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Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street N.W.
Washington, D.C. 20552

Via upload to: http://www.regulations.gov

Re: Advance Notice of Proposed Rulemaking, Debt Collection (Regulation F), Docket No. CFPB-2013-0033, Regulatory Identification Number (RIN) 3170-AA41

Dear Ms. Jackson,

Thank you for the opportunity to submit comments to the Bureau's Advance Notice of Proposed Rulemaking (ANPR) on Debt Collection (Regulation F), dated November 5, 2013.

In this letter, we address several of the topics and questions raised by the ANPR, specifically:

(1) what information do consumers need to protect themselves from wrongful debt collection, particularly in the debt-buying context?;
(2) what rules should govern the transfer of information related to debt when debts are sold or placed for collection with third parties? In particular:

- should that information be maintained and made available to the affected consumers through a centralized repository or some other means?; and
- what should creditors, debt collectors, and debt-buyers be required to do to ensure that consumers have accurate and timely access to the information they need to protect themselves from wrongful debt collection?

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I. Data Deficits Currently and the Problems They Create For Consumers

In this section, we discuss the information gaps that consumers face when they are the subject of debt collection and the resulting harm to those consumers. This part of our discussion responds to Questions 5-10 (regarding data transfer by debt owners to debt buyers and third-party collectors), 16 (regarding the identity of the current owner of the debt), and 123 (regarding substantiation).

Under the U.S. legal system, a debt collector should only be able to collect a debt against the person who actually owes it, for the right amount, and subject to all defenses that the consumer may have. It goes without saying, furthermore, that the debt collector must also possess the legal right to collect the debt. Consequently, a consumer contacted by a debt collector needs a certain amount of information before deciding whether to repay a debt. The consumer needs to know enough information about the debt to (1) recognize whether or not it is hers, (2) be able to satisfy herself that the amount being sought is the correct amount, (3) understand whether she has any defenses to all or part of the debt, and (4) make sure that she would be paying the right party. Currently, however, it is all but impossible for a consumer to learn all of this information without simply trusting the party on the other end—a party that the consumer did not choose.

In the third-party debt collection and debt buyer context, currently there are three barriers preventing a consumer from knowing all of the information she needs about a debt: (1) the limited amount of information that creditors provide to third-party collectors or debt buyers, (2) the limited amount of media that is available to collectors and debt buyers, and (3) the limited amount of information that is shared among third-party collectors, creditors, and debt buyers.

A. Limited information available to collectors regarding the debt

As to the first problem: the 2013 Debt Buyer report by the Federal Trade Commission found that the vast majority of accounts sold lacked critical information, in particular, the

(1) name of the original creditor was missing from 54% of accounts;
(2) principal amount was missing from 89% of accounts;
(3) finance charges and fees were missing from 63% of accounts;
(4) interest rate charged on the account was missing from 70% of accounts;
(5) date of first default was missing from 65% of accounts;
(6) date of last payment was missing from 10% of accounts; and the
(7) amount owed at charge-off was missing from 28% of accounts.[1]

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[1] Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry 34-37 (2013) [hereinafter FTC Debt Buyer Report], *available at* http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf. The FTC believes

All of these pieces of information are ones that the original creditor should have and it is information that all subsequent servicers or owners of the account should be given. To the extent collectors do not have this information before collecting from consumers, it is a problem that can result in injury to consumers.

The Fair Debt Collection Practices Act (FDCPA) already requires collectors to know the name of the original creditor and provide it to the consumer.[2] The creditor's name is essential so that the consumer can identify the debt. Nonetheless, the FTC study found that more than half of the accounts they examined did not include the name of the original creditor at the account level. The FTC noted that this number likely overestimates the number of situations in which a collector does not know the name of the original creditor, since debt buyers purchasing from an original creditor will obviously know it and "many contracts specified that the contract between the original creditor and the original buyer be attached to the contract in any subsequent resale."[3] Nonetheless, it is important to note that portfolios are sometimes fragmented and resold in parts, which means that a sale may include more than one creditor's accounts at a time.[4] If the name of the original creditor is not provided at the account level, subsequent buyers of portfolios that includes multiple creditors would have a very difficult time ascertaining the name of the original creditor on each account.

Similarly, the amount of principal (or the total amount of finance charges and fees) is important to the consumer for tax purposes. Income from a loan is not taxable because it has to be repaid.[5] However, if a consumer settles a non-mortgage debt and thus decreases the amount of the loan that it has to repay, the IRS requires that the consumer pay taxes on the forgiven amount.[6] The goods and services the consumer bought but did not pay for (because all or part of the debt was forgiven) are taxable income. Unless they are deductible, interest and fees added to the principal would also be taxable income.[7] However, if the creditor or debt buyer issues a 1099-C to the

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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*. at 35.

[2] 15 U.S.C. § 1692g(a)(5). We recommend that the name of the original creditor be included in the validation notice in our proposal below.

[3] FTC DEBT BUYER REPORT, *supra* note 1, at 35 n. 148.

[4] *See*, *e.g.*, Purchase and Sale Agreement from Sherman Acquisition LLC (Seller) to Gemini Capital Group LLC (Buyer) 23 (March 3, 2009), *available at* http://dalie.org/contracts (last visited February 22, 2014) (consumer debt sale including debts from thirty-four different creditors and two debt buyers).

[5] Martin MacMahon & Daniel L. Simmons, *A Field Guide to Cancellation of Debt Income*, 63 TAX LAWYER 415, 417 (2010).

[6] *See* U.S. v. Kirby Lumber Co., 284 U.S. 1 (1931): "Generally, a taxpayer must include income from the discharge of indebtedness … Where indebtedness is being discharged, the resulting income would equal the difference between the amount due on the obligation and the amount paid, if any, for the discharge." Martin v. Commissioner of Internal Revenue, T.C. Summ. Op. 2009-121, 2009 WL 2381577 (U.S. Tax Ct. 2009) (internal citations omitted).

[7] *See* 26 U.S.C. § 108(e)(2); MacMahon & Simmons, *supra* note 5, at 450.

consumer for an amount that lumps together principal with interest and fees, the consumer may lose out on two potential defenses that would lower her tax liability. This is because she would unable to calculate that part of the interest that may have been deductible or that part she may legitimately dispute. Under many circumstances, the consumer will not be liable for that portion of the cancelled debt that she disputed before settlement.[8] These defenses would not be available to the consumer unless the principal and interest and fees are separately broken out.[9] Creditors are in the best position to separate interest and fees and should be required to do so, and to pass that information on to anyone who subsequently owns the debt.

The contractual rate of interest is also a critical piece of information for consumers. Without the correct interest rate, the debt buyer should not attempt to charge any interest to the consumer. It is not known how often debt buyers seek to collect interest on accounts they purchase, but it would be improper to do so without knowing the interest rate charged.[10]

The date of first default—missing from 65% of accounts examined by the FTC—is a critical date for purposes of calculating when the statute of limitations began to run on an account and thus essential to determining whether an account is out of statute. Unless a state statute says otherwise, the statute of limitations begins to run on the date that the cause of action accrues, which is another way of saying that it starts to run when the original creditor could have first sued the consumer in a court of law.[11] Under general principles of contract law, the cause of action would accrue on the date that the consumer first defaulted on the account by not making a payment when one was due. If the consumer made a payment after the first default, the date of the last payment would begin the limitations clock. In the FTC study most debt buyers (90%) received this information.

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[8] MacMahon & Simmons at 435-39.

[9] These defenses would be particularly important for consumers whose debts were sold under contracts that specifically disclaimed, *inter alia*, "the accuracy of … accrued interest amounts due under the loans." FIA Card Services to CACH (April 10, 2010), *available at* http://dalie.org/contracts; FIA Card Services to CACH (Aug. 11, 2009), *available at* http://dalie.org/contracts. *See* discussion *infra* at page 7.

[10] Conversations with consumer lawyers, debt collectors, and personal review of court files lead us to believe that where debt collectors charge interest, they do so at the prevailing pre-judgment interest in the state, typically compounded annually. We have also seen a number of instances where large debt buyers charge interest when seeking to collect from the consumer via letter—pre-litigation—and do not seek interest when they file a lawsuit. *But see* FTC DEBT BUYER REPORT, *supra* note 1, at C-31 ("A few contracts prohibited debt buyers from adding any amount to the account balances purchased from sellers, stating, simply "Purchaser agrees not to add any further interest or fees to the Account Balances.").

[11] *See, e.g.*, Citibank S.D., NA v. Sawant, 2012 Mass. App. Div. 79, 2012 WL 1622233 (2012); Knighten v. Palisades Collections, LLC, 721 F. Supp.2d 1261, 1269 (S.D. Fla. 2010); Dodeka, LLC v. Campos, 377 S.W.3d 726, 731 (Tex. 2012); Anderson v. Neal, 428 A.2d 1189, 1191 (Me. 1981).

In at least three states, when a debt falls out of statute, it is extinguished and no longer collectible.[12] Collectors need to know the date from which the applicable statute of limitations begins to run so that they can properly cease all collection activities in those states. In the rest of the country, the debt is not extinguished, but the overwhelming majority of courts that have considered the issue have held that filing a lawsuit barred by the statute of limitations is a violation of the FDCPA.[13] Many courts have also found that threatening to file a lawsuit is also a violation.[14] As discussed later, we agree with the FTC's position that for debts which the debt collector "knows or should know may be beyond the applicable statute of limitations," the collector must inform the debtor that the debt is time-barred and the debt collector has no legal remedy.[15] In order for a collector to be able to comply, however, she needs to know the date of first default to be able to calculate the proper limitations period.

Finally, the amount owed at charge-off may also be important, in particular in the case of open credit accounts. At least one court has found that a creditor waives his ability to charge interest or fees if he does not do so for a long enough time—as determined by state law—after charge

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[12] MISS. CODE ANN. § 15-1-3 (2012); WIS. STAT. ANN. § 893.05 (WEST 2012); N.C.G.S. §§ 58-70-115(4), 155(b)(7) (2012) (prohibits debt buyers from attempting to collect past the statute of limitations and requires evidence establishing the date of last payment in order to calculate the date the statute would expire).

[13] Phillips v. Asset Acceptance, LLC, 736 F.3d 1076 (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 (D. Conn. 2005); Freyermuth v. Credit Bureau Servs., Inc., 248 F.3d 767, 771 (8th Cir. 2001); Shorty v. Capital One Bank, 90 F. Supp.2d 1330 (D. N.M. 2000); Stepney v. Outsourcing Solutions, Inc., Case 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. Federal Financial Corp., 668 F. Supp. 1480 (M.D. Ala. 1987).

[14] *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 (it is a violation of the Act to threaten to take "any action that cannot legally be taken"); *Herkert*, 655 F. Supp.2d 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.2d 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 28 ("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 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*, 90 F. Supp.2d at 1331-33 (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).

[15] United States v. Asset Acceptance, LLC, Case No. 8:12-cv-00182-JDW-EAJ, Consent Decree at 11, http://www.ftc.gov/os/caselist/0523133/120131assetconsent.pdf. *See also id.* at 13 (providing specific disclosure language). This means we explicitly disagree with cases such as *Freyermuth v. Credit Bureau Services, Inc.* and others that hold that without litigation or a threat of litigation no violation of the FDCPA has occurred. 248 F.3d at 767; *see also* Wallace v. Capital One Bank, 168 F. Supp.2d 526, 528 (D. Md. 2001); Shorty, 90 F. Supp.2d at 1331–33.

off.[16] In this situation, a subsequent debt buyer can only buy whatever rights the creditor had at the time of sale, and thus would not be allowed to charge any interest or fees after charge-off.[17] One of the arguments the debt buyer made in that case was that it did not know whether the original creditor had charged interest after charge-off; this is something that debt buyers should know when they purchase a debt.

B. Limited media available to collectors and debt buyers

The problem of limited information is made even worse by the limited (or non-existent) media that buyers receive when a debt is sold. Media consist of the back-up documentation for the debt, including the underlying contract and the servicing records. As one of us has described previously,[18] issues arise when collectors have limited information about the debts they are collecting and even less in the way of documents to back up that debt.

In the case of a third-party collector for the original creditor, one would expect the media to be available from that original creditor. However, in the case of a debt buyer or a third-party collector working for a debt buyer, the FTC report and our own research of consumer debt purchasing contracts shows that most debt purchasing transactions do not convey documentation/media on the debt or even in some cases do not permit the debt buyer the right to obtain documentation. We are concerned that many consumer debt purchase and sale agreements contain language relieving the seller (even the original creditor) of an obligation to maintain documents or provide them.[19]

A number of consumer debt purchase and sale agreements we have reviewed contain specific time limits ranging from one to three years after which sellers will not provide documentation to debt buyers.[20] The FTC's study also found that most of the contracts the Commission examined "specified a date beyond which the credit issuer was no longer obligated to provide any account

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[16] *See, e.g.*, McDonald v. Asset Acceptance L.L.C., 2013 WL 4028947 (E.D. Mich. Aug. 7, 2013). ("It is clear from the evidence above that Chase and WFNB intended to waive the right to collect interest on Plaintiffs' accounts … Both creditors had the absolute right to continue to impose interest on Plaintiffs' delinquent accounts. However, both took decisive and unequivocal acts to forgo the imposition of interest for strategic business reasons.").

[17] *Id*. at *11 ("Because Chase and WFNB waived the interest, Asset could not retroactively impose interest for the period in which it did not own the accounts.").

[18] Dalié Jiménez, *Dirty Debts Sold Dirt Cheap* (Working Paper Feb. 28, 2014), *available at* http://ssrn.com/abstract=2250784.

[19] *See, e.g.*, "Seller makes no guarantees as to the availability of applications, statements, records or copies of previous payment checks on any account." FTC DEBT BUYER REPORT, *supra* note 1, at C-13. "There is no assurance that any Account Documents will be available." *Id*.

[20] *See, e.g.*, Wells Fargo Bank v. Purchasers Advantage, LLC at 8 (June 21, 2011) (one year); Purchase Agreement between Chase Bank USA, NA and Global Acceptance Co., LP at 8 (Dec. 22, 2010) (3 years); Turtle Creek Assets, Ltd. and Pasadena Receivables, Inc. at 8 (July 13, 2009) (three years). All of these agreements are available at http://dalie.org/contracts.

documents to the debt buyer," often two to three years after the accounts were sold.[21] Furthermore, the contracts overwhelmingly indicate that the sellers do not obligate themselves to provide account documents and that if any cannot be found, it is not a breach of the purchase and sale agreement.[22]

The FTC obtained information about whether a debt buyer ever had media on an account for a portion of accounts that were purchased between March through August 2009.[23] The report noted that depending on how the data were weighted between 88-94% of accounts purchased by buyers never had any documentation.[24] We are concerned that debts are sold without any documentation and via contracts that specifically disclaim material aspects of the information sold, such as:

> Buyer understands and agrees that, although Seller has provided Buyer with the interest rates Seller applied to the Accounts, if any, Seller makes *no representation or warranty as to the accuracy of those rates* and Seller and/or its Servicing Agent assumes no responsibility or liability … for Buyer's continued use of those rates or attempts to collect interest based upon those rates.[25]

(emphasis added). Similarly, we are concerned that debts are being sold pursuant to disclaimers such as these that appear in multiple contracts:

> … the sale of all loans made by seller pursuant to this agreement shall be without recourse, representation or warranty, and that seller has not made did not make and specifically disclaims … any representations, warranties …. with respect to the following: …. the *compliance of the loans with any state or federal usury law and regulation applicable thereto*; … the *accuracy or completeness of any information provided by the seller to the buyer*, including,

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[21] FTC DEBT BUYER REPORT, *supra* note 1, at C-12 to C-13 (as an example, the FTC quoted one contract as stating that "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.").

[22] *See, e.g.*, Blank Wells Fargo Purchase and Sale Agreement (Jan. 6, 2010) ("The failure of Seller to locate a requested Receivable Document shall not be deemed a breach of this Agreement."), *available at* http://dalie.org/contracts; Citibank to Unifund CCR Purchase and Sale Agreement (Feb. 28, 2005) ("The failure of the Bank to provide an Account Document requested by Buyer will not be a breach of this Agreement."), *available at* http://dalie.org/contracts.

[23] Approximately 3.9 million accounts. FTC DEBT BUYER REPORT, supra note 1, at 35.

[24] *Id*. at 35 and n. 150.

[25] Midfirst Bank to Calvary SPV I LLC Purchase and Sale Agreement (June 7, 2002), *available at* http://dalie.org/contracts.

> without limitation, the *accuracy of any sums shown as current balance or accrued interest amounts* due under the loan[26]

(emphasis added). Neither the consumer nor any courts are shown these contracts. This raises concerns in all cases, but particularly so in cases in which there is no documentation to back up the information that is being represented to the consumer or the court. The collections industry association has also called for greater documentation retention requirements for creditors.[27] We join them in this request in our proposal below.

C. Limited information shared between collectors after debt is placed/sold

The third problem for consumers contacted by collectors deals with what happens to a debt after it has first been sold, when it is subsequently resold or placed with another third-party collector. In its Debt Buying Report, the FTC found that the majority of accounts were resold without any information about whether the purported account holder disputed the amount or validity of, or anything else about, the account.[28] In the FTC sample, sellers also did not typically include any specifics about the collection history of accounts sold, so that potentially valuable information about interactions of previous collectors with the consumer, written disputes, or attempts at verification of a debt was not forwarded to the debt buyer.[29] At minimum this can be frustrating for the consumer who will have to repeat information to a second collector because it was not passed on. At worst, it can impair the ability of consumers to raise legitimate counterclaims and defenses to the collection of debts.

D. Problems this causes for consumers

Consumers today often have to rely on the word of a third-party debt collector who is communicating with them for the first time. Consumers often have trouble contacting their original creditor to verify who currently owns or is servicing their debt. Worse, the creditor may not even be able to provide that verification when the debt is sold multiple times. At that point, the original creditor has no information about who currently owns (or is servicing) the debt. This very real problem encourages illegitimate collectors to extract money from consumers who trust

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[26] FIA Card Services to CACH (April 10, 2010), http://dalie.org/contracts; FIA Card Services to CACH (Aug. 11, 2009), http://dalie.org/contracts.

[27] ACA Int'l, THE PATH FORWARD: ACA INTERNATIONAL'S BLUEPRINT FOR MODERNIZING AMERICA'S CONSUMER DEBT COLLECTION SYSTEM 17 (April 2011), http://www.acainternational.org/files.aspx?p=/images/18898/finalblueprint-designedversion.pdf.

[28] FTC DEBT BUYER REPORT, *supra* note 1, at 37.

[29] *Id*. 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.

the person calling to be the right party.[30] Similarly, the informational gaps that we have described put consumers in real danger of over paying for debts and even paying for debts that they do not owe.

The limited information and documentation available to collectors also cause consumers to mistrust the system. Consumers have difficulty finding out whom to legitimately pay when the information and documentation discussed above is not available to the collector. If a consumer cannot identify a debt as legitimate and the party contacting her as the rightful party, she should not be required to pay it, as she runs the risk of paying the wrong party or wrong amount.[31]

In order to prevent these problems, a consumer needs to be equipped with the proper information to verify her debt and evaluate her defenses. In the next section, we discuss what that information is. In the remainder of this comment letter, we explore the best way, given current constraints, to make sure that consumers have access to the information they need.

II. What Information Do Consumers Need to Protect Themselves From Wrongful Debt Collection? What Information or Documentation Should Collectors Have?

This section responds to Questions 5-10 (regarding data transfer by debt owners to debt buyers and third-party collectors), 16 (regarding the identity of the current owner of the debt), and 123 (regarding substantiation).

In order to recognize whether or not a debt is hers, whether the correct amount is being sought, and whether the right party is contacting her, a consumer needs the following information:

(1) information about the identity of the debtor;

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[30] *See, e.g.*, Federal Trade Commission, At FTC's Request, Court Orders Halt to Debt Collector's Illegal Practices, Freezes Assets: Defendants Allegedly Broke the Law by Posing as Process Servers, Threatening Lawsuits, and Contacting Consumers' Employers and Family Members in Violation of Their Privacy (Aug 1, 2013), http://www.ftc.gov/news-events/press-releases/2013/08/ftcs-request-court-orders-halt-debt-collectors-illegal-practices.

[31] *See, e.g.*, Cooper v. Frost, 1:12-cv-00295-HJW (S.D. Ohio 2012) (alleging that debt buyer sold accounts to another debt buyer without disclosing it did not have title to the accounts; accounts have since been collected upon and resold multiple times); United States v. Goldberg (S.D. Fla. Mar. 5, 2009), available at www.consumerlaw.org/unreported (alleging fraud by debt buyer who sold debts they did not own to other debt buyers); Miller v. Wolpoff & Abramson, L.L.P., 2008 U.S. Dist. LEXIS 12283 (N.D. Ind. Feb. 19, 2008) (consumer alleges two debt buyers sued him on the same debt); Wood v. M & J Recovery L.L.C., 2007 U.S. Dist. LEXIS 24157 (E.D.N.Y. Apr. 2, 2007) (same; multiple entities claiming ownership of debt). *See also* 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, 271-72 (2011) (collecting over a dozen cases).

(2) sufficient information about the originator of the debt so that the consumer can recognize the debt;[32]
(3) the amount owed on the debt, itemized among principal, interest and fees assessed, both before and after charge-off;
(4) account statements generated by the original creditor (if debt was sold), including the last one sent to the consumer by the creditor;
(5) the date, source, and amount of the most recent payment;
(6) the date of first default;
(7) the amount of the debt at charge-off, if any;
(8) the original debt contract;
(9) the name of and contact information for the current debt owner;
(10) the name of and contact information for the current debt collector;
(11) the name and contact information for the securitization trustee (if any);
(12) documentary proof that the debt owner actually owns the loan; and
(13) documentary proof that the debt collector currently has the right to collect on the loan.

A collector should have *all of this information* accessible or in their possession before they attempt to collect on a debt. When a consumer is contacted by a collector (i.e., not the original creditor), she also needs some way to verify that the collector is legitimate. In Part IV we propose a way in which a collector may share this information with the consumer.

In addition, collectors should keep the following information relating to the *collection* of the debt:

(1) requests and responses to validation requests or disputes;
(2) the consumer's request to stop contact;
(3) settlements concerning the debt, if any;
(4) the status of debt under the statute of limitations;
(5) representation of the consumer by an attorney and attorney's contact information, if applicable;
(6) information regarding inconvenient time or place for communication;
(7) discharge of debt or listed in bankruptcy;
(8) illness or disability claimed by the consumer or known to the collector, or other notes regarding consumer's current ability to repay; and
(9) known or claimed violations of the FDCPA and other state and federal consumer laws to date.

[32] For example, if a credit card was co-branded (e.g., Sears Card, Macy's, Mobil, etc.), the consumer should be told the name of the brand as well as the name of the original creditor.

If the collector on an account changes, either because the debt is sold or placed with a new third-party collector, this information should "travel with the debt" to the new collector. We propose a way to do this in Part IV of this letter.

III. Whether the CFPB Should Mandate a Centralized Repository

In the ANPR, the Bureau also solicits comment on the best way to make needed information available to consumers who are the target of debt collection on an accurate and timely basis. In this regard, Question 12 of the ANPR asks whether sharing documentation and information about debts through a centralized repository would be advisable and useful for consumers and industry participants.

A. The Purposes of a Centralized Repository

In order to answer Question 12, first it is necessary to define the purposes that a centralized repository should serve. In our discussion in this section, we will only discuss the purposes of an ideal model repository.[33] Similarly, we only discuss the advisability of a centralized repository with respect to unsecured consumer debts, not secured consumer debts.[34]

To adequately serve the public, a centralized repository should serve the following purposes:

- *Identify the owner of the debt and the chain of title that leads to that owner:* First, the repository should serve as the official record of the identity of the owner of every unsecured consumer debt. To that end, all purchase and sale agreements, assignments, and other documents that are necessary to establish title to an unsecured consumer debt should be filed with the repository. The repository would also need to establish rules to

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[33] Here, we want to stress that the purposes of the model repository that we discuss are fundamentally different than most of the purposes served by existing clearinghouses such as Global Debt Registry and Convoke Systems. The purposes of the model repository we describe here focus primarily on consumer financial protection, while the purposes of the existing clearinghouses focus primarily on ownership and servicing rights among debt industry participants.

[34] The recent history of documentation problems and foreclosure abuses in the servicing of residential mortgage loans shed light on severe back office breakdown in the mortgage servicing industry. Many of the concerns we raise regarding unsecured consumer debts are equally true for home mortgages and other secured consumer debts. In addition, any proposal for a centralized repository for secured consumer debts would have to be coordinated with this country's well-established local recording systems (for residential mortgage loans) or state UCC registries (for consumer loans secured by personal property). *See* Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 DUKE L.J. 637, 713-15 (2013).

determine the priority of assignments[35] and maintain proper procedures to prevent unauthorized access or changes to documents.[36]

- *Identify the securitization trustee:* Second, for debts that have been securitized, the repository should allow affected parties to identify the trustee of any securitization trust that owns the debt. The repository should accordingly contain the legal documents designating the trustee for every securitization trust owning unsecured consumer debts. In addition, when consumers consult the repository, they should be able to tell whether the securitization trust still owns the debt and, if not, who the current owner is.[37]

- *Identify the debt collector or servicer:* Third, the repository should enable affected parties to determine accurately who is currently authorized to collect the debt. Consequently, the repository should contain the necessary contracts, including any pooling and servicing agreements, to identify the current debt collector or servicer.

- *Identify the consumer:* Fourth, the repository should contain sufficient information about the identity of the debtor to distinguish among debtors of similar names.

- *Keep track of debts that have been satisfied or otherwise extinguished by agreement:* Finally, if a consumer has repaid, settled, or otherwise extinguished a debt (for example, by successfully arguing that it was created by an identity thief), the repository should keep track of this information and help consumers protect themselves against scam artists that may try to resuscitate the debt.

We note that we do not think the repository is an appropriate place to keep the amount owed on a debt, or the itemization between interest and fees. Unless the repository is serving as the real-time system of record for every collector or debt buyer,[38] any information that is stored in the repository about the amount owed or the payments made will necessarily be out of date and in no way verifiable by the repository. We could contrast this with the chain-of-title information, where the repository will have at least two entities—the buyer and seller—who will be submitting information about the debt. We stress that while the repository can serve a very useful purpose in identifying the owner of the debt and the entity authorized to collect on it, because the repository itself is not any of those entities, it cannot be used to substantiate the amounts owed on a debt.

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[35] Akin to the function served by registries of deeds, such rules would determine who takes title in situations such as when one assignment is filed with the repository but an earlier assignment of the same debt to someone else is not.

[36] For example, this could be accomplished by implementing a system to track who accesses each document and verifying the integrity of the information maintained by the repository.

[37] This is especially important for credit card securitizations, where automatic buyback clauses are virtually ubiquitous.

[38] As an example, if it served like a post-default TSYS system of record. *See Our Company*, Total System Services, Inc. (TSYS), http://www.tsys.com/About/ (last visited Feb. 28, 2014); *Travel Card Program Basics*, US Bank (Aug. 10-12, 2010), https://www.usbank.com/cgi_w/cfm/inst_govt/products_and_services/pdf/2010_GSA/Civilian/04_Travel_Card_Program_Basics_Civilian.pdf (describing TSYS as "the system of record that houses customer and company data").

We also need to stress that the data in this ideal centralized repository would not be available to the general public. This is due to the possible proprietary nature of some of the information on file and the strong privacy concerns surrounding consumer debts. Instead, those data would only be accessible to the Bureau, to other state and federal financial regulators, and to specific parties who are involved in a particular debt transaction.[39] Those parties would include the consumer (including the debtor or putative debtor, in the case of a dispute over identity) or his authorized representative, the creditor, any subsequent debt buyers, relevant trustees, and the servicers or debt collectors hired to collect the debt. No other private companies or individuals would be allowed to view that information.

B. Potential Advantages of a Centralized Repository

In a perfect world, a centralized repository could offer advantages both to consumers and industry participants. From consumer's perspective, more accurate debt collection would be a significant advantage. A centralized repository would provide consumers who are targeted for debt collection with an easy-to-find place for examining the facts regarding their alleged debts. Such a repository would help guard against identity theft and collection against the wrong individual by verifying the identity of the debtor. Similarly, the availability of the original, underlying debt contracts, the last account statement, the amount owed at charge-off, and the date of first default would help consumers ascertain whether the principal, interest and fees being charged were excessive and evaluate any defenses to collection. A repository would also protect consumers against potential double recovery and fraudulent collection by enabling them to identify the rightful owner of their debts and the debt collector or servicer who is authorized to collect on them. Finally, the ready availability of this information would encourage more courts to insist that debt holders and collectors prove a *prima facie* case before granting them default judgments to collect debts.[40]

A centralized repository could also aid loss mitigation efforts, to the benefit of consumers. In all likelihood, a centralized repository would facilitate the negotiation of temporary hardship agreements and permanent loan workouts in situations where those agreements make economic sense. Distressed borrowers and the lawyers and credit counselors who represent them need to ascertain the owner of the debt, any securitization trustee, and the debt collector or servicer in

[39] Akin to the Census Bureau's procedures, provision should also be made for the study of aggregate data from any repository, after being scrubbed of personal identifiers, by "trusted" private researchers who are certified by the Bureau. *See, e.g.*, United States Census Bureau, Center for Economic Studies (CES), RDC Research Opportunities (last viewed Feb. 14, 2014), *available at* http://www.census.gov/ces/rdcresearch/.

[40] Although here we note again that the repository would not be able to assist collectors to prove their case with regards to the amount of 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. It can only speak to the integrity of those documents—that is, that they were not changed—after they were stored with the repository.

order to know who to talk to about loss mitigation. A repository would have that information quickly at hand. Accurate information on the amount owed and the underlying contract terms would also help speed the negotiation of loss mitigation agreements where appropriate.

Many of the advantages that a centralized repository could offer to debtors flow from the fact that it would relatively easy to publicize the databank's existence and location to consumers. In addition, a centralized repository would enhance data quality through standardization, by specifying uniform data standards for the content, format, and transmission of data on consumer debts. A centralized repository could also maintain a consumer's data long enough to help consumers avoid situations where information in the hands of a creditor or a debt buyer is destroyed pursuant to document retention policies.

A centralized repository would offer distinct advantages to industry participants as well. By establishing the true owners of loans, a repository would minimize disputes over the ownership of debts (and rights to debt collection) that are all too common these days. The central accessibility of the data would allow remote debt buyers and debt collectors to shepherd the data without having to engage in otherwise fruitless negotiations with the original creditor.[41]

C. Potential Adverse Unintended Consequences to Consumers

These advantages are all attractive and, in isolation, might be grounds to set up a centralized repository. However, we have strong concerns that it is premature to establish a centralized repository of the sort mentioned in the ANPR. Such a repository could have serious unintended consequences for consumers, judging by the nation's recent negative experience with the private centralized repository for mortgages established by the Mortgage Electronic Registration Systems, Inc. ("MERS"). In the remainder of this section of this comment, we discuss these potential unintended adverse consequences for consumers, both those raised by the MERS experience and otherwise.

1. The Experience with MERS

As a preface to our discussion, we start by providing a description of MERS. 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

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[41] *See* GENERAL ACCOUNTING OFFICE, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 45 (2009).

transactions in order to use the information filed with MERS.[42] MERS has registered over 81 million home loans to date and currently maintains over 26 million active mortgage loans.[43] Reporting to MERS is voluntary and members have no responsibility to update their reports.

Although MERS holds itself out as a centralized repository, during the years leading up to the 2008 financial crisis, MERS took on additional roles that served to obscure the true ownership of home mortgages from distressed borrowers in foreclosure actions.[44] For instance, at closing, many mortgage lenders named MERS as the "mortgagee of record" on the mortgage, instead of themselves. When the mortgage was later recorded with the local register of deeds, it was recorded under MERS' name, not the name of the lender, even though MERS did not fund and did not own the loan. In other cases, MERS was recorded as the assignee of the mortgage from the original lender, even though it did not hold the note. Thereafter, MERS held itself out as the mortgagee or assignee for the life of the loan, regardless of whether the loan was assigned to someone else.

In addition, MERS took on the role of plaintiff in actions against homeowners for foreclosure. During this period, when home loans went into default, MERS often foreclosed on homes in its own name, instead of in the name of the actual owner of the loan. This raised at least two types of consumer protection concerns. To begin with, MERS was not entitled to repayment or to the foreclosure proceeds because it did not actually own the mortgage or the note. In addition, MERS had a relatively small number of employees and was not remotely capable of handling the millions of foreclosure actions that went forward in counties all over the country after the housing bubble burst. Accordingly, MERS authorized the actual mortgagees and purported assignees or their servicers or vendors to foreclose in MERS' name instead of in their own. MERS did so by authorizing all of these individuals to sign foreclosure documents as officers of MERS.[45]

Because actual assignments of private-label notes were often not recorded or filed with MERS during the housing bubble years, often consumers could not ascertain the true owners of their

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[42] MERS®WORKS, Quick Facts: An Introduction to the MERS® System, MERSCORP Holdings, Inc., and Mortgage Electronic Registration Systems, Inc. (Jan. 2014), *available at* http://www.mersinc.org/media-room/press-kit (viewed Feb. 14, 2014).

[43] *Id*.

[44] For an in-depth description of these problems, see Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CINN. L. REV. 1359 (2010); Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 WILLIAM & MARY L. REV. 111 (2011).

[45] *See, e.g.*, MERS, *MERS Recommended Foreclosure Procedures* 8 (2002) ("Employees of the servicer will be certifying officers of MERS. This means they are authorized to sign any necessary documents as an officer of MERS. The certifying officer is granted this power by a corporate resolution of MERS. In other words, the same individual that signs the documents for the servicer will continue to sign the documents, but now as an officer of MERS.").

mortgage loans. This exposed them to several risks. First, it exposed them to potential double foreclosure actions – and a double layer of attendant foreclosure fees – because they could not determine exactly who owned their loans. In the most egregious cases, fraudsters could become authorized officers of MERS and initiate foreclosure. Second, consumers could not find out who to contact to settle the foreclosure case when MERS was the one that initiated the actions. Third, debt collectors and assignees used MERS as a front to attempt to evade liability under state and federal consumer protection laws. This is because MERS' lack of ownership of the actual mortgage allowed it to argue, when sued for unfair or deceptive practices, fraud or violations of the Truth in Lending Act or the Fair Debt Collection Practices Act, that it was merely an agent in order to escape liability.[46] Essentially, by variously holding itself out as the owner of the mortgage or merely as a nominee on behalf of the real owner, depending on the circumstances, MERS sought the ability to foreclose on loans without any accompanying legal accountability. Finally, illegal debt collection mills sought to evade the protections in the Fair Debt Collection Practices Act by hiding behind the cloak of MERS when foreclosing. In the meantime, growing questions surrounding foreclosure sales initiated by MERS put cloud over subsequent transfers of titles in some states.[47]

2. *Potential Unintended Consequences*

These problems with MERS illustrate a host of potential abuses that a centralized repository could spawn. Before officially sanctioning the concept of a centralized repository, we call upon the Bureau to realistically assess whether it has the legislative authority, resources, and resolve to solve each of the following problems:

- What would prevent the new centralized repository from collecting unsecured consumer debts in its own name or as a nominee? Could the CFPB prevent state and local courts from conferring standing on the new centralized repository to collect those debts, as some did in the case of MERS?[48]

- Unless the repository was *the* system of record on the debt, it would not have personal knowledge of the amount of the debt. Consequently, could the CFPB prohibit a centralized repository from testifying as to or otherwise certifying the amount of a debt in court?

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[46] *See, e.g.*, Escher v. Decision One Mortgage Co. (*In re* Escher), 369 B.R. 862, 867 n.8 (Bankr. E.D. Pa. 2007), *aff'd in part, vacated in part*, 417 B.R. 245 (E.D. Pa. 2009); Hartman v. Deutsche Bank Nat'l Trust Co., No. 07-5407, 2008 WL 2996515, *2 (E.D. Pa. Aug. 1, 2008).

[47] See, e.g., Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 DUKE L.J. 637 (2013); Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 WILLIAM & MARY L. REV. 111 (2011).

[48] For a discussion of a split in state case law, see, *e.g.*, David P. Weber, *The Magic of the Mortgage Electronic Registration System: It Is and It Isn't*, 85 AM. BANKR. L.J. 239, 246-256 (2011).

- What would prevent the new centralized repository from opposing defenses or affirmative claims against it on grounds that it is merely a nominee of the creditor or the debt holder in court? Would the repository be accountable in any way to consumers directly?
- Would the CFPB be able to *require* all creditors, assignees, and debt collectors to contribute and update data to the new centralized repository? We are concerned that if reporting were strictly voluntary, that would create the danger of incomplete and inaccurate reporting and cause consumers to lack assurance that the data were complete and accurate.
- If a centralized repository were a private, for-profit entity, its officers, directors, and employees would owe primary loyalty to their shareholders and industry customers, as a practical matter. How would the CFPB resolve any resulting conflicts of interest and ensure that those loyalties did not eclipse the repository's overarching responsibilities to consumers and to the public?
- Data standards would be crucial in ensuring standardization of the data submitted.[49] Would the CFPB be able to prescribe binding rules governing the content and rigor of those data standards?
- Would the CFPB be able to police and enforce compliance with the data standards and the accuracy of the repository's data through examinations and enforcement (similar to its power under HMDA for HMDA reporters)?

We are also concerned that under current law, a centralized repository would be deemed a "consumer reporting agency" under the Fair Credit Reporting Act (FCRA).[50] This might bring

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[49] This is especially true 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 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); TerraHertz, *An Actual Know (and a Rack)* (Dec. 1, 2013), http://everist.org/NobLog/20131122_an_actual_knob.htm#jbig2 (last visited Feb. 28, 2014).

[50] 15 U.S.C. § 1681a(f) 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 available information 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 (i) in connection with a business transaction that is initiated by the consumer" (the original credit agreement). § 1681b(a)(3)(F). And

some additional consumer protections such as the requirement of "maximum possible accuracy,"[51] correction or deletion of disputed information,[52] and free consumer disclosures every twelve months,[53] as well as potential direct supervision by the CFPB.[54] However, the FCRA would do nothing to stop a repository from sharing this newly collected information with third parties, a development that has negative consequences for consumers' privacy. The FCRA's seven year limit on reporting would also present a problem, as one of the most useful features of an ideal repository would be its ability to report whether a debt has been paid or extinguished much longer than seven years since charge-off.[55] We also hasten to add that while FCRA's provisions provide some threshold consumer safeguards, given FCRA's mixed track record of empowering consumers to correct inaccurate credit reports, we firmly believe that 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.

In sum, we conclude that it is premature to know whether the Bureau can solve the many thorny issues that a centralized repository would raise affecting the welfare of ordinary consumers, without extensive further input from the public and deliberation. For this reason, in the next section, we advance a more modest proposal for addressing the informational challenges confronting consumers facing debt collection.

IV. Proposal

In this last section of our comment letter, we propose a different solution that would enable consumers to have access to the information they need to evaluate and respond to attempts to collect debts without the problems potentially raised by a centralized repository. This part of our discussion responds to Questions 5-10 (regarding data transfer by debt owners to debt buyers and third-party collectors), 16 (regarding the identity of the current owner of the debt), 123 (regarding substantiation), and 133 (regarding time-barred debt)

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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 whom the information is to be furnished (for the) collection of an account of the consumer;" (emphasis added). § 1681b(a)(3)(A).

[51] 15 U.S.C. § 1681e(b).
[52] 15 U.S.C. § 1681i.
[53] 15 U.S.C. § 1681j.
[54] Repositories would be subject to CFPB supervision if they met the Bureau's definition of a "larger participant" in the market for consumer reporting. Consumer Financial Protection Bureau, *Final Rule: Defining Larger Participants of the Consumer Reporting Market*, 77 FR 42873 (July 20, 2012). They may also qualify for supervision as service providers of depository institutions. Dodd-Frank Act § 1025.
[55] *See generally* 15 U.S.C. § 1681c(a)(4).

A. General Principles

In proposing this solution, we are guided by three principles. First, creditors, debt collectors, and debt buyers should be required to establish the existence of a debt, its amount, its status as non-performing, the identity of the debtor, the validity of the debt for limitations purposes, and their standing to collect on the debt, based on the original contract, original billing records, and other relevant original documentation, before attempting to collect a debt from a consumer. This, in turn, requires them to have timely access to that information.

Second, consumers need timely access to accurate information about the existence of the debt being collected, the relevant date for limitations purposes, the principal, interest and fees being sought, the identity of the debtor, the standing of the plaintiff, and any possible defenses in order to make sure that they are not subject to collection for excess amounts, for time-barred debts, for double recovery, or for debts that they do not owe.

Third, the CFPB should address the problem of collection and attempted collection of time-barred debts.

B. Proposal

Under our proposal, any needed information that is within the original creditor's control should stay with that creditor. The Bureau should then require the creditor to make that information available on a timely basis to all of the participants in the debt transaction in question at the time that the participant has the legal right to collect on the debt—either because the participant has purchased the debt or because it is the authorized servicer. Recognizing that this information and documentation no longer exists for many of the debts that have been sold up until now, our proposal is prospective.

Specifically, creditors should be required to maintain the following information for access by affected consumers and subsequent buyers and collectors of any unsecured consumer debt:

(1) The debtor's—and co-debtor's, if any—name and address;
(2) the amount owed on the debt, itemized among principal, interest and fees assessed;
(3) copies of the 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;
(4) copy of the last account statement generated by the original creditor (if the debt was sold);
(5) account numbers used by original creditor to identify the account;
(6) a legible copy of the original debt contract, including all amendments;

(7) if a co-debtor is alleged, the contract should have evidence that the co-debtor is actually liable on the account, as opposed to a mere authorized user;[56]
(8) the date of first default;
(9) the name of and contact information for the creditor;
(10) the name of and contact information for the current debt owner (if known);
(11) the name of and contact information for the current debt collector (if known); and
(12) the name of and contact for any securitization trustee (if known).

Under our proposal, creditors would have to maintain that information for a stated number of years—e.g., seven—after the consumer dies.

The purpose of requiring creditors to maintain this information is two-fold. First, this requirement would provide consumers and subsequent debt buyers with access to the original information and underlying documentation regarding the debt. Creditors would have to provide the information listed above upon request to the debtor (or putative debtor, in the case of a dispute over identity) or her authorized representative, any subsequent debt buyers, relevant trustees, and the servicers or debt collectors hired to collect the debt. To protect consumer privacy, sharing of this information would be limited to these entities and any of their service providers (who could not use this information except to provide the service).

Second, making creditors maintain this information would now give debt buyers and debt collectors the ability to verify the debt. Consequently, the Bureau should concomitantly require debt owners and debt collectors 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. Furthermore, if 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.[57]

[56] We are concerned that authorized users on credit card accounts are being pursued for collection when they never entered into an agreement to repay the creditor. Under state laws, they could potentially be pursued for purchases that they themselves made, but this would be under equitable principles in court.
[57] In the case of a debt sale, the contracts underlying each sale should be retained 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. *See, e.g.*, Wells Fargo Purchase Agreement (Jan. 6, 2010), *available at* http://dalie.org/contracts (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"); Jiménez, *supra* note 18.

When a debt is sold or the right to collect is transferred to a third-party debt collector, the original creditor will not have all the information that is necessary to allow the consumer to evaluate the legitimacy of a debt collection effort. Instead, that additional information will be in the hands of the third party seeking to collect to the debt. Accordingly, the Bureau should also require debt collectors to keep the following information relating to the *collection* of the debt for timely disclosure to consumers when attempting to collect and to pass on *all of the information collected on a debt* to any subsequent collector or owner of the debt on a timely basis:

(1) Any other account numbers used by subsequent owners and collectors of the debt;
(2) the name of and contact information for the current debt owner;
(3) the name of and contact information for the current debt collector;
(4) the name of and contact for any securitization trustee;
(5) documentary proof that the debt owner actually owns the loan;
(6) documentary proof that the debt collector currently has the right to collect on the loan;[58]
(7) requests and responses to validation requests or disputes;
(8) the consumer's request to stop contact;
(9) a thorough accounting of charges, credits, and payments on the account;
(10) settlements concerning the debt, if any;
(11) the status of debt under the statute of limitations;
(12) representation of the consumer by an attorney and attorney's contact information, if applicable;
(13) information regarding inconvenient time or place for communication;
(14) discharge of debt or listed in bankruptcy;
(15) illness or disability claimed by the consumer or known to the collector, or other notes regarding consumer's current ability to repay; and
(16) known or claimed violations of the FDCPA and other state and federal consumer laws to date.

A subsequent debt buyer or collector could not begin collection on a debt until it has received this information.

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[58] The Bureau could facilitate the creation of this proof by requiring creditors to send a "goodbye letter" to the consumer whenever it sells her account. Ideally, this letter would include the name and contact information for the new owner and any charge-off statement—the last statement ever mailed from the bank to the consumer at the time of charge-off. The letter could even attach a ledger accounting of the last year's purchases, payments, and interest or fee charges. Every subsequent buyer should also mail the consumer a version of this letter if it resells the loan. If all of the debt buyers kept records of the letter being sent and those records were given to the subsequent buyer at the moment of sale, this would go a long way towards ameliorating the business records problem in state court. This "goodbye letter" would also be helpful to consumers who wish to pay their obligations or who wish to learn who currently owns their debt and how to get in touch with that company.

We also urge that the Bureau use its authorities to limit collections on debts that are past the statute of limitations. In particular, the Bureau should at a minimum clarify that suits on time-barred debts and threats to bring such suits are prohibited as misleading or deceptive under the Fair Debt Collection Practices Act by adopting the holdings in the *Kimber* line of cases.[59]

The CFPB should go further and adopt the FTC's reasoning in its consent decree with Asset Acceptance[60] that seeking to collect from a consumer outside of court without meaningfully disclosing that a debt is outside the statute of limitations is misleading to the least sophisticated consumer. Without meaningful disclosure, the least sophisticated consumer will not be protected because it is likely that she will assume that the collector has the legal right to sue on the debt.

Consequently, the Bureau should require debt collectors to (1) investigate whether a debt is beyond the applicable statute of limitations, and (2) make a disclosure to the consumer each time it communicates with her, regarding a debt outside the statute of limitations. The disclosure should make clear that the collector lacks the right to sue the consumer to collect the debt.

To implement the disclosure requirement, the Bureau should mandate a model disclosure form for debt collectors to use when attempting to collect time-barred debts. Such disclosure should be tested with real consumers to the maximum extent possible to ensure its effectiveness. We urge the Bureau to test whether oral disclosures are as effective as written disclosures, as we are concerned that an oral disclosure will be harder to regulate and not as clear to consumers.

Even if state law allows a collector to revive the statute of limitations upon a payment or promise of payment, we urge the CFPB to declare this practice by collectors unfair or abusive, at least in the circumstances in which the collector would be reviving a debt whose limitations period had already expired or was very close to expiring. State statutes of limitations can be 10 years or longer.[61] An attempt to revive such a long statute by eliciting a payment from the consumer should be deemed unfair. In the (less desirable) alternative, the Bureau should at least require special disclosures by the collector in the months leading up to the expiration of a limitations period or anytime thereafter should very clearly indicate that making a payment could revive a debt that otherwise would be time-barred.

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[59] *Kimber*, 668 F. Supp. at 1488 ("By threatening to sue Kimber on her alleged debt, FFC violated § 1692e(2)(A) & (10)"). *See also* cases listed in notes 13-14 *supra*.

[60] United States v. Asset Acceptance, LLC, Case No. 8:12-cv-00182-JDW-EAJ, *Consent Decree* at 11, http://www.ftc.gov/os/caselist/0523133/120131assetconsent.pdf.

[61] *See, e.g.*, KY. REV. STAT. § 413.090 (15 years); OHIO REV. CODE § 2305.06 (15 years); 735 ILL. COMP. STAT. 5/13-206 (10 years); LA. CIV. CODE § 3499 (10 years); W. VA. CODE § 55-2-6 (10 years); WYO. STAT. § 1-3-105(A)(I) (10 years).

Finally, the Bureau should prohibit time-barred debts from being reported to credit bureaus even if within the seven years permitted by the FCRA. If these debts are reported, many consumers will not understand that the debt is time-barred and may pay it to "get it off their credit report" when instead what they will do by paying is unwittingly ensure that it remains on their credit report for another seven years.

We believe that these changes are possible under the Bureau's current authorities and will greatly enhance the marketplace for consumers, creditors, and debt collectors.

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We appreciate the opportunity to comment on this ANPR and respectfully request that the Bureau consider our recommendations and suggestions. We are available to meet and discuss these matters with the Bureau and its staff, and to respond to any questions.

Sincerely yours,

/s/ Patricia A. McCoy
Connecticut Mutual Professor of Law &
Director, Insurance Law Center

/s/ Dalié Jiménez
Associate Professor of Law &
Jeremy Bentham Scholar