

Client Alert

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FDCPA & More: CFPB Considers “Modern” Methods of Consumer Communications

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On November 12, 2013, the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) published an advance notice of proposed rulemaking (“ANPR”) in the *Federal Register* seeking information from the public about the operations, disclosures and practices used by debt collectors as well as creditors selling and collecting on their own consumer debts.¹ The ANPR follows the CFPB’s July 2013 issuance of two guidance bulletins (“July 2013 Bulletins”) that address debt collection practices. The CFPB continues to explore ways to uniformly apply federal debt collection requirements to both creditors and debt holders—which are generally exempted from the requirements of the Fair Debt Collection Practices Act (“FDCPA”) when collecting on their own debts—and third-party debt collectors.

Importantly, the ANPR represents the widest rulemaking inquiry to date by the Bureau into the use of social media and other modern forms of communication in consumer-facing activities. It follows that the CFPB’s actions pursuant to the ANPR likely will shape the Bureau’s overall approach to the use of digital and social media in consumer financial services.

Substantively, the questions set forth in the ANPR suggest the CFPB is considering three new categories of requirements for the debt collection industry: (1) operational elements of debt sales and transfers; (2) debt collection activities that may involve newer forms of communication via digital and social medias and (3) disclosures to consumers regarding debt ownership and dispute rights.

Comments on the ANPR are due February 10, 2014.

EXTENDING FDCPA COVERAGE TO CREDITORS AND CREDITOR COLLECTIONS

In the ANPR, the CFPB explains it is considering rules “covering the conduct of creditors” based on a belief that reputational risk is no longer sufficient to deter creditors from engaging in harmful debt collection practices. Statements such as these, along with the July 2013 Bulletins, demonstrate the CFPB’s continuing interest in expanding the scope of the FDCPA and federal debt collection protections to the actions of original creditors. As a result, creditors who offer consumer credit products or engage in their own debt collection activities are advised to compare the requirements found in the CFPB’s recent guidance and this rulemaking effort to their current practices.

The ANPR also invites comments on whether a rulemaking under the FDCPA should exclude certain types of debts or subject them to different requirements, given that certain debts, such as those related to medical

¹ See 78 Fed. Reg. 67847 (Nov. 12, 2013).

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services or municipal fines, may not be covered by the Bureau's authority over unfair, deceptive or abusive acts or practices ("UDAAP"). In this regard, the CFPB is seeking information to determine whether FDCPA requirements may extend to health care providers, telecommunications providers and municipalities who collect on debts that are related to a consumer financial product or service. Any such rules would be limited in scope and application, however, as creditors who provide non-financial products and services and collect their own debt are expressly exempted from the FDCPA's statutory definition of the term "debt collector" and generally are not subject to the Dodd-Frank Act's Title X definition of "covered person."

EXPANDING FDCPA PROTECTIONS TO DIGITAL AND SOCIAL MEDIA COMMUNICATIONS

Unlike the "what's old is new again" push to expand the scope of the FDCPA beyond third-party collectors, the ANPR marks the first time a major federal regulatory agency has suggested an intent to apply a formal framework to communications made through social media and other technology-driven forms of communication. In this regard, the ANPR identifies debt collection communications as an area in which existing FDCPA rules may fail to "prevent consumer harm." The CFPB notes that advances in communications technologies—such as email, communications over social media and text messaging—were not contemplated under the original FDCPA "statutory framework." Accordingly, the ANPR poses questions on the need to develop a regulatory framework that recognizes these new forms of "communications," including requests for information on:

- The types of technologies that debt collectors regularly use to communicate or transact business with consumers;
- The types of collection technologies that merit the application of FDCPA rules regarding "unfair, deceptive, or abusive acts or practices";
- Emerging communications technologies that might materially benefit or harm consumers or debt collectors in the absence of further guidance or rulemaking;
- The complications or compliance issues that social media present for consumers and debt collectors; and
- The costs and benefits of using "mini-Miranda" warnings in communications over social media.

The CFPB is seeking public comment on how new forms of digital and social media communications should be covered under debt collection laws and the UDAAP statute. The CFPB also appears to be concerned about emerging privacy risks that new forms of communication present, such as when text messages are displayed on "public-facing screens" of mobile phones or when email accounts accessed through a provider pose risks of "third-party disclosure" of protected communications under the FDCPA.

Companies that provide communications platforms and develop innovative consumer-centric communications pathways, such as social media companies and mobile app developers, should take note and consider developing policy positions related to the Bureau's questions. The ANPR presents open-ended questions regarding creditor or first-party collector communications with consumers using emerging communications technologies. The CFPB's authority under Title X does not preclude it from issuing FDCPA rules to restrict or limit these communications. Further, regulators have frequently adapted regulatory frameworks for one set of institutions or products to other similar institutions or products, even if the regulation of the players is governed by

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different statutes and regulations. So while the current topic of debt collection may not directly apply to technology companies and other providers of social media and communications platforms, those companies that fail to consider commenting on the ANPR may find themselves bound by CFPB rules that are unfavorable to innovation.

REGULATORY INTEREST IN OPERATIONAL ELEMENTS OF DEBT SALES AND TRANSFERS

The ANPR echoes recent statements by CFPB officials and demonstrates that creditors and first- and third-party collectors are facing renewed regulatory interest over the operational elements of selling and transferring consumer debt obligations. In his remarks accompanying the release of the ANPR, Director Richard Cordray stated that the CFPB is concerned about the “integrity of information within the debt collection system.”² The ANPR notes that this concern stems from incomplete or inaccurate debt information caused by operational failures during the placement of debts with third-party collectors or debt sales from the original creditor to a debt buyer. The ANPR solicits comments about how “information related to debt” is transferred, including:

- The availability of data about the types of information that are transferred to third-party collectors upon the purchase or placement of debt;
- The effect of information about transferred debt on the cost of debt that is sold;
- The current or potential systems and controls that creditors employ or could employ to monitor or oversee debt buyers;
- The type and nature of information that debt sellers either retain and/or transfer to debt buyers;
- The extent to which debt owners transfer or make available to third-party collectors or debt buyers information relating to: (1) disputes, (2) prior correspondence with consumers, (3) attorney representation, and (4) a consumer’s language proficiency, servicemember status, income source, or deceased status; and
- The access rights and limitations of debt collectors to documentation related to the debt, such as the debtor-creditor account agreement, account statements, and similar documents.

The ANPR explains that comments are being solicited for the purpose of creating “a comprehensive and coherent system for information about debt,” which suggests the Bureau intends to assess whether existing reporting and recordkeeping requirements on debt sales and transfers are adequate to protect consumers. The ANPR also states that the CFPB will consider how new reporting or recordkeeping requirements will increase burdens and costs for the industry. In this regard, original creditors and third-party debt buyers may wish to provide comment about their current debt transfer and sale practices, and highlight areas they consider to be industry best practices.

² Director Cordray Remarks at the Debt Collection ANPR Press Call. (Nov. 6, 2013).

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FOCUS ON UPDATING CONSUMER DISCLOSURE AND DISPUTE RESOLUTION REQUIREMENTS

The ANPR also describes how the CFPB is considering rules that may impose additional disclosure requirements on creditors and third-party collectors. The ANPR discusses at length whether existing rules sufficiently “eliminate the recurring problem of debt collectors” collecting debts from the wrong person or where the debt has already been paid. To further explore industry attempts to resolve these issues, the CFPB solicits comments on:

- Whether FDCPA Section 809 validation notices sufficiently permit a consumer to identify the debt;
- Whether current disclosures appropriately inform consumers of their rights to dispute a debt; and
- The types of practices debt collectors use to verify disputed debts.

The ANPR invites comments for the purpose of assessing the “adequacy of current practices to investigate collection disputes,” which suggests that the Bureau is considering rules that may establish standards requiring debt collectors to undertake a “reasonable investigation” to verify a debt once a debt has been disputed by a consumer. While the ANPR does not define what constitutes a “reasonable investigation,” the ANPR refers to the dispute requirements under the Fair Credit Reporting Act (“FCRA”) and invites comments on whether future FDCPA rules should include requirements and procedures similar to those set forth under Regulation V of the FCRA when a consumer disputes the accuracy of information in a credit report.³

MAJOR TAKEAWAYS

At this point, industry participants may say, “It’s only an ANPR, why should we worry?” The answer is easy. The CFPB, as much as any federal financial regulator, in its rulemakings to date takes industry “silence” as assent. Under this ANPR, “assent” may mean that strong, pro-consumer standards that are both overreaching and nearly impossible to implement will emerge. Moreover, while the ANPR is focused on consumer debt and consumer debt buying, it would be a mistake to conclude that the Bureau’s regulatory approach to debt collection will be unique or confined to the debt collection market. Accordingly, industry participants with business interests beyond credit, debt buying and collection should consider submitting comments with respect to the CFPB’s lines of inquiry, especially regarding emerging technologies such as digital and social media.

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³ Regulation V of the Fair Credit Reporting Act sets standards for how the issue of a consumer filing a direct dispute notice with a credit reporting agency is resolved. See 12 C.F.R. §1022.

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