CFPB’s Proposed Debt Collection Rule: Perspectives from the Comment Period

Published on: 17 October 2019 at 11:00 a.m. ET

Written by:
Mark Rooney – Partner – Hudson Cook LLP

http://www.insidearm.com/news/00045578-cfpbs-proposed-debt-collection-rule-persp/

Editor's Note: *This article is published on insideARM with permission from the author.*

--

It’s been four weeks since the comment period closed on the CFPB’s proposed debt collection rule—just enough time to look back with some perspective on the comments submitted and assess how the CFPB may move forward.

The Bureau received over 12,000 comments on its proposed Regulation F, which would be the first rule implementing the Fair Debt Collection Practices Act since its original passage in 1977. In case you missed them, here are the highlights from comments submitted by some of the most influential participants in the industry and government.

State Attorneys General

Attorneys General representing 28 states declared in **their comment (https://www.michigan.gov/documents/ag/Multistate_CFPB_Debt_Collection_Comment_Letter_666257_7.pdf)** that “the CFPB elevates the interests of the debt collection industry over consumers.” At bottom they believe the proposed rule doesn’t go far enough in imposing regulations designed to protect consumers. Notably, the AGs argued that CFPB should have used its authority under the Dodd-Frank Act to extend the regulation to the collection activities of first-party creditors. The AGs concede that such a move would be limited to regulation of allegedly unfair, deceptive, or abusive practices (UDAAP). And while they cited legislation in the House of Representatives this year that would have expanded the definition of “debt collector” under the FDCPA to include first-party creditors, that bill did not make it past committee consideration.

The group of mostly Democratic Party AGs also claim that the proposed rule will result in “more phone calls” because the call limit provision applies per debt, not per debtor. They expressed further concern that the rule “places no meaningful restriction” on electronic communications and warned of “a barrage of emails and texts” and social media contacts with debtors.

Finally, with respect to the time-barred debt provision, the AGs asked the Bureau to adopt a strict liability standard for any collection effort relating to time-barred debt (instead of imposing liability only where the collector “knew or should have known” the debt was time-barred, as provided in the proposed rule).

Federal Trade Commission

If there was ever any question about the extent to which federal agencies coordinate their rulemaking (and enforcement) activities, the FTC seems determined to put the issue to rest. They coordinate closely. In **its comment (https://www.ftc.gov/news-events/press-releases/2019/09/ftc-staff-submits-comment-cfpb-proposed-debt-collection-rules)**, the FTC "supports" the CFPB's proposed rule—literally 23 times throughout its comment—and "opposes" nothing. The FTC's comment is primarily an exercise in jurisdictional maintenance—reminding readers of the FTC's historical role in enforcing the FDCPA and its continued status as co-enforcer of the FDCPA (with the CFPB).

ACA International

On behalf of its debt collection industry members, ACA International submitted a **forceful, 154-page comment (https://www.acainternational.org/assets/advocacy-resources/aca-comment-cfpb-reg-f-9.17.19.pdf)** touching on nearly every aspect of the proposed rule. ACA applauded the CFPB for its effort to bring uniformity and consistency to the FDCPA, particularly with respect to electronic communications, limited content voicemails, and the model validation notice.

And yet ACA did not hold back in expressing concern over many aspects of the proposed rule. Among other things, it argued that: (i) the call caps, time and place restrictions, and other provisions regulating communications with consumers may hinder the ability of debt collectors to reach customers for the purpose of settling accounts, thereby risking an increase in litigation; (ii) the requirement to itemize information about the debt in the initial communication with a consumer will be burdensome, highly costly, and will increase the likelihood of litigation; and (iii) the Bureau's proposal to impose liability on debt collectors when they "should know" (*e.g.*, about the consumer's preferred contact times, whether an email address is a work email, or whether the consumer paid someone else) breaks with well-settled debt collection standards and discourages open communication with consumers.

Small Business Administration—Office of Advocacy

The SBA's Office of Advocacy expressed concern **in its comment (https://cdn.advocacy.sba.gov/wp-content/uploads/2019/09/19153425/Debt-Collection-Comment-Letter-Sept-2019-Final-pdf1.pdf)** about deficiencies in the CFPB's compliance with the Regulatory Flexibility Act (RFA). Under the RFA, agencies like the CFPB must either certify that a proposed rule will not have a meaningful effect on small businesses or perform a regulatory flexibility analysis demonstrating the impact of the proposed rule on small entities. While the CFPB did perform a flexibility analysis, the Office of Advocacy argues that it failed to provide sufficient information to back up its conclusions. In particular, the Office of Advocacy noted that the SBREFA panel identified costs associated with implementing certain aspects of the rule could be between $35,000 and $200,000 per agency. Those findings should have been included in the CFPB's proposed rule.

The Office of Advocacy also urged the Bureau to limit its rule to provisions under the FDCPA. As drafted the proposed rule leverages the Bureau's FDCPA and UDAAP authority. The UDAAP provisions should be stricken, the Office of Advocacy argues, because the SBREFA panel did not consider the UDAAP provisions and because those provisions create "uncertainty and legal risk for first party creditors."

Consumer Relations Consortium

As **previously covered on InsideARM (../../../../../../news/00045477-consumer-relations-consortium-submits-com/)**, the Consumer Relations Consortium (CRC) **filed a comment (../../../../../../documents/2307/CRC_NPRM_Comment_-_Final_1.pdf)** to the proposed rule on behalf of its members (creditors, debt collectors, and others in the collection industry). Like ACA International's comment, the CRC presents a far-reaching response to every facet of the proposed rule. The CRC stresses, among other things, that (i) the use of safe harbor language and other clear expectations should benefit both consumers and businesses; (ii) consumer choice should drive the methods of communication between consumers and debt collectors; and (iii) the Bureau should more clearly articulate which rules apply in the context of collecting financial versus non-financial debt.

Conclusion

The CFPB plainly has its work cut out for it as it sifts through these (and the other 12,000-plus) comments and attempts to modify the proposed rule into a final rule that is fair and palatable to the wide variety of people and businesses affected. Here, the Bureau's past performance is probably a poor predictor of when the final rule will be issued. While previous major final rules took over a year to issue after the close of the comment period, the ultimate timing here likely will be influenced by the complexity of the rule, the number of staff dedicated to the rulemaking process, and possibly political or other considerations.