April 17, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
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Acting Director Mulvaney,

The Consumer Relations Consortium (CRC) was founded in 2013, in response to the release of the Larger Market Participant Rule for Debt Collectors. The CRC is comprised of more than 50 companies covering the ecosystem of collections, including creditors, large collection agencies and data/technology providers. We focus on two areas: advocacy and innovation.

From an advocacy perspective, the CRC engages with regulators, consumer groups and other thought leaders to produce common sense, consumer-centric solutions to issues facing debt collection stakeholders. Our approach is to discuss practical solutions in a non-public, candid, off-the-record environment where all parties can get well beyond talking points. We established ourselves in both the consumer community and with the CFPB rulemaking body as a respected and productive group.

As mentioned in our briefing sent to you January 24, 2018, CRC members would like you to know that they **do** want to see debt collection rules. The Fair Debt Collection Practices Act (FDCPA) has not been modernized since it was enacted by Congress in 1977. Instead, state regulators and courts have created a patchwork of conflicting precedents, resulting in an inefficient and confusing landscape for both consumers and businesses.

Also, numerous innovations in communication technology that are embraced and expected throughout our society are passing this industry by because of the strict requirements of the FDCPA, which was written with the limited context of letters and telephone calls.

This industry and consumers both need simple rules that allow communication in accordance with expressed preferences, and that help to eliminate outdated and conflicting areas in the law that have enabled a cottage industry of frivolous litigation. This submission is a follow up to our letter of January 24, 2018, in which we offered these suggestions for clarifying the current law:

1. Provide guidance for the use of modern communication channels to engage with consumers, and clarify the overly broad definition of "communication" with third parties
2. Create a set of fair and balanced standard disclosures that are recognized and understood by all parties
3. Establish a standard, limited-content message that can be left for a consumer without running afoul of conflicting rules
4. Provide for a right to cure errors, consistent with other areas of the law
5. Provide clarification related to the definition of "pre-default" and when the FDCPA applies

In January we offered a brief background explanation for each of the ideas above. In this memo we offer specific suggestions.

We look forward to the opportunity to discuss these suggestions with you and your team.

Respectfully,

Stephanie Eidelman
Executive Director, Consumer Relations Consortium

1. Provide guidance for the use of modern communication channels, and clarify the definition of "third party disclosure

Congress enacted the FDCPA at a time when nearly all communication was by telephone and U.S. postal mail. Over the past four decades, alternative communication channels have developed, including email, text messaging, web chats and more. These alternative communication channels are the preferred mechanisms of the vast majority of today's consumers, who do not want to be called on the phone and will not open traditional mail.

Unfortunately, the current statutory framework for third party debt collection lacks any clear guidance on the use of email, text messaging and other alternative communication channels. Additionally, a cottage industry of "consumer attorneys" has made a huge business of suing collection agencies for the most trifling and fanciful of claims, relying on inconsistent interpretations of an out-of-date statute. These attorneys are not helping clients that have truly been harmed; they are looking for quick and easy settlements from agencies that don't want to (or can't afford to) pay to defend frivolous cases.

Given the lack of guidance and the risk of using consumer-preferred alternatives, consumers' choices are largely ignored for fear of the legal repercussions that may result. Consider this example:

> A consumer has been interacting with her creditor via text and web chat, the means most convenient for her. The account is then sent to a collection agency and the consumer is told that she can only communicate via phone calls and letters. The consumer is frustrated. It is difficult to find a private place to have such a conversation, and waiting for letters in the mail only prolongs the situation.

Since many consumers will not answer their phone (due to concerns about fraud, regulators and the media advise them not to answer a call from someone they don't know) or respond to traditional mail, additional call attempts are made (which some view as harassment) and accounts which would otherwise be resolved are instead escalated, resulting in unnecessary credit reporting, garnishments, repossessions, and litigation. Courts throughout the country are swamped with collection litigation filed by companies because it is so difficult to communicate with consumers.

Intertwined with the matter of honoring consumer preference regarding communication channels is the issue of "communication with third parties." 15 USC 1692c (b) addresses this topic:

> Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector **may not communicate**, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector. (emphasis added)

The FDCPA says that collectors may not communicate about a debt with a third party, except in the limited circumstances outlined above. The CRC remains in agreement with the spirit of this requirement. What has become unworkable is the expansive definition of what is effectively *inadvertent*

“communication” with third parties. Essentially, courts have defined the clause to mean *potential* communication, rather than *actual* communication.

In years past this clause gave rise to volumes of litigation related to leaving voicemail messages, because standard voicemail technology required a consumer to listen to a recording in the open, where others might hear. And access to the voicemail was available simply at the click of a button on the machine.

Today, these devices are in far fewer homes, and the vast majority of consumers have the ability to hear voicemail messages in private, with a password typically being required for access. Yet collection agencies are still reluctant to leave messages. In its Outline of Proposals released in conjunction with the Debt Collection SBREFA hearing, the CFPB suggested a fix to this situation by offering a limited content message that can safely be left and not be deemed a “communication” under the FDCPA. That’s helpful (indeed, section 3 of this document supports the proposal), but really the root of the problem is deeper.

There are now parallels for this scenario in multiple other communication channels. For example:

eMail

Collectors must undergo contortions to use a decades-old ubiquitous communications “technology” called email. Because a neighbor might see the contents of an email? How… over my shoulder? Or my child might use a shared family email? Email accounts are free. Consumers can have as many as they wish. So why use a family email to open an account, or communicate with a healthcare provider?

The accompanying presentation outlines the extensive process required today to make use of the eMail channel. It demonstrates that, in spite of being a well-established, ubiquitous, and generally free communication channel, collectors are effectively unable to use it to reach consumers; not so much because the regulations say they can’t, but because they don’t say they CAN, and therefore creditor clients in general will not allow it.

Mobile phones

The proliferation of illegal and unwanted robocalls has stirred a massive effort to put tools in between call originators and called parties. Dozens of applications have been developed with the goal of notifying a consumer who is calling, and WHY, in order to provide them with enough information to determine whether to answer a call (developers of these applications have become known as “analytics” companies). As consumers, we all love this. However, collections is the ONE INDUSTRY faced with a unique challenge in this new scenario. Should one of these applications disclose on a consumer’s mobile phone screen that a debt collector is calling, the debt collector (who has no idea how their calls are being labeled) would be open to litigation due to the potential for a third party disclosure. This is not unlike the potential for a voicemail to be heard by a roommate or family member.

But the whole point of the technology – wanted by consumers and supported (in fact, encouraged) by the Federal Communications Commission -- is to give the consumer accurate information. This situation has caused the industry to come up with alternate terminology, “account servicing,” to suggest to application providers that vaguely – but accurately – describes the call. It has been adopted so far by one analytics company, First Orion.

So, what happens when account servicing becomes synonymous with debt collection? Another term must be found? How long will it take for a clever consumer attorney to file a lawsuit against the application provider, the carrier, and the debt collector, saying “account servicing” misled their client into picking up a call from a debt collector?

This is an endless loop of potential liability. The broad interpretation of this rule to mean the *potential* for third party disclosure rather than *actual* third party disclosure inconveniences the vast majority of consumers, who need the ability to communicate about debts in their preferred channel. The more barriers we put in front of this goal, the more we end up with debts on credit reports, debts turning into lawsuits, and debts getting re-placed with multiple collection agencies or sold because of an inability to communicate and resolve.

The authentication dance

The beginning of a collection call is incredibly uncomfortable. As we’ve noted above, collectors are required by law to confirm they are talking to the right consumer before they can reveal why they are calling. But the consumer has been trained to not trust a caller they don’t know, and certainly not to provide any personally identifying information. And… collectors are required by law to tell consumers why they are calling. So there is a stand-off, and a really awkward situation.

One way to solve this is to make it easier for collectors to initiate communication with consumers through digital channels. This would make it possible for collectors to employ the dozens of more advanced ways to authenticate the consumer that are now available to banks and other financial institutions. This would greatly benefit the consumer by making the beginning of a collection communication far less awkward and frightening.

For all of these reasons, the CRC suggests that it is time to revisit this overly broad definition of “communication” with a third party.

2. Create a set of fair and balanced standard disclosures

The FDCPA requires that notices and disclosures be made to consumers about a range of topics but does not prescribe the language of those notices and disclosures. As a result, hundreds – if not thousands – of interpretations/variations of these notices have been created by attorneys and compliance officers nationwide. This resulted in consumer confusion over what they mean, and frivolous litigation over – literally -- the placement of commas and other technical grammatical or word choices that could be misconstrued.

Consumers and the collection industry both need clarity from the CFPB regarding simple, clear disclosures. Federal Courts are often tasked with interpreting debt collection disclosures in connection with FDCPA cases. Despite seemingly clear guidance from the plain language of the FDCPA and the Courts, FDCPA lawsuits are filed every day against debt collectors using seemingly crystal clear disclosures.

For example, in March 2016, the Second Circuit Court of Appeals issued its ruling in the *Avila* case, adopting a "safe harbor" disclosure regarding the accrual of interest, writing:

> We hold that a debt collector will not be subject to liability under Section 1692e for failing to disclose that the consumer's balance may increase due to interest and fees if the collection notice either accurately informs the consumer that the amount of the debt stated in the letter will increase over time, or clearly states that the holder of the debt will accept payment of the amount set forth in full satisfaction of the debt if payment is made by a specified date. Like the Miller court, we do not hold that a debt collector must use any particular disclaimer. Using the language set forth in Miller will qualify for safe-harbor treatment, as would the language suggested in Jones, 755 F.Supp.2d at 397 n. 7, which may be preferable to the extent it advises the consumer of the specific rate of increase in the debt over time.[2] Moreover, a debt collector who is willing to accept a specified amount in full satisfaction of the debt if payment is made by a specific date could considerably simplify the consumer's understanding by so stating, while advising that the amount due would increase by the accrual of additional interest or fees if payment is not received by that date.

It would seem likely that lawsuits regarding this issue would drop dramatically after the ruling in *Avila* because debt collectors would change their debt collection communications to incorporate the holding in this case. Quite to the contrary, lawsuits against debt collectors immediately skyrocketed after the Second Circuit Court of Appeals ruling in *Avila*, clogging the dockets with hundreds of cases claiming that the *Avila* case somehow requires a debt collector to disclose when interest is not accruing. The attached study of the dockets in New York Federal Court from April 2016 through April 2017 demonstrates that there were 310 FDCPA cases filed citing to the interest disclosure issue, with 308 of those cases – most of them filed by just eight attorneys -- somehow asserting that a debt collector was required to disclose when interest was not accruing. In the 2018 *Taylor* decision, the Second Circuit Court of Appeals addressed and dismissed the "reverse-Avila" theory behind these hundreds of cases (siding with the Seventh Circuit Court of Appeals which addressed the issue in 2004):

> Contrary to Taylor and Klein's objection, our decision today reads Sections 1692e and 1692g in harmony. That is, if a collection notice correctly states a consumer's balance without mentioning

interest or fees, and no such interest or fees are accruing, then the notice will neither be misleading within the meaning of Section 1692e, nor fail to state accurately the amount of the debt under Section 1692g. If instead the notice contains no mention of interest or fees, and they are accruing, then the notice will run afoul of the requirements of both Section 1692e and Section 1692g.

Unfortunately, it would be naïve to think that the *Taylor* decision will stem the tide of questionable FDCPA lawsuits. Undoubtedly new theories on the interest disclosure will arise and consumers will be harmed by thinking that they somehow do not have to pay their just obligations because some there was some theoretical error in a communication they received. Only clear and concise disclosures promulgated by the CFPB can save consumers from this harm.

The issue, unfortunately, is not isolated to interest disclosures:

1. Cases asserting that the validation language in a collection communication, drawn verbatim from the statute, is unclear;
2. Claims that the creditor is not clearly disclosed, when the name of the creditor is, for instance, American Express;
3. Claims that a disclosure is misleading where it was stated that a creditor will not sue on a time barred debt because the disclosure does not say that the creditor "cannot" sue;
4. Claims that a disclosure is misleading for stating that the creditor will not report a debt to the credit reporting agencies is false because the creditor could report it; and,
5. Claims that there were too many required disclosures in a letter.

As such, the CRC suggests that a set of fair and balanced standard disclosures on the following topics would bring clarity for all involved, and could even contribute to defining the difference between a legitimate collector and a scammer: Validation notice, Credit reporting, Interest accruing, Tax consequences, Time barred debt,

The following recommendations provide consumers with clear and easy-to-understand descriptions of their rights and important information about their accounts, while providing safe harbor for legitimate companies looking to comply with the law.

Validation notice

The FDCPA requires that collectors provide to consumers an initial disclosure, colloquially referred to as the "validation notice." This is codified at 15 USC 1692(g) and requires that a collector advise the consumer of the following:

a. the amount of the debt;

b. the name of the creditor to whom the debt is owed;

c. a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

d. a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain

verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

e. a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

While it would seem there is nothing particularly difficult about placing such a notice on a letter, the statute does not prescribe any particular wording, so collection agencies fashion on their own a paragraph they believe covers all these points. This has resulted in substantial class action litigation. As such, the CRC proposes that the CFPB establish a standard validation notice that properly advises the consumer of their rights but is also sufficiently clear and easy to read so that the average consumer will understand it.

> ***Proposed standard disclosure:*** **If you write to us within 30 days of receiving this letter to dispute all or part of this debt or to request the name and address of the original creditor (if different from the current creditor), then we will stop collecting until we send you our response. Unless you dispute all or part of the debt in writing within 30 days of receiving this letter, we will assume the debt is valid. If you tell us in writing that you want us to stop contacting you, we are required by law to do so, but this alone will not make the debt go away.**

Credit Reporting

Debt collectors face issues when providing credit reporting disclosures to consumers. Agencies and their creditor clients want to provide consumers reasonable notice that an account will be reported if not resolved to allow the consumer adequate opportunity to pay or dispute the account as appropriate. However, consumer attorneys file lawsuits after disclosures are given when the agency or creditor later determines that the account will not be reported. Accounts are not reported for many reasons after the initial demand/credit reporting disclosure letter is sent -- for instance, because a consumer disputes or makes payments, or a client requests the account be closed.

Due to the craftiness of the consumer bar, there is a very real risk of high volume litigation regarding any disclosure that discusses credit reporting since it is difficult to include all of the different situations that may impact whether or how an account appears on a consumer's credit report.

As a result, CRC makes two recommendations:

- Debt collection agencies that cannot -- or choose not to -- credit report should not be required to provide any credit reporting disclosure.
- Debt collectors that do choose to credit report, or are required by a creditor to do so in the collection agreement, also should not be required to include a disclosure. However, for agencies that do credit report and do choose to include a disclosure, CRC recommends the following standard disclosure to be provided in the initial written communication with the consumer:

  Proposed standard disclosure: **Adverse credit information is scheduled to be reported on or after [enter date after 30 day validation period].**

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Interest Accruing

Accounts in collection may or may not accrue interest. As highlighted in the discussion above, consumer attorneys file countless lawsuits against collection agencies based on their disclosures of accruing interest, or lack thereof. It is generally accepted that if interest is accruing on an account, that fact must be disclosed. However, consumer attorneys are now filing cases against agencies when there is no interest accruing, and the agency fails to disclose that fact.

In line with the Second Circuit's decisions regarding interest disclosure, debt collectors should inform consumers if their accounts are currently accruing interest[1], but should not be required to disclose that an account balance is static while it remains with the debt collector[2].

For accounts that accrue interest, CRC recommends the following model disclosure:

> ***Proposed standard disclosure:*** **The balance listed above is the total amount required to pay your obligation in full as of the date of this letter. Because interest continues to accrue, the amount required as of a later date may be different. Contact us for the correct balance.**

For accounts that do not accrue interest, CRC recommends the CFPB issue specific guidance that the collection agency need not disclose that the account balance is static.

Tax Consequences/ IRS Form 1099-C

Debt collectors and creditors face challenges with 1099-C disclosures. Many creditors believe that a disclosure must be made to a consumer in cases when the consumer's account is reduced/forgiven by $600 or more. Yet hundreds of lawsuits have been filed or threatened against collection agencies when making these disclosures. Case law is not consistent and has further clouded the situation.

In line with the judicial decisions from many jurisdictions throughout the United States[3], CRC recommends that the CFPB issue guidance that a collection agency is not required to provide a 1099c/settlement tax consequences disclosure to a consumer. However, if an agency chooses to include such a disclosure, then CRC recommends the following court-approved[4] disclosure:

> ***Proposed standard disclosure:*** **This settlement may have tax consequences. Please consult your tax advisor.**

Time Barred Debt

The calculation of when the statute of limitations runs and expires is not consistent from state to state, and among different types of debt. It is extremely confusing, even to sophisticated attorneys. While a handful of states prescribe a disclosure to notify the consumer that the statute of limitations expired on their account, the majority of states provide no clarity. Additionally, in states that do not prescribe a

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[1] *Avila v. Riexinger & Assoc., LLC*, 817 F.3d 72 (2d Cir. 2016).

[2] *Taylor v. Fin. Recovery Servs., Inc.*, 2018 WL 1526057 (2d Cir. 2018).

[3] [3] *See Ceban v. Capital Mgmt. Servs., L.P.*, 2018 WL 451637 (E.D.N.Y. Jan. 17, 2018); *Remington v. Fin. Recovery Servs, Inc.*, 2017 WL 1014994 (D. Conn. Mar. 15, 2017); *Taylor v. Fin. Recovery Servs., Inc.*, 252 F.Supp.3d 344 (S.D.N.Y. May 18, 2017); *Rhein v. Forster, Garbus & Garbus, LLP*, 2017 WL 4969335 (D.N.J. Nov. 1, 2017).

[4] *See Ceban v. Capital Mgmt. Servs., L.P.*, 2018 WL 451637 (E.D.N.Y. Jan. 17, 2018); *Remington v. Fin. Recovery Servs, Inc.*, 2017 WL 1014994 (D. Conn. Mar. 15, 2017); *Taylor v. Fin. Recovery Servs., Inc.*, 252 F.Supp.3d 344 (S.D.N.Y. May 18, 2017); *Rhein v. Forster, Garbus & Garbus, LLP*, 2017 WL 4969335 (D.N.J. Nov. 1, 2017).

disclosure, the disclosures differ depending on whether or not the state recognizes that a payment or written acknowledgment of the debt restarts the statute of limitations.

While some states have a required verbatim disclosure for collecting on time barred debts[5], many states provide no guidance. To fill the gap for the states that do not have a verbatim disclosure requirement, CRC recommends the following two disclosures depending on whether or not the account is past the FCRA date of obsolescence.

Accounts not past date of obsolescence:

> ***Proposed standard disclosure:*** **The law limits how long you can be sued on a debt. Because of the age of your debt, you cannot be sued for it. If you do not pay the debt, it may [continue to] be reported to any credit reporting agency. In some states, making a payment or a promise to pay could restart the statute of limitations. Please ask a lawyer if you have any questions.**

Accounts past the date of obsolescence:

> ***Proposed standard disclosure:*** **The law limits how long you can be sued on a debt. Because of the age of your debt, you cannot be sued for it and it cannot be reported to any credit reporting agency. In some states, making a payment or a promise to pay could restart the statute of limitations.**

Collection Costs

For certain accounts, the creditor may be entitled to collection costs per the credit agreement with the consumer or where permitted by law. Where collection costs are to be collected, the Northern District of Illinois reasoned that it is better for a debt collector to set forth the collection costs in the letter to consumers and collect that amount in whole, rather than collecting the balance and then coming back after payment to collect the collection costs[6].

CRC agrees with the Norther District of Illinois's reasoning, which is in line with the 2nd Circuit's reasoning in *Avila* (to prevent a perpetual collection process caused by not disclosing to the consumer if any immediate additional interest, fees, or charges that may prevent the account's resolution after payment is made). Based on this, CRC recommends the following model disclosure for those that collect the collection costs associated with an account:

> ***Proposed standard disclosure:*** **The Collection Costs amount stated above, which would be applied if full payment were made as of this date, is included in the Payoff Amount. It reflects the addition of collection costs as permitted by [your agreement with the creditor/law].**

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[5] E.g., Cal. Civ. Code § 1788.52; 940 Mass. Code Regs. 7.07; N.Y. Comp. R. & Regs. Tit. 23, § 1.3.
[6] *Bernal v. NRA Group, LLC*, 318 F.R.D. 64 (N.D. Ill. Aug. 30, 2016).

3. Establish a standard, limited-content message

The FDCPA contains conflicting requirements in that a debt collector must disclose his or her identity to a consumer in every communication and that a collector must refrain from communicating about a consumer's debt to a third party. Congress did not anticipate the challenges created by the wording of the FDCPA in the context of today's modern communications.

For example, current interpretations of the FDCPA provide that leaving a voicemail message, no matter how terse, is considered a "communication" under the FDCPA, thus triggering both the mini-Miranda debt collector disclosure requirement (which might be heard by, e.g., a roommate) and the third-party disclosure prohibition.

The combination of these outdated rules and the inability to use current communication channels threatens to leave this one industry in the last century, while the rest of the world moves ahead. Given that an estimated 77 million Americans have a debt in collections, this is an issue that will only cause more and more consumer frustration as today's younger – digital only – consumers age.

> ***Recommendation:*** **Declare that a limited content message, delivered via any medium other than by letter (such as voicemail, email or text), is not a communication subject to the "debt collector" disclosure requirements. This message could be used in cases where the right party contact information has not yet been confirmed.**
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> ***Proposed communication:*** **This is <name of person> seeking to communicate with <name of debtor>. This concerns an important matter. Please contact me at <contact information> and reference account <account number>. Thank you.**

Note: the proposed communication is approximately 180 characters, which would vary based on the length of the name of the caller and the debtor. The message would likely need to be tweaked in order to make it usable by text; this would also help to avoid the need to create channel-specific rules.

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4. Provide for a right to cure errors

Debt collectors presently have no ability to fix a mistake without threat of class action litigation. Of course this is an issue for collectors, but it is also bad for consumers. Consider this example:

> Upon taking on a new creditor client, Collection Agency ABC sends initial notices to a new set of debtors. Three days later it is recognized that the letters all had the same mistake; because of a technical glitch, a decimal point was misplaced, suggesting that people's debts were ten-times what they really owed. What's the reasonable thing to do? Fix it; Send another letter explaining the mistake and correcting the amount. However, because collectors have no "right to cure" they are immediately subject to civil liability. That correction letter in effect invites a class action lawsuit.

The purpose of the Fair Debt Collection Practices Act is "to eliminate abusive debt collection practices by debt collectors to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged…" However, debt collectors who refrain from using abusive debt collection practices are indeed being competitively disadvantaged because of an excessive amount of frivolous litigation fueled by plaintiff attorneys looking to take advantage of the fee shifting provision within 15 USC 1692k(a)(3). The statutory damage award available to an individual consumer is up to $1,000, while consumer attorneys are often awarded many times that amount. This can result in a curable mistake costing a collection agency a significant amount of money, only a very small percent of which goes to the actual consumer who has been impacted by the mistake.

Similar to your concerns regarding the power wielded by the CFPB being used to harm consumers, destroy businesses, or arbitrarily remake American financial markets, collection agencies are concerned about consumer attorneys' use of the power afforded by fee-shifting to destroy businesses, reduce consumer benefits, and in extreme cases, cause consumer harm.

As such, the CRC proposes the CFPB adopt a federal solution that mirrors one at the state level.

California – a notoriously liberal, consumer friendly state -- has a "right to cure" provision giving debt collectors a period of time to fix an error with the consumer before being susceptible to civil liability. California law provides that a debt collector shall have no liability under the Rosenthal Fair Debt Collection Practices Act ("RFDCPA"), Title 1.6C of the Civil Code, if, "within 15 days either after discovering a violation which is able to be cured, or after the receipt of a written notice of such violation, the debt collector notifies the debtor of the violation, and makes whatever adjustments or corrections are necessary to cure the violation with respect to the debtor." See California Civil Code § 1788.30(d).

Such a provision would be mutually beneficial to both the consumer and the debt collector. The consumer gets "made whole" and the business gets an opportunity to remedy a violation, instead of being served with a lawsuit subjecting it to a statute with no maximum recoveries for attorney fees. Debt collection is the only business in the United States in which a company is severely penalized for self-identifying and correcting unintentional errors. Action is needed now to protect consumers and legitimate businesses.

Proposed Rule: **A debt collector shall have no civil liability under this title if, within 30 days after discovering a violation, or after receipt of notice of an alleged violation and the factual basis for the violation, by certified mail, return receipt requested, the debt collector makes whatever adjustments or corrections are necessary to cure the violation with respect to the debtor.**

This language is modeled after the Rosenthal Fair Debt Collections Practice Act, California's consumer protection statute. The RFDCPA is very similar to the FDCPA, but the right to cure provision is an important and impactful difference between the state and federal consumer protection statutes.

5. Provide clarification related to pre-default definition and when the FDCPA applies

The Fair Debt Collection Practices Act (FDCPA) was intended to apply to third-party debt collectors who are collecting defaulted debt. However, since the Act's enactment in 1977 an exponential demand arose for businesses to provide "pre-default" account servicing for lenders and creditors who wish to outsource their accounts receivable management operations and focus on their core business. This is also known as "first party" business process outsourcing (BPO).

Entities that provide first party services are better equipped to handle large volumes of accounts or calls, and their operating structure allows them to be a complete extension of their client; they operate under the creditor's name, branding, site environment and training. These entities typically work on the creditor's system, which allows for real time updates, more efficient customer support, and less confusion for all involved.

Under the FDCPA, the definition of a "debt collector" primarily includes "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."

Two important exemptions under the FDCPA were intended to draw a line between a traditional debt collector and one providing "first party" BPO services to lenders and creditors:

- Any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity concerns a debt which was *not in default* at the time it was obtained by such person.
- An entity is not a debt collector if it, while, in the name of the creditor, collects debts for such creditor under the creditor's supervision.

However very little clarity exists regarding these definitions. In 2000 and 2002, the Federal Trade Commission issued two **opinion letters** in response to questions about first party servicing from Richard deMayo; these have become known in the industry as "The deMayo letters." Primarily, they attempt to define:

1. When an account goes into default
2. When a collection agency's employees become the creditor's *de facto* employees

In the discussion on when an account goes into "default," the FTC states:

> *"We believe that, in the absence of a contractual definition or conclusive state or federal law, a creditor's reasonable, written guidelines may be used to determine when an account is "in default. [But,] we would not consider a set of guidelines reasonable if, under those guidelines, the same account were deemed in default for one purpose, such as determining whether the creditor may accelerate the loan, but not in default for purposes of determining whether a third-party collector is a "debt collector" under the FDCPA".*

In the discussion on *de facto* employees the letter defines when a collection agency employee would be considered a *de facto* employee of the creditor:

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".......collection agency employees who are treated essentially the same as creditor employees. The more that agency employees are treated like creditor employees, the more likely it is that we would deem them de facto employees. Whether agency employees — working on the creditor's premises or on the agency's premises — are treated enough like creditor employees to become de facto employees of the creditor will depend on the degree of control and supervision exercised by the creditor over the agency employees' collection activity, and how similar that control and supervision is to that exercised by the creditor over its own employees. Relevant facts will include, for example, whether the creditor directly supervises and monitors the collection activities of the agency employees and, if so, how that supervision and monitoring is carried out; whether the creditor trains the agency employees; and whether the agency employees are subject to the same rules, procedures, and disciplinary actions that govern the collection activities of creditor employees."

These two opinion letters remain the only guidance from a regulatory body on HOW a collection agency may work in a first party capacity. As a result, this is another area that has generated significant litigation from the plaintiffs' bar. It is critical that lenders and creditors of all sizes have a clear understanding of when their outsourced partners can service accounts without being subject to the unique disclosure requirements of the FDCPA, while still providing customers with a positive experience. Consider this example:

> You are a patient who received a bill. It says it is now overdue, yet you don't even recognize it. You call the number to start investigating and you reach a collection agency that is operating as a "first party." Their job is to help callers like you sort through what you have and figure out what is owed, what isn't, where you may have insurance to cover it, etc. However, because the law is not clear, they may be required to first read you the mini-Miranda notice, which goes like this: "This is an attempt to collect a debt and any information obtained will be used for that purpose."
>
> Wait. What? You might think, "Am I being arrested? I am just calling to figure out this bill!" Sounds intimidating, doesn't it? Yet this is what the FDCPA requires collectors to say.

***Proposed Rule*: The CRC proposes that the CFPB adopt a regulation clarifying that, under the FDCPA, a person is not a debt collector if that person:**

- **Services a debt on behalf of the creditor exclusively in the name of the creditor, even if the person is not an employee or officer of the creditor, so long as the person is authorized by and acting under the supervision of the creditor; or**
- **Services a debt that is not in default as defined by state or federal law or the terms of the contract creating the indebtedness; in the absence of such definition in contract or law, a creditor's reasonable, written, and consistently applied guidelines may be used to determine if a debt is in default.**