



Celebrating **20** Years of Connections

# Navigating Debt Buying in a “Regulation By Enforcement” Environment

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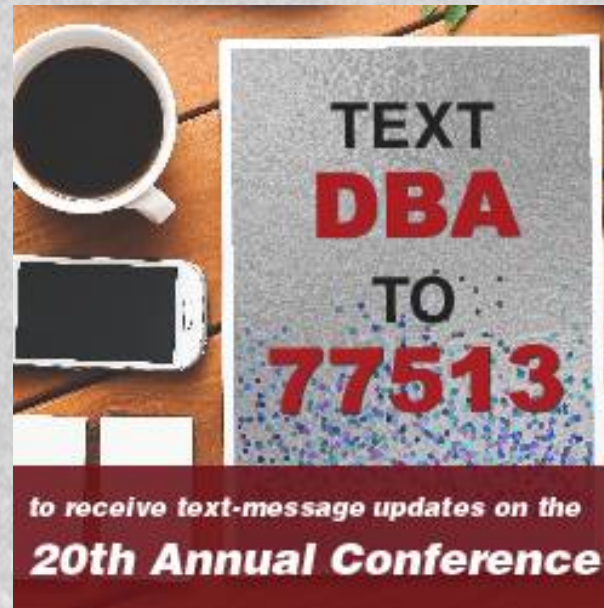
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# What We Will Cover Today

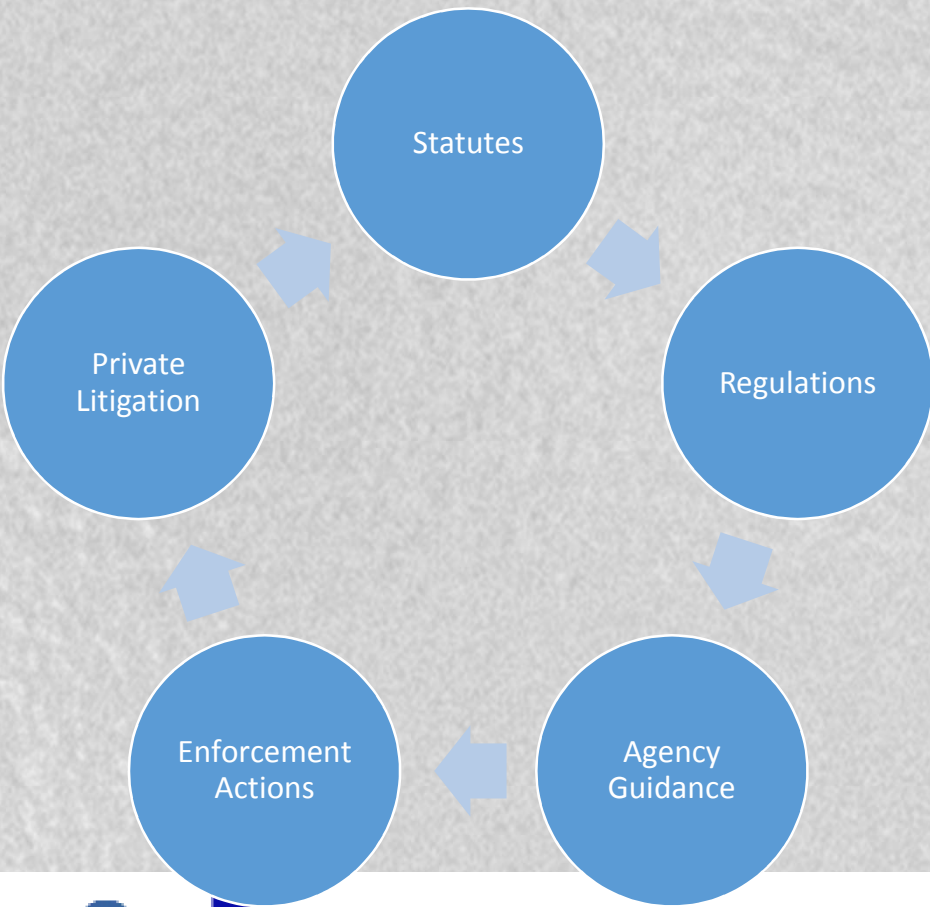
- The Current Regulatory Landscape
- Challenges The Current Landscape Poses for Debt Portfolio Transactions
- Strategies For Overcoming Challenges & Mitigating Risk
- Q & A

# Regulatory Environment for Debt Buying & Debt Collection

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# Regulation of Debt Collection



# Sources of Regulation



Consumer Financial  
Protection Bureau



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# Regulatory Developments

- Federal

- OCC 2014  
Bulletin on Debt  
Sales
- CFPB Bulletins  
on Debt  
Collection and  
Credit Reporting
- CFPB  
Rulemaking
- “Operation  
Collection  
Protection”

- State

- North Carolina  
Consumer Economic  
Protection Act of 2009
- Maryland Rules of  
Procedure
- NYS Unified Court  
System Rules
- California Debt Buying  
Practices Act
- NY Department of  
Financial Services  
Regulations



# CFPB Rulemaking

- CFPB is authorized to issue debt collection rules under the FDCPA *and* Dodd-Frank Act's UDAAP provisions.
- In November 2013, CFPB announced Advanced Notice of Proposed Rulemaking, seeking comments, data, and information from the public about debt collection. CFPB received more than 23,000 comments.
- July 2016, CFPB issued Outline of Proposals Under Consideration and Alternatives Considered.
- Held SBREFA sessions in late August 2016.
- What's next?

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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# What Proposed Rules May Cover: Information Integrity & Substantiation

Summary of Substantiation Requirements under Consideration		
When	Actor(s)	Actions(s)
Prior to making initial claim of indebtedness	Collector	<ul style="list-style-type: none"> <li>▪ Review information sufficient to substantiate claims of indebtedness</li> <li>▪ May obtain list of fundamental information and representation of accuracy from debt owner, as discussed in Appendix C of the Outline and discussed below</li> <li>▪ Determine whether there are warning signs</li> <li>▪ Obtain and review additional information or documentation as needed to address any warning signs discovered during initial review</li> </ul>
During the course of collections generally	Collector + subsequent collector, if applicable	<ul style="list-style-type: none"> <li>▪ Look for warning signs that may arise during the course of collections</li> <li>▪ Cease claims of indebtedness to the consumer until collector obtains and reviews information or documentation as needed to address any warning signs discovered during ongoing review</li> </ul>
After a dispute generally	Collector + subsequent collector, if applicable	<ul style="list-style-type: none"> <li>▪ Cease claims of indebtedness to the consumer until collector reviews documentation as needed to address the dispute submitted by the consumer</li> <li>▪ May obtain and review documentation for relevant dispute category, as specified in Appendix D of the Outline, discussed below</li> <li>▪ Collector that receives dispute must note dispute status when transferring debt</li> <li>▪ If collector has not responded to dispute, subsequent collector must review documentation as needed to address the dispute submitted by the consumer before making initial claims of indebtedness to the consumer</li> </ul>
After a written dispute within 30 days of the validation notice	Collector + subsequent collector, if applicable	<ul style="list-style-type: none"> <li>▪ General dispute requirements described above, plus collector must provide consumer copy of verification responsive to consumer's dispute (or subsequent collector, if applicable, must address dispute)</li> </ul>
After an oral dispute within 30 days of the validation notice	Collector + subsequent collector, if applicable	<ul style="list-style-type: none"> <li>▪ General dispute requirements described above, plus either notify consumer of right to receive verification in response to written disputes within 30 days of the validation notice or simply provide verification in response to timely oral disputes</li> </ul>
Prior to making claim of indebtedness in litigation	Collector	<ul style="list-style-type: none"> <li>▪ Review documentation sufficient to substantiate claims of indebtedness</li> <li>▪ May obtain and review all of the documentation specified in Appendix D of the Outline, discussed below</li> </ul>

# What Proposed Rules May Cover: Litigation & Time-Barred Debt Disclosures

- A specific "litigation disclosure" in all written and oral communication in which a debt collector expresses an intent to sue;
- A "time-barred debt" disclosure whenever a debt collector seeks payment on time-barred debt; and
- An "obsolescence disclosure" explaining whether a debt can or cannot appear on a credit report.
- Moreover, the CFPB is considering whether to prohibit collectors from collection on time-barred debt that can be revised under state law *unless* they waive the right to sue on the debt.

# What Proposed Rules May Cover: Communications with Consumers

Summary of Communication with Consumer Proposals	
Communication Type	Proposals
Frequency of Consumer Contact Attempts	Weekly numerical restrictions (per unique phone number/address, per third party, and per account), depending on whether the collector has successfully established contact with the consumer, as described below.
Frequency of Third-Party Location Contact Attempts	Weekly numerical restrictions (per unique phone number/address and total attempts), depending on whether the collector has successfully established contact with the consumer, as described below.
Leaving Messages with Consumers	Voicemail not considered a communication under the FDCPA if message only conveys the debt collector's name, consumer's name, and toll-free method that the consumer can use to reply to the collector.
Inconvenient Times	When debt collector has conflicting location information for the consumer, and in the absence of knowledge to contrary, must establish that it's convenient in all of the locations in which the collector's information indicates the consumer might be.
Inconvenient Places	The following would be presumptively inconvenient places for consumers (unless consumer consents): <ul style="list-style-type: none"> <li>▪ Medical facilities</li> <li>▪ Places of worship</li> <li>▪ Places of burial or grieving</li> <li>▪ Daycare or childcare centers</li> </ul>
Inconvenient Communication Methods	Email address that collector knows or should know is the consumer's workplace email (unless consumer consents).
Decedent Debt	Generally permissible for collectors to contact surviving spouses, parents of deceased minors, and designated personal representatives of an estate under state law, but only after 30 days after consumer's death.

# What Proposed Rules May Cover: Debt Transfers & Recordkeeping

- The CFPB has proposed additional limits on debt buyers. For example, it is considering **a prohibition on the placement or sale of debt to an entity that lacks any license to purchase or collect debt, as applicable.**
- Finally, the proposal would impose a **three year record retention requirement on all records documenting a debt collector's action with respect to a debt and that were relied upon for the validation notice and other claims of indebtedness.**

# Regulation by Enforcement: Key Takeaways

- Aggressive use of UDAAP
  - FDCPA already prohibits use of deceptive and misleading representations and unfair or abusive practices to collect debt.
    - Statute includes non-exhaustive list of what may be considered deceptive, unfair or abusive.
    - Long line of cases interpreting FDCPA have augmented the list and better defined the standards for applying these concepts.
  - CFPB almost always relies on its UDAAP authority built in the CFPB—not the FDCPA.
- Enforcement priorities mirror topics rulemaking may address, including reasonable basis to collect and litigate and time-barred debt and related disclosures.

# Regulation by Enforcement: Reasonable Basis to Collect & Litigate

Case	Allegations	Outcome
<b>Pressler &amp; Pressler</b>	<p>Firm filed misleading collection lawsuits based on insubstantial or nonexistent evidence.</p> <ul style="list-style-type: none"> <li>• Use of automated claim preparation system and non-attorney staff to determine whether to file suit</li> <li>• Failure to verify debt after consumer disputed and proceeded to file suit</li> <li>• Some court filings relied solely on summary data</li> </ul>	Firm required to review specific media before it can threaten or file suit.
<b>Encore &amp; PRA</b>	<p>Debt buyers deceptively collected on unsubstantiated and inaccurate debt.</p> <ul style="list-style-type: none"> <li>• Failure to adequately investigate disputes</li> <li>• Failed to review media before filing suit or when it had reasons to believe debt portfolio has inaccurate data</li> </ul>	Both required to review media in a number of scenarios, including before filing suit
<b>Chase</b>	Sold bad debts to third-party buyers that had already been paid, settled, discharged in bankruptcy, missing information, etc.	Required to send buyers certain media; banned from selling certain accounts; affidavits must be accurate and capable of being supported by competent and reliable evidence
<b>Hanna</b>	<p>Firm filed deceptive court filings and introduced unsubstantiated evidence.</p> <ul style="list-style-type: none"> <li>• No meaningful attorney involvement in preparation complaints</li> <li>• Relied on sworn statements from clients (debt buyers) attesting to facts the clients could not possibly attest to</li> </ul>	Firm required to have specific media before it can threaten or file suit and required to revise attorney review processes.

# Regulation by Enforcement: Time-Barred Debt

Case	Allegations	Outcome
<b>Encore &amp; PRA</b>	<p>Firms filed debt collection lawsuits even though the actions were time-barred.</p> <ul style="list-style-type: none"> <li>• Sent letters offering to “settle” a lawsuits without revealing the debt was too old for litigation</li> <li>• Filed lawsuits past statute of limitations</li> </ul>	Both firms required to stop debt collections they can’t verify, ensure accuracy when filing lawsuits, provide consumers with information before filing suits, and use accurate affidavits.
<b>Delgado v. Capital Management Services</b>	<p>CFPB and FTC submitted an amicus brief in support of a cause of action against a debt collector that failed to disclose that a debt was time-barred</p> <ul style="list-style-type: none"> <li>• Sent letters offering to “settle” a debt that was time-barred</li> <li>• Agencies assert this deceives and misleads consumers</li> </ul>	On 3/11/16, the Seventh Circuit affirmed the lower court’s denial of the defendant’s motion to dismiss, expressly deferring to the FTC and CFPB. <u>Juanita Delgado v. Capital Management Services, L, No. 13-2030 (7<sup>th</sup> Circ. 2015).</u>
<b>Buchanan v. Northland Group</b>	<p>CFPB and FTC submitted an amicus brief in support of a cause of action against a debt collector that failed to disclose that a debt was time-barred</p> <ul style="list-style-type: none"> <li>• Sent letters offering to “settle” a debt that was too old to litigate</li> <li>• Agencies argue that the district court erred in dismissing the complaint because the action misled consumers</li> </ul>	On 1/13/15, the Sixth Circuit reversed and remanded, consistent with the “instructive” positions of the CFPB and FTC. <u>Buchanan v. Northland Group Inc, No. 13-2524 (6<sup>th</sup> Cir. 2015).</u>



# Regulation by Enforcement: Debt Sales & Contract Provisions

Case	Allegations	Outcome
<b>Encore &amp; PRA</b>	<p>Firms collected bad debts, despite warnings from sellers that:</p> <ul style="list-style-type: none"> <li>• The consumer debt balances were “approximate”</li> <li>• The debts did not have reflect the most recent consumer payments</li> <li>• Documents were not available for some of the accounts</li> </ul>	Firms ordered to stop reselling debts and stop collecting debts they cannot verify
<b>Chase</b>	<p>Chase sold bad debts to third-party debt buyers.</p> <ul style="list-style-type: none"> <li>• Chase knew that certain debts they sold had been settled by agreement, paid in full, discharged in bankruptcy, fraudulent, or no longer owned</li> </ul>	Chase ordered to cease collecting on 528,000 accounts., prohibit debt buyers from reselling accounts, confirm debt before selling to debt buyers, notify consumers that their debt has been sold and make their account info available to them, not sell zombie debts and other specified debts, withdraw, dismiss, or terminate collections litigation, stop signing robo-signing affidavits, and verify debts when filing a lawsuit.
<b>Citibank</b>	<p>Citibank sold inflated debts to third-party debt buyers.</p> <ul style="list-style-type: none"> <li>• Citibank provided incorrect and inflated APR information for nearly 130,000 credit card accounts that it sold to debt buyers.</li> <li>• Citibank failed to promptly forward to the debt buyers approximately 14,000 customer payments related to such debts.</li> </ul>	Citibank to provide specific account documents when it sells debt, to stop selling unverified debt, to include protections in debt sales contracts, and to provide debt sale information to consumers.

# Challenges Regulatory Environment Poses for Debt Portfolio Transactions

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# Regulatory (and now Political) Climate Has Bred Uncertainty

- Overall reduction in number of accounts sellers and buyers may deem eligible for sale
- Uncertainty regarding risk and liability has decreased parties' willingness to enter into transactions
- Increased due diligence and upfront requirements front-loads much of the transaction costs and work
- Negotiating the contract language has become more challenging and protracted

# Strategies for Overcoming Challenges & Mitigating Risk

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# Leverage Your Organizations' CMS



# Conduct Robust Due Diligence on Counter-Parties & Prospective Portfolios

- Written policies and procedures governing due diligence.
- Documented and mandatory questionnaires and checklists.
- Create and implement process to incorporate data and other information you have about your prior experience with a counter-party.
- Adapt substantive pre-requisites and standards before entering into a deal covering:
  - data integrity,
  - access to account level documentation,
  - representations about account history and eligibility, and
  - whether re-sales are permitted
- Account level testing pre- and post-transaction

# Standardize Contracting Process

- Written policies and procedures governing contract negotiation and approval process.
- Substantive requirements and minimum standards for contract provisions covering key compliance areas and representations regarding data integrity and access to account documentation.
- Formal protocol for sign-off, final approval (including approval of exceptions), and execution of PSAs.
- Build in flexibility in the event that changes in the regulatory environment impact contractual obligations.

# Ongoing Monitoring of Counter-Parties and Sold/Purchased Portfolios

- Monitor portfolios for compliance “red flags”, such as
  - Consumer disputes
  - Consumer complaints
  - Access to and quality of account level documentation
  - Performance
- Conduct regular audits and track remediation.
- Address potential or actual issues as they arise and, where necessary, pursue contractual remedies.



# Observations and Q&A



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