

## DAZED AND CONFUSED: THE NEED FOR CLARITY IN DODD-FRANK'S ABUSIVE STANDARD

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Danieshia had just lost her job.<sup>1</sup> She received some income from unemployment, but soon had trouble making payments on her car loan.<sup>2</sup> After a while, her car loan became delinquent and was sold to a debt collector.<sup>3</sup> Several debt collectors began calling Danieshia to try to have the car loan paid.<sup>4</sup> But these were not typical phone calls. Some debt collectors began threatening Danieshia.<sup>5</sup> They threatened her with jail time, and one debt collector even represented herself as a detective and threatened to come to Danieshia's house and arrest her for stealing the car.<sup>6</sup>

Unfortunately, stories like Danieshia's are not uncommon.<sup>7</sup> Indeed, these stories are disturbingly common nowadays. While the twenty-first century has brought an increased prevalence of financial products and services that enhance modern life, it has also brought increasing concerns with debt collection as it pertains

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\* LED ZEPPELIN, *Dazed and Confused*, on LED ZEPPELIN (Atlantic Records 1969).

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1. *Danieshia: Threatened with Jail*, CONSUMER FIN. PROTECTION BUREAU, <https://www.consumerfinance.gov/consumer-tools/everyone-has-a-story/danieshia-threatened-with-jail/> (last visited Nov. 4, 2017).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. The Consumer Financial Protection Bureau (CFPB) has detailed several other consumer stories related to debt collection. Some consumers were contacted by debt collectors up to thirty or forty times per day; some consumers had family members contacted about debts; and some consumers were also threatened to have lawsuits filed against them. *See generally Debt Collection Stories*, CONSUMER FIN. PROTECTION BUREAU, <https://www.consumerfinance.gov/consumer-tools/everyone-has-a-story/debt-collection/> (last visited Nov. 4, 2017) (giving examples of the threats debt collectors make in attempt to collect payment).

to those financial products and services.<sup>8</sup> To better address these debt collection concerns, among many other issues, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (hereinafter “Dodd-Frank Act”) in 2010.<sup>9</sup> Among other things, the Dodd-Frank Act established the Consumer Financial Protection Bureau (hereinafter “CFPB”),<sup>10</sup> which in part

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8. The CFPB’s Monthly Complaint Reports routinely indicate that debt collection is one of the most, if not the most, problematic industries for which it regulates. For example, the most recent report demonstrated that the CFPB has received the most complaints regarding debt collection for the past several years. *Monthly Complaint Report Vol. 25*, CONSUMER FIN. PROTECTION BUREAU 6 (July 2017), [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707\\_cfpb\\_monthly-complaint-report-vol-25.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_monthly-complaint-report-vol-25.pdf). In addition, debt collection represents the industry with the highest number of complaints since the CFPB’s inception with 316,810 complaints, which represents approximately twenty-seven percent of the 1,163,156 total complaints the CFPB has received. *Id.* at 16. And these figures do not take into the account the number of debt collection complaints submitted to the Federal Trade Commission. *See id.* at 3 (describing the data as outlining complaints received by the CFPB). The large number of debt collection complaints is significant in the context of this Article. The CFPB has explained on at least one occasion that “complaints may be one indication of UDAAPs [unfair, deceptive, and/or abusive acts or practices].” *Unfair, Deceptive, or Abusive Acts or Practices*, CONSUMER FIN. PROTECTION BUREAU 9 (Oct. 2012), <https://www.cfpaguide.com/portalresource/Exam%20Manual%20v%202%20-%20UDAAP.pdf>. The high number of debt collection complaints demonstrates a high probability of ongoing UDAAPs in the industry, which is likely what has led to the CFPB’s efforts to propose new debt collection rules. Just as the CFPB is seeking an overhaul of the debt collection industry, this is the proper time in which the differing “abusive” standards in the Fair Debt Collection Practices Act (FDCPA) and Dodd-Frank Act, which are the focus of this Article, can be harmonized.

9. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

10. *See infra* Part III (detailing the CFPB).

protects consumers of financial products and services from unfair,<sup>11</sup> deceptive,<sup>12</sup> and abusive acts or practices.<sup>13</sup>

While the Federal Trade Commission (hereinafter “FTC”) has long prohibited and enforced unfair and deceptive acts or practices in or affecting commerce,<sup>14</sup> there has not been an agency in charge of generally prohibiting “abusive acts or practices” until the CFPB.<sup>15</sup> As a result, there has been much debate since the inception of the Dodd-Frank Act as to what generally constitutes an abusive act or practice.<sup>16</sup> Some argue it deserves a broad

11. 12 U.S.C. § 5531 (2016). The FTC has traditionally prohibited and enforced unfair acts or practices “in or affecting commerce.” 15 U.S.C. § 45 (2012). The CFPB incorporated the FTC’s definition of an unfair act or practice in the Dodd-Frank Act. *See* 12 U.S.C. § 5531 (c)(1)(A)–(B) (“[T]he 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.”); *Unfair, Deceptive, or Abusive Acts or Practices*, *supra* note 8, at 2 n.4 (“The standard for unfairness in the Dodd-Frank Act has the same three-part test as the FTC Act.”).

12. 12 U.S.C. § 5531. Similar to unfair acts or practices, deceptive acts or practices have long been prohibited and enforced by the FTC. *See* 15 U.S.C. § 45(a)(1) (declaring “deceptive acts or practices in or affecting commerce” as unlawful). The CFPB also adopted a similar definition of deceptive acts or practices as the FTC has provided. *See Unfair, Deceptive, or Abusive Acts or Practices*, *supra* note 8, at 5, n.10 and accompanying text:

A representation, omission, [act, or] practice is deceptive when[:] (1) [t]he representation, omission, act, or practice misleads or is likely to mislead the consumer; (2) [t]he consumer’s interpretation of the representation, omission, act, or practice is reasonable under the circumstances; and (3) [t]he misleading representation, omission, act, or practice is material.

13. 12 U.S.C. § 5531. The prohibition of abusive acts or practices is specifically located in the Consumer Financial Protection Act, which is one part of the Dodd-Frank Act. CONSUMER FIN. PROT. ACT OF 2010, 12 U.S.C. §§ 5481–5603 (2016). Throughout this Article, I will reference the legislation generally as the Dodd-Frank Act for simplicity.

14. *Supra* notes 11–12. Because of the overlap between the FTC and CFPB’s authority to enforce unfair and deceptive acts or practices, the agencies published a Memorandum of Understanding for effective cooperation. *Infra* note 80 and accompanying text.

15. Even state consumer protection statutes have never addressed “abusive” acts or practices. Every state has a consumer protection statute that addresses deceptive acts or practices, and many state consumer protection statutes also address unfair and/or unconscionable acts or practices. *See, e.g.*, GA. CODE § 10-1-372 (2016) (deceptive trade practices); FLA. STAT. § 501.204 (2016) (deceptive, unfair, and unconscionable acts or practices). Of note, however, is that the effectiveness of some state statutes has been questionable at best. *See* Carolyn L. Carter, *A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, NAT’L CONSUMER L. CTR. 5 (Feb. 2009), [http://www.nclc.org/images/pdf/udap/report\\_50\\_states.pdf](http://www.nclc.org/images/pdf/udap/report_50_states.pdf) (detailing weaknesses in various state consumer protection statutes).

16. One court noted, “[t]he legislative history of the CFPB [Consumer Financial Protection Act] suggests that the term was added, in part, to enable the Bureau to reach forms of misconduct not embraced by the more rigid, cost-benefit standard that had grown up around the terms ‘unfair’ and ‘deceptive.’” *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 904 (S.D. Ind. 2015).

interpretation, but others criticize its seemingly limitless jurisdiction.<sup>17</sup> Notably, however, there is a preexisting federal statute that addresses abusive conduct in one specific area that is also covered by the Dodd-Frank Act—the Fair Debt Collection Practices Act (hereinafter “FDCPA”).<sup>18</sup> Except the problem is that the Dodd-Frank Act seems to impose a new and different standard for abusive conduct committed by debt collectors.

This Article analyzes the Dodd-Frank Act’s prohibition of “abusive acts or practices” in the context of debt collection and the CFPB’s ongoing debt collection rulemaking procedures pursuant to its authority under the FDCPA. In 2013, the CFPB issued an Advanced Notice of Proposed Rulemaking (“ANPR”) for debt collection,<sup>19</sup> which sought to collect information regarding debt collection practices in order to promulgate various rules to better protect consumers under the FDCPA.<sup>20</sup> In part, the ANPR sought to clarify the meaning of abusive debt collection practices given the differing standards in the FDCPA and the Dodd-Frank Act, and also to clarify if first-party creditors should be subject to debt collection rules, whether under the FDCPA or the Dodd-Frank Act.<sup>21</sup> Thereafter in July 2016, the CFPB released an outline of proposed debt collection rules.<sup>22</sup> Although the CFPB had indicated that the debt collection rulemaking process is, in part, aimed to help clarify what constitutes an abusive act or practice under the Dodd-Frank Act,<sup>23</sup> it seems as though thus far the proposal fails to

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17. Compare John D. Wright, *Dodd-Frank’s “Abusive” Standard: A Call for Certainty*, 8 BERKELEY BUS. L.J. 164, 172 (2011) (arguing the CFPB should provide more certainty in its abusive standard enforcement) with Carey Alexander, *Abusive: Dodd-Frank Section 1031 and the Continuing Struggle to Protect Consumers*, 85 ST. JOHN’S L. REV. 1105, 1108 (2011) (arguing the CFPB should adopt a broad interpretation of its abusive prohibition to better protect consumers). While some might disagree as to the standard’s meaning, it has at least survived a claim alleging it is vague and therefore in violation of the Due Process Clause of the Fifth Amendment. *ITT Educ. Servs.*, 219 F. Supp. 3d at 902–03.

18. Codified at 15 U.S.C. §§ 1692–1692p (2012).

19. Debt Collection (Regulation F); Advanced Notice of Proposed Rulemaking, 78 Fed. Reg. 67848 (Nov. 12, 2013) [hereinafter ANPR].

20. *Id.* at 67848.

21. *Id.* at 67870. As discussed *infra*, the Dodd-Frank Act’s coverage of first-party creditors caused much debate given that the FDCPA only applies to third-party creditors.

22. Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking, Outline of Proposals Under Consideration and Alternatives Considered, CONSUMER FIN. PROTECTION BUREAU (July 28, 2016), available at [http://files.consumerfinance.gov/f/documents/20160727\\_cfpb\\_Outline\\_of\\_proposals.pdf](http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf) [hereinafter Debt Collection Rules Proposal].

23. ANPR, *supra* note 19, at 67870.

add any clarification as to the “abusive” standard under the Dodd-Frank Act<sup>24</sup>. This Article seeks to provide suggestions as to the Dodd-Frank Act’s definition of abusive acts or practices in light of the ongoing rulemaking procedures for debt collection.<sup>25</sup>

Part I of this Article will briefly explain the debt collection industry, how it operates, and how it has become so controversial. Part II will examine the passage of the FDCPA and its various provisions. Part III will explain the creation of the CFPB, its “abusive” standard under the Dodd-Frank Act, and how its debt collection rulemaking process has sought to clarify that standard. Finally, Part IV will analyze what should be done going forward with the CFPB’s “abusive” standard under the Dodd-Frank Act. It will propose a simple and logical position—the standard for abusive debt collection practices should carry the same meaning under both the FDCPA and the Dodd-Frank Act. Part IV will also briefly discuss the CFPB’s indication of regulating first-party debt collectors before concluding in Part V.

## I. DEBT COLLECTION

At its core, a debt collector attempts to collect some kind of outstanding balance.<sup>26</sup> For example, assume Person A took out a loan with Bank B. Person A subsequently experienced financial troubles and stopped paying the loan back. The loan went delinquent, and Bank B is now considering how it wants to proceed in attempting to collect the outstanding balance from Person A. The relationships involved in that process can vary.

One option is that Bank B could attempt to collect the balance of the loan itself. Bank B might have a preexisting relationship with Person A and believe it can work out the situation. In these

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24. The proposal primarily outlines specific rules the CFPB seeks to enforce. See Christopher K. Odinet & Roederick C. White, Sr., *Regulating Debt Collection*, 36 REV. BANKING & FIN. L. 869, 881–910 (2017) (summarizing and critiquing the CFPB’s debt collection proposal).

25. Some commentators have already attempted to analyze the Dodd-Frank Act and provide recommendations clarifying the “abusive” standard. *E.g.*, Tiffany S. Lee, *No More Abuse: The Dodd-Frank and Consumer Financial Protection Act’s “Abusive” Standard*, 14 J. CONSUMER & COM. L. 118 (2011). This Article only seeks to analyze the Dodd-Frank Act’s prohibition of abusive acts or practices as it relates to debt collection given the CFPB’s ongoing debt collection rulemaking process. Of course, it is important to remember that the Dodd-Frank Act applies more broadly to federal consumer financial law, and not just debt collection.

26. *How Do Collection Agencies Work?*, CONVERGENT, <http://www.convergentusa.com/outsourcing/page/how-do-collection-agencies-work> (last visited Nov. 4, 2017).

circumstances, Bank B is considered the original, or first-party, creditor because it is the entity that originally extended credit to Person A.<sup>27</sup>

But commonly, however, creditors use one of two other options. One of those options is that Bank B could contract with a collection agency. This involves Bank B hiring a third-party collection agency,<sup>28</sup> or debt collector, to work on behalf of Bank B to collect payment from Person A.<sup>29</sup> The collection agency is typically compensated based on the percentage of the debt it collects,<sup>30</sup> although many collection agencies are paid on a contingency basis.<sup>31</sup> Bank B might hire a third-party debt collector for a number of reasons. A third-party debt collector often has a heightened level of expertise with respect to collecting debts and often has the infrastructure to collect debts more efficiently.<sup>32</sup> It might be impractical for Bank B to acquire the knowledge or resources that a debt collector might already have.<sup>33</sup>

Another option is that Bank B could outright sell Person A's debt to another company, and that company could attempt to collect the debt. These companies that buy debts are intuitively

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27. See Baran Bulkat, *What Is the Difference Between a Debt Collector and a Creditor?*, NOLO, <http://www.nolo.com/legal-encyclopedia/what-is-the-difference-between-debt-collector-creditor.html#> (last visited Nov. 4, 2017) (explaining the meaning of an original creditor). In this scenario, with minor exceptions, Bank B would be exempt from the FDCPA in trying to collect Person A's debt. See 15 U.S.C. § 1692a(6) (2016) (excluding creditors collecting debts in their own name from the FDCPA's provisions). Where controversy has emerged, however, is that the Dodd-Frank Act applies to both first- and third-party creditors. *Infra* notes 95–100 and accompanying text.

28. In addition to a collection agency, Bank B could hire certain bill collectors or collection attorneys. *When Creditors Are Subject to Federal Fair Debt Collection Rules*, NOLO, <http://www.nolo.com/legal-encyclopedia/when-creditors-are-subject-federal-fair-debt-collection-rules.html#> (last visited Nov. 4, 2017).

29. *How Do Collection Agencies Work?*, *supra* note 26.

30. Amy Fontinelle, *How the Debt Collection Agency Business Works*, INVESTOPEDIA (June 1, 2017, 6:00 AM), <http://www.investopedia.com/articles/personal-finance/121514/how-debt-collection-agency-business-works.asp>.

31. Patrick Lunsford, *Do You Know What a Collection Agency Does?*, FORBES (June 8, 2011, 10:01 AM), <https://www.forbes.com/sites/insidearm/2011/06/08/do-you-know-what-a-collection-agency-does/#61fe4e1c6ceb>.

32. See Jon Leibowitz et al., *Structure and Practices of the Debt Buying Industry*, FED. TRADE COMMISSION 11 (Jan. 2013), <https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf> (detailing reasons why a creditor might hire a third-party debt collector).

33. *Id.*

called “debt buyers.”<sup>34</sup> Because the debt buyers technically own the debt, they are able to earn as much money as they can collect, and do not owe any obligations to the original creditor.<sup>35</sup> A debt buyer might attempt to collect the debt itself, hire its own third-party debt collector, or resell the debt to another debt buyer.<sup>36</sup>

The important implication from either model of debt collection discussed above<sup>37</sup> is that a collector is naturally incentivized to collect as much money as it can as quickly as it can. If contracting with the creditor, the third-party collection agency wants to maximize the amount of money earned based on the percentage it will receive, or alternatively wants to ensure it earns any money at all if operating on a contingency basis. Similarly, given that debt buyers often purchase debts for pennies on the dollar, they are also incentivized to collect more than they paid for the debt. Given these incentives, debt collectors’ conduct has become increasingly controversial over the years, with illegal tactics becoming common practice.<sup>38</sup> Debt collectors have become notorious for using profane language, making threats against the debtor, and calling debtors or their family members repeatedly, among other things.<sup>39</sup>

But to understand why these implications in the debt collection industry are significant, it is important to understand how large of a role debt collection plays in today’s society. Over the years, debt collection effectively grew into its own industry. Companies often solely operate in debt collection and even

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34. *How Do Collection Agencies Work?*, *supra* note 26; *see also* Lunsford, *supra* note 31 (detailing key differences between collection agencies and debt buyers). For a detailed explanation of the debt buying industry specifically, *see* Leibowitz et al., *supra* note 32.

35. *How Do Collection Agencies Work?*, *supra* note 26. Given that a debt buyer would “own” the debt upon purchase, it technically becomes the creditor of that debt.

36. Leibowitz et al., *supra* note 32, at 11. For a brief discussion on why creditors might prefer using third-party debt collectors as opposed to selling debts, and vice versa, *see id.* at 12.

37. For an additional, helpful discussion of the various debt collection business models, *see* Odinet & White, *supra* note 24, at 874–81.

38. Of course, not every collection agency structures its business model on breaking the law. But the occurrence of illegal collection tactics has become much more common in today’s society.

39. *See, e.g.*, Mitch Lipka, *5 Illegal Tactics Shady Debt Collectors Love*, CBS NEWS (Feb. 27, 2015, 5:30 AM), <http://www.cbsnews.com/news/5-illegal-tactics-used-by-shady-debt-collectors/> (detailing common illegal tactics among debt collectors). Given the prevalence of these illegal tactics, the FTC has developed a list of individuals and entities banned per court order from engaging in the business of debt collection. *Banned Debt Collectors*, FED. TRADE COMMISSION, <https://www.ftc.gov/enforcement/cases-proceedings/banned-debt-collectors> (last visited Nov. 4, 2017).

specialize in collecting certain debts.<sup>40</sup> In some circumstances, debt collection has even become a lucrative industry for investors.<sup>41</sup> But it has certainly come with its own unique set of challenges. Given that debts can be purchased at low costs, collectors often do everything they can to make a profit—even break the law.<sup>42</sup>

In March, the CFPB published its annual FDCPA report on debt collection that provided astronomical numbers. Debt collection is approximately an 11.4 billion dollar industry in the United States including over 130,000 employees and 8,500 collection agencies.<sup>43</sup> Moreover, in a recent national debt collection consumer survey, the CFPB reported that creditors and debt collectors contacted about seventy million Americans in connection with a debt during 2016.<sup>44</sup> Debt collectors generated the majority of their revenue through collections of “medical debt, student loans, and financial services obligations such as credit cards, auto loans, and mortgages.”<sup>45</sup> But more significantly and unfortunately,

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40. Fontinelle, *supra* note 30.

41. See, e.g., Jake Halpern, *Paper Boys: Inside the Dark, Labyrinthine, and Extremely Lucrative World of Consumer Debt Collection*, N.Y. TIMES (Aug. 15, 2014), [https://www.nytimes.com/interactive/2014/08/15/magazine/bad-paper-debt-collector.html?\\_r=0](https://www.nytimes.com/interactive/2014/08/15/magazine/bad-paper-debt-collector.html?_r=0) (detailing the story of one Wall Street investor who made “astronomical” profits from buying and collecting consumer debts).

42. An interesting comment in response to the CFPB’s debt collection ANPR came from a person who claimed to have worked as a debt collector for over two years. When he asked his employer if they wanted him “to blatantly break the law,” his employer “advised [him] simply not to get caught.” Devon Cooper, *Comment on CFPB-2013-0033-0001*, REGULATIONS.GOV (Feb. 18, 2014), <https://www.regulations.gov/document?D=CFPB-2013-0033-0113>.

43. *Fair Debt Collection Practices Act: CFPB Annual Report 2017*, CONSUMER FIN. PROTECTION BUREAU 9 (Mar. 2017), [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201703\\_cfpb\\_Fair-Debt-Collection-Practices-Act-Annual-Report.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201703_cfpb_Fair-Debt-Collection-Practices-Act-Annual-Report.pdf).

44. See *Consumer Experiences with Debt Collection*, CONSUMER FIN. PROTECTION BUREAU 13 (Jan. 2017), [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201701\\_cfpb\\_Debt-Collection-Survey-Report.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf) (reporting that one-third of Americans were contacted throughout 2016 “by a creditor or debt collector about a debt”). These statistics are often contested, however. For example, ACA International, which is the Association of Credit and Collection Professionals, published a white paper arguing the implications from the CFPB’s consumer survey are flawed. Josh Adams, *An Overview of the Analytical Flaws and Methodological Shortcomings of the CFPB’s Survey of Consumer Experiences with Debt Collection*, ACA INT’L (Feb. 2017), <http://www.acainternational.org/assets/research-statistics/wp-cfpbsurvey.pdf>. ACA’s main criticism is that the CFPB’s survey cannot be used to support its rulemaking process because it “potentially manipul[at]ed inconclusive results to promote the incorrect perception of debt collectors as predatory.” *Id.* at 10; see also John L. Culhane, Jr., *ACA International Flags Shortcomings in CFPB National Debt Collection Consumer Survey*, BALLARD SPAHR L.L.P. (Mar. 6, 2017), <https://www.cfpbmonitor.com/2017/03/06/aca-international-flags-shortcomings-in-cfpb-national-debt-collection-consumer-survey/> (summarizing ACA International’s white paper).

45. *Fair Debt Collection Practices Act: CFPB Annual Report 2017*, *supra* note 43, at 10. For a detailed account of statistics in the debt collection industry, see *id.* at 9–13.



debt collection remains the most complained-of industry to the CFPB.<sup>46</sup>

## II. FAIR DEBT COLLECTION PRACTICE ACT

Given the need for regulation, Congress enacted the FDCPA in 1977, which is a federal consumer protection statute designed to prevent unfair, deceptive, and harassing or abusive<sup>47</sup> acts or practices as they relate to debt collectors.<sup>48</sup> With regard to its prohibition of abusive debt collection conduct, the FDCPA provides that “[a] debt collector<sup>49</sup> may not engage in any conduct the natural consequence of which is to harass, oppress, or *abuse* any person in

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46. *Id.* at 15. During 2016, the CFPB received about 88,000 debt collection complaints. *Id.* An interesting note is that consumers reported collectors contacting them through text messages, emails, and forms of social media. *Id.* at 18. Reports of these instances involving technology are likely what have contributed, in part, to the CFPB’s desire to promulgate new rules under the FDCPA.

47. The FDCPA does not outright prohibit “abusive acts or practices” such as in the Dodd-Frank Act. Rather, as discussed in this Part, the FDCPA prohibits conduct in which the natural consequence is to abuse a person in connection with a debt. 15 U.S.C. § 1692d (2016). Given the similarity between the FDCPA and the Dodd-Frank Act in generally prohibiting abusive debt collection conduct, my position is that they should be treated as the same standard.

48. *Id.* § 1692. Congress specifically noted, “[t]here is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.” *Id.* § 1692(a).

49. The FDCPA defines a debt collector as “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.” *Id.* § 1692a(1)(6). However, it is noteworthy what the definition of a “debt collector” does not include. “The term does not include . . . any officer or employee of a *creditor* while, in the name of the creditor, collecting debts for such creditor.” *Id.* § 1692a(6)(A) (emphasis added). Thus, the FDCPA does not apply to first-party creditors, unless they are collecting or attempting to collect a debt under a different name. The reasoning is that “[u]nlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer’s opinion of them.” S. Rep. No. 95-382, at 2 (1977). However, controversy arose among the circuit courts of appeal as to whether debt buyers constituted debt collectors for purposes of the FDCPA. This led to the U.S. Supreme Court’s recent decision in *Henson v. Santander Consumer USA, Inc.* that held debt buyers are not debt collectors within the meaning of the FDCPA. 137 S. Ct. 1718, 1724–26 (2017). Legislation has already been enacted to amend the FDCPA, which would classify debt buyers as debt collectors. Barbara S. Mishkin, *House Financial Services Subcommittee to Hold July 12 Hearing on Community Financial Institution Relief; Bills to be Examined Include FDCPA Amendments, CFPB Changes*, BALLARD SPAHR L.L.P. (July 10, 2017), <https://www.consumerfinance.com/2017/07/10/house-financial-services-subcommittee-to-hold-july-12-hearing-on-community-financial-institution-relief-bills-to-be-examined-include-fdcpa-amendments-cfpb-changes/>.

connection with the collection of a debt.”<sup>50</sup> The FDCPA proceeds to list specific examples, though not dispositive,<sup>51</sup> of what constitutes abusive debt collection conduct.<sup>52</sup> While Congress did not want to completely limit the scope of the rule, it included various examples of abusive conduct that violate Section 1692d.<sup>53</sup> These examples generally include repeated and continuous phone calls, use of obscene language, coercing payment of a debt, or any use or threat of physical violence.<sup>54</sup>

One of the most fundamental abusive debt collection practices is the use of intimidating means of communication with consumers. For example, the FDCPA prohibits the use or threat of violence or other criminal means against a consumer.<sup>55</sup> It also prohibits the use of obscene or profane language.<sup>56</sup> Courts analyzing abusive language, as it relates to debt collection, focus not on the debt collectors’ intent, but on the “natural consequence[s] of [their actions].”<sup>57</sup> This standard allows for broader protections to consumers.<sup>58</sup> In addition, the rule is aimed

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50. 15 U.S.C. § 1692d (emphasis added).

51. The FDCPA provides, “Without limiting the general application of the foregoing, the following conduct is a violation of this section . . . .” *Id.* This provision allows courts to still find certain debt collection conduct is abusive even if not one of the specifically listed examples in the FDCPA. *E.g.*, *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1178 (11th Cir. 1985).

52. In addition to providing examples about what constitutes an abusive debt collection practice, which will be explained in greater detail, it is interesting to note that the FDCPA also provides specific examples of what constitutes a deceptive or unfair debt collection practice. *See* 15 U.S.C. § 1692e (providing a non-dispositive list of what constitutes a deceptive debt collection practice); *see also id.* § 1692f (providing a non-dispositive list of what constitutes an unfair debt collection practice).

53. *See Diaz v. D.L. Recovery Corp.*, 486 F. Supp. 2d 474, 477 (E.D. Pa. 2007) (explaining that Section 1692d “merely provides an *illustration* of the sort of conduct that is prohibited”) (emphasis in original); *see also Jeter*, 760 F.2d at 1178 (reasoning that section 1692d is “explicitly not limited to the conduct proscribed” in the six listed examples).

54. 15 U.S.C. § 1692d.

55. *Id.* § 1692d(1). For an example of a violation of this type of conduct, *see supra* notes 1–6 and accompanying text.

56. It is a violation of Section 1692d(2) to use “obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.” *Id.* § 1692d(2). For an example of this type of violation, *see Outrageous Calls from Debt Collectors ABC News 0:00–0:35* (ABC News video June 19, 2009), <https://www.youtube.com/watch?v=KJS9c0jgosQ>. This example likely also illustrates violations of 15 U.S.C. § 1692d(1) (threat of criminal means to harm reputation) and 15 U.S.C. § 1692d(5) (engaging in telephone conversation with intent to harass).

57. *E.g.*, *Horkey v. J.V.D.B. & Assoc. Inc.*, 333 F.3d 769, 774 (7th Cir. 2003); *Taylor v. Heath W. Williams LLC*, 510 F. Supp. 2d 1206, 1216 (N.D. Ga. 2007).

58. The main reason courts look to the natural consequences of actions rather than the debtor’s intent is to protect the public at-large. The FTC Act, for example, aims to protect “unsophisticated consumers, not only ‘reasonable consumers’ who could otherwise protect

at preventing offensive language “which is at least akin to profanity or obscenity.”<sup>59</sup>

The FDCPA also prohibits certain telephone call practices in and of themselves.<sup>60</sup> Generally, courts look to the continuity or repetition of phone calls when determining whether a debt collector’s actions constitute abusive conduct.<sup>61</sup> Alternatively, a debt collector’s lack of disclosure of his or her identity could also constitute an abusive practice.<sup>62</sup> However, when analyzing whether telephone calls to collect debts are abusive, courts may infer from the circumstances, which helps provide broader protection to consumers.<sup>63</sup>

Consumers have added protection under the FDCPA through a private right of action. The FDCPA provides that debt collectors may be civilly liable to consumers in any appropriate U.S. District Court<sup>64</sup> if they violate any of the FDCPA’s provisions.<sup>65</sup> The FDCPA provides consumers<sup>66</sup> with the ability to seek actual damages,

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themselves in the market place.” *Jeter*, 760 F.2d at 1172. As a result, courts apply a “least sophisticated consumer” standard as it applies to debt collection cases. *Id.* at 1175; *Flores v. Shapiro & Kreisman*, 246 F. Supp. 2d 427, 433 (E.D. Pa. 2002). However, courts have also noted, specifically regarding debt collection practices likely to harass, oppress, or abuse, that the more appropriate standard is viewing the conduct “from the perspective of a consumer whose circumstances make him relatively more susceptible to harassment, oppression, or abuse.” *E.g.*, *Jeter*, 760 F.2d at 1179; *Bryant v. Bonded Account Serv./Check Recovery Inc.*, 208 F.R.D. 251, 256 (D. Minn. 2000). This type of standard also accords with the CFPB’s abusive standard in that it prohibits a business from taking unreasonable advantage of the *consumer’s* lack of understanding, ability to protect their interests, or reasonable reliance. 12 U.S.C. § 5531(d)(2) (2016) (emphasis added).

59. *Jeter*, 760 F.2d at 1178; *see also* Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097, 50105 (1988) (explaining that “[a]busive language includes religious slurs, profanity, obscenity, calling the consumer a liar or a deadbeat, and the use of racial or sexual epithets”).

60. It is a violation of Section 1692d(5) to “[cause] a telephone to ring or [engage] any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.” 15 U.S.C. § 1692d(5).

61. *See* Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, *supra* note 59, at 50105 (defining “continuously” as “making a series of telephone calls, one right after the other,” and defining “repeatedly” as “calling with excessive frequency under the circumstances”).

62. 15 U.S.C. § 1692d(6).

63. *See, e.g.*, *Crockett v. Rash Curtis & Assocs.*, 929 F. Supp. 2d 1030, 1032 (N.D. Cal. 2013) (reasoning that intent to annoy, abuse, or harass “may be inferred from circumstantial evidence such as the nature, pattern, and frequency of debt collection calls”).

64. 15 U.S.C. § 1692k(d). The statute of limitations on these FDCPA actions is limited to “one year from the date on which the violation occur[red].” *Id.*

65. *Id.* § 1692k(a). The FTC also has authority to enforce the provisions of the FDCPA. *Id.* § 1692l(a).

66. Consumers may bring an action as an individual or in a class action proceeding. *Id.* § 1692k(a).

costs, and attorneys' fees.<sup>67</sup> Consumers can also seek additional damages not to exceed \$1,000, in which the court will consider various factors to determine whether to award these additional damages.<sup>68</sup> Debt collectors are provided a safe-harbor provision, however. To the extent a debt collector can show by a preponderance of the evidence that its alleged violation "was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error," it will not be held liable.<sup>69</sup> Despite all of the protections<sup>70</sup> afforded to consumers in the FDCPA, Congress saw a need to increase those protections in 2010 through the Dodd-Frank Act.

### III. THE CONSUMER FINANCIAL PROTECTION BUREAU

Congress created the Dodd-Frank Act and the CFPB largely in response to the 2008 financial crisis.<sup>71</sup> The increasing use and access of consumer financial products and services led to a whole new wealth of problems. Because of the heightened need for these products and services, combined with increased expenses, credit became easier to access and many consumers started incurring more debt.<sup>72</sup> In addition, lenders started taking advantage of consumers' desperate circumstances by selling a vast amount of loans and other financial products, such as mortgages.<sup>73</sup> Because

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67. *Id.* §§ 1692k(a)(1), (3).

68. *Id.* § 1692k(a)(2)(A). The primary factors for a court to consider are the frequency and persistence of the debt collector in violating the FDCPA. *Id.* § 1692k(b)(1). The court considers the same factors in a class action proceeding, except it will also consider the number of consumers adversely affected. *Id.* § 1692k(b)(2).

69. *Id.* § 1692k(c).

70. It is also important to remember that the FDCPA prohibits a number of other types of misconduct from debt collectors than those specifically discussed in this Part. *See generally id.* § 1692c (communications in connection with debt collection); *id.* § 1692e (false or misleading representations); *id.* § 1692f (unfair practices); *id.* § 1692g (validation of debts). Many of the CFPB's proposed debt collection rules will also fall within these areas. However, the scope of this Article is limited to the definition and application of abusive debt collection conduct.

71. *See Creating Consumer the Bureau*, CONSUMER FIN. PROTECTION BUREAU, [www.consumerfinance.gov/the-bureau/creatingthebureau/](http://www.consumerfinance.gov/the-bureau/creatingthebureau/) (last visited Nov. 4, 2017) (explaining the events leading up to the passage of the Dodd-Frank Act and the creation of the CFPB).

72. *Id.*

73. *Id.* *See also* Alec C. Covington, *Fighting Yesterday's Battles: Proposed Changes to the Consumer Financial Protection Bureau*, 16 N.C. BANKING INST. 299, 301-02 (2012) (indicating that some of the primary causes of the financial crisis included "unscrupulous business practices in investment banking and structured finance, inflated credit ratings,

many consumers could not repay their loans, what eventually resulted was catastrophic—home values dropped, savings depleted, jobs were eliminated, and businesses lost financing.<sup>74</sup> To combat these adverse effects, Congress took action to give consumers more protection.

### A. The Agency

In 2010, Congress passed the Dodd-Frank Act, which in part established the CFPB.<sup>75</sup> In an effort to help sustain a fair, competitive, and transparent marketplace,<sup>76</sup> the CFPB regulates consumer financial products and services as defined under federal consumer financial laws.<sup>77</sup> While federal consumer financial law includes a broad spectrum, the CFPB has specific departments for the regulation of mortgages, lending, and collections, among

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high risk lending in the mortgage market, and regulatory inaction”). Subprime mortgages, specifically, played a large role in the financial crisis, as private lenders made approximately 12 million subprime mortgages in 2006, totaling a value of about two trillion dollars. Jonathan Swift, *Lest We Forget: Why We Had a Financial Crisis*, FORBES (Nov. 22, 2011, 11:28 AM ET), <http://www.forbes.com/sites/stvedenning/2011/11/22/5086/#145fcabb5b56>.

74. *Creating the Consumer Bureau*, *supra* note 71. For a brief snapshot of some of the events leading to the 2008 financial crisis, see *The Origins of the Financial Crisis*, ECONOMIST (Sept. 7, 2013), [www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article](http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article). For a more detailed discussion, see Christopher K. Seide, *Consumer Financial Protection Post Dodd-Frank: Solutions to Protect Consumers Against Wrongful Foreclosure Practices and Predatory Subprime Auto Lending*, 3 U. PUERTO RICO BUS. L.J. 219 (2012).

75. 12 U.S.C. § 5491 (2016). For a brief summary of everything in the Dodd-Frank Act, see Jill Jackson, *Wall Street Reform: A Summary of What's in the Bill*, CBS NEWS (June 25, 2010, 4:54 PM), <http://www.cbsnews.com/news/wall-street-reform-a-summary-of-whats-in-the-bill/>. An interesting and ongoing dispute concerns the constitutionality of the CFPB's structure. The D.C. Circuit held that the CFPB's structure was unconstitutional given that it was established as an independent agency, yet headed by only one director who could only be removed for-cause. See generally *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016) (discussing that the multi-member structure of independent agencies is a measure, required by Article II, to protect against arbitrary decision making in the executive branch). However, the court later granted a petition for rehearing en banc, and the case will be reheard in May 2017. Order Granting Rehearing En Banc, *PHH Corp. v. Consumer Fin. Prot. Bureau*, [https://www.cadc.uscourts.gov/internet/opinions.nsf/5D0253C4E25B93FB852580C9005F3AE1/\\$file/15-1177-1661681.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/5D0253C4E25B93FB852580C9005F3AE1/$file/15-1177-1661681.pdf) (D.C. Cir. Feb. 16, 2017) (No. 15-1177).

76. See 12 U.S.C. § 5511(a) (2010) (“The [CFPB] shall seek to implement and . . . enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets . . . and that markets . . . are *fair, transparent, and competitive*.”) (emphasis added).

77. *Id.* § 5491. The definition of consumer financial products or services includes credit, loans, leases, debt management or settlement services, check cashing, deposit-taking activities, and financial advisory services, among others. *Id.* § 5481.

others.<sup>78</sup> In addition to the enforcement of federal consumer financial law, the CFPB encourages financial education for consumers as a result of the 2008 financial crisis and frequently provides advice to help certain groups improve their financial literacy.<sup>79</sup> While the CFPB's regulation and enforcement of consumer financial products and services largely overlaps with the FTC, the two agencies share jurisdiction. Specifically, the FTC recognized a substantial need for the CFPB and published a Memorandum of Understanding.<sup>80</sup> The CFPB also provides additional enforcement authority to state attorneys general.<sup>81</sup>

### B. Authority Under the Dodd-Frank Act

Generally, the CFPB is given a wide range of discretion to “administer, enforce, and otherwise implement the provisions of Federal consumer financial law.”<sup>82</sup> The CFPB is also given exclusive authority to prescribe rules and issue orders as necessary to carry out its general goal relating to federal consumer financial law.<sup>83</sup>

With respect to federal consumer financial law, the CFPB can enforce unfair, deceptive, and abusive acts or practices.<sup>84</sup> These specific prohibitions mirror the majority of other consumer

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78. For a snapshot of the CFPB's structure and hierarchy, see *About Us*, CONSUMER FIN. PROTECTION BUREAU, [www.consumerfinance.gov/the-bureau/](http://www.consumerfinance.gov/the-bureau/) (last visited Nov. 2, 2017).

79. See generally *Educational Resources*, CONSUMER FIN. PROTECTION BUREAU, [www.consumerfinance.gov](http://www.consumerfinance.gov) (last visited Nov. 2, 2017) (providing information for students, elderly, veterans, community banks and credit unions, and generally the economically vulnerable population). The CFPB provides general information and detailed guides for certain complex financial products or services, such as student loans, mortgages, and veterans benefits. *Id.*

80. Jon Leibowitz & Richard Cordray, *Memorandum of Understanding Between the Consumer Financial Protection Bureau and the Federal Trade Commission*, FED. TRADE COMMISSION (Jan. 20, 2012), <https://www.ftc.gov/system/files/120123ftc-cfpb-mou.pdf>. The agencies specifically noted, “effective cooperation is critical to protect consumers, prevent duplication of efforts, provide consistency and ensure a vibrant marketplace for Consumer Financial Products or Services.” *Id.* As part of the ongoing relationship, the agencies often report their activities over a given period of time to the other in areas in which they share jurisdiction. See, e.g., Barbara S. Mishkin, *FTC Sends Letter to CFPB on 2016 Debt Collection Activities*, CFPB MONITOR (Feb. 15, 2017), <https://www.cfpbmonitor.com/2017/02/15/ftc-sends-letter-to-cfpb-on-2016-debt-collection-activities/> (summarizing the FTC's 2016 letter to the CFPB regarding the FTC's debt collection activities for that year).

81. See 12 U.S.C. § 5552 (2012) (allowing state attorneys general to bring a civil suit to enforce the provisions in Dodd-Frank Act).

82. *Id.* § 5512(a).

83. *Id.* § 5512(b)(1).

84. *Id.* § 5531.

protection statutes throughout the country, including the FTC Act and state laws.<sup>85</sup> However, as previously discussed, the CFPB's authority differs from the FTC and state attorneys general in one significant way—the ability to prohibit abusive acts or practices.<sup>86</sup> The CFPB's abusive standard provides the following:

The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice—

- 1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
- 2) takes unreasonable advantage of—
  - A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
  - B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
  - C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.<sup>87</sup>

While the idea behind the abusive standard is noble, there are many deficiencies. The CFPB has not narrowly defined what constitutes an abusive act or practice.<sup>88</sup> Rather, the CFPB wanted

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85. Compare Federal Trade Commission Act, 15 U.S.C. § 45 (2016) (prohibiting “unfair or deceptive acts or practices in or affecting commerce”), and FLA. STAT. § 501.204(1) (2016) (prohibiting “unfair or deceptive acts or practices in the conduct of any trade or commerce”), with 12 U.S.C. § 5531 (prohibiting “unfair, deceptive, or abusive act[s] or practice[s] . . . in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service”). These types of consumer protection statutes are commonly referred to as UDAP statutes, or in the case of the CFPB a UDAAP statute.

86. See Tiffany S. Lee, Note, *No More Abuse: The Dodd-Frank and Consumer Financial Protection Act's “Abusive” Standard*, 14 J. CONSUMER & COM. L. 118, 119 (2011) (explaining how other federal consumer protection agencies already had authority prior to the passing of the Dodd-Frank Act to prohibit unfair or deceptive acts or practices, but the CFPB's authority to prohibit abusive acts or practices “expands the standard of misconduct.”).

87. 12 U.S.C. § 5531(d).

88. Traditionally, government agencies pass regulations that further interpret the law, but the CFPB has declined to do so for abusive acts or practices. Jenna Greene, *Beyond*

to define abusive acts or practices “one enforcement action at a time.”<sup>89</sup> However, the absence of a clear definition regarding this new standard has left many troubling, unanswered questions for businesses that have to comply with the law:

What is “material interference?” What is “unreasonable advantage?” When is it reasonable for a consumer to rely on the covered person to act in their interest? How does one determine whether a consumer is able to protect its own interests? And how does one determine “the interests of the consumer?”<sup>90</sup>

Businesses have not had a clear understanding of what the law is or how to comply with the law.<sup>91</sup> This is because unfair and

*Deceptive; Regulators May Not Be Able to Define ‘Abusive,’ But They Know It When They See It*, 15 CORP. COUNS. 55, 55–56 (Aug. 1, 2015).

89. *Id.*; see also Evan Weinberger, *CFPB’s Definition of Abusive Practices Remains Elusive*, LAW360 (July 5, 2012, 8:52 PM ET), [www.law360.com/articles/357036/cfpb-s-definition-of-abusive-practices-remains-elusive](http://www.law360.com/articles/357036/cfpb-s-definition-of-abusive-practices-remains-elusive) (speculating that the CFPB likely chose such an enforcement approach because it gives the agency flexibility in determining how to enforce and define an abusive act or practice); *How Will the CFPB Function Under Richard Cordray: Hearing Before the Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs of the Committee on Oversight and Government Reform*, OVERSIGHT.HOUSE.GOV 70 (Jan. 24 2012), available at <http://oversight.house.gov/wp-content/uploads/2012/06/01-24-12-Subcommittee-on-TARP-Financial-Services-and-Bailouts-of-Public-and-Private-Programs-Hearing-Transcript.pdf> (acknowledging the lack of definition in that “[i]t is obviously going to depend on judging facts and circumstances. As we have more guidance to provide, we will try to be transparent in providing the guidance”).

90. Reginald R. Goeke, *Is the CFPB Torturing Language with Its Abusive Standard?*, LAW360 (Feb. 12, 2015, 5:41 PM ET), [www.law360.com/articles/621386/is-the-cfpb-torturing-language-with-its-abusive-standard](http://www.law360.com/articles/621386/is-the-cfpb-torturing-language-with-its-abusive-standard). See Rebecca Schonberg, Note, *Introducing ‘Abusive’: A New and Improved Standard for Consumer Protection*, 100 CAL. L. REV. 1401, 1405 (2012):

[W]hat level of harm will be sufficient to merit enforcement action? Must lenders assess “lack of understanding” on an individualized basis prior to entering into each contract, or is it to be measured on a group level, perhaps by regulators conducting surveys at regular intervals? Can sophisticated consumers waive the protections of this statute? Will this standard be more effective as an ex ante tool for regulation or an ex post tool for litigation?

See also Diane Katz, *The CFPB in Action: Consumer Bureau Harms Those It Claims to Protect*, HERITAGE FOUND. (Jan. 22, 2013), <http://www.heritage.org/housing/report/the-cfpb-action-consumer-bureau-harms-those-it-claims-protect> (“One must ask just how the CFPB is to determine consumer ‘ability’ or the requisite degree of consumer ‘understanding’ for a population of more than 300 million Americans using thousands of different financial products and services.”).

91. Because of the lack of understanding of abusive acts or practices, applying the standard has been labeled as essentially a subjective effort. Weinberger, *supra* note 89. This gives the CFPB flexibility in determining how to enforce the provision, but does nothing in terms of helping the overall marketplace. *Id.* See also Cheyenne Hopkins, *New ‘Abusive’*



deceptive acts or practices have been defined through caselaw dating back to the FTC's inception in 1914. But because "abusive" has been added in conjunction with "unfair" and "deceptive," it must mean something distinct.<sup>92</sup> As a result, many are left to wonder just how much value, if any, the "abusive" standard, and the Dodd-Frank Act in general, really add to consumer protection.<sup>93</sup> In the context of this Article, the troubling question

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*Standard in Dodd-Frank Has Bankers Nervous*, FIN. PLAN. (Nov. 23, 2010), <https://www.financial-planning.com/news/new-abusive-standard-in-dodd-frank-has-bankers-nervous> (describing a lawyer's comments that abusive is defined "in a way . . . that seems very subjective, because it's driven off consumer perception and that's a very difficult thing to regulate. . . . It's going to open up a lot of subjective analysis by examiners and the courts of what is abusive").

92. See *Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts*, CONSUMER FIN. PROTECTION BUREAU at 4 (July 10, 2013), [http://files.consumerfinance.gov/f/201307\\_cfpb\\_bulletin\\_unfair-deceptive-abusive-practices.pdf](http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf) ("It is important to note that, although abusive acts or practices may also be unfair or deceptive, each of these prohibitions are separate and distinct, and are governed by separate legal standards."). While the CFPB issued a bulletin providing examples of unfair, deceptive, and/or abusive acts or practices, it did not specify which of the examples provided would constitute unfair, deceptive, or abusive acts or practices. *Id.* at 5–6. See also *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 904 (S.D. Ind. 2015) ("The legislative history of the CFPB suggests that the term was added, in part, to enable the Bureau to reach forms of misconduct not embraced by the more rigid, cost-benefit standard that had grown up around the terms 'unfair' and 'deceptive.'").

93. Compare Hopkins, *supra* note 91 (labeling the abusive standard "the most egregious" part of the CFPB's enforcement authority), with Kevin L. Petrasic, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Overview and Implementation*, PAUL HASTINGS LLP (July 15, 2010), [www.paulhastings.com/publications-items/details/?id=1b47de69-2334-6428-811c-ff00004cbded](http://www.paulhastings.com/publications-items/details/?id=1b47de69-2334-6428-811c-ff00004cbded) (touting the Dodd-Frank Act as "the single most important and comprehensive piece of financial system reform legislation since the myriad of reforms following the Great Depression."); see also Christopher Maag, *Post Warren, the Battle Over the CFPB Is Far From Over*, CREDIT.COM (July 18, 2011), <http://blog.credit.com/2011/07/remember-the-financial-reform-fight-its-far-from-over/> (suggesting that the CFPB's wide range of power to make products easier to understand will actually prevent businesses from developing new innovative products). As problematic as the current abusive standard might be, the House's originally proposed version was even broader:

- (3) Abusive acts or practices.—The Director and the Agency may determine that an act or practice is abusive only if the Director finds that—
  - (A) the act or practice is reasonably likely to result in a consumer's inability to understand the terms and conditions of a financial product or service or to protect their own interests in selecting or using a financial product or service; and
  - (B) the widespread use of the act or practice is reasonably likely to contribute to instability and greater risk in the financial system.

H.R. REP. No. 111-370, at 41 (2009). When considering the disconnect between the Dodd-Frank Act's abusive standard compared with other abusive standards, it is also important to remember the political tension regarding the CFPB. See Lydia DePillis, *A Watchdog Grows Up: The Inside Story of the Consumer Financial Protection Bureau*, WASH. POST (Jan. 11, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/01/11/a-watchdog-grows->

posed by the Dodd-Frank Act's abusive standard is as follows: could debt collection conduct that has not traditionally been enforced as an abusive act or practice under the FDCPA nevertheless be considered an abusive act or practice under the Dodd-Frank Act's expanded and unclear definition?<sup>94</sup> The answer is not entirely clear.

The CFPB's authority under the Dodd-Frank Act, in the context of debt collection, also differs from the FDCPA with respect to whom the law applies. The Dodd-Frank Act applies to a "covered person"<sup>95</sup> or "service provider,"<sup>96</sup> whereas the FDCPA applies to a "debt collector."<sup>97</sup> Although a "debt collector" within the meaning of the FDCPA excludes first-party creditors,<sup>98</sup> the scope of the Dodd-Frank Act includes both first- and third-party creditors alike.<sup>99</sup> Because a "covered person" and "service provider" apply to "any person" that deals in consumer financial products and services,<sup>100</sup> the Dodd-Frank Act makes no distinction between first- and third-party creditors. This brings up another important question that remains unanswered: whether a first-party creditor

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up-the-inside-story-of-the-consumer-financial-protection-bureau/ (discussing various issues between Republicans and Democrats in creating the CFPB). Many of the considerations the CFPB took into account in its formation were aimed at compromising with both political parties. *See id.* ("[T]he agency couldn't just work to assuage Republicans and the financial industry . . . they couldn't disappoint their left flank either."). Even in the early days of the Trump Administration, there has already been rhetoric about whether it will restructure or make changes to the CFPB. *E.g.*, Yuka Hayashi, *Trump Administration Looks to Restructure CFPB*, WALL ST. J. (Feb. 3, 2017, 5:03 AM EST), <https://www.wsj.com/articles/trump-administration-looks-to-restructure-cfpb-1486116000>.

94. *See* Richard E. Bostrom, et al., *CFPB's Examination Manual and First Annual Report Regarding the FDCPA and Federal Enforcement*, 66 CONSUMER FIN. L.Q. REP. 31, 32 (2012) (arguing that the lack of precedent for the Dodd-Frank Act's abusive standard indicates debt collection activity that has not been considered unlawful under the FDCPA may now be considered unlawful under the Dodd-Frank Act).

95. A covered person is defined as "any person that engages in offering or providing a consumer financial product or service." 12 U.S.C. § 5481(6) (2016) (emphasis added).

96. A service provider is defined 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." *Id.* § 5481(26) (emphasis added).

97. *Supra* note 49.

98. The main exception to this exemption is that the FDCPA will apply to a first-party creditor if that creditor is attempting to collect a debt while using a different name. 15 U.S.C. § 1692a(6) (2016).

99. *Compare* *In re Koresko*, 91 B.R. 689, 694 n.2 (Bankr. E.D. Penn. 1988) (noting that "a first party creditor . . . is not subject to the FDCPA."), *with* John L. Culhane, Jr. & Christopher J. Willis, *CFPB Second Annual Report on FDCPA Activities*, 68 CONSUMER FIN. L.Q. REP. 54 (2014) (explaining that while first-party creditors are generally not subject to the FDCPA, the CFPB can subject them to deceptive, unfair, or abusive acts or practices under the Dodd-Frank Act).

100. *Supra* notes 95–96.

could be held liable for an abusive act or practice under the Dodd-Frank Act for conduct that has traditionally only applied to third-party creditors under the FDCPA?<sup>101</sup>

### C. The CFPB's Debt Collection Rulemaking Process

In 2013, the CFPB issued an Advanced Notice of Proposed Rulemaking (“ANPR”), which sought to collect information regarding debt collection practices in order to promulgate various rules to better protect consumers.<sup>102</sup> Although the ANPR was published pursuant to the CFPB's authority to issue rules for debt collection under the FDCPA,<sup>103</sup> the CFPB also referenced its authority under the Dodd-Frank Act to issue regulations regarding unfair, deceptive, and abusive acts or practices.<sup>104</sup> The ANPR contained over 160 questions in which the CFPB sought comments relating to areas such as the quality and quantity of information that debt collectors need, the transfer of that information, validation notices, disputes, the conduct of collectors, and many others.<sup>105</sup>

Notably, the CFPB also devoted a minimal part of its ANPR to unfair, deceptive, and abusive acts or practices. The CFPB briefly explained the relevant authorities on these acts or practices—which include the FDCPA and the Dodd-Frank Act—before posing two important questions with respect to abusive conduct:<sup>106</sup>

Q92: Should the Bureau incorporate all of the examples in FDCPA section 806 into proposed rules prohibiting acts and practices by third-party debt collectors where the natural

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101. An answer may be imminent, however, as amendments to the FDCPA have already been proposed in light of the *Henson* decision that would bring debt-buyers, who are typically first-party creditors, within the scope of the FDCPA. *Supra* note 49.

102. ANPR, *supra* note 19, at 1.

103. The CFPB is the first federal agency with the authority to promulgate new debt collection rules under the FDCPA. *Id.* Although the FDCPA has been in existence since 1977, the FTC—the agency that traditionally enforced the statute—did not have the authority to issue new debt collection rules. Kevin Petrasic et al., *What Should Banks Expect from the CFPB's Debt Collection Rulemaking?*, 35 BANKING & FIN. SERVICES POL'Y REP. 10 (2016).

104. *Id.* at 9; *see also* 12 U.S.C. § 5531(b) (2012) (providing the CFPB with authority to “prescribe rules” regarding unfair, deceptive, and abusive acts or practices).

105. ANPR, *supra* note 19, at 3–4; *see also* Odinet & White, *supra* note 24, at 881–910 (summarizing and critiquing the CFPB's debt collection proposal).

106. ANPR, *supra* note 19, at 78–80.

consequence is to harass, oppress, or abuse any person? Should any other conduct by third-party debt collectors be incorporated into proposed rules under section 806 on the grounds that such conduct has such consequences? If so, what are those practices; what information or data support or do not support the conclusion that they are harassing, oppressive, or abusive; and how prevalent are they?

Q93: Should the Bureau 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? What considerations, information, or data support or do not support the conclusion that this conduct is “abusive” under the Dodd-Frank Act? Does information or data support or not support the conclusion that this conduct is “unfair” or “deceptive” conduct under the Dodd-Frank Act?<sup>107</sup>

Based on these questions, it seems the CFPB was seeking to clarify two concerns with the Dodd-Frank Act. First, it seems the CFPB was seeking input on the conflicting standards for abusive conduct under the Dodd-Frank Act and the FDCPA.<sup>108</sup> Second, it seems the CFPB was seeking to clarify the conflict between the FDCPA and the Dodd-Frank Act, in determining who is subject to each law.<sup>109</sup>

At least with respect to the first proposal of debt collection rules, the CFPB did not seem to provide any insight as to the answers to these specific questions.<sup>110</sup> The CFPB issued its initial proposal of debt collection rules on July 28, 2016.<sup>111</sup> In its proposal, the CFPB outlined many debt collection rules pertaining to the integrity of information, providing certain information to consumers in collection, and communications with consumers generally.<sup>112</sup> However, the CFPB did not indicate whether these

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107. *Id.* at 81.

108. I do not use the term “conflicting” to imply the two standards are incapable of coexisting. Rather, I use the term to highlight the unusual nature of prohibiting the exact same type of debt collection misconduct under two statutes with two different standards.

109. By contrast here, the two statutes are conflicting in the traditional sense. The FDCPA only applies to third-party creditors, whereas the Dodd-Frank Act applies to third- and first-party creditors. *Supra* notes 95–100 and accompanying text.

110. Of course, the rulemaking process is still ongoing, and the possibility is not foreclosed that the CFPB will ultimately answer these questions.

111. Debt Collection Rules Proposal, *supra* note 22, at 1.

112. *Id.* at 4–5. For an additional, detailed summary of the CFPB’s initial debt collection proposal, see Eric P. Rosenkoetter & Keith Wier, *The CFPB’s Outline of Debt Collection*

rules add to the understanding of what constitutes an abusive act or practice, whether under the FDCPA or the Dodd-Frank Act. Moreover, although the CFPB declined to issue proposed rules regarding first-party creditors, it indicated it would do so “soon.”<sup>113</sup>

#### IV. REMOVING THE DAZE AND CONFUSION

This Part proposes that the CFPB should adopt and integrate the FDCPA’s standard of abusive debt collection practices within the meaning of the Dodd-Frank Act’s abusive standard when applied to debt collection. It also briefly discusses the CFPB’s proposed question about whether to regulate first-party creditors in addition to third-party creditors.

##### A. The “Abusive” Standard

As the law currently stands, there exist two federal statutes that apply to debt collectors and prohibit abusive conduct, but each do so differently. It is odd that the CFPB would utilize this new abusive standard, but start from a blank slate when similar language for similar conduct is used in the FDCPA.<sup>114</sup> The question is why? This is especially questionable given that the CFPB has put forth extensive efforts to regulate the debt collection industry.<sup>115</sup> It is likely because the Dodd-Frank Act is intended to encompass a much wider range of conduct than the FDCPA. But given the overlap of the two statutes and the CFPB’s heavy

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*Proposal: A Look into the Past and Future*, BUS. L. TODAY (2016), [http://www.americanbar.org/publications/blt/2016/10/03\\_wier.html](http://www.americanbar.org/publications/blt/2016/10/03_wier.html).

113. CFPB Director Richard Cordray stated, “we also plan to address first-party debt collectors soon, but on a separate track.” Richard Cordray, *Prepared Remarks of CFPB Director Richard Cordray on Field Hearing on Debt Collection*, CONSUMER FIN. PROTECTION BUREAU (July 28, 2016), <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-field-hearing-debt-collection/>.

114. For an argument on why “abuse” under the FDCPA and “abusive” under the Dodd-Frank Act are different standards and address entirely different misconduct, see Letter from Bill Himpler, Executive Vice President, American Financial Services Association, to Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, *Re: Debt Collection 24–26* (Feb. 28, 2014), available at <https://www.regulations.gov/document?D=CFPB-2013-0033-0298>.

115. See Brent Ylvisaker, *CFPB Targets UDAAPs and Consumer Debt*, DORSEY (July 18, 2013), <https://www.dorsey.com/newsresources/publications/2013/07/cfpb-targets-udaaps-and-consumer-debt> (arguing that the CFPB’s issuance of a bulletin relating to consumer debt collection practices “appears to represent an increasing focus of the CFPB upon UDAAPs in relation to consumer debt practices.”). The current goal of the CFPB to overhaul the debt collection industry by promulgating new rules illustrates this point.

involvement in regulating the debt collection industry, it makes sense to enforce the same standard. As a result, this Article proposes that the FDCPA's interpretation of abusive debt collection conduct be applied to the Dodd-Frank Act's application of abusive acts or practices in the context of debt collection.<sup>116</sup>

As previously discussed, the FDCPA's standard prohibits "conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection a debt."<sup>117</sup> It goes on to list specific examples, such as using or threatening to use violence, or using profanity.<sup>118</sup> This standard focuses on the effects of debt collectors' conduct. It can be harmonized with at least two provisions of the Dodd-Frank Act's "abusive" standard. The Dodd-Frank Act labels conduct as abusive when it "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service,"<sup>119</sup> and when it "takes unreasonable advantage of . . . a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service."<sup>120</sup> For example, if a debt collector threatens to use violence or uses profanity in connection with the collection of a debt, that conduct could certainly materially interfere with or take unreasonable advantage of a consumer's lack of understanding regarding terms or conditions of a financial product or service.<sup>121</sup> The only difference here is that the Dodd-Frank Act would solely apply to debt collection in the context of consumer financial products or services,<sup>122</sup> whereas the FDCPA would apply to any

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116. An alternative proposal that would achieve a similar objective would be to exempt debt collectors from the application of the Dodd-Frank Act. The CFPB would still have enforcement authority over debt collectors through the FDCPA, which in addition to abusive conduct also prohibits unfair and deceptive acts or practices. 15 U.S.C. §§ 1692d, 1692e, 1692f (2016). However, this proposal is likely less feasible given the highly litigated issue of who does and does not constitute a debt collector. *See, e.g., supra* note 49 (detailing some of the controversy over the FDCPA's application to "debt collectors").

117. 15 U.S.C. § 1692d.

118. *Id.* §§ 1692d(1)–(2).

119. 12 U.S.C. § 5531(d)(1) (2016).

120. *Id.* § 5531d(2)(A).

121. At least one commentator would disagree with this proposition. *See* Letter from Bill Himpler, *supra* note 114, at 24–26 (arguing the FDCPA's "abuse" standard and the Dodd-Frank Act's "abusive" standard address different forms of conduct).

122. *See* 12 U.S.C. § 5491a (providing the CFPB "shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws"); *id.* §§ 5481(5), (15) (defining consumer financial products or services).

instance of debt collection.<sup>123</sup> As a result, harmonizing these standards, at least as applied to third-party debt collectors, would provide more clarity in the law.

Other federal rules have also drawn from the FDCPA's "abuse" standard. For example, the Telemarketing Sales Rule<sup>124</sup> ("TSR") is another instance of consumer protection legislation that prohibits abusive conduct, but in the context of telemarketing.<sup>125</sup> The TSR adopted a majority of the underlying prohibitions for abusive conduct that are listed in the FDCPA.<sup>126</sup> Given that telemarketing is a distinct practice from debt collection, this history provides support that adopting similar standards under the Dodd-Frank Act would likely be an even easier transition. Similarly, the CFPB adopted the FTC's definition of deceptive and unfair acts or practices into the Dodd-Frank Act.<sup>127</sup> Given that adopting a definition or body of law with respect to these consumer protection provisions has been done before, it supports the idea that there should be a certain level of uniformity in the consumer protection standards. This seems like the next logical situation in which to do the same. Such an act would accomplish many important objectives.

First, adopting the FDCPA's body of law with respect to abusive debt collection practices within the Dodd-Frank Act generally provides clarity in the law. The CFPB itself has indicated in its debt collection rulemaking process that it is seeking clarity in the law. Specifically, the CFPB noted in its ANPR that:

Although [unfair, deceptive, and abusive acts or practices are] unlawful under [the FDCPA and Dodd-Frank Act],

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123. The "abuse" standard of the FDCPA broadly applies to "any person in connection with the collection of a debt." 15 U.S.C. § 1692d. There is no language limiting the FDCPA's application to certain industries, such as the Dodd-Frank Act.

124. 16 C.F.R. § 310 (2016). The TSR is a federal regulation that is part of the Telemarketing and Consumer Fraud Abuse Prevention Act. 15 U.S.C. § 6102 (2016).

125. It has also been argued by others that the TSR should be a resource to define the Dodd-Frank Act's abusive standard generally, and not necessarily just with respect to debt collection. Lee, *supra* note 25, at 125.

126. See Rules and Regulations, *Telemarketing Sales Rule*, 60 Fed. Reg. 43842, 43853 (Aug. 23, 1995) (explaining that the legislative history to the TSR encouraged the FTC to "draw upon its experience in enforcing standards established under the Fair Debt Collection Practices Act"). The TSR defines abusive telemarketing acts or practices in much more detail than the FDCPA, which makes sense given that the TSR addresses an area entirely distinct from debt collection.

127. See *Unfair, Deceptive, or Abusive Acts or Practices*, *supra* note 8, at 2 n.4, 5 n.10 (indicating that the Dodd-Frank Act utilizes the same definitions of "unfair" and "deceptive" as the FTC).

incorporating debt collection provisions into rules relating to unfair, deceptive, or abusive conduct could provide greater clarity and specificity. 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.<sup>128</sup>

Having similar standards for what constitutes an abusive act or practice with respect to debt collection helps achieve that goal.<sup>129</sup> It seems counterintuitive to have two federal statutes addressing the exact same type of debt collection misconduct but in two different ways.

Moreover, adopting the FDCPA's body of law regarding abusive debt collection conduct avoids having conflicting standards for private causes of action and enforcement actions. Although the FTC and CFPB can enforce both statutes, only the FDCPA grants consumers with a private right of action.<sup>130</sup> By having similar standards of what constitutes an abusive act or practice in the statutes, it provides a certain level of clarity and notice to those who must comply with the law.<sup>131</sup> But currently, a company could otherwise be operating in compliance with the abusive conduct provisions of the FDCPA, yet still find itself dealing with an enforcement action by the CFPB and/or FTC for allegedly engaging in abusive acts or practices, but under the guise of a different abusive standard with the Dodd-Frank Act.<sup>132</sup>

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128. ANPR, *supra* note 19, at 80. While the CFPB wants to provide clarity by issuing specific debt collection rules under the FDCPA, it does not fix the problem that the Dodd-Frank Act still contains an "abusive" standard for the same type of debt collection misconduct. This Article simply advances the argument that the meaning of "abusive" under the FDCPA following the CFPB's new debt collection rules should be extended to the "abusive" standard under the Dodd-Frank Act when applied to debt collection.

129. Again, even if the CFPB ultimately decides to promulgate new debt collection rules in its FDCPA rulemaking process, those new rules should also be incorporated within the meaning of an abusive act or practice under the Dodd-Frank Act.

130. *Supra* notes 64–68 and accompanying text.

131. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

132. Admittedly, there are circumstances where the standard in a private cause of action differs from that in an administrative enforcement action. For example, in the context of Title IX, a federally-funded educational institution may be held liable in a private cause of action for student-on-student harassment if it had actual knowledge of, and was deliberately indifferent to, harassment that was so severe, pervasive, and objectively offensive as to deprive access to educational benefits or opportunities. *Davis v. Monroe Cnty.*



Finally, having similar standards for abusive debt collection conduct between the FDCPA and Dodd-Frank Act will still allow the law to develop over time, whether through private causes of action or enforcement actions. Courts will still be in a position to interpret the abusive conduct rules in private causes of action, and the federal agencies will still be able to provide clarification through enforcement actions. The development of the abusive standard has been a primary motivation for the CFPB's debt collection rulemaking, as it has specifically noted challenges in determining what is abusive conduct given the advances in technology.<sup>133</sup> As technology continues to advance, so can the standard for abusive debt collection practices. But the developing standard should be the same, whether under the FDCPA or the Dodd-Frank Act.<sup>134</sup>

## B. Regulation of First-Party Creditors

Part two of the CFPB's debt collection rulemaking process will focus on first-party creditors.<sup>135</sup> During the CFPB's comment period for its debt collection proposal, responses were mixed

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Bd. of Edu., 526 U.S. 629, 643–45 (1999). However, the Office for Civil Rights (“OCR”) can bring an administrative enforcement action against an educational institution if “the harassing conduct is sufficiently serious to deny or limit the student’s ability to participate in or benefit from the program, and if the school knows or reasonably should know about the harassment.” Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEPT EDUC. 12 (Jan. 2001), available at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>. However, the concerns present in Title IX justify the different standards. The U.S. Supreme Court did not want schools to be liable for money damages for harassment in which it lacked actual knowledge. *Id.* at iii. In OCR enforcement actions, by contrast, the agency is merely seeking corrective action as opposed to money damages. *Id.* at iii–iv. With respect to abusive debt collection practices, having a similar standard under the FDCPA and Dodd-Frank Act makes sense given that individuals seek monetary damages in a private cause of action and the FTC or CFPB often seek large monetary settlements in the administrative enforcement context.

133. See ANPR, *supra* note 19, at 56 (explaining that “challenges often arise when attempting to apply the FDCPA’s prohibitions to a technology that was not envisioned at the time of its enactment and may not easily fit its statutory framework”); Debt Collection Rules Proposal, *supra* note 22, at 3 (“[T]he ANPR also sought comment about interpreting the nearly forty-year old statute to address contemporary debt collection challenges, including . . . technology such as cell phones, text messages, and email.”).

134. It is important to remember that even with similar abusive conduct standards, the Dodd-Frank Act’s definition of “abusive” as currently written still serves an important purpose. This is because that abusive standard applies in many other industries in addition to debt collection. Thus, to the extent that the CFPB wants to use that standard to cover new types of misconduct that unfair or deceptive might not cover, this Article’s proposal still affords the CFPB with sufficient flexibility to do so.

135. *Supra* notes 107, 113 and accompanying text.

regarding whether additional rules should be imposed on first-party creditors.<sup>136</sup> Opponents to regulation of first-party creditors argue that first-party creditors are already subject to many existing regulations, and that they have an inherent incentive to develop good customer relationships.<sup>137</sup> They note that third-party creditors, by contrast, typically only communicate with consumers in order to collect an outstanding debt.<sup>138</sup> Supporters of first-party creditor regulation, on the other hand, argue that history has shown both first- and third-party creditors engage in abusive conduct, and the “risk of reputational harm” to first-party creditors has not proven to be a sufficient deterrence from such misconduct.<sup>139</sup>

It seems now that the issue is more appropriately classified as *how* will the CFPB regulate first-party creditors, as opposed to *if* they will regulate first-party creditors. In May 2017, CFPB Director Richard Cordray remarked in a Consumer Advisory

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136. See, e.g., Letter from Tony Marcus, Senior Vice President, Cathay Bank, to Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, *Re: Advanced Notice of Proposed Rulemaking, Debt Collection (Regulation F)* 1–2 (Feb. 27, 2014), available at <https://www.regulations.gov/document?D=CFPB-2013-0033-0256> (suggesting that additional debt collection rules for first-party creditors would not provide any benefits); Letter from Patrick Morris, Chief Executive Officer, ACA International, to Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, *Comments on the Advance Notice of Proposed Rulemaking on Debt Collection, Regulation F* 38–39 (Feb. 27, 2014), available at <https://www.regulations.gov/document?D=CFPB-2013-0033-0257> (suggesting that while it might be logical to apply similar rules to first and third-party creditors, the CFPB should consider whether any particular exceptions should apply to first-party creditors); Letter from Notre Dame Law School Economic Justice Project, to Consumer Financial Protection Bureau, *Comments to Proposed Rulemaking, Fair Debt Collection Practices Act* 14–16 (Feb. 27, 2014), available at <https://www.regulations.gov/document?D=CFPB-2013-0033-0255> (suggesting that first and third party creditors should be regulated similarly, noting concerns with payday lenders engaging in abusive conduct specifically).

137. See, e.g., Rebecca Plett, *Who's Your Debt Collector Now? Extending Debt Collection Regulation to First-Party Lenders*, 19 N.C. BANKING INST. 319, 338–39 (2015) (arguing first-party creditors should not be regulated in the same manner as third-party creditors in part given the many existing regulations for first-party creditors, and their inherent incentive to develop strong customer relationships).

138. See *id.* at 323 (noting a key difference between first- and third-party creditors in that first-party creditors “depend on consumers choosing their services”).

139. E.g., Letter from Thirty-One State Attorneys General to Richard Cordray, Director, Consumer Financial Protection Bureau, *Re: Bureau of Consumer Financial Protection Rules Implementing the Fair Debt Collection Practices Act and/or Pursuant to Authority Under the Dodd-Frank Act* 3 (Feb. 28, 2014), available at <https://www.regulations.gov/document?D=CFPB-2013-0033-0342>.

Board Meeting that debt collection rulemaking for first- and third-party creditors would be consolidated.<sup>140</sup>

## V. CONCLUSION

The CFPB is, and will continue to be, a vital player in the consumer protection field. An agency dedicated to enforcement in the consumer financial market will give consumers the protection they deserve. And in the context of debt collection, the CFPB has assumed a demanding role in taking over primary responsibility for enforcement. But the existence of two federal statutes, both of which cover abusive debt collection practices with two different standards is puzzling. The fusion of abusive debt collection practices under the FDCPA and the Dodd-Frank Act is a logical result.

It will be interesting to see how the CFPB's rulemaking process continues. The Small Business Regulatory Enforcement Fairness Act ("SBREFA") panel for the CFPB's proposed debt collection rules was expected to submit a report within sixty days from the time the panel "convened," which was likely late August 2016.<sup>141</sup> The report was not to become public until the CFPB issued its new debt collection rules, which was projected to occur in 2017.<sup>142</sup> However, given the restructuring of the CFPB's debt collection rulemaking agenda,<sup>143</sup> it could be much later until the agency issues its final rules.

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140. Barbara S. Mishkin, *Director Cordray Announces Extension of Comment Period for Small Business Lending RFI, Restructuring of Debt Collection Rulemaking*, CONSUMER FIN. MONITOR (June 8, 2017), <https://www.consumerfinance.com/2017/06/08/director-cordray-announces-extension-of-comment-period-for-small-business-lending-rfi-restructuring-of-debt-collection-rulemaking/>.

141. Barbara S. Mishkin, *CFPB Fall 2016 Rulemaking Agenda Published*, CONSUMER FIN. MONITOR (Dec. 1, 2016), <https://www.cfpbmonitor.com/2016/12/01/cfpb-fall-2016-rulemaking-agenda-published/> [hereinafter Mishkin, *CFPB Rulemaking Agenda*].

142. See Barbara Mishkin, *Debt Collection SBREFA Panel Meets with SERs*, CFPB MONITOR (Aug. 29, 2016), <https://www.cfpbmonitor.com/2016/08/29/debt-collection-sbrefa-panel-meets-with-sers/> (projecting the CFPB to issue the debt collection rules "during the first six months of [2017]"). It will be interesting to see if the timeline gets delayed. It is unclear if, or to what extent, the new presidential administration has become an obstacle to the CFPB in its rulemaking process. Further, in addition to debt collection, the CFPB is also in the rulemaking process with respect to arbitration, payday loans, overdrafts, mortgage rules, student loan servicing and consumer reporting, among others. Mishkin, *CFPB Rulemaking Agenda*, *supra* note 141.

143. Mishkin, *supra* note 140.