over One-In-Four Consumers Contacted By Debt Collectors Feel Threatened (Jan. 12, 2017), *available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-survey-finds-over-one-four-consumers-contacted-debt-collectors-feel-threatened/.

96 *See also* National Consumer Law Center, Fair Debt Collection § 1.4.9.1 (9th ed. 2018), *updated at* www.nclc.org/library (collecting data about the number of debt collection lawsuits).

97 *See, e.g.*, Bock v Pressler & Pressler, L.L.P., 30 F. Supp. 3d 283, 290 (D.N.J. 2014) (one collection attorney "reviewed 673 complaints" in one day, approving 663 that were then filed; some days that one attorney reviewed for court filing as many as 1,000 collection lawsuits); Commonwealth v. Lustig, Glaser & Wilson, P.C., Complaint ¶¶ 22–23 (Mass. Super. Ct. Dec. 21, 2015) (stating that the debt collection law firm filed more than 100,000 collection lawsuits from 2011 through 2015). *See also* The Legal Aid Society et al., Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower Income New Yorkers 1–2 (May 2010) (finding that five law firms filed roughly two-thirds of the 457,322 debt buyer lawsuits filed between January 2006 and July 2008).

98 *Midland Funding LLC v. Brent*, 644 F. Supp. 2d 961, 966-69 (N.D. Ohio 2009).

99 *See also* National Consumer Law Center, Fair Debt Collection § 1.4.9.3 (9th ed. 2018), *updated at* www.nclc.org/library (collecting research about default judgments).

100 Federal Trade Comm'n, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration 7 (July 2010), *available at* https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf (also collecting studies).

101 *See* Office of the N.Y. Att'y Gen., Press Release, Attorney General Cuomo Sues to Throw Out Over 100,000 Faulty Judgments Entered Against New York Consumers in Next Stage of Debt Collection

Even when consumers appear, they are almost overwhelmingly unrepresented in debt collection lawsuits, leading to a significant power and knowledge imbalance. Studies show that between ninety-one and ninety-nine percent of consumers are unrepresented by an attorney when they are sued on a debt.[102] Collection attorneys typically try to convince these unrepresented consumers to settle rather than appearing before the judge or magistrate. Court officials often direct consumers to speak to these attorneys.[103]

When consumers do attempt to dispute a debt in court, collection attorneys who do not have the evidence to prove their debt often ask for a continuance – in the hopes that the consumer will not appear the next time -- or dismiss the lawsuit (without prejudice to their ability to refile) in the hopes that they can obtain a default judgment.[104]

C. Collection of Time-Barred "Zombie" Debt is Unfair, Deceptive and Abusive

Courts have found that the FDCPA prohibits debt collectors, including debt buyers, from suing or threatening to sue on debt that is time-barred.[105] Yet some debt collectors continue to sue

Investigation (July 22, 2009), *available at* https://ag.ny.gov/press-release/attorney-general-cuomo-sues-throw-out-over-100000-faulty-judgments-entered-against-new (alleging that a process serving company failed to properly serve consumers across New York State, resulting in approximately 100,000 default judgments).

102 *See also* National Consumer Law Center, Fair Debt Collection § 1.4.9.4 (9th ed. 2018), *updated at* www.nclc.org/library (collecting data about the percent of consumers that are represented in collection lawsuits).

103 See, e.g., Chris Albin-Lackey, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor 54–57 (Human Rights Watch, Jan. 2016).

104 *See,* Demarais v. Gurstel Chargo, P.A., 869 F.3d 685, 695-696 (8th Cir. 2017) (Interpreting the FDCPA to prohibit debt collectors from falsely threatening to proceed to trial—coercing consumers and their attorneys to prepare for and appear at a trial that the debt collector did not intend to pursue.).

105 See, e.g., Buchanan v. Northland Group, Inc., 776 F.3d 393 (6th Cir. 2015) (finding that a misrepresentation about the limitations period is a ―straightforward‖ violation of § 1692e(2)(A)); Phillips v. Asset Acceptance, L.L.C., 736 F.3d 1076 (7th Cir. 2013) (reversing lower court's denial of certification of an FDCPA class action against a debt buyer that was bringing suits against consumers on old natural gas bills); Jackson v. Midland Funding, L.L.C., 468 Fed. Appx. 123 (3d Cir. 2012) (affirming judgment against debt buyer arising from its filing of a time-barred collection suit); Spencer v. Hendersen-Webb, 81 F. Supp. 2d 582, 590, 595 (D. Md. 1999) (holding that misrepresentation of statute of limitations was violation of FDCPA). See also FederalTrade Comm'n, Collecting Consumer Debts: The Challenges of Change – A Workshop Report.62-66 (Feb. 2009), available at https://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-changefederal-trade-commission-workshop-report/dcwr.pdf.

or threaten to sue on time-barred debt.[106] The Bureau found, in its 2018 FDCPA Annual Report, that 11% of complaints received were for collectors taking or threatening to take legal or other negative action, with 26% of those complaints involving a threat to sue on an old debt.[107] Consumers faced with a lawsuit are likely to believe that the allegations in the complaint are accurate and that there is a valid claim against them for the debt.[108] As such, they often end up paying on debts they otherwise would not pay, with money that would have gone toward food, rent, and other necessities. Or, believing that they have no defenses, they may fail to appear in the action, resulting in a default judgment against them.[109]

Whether in or out of court, collecting on these "zombie debts" exposes consumers to harmful errors, as older debts often lack documentation to prove that the amount of the debt is correct and that the consumer actually owes it. Consumers themselves also typically lack documentation for these older debts. The collection of time-barred debt is particularly harmful to the least sophisticated consumers, who do not understand that the statute of limitations has run, that paying on the debt can restart the clock on the debt (in many states), or that they have a defense to a legal action.

D. Debt Collectors Engage in Harassment and Threats

Despite the 1977 passage of the FDCPA, the basic debt collection problems of harassment, threats and abuse prohibited by the Act remain common.

In the CFPB survey of consumer experiences with debt collection, 53% of consumers contacted about a debt were contacted about one that they did not owe, was for the incorrect

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106 *See* National Association of Consumer Advocates, "An Online Survey Snapshot: Consumer Attorneys Report on How Debt Collectors Treat Their Clients" (Sept. 2019) https://www.consumeradvocates.org/sites/default/files/naca_report_survey_debtcollectionpractices092019.pdf (71% of consumer attorneys have recently represented consumers in cases where a debt collector threatened to sue the consumer to collect on time-barred debt, assisting at least 455 individual consumers in the two-year period; and 64% of attorneys have recently worked on cases representing consumers where a debt collector sued a consumer to collect on time-barred debt).

107 Consumer Fin. Prot. Bureau, Annual Report 2018: Fair Debt Collection Practices Act 15-16,, tbl. 1 (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2018.pdf.

108 See Consumer Fin. Prot. Bureau v. Hanna & Assocs., 114 F. Supp. 3d 1342, 1366 (N.D. Ga. July 14, 2015)

109 *See Id.* at 1366-67.

amount, or was owed by a family member.[110] Sixty-three percent of respondents who had been contact about a debt said they were contacted too often; 17% reported being contacted eight or more times a week. [111] Only one out of four consumers who requested that collectors stop contacting them said that the collectors did in fact stop in response to their requests.[112] More than one in four people contacted by a debt collector had been threatened.[113]

Similarly, the most common types of debt collection complaints in 2017 compiled by the FTC were "Calls After Getting 'Stop Calling' Notice" (227,917 complaints), "Calls Repeatedly" (210,238 complaints), "Makes False Representation about Debt" (192,704 complaints), "Fails to Identify as Debt Collector" (84,364), as well as "Falsely Threatens Illegal or Unintended Act" (31,519 complaints).[114] Despite the FDCPA's ban on disclosing a debt to a third-party, the FTC complied nearly 40,000 complaints about "Tells Someone Else About Consumer's Debt" in 2017.[115]

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110 Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 24 (Jan. 2017), *available at* https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf

111 *Id.* at 31. *See also* National Association of Consumer Advocates, "An Online Survey Snapshot: Consumer Attorneys Report on How Debt Collectors Treat Their Clients" (Sept. 2019) https://www.consumeradvocates.org/sites/default/files/naca_report_survey_debtcollectionpractices092019.pdf (Survey found that 79% of private attorneys and 74% of legal aid attorneys had consumer clients who received seven or more calls in a week from a debt collector. In the past two years, 34 attorneys have each helped more than 20 consumers who received this volume of collector calls. Based on the low end of the survey data collection range, consumer attorneys collectively have helped at least 1,024 consumers who received seven or more calls a week from debt collectors.).

112 Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 35 (Jan. 2017), *available at* https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf. *See also* National Association of Consumer Advocates, "An Online Survey Snapshot: Consumer Attorneys Report on How Debt Collectors Treat Their Clients" (Sept. 2019) https://www.consumeradvocates.org/sites/default/files/naca_report_survey_debtcollectionpractices092019.pdf (Survey found that 81% of all responding attorneys have clients who were contacted by a debt collector even after the consumer asked the collector to stop calling. In a two-year period, 36 attorneys each have represented 11 or more consumers who were contacted after they had asked collectors to stop calling. In total, responding attorneys represented more than 816 consumers in the same time-period who had requested debt collectors to stop contacts, but the collectors failed to comply.).

113 Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 46 (Jan. 2017), *available at* https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

114 *See* April Kuehnhoff & Ana Girón Vives, National Consumer Law Center, Consumer Complaints About Debt Collection: Analysis of Unpublished Data from the FTC, at 2-3 (Feb. 2019), *available at* https://www.nclc.org/issues/analysis-of-unpublished-data-ftc.html (analyzing hundreds of thousands of debt collection complaints received by FTC in 2017).

115 *Id.*

E. Other Problems

This testimony cannot possibly catalog the long litany of problems posed by the collection of debts. For example, there are numerous problems posed by creditors' and collectors' reporting of debts to consumer reporting agencies and the way that the credit bureaus handle those debts and disputes about them.[116] In addition, the world of debts incurred through civil and criminal fees, fines and other costs imposed by or through governments also leads to a number of issues in how those debts are collected and their consequences.[117] Finally, while this testimony focuses on debt collectors, original creditors can and do engage in abusive collection practices.[118]

V. The CFPB's Proposed Debt Collection Regulation

On May 21, 2019, the Bureau published a Notice of Proposed Rulemaking (NPRM) to implement the FDCPA, accepting comments through September 18, 2019.[119] The Bureau received more than 12,000 comments on the proposed debt collection rule.[120]

The rule as proposed does far more to protect abusive debt collectors than consumers. While the proposal does have some positive elements, they are far outweighed by the negative ones. The CFPB must strengthen the rule to fulfill the Bureau's obligation to faithfully implement the Fair Debt Collection Practices Act's (FDCPA).

The remainder of this section summarizes some of the concerns with the proposed debt collection rule. Detailed technical comments are available online.[121]

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[116] *See, e.g.*, National Consumer Law Center, Fair Credit Reporting § 6.13.2 (9th ed. 2017), *updated at* www.nclc.org/library ("Problems with Debt Collectors As Furnishers"); National Consumer Law Center et al., Comments to CFPB on its Proposed Debt Collection Rule at 137 & 223 (Sept. 18, 2019), https://www.nclc.org/images/pdf/debt_collection/comments-debt-collection-sept2019.pdf.

[117] *See* National Consumer Law Center, What States Can Do: Criminal Justice Debt (Sept. 2019), https://www.nclc.org/issues/fs-criminal-justice-debt.html.

[118] *Id.* at Appx. B (listing top 50 debt collection complaint recipients and including original creditors)

[119] 84 Fed. Reg. 23,274 (May 21, 2019).

[120] Debt Collection Practices (Regulation F), CFPB-2019-0022, available at: https://www.regulations.gov/docket?D=CFPB-2019-0022

[121] Group long comments to the CFPB re: proposed debt collection rule (Sept. 18, 2019), available at: https://www.nclc.org/images/pdf/debt_collection/comments-debt-collection-sept2019.pdf.

A. Telephone calls

The Bureau has proposed to allow collectors to make seven attempted calls to a consumer and to have one actual conversation per week for each debt in collection. The same limit would apply to calls to friends or family members seeking the consumer's location information.

We support the concept of a clear, specific limit on the number of both attempted calls and conversations. But constantly ringing phones, and actual conversations with collectors, can be deeply disturbing, and collectors need clear limits. Hearing the phone ring so often is likely to cause significant stress and harassment. It could also interfere with work, potentially jeopardizing the consumer's ability to pay her debts, and could also disturb business places and employers.

However, in order to provide clear and reasonable limits, the limits must be per consumer, not per debt. Many if not most consumers facing debt collection have more than one debt in collection. People also should not have to listen to the phone ringing from collectors every single day. Thus, the rule should be amended to limit collectors to three attempted calls and one conversation per consumer per week.

We support the right of a consumer to tell a collector to stop calling. However, the CFPB should clarify that consumers can stop calls through an oral request, and that collectors should stop calling any phone number unless the consumer specifies a particular number.

The proposed rule allows collectors to leave "limited-content messages" with a third party who answers the phone. Even without specific information about the debt, people are likely to know that a message urging a consumer to call back "to discuss an account" is from a debt collector CFPB should not exempt any form of communication, including limited-content messages, from privacy rules.

Especially alarming, the proposal could be read to allow debt collectors to deliberately contact third parties such as employers, neighbors, family or friends to convey a message for the consumer. Collectors should not be allowed to call or leave messages with employers or other third parties to convey a message for the consumer. Limited-content messages, if allowed, should only be left on a private voicemail, email or text belonging to the consumer.

B. Emails, text and social media messages

1. The CFPB should not allow emails, texts or social media messages without the consumer's consent by full compliance with the E-Sign Act.

The Bureau has proposed to allow debt collectors to contact consumers through email, text messages, and private social media direct messages. As long as the collector follows minimal procedures that are unlikely to ensure either that the consumer will actually see a message or that it is private, the rule would allow collectors to send legally required notices electronically without complying with the E-Sign Act (which requires consumer consent and a demonstration that the consumer is able to access the information) and would not be responsible if a message is seen by third parties. Yet the mere fact that the consumer gave an email address or cell phone number to the creditor at some point in the past says nothing about whether it is appropriate for a debt collector to communicate that way.

As a result, it is likely that some consumers will never see the important information detailing the debt and the consumer's right to dispute it. Email addresses and phone numbers often change. Many low-income people do not have a computer or sufficient data access, and may only be able to access email, if at all, sporadically at libraries or work. The millions of low-income consumers with Lifeline, pay-as-you-go or limited data cell phones are often not able to receive emails or access the internet, or may incur costs for texts and emails. Emails with the word "debt" may be sent to spam or consumers may automatically delete messages coming from an unknown party. Some older consumers who have cell phones may not be able to access texts, or they may have forgotten how to access texts or email. People simply may not regularly monitor email and may prefer to receive information by mail. Even those who can access emails and texts through smartphones may have trouble reviewing legal notices on small screens or printing and saving them to review later, making it more difficult for consumers to understand the notices or to seek help in dealing with them.

Collectors also should not be exempt from privacy rules when they send emails, texts or direct messages without the consumer's consent. We support the proposed ban on communications on public social media platforms, but far more is needed to protect consumer privacy. Mobile phones or email may be shared among family members, including children who can see text and social media messages. Phone numbers can be reassigned. Collectors may be using work email addresses that are not private, even if the collector claims not to know that it is a work email.

Collectors may have the wrong person and may send an email, text or social media message to a third party.

All of these problems would be avoided by requiring collectors to get the consumer's consent and comply with the E-Sign Act before sending electronic communications.

2. Collectors should not be allowed to convey legally required information through hyperlinks, which risks consumers not receiving information or subjecting themselves to viruses and identity theft.

The proposal contains an especially alarming proposal to allow debt collectors to send validation notices through hyperlinks. Many consumers will not recognize the debt collector and will be reluctant to click on a hyperlink that could expose the consumer to a virus, malware or spyware. As the CFPB itself notes, "federal agencies have advised consumers against clicking on hyperlinks provided by unfamiliar senders," and "consumer email services can be configured to block hyperlinks from unrecognized senders." The minimal procedures proposed to give consumers notice and opportunity to opt out of hyperlinks do not give any reasonable assurance that the email will not be sent to spam or that the consumer will recognize an email or text from a debt collector or be comfortable clicking on a hyperlink.

Requiring the validation notice to be accessed through a secure website – while intended to protect the consumer's privacy –will also make it less likely that a consumer will see the notice, especially if they are required to provide personal information to access the site. People will fear that the hyperlink is a phishing email. If the collector does not require additional steps, the consumer's private information could potentially be viewable by the public.

Allowing debt collectors to send unsolicited texts or emails with hyperlinks will also put everyone at greater risk of viruses and identity theft. It will complicate or be inconsistent with warnings from government, employers and advocates that people should never click on a hyperlink from an unknown party. Scammers and criminals are likely to impersonate debt collectors and use collection messages to spread viruses and to induce consumers into turning over personal information. Business computers could also be exposed if consumers – especially those who do not have computers at home – access supposed debt collection emails at work. **Debt collectors should not provide legally required written information through hyperlinks without the consumer's consent.**

3. **Consumers should be able to opt out of emails, texts and direct messages through any convenient channel.**

To the extent that consumers do receive emails, texts or direct messages from collector, we support the proposed right to opt out of those messages. However, some collectors could make opting out difficult. **Collectors should be required to accept an opt-out sent through any reasonable method – such as by replying "stop" to an email, text or direct message, or orally by phone.** Collectors should be required to describe the opt-out right **in clear, conspicuous and simple language** accessible to the least sophisticated consumer. The CFPB should provide model opt-out language.

4. **The CFPB should monitor and consider limits on texts, emails and direct messages.**

The proposal does not impose any specific limits on the number of texts, emails, or direct messages. **The CFPB should carefully monitor and require reporting on collectors' use of emails, texts and direct messages and should consider specific limits if collectors abuse these media.**

C. **The proposed rule protects false, deceptive, or misleading practices by collection attorneys.**

Some collection attorneys file thousands of collection lawsuits a year without adequate review. Debts are often sold and resold without accompanying records. As a result, lawsuits may be filed against the wrong person, for the wrong amount, or by an entity without legal authority to collect that debt.

The FDCPA prohibits false, deceptive or misleading representations by debt collection attorneys. Yet the proposed rule gives collection attorney a "safe harbor" from liability as long as the attorney reviews unspecified "information" and somehow "determines" that the claims in the lawsuit are correct. This weak to nonexistent standard is not strong enough to protect consumers. Filing a lawsuit against a consumer is a serious business. Many lawsuits will result in judgments, often default judgments, and credit report damage even if the collector has the wrong person or wrong amount. Consumers who are forced to fight these lawsuits will incur the burden, stress, and expense of doing so, and even the potential risk to their job of taking time off work.

The CFPB should require collection attorneys to **review original account-level documentation** of alleged indebtedness and make independent determinations that they are filing a lawsuit against the **right person, for the right amount, based on accurate information about the age of the debt, and that their client has the legal authority to file the lawsuit.**

D. The proposed rule could encourage abusive collection of time-barred zombie debt.

The proposed rule prohibits collectors from filing or threatening a lawsuit if the collector "knows or should know" that the legal time limit to sue has expired, instead of holding the collector responsible for knowing the time limit, as courts have done. The vast majority of debt collection lawsuits end up with default judgments, and consumers who show up in court frequently lack attorneys. Collectors should not be allowed to file or threaten lawsuits knowing that very few consumers will object and the few that do may have difficulty showing the collector knew or should have known that the debt was time-barred. **No collector should be allowed to threaten or file a lawsuit unless they have determined that the debt is still within the legal statute of limitations.**

Even out of court, collecting older debts pose too high a risk of mistake, deception and abuse. Consumers, especially older consumers, may pay even if they do not recognize a debt simply out of fear or to stop harassment. Collectors may also try to trick people into making a small payment that, in many states, will revive the debt and re-start the statute of limitations. **The CFPB should prohibit out-of-court collection of time-barred debt, which is too old to collect without mistakes or deception. At a bare minimum, the Bureau should restore its earlier outline proposal that would have prohibited lawsuits on "revived" debt.**

E. The CFPB must improve the proposed model validation notice.

We support the concept of a model validation notice. A clear, understandable consumer-tested notice will support the requirement of the FDCPA that consumers be given information about the debt and their rights. However, several aspects of the proposed notice fall short.

First, collectors should not be allowed to provide the notice orally. Consumers are unlikely to be able to accurately remember all of the information that they are provided in a stressful call. Second, the notice should make clear that the consumer may dispute the debt "at any time," not by a specified date. Third, the validation notice should include a statement of rights, as the Bureau proposed earlier, not just a link to the CFPB website. Fourth, the CFPB should restore the prior proposal to develop a model validation notice in Spanish and other languages and to require collectors to provide notice in the language of the original transaction if the Bureau has a validation notice in that language.

F. We support but urge the Bureau to strengthen proposals regarding parking debts on credit reports and sale of debt.

We support the proposal that prohibits collectors from "parking" debts on credit reports – reporting debts to credit bureaus without first informing a consumer that they are attempting to collect the debt. However, collectors should be required to provide notice about the debt by mail before credit reporting unless the consumer has opted in to electronic communications.

We also support the proposal to prohibit collectors from selling accounts that were paid, discharged in bankruptcy, or where an identity theft report was filed. These debts are either not owed or are highly likely to be fraudulent, and the collectors who are willing to buy these types of debts are likely to engage in unscrupulous and unlawful efforts to collect. The Bureau should also prohibit the sale of time-barred debts and disputed debts for the same reasons.

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Overall, this proposal does far more to protect abusive collectors and to encourage harassing and abusive collection practices than it does to protect consumers. We urge the Bureau to go back to the drawing board, reject the proposal rule, and start over again.

VI. Proposed Legislation

More than 40 years after the passage of the FDCPA, consumers continue to suffer from abusive debt collection practices. Congress has the power to change this by amending the FDCPA to better protect consumers. We briefly discuss the bills that are up for discussion in this session, highlighting the reasons that reforms are needed and what we believe each bill would accomplish. Going forward, we welcome the chance to continue to engage with members on this committee to shape these bills or draft comprehensive FDCPA reform legislation.

A. H.R. 3490: Small Business Lending Fairness Act

This bill addresses one of the serious problems created by the failure of consumer protection laws to cover credit extended to small businesses. As highlighted by a 2018 article by Bloomberg

News,[122] high cost lenders offer revolving credit loans to struggling small businesses throughout the U.S, often with a treacherous provision hidden in the fine print of the loan documents. If the small business fails to pay the loan back on time, the lender can trigger a "confession of judgment," allowing the lender to seize all of the business's assets, including emptying out bank accounts. The confession of judgment allows the creditor to act as if it has a fully enforceable judgment without ever having to go into court. The borrower—the small business—has no opportunity to defend itself, to show that payment has been made, or even to reach some settlement.

These transactions, often characterized as merchant cash advances, attempt to avoid state usury limits—even in those states which have caps applicable to non-consumer credit—by describing the loans as a purchase of the proceeds of the merchants' future sales, rather than straight loans. The creditor gives the merchant money now in return for the merchant providing the proceeds of the sales in the future. The problem is that the merchant must turn over to the creditor a lot more money in sale proceeds than the creditor provided to the merchant. If analyzed through the lens of a credit transaction, the effective interest rates in these transactions are in the high triple digits.[123] Some courts have bought the subterfuges and allowed these transactions to stand, even though state law would have prohibited the transactions if they were seen as what they were: actual extensions of credit.[124]

Confessions of judgments in consumer transactions have been illegal in the United States for decades, as the FTC prohibited them in 1985.[125] However, there is no federal law outlawing these draconian creditor-self-help provisions for small business transactions. HR 3490 would address this situation and make the prohibition against confessions of judgments applicable to everyone, including small businesses.

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[122] Zachary R. Mider and Zeke Faux, Bloomberg News, *How an obscure legal document turned New York's court system into a debt-collection machine that's chewing up small businesses across America.* November 20, 2018. *Available at* https://www.bloomberg.com/graphics/2018-confessions-of-judgment/.

[123] *Id.* One example included a loan for over $36,000 with an APR of 350%.

[124] *See e.g.* K9 Bytes, Inc. v. Arch Capital Funding, L.L.C., 57 N.Y.S.3d 625, 632 (N.Y. Sup. Ct. 2017) (emphasis in original). *See also* Giventer v. Arnow, 333 N.E.2d 366, 369 (N.Y. Ct. App. 1975) ("when the terms of the agreement are in issue, and the evidence is conflicting, the lender is entitled to a presumption that he did not make a loan at a usurious rate").

[125] 16 C.F.R. pt. 444 (effective Mar. 1, 1985).

B. H.R. 3948: Debt Collection Practices Harmonization Act

Definition of Debt

H.R. 3948 would state expand the definition of debt covered under the FDCPA to includes money "owed to a State." This expansion is important because many courts have interpreted the definition of debt narrowly in a way that too often excludes government debts. That narrow construction has led many courts to conclude that protections against abusive and unfair debt collection practices do not apply when third-party collectors collect debts allegedly owed to state and local governments, such as municipal utility bills,[126] tolls,[127] traffic tickets,[128] and court debts.[129] The urgency of protecting against abusive practices in third-party collection of these debts is growing as private debt collectors are increasingly collecting accounts owed to government. According to a 2017 report commissioned by an organization representing debt collectors, government debt (not including federal student loans) was the third largest category of debt collected in 2016 (following medical debt and student loan debt), accounting for 16.4% of the total debt collected by third-party debt collectors,[130] up from only 2.1% in a 2012 report.[131]

Individuals with government debts need and deserve protection from unfair collection practices by these third-party collection companies. Debtors and alleged debtors experience the

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126 Boyd v. J.E. Robert Co., 765 F.3d 123 (2d Cir. 2014)(mandatory municipal water and sewer charges were not debts under FDCPA because they were levied by city as an incident to property ownership), compare with Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379, 400 (3d Cir. 2000) (municipal water and sewer charges were debts within meaning of FDCPA because debts arose from transaction of consumers requesting water and sewer services from city).

127 See, e.g.,Yazo v. Law Enf't Sys., Inc., No. CV0803512DDP (AGRX), 2008 WL 4852965, at *3 (C.D. Cal. Nov. 7, 2008).

128 See, e.g., Herrera v. AllianceOne Receivable Mgmt., Inc., 2015 WL 3796123 (S.D. Cal. June 18, 2015) (traffic fines); Gibson v. Prof'l Account Mgmt., 2011 WL 6019958 (E.D. Mich. Dec. 1, 2011) (parking ticket).

129 Harper v. Collection Bureau, Inc., 2007 WL 4287293 (W.D. Wash. Dec. 4, 2007) (court debtt);Gulley v. Markoff & Krasny, 664 F.3d 1073 (7th Cir. 2011) (municipal fines); Worley v. Mun. Collections of Am., Inc., 2015 WL 890878 (N.D. Ill. Feb. 27, 2015) (municipal fines).

130 Ernst & Young, The Impact of Third-Party Debt Collection on the US National and State Economies in 2016, at 7 (Nov. 2017), available at: https://www.acainternational.org/assets/ernst-young/ey-2017-aca-state-of-the-industry-report-final-5.pdf?viawrapper (report commissioned by ACA International).

131 Ernst & Young, The Impact of Third-Party Debt Collection on the National and State Economies, at 8 (Feb. 2012), available at: http://www.creditandcollectionnews.com/uploads/The%20Impact%20of%203rd%20Party%20Debt%20Collection%20on%20the%20National%20and%20State%20Economies.pdf (report commissioned by ACA International).

same types of unfair and abusive debt collection practices proscribed by the FDCPA in attempts to collect state and local government debt, including traffic and court debt, as they experience in attempts to collect other types of consumer debts. Indeed, the CFPB's consumer complaint database is rife with complaints about abusive practices by private companies collecting on debt allegedly owed to the government.

Further, collection by, or on behalf of, the government is already unusually coercive as a result of the government's police power. This coerciveness makes the need for robust protections against abusive and unfair debt collection practices all the more important. Indeed, the coercive power of the government is the reason so many scammers and debt collectors falsely represent that they are working for or with the backing of the government.[132]

Finally, clarifying the definition of transaction and debt to encompass government-imposed financial obligations would create clarity and consistency in debt collection standards, ensure that the rules apply evenly across private collection of all types of personal debt, and ensure that ethical collectors are not at a competitive disadvantage in collecting government-imposed debt.

Remedies

This bill would also increase the maximum amounts that can be awarded in statutory damages for a violation of the FDCPA, which are currently capped at $1,000 for an individual or $500,000 for a class action, by accounting for inflation since the Act's passage and indexing the amounts going forward so that they will adjust annually to reflect the amount of inflation. These amounts have never been adjusted for inflation. Unfortunately, as time passes the relative value of the penalty has declined and so has it deterrent effect on abusive practices by debt collectors. Congress needs to adjust the amount of the penalty to ensure it is sufficient to prevent debt collectors from engaging in abusive practices instead of just a slap on the wrist that debt collectors consider a cost of doing business.

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[132] See, e.g., Press Release, Consumer Fin. Prot. Bureau, CFPB and the New York Attorney General Settle with Debt Collection Group (July 25, 2019) (announcing proposed $66 million settlements and injunction banning from the industry debt collectors Douglas MacKinnon, Northern Resolution Group, LLC, Enhanced Acquisitions, LLC, Delray Capital, LLC, and Mark Gray), available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-new-york-attorney-general-settle-debt-collection-group/; see also Press Release, Federal Trade Commission, Imposter Scams Top Complaints Made to FTC in 2018 (Feb. 28, 2019), available at https://www.ftc.gov/news-events/press-releases/2019/02/imposter-scams-top-complaints-made-ftc-2018.

H.R. 3948 would also amend the FDCPA to clarify that courts can award injunctive relief and other "appropriate relief" in addition to monetary sanctions. Although the FDCPA is silent regarding the availability of non-monetary relief, many courts have found that declaratory and injunctive relief are not available. These types of non-monetary remedies are important to protect cons

C. H.R. 4403: Stop Debt Collection Abuse Act of 2019

This bill would clarify coverage for debt buyers after the Supreme Court's decision in Henson v. Santander Consumer USA, Inc. and clarify coverage for certain debts owed to the federal government that are being collected by private debt collectors.

Henson Fixes

In *Henson v. Santander Consumer USA Inc.*, __ U.S. __, 2017 WL 2507342 (June 12, 2017), the Supreme Court held that Santander was not a debt collector under the FDCPA's second definition of debt collector. This narrow opinion held that a debt buyer[133] is not subject to the FDCPA as an entity regularly collecting debts "owed or due another," leaving intact the alternative approach of showing that a debt buyer qualifies as a debt collector under the FDCPA because the "principal purpose" of its business is the collection of debts.

This bill would amend the FDCPA in multiple ways in response to Henson. First, it would amend the definition of creditor under the FDCPA to exclude debt buyers. Second it would amend the definition of debt collector to clarify that debt buyers are debt collectors covered under the Act. Debt buyers purchase accounts with a face value of billions of dollars every year[134] and significant concerns exist about some of the common collection practices engaged in by debt buyers, which may result in collection of the wrong amount from the wrong consumer or even by a party that does not have the right to collect that account.[135]

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133 Debt buyers are companies that purchase debts from original creditors, intermediaries, or other debt buyers. Debts are purchased for pennies on the dollar. The debt buyer may either try to collect the debts themselves, place them for collection with debt collectors, or sell the debts to other debt buyers. For more background information about debt buyers, see National Consumer Law Center, Fair Debt Collection § 1.3.4 (9th ed. 2018), *updated at* www.nclc.org/library.

134 *See id.* at § 1.3.4.2.

135 For more about collection practices by debt buyers, see *id.* at § 1.4.7.

Debts owed to the Federal Government

This bill would amend the definition of debt in the FDCPA to specifically include debts "owed to a Federal agency" that are at least 180 days past due. Thus, federal tax debts,[136] federal student loans,[137] federal criminal justice debts, and overpayment of benefits would all be covered under the Act as long as they were being collected by a debt collector as defined by the Act[138] and are at least 180 days past due. The bill would also amend the definition of debt collector to clarify that the term applies to "any person . . . who regularly collects debts currently or originally owed or alleged owed to a Federal agency." Specifying that the FDCPA applies to debt collectors collecting on federal government debts is important because collection by, or on behalf of, the government is already unusually coercive as a result of the government's police power and other means of seizing citizen's assets.

The bill would prohibit debt collectors from selling or transferring a debt originally owed to a federal agency for the first 90 days after default or delinquency and would require at least three notices by the agency to be made to the consumer before selling or transferring the debt. Requirements to provide notice when a debt is sold are transferred are important consumer protections that make it more likely that the consumer will recognize the debt collector when it calls and also prevent fraud by scammers who call people claiming that they owe a debt.

The bill would also only allow debt collectors to add interest, fees, and other amounts to a debt originally owed to a federal agency if the amount is reasonable, authorized by contract between the federal agency and the debt collector, and not greater than 10 percent of the amount collected. Such a provision is aimed at curbing exorbitant debt collection fees, which would be passed along to consumers.

This bill would also require the Comptroller General to study the use of debt collectors by state and local government agencies. As noted in the discussion of H.R. 3948, there appears to be growing use of third-party debt collectors by different government entities. The proposed study represents an opportunity to learn more about these practices.

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136 *See also* 26 U.S.C. § 6306(g) ("The provisions of the Fair Debt Collection Practices Act (15 U.S.C. 1692 et seq.) shall apply to any qualified tax collection contract, except to the extent superseded by section 6304, section 7602(c), or by any other provision of this title.")

137 For more about the current application of the FDCPA to student loan collection activity, see National Consumer Law Center, Student Loan Law § 8.4.3 (5th ed. 2015), updated at www.nclc.org/library.

138 For example, the definition of debt collector would not include government agencies collecting their own debts.

D. Discussion Draft: Monitoring and Curbing Abusive Debt Collection Practices Act

This bill would require the CFPB to make quarterly reports to Congress about debt collection that include details about consumer complaints and a list of enforcement actions. Such a provision would increase the frequency of reports that the CFPB is already required to provide annually and would provide additional details about what must be included.

It would also prohibit the Director of the CFPB from issuing "any rule with respect to debt collection that allows a debt collector to send unlimited email and text messages to a consumer." Such a provision would prohibit certain rulemaking conduct, in addition to the rulemaking authority described in 15 U.S.C. § 1692l(d). Clarification of the scope of the CFPB's rulemaking authority will shape the content of any final regulations that the CFPB issues.

E. Discussion Draft: Non-Judicial Foreclosure Debt Collection Clarification Act

On March 20, 2019, the Supreme Court's unanimous decision in Obduskey v. McCarthy & Holthus L.L.P. examined liability for violations of the Fair Debt Collection Practices Act (FDCPA) that are committed in non-judicial foreclosures. Obduskey holds that entities whose principal purpose is enforcing security interests are subject only to § 1692f(6), not other FDCPA provisions, when they conduct non-judicial foreclosures in a manner required by state law. This bill would amend the definition of debt collector to clarify coverage for security interest enforcers in light of Obduskey,which is important to protect consumers from abusive practices by debt collectors collecting mortgages and other secured debts.

F. Other Legislation

The Committee is considering discussion drafts of other bills that I do not have the time to discuss in this testimony. Other problems discussed in my testimony can also be addressed by Congress or by the CFPB. I look forward to working with Congress to protect consumers against a full range of problems posed by debt collection and to ensure that the CFPB fulfills its mission to protect consumers.

VII. Conclusion

Thank you for the close attention you are paying to abusive debt collection practices and for the bills you are considering today to protect consumers and small business owners. I appreciate the opportunity to provide this testimony and look forward to your questions.

U.S. House Committee on Financial Services Hearing:
"Examining Legislation to Protect Consumers and Small Business Owners from Abusive Debt Collection Practices."

Testimony of Amanda Ballantyne, Executive Director
Main Street Alliance

Thursday, September 26, 2019

Chairwoman Waters, Ranking Member McHenry, and members of the House Committee on Financial Services, thank you for holding a hearing on *"Examining Legislation to Protect Consumers and Small Business Owners from Abusive Debt Collection Practices"* last Thursday, September 26, 2019. On behalf of small business owners throughout the country, we appreciate your efforts to examine this problem and your recognition of the challenges small business owners face regarding debt and financial stability and I would like to add this written testimony to be entered into the record.

My name is Amanda Ballantyne and I am the Executive Director of Main Street Alliance. We are a 501(c)(3) organization and since 2008, we have engaged over 30,000 businesses in eleven states, including Iowa, Michigan, New Jersey, and Washington through grassroots organizing, including in-person surveys at business locations, one-on-one meetings and at local events, where we seek to understand the issues that matter most to small business. Our members include small business owners that are manufacturers, restaurateurs, artists, farmers, accountants, printers, software designers, retailers, mechanics, and more. Our mission is simple: Provide small businesses a voice on pressing public policy issues that impact their businesses, employees, and the communities they serve.

Businesses need stability, transparency, and predictability in order to thrive. Today, I would like to share important small businesses perspectives regarding the impact of abusive debt collection practices, which emcompasses the intersection of access to capital and debt, the unregulated business lending industry and debt collection practices, and what the federal government can do to help legislate basic transparency and monitoring, ensuring small businesses across the country have the ability to succeed.

Addressing the challenges of abusive debt collection, and ultimately greater and more equitable access to capital, will support aspiring entrepreneurs. Although the number of minority-owned businesses is growing, compared to their white counterparts entrepreneurs of color have lower net worth and fewer resources to draw on when launching their businesses.[1] This makes accessing good, affordable financing appropriate for their needs especially important. Yet, banks have historically closed their doors to and continue to shut out minority business owners. This severely hurts these entrepreneurs' ability to thrive, as there is nowhere to turn but alternative financing companies, such as providers of merchant cash advances (MCAs), which are likely to be predatory and may engage in abusive debt collection practices. Outside the area of predatory lending, small business owners are also harmed when abusive debt collectors harass them over other forms of debt, or harass their employees, as there are little to no regulations or guardrails to prevent these abuses.

[1]Alison Decker, "The Racial Wealth Gap Hurts Entrepreneurs of Color -- and the Economy," The Aspen Institute, Dec. 22, 2016, "https://www.aspeninstitute.org/blog-posts/racial-wealth-gap-hurts-entrepreneurs-color-economy/

For these reasons, we urge Congress to pass the "Small Business Lending Fairness Act," introduced by Chairwoman Nydia Velazquez and Congressman Roger Marshall; create an oversight process that could lead to legislation to enforce the Consumer Federal Protection Bureau's (CFPB) obligations under Dodd-Frank Act Section 1071 regarding collection of data on lending to small businesses, with the goal of better understanding the landscape for those that are owned and operated by women and minorities and shift the paradigm for small business owners; and, pass a "truth in lending" (TILA) bill that requires transparent disclosures in small business lending.

I. The number of minority-owned businesses is growing steadily, but these businesses start out with lower net worth and fewer resources.

Although the number of minority-owned businesses is on the rise, these businesses face numerou financing-related obstacles. Minority business owners launch their businesses with lower startu capital and fewer resources, making the need for affordable financing even more pressing.

Between 2007 and 2017, minority-owned small businesses grew by 79 percent, at a rate roughly 1 times faster than for U.S. small businesses overall during the same timeframe.[2] The number o women-owned firms is also increasing.[3] However, small business owners are sti disproportionately white and male,[4] with Latinx and Black entrepreneurs owning only 6.0 percei and 2.2 percent of classifiable small-employer firms as of 2015, respectively, despite representin 17.6 and 12.7 percent of the country's population.[5]

Entrepreneurs of color and women entrepreneurs start businesses with lower net worth and fewe resources to draw on than their white, male counterparts. The racial wealth gap, rather tha narrowing, is growing even steeper, with wealth cut in half for the median Black family betwee 1983 and 2016, while increasing 33 percent for the median white family, and Black and Latin families are twice as likely as white families to have zero net worth.[6] A 2016 study found that, o

[2] "Number of Minority Owned U.S. Small Businesses Growing Rapidly," Small Business Labs, Oct 3, 2017, https://www.smallbizlabs.com/2017/10/number-of-minority-owned-us-small-businesses-growing-rapidly.html; Jared Weitz, Why Minorities Have So Much Trouble Accessing Small Business Loans, Forbes, Jan. 22, 2018, https://www.forbes.com/sites/forbesfinancecouncil/2018/01/22/why-minorities-have-so-much-trouble-accessing-small-business-loans/#1b05463355c4

[3] "Number of Women-Owned Employer Firms Increases," U.S. Census Bureau, Aug. 13, 2018, https://www.census.gov/newsroom/press-releases/2018/employer-firms.html

[4] "2018 Small Business Profile," Small Business Administration Office of Advocacy, https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf

[5] Kimber Lanning, "Lack of Access to Capital Is Crippling the US Small Business Sector in Communities of Color," Interise,https://www.interise.org/blog-news/8011-lack-of-access-to-capital-is-crippling-the-us-small-business-sector-in-communities-of-color

[6] Chuck Collins, et al, "Ten Solutions to Bridge the Racial Wealth Gap," National Community Reinvestment Coalition, Kirwan Institute for the Study of Race and Ethnicity, Ohio State University, Institute for Policy Studies, Inequality.org, 2019, https://inequality.org/wp-content/uploads/2019/04/Ten-Solutions-to-Bridge-the-Racial-Wealth-Divide-FINAL-.pdf

average, Black entrepreneurs launched their firms with $35,205 in startup capital, compared to white entrepreneurs who used $106,720.[7]

Accordingly, minority-owned and women-owned small businesses have a great need for affordable financing, but banks' lending practices compound rather than alleviate the disparities.

II. Historic and current bank lending practices continue to disadvantage minority-owned businesses and demonstrate the increasing need to implement Section 1071 of the Dodd-Frank Act.

Lack of access to quality, affordable credit for minority small business owners stems both from redlining and a long history of inequity in bank-based lending models.[8] The federal government should re-examine banking regulations and require commercial banks to improve their lending models to ensure access to low and moderate income minority entrepreneurs. These changes could include prohibiting approval/denial based solely on the location of a business, barring banks from simply ignoring applicants with lower net worth, and requiring the use of metrics other than credit scores to determine the bankability of minority entrepreneurs. Under Section 1071 of the Dodd-Frank Act, financial institutions should be providing data on small business lending, but this section of the law has not yet been implemented.

Without full implementation of Section 1071 of the Dodd-Frank Act, we lack comprehensive data on race and gender in small business lending. However, we do have information about the effects of historic and ongoing exclusion from sources of capital for minority-and women-owned firms. First, banks look at lower net-worth, business location, and credit history as counts against these entrepreneurs, creating a self-perpetuating cycle for businesses and the communities where they are located.

Research indicates that, for minority-owned small businesses, approval rates are lower,[9] loan sizes are smaller, and interest rates are higher.[10] According to one study, approval rates for women-owned firms is 15 to 20 percent lower than for male-owned firms.[11] These findings are echoed by the experiences of many Main Street Alliance members, who report that banks expect

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[7] Robert Fairlie, et al, " Black and White: Access to Capital among Minority-Owned Startups," Working Paper, March 7, 2016, https://people.ucsc.edu/~rfairlie/papers/rfr_v21_KFS.pdf, p. 6.

[8] Tracy Jan, "Redlining was banned 50 years ago. It's still hurting minorities today." Washington Post, March 28, 2018,https://www.washingtonpost.com/news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today/?utm_term=.8fe90af4e133

[9] Jared Weitz, Why Minorities Have So Much Trouble Accessing Small Business Loans, Forbes, Jan. 22, 2018, https://www.forbes.com/sites/forbesfinancecouncil/2018/01/22/why-minorities-have-so-much-trouble-accessing-small-business-loans/#1b05463355c4

[10] Robert W. Fairlie, Ph. D. and Alicia M. Robb, Ph.D., "Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs," U.S. Department of Commerce, Minority Business Development Agency, Jan. 2010. https://www.mbda.gov/sites/mbda.gov/files/migrated/files-attachments/DisparitiesinCapitalAccessReport.pdf p.3

[11] Josh Silver, "Small Business Loan Data: Recommendations to the Consumer Financial Protection Bureau for Implementing Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010," National Community Reinvestment Coalition, 2014, https://ncrc.org/wp-content/uploads/2014/08/recommendations-to-cfpb-on-small-business-loan-data.pdf. p.15

credit and sales history they simply do not have.

Many of our members suspect they have experienced discrimination when they have sought and been denied commercial loans. These suspicions are supported by recent testing studies, such as one study conducted by the National Community Reinvestment Coalition, that found that bank staff introduce themselves more frequently to white customers than to Black or Latinx customers, provided white customers with "significantly better" information about business loans, and requested more documentation from Black and Latinx customers.[12]

One of our longtime members is a Black woman with a long history of entrepreneurship who was repeatedly denied loans for operating capital to launch her retail business despite a credit score of 700 and longstanding relationships with the banks where she had applied. She finally received a loan that was only two-thirds the amount she had requested after approaching a third financial institution. Though her business became very successful, the lack of financing prevented her from growing it as she had planned, and she finally had to convert it into a franchise company. One of her franchisees, who is white, quickly obtained financing in amounts that she had been denied. Another franchisee, who is Black, was unable to raise sufficient capital and fell behind on royalty payments. The founder of this company was thus was caught in a cascade of debt.

Another member who experienced lack of access was a white woman who recently developed a growth plan for her business with four-employees at her successful printing company and approached her bank for a $30,000 loan. The bank denied her application citing "insufficient cash flow" and when pressed, stated they were no longer lending to small businesses.

These stories illustrate the closed doors many small business owners encounter when they seek financing from commercial banks. The denial of quality financing can devastate even healthy small businesses. Those running on tight margins and with little cushion cannot always weather a storm. Out of desperation, many cash-strapped entrepreneurs turn to lenders that wind up being predatory and abusive, profiting off the desperation of business owners and placing their businesses at an even greater risk.

III. With limited or no access to quality, affordable financing, small businesses are often forced to turn to alternative lenders.

A range of highly profitable alternative finance companies have stepped into the vacuum in small business lending left by traditional lenders and now provide a wide range of mostly unregulated loans and financial products to small business owners. Many of these companies aggressively pursue business clients, offering predatory, untransparent loans. Small business owners take these loans because they are desperate and have no alternative.

When a small business owner is scrambling to make payroll, pay a supplier, or cover rent, these firms may seem to offer a quick way out. However, a lack of transparency about the terms and conditions of the financial products they offer is disturbing. Often these types of loans come with

[12] Amber Lee, et al, "Disinvestment, Discouragement and Inequity in Small Business Lending," National Community Reinvestment Coalition, https://ncrc.org/disinvestment/

hidden, onerous, or abusive terms that may not be legible to typical borrowers.[13] Recent research by the Opportunity Fund on these alternative loan products uncovered an average APR of 94 percent (and going as high as 358 percent), average monthly loan repayments greater than business owners' take-home pay (combining both business and personal net income), and pervasive stacking of loans.[14]

In late 2018 a Bloomberg investigation report examined the predatory Merchant Cash Advance (MCA) industry and its abuse of confessions of judgment, a practice designed to deny small business borrowers their day in court when they try to defend themselves. The abuses described in this series are both remarkable and outrageous. One business owner describes what happened to his accounts as an owner of a real estate agency. When he needed additional funding, sadly he used an MCA and fell into a situation where he was frozen out of his accounts and stripped of deposits, despite continuing to make payments on the loan. He eventually lost the business and his retirement savings.[15] In addition to the numerous horror stories associated with MCAs, countless small business owners are slowly being dragged under by other forms of risky financing.

"It's a vicious cycle," according to an MSA member who borrowed money from a predatory online lender. She paid a 10 percent set-up fee and 10 percent interest rate on a short-term line of credit, then found then herself taking another loan to borrow back the amount she repaid.

Even business owners with resources and a history of success may be forced into predatory products such as MCAs. Without capital through traditional bank loans, the owner of several restaurants in Washington state has had to rely on predatory cash advances, putting her business at risk. Speaking of the predatory cash advances, she has said, "There's money available but it's not necessarily the money that will help you to grow your business. More than likely it's money that will help bankrupt your business."[16]

IV. Small business owners are harmed by abusive debt collection practices that target their businesses and their employees, and the proposed CFPB debt collection rule will only open the door to more abuse.

In addition to predatory financing, small business owners are often the targets of predatory marketing that can draw them into debt that threatens their businesses. We have received reports of companies that provide products and services to small businesses inserting auto-renew clauses in

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[13] Lenore Palladino, " Small Business Fintech Lending: The Need for Comprehensive Regulation," Fordham Journal of Corporate & Financial Law, 2018, https://news.law.fordham.edu/jcfl/wp-content/uploads/sites/5/2019/03/Palladino-Article.pdf, p. 89.

[14] Eric Weaver, et al, "Unaffordable and Unsustainable: The New Business Lending," Opportunity Fund, May 2016, https://www.opportunityfund.org/assets/docs/Unaffordable%20and%20Unsustainable-The%20New%20Business%20Lending%20on%20Main%20Street_Opportunity%20Fund%20Research%20Report_May%202016.pdf

[15] Zachary Mider & Zeke Faux, "I Hereby Confess Judgment," Bloomberg Businessweek, Nov. 20, 2018, https://www.bloomberg.com/graphics/2018-confessions-of-judgment/?srnd=confessions-of-judgment

[16] "Field hearing about small business lending in Los Angeles," Consumer Financial Protection Bureau, Aug. 18, 2017, https://www.consumerfinance.gov/about-us/events/archive-past-events/field-hearing-about-small-business-lending-los-angeles-ca/, 1:36:14.

contracts, piling debt onto small business owners, demanding lump-sum payment, then sending the small businesses to collection agencies. Predatory practices like these harm the kinds of small businesses that sustain good jobs and local economies.

Small businesses are also harmed when abusive debt collectors are given free rein to harass employees. Calls and emails distract employees and produce stress that interferes in the workplace. From one of our members who advises small businesses, including helping them defend themselves against predatory debt, we have heard of one employer who is spending significant money on legal fees to help an employee with a wage garnishment issue.

The debt collection practices rule proposed by the CFPB, rather than curbing abusive debt collection practices in the workplace, opens the door to such practices. Under the rule, debt collectors will be able to harass borrowers and violate their privacy over the phone, via text and email, and through other means. Additionally, among other problems, the rule gives debt collectors room to pursue "zombie debt."[17] We do not believe the proposed rule represents a faithful enforcement of the Fair Debt Collections Practices Act.

V. Congress should take action to rein in abusive debt collection practices affecting both small business owners and employees

Non-bank lending to individual borrowers is covered by consumer protection law, but non-bank lending to small businesses is not covered, despite the fact that over half of small employer firms with debt use a personal guarantee to secure that debt.[18] Small business owners, then, are putting their individual, personal finances on the line for this capital but receive none of the protection individuals would receive. Congress should take action to protect small business owners at least to the extent consumers are covered.

Small business owners want lawmakers to act

A 500-respondent survey conducted in 2017 by Greenberg Quinlan Rosner Research for Small Business Majority found small business owners are worried about predatory lending and agree that there should be stronger regulations on online lending.

According to the survey, nearly eight in 10 respondents (78 percent) believe "high interest, high fee products offered to small businesses are a problem," with more than a quarter saying they are a "major problem."[19] A vast majority of survey respondents (74 percent) also want stronger regulation of online lenders to protect small businesses from predatory practices. Eight in ten want

[17] "Comments to the Consumer Financial Protection Bureau on its Proposed Debt Collection Rule Docket No. CFPB-2019-0022 RIN 3170-AA41," National Consumer Law Center, et al., Sept 18, 2019, https://www.nclc.org/images/pdf/debt_collection/comments-debt-collection-sept2019.pdf p.34
[18] "Small Business Cred Survey, 2019 Report on Employer Firms," Federal Reserve Banks, https://www.fedsmallbusiness.org/medialibrary/fedsmallbusiness/files/2019/sbcs-employer-firms-report.pdf p.9
[19] "Small Business Owners Concerned with Predatory Lending, Support More Regulation of Alternative Lenders," Small Business Majority, Dec. 12, 2017, https://smallbusinessmajority.org/sites/default/files/research-reports/121217-Small-Business-Access-To-Capital-Poll.pdf, p. 4.

regulation of online lenders to guarantee clear disclosure of fees and interest rates.[20]

Congress should pass legislation protecting small business borrowers from confessions of judgment and other unfair lending and debt collection practices

There are a number of ways that Congress can protect small businesses from abusive debt collection, including from confessions of judgment. Congress should include small business financial products in federal consumer protection laws, including the Truth in Lending Act, the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, and others.

In particular, we urge Congress to pass the Small Business Lending Fairness Act, which will eliminate the use of confessions of judgment against small business borrowers, and the Small Business Fair Debt Collection Protection Act, which will extend the protections of the Fair Debt Collections Practices Act to small businesses. Moreover, Congress should exercise its oversight authority to monitor any new debt collection practices rule and ensure proper enforcement of the Fair Debt Collections Practices Act. Finally, we want to emphasize the importance of small business loans coming with the same transparency protections as those for individual consumers.

Congress should take action to ensure full implementation of the Dodd-Frank Act, Section 1071

The Dodd-Frank Act was passed almost ten years ago, and the CFPB has yet to adopt regulations implementing this essential provision. This failure deprives the country, and small business owners in particular, of a full and accurate picture of the small business lending marketplace and racial and gender discrimination within that marketplace.

In 2017, in response to the CFPB's Request For Information on 1071, we urged the agency to adopt a rule with the following elements, among others: a definition of small business that covers the largest possible share of small businesses, while allowing for meaningful disaggregation of small business lending; mandatory data points on race, gender, national origin, gross annual revenue, census tract, type of action taken on the application, type and purpose of loan, amount of credit applied for and received, and business size; and, comprehensive reporting requirements on lending institutions, with no exemptions for any institution that engages in small business lending, whether retail banks, credit unions, community development financial institutions, or online banks and non-depository lenders like fintech companies and merchant cash advances.

The CFPB still has not implemented Section 1071. We urge Congress to exercise its oversight authority to ensure full implementation of Section 1071, with the possibility of legislation should it be necessary.

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[20] "Small Business Owners Concerned with Predatory Lending, Support More Regulation of Alternative Lenders," Small Business Majority, Dec. 12, 2017, https://smallbusinessmajority.org/sites/default/files/research-reports/121217-Small-Business-Access-To-Capital-Pol l.pdf, p. 4.

Conclusion

Small business borrowers have been left exposed to predatory financing and debt collection practices. Without even the protections for individual consumers, small business owners are left to fend for themselves in a lending market rife with discrimination, deceptive marketing, and abusive debt collection practices. The lack of safeguards and protections particularly disadvantages minority-owned and women-owned businesses that are already starting with lower net worth and fewer resources. For many minority, female, and rural entrepreneurs, small business ownership is the only path to a reasonable income as well as a source of jobs for their communities. Main Street Alliance thanks the Committee for its attention to the experiences and concerns of the country's small businesses and urges Congress to take action.

Broker's Name:	OMEGA BROKERAGE INC.
Broker's Address:	34-20 31st Street
	Astoria, N.Y. 11106

BUYER'S CLOSING STATEMENT

Buyer's Name: [redacted] Seller's Name: THE ESTATE OF LINDELL MINTO

Address 1: [redacted] 100-02 32 AVE., E.ELMHURST, NY 11369

Type of Transfer:	Individual: X	Partnership:	Corporate/ LLC	
	Complete Stock:	X	Partial Stock:	
Date of TLC Closing:	7/3/2014	Date of Financial Closing:	7/15/2014	Med. Lic 8B23

EXPENSES

DESCRIPTION:		PAID TO:	AMOUNT:
Medallion License Rights		SELLER	$1,000,000.00
City Sales Tax (5%)		N.Y.C. COLLECTOR	$50,000.00
TLC License Fee (R/C)		N.Y.C., T.L.C	$550.00
TLC Transfer Fee		N.Y.C., T.L.C	$160.00
NYC Commercial Motor Vehicle Tax			
Incorporation Fee, LLC		HUBCO	$1,185.65
Inter-county Clearance Fee			
Attorney's Fee			
Broker's Fee		OMEGA BROKERAGE INC	$5,000.00
Financing Fee/Loan origination fee		MEGA FUNDING CORP.	$25,000.00
Automobile			
Liability Insurance Deposit		AMERICAN TRANSIT INS. CO.	$2,358.41
Liability Insurance Premium			
Fire/Theft/Collision/ Deposit		KINGSTON INS. CO.	$863.00
Workers Comp. Insurance Dep.		HEREFORD INS. CORP.	$1,017.60
Misc.:	SHORT INTEREST	MEGA FUNDING CORP.	$2,383.56
Misc.:	SHORT INTEREST	MEGA FUNDING CORP.	$639.59
Misc.:	LIEN FILING FEES	MEGA FUNDING CORP.	$500.00
Misc.:	RATE CARD 7/3/14-6/1/16	SELLER	~~$1,594.00~~
TOTAL EXPENSES			$1,091,251.81

CREDITS

1ST Loan: Lender Name:	MEGA FUNDING CORP.			$800,000.00
Lender Address:	34-20 31 STREET, ASTORIA, NY 11106			
Term: 25YR/3YR BL.	3.75%	Mo. Payment:	$4,114.26	
2nd Loan: Lender Name:	MEGA FUNDING CORP.			$140,000.00
Lender Address:	34-20 31 STREET, ASTORIA, NY 11106			
Term: 25YR/3YR BL. Interest Rate:	5.75%	Mo. Payment:	$881.11	
3rd Loan: Lender Name:				
Lender Address:				
Term: Interest Rate:		Mo. Payment:		
Cash down Payment: Source of funds:	OS-1			$150,000.00
Other: Source: CASH				
TOTAL CREDITS				$1,090,000.00
LESS TOTAL EXPENSES				$1,091,251.81
REFUND DUE TO BUYER				
NET DUE TO:	Omega Brokerage Inc.			$1,251.81

SIGNATURE OF BROKER: ______________ DATE: ______________

SAVAS KONSTANTINIDES

SIGNATURE OF BUYER: Mohammad Monjurul Hoque DATE: 7-15-2014

MOHAMMED M. HOQUE, MGR. OF MONJURUL LLC

MEGAFUNDING

34-20 31st Street • Astoria, NY 11106 • Phone: (718) 361-5555 • Fax: (718) 361-8630

N.Y.C. Taxi & Limousine Commission
33 Beaver Street 22FL
New York, NY 10004

June 26, 2014

RE: **MONJURUL LLC**
(MOHAMMED M. HOQUE)
MEDALLION # 8B23

Gentlemen:

Please be advised two loans for the total amount of **$940,000.00** have been approved for **MONJURUL LLC** (MOHAMMED M. HOQUE) Loan #1 - for the amount of $800,000.00 amortized at 25 (Twenty-Five) years, with a 3 (Three) year balloon, a monthly payment of $4,114.32. Loan #2 - for the amount of $140,000.00 amortized at 25(Twenty-Five) years with a 3(Three) years balloon, with a monthly payment of $881.13. The loans approved are for the purchase of N.Y.C. Taxi medallion #8B23.

This approval is contingent upon completion of all documentation requirements prior to or at the closing of the proposed loan.

Yours truly,

Savas Konstantinides

AFTER THIRTY DAYS, WE HAVE THE OPTION OF CANCELLING THIS COMMITMENT.

I am MOHAMMED HOQUE Med #8B23.Here's is something about this business with Omega brokerage inc ---

1.April,4 2014 Mrs. Eleni(Omega) called me and after collect $50,000 made an agreement for price of $ 1 million and said I have to buy a car. Long before of my closing date (7-3-2014) they keep calling and collect total of $ 150,000.NowI thing, they knew about this business falling down. They made closing paper July , 15 2014 and collect $25,000 as a finance fee. I asked Mrs Eleni about it. But

Date	Amount $	Received by
4-4-2014	50,000	Eleni
4-23-2014	3,000	Vsiliki
5-21-2014	9,900	Vsiliki
5-21-2014	54,000	Vsiliki
6-9-2014	10,000	Vsiliki
6-9-2014	23,100	Vsiliki
	=150,000	

Records attested

2.My total payment for the both loans (principal, interest, late fees, impound fees) ----- ----

Year	Amount $	
2014	19,981.48	
2015	54,315.00	
2016	47,075.80	
2017	34,571.30	
2018	24,379.42	Interest only
2019	3,500	"
	=183,823.80	

Records attested

3. I request many times for reduce my principal like other banks/brokers because I lost my savings and everyday I losing my income. Mr. Tomas said, you have good credit so you can get some money from your credit cards or your wife credit card or you can borrow money from your friends/neighbors. They harassed me seized my car six(6) times without any notice. I asked Mrs. Hasna about it she said as a lender their allowed to do so. All seizure are lead by Mrs. Hasna. She/Tomas/Maria gave me the most hard time and forced for the cash payments.

Date	Collected Amount $	Received by
10-20-2015	12,342.78 - official check	Tomas
12-9-2015	7,000 -official check	Tomas
11-30-2017	7,000 -cash	Maria
12-21-2017	6,102.23 -cash	Maria
4-20-2018	9,088.21 -cash	Maria
3-18-2019	---------------	----------
	=41,533.22	

Records attested

4.Dec.2017 they start asking for $ 6102.23 and gave me different-different amounts. I asked big boss Mr. Savas about various payment amounts. He said this is interest so it can be different even morning-evening.Dec.20 I gave them $ 2,000 but same night they towed my car and next day after collect the balance of $ 4,102.23 they release my car. They not done their paper work April, 20,2018 they again towed my car and demanded $ 9,088.21.I called NYCB they also said if I need their favor I have to pay $ 9,088.21.Five days after I can manage their money but they were not gave me their committed amount.

Records attested.

5.They threat me about my credit line. Feb, 25 2019 before my seizure # 06 they mail me 13 envelopes again after tow April, 9 2019 another 15 envelopes asked for around $ 1 million. April, 19 2019 Mrs. BHAIRAVI DESAI ,executive director-NYTWA [redacted]
Went Omega asked about my balance Mrs. Hasna said $ 4900+ and I said I can manage $ 2,000 but week after she called me and said I have to bring $ 5,900+ for release the car.But after NY times news they stopped everything.

Records attested

6.

(a) NYCB officer Mr. Kurt Pohmer-Senior voice president-his team [redacted]
And.

(b) Omega brokerage's harrassment now I am in long list of medications, put me in trauma. I have Hi blood pressure, Diabetes with few others. Most of the night I can't sleep properly. My wife has also the same situation. I have a unhuman living condition. My three (3) kids are in risk now because I am the only earning person in this household and 8B23 is my only asset.

Records attested.

MOHAMMED HOQUE
Monjurul LLC
Sep.10

* InCome (According to my tax Return) -

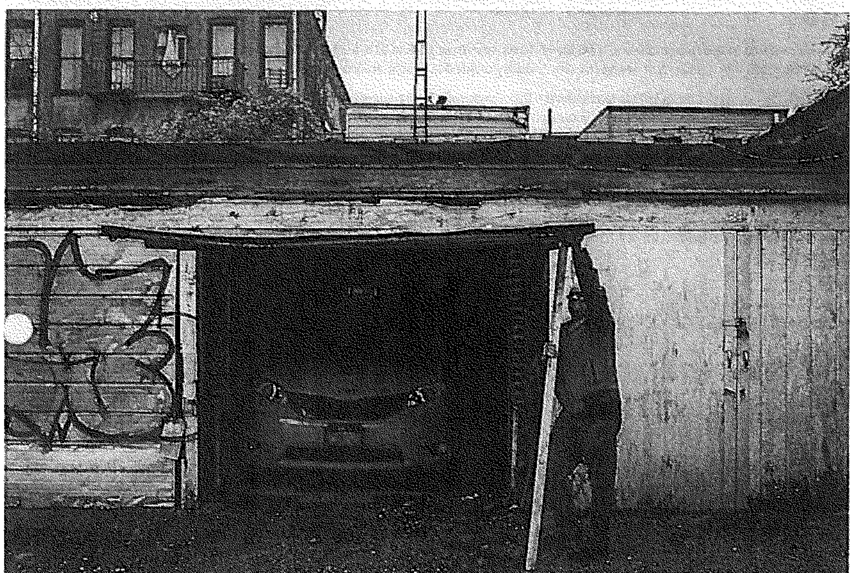
2012 — $ 22,392
2013 - $ 23,269

The New York Times

As Thousands of Taxi Drivers Were Trapped in Loans, Top Officials Counted the Money

By Brian M. Rosenthal

May 19, 2019



Wael Ghobrayal, an Egyptian immigrant, bought a taxi medallion for $890,000 and now cannot make his loan payments. Kholood Eid for The New York Times

[Read Part 1 of The Times's investigation: How Reckless Loans Devastated a Generation of Taxi Drivers]

At a cramped desk on the 22nd floor of a downtown Manhattan office building, Gary Roth spotted a looming disaster.

An urban planner with two master's degrees, Mr. Roth had a new job in 2010 analyzing taxi policy for the New York City government. But almost immediately, he noticed something disturbing: The price of a taxi medallion — the permit that lets a driver own a cab — had soared to nearly $700,000 from $200,000. In order to buy medallions, drivers were taking out loans they could not afford.

Mr. Roth compiled his concerns in a report, and he and several colleagues warned that if the city did not take action, the loans would me unsustainable and the market could collapse.

They were not the only ones worried about taxi medallions. In Albany, state inspectors gave a presentation to top officials showing that medallion owners were not making enough money to support their loans. And in Washington, D.C., federal examiners repeatedly noted that banks were increasing profits by steering cabbies into risky loans.

They were all ignored.

Medallion prices rose above $1 million before crashing in late 2014, wiping out the futures of thousands of immigrant drivers and creating a crisis that has continued to ravage the industry today. Despite years of warning signs, at least seven government agencies did little to stop the collapse, The New York Times found.

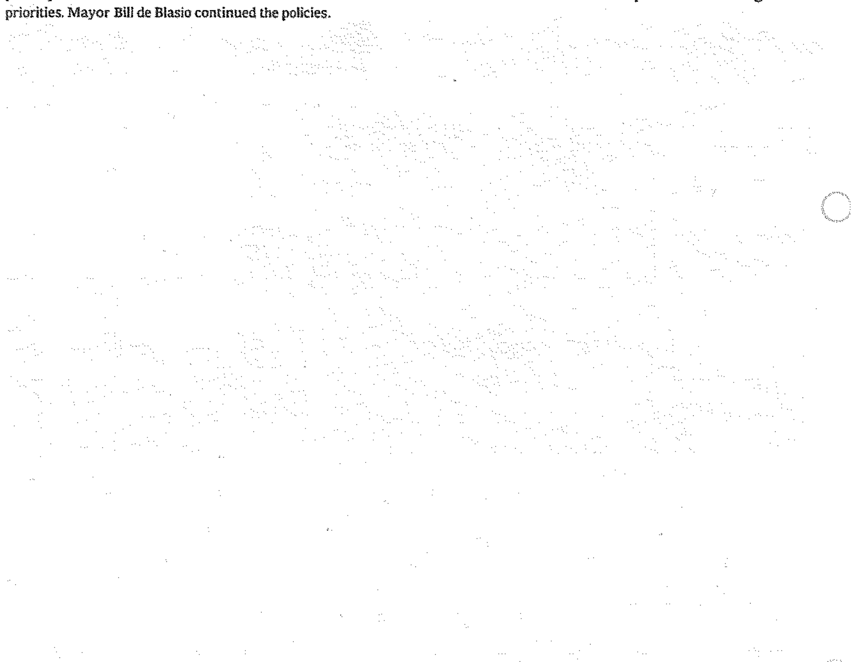
Instead, eager to profit off medallions or blinded by the taxi industry's political connections, the agencies that were supposed to police industry helped a small group of bankers and brokers to reshape it into their own moneymaking machine, according to internal records and interviews with more than 50 former government employees.

For more than a decade, the agencies reduced oversight of the taxi trade, exempted it from regulations, subsidized its operations and promoted its practices, records and interviews showed.

Their actions turned one of the best-known symbols of New York — its signature yellow cabs — into a financial trap for thousands of immigrant drivers. More than 950 have filed for bankruptcy, according to a Times analysis of court records, and many more struggle to stay afloat.

"Nobody wanted to upset the industry," said David Klahr, who from 2007 to 2016 held several management posts at the Taxi and Limousine Commission, the city agency that oversees cabs. "Nobody wanted to kill the golden goose."

New York City in particular failed the taxi industry, The Times found. Two former mayors, Rudolph W. Giuliani and Michael R. Bloomberg, placed political allies inside the Taxi and Limousine Commission and directed it to sell medallions to help them balance budgets and fund priorities. Mayor Bill de Blasio continued the policies.



Kholood Eid for The New York Times

Under Mr. Bloomberg and Mr. de Blasio, the city made more than $855 million by selling taxi medallions and collecting taxes on private sales, according to the city.

But during that period, much like in the mortgage lending crisis, a group of industry leaders enriched themselves by artificially inflating medallion prices. They encouraged medallion buyers to borrow as much as possible and ensnared them in interest-only loans and other one-sided deals that often required them to pay hefty fees, forfeit their legal rights and give up most of their monthly incomes.

When the medallion market collapsed, the government largely abandoned the drivers who bore the brunt of the crisis. Officials did not bail orrowers or persuade banks to soften loan terms.

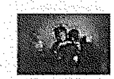
"They sell us medallions, and they knew it wasn't worth price. They knew," said Wael Ghobrayal, 42, an Egyptian immigrant who bought a medallion at a city auction for $890,000 and now cannot make his loan payments and support his three children.

"They lost nothing. I lost everything," he said.

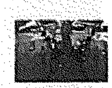
The Times conducted hundreds of interviews, reviewed thousands of records and built several databases to unravel the story of the downfall of the taxi industry in New York and across the United States. The investigation unearthed a collapse that was years in the making, aided almost as much by regulators as by taxi tycoons.

More about The Times's Investigation.

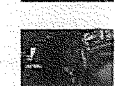
'They Were Conned': How Reckless Loans Devastated a Generation of Taxi Drivers May 19, 2019



What Actually Happened to New York's Taxi Drivers May 28, 2019



How NYC Taxi Drivers Bought Medallions and Became Victims of a Reckless Lending Scheme June 7, 2019



Publicly, government officials have blamed the crisis on competition from ride-hailing firms such as Uber and Lyft.

In interviews with The Times, they blamed each other.

The officials who ran the city Taxi and Limousine Commission in the run-up to the crash said it was the job of bank examiners, not the commission, to control lending practices.

The New York Department of Financial Services said that while it supervised some of the banks involved in the taxi industry, it deferred to federal inspectors in many cases.

The federal agency that oversaw many of the largest lenders in the industry, the National Credit Union Administration, said those lenders were meeting the needs of borrowers.

The N.C.U.A. released a March 2019 internal audit that scolded its regulators for not aggressively enforcing rules in medallion lending. But even that audit partially absolved the government. The lenders, it said, all had boards of directors that were supposed to prevent reckless practices.

And several officials criticized Congress, which two decades ago excepted credit unions in the taxi industry from some rules that applied to other credit unions. After that, the officials said, government agencies had to treat those lenders differently.

Ultimately, former employees said, the regulatory system was set up to ensure that lenders were financially stable, and medallions were sold. But almost nothing protected the drivers.

A 'once-in-a-lifetime opportunity'

Matthew W. Daus, far right, at a hearing of the New York City Taxi and Limousine Commission in 2004. Marilynn K. Yee/The New York Times

Matthew W. Daus was an unconventional choice to regulate New York's taxi industry. He was a lawyer from Brooklyn and a leader of a political club that backed Mr. Giuliani for mayor.

The Giuliani administration hired him as a lawyer for the Taxi and Limousine Commission before appointing him chairman in 2001, a leadership post he kept after Mr. Bloomberg became mayor in 2002.

The commission oversaw the drivers and fleets that owned the medallions for the city's 12,000 cabs. It licensed all participants and decided what cabs could charge, where they could go and which type of vehicle they could use.

And under Mr. Bloomberg, it also began selling 1,000 new medallions.

At the time, the mayor said the growing city needed more yellow cabs. But he also was eager for revenue. He had a $3.8 billion hole in his budget.

The sales put the taxi commission in an unusual position.

It had a long history of being entangled with the industry. Its first chairman, appointed in 1971, was convicted of a bribery scheme involving an industry lobbyist. Four other leaders since then had worked in the business.

It often sent staffers to conferences where companies involved in the taxi business paid for liquor, meals and tickets to shows, and at least one past member of its board had run for office in a campaign financed by the industry.

Still, the agency had never been asked to generate so much money from the business it was supposed to be regulating.

Former staffers said officials chose to sell medallions with the method they thought would bring in the most revenue: a series of limited auctions that required participants to submit sealed bids above ever-increasing minimums.

Ahead of the sales, the city placed ads on television and radio, and in newspapers and newsletters, and held seminars promoting the "once-in-a-lifetime opportunity."

"Medallions have a long history as a solid investment with steady growth," Mr. Daus wrote in one newsletter. In addition to guaranteed employment, he wrote, "a medallion is collateral that can assist in home financing, college tuition or even 'worry-free' retirement."

At the first auctions under Mr. Bloomberg in 2004, bids topped $300,000, surprising experts.

Some former staffers said in interviews they believed the ad campaign inappropriately inflated prices by implying medallions would make buyers rich, no matter the cost. Seven said they complained.

The city eventually added a disclaimer to ads, saying past performance did not guarantee future results. But it kept advertising.

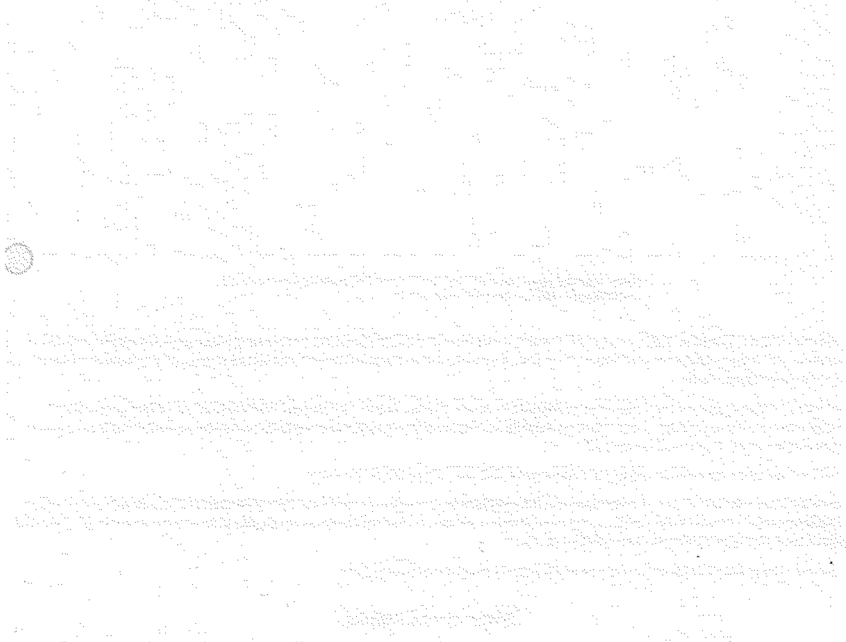
During the same period, the city also posted information on its website that said that medallion prices were, on average, 13 percent higher than they really were, according to a Times data analysis.

In several interviews, Mr. Daus defended the ad campaigns, saying they reached people who had been unable to break into the tight market. The ads were true at the time, he said. He added he had never heard internal complaints about the ads.

In all, the city held 16 auctions between 2004 and 2014.

"People don't realize how organized it is," Andrew Murstein, president of Medallion Financial, a lender to medallion buyers, said in a 2011 interview with Tearsheet Podcast. "The City of New York, more or less, is our partner because they want to see prices go as high as possible."

Help from a federal agency



New York City made more than $855 million from taxi medallion sales under Mayor Bill de Blasio and his predecessor, Michael R. Bloomberg.
Richard Perry/The New York Times

For decades, a niche banking system had grown up around the taxi industry, and at its center were about half a dozen nonprofit credit unions that specialized in medallion loans. But as the auctions continued, the families that ran the credit unions began to grow frustrated.

Around them, they saw other lenders making money by issuing loans that they could not because of the rules governing credit unions. They recognized a business opportunity, and they wanted in.

They found a receptive audience at the National Credit Union Administration.

The N.C.U.A. was the small federal agency that regulated the nation's credit unions. It set the rules, examined their books and insured their accounts.

Like the city taxi commission, the N.C.U.A. had long had ties to the industry that it regulated. One judge had called it a "rogue federal agency" focused on promoting the industry.

In 2004, its chairman was Dennis Dollar, a former Mississippi state representative who had previously worked as the chief executive of a credit union. He had just been inducted into the Mississippi Credit Union Hall of Fame, and he had said one of his top priorities was streamlining regulation.

Dennis Dollar, the former chairman of the National Credit Union Administration, is now a consultant in the industry. Jay Mallin/Bloomberg News

Under Mr. Dollar and others, the N.C.U.A. issued waivers that exempted medallion loans from longstanding rules, including a regulation requiring each loan to have a down payment of at least 20 percent. The waivers allowed the lenders to keep up with competitors and to write more profitable loans.

Mr. Dollar, who left government to become a consultant for credit unions, said the agency was following the lead of Congress, which passed a law in 1998 exempting credit unions specializing in medallion loans from some regulations. The law signaled that those lenders needed leeway, such as the waivers, he said.

"If we did not do so, the average cabdriver couldn't get a medallion loan," Mr. Dollar said.

The federal law and the N.C.U.A. waivers were not the only benefits the industry received. The federal government also provided many medallion lenders with financial assistance and guaranteed a portion of their taxi loans, assuring that if those loans failed, they would still be partially paid, according to records and interviews.

As lenders wrote increasingly risky loans, medallion prices neared $500,000 in 2006.

'Snoozing and napping'

Under Mr. Bloomberg, the New York City Taxi and Limousine Commission began selling 1,000 new medallions. Suzanne DeChillo/The New York Times

Another agency was also supposed to be keeping an eye on lending practices. New York State banking regulators are required to inspect all financial institutions chartered in the state. But after 2008, they were forced to focus their attention on the banks most affected by the global economic meltdown, according to former employees.

As a result, some industry veterans said, the state stopped examining medallion loans closely.

"The state banking department would come in, and they'd be doing the exam in one room, and the N.C.U.A. would be in another room," said Larry Fisher, who was then the medallion lending supervisor at Melrose Credit Union, one of the biggest lenders. "And you could catch the state banking department snoozing and napping and going on the internet and not doing much at all."

The state banking department, which is now called the New York Department of Financial Services, disputed that characterization and said it had acted consistently and appropriately.

Former federal regulators described a similar trend at their agencies after the recession.

Some former employees of the N.C.U.A., the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency said that as medallion prices climbed, they tried to raise issues with loans and were told not to worry. The Securities and Exchange Commission and the Federal Reserve Board also oversaw some lenders and did not intervene.

A spokesman for the Federal Reserve said the agency was not a primary regulator of the taxi lending industry. The rest of the agencies declined to comment.

"It was obvious that the loans were unusual and risky," said Patrick Collins, a former N.C.U.A. examiner. But, he said, there was a belief inside his agency that the loans would be fine because the industry had been stable for decades.

Meanwhile, in New York City, the taxi commission reduced oversight.

For years, it had made medallion purchasers file forms describing how they came up with the money, including details on all loans. It also had required industry participants to submit annual disclosures on their finances, loans and conflicts of interest.

But officials never analyzed the forms filed by buyers, and in the 2000s, they stopped requiring the annual disclosures altogether.

"Reviewing these disclosures was an onerous lift for us," the commission's communications office said in a recent email.

By 2008, the price of a medallion rose to $600,000.

At around the same time, the commission began focusing on new priorities. It started developing the "Taxi of Tomorrow," a model for future cabs.

The agency's main enforcement activities targeted drivers who cheated passengers or discriminated against people of color. "Nobody really scrutinized medallion transfers," said Charles Tortorici, a former commission lawyer.

A spokesman for Mr. Bloomberg said in a statement that during the mayor's tenure, the city improved the industry by installing credit card machines and GPS devices, making fleets more environmentally efficient and creating green taxis for boroughs outside Manhattan.

"The industry was always its own worst enemy, fighting every reform tooth and nail," said the spokesman, Marc La Vorgna. "We put ou energy and political capital into the reforms that most directly and immediately impacted the riding public."

Records show that since 2008, the taxi commission has not taken a single enforcement action against brokers, the powerful players who arrange medallion sales and loans.

Alex Korenkov, a broker, suggested in an interview that he and other brokers took notice of the city's hands-off approach.

"Let's put it this way," he said. "If governing body does not care, then free-for-all."

Ignored warnings

Gabriella Angotti-Jones/The New York Times

By the time that Mr. Roth wrote his report at the Taxi and Limousine Commission in 2010, it was clear that something strange was happening in the medallion market.

Mr. Daus gave a speech that year that mentioned the unusual lending practices. During the speech, he said banks were letting medallic buyers obtain loans without any down payment. Experts have since said that should have raised red flags. But at the time, Mr. Daus seemed pleased.

"Some of these folks were offering zero percent down," he said. "You tell me what bank walks around asking for zero percent down on a loan? It's just really amazing."

In interviews, Mr. Daus acknowledged that the practice was unusual but said the taxi commission had no authority over lending.

Inside the commission, at least four employees raised concerns about the medallion prices and lending practices, according to the employees, who described their own unease as well as Mr. Roth's report.

David S. Yassky, a former city councilman who succeeded Mr. Daus as commission chairman in 2010, said in an interview that he never saw Mr. Roth's report.

Mr. Yassky said the medallion prices puzzled him, but he could not determine if they were inflated, in part because people were still eager to buy. Medallions may have been undervalued for decades, and the price spike could have been the market recognizing the true value, he suggested.

Meera Joshi, who became chairwoman in 2014, said in an interview that she was worried about medallion costs and lending practices but was pushed to prioritize other responsibilities. Dominic Williams, Mr. de Blasio's chief policy adviser, said the city focused on initiatives such as improving accessibility because no one was complaining about loans.

Worries about the taxi industry also emerged at the National Credit Union Administration. In late 2011, as the price of some medallions reached $800,000, a group of agency examiners wrote a paper on the risks in the industry, according to a recent report by the agency's inspector general.

In 2012, 2013 and 2014, inspectors routinely documented instances of credit unions violating lending rules, the inspector general's report said.

David S. Yassky, the former chairman of the New York City Taxi and Limousine Commission. Michael Appleton for The New York Times

The N.C.U.A. chose not to penalize medallion lenders or impose extra oversight. It did not take any wide industry action until April 2014, when it sent a letter reminding the credit unions in the taxi market to act responsibly.

Former staffers said the agency was still focused on the fallout from the recession.

A spokesman for the N.C.U.A. disputed that characterization and said the agency conducted appropriate enforcement.

He added the agency took actions to ensure the credit unions remained solvent, which was its mission. He said Congress allowed the lenders to concentrate heavily on medallion loans, which left them vulnerable when Uber and Lyft arrived.

At the New York Department of Financial Services, bank examiners noticed risky practices and interest-only loans and repeatedly wrote warnings starting in 2010, according to the state. At least one report expressed concern of a potential market bubble, the state said.

Eventually, examiners became so concerned that they made a PowerPoint presentation and called a meeting in 2014 to show it to a dozen top officials.

“Since 2001, individual medallion has risen 455%,” the presentation warned, according to a copy obtained by The Times. The presentation suggested state action, such as sending a letter to the industry or revoking charters from some lenders.

The state did neither. The department had recently merged with the insurance department, and former employees said it was finding its footing.

The department superintendent at the time, Benjamin M. Lawsky, a former aide to Gov. Andrew M. Cuomo, said he did not, as a rule, discuss his tenure at the department.

In an emailed statement, the department denied it struggled after the merger and said it took action to stop the collapse of the medallion market. A department spokesman provided a long list of warnings, suggestions and guidelines that it said examiners had issued to lenders. He said that starting in 2012, the department downgraded some of its own internal ratings of the lenders.

The list did not include any instances of the department formally penalizing a medallion lender, or making any public statement about the industry before it collapsed.

Between 2010 and 2014, as officials at every level of government failed to rein in the risky lending practices, records show that roughly 1,500 people bought taxi medallions. Over all, including refinancings of old loans and extensions required by banks, medallion owners signed at least 10,000 loans in that time.

Several regulators who tried to raise alarms said they believed the government stood aside because of the industry's connections.

Many pointed to one company — Medallion Financial, run by the Murstein family. Former Gov. Mario M. Cuomo, the current governor's father, was a paid member of its board from 1996 until he died in 2015.

Others noted that Mr. de Blasio has long been close to the industry. When he ran for mayor in 2013, an industry lobbyist, Michael Woloz, was a top fund-raiser, records show. And Evgeny Freidman, a major fleet owner who has admitted to artificially inflating medallion prices, has said he is close to the mayor.

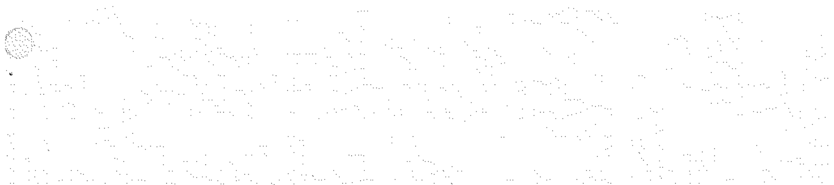
Some people, including Mr. Dollar, the former N.C.U.A. chairman, said Congress excepted the taxi trade from rules because the industry was supported by former United States Senator Alfonse D'Amato of New York, who was then the chairman of the Senate Banking Committee.

“The taxi industry is one of the most politically connected industries in the city,” said Fidel Del Valle, who was the chairman of the taxi commission from 1991 to 1994. He later worked as a lawyer for drivers and a consultant to an owner association run by Mr. Freidman. “ been that way for decades, and they've used that influence to push back on regulation, with a lot of success.”

A spokesman for Mr. Cuomo said Medallion Financial was not regulated by the state, so the elder Mr. Cuomo's position on the board was irrelevant. A spokeswoman for Mr. de Blasio said the industry's connections did not influence the city.

Mr. Murstein, Mr. Woloz, Mr. Freidman and Mr. D'Amato all declined to comment.

The aftermath



"I think city will help me," Mohammad Hossain, who is in deep debt from a taxi medallion loan, said at his family's home in the Bronx. Khalood Eid for The New York Times

New York held its final independent medallion auction in February 2014. By then, concerns about medallion prices were common in the news media and government offices, and Uber had established itself. Still, the city sold medallions to more than 150 bidders. ("It's better than the stock market," one ad said.)

Forty percent of the people who bought medallions at that auction have filed for bankruptcy, according to a Times analysis of court records.

Mohammad Hossain, 47, from Bangladesh, who purchased a medallion for $853,000 at the auction, said he could barely make his monthly payments and was getting squeezed by his lender. "I bought medallion from the city," he said through tears. "I think city will help me, you know. I assume that."

The de Blasio administration's only major response to the crisis has been to push for a cap on ride-hail cars. The City Council at first rejected a cap in 2015 before approving it last year.

Taxi industry veterans said the cap did not address the cause of the crisis: the lending practices.

COMING IN JUNE FROM THE NEW YORK TIMES: "THE WEEKLY" ON FX AND HULU

Watch a preview of our television show, "The Weekly," which will feature The Times' investigation of the taxi industry. Mohammad Hossain emptied his savings to buy a taxi medallion. He had no idea he had just signed away his financial freedom.

Richard Weinberg, a taxi commission hearing officer from 1988 to 2002 and a lawyer for drivers since then, said that when the medallion bubble began to burst, the city should have frozen prices, adjusted fares and fees and convinced banks to be flexible with drivers. That could have allowed prices to fall slowly. "That could've saved a lot of people," he said.

In an interview, Dean Fuleihan, the first deputy mayor, said the city did help taxi owners, including by reducing some fees, taxes and inspection mandates, and by talking to banks about loans. He said that if the City Council had passed the cap in 2015, it would have helped.

"We do care about those drivers, we care about those families. We attempted throughout this period to take actions," he said.

Federal regulators also have not significantly helped medallion owners.

In 2017 and 2018, the N.C.U.A. closed or merged several credit unions for "unsafe business practices" in medallion lending. It took over many of the loans, but did not soften terms, according to borrowers. Instead, it tried to get money out as quickly as possible.

The failure of the credit unions has cost the national credit union insurance fund more than $750 million, which will hurt all credit union members.

In August 2018, the N.C.U.A. closed Melrose in what it said was the biggest credit union liquidation in United States history. The agency barred Melrose's general counsel from working for credit unions and brought civil charges against its former C.E.O., Alan Kaufman, saying he used company funds to help industry partners in exchange for gifts.

The general counsel, Mitchell Reiver, declined to answer questions but said he did nothing wrong. Mr. Kaufman said in an interview that the N.C.U.A. made up the charges to distract from its role in the crisis.

"I'm definitely a scapegoat," Mr. Kaufman said. "There's no doubt about it."

Glamour, then poverty

After he struggled to repay his taxi medallion loan, Abel Vela left his family in New York and moved back to Peru, where living costs were cheaper.
Angela Ponce for The New York Times

During the medallion bubble, the city produced a television commercial to promote the permits. In the ad, which aired in 2004, four cabbies stood around a taxi discussing the perks of the job. One said buying a medallion was the best decision he had ever made. They all smiled. Then Mr. Daus appeared on screen to announce an auction.

Fifteen years later, the cabbies remember the ad with scorn. Three of the four were eventually enticed to refinance their original loans under far riskier terms that left them in heavy debt.

One of the cabbies, Abel Vela, had to leave his wife and children and return to his home country, Peru, because living costs were lower there. He is now 74 and still working to survive.

The only woman in the ad, Marie Applyrs, a Haitian immigrant, fell behind on her loan payments and filed for bankruptcy in November 2017. She lost her cab, and her home. She now lives with her children, switching from home to home every few months.

"When the ad happened, the taxi was in vogue. I think I still have the tape somewhere. It was glamorous," she said. "Now, I'm in the poorhouse."

Today, the only person from the television commercial still active in the industry is Mr. Daus. He works as a lawyer for lenders.

[Read Part 1 of The Times's investigation: How Reckless Loans Devastated a Generation of Taxi Drivers]

Madeline Rosenberg contributed reporting. Doris Burke contributed research. Produced by Jeffrey Furticella and Meghan Louttit.

Follow Brian M. Rosenthal on Twitter at @brianmrosenthal

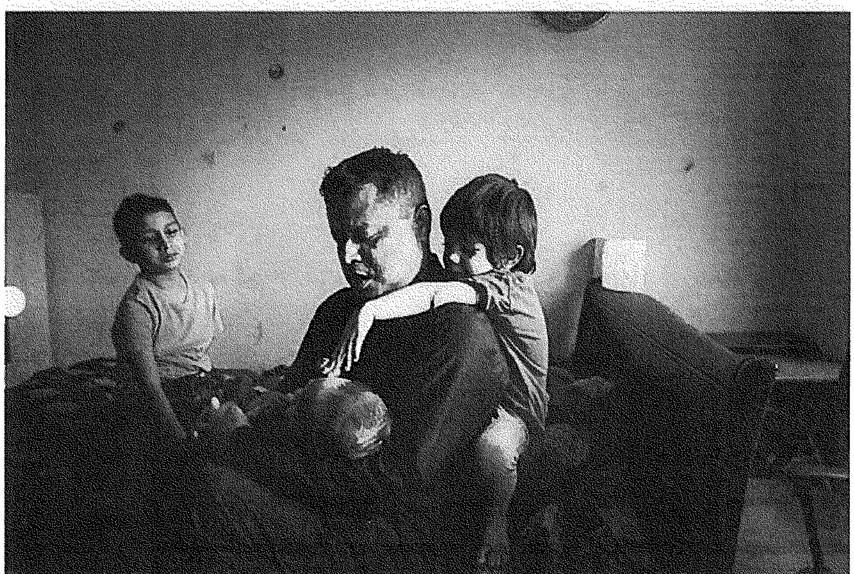
The New York Times

'They Were Conned': How Reckless Loans Devastated a Generation of Taxi Drivers

By Brian M. Rosenthal

Photographs and Video by Kholood Eid

May 19, 2019



Mohammed Hoque with his three children in their studio apartment in Jamaica, Queens.

The phone call that ruined Mohammed Hoque's life came in April 2014 as he began another long day driving a New York City taxi, a job he had held since emigrating from Bangladesh nine years earlier.

The call came from a prominent businessman who was selling a medallion, the coveted city permit that allows a driver to own a yellow cab instead of working for someone else. If Mr. Hoque gave him $50,000 that day, he promised to arrange a loan for the purchase.

After years chafing under bosses he hated, Mr. Hoque thought his dreams of wealth and independence were coming true. He emptied his bank account, borrowed from friends and hurried to the man's office in Astoria, Queens. Mr. Hoque handed over a check and received a stack of papers. He signed his name and left, eager to tell his wife.

Mr. Hoque made about $30,000 that year. He had no idea, he said later, that he had just signed a contract that required him to pay $1.7 million.

Over the past year, a spate of suicides by taxi drivers in New York City has highlighted in brutal terms the overwhelming debt and financial plight of medallion owners. All along, officials have blamed the crisis on competition from ride-hailing companies such as Uber and Lyft.

But a New York Times investigation found much of the devastation can be traced to a handful of powerful industry leaders who steadily and artificially drove up the price of taxi medallions, creating a bubble that eventually burst. Over more than a decade, they channeled thousands of drivers into reckless loans and extracted hundreds of millions of dollars before the market collapsed.

These business practices generated huge profits for bankers, brokers, lawyers, investors, fleet owners and debt collectors. The leaders of nonprofit credit unions became multimillionaires. Medallion brokers grew rich enough to buy yachts and waterfront properties. One of the most successful bankers hired the rap star Nicki Minaj to perform at a family party.

But the methods stripped immigrant families of their life savings, crushed drivers under debt they could not repay and engulfed an industry that has long defined New York. More than 950 medallion owners have filed for bankruptcy, according to a Times analysis of court records. Thousands more are barely hanging on.

The practices were strikingly similar to those behind the housing market crash that led to the 2008 global economic meltdown: Banks and loosely regulated private lenders wrote risky loans and encouraged frequent refinancing; drivers took on debt they could not afford, under terms they often did not understand.

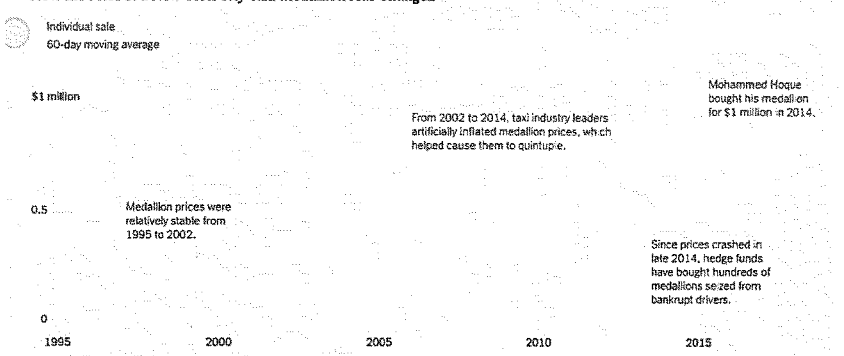
Some big banks even entered the taxi industry in the aftermath of the housing crash, seeking a new market, with new borrowers.

The combination of easy money, eager borrowers and the lure of a rare asset helped prices soar far above what medallions were really worth. Some industry leaders fed the frenzy by purposefully overpaying for medallions in order to inflate prices, The Times found.

Between 2002 and 2014, the price of a medallion rose to more than $1 million from $200,000, even though city records showed that driver incomes barely changed.

About 4,000 drivers bought medallions in that period, records show. They were excited to buy, but they were enticed by a dubious premise.

How the Price of a New York City Taxi Medallion Has Changed

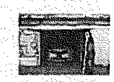


By Scott Reinhard | Source: New York City Taxi and Limousine Commission

"The whole thing was like a Ponzi scheme because it totally depended on the value going up," said Haywood Miller, a debt specialist who has consulted for both borrowers and lenders. "The part that wasn't fair was the guy who's buying is an immigrant, maybe someone who couldn't speak English. They were conned."

…e about The Times's investigation.

As Thousands of Taxi Drivers Were Trapped in Loans, Top Officials Counted the Money May 19, 2019



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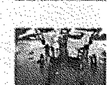
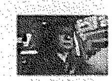


How NYC Taxi Drivers Bought Medallions and Became Victims of a Reckless Lending Scheme June 7, 2019



After the medallion market collapsed, Mayor Bill de Blasio opted not to fund a bailout, and earlier this year, the City Council speaker, Corey Johnson, shut down the committee overseeing the taxi industry, saying it had completed most of its work.

Over 10 months, The Times interviewed 450 people, built a database of every medallion sale since 1995 and reviewed thousands of individual loans and other documents, including internal bank records and confidential profit-sharing agreements.

The investigation found example after example of drivers trapped in exploitative loans, including hundreds who signed interest-only loans that required them to pay exorbitant fees, forfeit their legal rights and give up almost all their monthly income, indefinitely.

A Pakistani immigrant who thought he was just buying a car ended up with a $780,000 medallion loan that left him unable to pay rent. A …gladeshi immigrant said he was told to lie about his income on his loan application; he eventually lost his medallion. A Haitian immigrant who worked to exhaustion to make his monthly payments discovered he had been paying only interest and went bankrupt.

Abdur Rahim, who is from Bangladesh, is one of several cab drivers who allege they were duped into signing exploitative loans.

It is unclear if the practices violated any laws. But after reviewing The Times's findings, experts said the methods were among the worst that have been used since the housing crash.

"I don't think I could concoct a more predatory scheme if I tried," said Roger Bertling, the senior instructor at Harvard Law School's clinic on predatory lending and consumer protection. "This was modern-day indentured servitude."

Lenders developed their techniques in New York but spread them to Chicago, Boston, San Francisco and elsewhere, transforming taxi industries across the United States.

In interviews, lenders denied wrongdoing. They noted that regulators approved their practices, and said some borrowers made poor decisions and assumed too much debt. They said some drivers were happy to use climbing medallion values as collateral to take out cash, and that those who sold their medallions at the height of the market made money.

The lenders said they believed medallion values would keep increasing, as they almost always had. No one, they said, could have predicted Uber and Lyft would emerge to undercut the business.

"People love to blame banks for things that happen because they're big bad banks," said Robert Familant, the former head of Progressive Credit Union, a small nonprofit that specialized in medallion loans. "We didn't do anything, in my opinion, other than try to help small businesspeople become successful."

Mr. Familant made about $30 million in salary and deferred payouts during the bubble, including $4.8 million in bonuses and incentives in 2014, the year it burst, according to disclosure forms.

Meera Joshi, who joined the Taxi and Limousine Commission in 2011 and became chairwoman in 2014, said it was not the city's job to regulate lending. But she acknowledged that officials saw red flags and could have done something.

"There were lots of players, and lots of people just watched it happen. So the T.L.C. watched it happen. The lenders watched it happen. The borrowers watched it happen as their investment went up, and it wasn't until it started falling apart that people started taking action and pointing fingers," said Ms. Joshi, who left the commission in March. "It was a party. Why stop it?"

A valuable piece of tin

Cabs crowded a Midtown street in New York City in 1945.
William C. Shrout/The LIFE Picture Collection, via Getty Images

Every day, about 250,000 people hail a New York City yellow taxi. Most probably do not know they are participating in an unconventional economic system about as old as the Empire State Building.

The city created taxi medallions in 1937. Unlicensed cabs crowded city streets, so officials designed about 12,000 specialized tin made it illegal to operate a taxi without one bolted to the hood of the car. The city sold each medallion for $10.

People who bought medallions could sell them, just like any other asset. The only restriction: Officials designated roughly half as "independent medallions" and eventually required that those always be owned by whoever was driving that cab.

Over time, as yellow taxis became symbols of New York, a cutthroat industry grew around them. A few entrepreneurs obtained most of the nonindependent medallions and built fleets that controlled the market. They were family operations largely based in the industrial neighborhoods of Hell's Kitchen in Manhattan and Long Island City in Queens.

A sampling of medallions issued by the Taxi and Limousine Commission through the years.
Sam Falk, Fred R. Conrad, John Sotomayor, Andrea Mohin and Richard Perry/The New York Times, Kholood Eid for The New York Times

Allegations of corruption, racism and exploitation dogged the industry. Some fleet bosses were accused of cheating drivers. Some drivers refused to go outside Manhattan or pick up black and Latino passengers. Fleet drivers typically worked 60 hours a week, made less than minimum wage and received no benefits, according to city studies.

Still, driving could serve as a path to the middle class. Drivers could save to buy an independent medallion, which would increase their earnings and give them an asset they could someday sell for a retirement nest egg.

Those who borrowed money to buy a medallion typically had to submit a large down payment and repay within five to 10 years.

The conservative lending strategy produced modest returns. The city did not release new medallions for almost 60 years, and values slowly climbed, hitting $100,000 in 1985 and $200,000 in 1997.

"It was a safe and stable asset, and it provided a good life for those of us who were lucky enough to buy them," said Guy Roberts, who began driving in 1979 and eventually bought medallions and formed a fleet. "Not an easy life, but a good life."

"And then," he said, "everything changed."

5 a.m. to 5 p.m., six days a week

Before coming to America, Mohammed Hoque lived comfortably in Chittagong, a city on Bangladesh's southern coast. He was a serious student and a gifted runner, despite a small and stocky frame. His father and grandfather were teachers; he said he surpassed them, becoming an education official with a master's degree in management. He supervised dozens of schools and traveled on a government-issued motorcycle. In 2004, when he was 33, he married Fouzia Mahabub.

t same year, several of his friends signed up for the green card lottery, and their thirst for opportunity was contagious. He applied, and won.

His wife had an uncle in Jamaica, Queens, so they went there. They found a studio apartment. Mr. Hoque wanted to work in education, but he did not speak enough English. A friend recommended the taxi industry.

It was an increasingly common move for South Asian immigrants. In 2005, about 40 percent of New York cabbies were born in Bangladesh, India or Pakistan, according to the United States Census Bureau. Over all, just 9 percent were born in the United States.

Mr. Hoque and his wife emigrated from Bangladesh, and have rented the same apartment in Queens since 2005.

Mr. Hoque joined Taxifleet Management, a large fleet run by the Weingartens, a Russian immigrant family whose patriarchs called themselves the "Three Wise Men."

He worked 5 a.m. to 5 p.m., six days a week. On a good day, he said, he brought home $100. He often felt lonely on the road, and he developed back pain from sitting all day and diabetes, medical records show.

He could have worked fewer shifts. He also could have moved out of the studio. But he drove as much as feasible and spent as little as possible. He had heard the city would soon be auctioning off new medallions. He was saving to buy one.

'They used it as an A.T.M.'

Andrew Murstein, left, with his father, Alvin. Chester Higgins Jr./The New York Times

In the early 2000s, a new generation took power in New York's cab industry. They were the sons of longtime industry leaders, and they had new ideas for making money.

Few people represented the shift better than Andrew Murstein.

Mr. Murstein was the grandson of a Polish immigrant who bought one of the first medallions, built one of the city's biggest fleets and began informally lending to other buyers in the 1970s. Mr. Murstein attended business school and started his career at Bear Stearns and Salomon Brothers, the investment banks.

When he joined the taxi business, he has said, he pushed his family to sell off many medallions and to establish a bank to focus on lending. Medallion Financial went public in 1996. Its motto was, "In niches, there are riches."

Dozens of industry veterans said Mr. Murstein and his father, Alvin, were among those who helped to move the industry to less conservative lending practices. The industry veterans said the Mursteins, as well as others, started saying medallion values would always rise and used that idea to focus on lending to lower-income drivers, which was riskier but more profitable.

COMING IN JUNE FROM THE NEW YORK TIMES: "THE WEEKLY" ON FX AND HULU

Watch a preview of our television show, "The Weekly," which will feature The Times' investigation of the taxi industry. Mohammad Hossain emptied his savings to buy a taxi medallion. He had no idea he had just signed away his financial freedom.

The strategy began to be used by the industry's other major lenders — Progressive Credit Union, Melrose Credit Union and Lomto Credit Union, all family-run nonprofits that made essentially all their money from medallion loans, according to financial disclosures.

"We didn't want to be the one left behind," said Monte Silberger, Lomto's controller and then chief financial officer from 1999 to 2017.

The lenders began accepting smaller down payments. By 2013, many medallion buyers were not handing over any down payment at all, according to an analysis of buyer applications submitted to the city.

"It got to a point where we didn't even check their income or credit score," Mr. Silberger said. "It didn't matter."

Lenders also encouraged existing borrowers to refinance and take out more money when medallion prices rose, according to interviews with dozens of borrowers and loan officers. There is no comprehensive data, but bank disclosures suggest that thousands of owners refinanced.

Industry veterans said it became common for owners to refinance to buy a house or to put children through college. "You'd walk into the bank and walk out 30 minutes later with an extra $200,000," said Lou Bakalar, a broker who arranged loans.

Yvon Augustin has been living with help from his children ever since he declared bankruptcy and lost his taxi medallion.

Some pointed to the refinancing to argue that irresponsible borrowers fueled the crisis. "Medallion owners were misusing it," said Aleksey Medvedovskiy, a fleet owner who also worked as a broker. "They used it as an A.T.M."

As lenders loosened standards, they increased returns. Rather than raising interest rates, they made borrowers pay a mix of costs — origination fees, legal fees, financing fees, refinancing fees, filing fees, fees for paying too late and fees for paying too early, according to a Times review of more than 500 loans included in legal cases. Many lenders also made borrowers split their loan and pay a much higher rate on the second loan, documents show.

Lenders also extended loan lengths. Instead of requiring repayment in five or 10 years, they developed deals that lasted as long as 50 years, locking in decades of interest payments. And some wrote interest-only loans that could continue forever.

"We couldn't figure out why the company was doing so many interest-only loans," said Michelle Pirritano, a Medallion Financial loan analyst from 2007 to 2011. "It was a good revenue stream, but it didn't really make sense as a loan. I mean, it wasn't really a loan, because it wasn't being repaid."

Almost every loan reviewed by The Times included a clause that spiked the interest rate to as high as 24 percent if it was not repaid in three years. Lenders included the clause — called a "balloon" — so that borrowers almost always had to extend the loan, possibly at a her rate than in the original terms, and with additional fees.

Yvon Augustin was caught in one of those loans. He bought a medallion in 2006, a decade after emigrating from Haiti. He said he paid $2,275 every month — more than half his income, he said — and thought he was paying off the loan. But last year, his bank used the balloon to demand that he repay everything. That is when he learned he had been paying only the interest, he said.

Mr. Augustin, 69, declared bankruptcy and lost his medallion. He lives off assistance from his children.

Big banks arrive

During the global financial crisis, Eugene Haber, a lawyer for the taxi industry, started getting calls from bankers he had never met.

Mr. Haber had written a template for medallion loans in the 1970s. By 2008, his thick mustache had turned white, and he thought he knew everybody in the industry. Suddenly, new bankers began calling his suite in a Long Island office park. Capital One, Signature Bank, New York Commercial Bank and others wanted to issue medallion loans, he said.

Some of the banks were looking for new borrowers after the housing market collapsed, Mr. Haber said. "They needed somewhere else to invest," he said. He said he represented some banks at loan signings but eventually became embittered because he believed banks were knowingly lending to people who could not repay.

Instead of lending directly, the big banks worked through powerful industry players. They enlisted large fleet owners and brokers — especially Neil Greenbaum, Richard Chipman, Savas Konstantinides, Roman Sapino and Basil Messados — to use the banks' money to lend to medallion buyers. In return, the owners and brokers received a cut of the monthly payments and sometimes an additional fee.

The fleet owners and brokers, who technically issued the loans, did not face the same scrutiny as banks.

"They did loans that were frankly insane," said Larry Fisher, who from 2003 to 2016 oversaw medallion lending at Melrose Credit Union, one of the biggest lenders originally in the industry. "It contributed to the price increases and put a lot of pressure on the rest of us to keep up."

Evgeny Freidman, a fleet owner, has said he purposely overbid for taxi medallions in order to drive up their value. Sasha Maslov

Still, Mr. Fisher said, Melrose followed lending rules. "A lot of people tend to blame others for their own misfortune," he said. "If they want to blame the lender for the medallion going down the tubes the way it has, I think they're misplaced."

Konstantinides, a fleet owner and the broker and lender who arranged Mr. Hoque's loans, said every loan issued by his company ..ided by federal and state banking guidelines. "I am very sympathetic to the plight of immigrant families who are seeking a better life in this country and in this city," said Mr. Konstantinides, who added that he was also an immigrant.

Walter Rabin, who led Capital One's medallion lending division between 2007 and 2012 and has led Signature Bank's medallion lending division since, said he was one of the industry's most conservative lenders. He said he could not speak for the brokers and fleet owners with whom he worked.

Mr. Rabin and other Signature executives denied fault for the market collapse and blamed the city for allowing ride-hail companies to enter with little regulation. "It's the City of New York that took the biggest advantage of the drivers," said Joseph J. DePaolo, the president and chief executive of Signature. "It's not the banks."

New York Commercial Bank said in a statement that it began issuing medallion loans before the housing crisis and that they were a very small part of its business. The bank did not engage in risky lending practices, a spokesman said.

Mr. Messados said in an interview that he disagreed with interest-only loans and other one-sided terms. But he said he was caught between banks developing the loans and drivers clamoring for them. "They were insisting on this," he said. "What are you supposed to do? Say, 'I'm not doing the sale?'"

Several lenders challenged the idea that borrowers were unsophisticated. They said that some got better deals by negotiating with multiple lenders at once.

Mr. Greenbaum, Mr. Chipman and Mr. Sapino declined to comment, as did Capital One.

Some fleet owners worked to manipulate prices. In the most prominent example, Evgeny Freidman, a brash Russian immigrant who owned so many medallions that some called him "The Taxi King," said he purposefully overpaid for medallions sold at city auctions. He reasoned that the higher prices would become the industry standard, making the medallions he already owned worth more. Mr. Freidman, who was partners with Michael Cohen, President Trump's former lawyer, disclosed the plan in a 2012 speech at Yeshiva University. He ently pleaded guilty to felony tax fraud. He declined to comment.

As medallion prices kept increasing, the industry became strained. Drivers had to work longer hours to make monthly payments. Eventually, loan records show, many drivers had to use almost all their income on payments.

"The prices got to be ridiculous," said Vincent Sapone, the retired manager of the League of Mutual Taxi Owners, an owner association. "When it got close to $1 million, nobody was going to pay that amount of money, unless they came from another country. Nobody from Brooklyn was going to pay that."

Some drivers have alleged in court that lenders tricked them into signing loans.

Muhammad Ashraf, who is not fluent in English, said he thought he was getting a loan to purchase a car but ended up in debt to buy a taxi medallion instead.

Muhammad Ashraf, a Pakistani immigrant, alleged that a broker, Heath Candero, duped him into a $780,000 interest-only loan. He said in an interview in Urdu that he could not speak English fluently and thought he was just signing a loan to buy a car. He said he found out about the loan when his bank sued him for not fully repaying. The bank eventually decided not to pursue a case against Mr. Ashraf. He also filed a lawsuit against Mr. Candero. That case was dismissed. A lawyer for Mr. Candero declined to comment.

Abdur Rahim, a Bangladeshi immigrant, alleged that his lender, Bay Ridge Credit Union, inserted hidden fees. In an interview, he added he was told to lie on his loan application. The application, reviewed by The Times, said he made $128,389, but he said his tax return showed he made about $25,000. In court, Bay Ridge has denied there were hidden fees and said Mr. Rahim was "confusing the predatory-lending statute with a mere bad investment." The credit union declined to comment.

Several employees of lenders said they were pushed to write loans, encouraged by bonuses and perks such as tickets to sporting events and free trips to the Bahamas.

They also said drivers almost never had lawyers at loan closings. Borrowers instead trusted their broker to represent them, even though, unbeknown to them, the broker was often getting paid by the bank.

Stan Zurbin, who between 2009 and 2012 did consulting work for a lender that issued medallion loans, said that as prices rose, lenders in the industry increasingly lent to immigrants.

"They didn't have 750 credit scores, let's just say," he said. "A lot of them had just come into the country. A lot of them just had no idea what they were signing."

The $1 million medallion

Mrs. Hoque did not want her husband to buy a medallion. She wanted to use their savings to buy a house. They had their first child in 2008, and they planned to have more. They needed to leave the studio apartment, and she thought a home would be a safer investment.

But Mr. Hoque could not shake the idea, especially after several friends bought medallions at the city's February 2014 auction.

One friend introduced him to a man called "Big Savas." It was Mr. Konstantinides, a fleet owner who also had a brokerage and a lending company, Mega Funding.

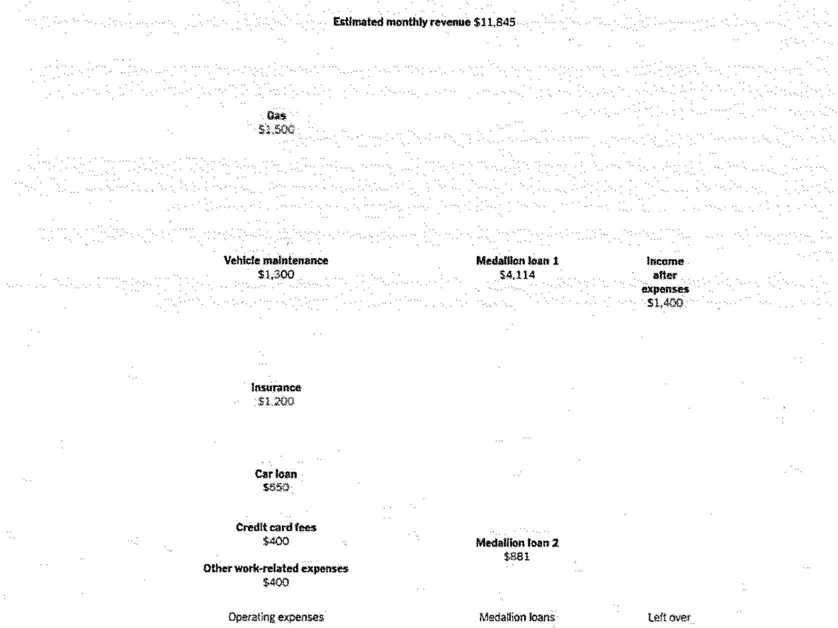
The call came a few weeks later. A medallion owner had died, and the family was selling for $1 million.

Mr. Hoque said he later learned the $50,000 he paid up front was just for taxes. Mega eventually requested twice that amount for fees and a down payment, records show. Mr. Hoque said he maxed out credit cards and borrowed from a dozen friends and relatives.

Fees and interest would bring the total repayment to more than $1.7 million, documents show. It was split into two loans, both issued by Mega with New York Commercial Bank. The loans made him pay $5,000 a month — most of the $6,400 he could earn as a medallion owner.

Mohammed Hoque's Medallion Loans Consumed Most of His Taxi Revenue

After paying his two medallion loans and business costs, Mr. Hoque had about $1,400 left over each month to pay the rent on his studio apartment in Queens and cover his living expenses.



By Scott Reinhard | Note: Loan payment amounts are described in documents obtained by The New York Times. All other costs are estimates based on Mr. Hoque's records and industry averages as of 2014.

Mr. Konstantinides said in his statement that lenders disclosed all the fees to Mr. Hoque and encouraged him to consult with a lawyer and accountant. "Mr. Hoque had extensive experience and knowledge of the taxi industry," he said.

By the time the deal closed in July 2014, Mr. Hoque had heard of a new company called Uber. He wondered if it would hurt the business, but nobody seemed to be worried.

As Mr. Hoque drove to the Taxi and Limousine Commission's downtown office for final approval of the purchase, he fantasized about becoming rich, buying a big house and bringing his siblings to America. After a commission official reviewed his application and loan records, he said he was ushered into the elegant "Taxi of Tomorrow" room. An official pointed a camera. Mr. Hoque smiled.

Nicki Minaj and yachts

In late 2012, Andrew Murstein appeared on the Fox Business Network to talk about medallions.

"These are little cash cows running around the city spitting out money," Mr. Murstein said, beaming in a navy suit and pink tie.

He did not mention he was quietly leaving the business, a move that would benefit him when the market collapsed.

By the time of the appearance, Medallion Financial had been cutting the number of medallion loans on its books for years, according to disclosures it filed with the Securities and Exchange Commission. Mr. Murstein later said the company started exiting the business and focusing on other ventures before 2010.

Mr. Murstein declined numerous interview requests. He also declined to answer some written questions, including why he promoted medallions while exiting the business. In emails and through a spokesman, he acknowledged that Medallion Financial reduced down payments but said it rarely issued interest-only loans or charged borrowers for repaying loans too early.

"Many times, we did not match what our competitors were willing to do and in retrospect, thankfully, we lost the business," he wrote to The Times.

Interviews with three former staffers, and a Times review of loan documents that were filed as part of lawsuits brought by Medallion Financial against borrowers, indicate the company issued many interest-only loans and routinely included a provision allowing it to charge borrowers for repaying loans too early.

Other lenders also left the taxi industry or took precautions long before the market collapsed.

The credit unions specializing in the industry kept making new loans. But between 2010 and 2014, they sold the loans to other financial institutions more often than in the previous five years, disclosure forms show. Progressive Credit Union, run by Mr. Familant, sold loans off almost twice as often, the forms show. By 2012, that credit union was selling the majority of the loans it issued.

In a statement, Mr. Familant said the selling of loans was a standard banking practice that did not indicate a lack of confidence in the market.

Several banks used something called a confession of judgment. It was an obscure document in which the borrower admitted defaulting on the loan — even before taking out any money at all — and authorized the bank to do whatever it wanted to collect.

Larry Fisher was the medallion lending supervisor at Melrose Credit Union, one of the biggest lenders originally in the industry, from 2003 to 2016.

Congress has banned that practice in consumer loans, but not in business loans, which is how lenders classified medallion deals. Many states have barred it in business loans, too, but New York is not among them.

Even as some lenders quietly braced for the market to fall, prices kept rising, and profits kept growing.

By 2014, many of the people who helped create the bubble had made millions of dollars and invested it elsewhere.

Medallion Financial started focusing on lending to R.V. buyers and bought a professional lacrosse team and a Nascar team, painting the car to look like a taxi. Mr. Murstein and his father made more than $42 million between 2002 and 2014, disclosures show. In 2015, Ms. Minaj, the rap star, performed at his son's bar mitzvah.

The Melrose C.E.O., Alan Kaufman, had the highest base salary of any large state-chartered credit union leader in America in 2013 and 2015, records show. His medallion lending supervisor, Mr. Fisher, also made millions.

It is harder to tell how much fleet owners and brokers made, but in recent years news articles have featured some of them with new boats and houses.

Mr. Messados's bank records, filed in a legal case, show that by 2013, he had more than $50 million in non-taxi assets, including three homes and a yacht.

The bubble bursts

At least eight drivers have committed suicide, including three medallion owners with overwhelming loans.

The medallion bubble burst in late 2014. Uber and Lyft may have hastened the crisis, but virtually all of the hundreds of industry veterans interviewed for this article, including many lenders, said inflated prices and risky lending practices would have caused a collapse even if ride-hailing had never been invented.

At the market's height, medallion buyers were typically earning about $5,000 a month and paying about $4,500 to their loans, according to an analysis by The Times of city data and loan documents. Many owners could make their payments only by refinancing when medallion values increased, which was unsustainable, some loan officers said.

City data shows that since Uber entered New York in 2011, yellow cab revenue has decreased by about 10 percent per cab, a significant bite for low-earning drivers but a small drop compared with medallion values, which initially rose and then fell by 90 percent.

As values fell, borrowers asked for breaks. But many lenders went the opposite direction. They decided to leave the business and called in their loans.

They used the confessions to get hundreds of judgments that would allow them to take money from bank accounts, court records show. Some tried to get borrowers to give up homes or a relative's assets. Others seized medallions and quickly resold them for profit, while still charging the original borrowers fees and extra interest. Several drivers have alleged in court that their lenders ordered them to buy life insurance.

Many lenders hired a debt collector, Anthony Medina, to seize medallions from borrowers who missed payments.

The scars left on cabs after medallions were removed.

Mr. Medina left notes telling borrowers they had to give the lender "relief" to get their medallions back. The notes, which were reviewed by The Times, said the seizure was "authorized by vehicle apprehension unit." Some drivers said Mr. Medina suggested he was a police officer and made them meet him at a park at night and pay $550 extra in cash.

One man, Jean Demosthenes, a 64-year-old Haitian immigrant who could not speak English, said in an interview in Haitian Creole that Mr. Medina cornered him in Midtown, displayed a gun and took his car.

In an interview, Mr. Medina denied threatening anyone with a gun. He said he requested cash because drivers who had defaulted could not be trusted to write good checks. He said he met drivers at parks and referred to himself as the vehicle apprehension unit because he wanted to hide his identity out of fear he could be targeted by borrowers.

"You're taking words from people that are deadbeats and delinquent people. Of course, they don't want to see me," he said. "I'm not the bad guy. I'm just the messenger from the bank."

Some lenders, especially Signature Bank, have let borrowers out of their loans for one-time payments of about $250,000. But to get that money, drivers have had to find new loans. Mr. Greenbaum, a fleet owner, has provided many of those loans, sometimes at interest rates of up to 15 percent, loan documents and interviews showed.

New York Commercial Bank said in its statement it also had modified some loans.

Other drivers lost everything. Most of the more than 950 owners who declared bankruptcy had to forfeit their medallions. Records indicate many were bought by hedge funds hoping for prices to rise. For now, cabs sit unused.

Jean Demosthenes said his medallion was repossessed by a man with a gun. The man denied that he was armed.

Bhairavi Desai, founder of the Taxi Workers Alliance, which represents drivers and independent owners, has asked the city to bail out owners or refund auction purchasers. Others have urged the city to pressure banks to forgive loans or soften terms.

After reviewing The Times's findings, Deepak Gupta, a former top official at the United States Consumer Financial Protection Bureau, said the New York Attorney General's Office should investigate lenders.

Mr. Gupta also said the state should close the loophole that let lenders classify medallion deals as business loans, even though borrowers had to guarantee them with everything they owned. Consumer loans have far more disclosure rules and protections.

"These practices were indisputably predatory and would be illegal if they were considered consumer loans, rather than business loans," he said.

Last year, amid eight known suicides of drivers, including three medallion owners with overwhelming loans, the city passed a temporary cap on ride-hailing cars, created a task force to study the industry and directed the city taxi commission to do its own analysis of the debt crisis.

Earlier this year, the Council eliminated the committee overseeing the industry after its chairman, Councilman Rubén Díaz Sr. of the Bronx, said the Council was "controlled by the homosexual community." The speaker, Mr. Johnson, said, "The vast majority of the legislative work that we have been looking at has already been completed."

In a statement, a council spokesman said the committee's duties had been transferred to the Committee on Transportation. "The Council is working to do as much as it can legislatively to help all drivers," the spokesman said.

As of last week, no one had been appointed to the task force.

'An unhuman life'

On the last day of 2018, Mr. and Mrs. Hoque brought their third child home from the hospital.

Mr. Hoque cleared space for the boy's crib, pushing aside his plastic bags of T-shirts and the fan that cooled the studio. He looked around. He could not believe he was still living in the same room.

His loan had quickly faltered. He could not make the payments and afford rent, and his medallion was seized. Records show he paid more than $12,000 to Mega, and he said he paid another $550 to Mr. Medina to get it back. He borrowed from friends, promising it would not happen again. Then it happened four more times, he said.

Mr. Konstantinides, the broker, said in his statement that he met with Mr. Hoque many times and twice modified one of his loans in order to lower his monthly payments. He also said he gave Mr. Hoque extra time to make some payments.

In all, between the initial fees, monthly payments and penalties after the seizures, Mr. Hoque had paid about $400,000 into the medallion by the beginning of this year.

But he still owed $915,000 more, plus interest, and he did not know what to do. Bankruptcy would cost money, ruin his credit and remove his only income source. And it would mean a shameful end to years of hard work. He believed his only choice was to keep working and to keep paying.

His cab was supposed to be his ticket to money and freedom, but instead it seemed like a prison cell. Every day, he got in before the sun rose and stayed until the sky began to darken. Mr. Hoque, now 48, tried not to think about home, about what he had given up and what he had dreamed about.

"It's an unhuman life," he said. "I drive and drive and drive. But I don't know what my destination is."

The New York Times

Why Are Taxi Drivers in New York Killing Themselves?

Three taxi owners and five other professional drivers have died by suicide over the last year. It has prompted a flurry of legislation to improve working conditions for drivers.

By Emma G. Fitzsimmons

Dec. 2, 2018

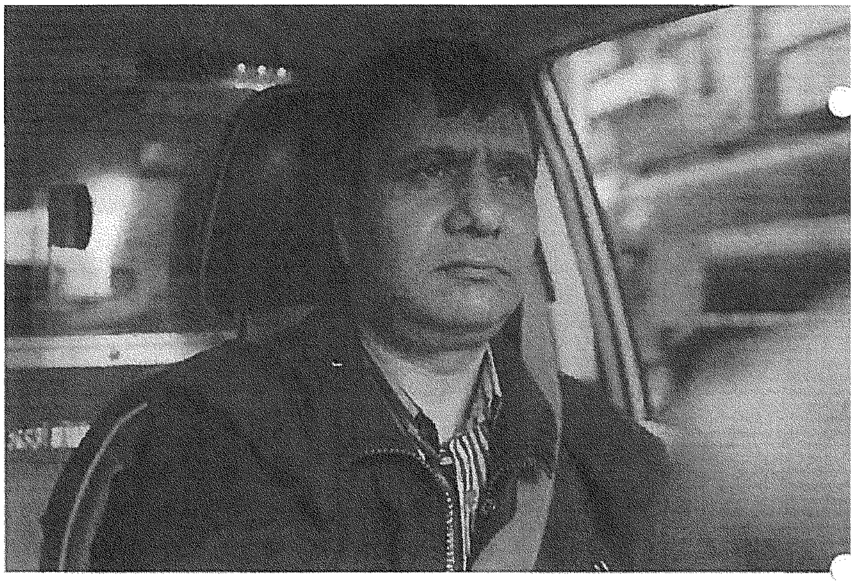
A taxi driver named Roy Kim recently became the eighth professional driver to die by suicide in New York over the last year.

The city's taxi commissioner, Meera Joshi, has characterized the deaths as an epidemic. The stories have drawn attention to the economic despair in the industry and prompted the City Council to weigh new legislation to help taxi owners reduce their debt and to increase driver wages.

Each case is different and it is difficult to know why someone decides to take their life. Most of the drivers were immigrants in their 50s and 60s, some of whom had told friends and family that they were having a difficult time making a living as Uber began to dominate the ride-hailing industry.

Three of the drivers owned a taxi medallion — the aluminum plate required to drive a cab in New York that once sold for more than $1 million. It is now worth as little as $200,000.

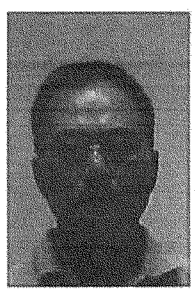
The Times's Investigation of the NYC Taxi Industry on Our TV Series, 'The Weekly.'
Watch the episode trailer.



How NYC Taxi Drivers Bought Medallions and Became Victims of a Reckless Lending Scheme
A new TV show from The New York Times on FX and Hulu
June 7, 2019

Here's what we know about Mr. Kim and the broader crisis:

Who was Roy Kim?



New York Taxi and Limousine Commission

Mr. Kim was a 58-year-old Korean immigrant who lived in Queens. He had driven a taxi for more than four years and bought a medallion last year for about $578,000 — an occasion he celebrated by having a sushi dinner with a driver he met years ago while waiting for passengers at Kennedy International Airport.

But Mr. Kim had complained to friends this year that he could not find fares. He began working more often, eventually driving seven days a week. Still, his friends were surprised by his death.

"There's no other reason but the financial aspect," said Kyung Ryong Kang, a friend and fellow driver who had celebrated at dinner with him last year. "It was harder and harder to survive."

On Nov. 5, Mr. Kim was found hanging by a belt from the doorway to his bedroom, the police said. He had an adult son who lives in South Korea. Friends have been unable to reach Mr. Kim's son.

A group of drivers recently held a vigil at Flushing Meadows Corona Park in Queens to remember him. Mr. Kang said he misses seeing Mr. Kim at the airport taxi lot.

"He was a generous person and always bought coffee for us," he said.

Were the other drivers worried about their finances?

Kholood Eid for The New York Times

Two other drivers who took their lives also owned taxi medallions: Nicanor Ochisor, who was from Romania, and Kenny Chow, who was from Burma. Both told friends they were worried about paying off their debt.

In February, a black-car driver named Douglas Schifter killed himself with a shotgun in front of City Hall. He had written on Facebook that Uber had flooded the streets with vehicles and complained about having to work 100 hours a week to survive.

Drivers for Uber and other car services have also raised concerns about low wages. The other drivers who died by suicide were: Fausto Luna, an Uber driver; Abdul Saleh, a taxi driver who had leased his vehicle; Danilo Castillo, a livery driver; and Alfredo Perez, a livery driver.

"This tragedy underscores the importance of finding new ways for government, the industry and lenders to work in unity to address the financial challenges that are weighing so heavily on our licensees," Ms. Joshi said in a statement after Mr. Kim's death.

What is the city doing to help drivers?

Taxi and Uber drivers gathered in October in northern Manhattan at a vigil for Fausto Luna, an Uber driver who killed himself. Demetrius Freeman for The New York Times

In August, the City Council approved a cap on Uber and other ride-hail vehicles — the first major American city to do so. The Council is considering a separate set of bills that would establish a health fund for drivers and create "driver assistance centers" to offer mental health counseling and financial advice.

Corey Johnson, the Council speaker, said the city was also looking at options to help medallion owners saddled with massive debt, from a partial bailout to a hardship fund. The New York Taxi Workers Alliance, a group that represents drivers, is urging the city to work with banks and philanthropic groups to write off 20 percent of taxi owners' outstanding debt.

At the vigil for Mr. Kim, the group's leader Bhairavi Desai had a message for taxi drivers who are struggling: The city is finally addressing the problem and things will get better soon.

"We know change is coming," she said.

After Mr. Ochisor's death, his family raised more than $30,000 to help pay off his medallion. An anonymous donor also contacted his son Gabriel Ochisor, wanting to help longtime drivers like his father. The donor sent him a batch of money orders, each worth $1,000, to deliver to 217 owners who bought their medallion before 1990 and still drive their taxi.

Mr. Ochisor is trying to reach all of the drivers to mail the gifts, which will be sent with a letter from the donor.

"Please know that your 3 decades (or more!) of service are appreciated and that my life has been made better by your having worked the streets," the letter says.

If you are having thoughts of suicide, call the National Suicide Prevention Lifeline at 1-800-273-8255 (TALK) or go to SpeakingOfSuicide.com/resources for a list of additional resources. Here's what you can do *when a loved one is severely depressed.*

Sangsuk Sylvia Kang contributed reporting.