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## Two New CFPB Bulletins Directly Affect Your Debt Collections

*By Michael Campbell, Practice Chair, Polsinelli*

On July 10, 2013, the Consumer Financial Protection Bureau (CFPB) issued two bulletins that directly affect all consumer lenders and creditors that are subject to the Dodd-Frank Act. The bulletins can be found at [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)

and

[http://files.consumerfinance.gov/f/201307\\_cfpb\\_bulletin\\_collections-consumer-credit.pdf](http://files.consumerfinance.gov/f/201307_cfpb_bulletin_collections-consumer-credit.pdf).

Bulletin 2013-07 puts creditors on notice that unfair, deceptive or abusive acts or practices (UDAAPs) are a violation of the Dodd-Frank Act. The effect of this notice is to extend the same rigorous requirements to original creditors that the Fair Debt Collection Practices Act (FDCPA) currently imposes only on third party debt collectors. The bulletin contains general descriptions and examples of conduct that the CFPBA considers to be UDAAP's.

Bulletin 2013-08 instructs creditors not to misrepresent the effects of payments of debt on credit reports, credit scores and creditworthiness. Again, this bulletin warns original creditors that the Dodd-Frank Act extends the same prohibitions against misrepresentations and deceptive practices that the FDCPA imposes on debt collectors.

Creditors should carefully note the broad scope of Bulletin 2013-07 – particularly its description of an “unfair act or practice”. It labels an act or practice as unfair if “it causes or is likely to cause **substantial injury** to consumers, the injury is not **reasonably avoidable** by consumers, and the injury is not outweighed by **countervailing benefits** to consumers or to competition”. The bulletin defines “substantial injury” to include both monetary and non-monetary harm. Although it states that “emotional impact . . . will not ordinarily amount to substantial injury”, it provides that “in certain circumstances emotional impacts may amount to or contribute to substantial injury”.

Similarly, the bulletin states that an injury is not “reasonably avoidable” if it “can only be avoided by

spending large amounts of money or other significant resources”. It is not clear whether the CFPB would determine that a consumer who must hire an attorney to defend against a creditor's collection lawsuit is exposed to harm that is not “reasonably avoidable”.

Lenders should also carefully note the examples of conduct that the CFPB considers to constitute UDAAP's. For instance, collecting any additional amounts that are not expressly authorized by “the agreement creating the debt” is one example of a UDAAP. This may prohibit charging a forbearance fee in connection with a workout of a consumer debt. Another example is a threat to pursue a lawsuit for non-payment of a debt when the lender does not actually intend to file suit. Although courts have previously defined such threats by debt collectors as a violation of the FDCPA, the CFPB has now clearly extended these prohibitions to original creditors.

The CFPB also issues regulations that supervise covered banks and companies, and enforces its own regulations. Pursuant to the Dodd-Frank Act, the CFPB enacted regulations (at 12 CFR § 1080) that enable the CFPB to accept consumer complaints, initiate civil investigative demands (CID's), and conduct investigational hearings on consumer complaints or CID's. Section 1080.6 gives the CFPB broad powers to carry out CID's. For instance, Deputy Assistant Directors in the CFPB's Office of Enforcement can issue CID's demanding the production of documents, written reports or answers to questions, or oral testimony. Section 1080.10 authorizes the CFPB to enforce its CID's through proceedings in the United States District Courts. As a result, the CFPB has broad powers to define UDAAP's and to enforce violations of the Dodd-Frank Act that may consist of UDAAP's.

Since the CFPB accepts consumer complaints, all lenders who are subject to the Dodd-Frank Act should take steps to assure that their conduct in servicing and enforcing debts does not constitute a UDAAP. Since the CFPB has also filed actions against third-party service providers, lenders should make sure that their outside servicers, collectors and counsel are observing

these requirements. Because of the CFPB's broad description of UDAAP's, lenders are well advised to err on the side of caution in any servicing or enforcement of debts.

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*Feel free to contact us for assistance in complying with these new requirements.*

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