

ACA INTERNATIONAL  
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# REMAINING COMPLIANT IN A SEA OF CHANGING EXPECTATIONS

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# Overview of Presentation

- Introduction to the Panelists
- Evolving Legal and Regulatory Requirements
- Managing Regulatory Change
- Avoiding Liability for Changes with Retroactive Effects
- Supervisory Expectations



# Panelists





## **John Schroeder**

**Midwest Regional Director, CFPB  
Office of Supervision Examinations**

Mr. Schroeder joined the CFPB in March 2013. Prior to becoming an acting regional director, he worked as the Assistant Regional Director and as a field manager in the Midwest region. Before coming to the Bureau, Mr. Schroeder spent over two decades working for the Indiana Department of Financial Institutions where he served as General Counsel and Deputy Director of Consumer Credit along with a number of other roles.



## **Alexandra Megaris**

**Counsel, Venable LLP**

Ms. Megaris is experienced in virtually all aspects of consumer protection laws. Her practice focuses on regulatory investigations and government enforcement matters involving state attorneys general, state regulatory agencies, and federal regulators including the CFPB and FTC. In addition to representing clients before government agencies, she advises on regulatory and compliance issues.



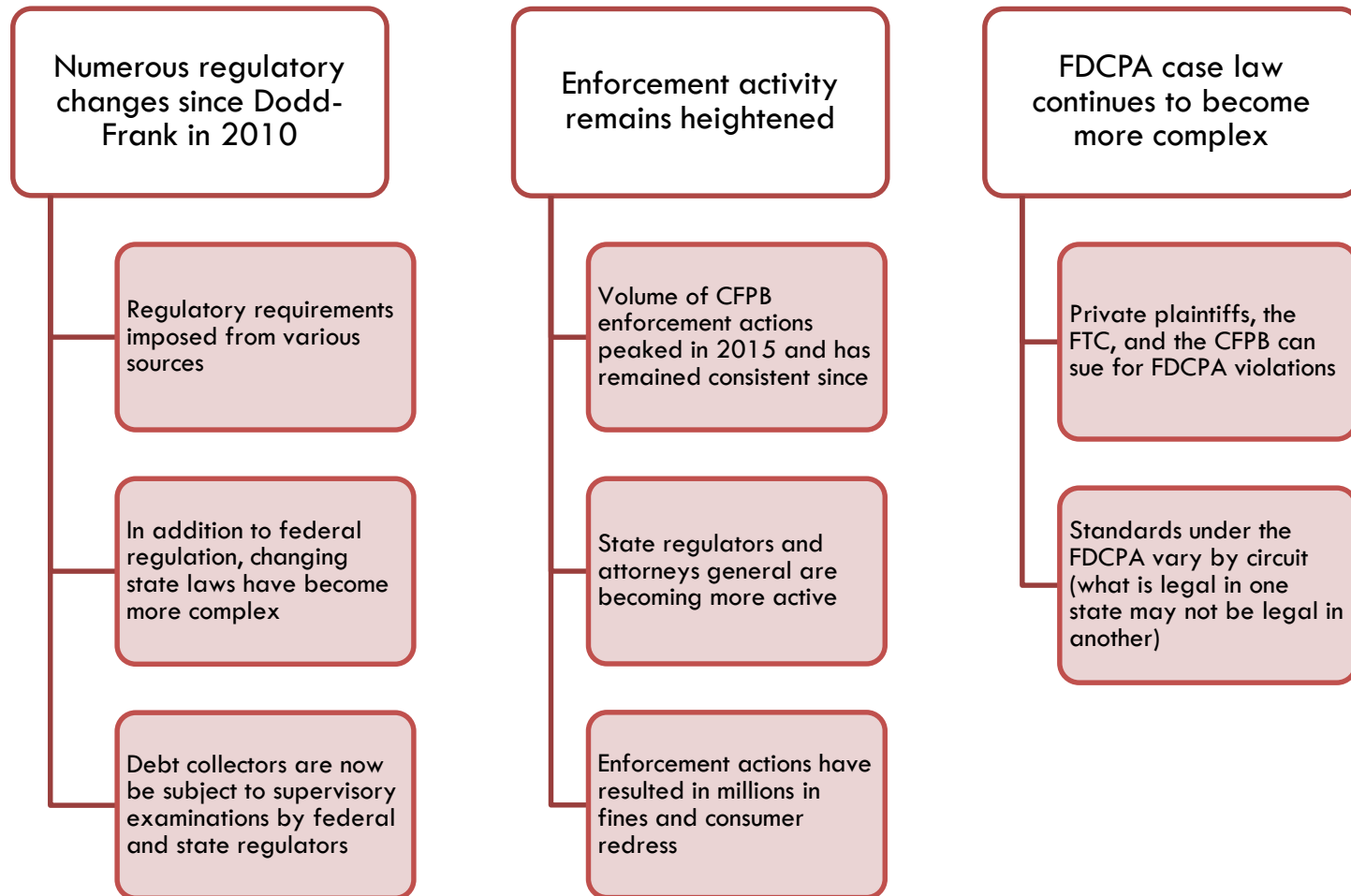
## **Katherine Lamberth**

**Associate, Venable LLP**

Ms. Lamberth advises bank and non-bank financial institutions on regulatory matters that arise under federal banking and consumer financial laws. Her practice includes representing financial institutions in corporate transactions and advising on regulatory compliance, examination, and enforcement matters. She also counsels clients on regulatory advocacy and administrative procedure efforts.



# Evolving Legal and Regulatory Requirements



# Drivers of Legal and Regulatory Expectations

Version 2 – October 2012

## CFPB Supervision and Examination Manual

This examination manual provides internal guidance to supervisory staff of the CFPB. It does not bind the CFPB and does not create any rights, benefits, or defenses, substantive or procedural, that are enforceable by any party in any manner. While every effort has been made to ensure accuracy, examination procedures should not be relied on as a legal reference.

**cfpb** Consumer Financial Protection Bureau



## Supervisory Highlights

**cfpb** Consumer Financial Protection Bureau

Fall 2014

### Weltman, Weinberg & Reis Co., L.P.A.

The Consumer Financial Protection Bureau (CFPB) filed a lawsuit in a federal district court against the debt collection law firm Weltman, Weinberg & Reis for falsely representing in millions of collection letters sent to consumers that attorneys were involved in collecting the debt.

DEBT COLLECTION ENFORCEMENT

DATE FILED JAN 09, 2017

### Works & Lentz, Inc.; Works & Lentz of Tulsa, Inc., and Harry A. Lentz, Jr.

The Consumer Financial Protection Bureau (CFPB) is taking action against two medical debt collection law firms and their president for falsely representing that letters and calls - some threatening legal action - were from attorneys attempting to collect on a debt when no attorney had yet reviewed the account.

DEBT COLLECTION ENFORCEMENT

DATE FILED NOV 02, 2016

### Northern Resolution Group, LLC, Douglas MacKinnon, Mark Gray, Enhanced Acquisitions, LLC, and Delray Capital, LLC,

Today the Consumer Financial Protection Bureau (CFPB), in partnership with the New York Attorney General, filed a lawsuit in a federal district court against the leaders of a massive debt collection scheme based out of Buffalo, N.Y.

DEBT COLLECTION ENFORCEMENT

July 28, 2016

## SMALL BUSINESS REVIEW PANEL FOR DEBT COLLECTOR AND DEBT BUYER RULEMAKING

### OUTLINE OF PROPOSALS UNDER CONSIDERATION AND ALTERNATIVES CONSIDERED

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# Drivers of Legal and Regulatory Expectations



FTC and State Law Enforcement Partners Announce  
More Actions and Results in Continuing Crackdown  
Against Abusive Debt Collectors

FOR RELEASE

January 7, 2016

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# What is Regulatory Change Management and Why is it Important?



# Regulatory Change Management *is* Compliance Management

- Regulatory change management refers to the process of preparing for and adapting to changes in regulatory and other requirements.
- Effective regulatory change management is critical to maintaining legal compliance, and should be incorporated to compliance management system (CMS).
- The CFPB expects every institution under its supervision and enforcement authority to have a CMS that covers regulatory change management.

# Compliance Management System

- A CMS is how an institution:
  - Establishes its compliance responsibilities;
  - Communicates those responsibilities to employees;
  - Ensures that responsibilities for meeting legal requirements and internal policies are incorporated into business processes;
  - Reviews operations to ensure responsibilities are carried out and legal requirements are met; and
  - Takes corrective action and updates tools, systems, and materials as necessary.
- Two interdependent components:
  - Board and Management Oversight; and
  - Compliance Program (policies and procedures; training; monitoring and/or audit; and consumer complaint response).



# Compliance Management Review

- Board and Management Oversight
  - Do the board and management respond promptly to changes in applicable Federal consumer financial laws by evaluating the change and implementing responses across impacted lines of business?
  - Do the board and management identify emerging compliance risks in the institution's products, services, and other activities?
  - The CFPB will review processes for the identification of new regulatory requirements, changes in requirements, and planning for implementation.



# Compliance Management Review

- Policies and Procedures
  - Are compliance policies and procedures maintained and modified to remain current and complete?
  - The CFPB will review policies and procedures to determine whether and how they address new or amended Federal consumer financial laws implemented since the most recent consumer compliance examination.

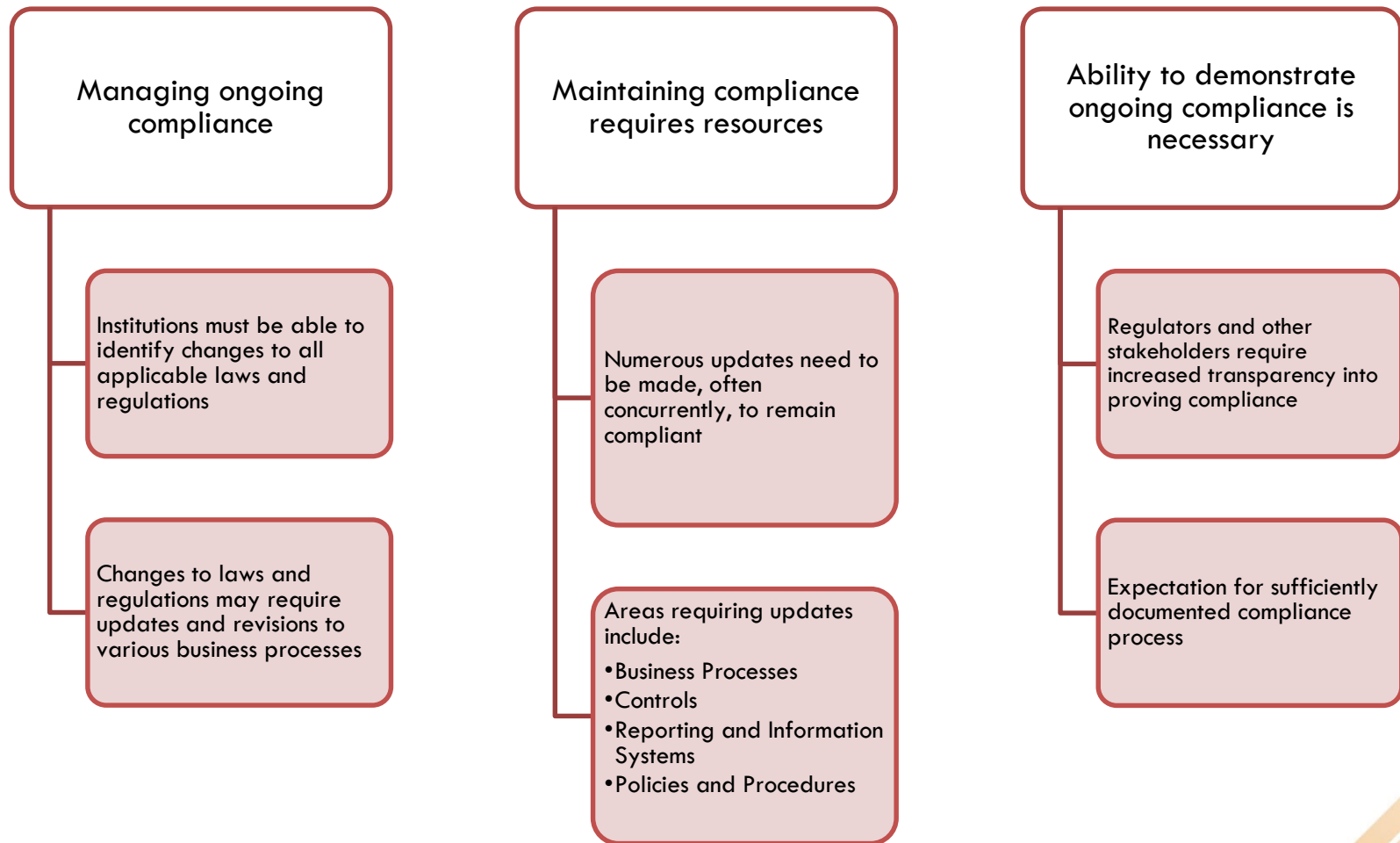


# Compliance Management Review

- Training
  - Is the compliance training program is updated proactively in advance of the rollout of the effective date of new or changed consumer protection laws and regulations to ensure that all staff is aware of compliance responsibilities?
  - The CFPB will review samples of the content of training materials and marketing (including scripts) related to new or changed regulatory requirements.

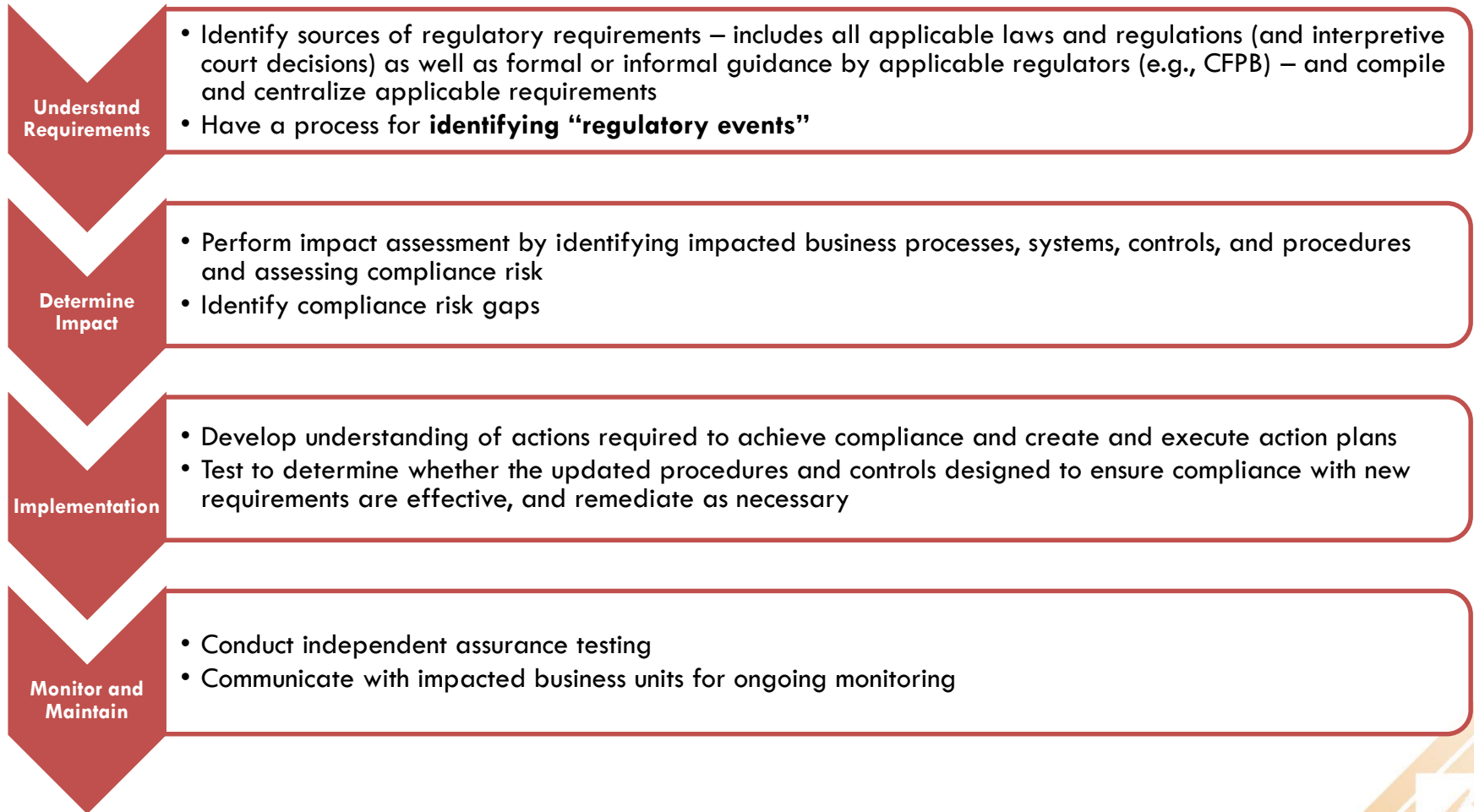


# Operationalizing and Maintaining Compliance





# Regulatory Compliance Management Model



# What is a “Regulatory Event”?

- A key aspect of regulatory change management is the ability to identify “regulatory events,” *i.e.*, relevant legal and regulatory developments that impose (or have the potential to impose) new compliance obligations.
- Examples:
  - Federal or state legislation
  - Federal or state rulemaking
  - Relevant enforcement actions or court decisions
  - Supervisory guidance



# Identifying Regulatory Events

- Relevant legal and regulatory developments should be identified at inception, well before they are finalized or become officially “binding.”
  - Prompt identification allows for additional time to review regulatory event, assess its applicability and impact.
  - Prompt identification is also important because institutions may be expected to adhere to proposed standards before they are formally adopted by law, regulation, or court order. Standards that are not yet codified may be enforced through broad enforcement provisions, such as UDAAP, or FDCPA.



# Case in Point: *Oliva v. Blatt, Hasanmiller, Leibsker & Moore LLC*

- The FDCPA requires collection lawsuits to be brought in the “judicial district or similar legal entity” where the debtor lives or where the contract sued upon was signed.
  - In *Newsom v. Friedman* (1996), the 7th Circuit held that the constitutionally-established Circuit Courts constituted “judicial districts,” and that administratively-established intra-Circuit municipal districts were not separate “judicial districts” for purposes of venue selection under the FDCPA.
  - In *Suesz v. Med-1 Solutions, LLC* (2014), the 7th Circuit overturned its decision in *Newsom*, holding that “the correct interpretation of ‘judicial district or similar legal entity’ . . . is the smallest geographic area that is relevant for determining venue in the court system in which the case is filed.”
- Defendant filed a collection lawsuit against Plaintiff in the first municipal district of the Circuit Court of Cook County, Illinois.
- Defendant’s choice of venue of was permissible under *Newsom*, but not under *Suesz*, which was decided while the collection action against Plaintiff was pending. Defendant voluntarily dismissed the collection action after *Suesz* was decided, and Plaintiff subsequently sued Defendant for violating the FDCPA’s venue provision.



# Case in Point: *Oliva v. Blatt, Hasanmiller, Leibsker & Moore LLC*

- The Defendant asserted a bona fide error defense under 15 USC § 1692k(c), which provides that a debt collector may not be liable for unintentional violations that “resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.”
  - The district court granted Defendant’s motion for summary judgment, holding that Defendant’s reliance on *Newsom*—and its failure to predict *Suesz*—was a bona fide error that did not give rise to FDCPA liability, despite a Supreme Court decision limiting the bona fide error defense to mistakes of fact (*Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*). A panel of the 7th Circuit affirmed.
  - However, the 7th Circuit reversed *en banc*, holding that the “new rule” instituted by *Suesz* applied retroactively and that Defendant’s reliance on *Newsom* was a mistake of law that foreclosed the bona fide error defense.



# Retroactivity of FDICPA Orders

- Judicial orders apply retrospectively, unless ruling is given only prospective effect “to avoid injustice or hardship to civil litigants who have justifiably relied on prior law.”
- The 7th Circuit declined to apply the new venue rule adopted in *Suez* prospectively for two reasons:
  1. Reliance on prior law is insufficient in itself to justify making a new judicial ruling prospective; and
  2. A prior decision of one intermediate appellate court does not create the appropriate degree of certainty that would justify reliance so as to estop retroactivity in order to protect settled expectations.



# Retroactivity of FDCPA Orders

- Prospective overruling on reliance grounds is impermissible unless the law had been so well settled before the overruling that it had been ***unquestionably prudent*** for the community to rely on the previous legal understanding.
- Prior to *Suesz*, debt collectors in the 7th Circuit had notice that the *Newsom* court may not have correctly interpreted the FDCPA's venue provision.
  - The decision of the 2nd Circuit in *Hess v. Cohen & Slamowitz* (2011) held that sub-districts could be considered separate “judicial districts” under the FDCPA.
  - Judge Posner's dissent to the panel's opinion stated “*Newsom* is unsound and should be overruled.”

# “Informal” Regulatory Expectations

- Additionally, regulators such as the CFPB can use UDAAAP provisions to enforce regulatory standards that are neither codified nor imposed by controlling FDCEPA precedent.
- Although there is debate over procedural adequacy, notice of regulatory expectations regarding “expected” standards may be obtained from a variety of sources:
  - CFPB Examination Procedures
  - Supervisory Highlights
  - Enforcement Actions (Complaints and Consent Orders)
  - Bulletins and Guidance on Analogous Topics
  - **Debt Collection ANPR and Proposals**





# Proactive Compliance with Debt Collection Proposals

- CFPB's debt collection rulemaking may be promulgated under CFPB's FDCPA and UDAAP rulemaking authority.
- Content of ANPR and SBREFA Proposals indicates the type of acts and practices the CFPB may consider unfair, deceptive, or abusive.

July 28, 2016	
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# Debt Collection Proposals: Topics of Interest

- Time-Barred Debt
  - Pay attention to statements that could be viewed as misrepresenting debt collectors' rights with respect to time-barred debts
- Consumer Consent
  - Exercise caution when relying on consumer consent given to previous debt collector to waive FDCPA protection
- Third-Party Relationships
  - Ensure service providers have necessary licenses and are lawfully able to engage in debt collection in states where collection activities occur
- Inconvenient Time, Place, and Methods
  - Document and, where possible, collect in accordance with consumers' communication preferences

# Role of Supervisory Examinations

- The purpose of CFPB examinations is to assess and address risks of harm to consumers, including the risk that a supervised entity does not operate in compliance with Federal consumer financial law.
- Where violations of law are identified by the CFPB during an examination, they may be addressed by public enforcement action or non-public supervisory action.
- Factors:
  - Severity of each violation
  - Whether violative conduct has ceased or is ongoing and likely to result in repeat violations
  - Whether violations appear to target certain classes, including servicemembers, older consumers, or economically vulnerable consumers
  - Importance of deterrence and pervasiveness of violative practices
  - Variety of violations and number of products affected by the violations



# Investigations and Enforcement Actions

- May investigate covered persons and service providers by issuing administrative subpoenas and compelling testimony.
- May issue cease-and-desist orders.
- May initiate actions in administrative or federal district court and obtain:
  - Monetary relief for consumers (e.g., refunds, payment of damages)
  - Disgorgement for unjust enrichment
  - Injunctive relief
  - Civil money penalties



# Investigation and Enforcement Triggers



# Thank You.



# Questions?



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