

## OVERVIEW

On July 28, 2016, the Consumer Financial Protection Bureau (CFPB) released an outline of proposals and alternatives under consideration for regulating debt collection practices. The outline's release triggers the formation of a panel pursuant to Small Business Regulatory Enforcement Fairness Act (SBREFA), from which the CFPB will seek and receive input related to its proposals. The outline and the proposals contained therein are extensive and would represent a comprehensive reframing of debt collection practices under the Fair Debt Collections Practice Act of 1977 (FDCPA). Below is a general overview of many of the key proposals as well as a few issues that would be generated by these proposals, if adopted and finalized as rules. Of particular concern to industry and consumer groups is the lack of clarity as to whether the CFPB intends to try to harmonize its new requirements with existing federal laws, especially the Telephone Consumer Protection Act. Additionally, and of equal importance, is a lack of clarity concerning whether the CFPB intends to expressly preempt state law, or have its proposal have the effect of preempting state law, in areas such as restrictions on time-barred debt sales and other changes related to time-barred debt. This would prevent state law contractual remedies from being used as well as involve CFPB action to treat time-barred debt as "extinguished" debt, even though state law ordinarily does not extinguish debt in such circumstances.

## WHO WOULD BE COVERED?

One of the most interesting issues concerning the proposals is their scope. In November 2013, the CFPB issued an Advanced Notice of Proposed Rulemaking (ANPR) for debt collection. The ANPR sought information from the public concerning debt collection issues in preparation for a Notice of Proposed Rulemaking (NPR). The ANPR covered first and third-party collectors.

Despite the fact that the ANPR applied to first and third-party debt collection practices, the outline released by the CFPB applies only to third-party collectors, including: (1) collection agencies, (2) debt buyers, (3) collection law firms, and (4) loan servicers. The CFPB will commence another process in the coming months that focuses on actors engaged in collection activity who are "covered persons" under the Dodd-Frank Wall Street Reform and Consumer Protection Act (i.e., so-called first party creditors seeking to collect on debt relating to a consumer "financial product or service"), but who may not necessarily be "debt collectors" under the FDCPA.

## INFORMATION INTEGRITY AND SUBSTANTIATION

The outline states that the most common debt collection complaint received by the CFPB involves collectors allegedly seeking to recover from the wrong consumer or the wrong amount. The CFPB believes that those problems arise mainly due to two reasons: (1) there are often "substantial deficiencies in the quality and quantity of information collectors receive at placement or sale of the debt that frequently result in collectors contacting the wrong consumers, for the wrong amount, or for debts that the collector is not entitled to collect"; and (2) notices that consumers receive as required under the FDCPA "lack critical elements that would help consumers recognize whether the debt is in fact theirs, which may lead to more consumer complaints, a lack of response by consumers, or both."

As such, the CFPB is considering proposals that would (1) require debt collectors to "substantiate," or possess a reasonable basis for, claims that a particular consumer owes a particular debt; (2) require that certain information provided by a consumer in the course of collections to one collector be passed on and reviewed by subsequent collectors; and (3) improve FDCPA validation notices and a statement of rights that provides consumers with critical information needed to determine whether the consumer owes a particular debt and to navigate the debt collection process generally.

- » **Substantiation Requirement:** The outline provides a list of specific items of "fundamental information" that a debt collector may obtain and review for "warning signs," in addition to the debt owner's representation of accuracy, in order to support its claims of indebtedness. According to the proposal, a collector that possesses each item of "fundamental information," has the owner's representation of accuracy, and is aware of no warning signs would have a "reasonable basis" for a claim of the indebtedness. Although it is possible for a collector to have a "reasonable basis" without receiving all of the information set forth in the outline, it would be the collector's burden to justify the approach it used to obtain a "reasonable basis" and its deviation from the proposal. The CFPB is considering identifying the following "fundamental information":

- Debtor's full name, last known address, and last known phone number;
- Debtor's account number;
- The date of default, the amount owed at the time of default, and the date and amount of any payment or credit applied after default;
- All charges of interest or fees after default and the contractual or statutory source for such interest or fees; and
- Chain of ownership of the debt from the debt owner at the time of default to the collector.

Further, the proposal sets forth the obligations of collectors in responding to consumer disputes, including information that must be provided to the consumer in response to certain disputes. For example, the CFPB is considering establishing the following categories of disputes: (1) generic disputes; (2) wrong amount disputes; (3) wrong consumer disputes; and (4) wrong collector disputes. Consumers would then identify which of the above dispute categories their dispute relates to as part of a validation notice. The proposal would require creditors to maintain documentation to verify disputes for each of these categories. In the event of a consumer dispute, the collector would be required to mail that documentation to the consumer.

» **Debt Collector Sharing of Information and Consumer Statement of Rights Proposals:** The CFPB is also considering proposals that would require prior debt collectors to share certain information with subsequent collectors. For example, the CFPB is considering the following:

- Requiring subsequent debt collectors to obtain and review certain consumer information that was provided to prior collectors that obligates collectors to take or refrain from taking collection action;
- Requiring debt collectors to forward certain information they receive from consumers after they have returned the debt to the original owner or transferred or sold the debt to a subsequent debt buyer or collector;
- Requiring debt collectors to include additional information about the debt and a new Statement of Rights in the standard 1692g validation notice, which may include requiring notices to be translated in languages other than English; and
- Requiring debt collectors to communicate directly with consumers concerning any debt information that the collector intends to furnish to the credit agencies.

### CONSUMER UNDERSTANDING

The CFPB is also considering proposals that would require certain consumer notices related to debt collection activities. For example, the CFPB is considering requiring the following consumer notices:

- » Requiring debt collectors to provide a "litigation disclosure," that must appear in all written or oral communications with consumers that would put consumers on notice of the collector's intent to sue if the consumer fails to pay the debt;
- » Requiring debt collectors to provide consumers with a disclosure regarding debt that may be subject to a statute of limitations defense and, as a result of that fact, the collector cannot sue to recover on the debt because the debt is too old. The collector would then only be able to accept payments on the time-barred debt if the consumer acknowledged receiving the notification;
- » Prohibiting a subsequent collector from filing a lawsuit if it determines that the debt is not subject to the statute of limitations, if a prior collector provided the consumer with a notice that the debt was, in fact, subject to statute of limitations or is otherwise time-barred;
- » Prohibiting a debt collector from collecting on time-barred debt that can be revived under state law unless the collector waives the right to sue on the debt, even if the consumer makes a payment or acknowledges the debt in writing; and
- » Requiring a disclosure that would inform consumers whether a particular time-barred debt can or cannot appear on the consumer's credit report.

### COLLECTOR COMMUNICATION

The CFPB's outline states that the second largest source of complaints that the CFPB receives about debt collection relates to collector communication practices. "Although the FDCPA has established multiple protections and requirements regarding debt collection communications throughout the debt collection lifecycle, consumers consistently complain about frequent or repeated collections telephone calls, disclosures of debts to third parties, and other concerns related to debt collection communications." (Outline, p. 22.) Thus, the CFPB is considering proposals that would:

- » Limit how frequently a collector may attempt to contact a consumer each week (with one proposal limiting the number of attempts to six per week);
- » Permit a collector to leave a voicemail message for a consumer that does not otherwise violate the FDCPA, but only if the message contains the following information (1) the individual debt collector's name; (2) the consumer's name; and (3) a toll-free method that the consumer can use to respond to the collector;
- » Limit the number of location contacts (or contact attempts) to a third-party per consumer account, per week;
- » Prohibit a debt collector from contacting a consumer using methods that the collector knows are inconvenient for the consumer;
- » Prohibit debt collectors from using an email address to contact a consumer that the debt collector knows or should know is the consumer's workplace email;
- » Clarify that generally, when a consumer dies, a debt collector may contact a consumer's surviving spouse, parents of deceased minors, and individuals who are designated as personal representatives of an estate under state law after a 30-day waiting period following the consumer's death;
- » Clarify how time restrictions for contacting consumers apply to emails and text messages;
- » Clarify that consumer consents that are traditionally available under the FDCPA that allow consumers to waive certain protections cannot be transferred from one collector to another;
- » Require debt collectors to clearly and prominently disclose to consumers, either orally or in writing, specifically what the consumer is consenting to (e.g., communications about the debt at specific times, at certain locations, or that information may be revealed to third-parties); and
- » Require debt collectors to memorialize all consumer consents in the consumer's file.

### ADDITIONAL PROPOSALS

The CFPB is also considering proposals that would prohibit transferring debt to certain entities or in certain circumstances. For example, the proposals would prohibit debt buyers from placing debt with, or selling debt to: (1) a person who is subject to a judgment, order, or other restriction that prohibits the person from collecting debt in the state where the consumer resides; or (2) a person lacks a required license to purchase or collect debt in the state where the consumer resides.

In addition, the CFPB is considering proposals that would prohibit the sale or placement for collection of debt when the debt buyer knows or should know that the debt was paid or settled, discharged in bankruptcy, or the result of identity theft.

Finally, the CFPB is considering proposals that would require debt collectors to retain records demonstrating the actions the collector took regarding the debt for the three years following the collector's last communication or attempted communication with the consumer about the debt. The proposed retention requirement would be related to all records the debt collector relied upon for the information in the validation notice and to support claims for indebtedness, such as the information the debt collector obtained before beginning to collect the debt, the records the debt collector relied upon in responding to the dispute, and all records related to the collector's interaction with the consumer. The retention policy would also apply to recorded telephone calls, though debt collectors that do not currently record debt collection calls would not be required to begin doing so.

### WHAT'S NEXT?

The next step in the process is for the SBREFA panel to convene, which is tentatively scheduled for Aug. 25, 2016. Within 60 days of the convening of the SBREFA panel, the panel must release a report concerning its input on the proposals. The CFPB will then consider the report and edit its proposals accordingly. The SBREFA report will then be published with a Notice of Proposed Rulemaking (NPR). Although the CFPB bifurcated the first and third-party collection proposal processes, it is not completely clear whether the CFPB will publish the SBREFA third-party report immediately or wait for the first-party collection proposal process to conclude, but the likely outcome will be the CFPB moving ahead with the third-party report and rulemaking. Once the NPR is published in the Federal Register, the public is usually provided at least 60 days to provide comment and input on the proposed rules. Depending on the nature and the extent of public comments, the CFPB would likely make further modifications to its third-party proposal and then issue a final rule. The entire process will likely take months and more than likely will be completed in mid-2017.

If you have questions about the CFPB's Outline of Proposals, or other CFPB-related questions contact the attorneys listed below or the Stinson Leonard Street attorneys with whom you regularly work.

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