

**AMERICANS FOR FINANCIAL REFORM
CENTER FOR RESPONSIBLE LENDING
CONSUMER ACTION
CONSUMER FEDERATION OF AMERICA
NATIONAL ASSOCIATION OF CONSUMER ADVOCATES
NATIONAL CONSUMER LAW CENTER (on behalf of its low-income clients)
NEW ECONOMY PROJECT**

By email: barry.wides@occ.treas.gov

January 31, 2014

Thomas J. Curry
Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street SW
Washington, D.C. 20219

Re: Proposed guidance concerning banks' sales of charged-off consumer debt

Dear Comptroller Curry:

The undersigned consumer and civil rights organizations write to commend the Office of the Comptroller of the Currency ("OCC") for issuing "best practices" concerning banks' sales of charged-off consumer debt and to urge the OCC to adopt strict guidance on this subject. As the OCC has recognized, unlawful debt buyer practices have caused great harm to Americans and present significant reputational risks for banks. We appreciate the opportunity to provide comments on this issue.

In this letter we set forth many of the problems we see with respect to debt collection by debt buyers, and detail the harmful impact on lower-income people and communities. As discussed in more detail below, we urge the OCC to issue strong guidance that would accomplish the following:

- a. Require banks to improve their document retention policies and practices;**
- b. Require increased and accurate documentation and information for each debt sold, at the time of sale;**
- c. Prohibit banks from selling those accounts for which they are unable to provide the documentation and fact witness necessary to substantiate the debts in litigation;**
- d. Prohibit banks from selling certain accounts;**
- e. Require banks to retain liability for the debts sold; and**
- f. Require banks to include a strong limitation on the resale of debts in their purchase and resale agreements with debt buyers.**

I. The Debt Buyer Industry

a. Practices

Debt buyers purchase portfolios of old, defaulted consumer debts for pennies on the dollar. In a typical debt sale, the bank provides the debt buyer with nothing more than an electronic spreadsheet containing minimal information about the debts and alleged debtors, and not any of the documents – such as credit applications, agreements, or statements – that the debt buyer would need to substantiate the debts in court.¹ Recent news reports and lawsuits have highlighted inadequate and weak bank documentation practices, as well as robo-signing abuses, and the recent foreclosure crisis has revealed the negative impact such practices can have. Nevertheless, banks generally sell debt portfolios “as is,” without any guarantee as to the accuracy of the accounts. Banks are thus enabling the unfair and abusive debt buyer business model of collecting and suing on debts that cannot be substantiated.

b. Devastating impact on people and communities

Through its legal hotline, New Economy Project has heard from numerous low-income New York City residents being pursued by debt buyers for debts that they do not owe, that were grossly inflated by unauthorized interest, fees or other charges; that were past the statute of limitations; or that they simply did not recognize because the debt buyers failed to provide sufficient information about the debt.² When they dispute the debts and request verification, too often debt buyers fail to respond with adequate verification, if they respond at all, and instead continue collection attempts in violation of the Fair Debt Collection Practices Act and state and local laws. This is not unique to New York City; it is happening across the country.³

¹ According to the Federal Trade Commission’s recent report on the debt buying industry, all or almost all accounts sold to debt buyers came with the following information from the seller: (1) the name, street address and social security number of the debtor; (2) the original creditor’s account number; (3) the outstanding balance; and (4) the date the debtor opened the account. Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* 34-35 (2013) [hereafter *FTC Debt Buying Report*], available at

<http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf>. Other important information does not always accompany an account, however. Less than one-half of the accounts came with the name of the original creditor; less than one-third indicated the interest rate on the account; 72% indicated the amount owed at charge-off. *Id.*

² New Economy Project (formerly NEDAP) together with other groups examined debt buyer lawsuits and their impact on low- and moderate-income New Yorkers in a report published in 2010. The Legal Aid Society, NEDAP, MFY Legal Services & Urban Justice Center, *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers* (May 2010) [hereafter *Debt Deception*], available at

http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf. The Report estimated that, in New York City, nearly all of the estimated \$1.1 billion in judgments obtained by debt buyers from 2006 to 2008 were based on false or legally insufficient affidavits. *Id.*

³ See, e.g., Peter A. Holland, “The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases,” 6 *Journal of Business and Technology Law* 259 (2011) [hereafter Holland, *One Hundred Billion Dollar Problem*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1875727.

State courts have been overwhelmed by debt collection lawsuits, many of which are brought by debt buyers.⁴ These debt collection lawsuits are problematic for numerous reasons. Many of the underlying debts are not valid. Even in cases where a person may owe some money, debt buyers often sue for amounts grossly inflated by unauthorized fees and interest. Also, many defendants do not receive notice that they have been sued. Without notice, they cannot and do not appear in court. Debt buyers then easily obtain “default” judgments, without having to produce legitimate proof that they own the debts or that the amount claimed is in fact owed by the defendant.

The consequences of these default judgments can be devastating, especially for lower-income people. Debt buyers enforce judgments by placing liens on property, freezing people’s bank accounts, and garnishing their wages, making it difficult for people to pay for their basic needs, such as housing, utilities, food or medication. The judgments also appear on credit reports, blocking people from obtaining housing, jobs, or affordable credit. A study by New Economy Project found that in New York these debt collection judgments are disproportionately concentrated in communities of color.⁵

While the OCC has no authority to supervise or regulate debt buyers, it is in a unique position to address some of the fundamental structural features of debt sales that enable debt buyers to use unfair, deceptive, and abusive collection practices. As the Federal Trade Commission’s 2013 report on the debt buyer industry revealed, banks “generally appear to draft” and are “responsible for many of the terms and conditions governing the sale of debt.”⁶ Furthermore, the OCC and other federal agencies have advised all national banks that under safety and soundness guidelines, “it is an unsafe and unsound practice if the bank fails to maintain loan documentation that, among other things, ensures that the bank’s claims against its borrowers are legally enforceable.”⁷

II. Strong OCC Guidance Is Necessary to Protect Banks and Consumers

We urge the OCC to adopt strong guidance, including the provisions outlined below, to ensure that the banks under its supervision do not facilitate unlawful and unfair debt buyer activities against consumers and are not subject to safety and soundness risks due to such activities.

⁴ See, e.g., *id.*

⁵ New Economy Project, *The Debt Collection Racket in New York: How the Industry Violates Due Process and Perpetuates Economic Inequality* (June 2013), available at <http://www.nedap.org/resources/documents/DebtCollectionRacketNY.pdf>; see also *Debt Deception* at 10-12.

⁶ *FTC Debt Buying Report* at 24-25.

⁷ OCC Advisory Letter AL 2004-9 at 3 (citing 12 C.F.R. Part 30, Appendix A, II, C), available at <http://www.occ.gov/static/news-issuances/memos-advisory-letters/2004/advisory-letter-2004-9.pdf>.

a. Require banks to improve their document retention policies and practices

As the OCC has recognized, banks must be able to “specify quality standards and quality control for debt that is sold, emphasizing the accuracy of account balances.”⁸ Unfortunately, “[m]any of the largest institutions have acquired other institutions, resulting in data quality and integrity issues and a collection of acquired systems that have been difficult to integrate. In some cases, customer account history in these legacy portfolios is not complete.”⁹

In order to guarantee the accuracy of account balances, particularly in the litigation context, the bank must retain key account documents, including for each and every account the contract and any revisions thereto, account riders that determine the applicable interest rate, all account statements, and records of consumer disputes. We urge the OCC to require banks to adopt clear document retention policies and practices. Similarly, the OCC should prohibit banks from selling an account unless it can provide *complete* documentation for that account. (All account documentation need not be transferred at the time of sale. However, the contract should provide that subsequent debt buyers will be able to obtain the required documentation within a reasonable time from the debt buyer’s request.)

In addition, it appears that at least one national bank replaces original account numbers with new account numbers when charging off accounts. This practice makes it very difficult to track accounts once they have been sold to debt buyers. Going forward, the OCC should recommend that banks not assign a new account number simply because they are charging off an account.

b. Require increased and accurate documentation and information for each debt sold, at the time of sale

As the OCC has said, “[t]he bank needs to avoid the appearance of not providing the debt buyer with sufficient and appropriate information to collect debt in compliance with federal and state regulations.”¹⁰ FTC reports on the debt buying industry indicate that banks are failing in this regard. In its 2009 workshop report, the FTC concluded that the information debt buyers receive from banks is frequently “inadequate and results in attempts to collect from the wrong consumer or to collect the wrong amount.”¹¹ The FTC’s 2013 study concluded that “both sellers and buyers know that some of the accounts included within a portfolio might have incomplete or inaccurate data, including data on important information such as the then-current balances

⁸ Office of the Comptroller of the Currency, Statement of the Office of the Comptroller of the Currency Provided to the Subcommittee on Financial Institutions and Consumer Protection Senate Committee on Banking, Housing, and Urban Affairs, “Shining a Light on the Consumer Debt Industry,” 6 (July 17, 2013), *available at* <http://www.occ.gov/news-issuances/congressional-testimony/2013/pub-test-2013-116-oral.pdf> [hereafter “OCC Statement”].

⁹ *Id.* at 8.

¹⁰ *Id.* at 13.

¹¹ Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change* v (Feb. 2009) [hereafter “FTC Workshop Report”], *available at* http://www.ftc.gov/sites/default/files/documents/public_events/life-debt/dcwr.pdf.

on accounts.”¹² That same study found that of the 3.9 million accounts purchased by the six largest debt buyers from March through August 2009, debt buyers received documentation for only 6-12% of the accounts at the time of purchase.¹³

To ensure that banks are not facilitating any unfair or unlawful debt collection practices by debt buyers, we urge the OCC to require that banks provide, at minimum, the following information at the time of sale for each account being sold:

- 1) A copy of the signed contract or signed application, or other documents that provide evidence of the consumer’s liability.
- 2) A copy of all or the last 12, whichever is fewer, account statements.
- 3) The date, source and amount of the most recent payment.
- 4) All account numbers ever used by the bank and its predecessor(s), if any, to identify the account. These should include the consumer’s last account number prior to charge-off, the current account number, and any other account or reference numbers that the bank used to identify the account.
- 5) An itemized accounting of the amount claimed to be owed, whether the account is for closed-end or open-end credit, including the amount of the principal, interest, and other fees and charges. “Principal” should be construed strictly to include only the amounts charged for goods, services or cash advances, and not capitalized interest.¹⁴ The accounting should indicate the legal and contractual basis for each interest rate, fee and charge.
- 6) A document that provides the name of the issuing bank, the brand (or store) name, if any, the date and amount of the last payment, and the date of default, as well as the date of charge-off, and the amount owed at charge-off, if applicable.
- 7) Information regarding any outstanding or unresolved disputes and fraud claims, as well as any disputes and fraud claims from 6 months prior to default.

¹² *FTC Debt Buying Report* at C-7-8.

¹³ *Id.* at 35 & n.150.

¹⁴ Under existing law, debt buyers and original creditors must distinguish between principal and interest when preparing Form 1099-C, in order to comply with Section 6050P of the Internal Revenue Code. *FTC Workshop Report* at 29-30. The FTC has already recommended that Congress amend the Fair Debt Collection Practices Act to require debt collectors to include in all validation notices an itemization of the principal, the total of all interest, and the total of all fees and other charges added. *Id.* at 30. Furthermore, under the FDCPA, the consumer has the right to challenge the entire debt “or any portion thereof.” 15 U.S.C. § 1692g(a)(4). Without knowing what “portion” of the debt is principal, and what is interest and fees, the consumer is unable to avail herself of this right.

- 8) Information regarding collection efforts, including internal and third-party collection efforts, placement with law firms, and negotiations with debt-relief companies.
- 9) All information regarding whether the account requires any special handling, such as whether the consumer has advised that her attorney is handling the account, or that her income is exempt from debt collection, or that she intends to file for bankruptcy.
- 10) The consumer's name, address, telephone number, and Social Security number.

c. Prohibit banks from selling those accounts for which they are unable to provide the documentation and fact witness necessary to substantiate the debts in litigation

Providing the documentation and information listed above would help ensure that banks are not facilitating unfair and unlawful *pre-litigation* collection practices by debt buyers. Where the debt buyer intends to engage in litigation, however, it will likely need more documentation, such as all account statements (as opposed to simply the last 12 months' worth), documents establishing the applicable interest rate over time, and possibly a fact witness depending on the jurisdiction, in order to be able to prove its claims in court in accordance with applicable state laws and rules.¹⁵

Standard purchase and sale agreements limit debt buyers to being able to request additional documentation “for a particular number of accounts in the portfolio and/or for a particular period of time”¹⁶ from the original creditor. The number is typically very low, and the time period very short. Some purchase and sale agreements bar debt buyers from requesting or obtaining any documents at all.

In practice, this limitation translates into debt buyers routinely filing lawsuits without having any documentation to prove their claims, and without any meaningful ability to ever obtain the documentation they need to prove their claims.¹⁷ These lawsuits are filed in violation of state and federal consumer protection laws, including the FDCPA, and therefore pose safety and soundness risks to banks.

The OCC should therefore require that banks sell only those accounts for which they are ready and able to provide complete documentation, as described in section II.a, upon the debt

¹⁵ See, e.g., Holland, *One Hundred Billion Dollar Problem*, at 273-80 (discussing Maryland's live witness requirement and other state laws).

¹⁶ *FTC Workshop Report* at 22.

¹⁷ See, e.g., *Debt Deception*. See also *FTC Debt Buying Report* at 30 (“[T]he Commission, consumer advocates, and academics have issued studies, reports, and articles questioning the sufficiency and accuracy of the information and documentation supporting the complaints debt buyers file in court, and advocating changes in such information and documentation.”).

buyer's request, as well as a fact witness where required by the jurisdiction. If a bank permits resale of its debts, the purchase and sale agreement should provide that the right to obtain complete documentation is transferred from the primary debt buyer to the secondary or subsequent debt buyer(s), and that secondary or subsequent debt buyers may request this documentation directly from the bank.

d. Prohibit banks from selling certain accounts

In addition, the OCC should prohibit banks from selling certain accounts at all. We were pleased to see that the OCC's best practices do suggest that banks adopt policies against selling certain accounts, such as "SCRA; minors (date of birth); settled; deceased with no remaining responsible party; accounts in disaster areas; pending bankruptcy; fraud; accounts close to statute of limitations; accounts lacking clear title; accounts lacking proof of right-to-cure or notice of intent-to-sell letters; balances comprised largely of interest and fees; cease and desist accounts; debts where payments were recently received; and, accounts in ongoing loss mitigation programs (short sales, deed in lieu, etc.)."¹⁸

While we recognize that the OCC's guidance must provide banks with some flexibility in developing debt sales policies and procedures, certain accounts simply should not be sold under any circumstances. These accounts include those that have been paid in full, settled, or discharged in bankruptcy, those that lack documentation, as well as accounts for which the debtor is deceased and no responsible party remains. Likewise, the OCC should prohibit banks from selling accounts that are subject to protections under various federal laws: accounts of active duty servicemembers subject to SCRA protections or accounts that are currently subject to bankruptcy law protections. Selling such accounts would likely subject consumers to repeated unlawful collection attempts. Similarly, accounts that are currently in active settlement or for which the bank has received a recent payment should not be sold, as in those situations the consumers are showing an active interest in paying the accounts.

As such, we encourage the OCC to maintain its list with some additions in any future guidance, and to strengthen the guidance by directly prohibiting the sale of at least the aforementioned accounts.

e. Require banks to retain liability for the debts sold

The OCC has acknowledged significant concerns with poor documentation and debt collection practices among banks. Among its best practices, the OCC highlights the need for quality control for the sold debt, including accuracy in the account balances, information shared, and documentation provided.

As the FTC has documented, purchase and sale agreements between banks and debt buyers frequently dictate that the debts are being sold "as is", without any guarantees as to the

¹⁸ OCC Statement at 12.

accuracy of the information, including critical information like the account balance, or the collectability of the accounts.¹⁹ Under these contracts, debt buyers have few rights, if any, to sell back any accounts which they later determined were inaccurate or had missing information.²⁰ Only 6-12% of accounts were accompanied by any sort of documentation, and even in those cases, the contracts often disclaimed warranties as to the accuracy of the documents and warned that they could not be relied on by debt buyers to establish a valid debt or the account balance.²¹ The FTC report makes clear that the banks, not the debt buyers, control the provisions in the purchase and sale agreements and by including these “as is” provisions, banks appear to be wiping their hands clean of responsibility for the debts.²²

Despite these warnings, debt buyers are nonetheless pursuing consumers for the purchased accounts both in and out of court, claiming that the information and documents received from the banks are “inherently reliable.”²³ News reports, court cases, and the OCC’s own investigations, however, reveal that in all too many cases, the exact opposite is true, and people around the country are being harmed by the use of unreliable information and documentation as they are pursued to pay an alleged debt.

The OCC is in an ideal position to prevent these harms by requiring that banks stop selling these debts “as is.” We agree that OCC guidance should provide that in the contract itself, banks should “confirm the accuracy of account balances, confirm marketable title...and confirm the completeness and accuracy of account documentation.”²⁴

We encourage the OCC to require that banks retain liability for the accuracy of the information and documentation shared with or passed on to debt buyers. One way to do so is to require that banks indemnify debt buyers for any successful claims made against debt buyers due to inaccurate account information or documentation. The OCC should also require that banks repurchase accounts that are not collectible because of insufficient documentation. This will promote compliance among banks, further protect consumers against unlawful and abusive collections, and ease enforcement.

f. Require banks to include a strong limitation on the resale of debts in their purchase and resale agreements with debt buyers

The resale of accounts by debt buyers increases the potential for consumers to experience abusive collection practices at the hands of debt buyers. The more often that account information and documentation changes hands, the more likely it becomes that account information will be lost or be inaccurate. Further, subsequent debt buyers do not have the

¹⁹ *FTC Debt Buying Report* at 25.

²⁰ *Id.*

²¹ *Id.* at C-13-14.

²² *Id.* at 24.

²³ Nat’l Assoc. Retail Collection Attorneys, Policy Positions (2011), available at http://www.narca.org/resource/resmgr/about_narca/narcapolicypositions.pdf.

²⁴ *OCC Statement* at 7.

same contractual rights as the primary debt buyers, making it even harder for subsequent purchasers to obtain information or documentation from the banks that originated the accounts.²⁵

We commend the OCC for including in its best practices a prohibition on the resale of debt, and we recommend that the OCC include such requirement in any guidance it releases. Specifically, we urge the OCC to require that banks' purchase and sale agreements include strong limitations on the resale of debts that go beyond simple time-period limitations or approval requirements from the bank. If banks allow debt buyers to resell accounts, then such debt buyers should be contractually obligated to pass on all the information and documentation to subsequent purchasers, and the rights of the debt buyer to seek documentation from the bank (as discussed in Section II.a, above) should pass to the subsequent owner(s).

Thank you for the opportunity to comment. If we can be of further assistance, please do not hesitate to contact Caryn Becker at the Center for Responsible Lending (510-379-5517) or Susan Shin or Claudia Wilner at New Economy Project (212-680-5100).

Sincerely,

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²⁵ *FTC Debt Buying Report* at 27-28. Subsequent debt buyers typically have to go through the previous debt buyers to obtain account documentation from the originating bank.