

## Key Points in the CFPB's Outline of Proposed Rule for Third Party Debt Collectors

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### I. Introduction

On July 28, 2016 the Bureau of Consumer Financial Protection (CFPB) announced that it is considering proposing a rule to “overhaul the debt collection market by capping collector contact attempts and by helping to ensure that

companies collect the correct debt.”<sup>1</sup> The CFPB released several related

documents, including a report on third-party debt collection operations and an outline of the proposal (the Outline) to be presented to a panel of small businesses pursuant to the Small Business Regulatory Enforcement Fairness Act

1. See CFPB Press Release (July 28, 2016), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-considers-proposal-overhaul-debt-collection-market/>.

(SBREFA).<sup>2</sup> Under the SBREFA process, the CFPB first seeks input from a panel of small businesses that likely will be subject to the forthcoming rule. A report regarding the input of those reviewers is then created and considered by the CFPB before issuing its proposed rule.

While the CFPB's earlier Advanced Notice of Proposed Rulemaking posed questions regarding collections by creditors and first party collectors, the Outline only addresses proposals for third party collectors (*i.e.*, collectors operating in their own name when collecting on behalf of others including debt buyers and collection law firms). Based on remarks by Director Cordray, the CFPB is expected to address first party collections (by creditors) separately.

The Outline's proposals for third party collections notably include: (1) requirements to obtain and review information substantiating consumer debts to be collected; (2) requirements regarding the transfer of information when consumer debts are transferred; (3) revisions and additions to the debt validation notice; (4) required disclosures when collection communications are made in connection with time-barred debt (as well as a prohibition on filing suit in connection with time-barred debt); and (5) limits to the contacts and contact attempts made in connection with a debt. These and other requirements proposed in the Outline are discussed further below.

Needless to say, much about the CFPB's forthcoming actions, including its rulemaking agenda, has been cast into doubt as a result of the presidential election and change in administration, and in particular the willingness of this Congress to use the Congressional Review Act to challenge and seek to overturn regulations.<sup>3</sup> However, this SBREFA

outline of a debt collection proposed rule likely merits continued attention and consideration. As noted, the CFPB arguably has omitted from this part of the process what presumably would be the most controversial issue -- the effective expansion of the Fair Debt Collection Practices Act to creditors collecting their own debts. In addition, as the CFPB articulated in its published rulemaking agenda, "[d]ebt collection continues to be the single largest source of complaints to the Federal government of any industry."

## II. Prohibition on Unsubstantiated Claims of Indebtedness

### A. Substantiation Prior to Initiating Collections

The CFPB proposes to require substantiation of debts prior to initiating collections and in reaction to certain events during the course of collections. Collectors would be required to obtain certain "fundamental information" to substantiate a claim of indebtedness and to review that information for "warning signs," *i.e.*, indications that the information is inaccurate or inadequate, before commencing collection activity. The proposal would further "allow" collectors to establish reasonable support for claims of indebtedness by obtaining a representation that its information is "accurate." Specifically, the CFPB proposes to allow a representation that: (1) the debt owner implemented reasonable policies and procedures to ensure the accuracy of transferred information; and (2) the transferred information is identical to the information in the debt owner's records.

The "fundamental information" to be obtained includes:

- the account number of the consumer with the debt owner at the time the account went into default;
- the date of default, the amount owed at default, and the date and amount of any payment or credit applied after default;
- each charge for interest or fees imposed after default and the contractual or statutory source for such interest or fees; and
- the complete chain of title from the debt owner at the time of default to the collector.

Collectors would be required to look for "warning signs" within an individual account or across an entire portfolio, such as:

- information for an individual debt that is not in a clearly understandable form;
- information for an individual debt that is facially implausible or contradictory;
- a significant percentage of debt in the portfolio that has missing or implausible information either in absolute terms or relative to portfolios with comparable types of accounts; or
- a significant percentage of debt in the portfolio that has unresolved disputes, either in absolute terms or relative to portfolios with comparable types of accounts.

A collector who has each of the specific fundamental elements of information above, a representation of accuracy, and no warning signs of problems, would have a reasonable basis for claims of indebtedness and thus could initiate collections. The collector also could acquire a reasonable basis for substantiation without each specific element above, but

2. See: CFPB, Study of Third-Party Debt Collection Operations (July 2016, [http://files.consumerfinance.gov/f/documents/20160727\\_cfpb\\_Third\\_Party\\_Debt\\_Collection\\_Operations\\_Study.pdf](http://files.consumerfinance.gov/f/documents/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf)); and Outline of Proposals Under Consideration and Alternatives Considered (July 28, 2016), [http://files.consumerfinance.gov/f/documents/20160727\\_cfpb\\_Outline\\_of\\_Proposals.pdf](http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_Proposals.pdf).

3. Passed in 1996 as part of Speaker Newt Gingrich's "Contract with America" and used once during the Obama administration (Continued in next column)

3. (Continued from previous column)

tion in an effort to overturn a regulation issued by the National Labor Relations Board, at this writing it had already been used 14 times under the current administration.

would bear the burden of justifying its alternative approach to substantiation.

**B. Substantiation During the Course of Collections**

**1. Introduction**

Debt collectors also would be required to look for “warning signs” that may arise during collection activity. If such signs occur, the collector must obtain additional support prior to making any subsequent claims of indebtedness. These “warning signs” include:

- a dispute filed by a consumer with respect to an individual debt;
- the inability to obtain underlying documents in response to a dispute; or
- receipt of disputes for a significant percentage of debt in the portfolio, either in absolute terms or relative to portfolios with comparable types of accounts.

Collectors would also be required to obtain additional support before proceeding with further claims of indebtedness following receipt of a consumer dispute, with the amount and type of additional support differing based on the nature of the dispute. The types of disputes are noted below.

**2. Generic Disputes**

For “generic” disputes, such as “I dispute the debt” with no additional information, the additional support would consist of documentation establishing:

- the first and last name, address, and account number (with the creditor at the time of default) of the debtor;
- the date of default and date of last payment;

- the name and address of the creditor at default; and
- the amount of the debt balance at default and any post-default interest and fees, and a description of the amount owed.

Documentation evidencing such information could include a combination of: (1) a charge-off statement; (2) the most recent billing or periodic statement; or (3) a contract, note, application, and/or service agreement.

**3. Specific Disputes**

For the specific dispute types noted below, verification would consist of both general documentation about the debt responsive to a generic dispute *and* documentation responsive to the dispute.

**a. Dispute as to Amount of Debt**

Verification as to the amount of the debt would consist of documentation establishing:

- the amount of principal, interest, or fees disputed;
- the basis for seeking to collect any such disputed amount (*e.g.*, a late fee or a charge for purchase on a credit card and the date the charge was made), including the terms and conditions relevant to collecting any post-default interest or fees, if applicable;
- the date and amount of each payment (or other credit) after default; and
- any additional information required to respond to the specific dispute.

Documentation evidencing such facts could include a copy of a billing or periodic statement covering the relevant time period, and/or the underlying agree-

ment describing the applicable interest rate or fees.

**b. Dispute as to Wrong Consumer**

Verification as regards the identity of the consumer would consist of documentation containing either information that the consumer provided to the creditor with respect to the consumer’s date of birth and information obtained with respect to the consumer’s addresses throughout the life of the account, or a number that uniquely identifies the consumer, such as a taxpayer identification number.<sup>4</sup>

Verification documentation also could include:

- the consumer’s original agreement or original consent to the debt; and
- any additional information required to respond to the specific dispute.

Documentation evidencing such facts may include: a copy of the credit application or document reflecting information gathered from the creditor’s Customer Identification Program; and a copy of the contract, note, application, or service agreement.

**c. Dispute as to Wrong Collector**

For disputes in which the consumer asserts that the debt collector is not the owner of the debt or is not entitled to collect on the debt, the required verification would consist of documentation establishing the following facts:

- the names and addresses of all persons that obtained the debt after default (as debt owners or third-party collectors), and the date of and parties to each

4. As defined in 26 CFR § 301.6109-1 (*e.g.*, SSN, EIN, ITIN).

purchase, assignment, or transfer; and

- any additional information required to respond to the specific dispute.

Documentation evidencing such information could include a copy of the bill of sale or assignment of the debt.

### C. Claims of Indebtedness Made in Complaints Filed in Litigation

Before making a claim of indebtedness in litigation, the debt collector, including collection law firms, would be required to have support for the claim that the consumer being sued owes the amount claimed and that the collector has a legal right to make the claim. Specifically, the debt collector must obtain and review all of the information required to substantiate a debt in connection with a dispute, as described above. While the Outline is not clear on this point, this requirement may encompass the documentation required for each of the specific complaint types above as well as a generic dispute. Collectors also would be permitted to acquire a reasonable basis through an alternative approach, but would bear the burden of justifying any such approach.

### III. Requirements to Obtain, Review, and Transfer Certain Information

When debts are transferred, the collector would be required to obtain and review certain information. Prior collectors would be obligated to transfer this information if the consumer provided such information, but not to obtain such information affirmatively. Prior collectors also would be required to provide this information when returning a debt to the creditor, forwarding the debt to another third party collector or selling the debt to a subsequent debt buyer. The information required potentially includes:

- whether the debt was disputed in writing within thirty days of

receipt of the validation notice, and either (1) a statement that the debt was verified or (2) the details of the dispute, including information the consumer submitted or the prior collector provided;

- whether the debt was disputed orally or more than thirty days after receipt of the validation notice, and either (1) a statement that the claims were substantiated or (2) the details of the dispute, including information the consumer submitted or the prior collector provided;
- any time, place, or method of communication that the consumer stated is inconvenient;
- the name and address of any attorney who is representing the consumer in connection with the debt;
- whether the consumer's employer prohibits the consumer from receiving collection communications at the place of employment;
- whether the collector has made confirmed consumer contact, and the contact information used to establish such contact;
- whether the collector has provided the time-barred debt disclosure;
- whether the consumer is deceased and, if so, the date of death;
- whether the consumer is an active duty service member and whether the consumer has secured an interest rate reduction pursuant to the Servicemembers Civil Relief Act;
- for student loans, whether the consumer has applied for dis-

charge of the debt and the date of the application;

- for student loans eligible for rehabilitation, the terms of any rehabilitation agreement, the number of payments made, and any requested adjustment to the amount of the monthly payment; and
- whether the consumer's income and assets are exempt under federal or state laws from a judgment creditor seeking garnishment related to debt collection litigation.

The CFPB also is considering requiring subsequent collectors to obtain (and prior collectors to transfer) the language preference of the consumer, and whether the consumer has submitted an oral or written cease communication request.

Furthermore, debt collectors would be required to forward the following after returning a debt to the debt owner or selling it: (1) payments submitted by the consumer; (2) bankruptcy discharge notices; (3) identity theft reports; (4) disputes; and (5) any assertion or implication by the consumer that his or her income and assets are exempt from garnishment.

### IV. Validation Notice

The CFPB is proposing changes to the validation notice and other requirements relating to that notice, as noted below.

#### A. Revisions to the Validation Notice

The CFPB is considering substantial changes to the disclosures required in debt validation notices, including requiring disclosure of the amount of the debt on the default date, the total amount currently owed, and an itemization of interest, fees, payments, and credits since the default date. The validation notice also would include an action-item "tear-off" to facilitate consumers exercising their dispute rights

under the notice. The Outline includes a proposed model notice for collectors.

**B. Statement of Rights**

Debt collectors also would be required to provide consumers with a one-page Statement of Rights with the validation notice. It would include plain-language explanations of consumer rights under the Fair Debt Collection Practices Act (FDCPA) and Fair Credit Reporting Act. A proposed Statement of Rights is included in the Outline. The CFPB is further considering a requirement that debt collectors offer an additional copy of the Statement of Rights when the first communication is made more than 180 days after the consumer received the validation notice and accompanying Statement of Rights.

**C. Non-English Language Requirements**

The CFPB is considering whether to adopt one of two alternative proposals related to the use of translated validation notices and Statements of Rights.

*Alternative 1:* Debt collectors would be required to send translated versions of the validation notice and Statement of Rights to a consumer if: (1) the debt collector’s initial communication with the consumer took place in a language other than English or the collector received information from the creditor or a prior collector indicating that the consumer prefers to communicate in a language other than English; and (2) the CFPB has published in the *Federal Register* versions of the validation notice and Statement of Rights in the relevant non-English language.

*Alternative 2:* Debt collectors would be required to include a Spanish translation on the reverse of every validation notice and Statement of Rights.

**D. Disputes**

The CFPB also is considering additional requirements relating to disputes within thirty days of a debt validation notice, including requirements to notify: any subsequent collector of a

timely validation dispute; the consumer if a dispute is deemed to be duplicative; and consumers after an oral dispute of their right to obtain verification by submitting a timely written dispute unless the collector provides copies of verification in response to oral disputes.

**V. Litigation Disclosure**

Debt collectors would be required to provide a brief “litigation disclosure” in which they represent, expressly or by implication, their intent to sue. The disclosure would inform the consumer that: (1) the debt collector intends to sue; (2) a court could rule against the consumer if he or she fails to defend a lawsuit; and (3) additional information about debt collection litigation is available through the CFPB. Debt collectors would provide the disclosure at the same time as - and using the same medium in which - they represent that they intend to sue.

**VI. Time-Barred Debt**

The CFPB proposes to prohibit suit and threats of suit on time-barred debt. In addition, the CFPB proposes to require disclosures when a debt collector seeks payment on time-barred debt, along with several other requirements, as noted below.

**A. Time-Barred Debt Disclosure**

Debt collectors would be required to provide a disclosure when seeking to collect a time-barred debt. According to the Outline, this disclosure would consist of a brief, plain-language statement informing the consumer that, because of the age of the debt, the collector cannot sue to recover it. Debt collectors also would be required to include such a statement in the validation notice, in the first oral communication in which they request payment, and potentially at additional intervals, including possibly in each communication seeking payment. The CFPB is further considering whether such disclosures would be required only if the collector knew or should have known that

the debt was time-barred, or whether a collector should be strictly liable.

**B. Binding Later Collectors**

Subsequent collectors would be prohibited from suing on a debt as to which an earlier collector provided a time-barred debt disclosure.

**C. Credit Reporting**

The CFPB also is considering requiring a disclosure that would inform the consumer whether a particular time-barred debt generally can or cannot appear on a credit report.

**D. Waiver of Revival**

The CFPB is considering whether to prohibit collectors from collecting on time-barred debt that can be revived under state law, unless they waive the right to sue on the debt.

**VII. Collection Communications**

**A. Leaving of Messages**

The CFPB is considering a proposal clarifying that no information regarding a debt is conveyed – and no FDCPA “communication” occurs – if collectors *only* convey: (1) the individual debt collector’s name; (2) the consumer’s name; and (3) a toll-free method that the consumer can use to reply to the collector. Such a clarification would address cases holding that the FDCPA prohibits a collector from leaving a voicemail or answer machine message without providing a mini-Miranda notice (which, in turn, may violate the FDCPA’s proscription against conduct likely to result in third party disclosure of a debt).<sup>5</sup>

5. See, e.g., *Foti v. NCO Financial Systems, Inc.*, 424 F. Supp.2d 643, 648 (S.D.N.Y. 2006).

**B. Limits on Contact Frequency**

The frequency with which a debt collector may attempt to contact a consumer would be limited. The applicable limit would depend, in part, on whether a confirmed consumer contact exists. The limits would apply on a per account, rather than per consumer basis, as follows:

**D. Restrictions on the Time, Place, and Manner of Communications**

The CFPB proposes several clarifications and amplifications of the FDCPA’s existing limitations on the time, place, and manner of debt collection communications, as follows.

sent at an unusual or inconvenient time would be based on the time at which the message generally is available for the consumer to receive it, not when the consumer actually sees or opens it.

Collector Activity (Per Week)	Collector Does Not Have Confirmed Consumer Contact	Collector Has Confirmed Consumer Contact
Attempts per unique address or phone number	3	2
Total contact attempts	6	3
Live communications	N/A	1

**C. Limits on Location and Third-Party Contacts**

Collectors also would be allowed to make only a limited number of location contacts with third parties if the collector does not have confirmed consumer contact. Like the consumer contact caps, the limits apply per account, rather than per consumer. The limits proposed are:

**1. Clarifications Regarding Inconvenient Times**

In the absence of knowledge to the contrary, a debt collector would be deemed to know that it is a convenient time to communicate with a consumer if it would be convenient in *all* of the consumer’s known locations. Furthermore, whether a communication is

**2. Clarifications Regarding Inconvenient Places**

The following four categories of places would be presumptively inconvenient for consumers: (1) medical facilities, including hospitals, emergency rooms, hospices, or other places of treatment of serious medical conditions; (2) places of worship, including churches,

Collector Activity (Per Week)	Collector Does Not Have Confirmed Consumer Contact	Collector Has Confirmed Consumer Contact
Attempts per unique address or phone number per third party	3	0
Total contact attempts per third party	6	0
Total contact attempts across all third parties	No specific limit	0
Live communication per third party (total, not weekly)	1	0

synagogues, mosques and temples; (3) places of burial or grieving, including funeral homes and cemeteries; and (4) daycare or childcare centers or facilities. The proposal makes clear, however, that these locations are not presumptively inconvenient for consumers who are employed at any of those locations, unless the debt collector otherwise knows or has reason to know this to be the case. The CFPB also is seeking feedback regarding the advantages and disadvantages to servicemembers and collectors of including military combat zones or qualified hazardous duty postings in the list of presumptively inconvenient places.

**3. Clarifications Regarding Inconvenient Communication Methods**

The proposals under consideration would clarify: (1) that a consumer need not utter any “magic words,” such as the word “inconvenient,” to provide a collector with the requisite knowledge that a time, place, or communication method is inconvenient; and (2) that collectors may need to ask clarifying questions if a consumer makes an ambiguous statement.

**4. Work Email Addresses**

Collectors would be prohibited from using an email address that they know or should know is the consumer’s workplace email for debt collection communications unless the consumer specifically consents.

**VIII. Decedent Debt**

The CFPB proposes several changes relating to decedents debts, as follows.

**A. Status of Surviving Spouses, Parents, and Personal Representatives**

The CFPB proposes to clarify that surviving spouses, parents, and personal representatives may continue to speak to collectors about the decedent’s debts and would interpret the FDCPA to apply to personal representatives of the decedent.

**B. Waiting Period for Decedent Debt**

A thirty-day waiting period after a decedent’s death would be established during which collectors generally would be prohibited from communicating with respect to the decedent’s debts.

**IX. Other Requirements**

Finally, the CFPB proposes a range of other requirements, including important restrictions on communications involving “unavoidable” charges and incidental fees (such as pay-by-phone fees), as noted below.

**A. Contacts Involving “Unavoidable” Charges**

Debt collectors would be prohibited from contacting any person using a communication method that would cause the consumer to incur an unavoidable charge, absent consent. The Outline specifically provides the use of a text message as an example of an unavoidable charge absent using Free-to-End-User text messaging, and wireless phone calls and emails as examples of methods where a charge can be avoided.

**B. Incidental Fees**

Debt collectors would be prohibited from collecting incidental fees, including payment method convenience fees, unless: (1) state law expressly permits such fees; or (2) the consumer expressly agreed to such fees in the contract creating the underlying debt and state law neither expressly permits nor prohibits such fees. A debt collector would be deemed as charging convenience fees indirectly if a third party charges the fee but the collector receives a portion through a fee-splitting arrangement.

**C. Prohibition on Certain Debt Transfers**

Debt buyers would be prohibited from placing debt with, or selling debt to: (1) persons subject to a judgment, order, or

similar restriction prohibiting them from purchasing or collecting debt in the state in which the consumer resides; or (2) persons lacking any license required to purchase or collect debt, as applicable, in the state in which the consumer resides. A prohibition on the sale of debt when the debt buyer knows or should know that the debt was paid, settled, discharged in bankruptcy, or the result of identity theft, also is being considered.

**D. Prohibition on Passive Collection**

The CFPB is considering a proposal to prohibit debt collectors from furnishing information about a debt to a consumer reporting agency unless the collector has communicated directly about the debt with the consumer (*e.g.*, by sending a validation notice).

**E. Consumer Consent**

Debt collectors would be required to obtain consent directly from the consumer rather than relying on the consent provided to the creditor or to a prior collector. The CFPB also proposes to require clear and prominent disclosure of consents and to clarify that consumers may revoke such consents.

**F. Recordkeeping Requirements**

Debt collectors would be required to retain records documenting the actions taken for three years after its last communication or attempted communication (including litigation) with the consumer about the debt. All records the debt collector relied upon for the information in the validation notice and to support claims of indebtedness must comply with the retention requirement. The retention requirement would encompass all records related to the debt collector’s interactions with the consumer and would apply to recorded telephone calls.

### G. Telephone Numbers

Debt collectors would be required to display working, in-bound, toll-free telephone numbers to appear on caller ID screens of consumers.

### H. Other Deceptive Claims

The CFPB proposes to clarify prohibited false, misleading, or unsub-

stantiated statements including claims: (1) that a person such as a surviving spouse of a decedent is responsible for a consumer's debts; (2) about the consequences for consumers of paying or not paying debts (*e.g.*, a military servicemember having his or her security clearance revoked); and (3) that relate to the collector's location or identity (*e.g.*, a debt collector pretending to be located in the same city or town as the consumer).

### I. Emails Revealing that the Communication Relates to a Debt

Debt collectors could be prohibited from sending an email message to a consumer if the message's "from" or "subject" lines contain information that would reveal that the email is about a debt.

## DOJ Settles Fair Lending Claims Based on Bank's Pricing Policy for Vehicle-Secured Loans

by Alan S. Kaplinsky, John L. Culhane, Jr. and Christopher J. Willis\*

The U.S. Department of Justice (DOJ) announced a proposed consent order with Charter Bank to settle charges that the bank violated the Equal Credit Opportunity Act (ECOA) by discriminating on the basis of national origin in connection with its vehicle-secured loans.<sup>1</sup>

The DOJ claimed that the bank's pricing policy or practice resulted in Hispanic borrowers paying higher prices for vehicle-secured loans than similarly situated non-Hispanic borrowers. The DOJ said that the action originated from a referral by the Federal Deposit Insurance Corporation.

The loans in question were non-purchase money loans secured by a consumer's vehicle. According to the DOJ's complaint filed in a Texas federal district court, the bank's policy prior to August 2014 gave loan officers discretion to deviate upward or downward from the interest rates listed on the bank's rate sheets by approximately three percentage points. In August 2014, the bank implemented a revised policy that prohibited discretionary adjustments.

The DOJ complaint alleged that, after accounting for risk factors that the bank documented it considered in pricing the loans, the pricing system

resulted in Hispanic borrowers being charged interest rates that were, on average, 108 basis points higher than the rates charged similarly situated non-Hispanics. The DOJ claimed that the disparity was "statistically significant, and the difference is based on national origin and not based on creditworthiness or other objective criteria related to borrower risk."

According to the DOJ, information as to each applicant's national origin was available and known to the bank's loan officers who personally handled the loans. The DOJ claimed that the bank did not properly instruct its loan officers

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1. See *USA v. Charter Bank*, No. 2:16-cv-413 (S.D. TX Sept. 28, 2016), <https://www.justice.gov/opa/file/898886/download>.

## American Bankers Association Identifies...

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Federal regulation of the United States financial system in a manner consistent with the Core Principles."

The American Bankers Association (ABA) has submitted a white paper that identifies areas of concern with respect to various fair lending topics. In this white paper, the ABA "offers its views" in relation to the directive that the Secretary has received pursuant to the Executive Order, *e.g.*:

- Under the Fair Housing Act (FHA), federal agencies should apply the disparate impact theory of liability consistent with

the framework outlined by the Supreme Court in *Inclusive Communities*.<sup>1</sup>

- Disparate impact claims are not cognizable under the Equal Credit Opportunity Act (ECOA).
- Redlining should be assessed consistent with the Community Reinvestment Act (CRA), and purchased loans should be recognized as promoting access to credit.

- The focus of the Bureau of Consumer Financial Protection (CFPB) should remain on consumers, not businesses.

Each of these points is discussed briefly below.

### II. *Inclusive Communities*

With respect to the *Inclusive Communities* framework, the comment in the white paper concerning FHA disparate impact claims arises from industry concerns that federal agencies have largely disregarded the safeguards against abusive disparate impact claims that were a centerpiece of the Supreme Court decision in *Inclusive Communities*. In the aftermath of the Supreme Court decision in *Inclusive Communities*,

1. Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc., 135 S.Ct. 2507 (2015).

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