3-1-2015

Who’s Your Debt Collector Now? Extending Debt Collection Regulation to First-Party Lenders

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I. INTRODUCTION

Freedom Stores, also known as Freedom Furniture, is in trouble. According to the Consumer Financial Protection Bureau (“CFPB”), the company improperly filed lawsuits to collect consumer debt in states in which the consumers neither lived nor signed the loan agreement. Additionally, Freedom Stores continued to withdraw funds from consumer accounts, even though consumers had only authorized a one-time withdrawal to make debt payments. Freedom Stores, together with Freedom Acceptance Corp. and Military Credit Services, agreed to refund over $2 million in consumer debt it collected and to pay serious fines pursuant to a consent order with the CFPB. Freedom Stores is not the only first-party lender in trouble. The “buy here pay here” car seller, DriveTime, recently entered into a consent order with the CFPB over abusive debt collection practices. The alleged practices included harassing phone calls to consumers’ workplaces, which in at least one instance led to a consumer being fired. DriveTime’s in-house debt collectors routinely ignored Do Not Call (“DNC”) requests where consumers requested that the collector stop calling them at their workplace and continued calling and harassing third parties, even after

2. Id.
3. Id.
4. Id.
5. Id. at 5.
7. Id. at 5.
8. Id.
being told they had reached a wrong number.\textsuperscript{9}

Despite these questionable practices, the recent interest in enforcing regulation against first-party lenders has left many in the industry surprised and wary.\textsuperscript{10} While debt collection by third-party debt collectors has been a consistent concern for regulatory agencies,\textsuperscript{11} debt collection by first-party lenders has received far less attention.\textsuperscript{12} Following the 2008 financial crisis, however, Congress passed new statutes authorizing additional regulation and oversight for financial service providers.\textsuperscript{13} Most notable was the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), which charged the newly-created CFPB with regulating the debt collection industry.\textsuperscript{14} The CFPB does so primarily by creating rules and regulations in accordance with provisions of the Fair Debt Collection Practices Act ("FDCPA"),\textsuperscript{15} which sets guidelines for debt collection practices of third-party debt collectors.\textsuperscript{16} Dodd-Frank also includes its own regulations for debt collection, including a prohibition on "unfair, deceptive, and abusive [acts or] practices," ("UDAAPs") by any financial service provider.\textsuperscript{17}

Despite existing protections and changes in regulation, significant consumer concerns related to debt collection persist.\textsuperscript{18} Since September 2013, complaints about debt collection exceeded all other complaints received by the CFPB.\textsuperscript{19} In response to these complaints,
the CFPB released an Advanced Notice of Proposed Rulemaking ("ANPR") in October 2013, laying out several areas in the debt collection industry that may see additional regulation. The ANPR primarily seeks regulation of third-party debt collectors. Third-party debt collectors do not originate loans, but have been the primary focus of previous debt collection regulation. The CFPB also suggested regulation of first-party lenders in debt collection, however, particularly with respect to unfair, deceptive, and abusive practices. This Note argues that, while the CFPB may have the authority to regulate first-party lenders, it should not do so in the same way it regulates third-party debt collectors. The CFPB should continue regulating through enforcement actions or consider a separate rulemaking for first-party lenders.

This Note proceeds in five parts. Part II outlines the primary differences between third-party debt collectors and first-party lenders. Part III provides an overview of current regulations of third-party debt collectors and first-party lenders, specifically relating to UDAAPs. Part IV explains the areas in which the ANPR suggests changes in regulation, particularly as those changes apply to first-party lenders. Part V discusses whether regulation of first-party lenders is statutorily feasible, or even necessary, and addresses some of the practical barriers to such regulation. Part VI concludes by arguing that, while additional regulation of first-party lenders and their debt collection practices is possible, the CFPB’s proposed method is not practical because this type of regulation requires more individualized consideration.

II. FIRST-PARTY LENDERS AND THIRD-PARTY DEBT COLLECTORS

First-party lenders and third-party debt collectors may appear to
fulfill similar roles in debt collection, but there are inherent differences between the two.29 In the context of debt collection, the basic definition of a first-party lender is a lender, like a bank, that originates a loan and then collects that same loan itself.30 It may do this through in-house debt collection or by contracting with outside collectors, who still collect the debt using the name of the original lender.31 DriveTime, a company that both sells cars and provides car loans to consumers, is an example of a first-party lender.32 DriveTime collects any delinquent loans by contracting with debt collectors that attempt to collect the debt using DriveTime’s name.33 Bank of America also acts as a first-party lender when it attempts to collect on the mortgage loans it issues to its mortgagees.34

Third-party debt collectors, on the other hand, are debt collectors that do not originate loans but rather collect debts issued by other institutions using their own name or purchase delinquent accounts from first-party lenders,35 often for pennies on the dollar.36 Examples of third-party debt collectors are large collection agencies, such as Portfolio Recovery Services,37 as well as law firms that specialize in debt collection under their own name.38

First-party lenders and third-party debt collectors are significantly different for several reasons.39 First, first-party lenders and

29. See Debt Collection (Regulation F), 78 Fed. Reg. 67848, 67849 (proposed Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006) (explaining that third-party debt collectors collect debt for an original creditor, but do not issue their own loans or credit).
30. Id.
31. Id.
33. Id. at 4–5.
34. See Dena Aubin, Bank of America in Record Settlement over ‘Robocall’ Complaints, REUTERS (Sept. 30, 2013), http://www.reuters.com/article/2013/09/30/bankofamerica-robocalls-settle-idUSL1N0HQ0HU20130930.
third-party debt collectors are regulated differently.\textsuperscript{40} The FDCPA exempts first-party lenders from regulation,\textsuperscript{41} but they are often subject to a variety of other regulations that do not apply to third-party debt collectors.\textsuperscript{42} Second, first-party lenders have a different relationship with consumers because they depend on consumers choosing their services.\textsuperscript{43} Meanwhile, third-party debt collectors only make a profit if they can collect at least a portion of a delinquent debt and, therefore, use aggressive collection tactics more frequently.\textsuperscript{44} Any new regulatory action should take these differences into account.

III. CURRENT REGULATION OF DEBT COLLECTORS AND FIRST-PARTY LENDERS

Current regulation already recognizes the differences between first-party lenders and third-party debt collectors.\textsuperscript{45} While the Federal Trade Commission Act (“FTCA”) and Dodd-Frank apply to a broader category of financial service providers,\textsuperscript{46} the FDCPA applies specifically to third-party debt collectors.\textsuperscript{47}

A. FTCA Regulation

The FTCA was enacted before the FDCPA and Dodd-Frank\textsuperscript{48} and has historically addressed many consumer concerns related to credit, lending, and debt collection.\textsuperscript{49} In particular, section 5 of the FTCA prohibits “using unfair methods of competition in or affecting

\begin{footnotesize}
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\item \textsuperscript{41} S. REP. NO. 95-382, at 3 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1698.
\item \textsuperscript{42} See Nixon, supra note 40.
\item \textsuperscript{43} See id. at 3.
\item \textsuperscript{44} Debt Collection (Regulation F), 78 Fed. Reg. at 67849.
\item \textsuperscript{45} See, e.g., Fair Debt Collection Practices Act (FDCPA) § 803(6), 15 U.S.C. § 1692a(6) (specifically excluding first-party lenders from regulation).
\item \textsuperscript{47} Debt Collection (Regulation F), 78 Fed. Reg. at 67849.
\item \textsuperscript{48} Kathryn L. Farrell, Managing UDAAP Compliance Risks in Financial Institutions, 27 J. TAX’N FIN. INST. 21, 21 (Nov./Dec. 2013).
\item \textsuperscript{49} See Debt Collection (Regulation F) 78 Fed. Reg. at 67851 n.16.
\end{itemize}
\end{footnotesize}
commerce and unfair or deceptive acts or practices in or affecting commerce.” A practice is “unfair” if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” The FTCA served as the primary means of consumer protection from deceptive or unfair debt collection from 1938 until Congress passed the FDCPA in 1977. Today, the FTCA still plays a key role in protecting consumers from deceptive or unfair debt collection practices.

B. FDCPA Regulations

The FDCPA seeks to protect consumers from improper debt collection by “eliminate[ing] abusive debt collection practices by debt collectors.” The FDCPA also aims to prevent those third-party debt collectors that do not employ abusive practices from being “competitively disadvantaged” because of regulation. Congress hoped for consistency in state actions by creating some minimal consumer protections from abusive debt collection by third-party debt collectors. The FDCPA is limited and excludes first-party lenders from regulation, unless they are collecting under a name that is not their own. The FDCPA specifies a variety of rules and limitations on only third-party debt collectors.

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51. FTCA § 5(n), 15 U.S.C. § 45(n). The FTC has since specified that the injury to a consumer must be substantial, that it “must not be outweighed by any offsetting consumer or competitive benefits” and that the consumer could not have reasonably avoided it. International Harvester Co., 104 F.T.C. 949, 1073–74 (1984).
52. Debt Collection (Regulation F), 78 Fed. Reg. at 67850.
55. See id.
56. See id.
57. See FDCPA § 803(6), 15 U.S.C. § 1692a(6) (listing which parties are considered debt collectors, and thus subject to the FDCPA). The Senate report on the FDCPA specifically excludes creditors that collect under their “true” name, presumably because it is only when the consumer is aware of the first-party lender relationship that the consumer can benefit from different relationship with a first-party lender as opposed to a third party debt collector. See S. REP. No. 95-382, at 3 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1698.
debt collectors, such as limits on communication with third parties and
with consumers.\textsuperscript{58}

An important provision of the FDCPA addresses harassment, abuse, false or misleading representation, and unfair practices.\textsuperscript{59} The FDCPA prohibits third-party debt collectors from engaging “in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.”\textsuperscript{60} The FDCPA provides some examples of abusive or harassing conduct.\textsuperscript{61} This conduct includes: threatening violence or other types of harm; using obscenities in communications; threatening to publish a list of all persons who refuse to pay a debt; advertising a debt to force a consumer to pay that debt; calling with sufficient frequency to rise to the level of harassment; and, except to gather location information, calling without providing the debt collectors identity.\textsuperscript{62}

In addition, third-party debt collectors may not “use any false, deceptive, or misleading representations or means in connection with the collection of any debt.”\textsuperscript{63} For instance, third-party debt collectors may not impersonate an attorney, pretend to be related to a government entity, or misrepresent the “character, amount, or legal status” of a debt or a payment on a debt.\textsuperscript{64} Third-party debt collectors are also prohibited from providing consumers with deceptive forms that would lead the consumer to believe that a different party was collecting the debt.\textsuperscript{65} Further, third-party debt collectors may not “use unfair or unconscionable means to collect or attempt to collect” a debt.\textsuperscript{66} For example, attempting collection of an amount greater than that expressed

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\item \textsuperscript{58} FDCPA § 804, 15 U.S.C. § 1692b.
\item \textsuperscript{59} FDCPA § 807, 15 U.S.C. § 1692e.
\item \textsuperscript{60} FDCPA § 806, 15 U.S.C. § 1692d.
\item \textsuperscript{61} FDCPA § 806(1)–(6), 15 U.S.C. § 1692d(1)–(6).
\item \textsuperscript{62} Id.
\item \textsuperscript{63} FDCPA § 807, 15 U.S.C. § 1692e.
\item \textsuperscript{64} FDCPA § 807(1)–(5), 15 U.S.C. § 1692e(1)–(5) (providing additional examples of deceptive means, such as threatening arrest or imprisonment for nonpayment of debt, threatening wage garnishment, or generally threatening debtor with anything that cannot legally be done, implicating that a crime has been committed, communicating false information related to credit information, making a document that appears to be authorized or created by a government entity, failing to use mini-Miranda warning when initially communicating with debtor, pretending documents are a legal process, or are not a legal process and do not require action when they are, or pretending to be a consumer reporting agency).
\item \textsuperscript{65} FDCPA § 812, 15 U.S.C. § 1692j.
\item \textsuperscript{66} FDCPA § 808, 15 U.S.C. § 1692f.
\end{itemize}
in the agreement between the debt collector and the consumer is considered unfair and unconscionable.67

Consumers have successfully invoked the FDCPA to protect themselves from abusive third-party debt collectors.68 In Crossley v. Lieberman,69 a sixty-eight year old widow received a letter informing her that legal action would commence against her within a week if she did not pay her $297.79 debt. The third-party debt collector threatened a foreclosure action against the widow if she did not pay her debt, even though the action would have been barred under the applicable Pennsylvania statute.70 When she called the debt collector to tell him she could not pay, he advised her to sell her house and become a “bag lady.”71 After cashing in her pension to pay her debt, the widow sued the debt collector.72 Ultimately, she prevailed by asserting that the debt collector could not use deceptive means to collect a debt, which includes threatening to take barred legal action.73

Congress “carefully considered” extending the provisions of the FDCPA to include first-party lenders when it passed the FDCPA, but decided against such an extension.74 Pitner v. Northland Group & Capital One Services LLC75 exemplifies the exclusion of first-party lenders under the FDCPA. The U.S. District Court for the Western District of Washington dismissed the plaintiffs’ claims against Capital One, because the plaintiffs failed to establish that the FDCPA applied to a first-party lender, such as Capital One.76 Thus, while the FDCPA provides extensive consumer protection against third-party debt collectors, consumers are dependent on Dodd-Frank for protection.

67. FDCPA § 808(1)–(3), (7), 15 U.S.C. § 1692f(1)–(3), (7) (providing further examples, like depositing checks more than five days after they are dated, unless the debtor is informed, encouraging consumers to send postdated checks and using those checks to threaten the debtor, or communicating with a debtor about a debt through a postcard).
69. Id. at 567–68.
70. Id. at 570–71.
71. Id. at 567–68.
72. Id. at 568.
73. Id. at 570–71.
76. Id.
against first-party lenders.  

C. Dodd-Frank Regulation of Debt Collectors and First-Party Lenders

Dodd-Frank applies to a broader category of financial service providers than does the FDCPA, including first-party lenders. Dodd-Frank covers any entity that provides a “consumer financial product or service” and anyone acting as a service provider to such an entity. Consumer financial services include “extending credit and servicing loans” and selling or buying loans, except for the purpose of “extending commercial credit to a person who originates consumer credit transactions.” Also included in the definition of consumer financial services is “collecting debt related to any consumer financial product or service.” Regulation under Dodd-Frank extends to any non-depository party that the CFPB determines “is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.” Dodd-Frank also requires financial service providers to comply with state debt collection laws, which may provide greater protection for consumers.

Dodd-Frank gives the CFPB rulemaking authority to implement the consumer protection provisions of the law. While making these rules, the CFPB is required to consider costs and benefits to consumers and to the financial industry. In addition to rulemaking, the CFPB

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78. Id. at 67852.
85. Dodd-Frank § 1021(c)(5), 12 U.S.C. § 5511(c)(5) (establishing several other research and data collection functions).
monitors activities in the financial services industry and actively participates in protecting consumers from unexpected risks, especially related to new trends. The CFPB mandates disclosures and consumer access to information so that consumers may understand the “costs, benefits, and risks associated with the [financial] product or service.” The CFPB is further tasked with preventing UDAAPs.

Dodd-Frank provides some guidance as to what qualifies as a UDAAP. The Dodd-Frank definition of an “unfair” practice was adopted from the FTCA and is nearly identical. Dodd-Frank does not further define “deceptive” practices, instead, its meaning has been developed through agency enforcement actions and publications. Both deceptive and unfair practice prohibitions appear in the FTCA and have been defined in that context through the judicial process and enforcement actions. The CFPB relies on those actions to inform its

87. Dodd-Frank § 1022(c)(1), 12 U.S.C. § 5512(c)(1). For example, the CFPB has been monitoring the changes in debt collection practices with the rise of new technologies. Debt Collection (Regulation F), 78 Fed. Reg. 67848, 67853 (proposed Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006).


90. See, e.g., Dodd-Frank § 1031(c)(1), 12 U.S.C. § 5531(c)(1) (providing guidance on “unfair” practices).

91. Dodd-Frank § 1031(c)(1), 12 U.S.C. § 5531(c)(1) (stating that a practice is unfair if “the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and . . . such substantial injury is not outweighed by countervailing benefits to consumers or to competition”); Federal Trade Commission Act (“FTCA”) § 5(n), 15 U.S.C. § 45(n) (2012) (stating that a practice is “unfair” if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition”).


understanding of unfair and deceptive practices. “Abusive” practices, however, represent a new concept introduced by Dodd-Frank. A practice qualifies as abusive if it “materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service” or if it “takes unreasonable advantage” of “lack of understanding . . . the inability of the consumer to protect the interest of the consumer [and] . . . the reasonable reliance by consumer on covered person to act in the interest of the consumer.” Because “abusive practice” prohibitions are relatively new, comprehensive interpretations of the term remain limited.

IV. AREAS OF PROPOSED REGULATION

Consumers and consumer advocacy groups have concerns about the current state of non-compliance of many third-party debt collectors and first-party lenders. While the most frequent consumer complaint is abusive communication, consumers also express concern over misrepresentation about the amount of debt they owe and the legal status of such debt. In light of technological advances, both consumers and debt collectors are left without guidance about what is considered abusive, unfair or deceptive.

In its ANPR on debt collection, the CFPB proposes regulation

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94 See, e.g., BULLETIN, supra note 89, at 2 n.8; see also MANUAL, supra note 92, at 1 n.2.
95 Farrell, supra note 48, at 28.
96 Dodd-Frank § 1031(d), 12 U.S.C. § 5531(d).
97 See Farrell, supra note 48, at 28. In a recent enforcement action, the CFPB found that creating a false sense of urgency in attempting to collect a debt which led consumers to borrow more money from a payday lender was abusive, since it took unreasonable advantage of the consumers’ inability to protect their own interest. ACE Cash Express, Inc., 2014 CFPB CO 0008, at 10–11 (2014).
98 See, e.g., CONSUMER FIN. PROT. BUREAU, CFPB ORDERS SUBPRIME CREDIT CARD COMPANY TO REFUND $2.7 MILLION FOR CHARGING ILLEGAL CREDIT CARD FEES (Feb. 4, 2015), http://www.consumerfinance.gov/newsroom/cfpb-orders-subprime-credit-card-company-to-refund-2-7-million-for-charging-illegal-credit-card-fees/ (explaining that the CFPB ordered a subprime credit card company to refund money to consumers for illegal credit card charges).
99 Debt Collection (Regulation F), 78 Fed. Reg. 67848, 67863 (proposed Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006) (stating that abusive communications include “multiple calls from debt collector in a pattern that seemed to them to be harassment”).
100 Lewis, supra note 37.
101 See Debt Collection (Regulation F), 78 Fed. Reg. at 67870–72 (stating that more rules could provide more clarity, and describing some of the concerns that arise with the use of new technology).
that touches upon a variety of different aspects of debt collection, including information disclosures upon the sale or transfer of a debt, validation notices and debt disputes, communications with consumers and third parties, abusive, deceptive and unfair practices, litigation practices, and time-barred debt.\(^{102}\) Through new rules, CFPB may also provide a clearer definition of service providers and service provider liability.\(^ {103}\) Significantly, the CFPB explicitly mentions regulation of unfair, deceptive, and abusive practices by first-party lenders.\(^{104}\) This is particularly surprising due to the previous dearth regarding regulation of first-party lenders and their debt collection practices.\(^{105}\) The CFPB’s suggestion of first-party regulation surprised many first-party lenders because the UDAAP provisions of Dodd-Frank were typically defined by enforcement actions or in reliance on the FTCA and because the CFPB gave no indication that it was planning to regulate this area of debt collection.\(^ {106}\) Still, the CFPB may now implement more specific regulatory definitions for first-party lenders that are similar, or identical, to those for third-party debt collectors under the FDCPA.\(^ {107}\)

A. **Unfair, Deceptive, and Abusive Practices**

The CFPB is considering more detailed standards relating to unfair, deceptive, and abusive debt collection to make compliance easier for any party collecting a debt.\(^ {108}\) In doing so, the CFPB may prohibit first-party lenders from engaging in practices that, until now, were only prohibited for third-party debt collectors under the FDCPA.\(^ {109}\) The CFPB could accomplish this by finding that practices that are abusive and prohibited under the FDCPA are also prohibited by Dodd-Frank’s

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102. Id. at 67848.
103. Id. at 67874–75.
104. See id. at 67870–73.
105. See Peters, supra note 10, at 2.
106. See Farrell, supra note 48, at 28 (stating that “no one can be sure” how the abusive acts definition will be shaped by the CFPB).
107. Debt Collection (Regulation F), 78 Fed. Reg. at 67870–74 (questioning, for example, whether the CFPB should “include in proposed rules prohibitions on first-party debt collectors engaging in the same conduct that such rules would bar as unfair or unconscionable by third-party debt collectors”).
108. Id. at 67870.
109. See id. (questioning, for example, whether the CFPB should “include in proposed rules prohibitions on first-party debt collectors engaging in the same conduct that such rules would bar as abusive conduct by third-party debt collectors”).
UDAAP provisions. This symmetry would create uniform
expectations and prohibitions related to abusive practices for any party
attempting to collect a debt, including first-party lenders. For
example, loan agreements for service members often include permission
for a first-party lender to contact the commanding officer of the
consumer about the loan. The FDCPA limits the way in which third-
party debt collectors communicate with commanding officers. However, less clarity remains if the collector of the debt is a first-party
lender, since little guidance exists on how the CFPB will apply the
provisions of abusive practices under Dodd-Frank. While more
clarity would be beneficial here, it could also be achieved through
individual enforcement actions instead of through broad regulation.

In the ANPR, the CFPB also addresses possible regulation of
deceptive conduct related to first-party lenders. First-party lenders
could benefit from a clearer definition of deceptive practices, since they
would have more guidance for their own conduct. The current
definition of deceptive practices is based on the FTCA definition of the
term, which has been shaped by years of enforcement actions. The
CFPB could expedite addressing deceptive conduct by creating a
uniform and expanded definition, particularly as it arises in the use of
new technology—including novel communication media such as email
or social media—which has implications for the mini-Miranda
requirement, electronic payment methods, and fee disclosures.

110. Id.
111. See id. (“Greater clarity and specificity as to prohibited conduct could make it
easier for collectors and others to know what they must do to comply with the law. Rules
that provide greater clarity and specificity as to prohibited conduct also could simplify law
enforcement actions against those who do not comply.”)
112. Id. at 67866.
113. Id. (finding that such communications will be limited under the FDCPA if they are
“inconvenient, annoying, or harassing, or may harm their reputations at work”).
114. See Farrell, supra note 48, at 28.
116. See id. at 67870.
118. The Mini-Miranda warning is the requirement that debt collectors disclose that they
are debt collectors or that they are attempting to collect a debt when they communicate with
consumers. TRACY A. KENNEDY, ZIMNEY FOSTER P.C., FEDERAL FAIR DEBT COLLECTION
PRACTICES ACT—FEDERAL LAW GOVERNING THE CONDUCT OF THIRD PARTY DEBT
COLLECTORS (COLLECTION AGENCIES AND LAWYERS) WHO COLLECT “CONSUMER” DEBTS
119. See Debt Collection (Regulation F), 78 Fed. Reg. at 67872–73 (discussing, for
Such improvements could prevent, for example, mini-Miranda warning violations, which occur when a party attempting to collect a debt “friends” a consumer on social media sites, without disclosing who they are or what they are doing. However, additional regulation of communications could make it more difficult for first-party lenders to communicate with consumers. While third-party debt collectors contact consumers solely for the purpose of collecting a debt and have no incentive to refrain from deceptive actions apart from regulation, first-party debt collectors have both a reputation and relationships with consumers at stake. Additional regulation would be expensive for first-party lenders and could even prevent consumers from communicating with a lender in a preferred manner.

The CFPB may also expand the definition of unfair practices, and apply concrete examples of unfair practices found in the FDCPA to first-party lenders. As with deceptive practices, the FTCA standard of unfair practices informs the Dodd-Frank interpretation of the term. A definitional expansion could affect new communication technologies, which raises concerns because of the potential consumer costs of receiving text messages and calls on cell phones. Because of possible expenses to consumers, the CFPB is contemplating requiring consumer permission for communication through certain forms of media. Many first-party lenders offer services to consumers that take advantage of new communication technology, for example text messaging.
CFPB imposes regulation on some of those services, it would not only create expenses for first-party lenders, it could also inconvenience consumers.129

Upon finalization of the regulation, several additional potential regulations intended to prevent unfair practices would apply to third-party debt collectors and possibly to first-party lenders.130 The regulations are related to payment practices, substantiation, and third-party liability.131 The CFPB may clarify payment standards, for example, allowing consumers to specify how payments should be applied if a consumer owes multiple debts and attempts to pay only one of them, and requiring the party to whom the payment is made to issue receipts.132 The CFPB has also expressed interest in implementing regulations that would require a party collecting a debt to substantiate information before making a legal claim on the debt to make sure that they have sufficient evidence to move forward in court.133 The CFPB may identify what type of substantiation should be required at what stage in the debt collection process,134 and could adopt substantiation requirements included in the FTCA, under which some types of unsubstantiated claims are unfair and deceptive.135 However, these substantiation requirements would be superfluous for first-party lenders.136 First-party lenders are the originators of a debt, and it would seem pointless to require them to explain the origin of the loans to consumers when they have not been sold to another party.137

https://www.bankofamerica.com/online-banking/text-banking.go (allowing consumers to check their balance or recent transactions by text message).


130. See Debt Collection (Regulation F), 78 Fed. Reg. at 67874.
131. Id.
132. See id. (questioning whether these additional safeguards may be necessary in light of some debt collector practices).
133. Id.
134. See id. (requesting information from consumers and industry about what information should be substantiated at what stage in litigation or debt collection).
136. O’Neil et al., supra note 74, at 5 (discussing information that needs to be included in validation notices, which is used to substantiate the accuracy of a debt).
137. Id.
B. Service Providers

Finally, the CFPB may propose two clarifications related to service providers. First, clarity regarding which entities are considered service providers, and second, the extent to which a service provider’s liability for UDAAP violations extends to a covered party. Dodd-Frank defines service providers as “any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service.” Covered parties include first-party lenders. However, the reach of the definition of service providers remains unclear. For example, is a cell phone carrier a service provider because they provide the platform for applications used in credit card or other payment transactions for the customers of a first-party lender? Under Dodd-Frank, covered parties, including first-party lenders, “stand in the shoes of their service providers” and may be liable for the misconduct of their service providers. It is, therefore, crucial that institutions that fall under the supervision of the CFPB, like first-party lenders, know which service providers they must monitor for compliance to avoid liability for UDAAP violations.

V. LIMITS ON FIRST-PARTY LENDER REGULATION

The CFPB should extend and clarify regulation for third-party debt collectors, but should not regulate first-party lenders in the same rulemaking because of distinct differences between first-party lenders and third-party debt collectors. The suggestion that several of the

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138. See Debt Collection (Regulation F), 78 Fed. Reg. at 67875.
139. Id. (requesting information on who the service providers in the industry are and what types of services they perform, and what their relationship is to debt collectors).
143. Id. at 3.
144. Id. at 1.
145. See id. (discussing the liability of debt collectors for actions of their service providers).
146. See, e.g., Sharp, supra note 39, at 11–12.
proposed regulations will be extended to first-party lenders has caused a stir in the debt collection industry, since the CFPB seems to ignore the “old distinction between third-party collection and the collection of debts in-house.” Some first-party lenders have specifically questioned the CFPB’s statutory authority to regulate third-party debt collectors and first-party lenders in the same way. Others have voiced concerns over the practical implications of blanket regulation.

A. Statutory Limits on the Extension of Regulation—Dodd Frank, the FDCPA and the FTCA

In response to the CFPB’s suggestion to extend debt collection regulation to first-party lenders, some first-party lenders argue that the CFPB lacks the authority for such a broad expansion, particularly if the CFPB adopts the same regulatory language for first-party lenders as already exists for third-party debt collectors under the FDCPA. During the comment period for the ANPR, several first-party lenders argued that Congress did not intend for the FDCPA provisions to extend to first-party lenders, and therefore, the statutory language should not indiscriminately apply to both first-party lenders and third-party debt collectors.

While the FDCPA excludes first-party lenders, the CFPB has regulatory authority over first-party lenders under Dodd-Frank.

148. Sharp, supra note 38, at 11–12.
149. See, e.g., Nixon, supra note 39, at 2 (suggesting that first-party lenders like banks are already heavily regulated and do not require further regulation).
150. The regulations are mostly related to unfair, abusive, and deceptive practices, and modeled in a way that would be uniform with regulation of third-party debt collectors. See, e.g., Debt Collection (Regulation F), 78 Fed. Reg. at 67870.
151. O’Neil et al., supra note 74, at 3, 36–37; see Reeves, supra note 123, at 2; see also Wallace, supra note 129, at 2, 4.
152. See Wallace, supra note 129, at 7.
153. Id. at 3.
154. Dodd Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 1002(15), 12 U.S.C. § 5481(15) (2012) (describing financial service providers as any party that extends credit, which would include first-party lenders).
Dodd-Frank was not, however, meant to alter the scope of the FDCPA,155 and FDCPA provisions are still limited to only third-party debt collectors.156 Dodd-Frank established its own set of regulations and guidance—including on UDAAPs—for financial service providers.157 The CFPB must have a reasonable basis before qualifying any act or practice as unfair, deceptive, or abusive under Dodd-Frank and may not rely solely on public policy considerations.158 The CFPB must consult with federal banking agencies in considering the “prudential, market, or systemic objectives” of such agencies before declaring an act a UDAAP.159 Dodd-Frank tasks the CFPB with establishing “general policies” and “implementing the Federal consumer financial laws through rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions.”160 The CFPB has interpreted the UDAAP provisions of Dodd-Frank through enforcement actions and through reliance on enforcement actions under the FTCA,161 as well as the statutory definitions under Dodd-Frank and the FTCA.162 It appears now that the CFPB may provide additional guidance.163

The CFPB recently issued a bulletin to clarify UDAAP definitions.164 In it, the CFPB provided examples of UDAAPs and further defined deceptive practices.165 The examples of UDAAPs included in the bulletin as falling within the scope of Dodd-Frank are, among others, threatening any legal action that a debt collector is not authorized to take, misrepresenting the nature or legal status of a debt, or falsely stating that a communication is from an attorney.166 These examples seem eerily similar to the prohibitions under the FDCPA.167

155. See O’Neil et al., supra note 74, at 36.
159. Dodd-Frank § 1031(e), 12 U.S.C. § 5531(e).
161. See MANUAL, supra note 92, at 1 n.2.
162. Id. at 1, 2 n.4.
164. BULLETIN, supra note 92, at 1.
165. Id.
166. Id. at 5–6.
The CFPB may interpret Dodd-Frank provisions to mean exactly the same thing as the FDCPA provisions and, in so doing, could take advantage of the broad authority conferred by Dodd-Frank to implement regulations directly at odds with the exclusion of first-party lenders from the FDCPA. Dodd-Frank has given the CFPB broad authority to interpret statutory provisions,\(^{168}\) however, and there is no valid statutory objection to the CFPB defining and interpreting UDAAPs in a manner that is consistent with the FDCPA.

However, UDAAPs have historically been defined through enforcement and other agency actions.\(^ {169}\) For example, unfair and deceptive actions, which are prohibited under the FTCA, were intended to be interpreted through individual actions, not specific statutory examples, to provide flexibility and prevent the exploitation of “loopholes.”\(^ {170}\) The term “unfair” was found to be of a “‘class of phrases which do not admit of precise definition, but the meaning and application of which must be arrived at by what this court elsewhere has called the gradual process of judicial inclusion and exclusion.’”\(^ {171}\) The FTCA definitions of unfair and deceptive practices have since been defined based on such judicial actions,\(^ {172}\) and the CFPB has relied on the FTCA interpretations in its enforcement actions to date.\(^ {173}\) While abusive practices are a new term in consumer protection under Dodd-Frank, the CFPB has followed the same practice to define this term: filing numerous enforcement actions that continue to provide guidance and inform the application of UDAAPs in practice.\(^ {174}\) Therefore, while the CFPB may have the statutory authority to define and regulate the practices of first-party lenders, it should do so through enforcement.

\(^{168}\) Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 1021(c)(1)–(5), 12 U.S.C. § 5511(c)(1)–(5) (2012) (establishing, for example, the CFPB’s authority to issue “rules, orders, and guidance implementing Federal consumer financial law”).

\(^{169}\) See Farrell, supra note 48, at 23 (explaining that deceptive and unfair practices were shaped by FTC litigation).


\(^{171}\) Id. (quoting Fed. Trade Comm’n v. Raladam Co., 283 U.S. 643, 648 (1931)) (internal quotation omitted).

\(^{172}\) See id. (“[T]he Commission has continued to refine the standards of unfairness in its cases and rules.”).

\(^{173}\) See Farrell, supra note 48, at 29 (stating that the CFPB relied on the FTCA deceptive acts definition).

\(^{174}\) See id. (listing examples of enforcement actions, like against Capital One in 2012).
actions that can address specific circumstances. This approach is better suited to first-party lenders because it would take into account their unique position and relationship with consumers.

B. Practical Reasons Why Additional Regulation of First-Party Lenders is Unnecessary

First-party lenders argue that due to an inherently different relationship between themselves and consumers, compared to third-party debt collectors, additional regulation remains unnecessary. First-party lenders, such as banks, are already heavily regulated, and limited in the ways in which they can interact with consumers by numerous other statutes. A few examples of additional regulation include the Fair Credit Reporting Act, section 5 of the FTCA, the Community Reinvestment Act, the Fair Lending Act, the Service Members Civil Relief Act, and, of course, Dodd-Frank. Many first-party lenders are also regulated by state statutes, which are often more stringent than federal laws.

First-party lenders further argue that the relationship between first-party lenders and consumers makes additional regulation superfluous. First-party lenders rely on strong relationships with consumers that create a strategic incentive to maintain those good customer relationships and provide fair treatment. Consumers are able to choose their first-party lender, thus creating market pressure for first-party lenders to attract consumers with a reputation of fair debt collection practices. Furthermore, once a consumer, like a credit card holder, is lost, it costs a first-party lender between $160 and $200 to

175. Wallace, supra note 126, at 4–5. For example, mini-Miranda warnings may scare consumers, and make relationship more adversarial. Id.
177. Id.
181. Id.
182. See Himpler, supra note 178, at 4 (finding that creditors are “still restrained by their inherent motivation to protect their goodwill when collecting past due accounts.”).
replace that consumer, \(^{183}\) and “a consumer may be debtor today, but 2 weeks from today he may be a customer again.”\(^ {184}\) Thus, first-party lenders are highly motivated to treat consumers fairly due to the competitive dynamics of the marketplace.

One requirement that the CFPB takes into consideration for regulation of deceptive practices is the mini-Miranda warning, a required disclosure statement in a communication that explains that the purpose of the communication is to collect a debt.\(^ {185}\) The mini-Miranda requirement is an essential regulation of third-party debt collectors, who generally do not communicate with consumers other than to collect a debt and have used unethical means to collect debts.\(^ {186}\) First-party lenders are concerned that forcing consumers to listen to such a standard warning would frustrate the first-party lender relationship, since first-party lenders communicate with consumers for a variety of reasons.\(^ {187}\) Furthermore, according to some first-party lenders, requiring standard warnings or disclosures of information when first-party lenders communicate about a debt could create a “hostile and adversarial environment,” thus closing off communication between creditors and consumers and foreclosing opportunities for early resolution of debt issues.\(^ {188}\) The application of the mini-Miranda warning could become cumbersome and counterproductive under such circumstances.

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\(^{183}\) Id. at 5 (quoting Julie Austin & Vytas Kisielius, Confronting the Rise of First Time Debtors: How to Collect Delinquencies from Otherwise Good Customers with Focus on Long-Term Relationships, TSYS (Summer 2010), available at http://www.tsys.com/thoughtLeadership/ngenuityInAction/summer2010/).

\(^{184}\) Id. at 4 (quotation marks omitted).


\(^{187}\) O’Neil et al., supra note 74, at 25–26 (explaining that consumers might get frustrated with repeatedly listening to standard warnings in communications with first-party lenders).

\(^{188}\) Id. at 25; see Mike Ferullo, CFPB Presses into Uncharted Territory as It Mulls Debt Collection Rules for Banks, 26 Bankr. L. Rep. (BNA) No. 30, at 1058 (July 31, 2014); see also Wallace, supra note 129, at 2.
First-party lenders are also concerned with the effects that additional regulation could have on their bottom line. Changing procedures adds additional expenses, and Dodd-Frank specifically requires the CFPB to take industry cost into account when formulating new rules, including a “sound cost-benefit analysis.” First-party lenders believe that more regulations could create a “deterrent for some consumers to repay their obligations,” which in turn could increase the cost of consumer loans. More regulation may also lead to more debts being sold, since collection becomes more difficult, or be so detrimental to consumers’ relationships with first-party lenders that those lenders lose the incentive to build a positive relationship.

While no evidence exists that new debt collection regulations would restrict the availability of credit, or that it would increase the costs to consumers, other concerns may be more valid. Recently, Wells Fargo announced that it would sell around $8.5 billion in federal student loans to Navient, a loan servicer recently spun off from Sallie Mae. This announcement came only weeks after the CFPB report on abusive conduct in student debt collection that included allegations against Sallie Mae and Navient, for “allocating borrowers’ underpayments across multiple loans in a manner that maximizes late fees; and [m]isrepresenting and inadequately disclosing in its billing statements how borrowers could avoid late fees.”

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189. See Himpler, supra note 173, at 7 (expressing concern about “burdensome” regulation).
192. Sharp, supra note 39, at 14–15; O’Neil et al., supra note 74, at 8.
194. Id.
195. Ripley, supra note 84, at 4–5 (finding no harmful impact on consumers after increased debt collection regulation in North Carolina).
198. CONSUMER FIN. PROT. BUREAU, ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN 19 (2014) [hereinafter STUDENT LOAN REPORT], available at
Consumers may have additional reasons to be concerned about the sale of their loans. In May 2014, Navient and Sallie Mae reached a $97 million settlement with the federal government related to allegations of unfair debt collection practices, including that they “maximized late fees and failed to adequately disclose how consumers could avoid the fees.” From October 2013 to September 2014, consumers filed almost 2,000 complaints against Navient and Sallie Mae. The sale of student loans demonstrates that increased regulatory scrutiny can cause first-party lenders to abdicate debt collection to third-party debt collectors or other loan buyers, but it also undermines the argument that first-party lenders are committed to their consumers and want to maintain positive consumer relationships.

C. More Appropriate Measures of Regulation

While several practical reasons exist for why first-party lenders should not be regulated in the same manner as third-party debt collectors, there are clear concerns over the debt collection practices of many first-party lenders. As the CFPB points out, there is lingering concern that consumers who are unable to pay their bills are not the kind of customer with whom a first-party lender would want to “maintain a long-term business relationship” that would negate any incentive to treat consumers fairly. First-party lenders point out that their debt collection practices are focused on consumer relationships,

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200. See, e.g., Emily Driscoll, When Student Loans Are Sold: What Borrowers Should Know, FOXBUSINESS.COM (Oct. 10, 2012), http://www.foxbusiness.com/personal-finance/2012/10/10/when-student-loans-are-sold-what-borrowers-should-know/ (discussing reasons, like disclosure requirements, that lead lenders to sell loans, which can lead to payment complications for consumers).


and include “polite notes” and reminder phone calls from bank employees who personally know the consumer.\textsuperscript{204} According to first-party lenders, employees check to see if there may be “something in the customer’s situation that has changed which may justify consideration of an adjustment on the borrower’s repayment schedule.”\textsuperscript{205}

In light of the number of consumer complaints,\textsuperscript{206} this description rings hollow. While there are certainly more incentives for first-party lenders to maintain a relationship with returning consumers, debt collection is not always what it should be.\textsuperscript{207} Particularly with the advent of new technology, there are several methods of debt collection, such as collection efforts through social media that will require new regulation for both third-party debt collectors and first-party lenders.\textsuperscript{208} Further, even though all FDCPA provisions should not be indiscriminately extended and applied to first-party lenders, any conduct that violates the UDAAP provisions of Dodd-Frank should be addressed by the CFPB or other regulatory agencies, as in the cases of DriveTime or Freedom Stores.\textsuperscript{209} In addressing these consumer concerns, however, the CFPB should continue to utilize enforcement actions to define UDAAP provisions, instead of relying on overbroad industry regulation. While individual actions may delay a concise UDAAP definition, it is more adaptable to individual circumstances. And if the CFPB does, ultimately, choose to establish more concrete regulations for first-party lenders, it should do so in a separate rulemaking that addresses first-party lenders’ unique position and concerns.

VI. CONCLUSION

The CFPB has a long road ahead before it can issue a final rule.\textsuperscript{210} It has taken an important step towards regulating third-party debt collectors and changing the perception of the debt collection industry.\textsuperscript{211} In doing so, however, the CFPB has neglected to properly

\textsuperscript{204} Himpler, supra note 178, at 4–5 (internal citation omitted).
\textsuperscript{205} Id.
\textsuperscript{206} FDCPA ANNUAL REPORT, supra note 197.
\textsuperscript{207} See, e.g., Aubin, supra note 33 (alleging harassing conduct by Bank of America related to collection of mortgage loans).
\textsuperscript{208} See Lopez, supra note 120, at 923, 923–24.
\textsuperscript{209} See supra text accompanying notes 1–9.
\textsuperscript{210} Ferullo, supra note 188, at 1059.
\textsuperscript{211} See Debt Collection (Regulation F), 78 Fed. Reg. 67848, 67848 (proposed Nov. 12,
distinguish between first-party lenders and third-party debt collectors.\textsuperscript{212} Even though debt collection statutes recognize the need to treat the two sectors of the industry differently,\textsuperscript{213} the CFPB seems intent on creating a blanket rule for UDAAP provisions that would treat first-party lenders and third-party debt collectors the same. The CFPB may have the authority to do just that under Dodd-Frank,\textsuperscript{214} but it may not be wise to do so. Approaching regulation of first-party lenders through enforcement actions, as it has done in the past, may be a better solution to addressing valid consumer concerns regarding first-party debt collection practices. By doing so, the CFPB would be able to address the practical concerns that first-party lenders have raised in a flexible manner. Overall, while the CFPB is to be commended for its efforts to provide more consumer protection while taking industry concerns into consideration, it must ensure that it does so discriminately.

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\begin{footnotesize}
\textsuperscript{212} See, e.g., Debt Collection (Regulation F), 78 Fed. Reg. at 67870 (suggesting expansion of the same definition of abusive conduct to both third-party debt collectors and first-party lenders).


\textsuperscript{214} Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 1012(a)(10), 12 U.S.C. § 5492(a)(10) (giving the CFPB freedom to interpret consumer financial laws).
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