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A Deep Dive Into New CFPB Debt Collection Rules: Part 2

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(June 24, 2019, 11:17 AM EDT)

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The second part of this article discusses the provisions of the Consumer Financial Protection Bureau's proposed debt collection rule regarding call frequency, validation of debt and other unfair or deceptive debt collection practices. In part one, we discussed the statutory background of the Fair Debt Collection Practices Act definitions under the proposed rule, and procedures for electronic communications.

Call Frequency Limits

The FDCPA itself does not provide a bright-line limit to the frequency with which a debt collector may attempt to contact a borrower; the statute provides only that a debt collector may not cause a telephone to ring, or engage any person in telephone conversation repeatedly or continuously "with intent to annoy, abuse, or harass" a person.[1] While some states already cap the number of calls that a collector may place to a consumer residing in that state,[2] no similar rule currently exists at the federal level.

Under the proposed rule, the bureau would prohibit a collector from making more than seven telephone calls to a debtor within seven consecutive days, or within a period of seven consecutive days after having had a telephone conversation with the debtor in connection with the collection of the debt.[3] The limit applies on a per-consumer and per-debt basis.[4]

With respect to the per-consumer limitation, phone calls concerning the same debt to different numbers owned by the same debtor count equally toward the seven-call limit. With respect to the per-debt limitation, if a collector is hired to collect multiple debts owed by a consumer (such as two delinquent credit card accounts, for example), then the collector may call the consumer up to seven times in seven days regarding the first account, and an additional seven times in seven days regarding the second account.[5]

However, the rule provides a special limitation for student loan debts. In the case

of student loan debts, all such debts that were serviced under a single account number at the time the debts were obtained by the collector count as a single debt for purposes of the call frequency limits.[6] The bureau noted that "multiple student loan debts are often serviced under a single account number and billed on a single, combined account statement, with a single total amount due and requiring a single payment from the consumer," and therefore classifying student loan debts as a single debt is "consistent with how the loans were likely serviced before entering collection."[7]

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Certain telephone calls are excluded from the seven-call cap. These are calls made to respond to a request for information from the debtor or made with the debtor's prior consent given directly to the collector, calls that do not connect to the dialed number (i.e., calls that do not cause the phone to ring — such as calls where the collector receives a busy signal or a notice that the number is no longer in service), or calls with the debtor's lawyer, a consumer reporting agency, the creditor and creditor's lawyer, and the collector's lawyer.[8]

Limited-content messages are not excluded from the cap; even if a collector leaves a limited-content message that does not discuss the consumer's debt, the message still counts toward the seven-call limit.[9] Finally, the call limits apply only to telephone calls, and do not apply to text message or email communications. There is no set numeric limit on such electronic communications, but as noted above, the consumer must be provided an opt-out right.

Validation of Debt

Few sections of the FDCPA have tripped up more debt collectors than the validation of debt requirement. Section 1692g of the FDCPA contains what appears to be a simple requirement: Within five days of the initial communication in connection with the collection of a debt, a debt collector must provide the consumer a notice containing the amount of the debt, along with information about the creditor, and informing the consumer of their right to dispute the debt.[10] But the section's apparent simplicity led to endless litigation, and in the absence of clarifying amendments to the FDCPA or regulations, different courts took conflicting positions as to the required content of a validation of debt notice.

Fortunately for debt collectors seeking a uniform standard, the bureau now is proposing a model-form validation of debt notice along with the proposed rule.[11] And the proposed rule establishes a "safe harbor" providing that a collector who provides a notice that tracks the model form is presumed to comply with the FDCPA requirement to provide a validation of debt notice.[12]

The proposed rule also sets a uniform standard for certain content of the validation of debt notice, to the extent a collector chooses not to use the model form.[13] Adopting the holdings of several circuit courts, the proposed rule requires that a debt collector provide an itemization of the debt owed by the consumer.[14]

This itemization must be in a table format, and reflect interest, fees, payments and credits to the account, and must reflect the amount of the debt as one of four dates (the "itemization date"): the last statement date, the charge-off date, the date the last payment was made on the debt, or the date the transaction gave rise to the debt.[15] If the debt is a credit card account, then the validation notice must

reflect the merchant co-brand associated with the credit card.[16] If the debt arises from a consumer financial product or service, as defined in the Dodd-Frank Act, then the notice must also contain the name of the creditor to whom the debt was owed on the itemization date.[17]

The proposed rule creates a limited exception from the requirement to itemize the debt for persons collecting mortgage loan debt where the loan is subject to Regulation Z's periodic statement requirement.[18] For these loans, a collector instead may provide the most recent Regulation Z periodic statement at the same time as the validation notice, and refer to the periodic statement in the validation notice instead of itemizing the debt.[19]

The FDCPA's validation of debt section created another land mine for collectors. The FDCPA requires that a collector's validation notice inform the debtor that unless the debtor notifies the collector that the debt is disputed, the collector will assume it to be valid.[20] The FDCPA fails to specify whether the debtor's dispute must be written, whereas Congress specifically required that disputes be in writing in order for the borrower to exercise their right to obtain a verification of the debt.[21]

Appeals courts are split on whether a validation notice must inform the debtor that disputes must be in writing. The U.S. Courts of Appeals for the Second, Fourth and Ninth Circuits (as well as a significant number of district courts) hold that as the FDCPA is silent as to the means by which a debtor may dispute the validity of any part of or all of the debt, the statute allows oral disputes.[22] Under this line of cases, a validation notice that states a debtor must dispute a debt in writing arguably violates the FDCPA. However, the Courts of Appeals Third, Sixth and Eleventh Circuits have held that Section 1692g(a)(3) requires that disputes be in writing, and the Eleventh Circuit goes so far as to say that debt collectors may not waive the requirement that disputes must be in writing.[23]

Adopting different validation notices for different circuits is impractical, so the proposed rule finally clarifies the dispute requirement. The bureau's proposal adopts the position that disputes do not need to be written to be effective, and the model form likewise informs debtors that they may call *or* write to dispute their debt (although the model form clarifies that only a written dispute is sufficient for the borrower to exercise their right to obtain verification of the debt).[24]

The proposed rule requires validation notices to also contain a statement specifying the end date of the period during which the debtor can dispute their debt, and a statement explaining how the debtor can dispute their debt electronically if the collector sends a validation notice through electronic media.[25] The proposed rule creates an additional notice requirement for persons collecting consumer financial product or service debt; these collectors must also include in their validation notice a statement referring the customer to additional information on the bureau's website.[26]

To decrease the burden on consumers seeking to dispute their debts, the proposed rule requires collectors to include certain dispute prompts in their validation notice. The prompts must be set aside from other validation notice content and contain distinct headings.[27] These prompts take the form of check boxes to allow the consumer to signal their desire to dispute their debt (and the reason for the dispute), or to obtain information about the original creditor.[28]

The proposed rule provides that if a debtor disputes the validity of the debt, the collector may not engage in any collection activity during the time period from when the collector provides a validation notice, and 30 days after the debtor receives the validation notice.[29] If the debtor invokes their right to request information about the original creditor, the collector must also cease collection activity until the debt collector provides the debtor the name and address of the original creditor.[30]

The proposed rule also adopts a procedure for debt collectors handling duplicative disputes, similar to the procedures in Regulations V and X for duplicative credit reporting disputes or notices of error.[31] If a collector determines that a dispute is substantially the same as a dispute previously submitted by the consumer in writing, for which the debt collector already has satisfied the validation requirements and does not include any new material information to support the dispute, the collector may notify the debtor that the dispute is duplicative, provide a brief statement of reasons for its determination, and refer to its earlier response.[32]

Time-Barred Debts

With the proliferation of "debt buyers" purchasing portfolios of charged-off debt in the secondary market, courts and regulators have increasingly focused on collectors' practices related to debts where the applicable statute of limitations to bring a legal action has expired. Attempting to collect "stale" debts is not a per se violation of the FDCPA, as courts recognize that some consumers may nonetheless feel morally obligated to pay a debt, even if not legally required to do so.[33] The proposed rule maintains the status quo of not expressly prohibiting collectors from attempting to collect time-barred debt, but prohibits collectors from bringing, or threatening to bring, a legal action against a consumer to collect a debt that the collector knows or should know is time-barred.[34]

Debt Collection by Lawyers and Law Firms

The FDCPA prohibits the false representation or implication that any individual is a lawyer, or that any communication is from a lawyer.[35] The bureau takes the position in the preamble to the proposed rule that "debt collection communications sent under a lawyer's name may violate [15 U.S.C. 1692e(3)] if the lawyer was not meaningfully involved in the preparation of the communication."[36] The CFPB similarly has taken this position in a number of enforcement actions brought against lawyers involved in debt collection.

The CFPB incorporated this "meaningful involvement" standard into proposed rule § 1006.18. The proposed rule creates a safe harbor from liability for law firms or lawyers submitting pleadings, written motions or other court papers if a lawyer personally drafts or reviews the pleading, motion or paper, and the lawyer reviews supporting information and makes a determination to the best of his or her information, knowledge and belief that the claims, defenses and other legal contentions are warranted by existing law; the factual contentions have evidentiary support; and the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or lack of information.[37]

The standard under the proposed rule largely borrows from Rule 11 of the Federal Rules of Civil Procedure. The bureau looked to the Federal Rules of Civil Procedure as a guide, noting that most FDCPA claims are considered by federal courts, and federal courts that have applied the meaningful lawyer involvement standard to pleadings and other submissions have applied the Rule 11 standard.[38]

Under the proposed rule, "an attorney or law firm who establishes compliance with the factors set forth in proposed § 1006.18(g), including when a court in debt collection litigation determines that the debt collector has complied with a court rule that is substantially similar to the standard in § 1006.18(g), will have complied with [the FDCPA] regarding the lawyer's meaningful involvement in submissions made in debt collection litigation."[39] The bureau noted that Federal Rule of Civil Procedure 11 "may provide an appropriate guide for judging whether a submission to the court has complied with § 1006.18(g)."

Shortly after releasing the proposed rule and the "meaningful involvement" standard, the bureau filed a lawsuit against a law firm engaged in debt collection on the grounds that it violated the FDCPA and the Dodd-Frank Act by filing collection lawsuits against consumers that contained lawyers' names and signatures, even though lawyers allegedly spent only minutes reviewing a file, and complaints and summons were prepared by clerical staff.[40] The bureau alleged that the firm's lawsuits were prepared without meaningful lawyer involvement and were therefore deceptive and violated the FDCPA.[41] Law firms and lawyers involved in filing collection lawsuits should monitor the development of the bureau's "meaningful involvement" standard.

Conclusion

The release of the proposed rule is a step toward resolving the maze of differing standards and inconsistent FDCPA interpretations that developed in the 40 years since Congress passed the FDCPA. The proposed rule suggests that the bureau will bring much-needed clarity and uniform standards to several areas of the FDCPA and adapt its interpretation and enforcement of the FDCPA to modern-day technology.

The proposed rule currently has no legal effect; the bureau will now accept public comments on the rule and consider the comments as it works to issue a final rule. Entities that are subject to the FDCPA — and those that are not but that are involved in debt collection activities — should carefully consider the proposed rule and determine whether they wish to provide comments to the bureau. The bureau will be accepting comments on the proposed rule until Aug. 19, 2019.

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[1] 15 U.S.C. § 1692d.

[2] For example, Massachusetts limits debt collectors to two call attempts in a seven-day period, and Washington's Collection Agency Act contains a presumption, as a matter of law, that a debt collection communication is made for purposes of harassment if the collector communicates with a debtor more than three times in a single week. See 940 Code Mass. Regs. § 7.04(f); Wash. Rev. Code § 19.16.250(13)(a).

[3] Proposed 12 C.F.R. § 1006.14(b)(2).

[4] Notice of Proposed Rule at 141, 441; Proposed 12 C.F.R. § 1006.14(b)(5).

[5] See Comment 14(b)(5) to Proposed 12 C.F.R. § 1006.14.

[6] Proposed 12 C.F.R. § 1006.14(b)(5).

[7] Notice of Proposed Rule at 169.

[8] Proposed 12 C.F.R. § 1006.14(b)(3); Comment 14(b)(3)(iii) to Proposed 12 C.F.R. § 1006.14.

[9] Id.

[10] 15 U.S.C. § 1692g.

[11] See https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-validation-notice.pdf.

[12] Proposed 12 C.F.R. § 1006.34(d)(2).

[13] The Proposed Rule also authorizes a debt collector to provide a statement in Spanish informing the debtor that he or she may request a Spanish-language validation notice. See Proposed 12 C.F.R. § 1006.34(d)(3)(vi).

[14] See, e.g., Carlin v. Davidson Fink LLP, 852 F.3d 207, 215-16 (2d Cir. 2017). Although itemization is not a universal requirement among courts, other federal courts have held that failure to itemize debt violates the FDCPA. See, e.g., Fields v. Wilber Law Firm, P.C., 383 F.3d 562, 565-66 (7th Cir. 2004); Gomez v. Niemann & Heyer, LLP, 2016 WL 3562148, at *8 (W.D. Tex. June 24, 2016) Dowdy v. Solutia Healthcare TAS, Inc., 2006 WL 3545047, at *8-9 (M.D. Tenn. Dec. 8, 2006).

[15] Proposed 12 C.F.R. § 1006.34(c)(2).

[16] Id.

[17] Id.

[18] Id. § 1006.34(c)(5)

[19] Id.

[20] 15 U.S.C. § 1692g(a).

[21] Compare 15 U.S.C. § 1692g(a)(3) and (4).

[22] Hooks v. Forman, Holt, Eliades & Ravin, LLC, 717 F.3d 282, 286 (2d Cir. 2013); Clark v. Absolute Collection Serv., Inc., 741 F.3d 487, 490-91 (4th Cir. 2014); Riggs v. Prober & Raphael, 681 F.3d 1097, 1099 (9th Cir. 2012); Busch v. Valarity, LLC, 2014 WL 466221, at *4 (E.D. Mo. Feb, 5, 2014) (gathering 17 district court cases standing for this proposition).

[23] Macy v. GC Servs. Ltd. P'ship, 897 F.3d 747, 757-58 (6th Cir. 2018); Bishop v. Ross Earle & Bonan, P.A., 817 F.3d 1268, 1277 (11th Cir. 2016); Laniado v. Certified Credit & Collection Bureau, 705 F. App'x 87, 90 (3d Cir. 2017).

[24] Proposed 12 C.F.R. § 1006.38(b).

[25] Id. § 1006.34(c)(3).

[26] Id.

[27] Id. § 1006.34(c)(4).

[28] Id.

[29] Id. § 1006.34(b)(5).

[30] Id. § 1006.38(c).

[31] See id. §§ 1022.43(f)(1)(ii); 1024.35(g)(1)(i).

[32] Proposed 12 C.F.R. § 1006.38(d)(2)(ii). The Proposed Rule does not eliminate the requirement that a debt collector avoid "overshadowing" the consumer's right to dispute the debt or request original creditor information.

[33] See, e.g., Daugherty v. Convergent Outsourcing, Inc., 836 F.3d 507, 509 (5th Cir. 2016) ("While it is not automatically unlawful for a debt collector to seek payment of a time-barred debt, a collection letter violates the FDCPA when its statements could mislead an unsophisticated consumer to believe that her time-barred debt is legally enforceable, regardless of whether litigation is threatened."); McMahon v. LVNV Funding, LLC, 744 F.3d 1010, 1020 (7th Cir. 2014) ("We do not hold that it is automatically improper for a debt collector to seek re-payment of time-barred debts; some people might consider full debt re-payment a moral obligation, even though the legal remedy for the debt has been extinguished.").

[34] Proposed 12 C.F.R. § 1006.26(b).

[35] 15 U.S.C. § 1692e(3).

[36] Notice of Proposed Rule at 179.

[37] Proposed 12 C.F.R. § 1006.18(g).

[38] Notice of Proposed Rule at 352-53.

[39] Id. at 181.

[40] Bureau of Consumer Fin. Protection v. Forster & Garbus, LLP¸ No. 2:19-cv-2928 (E.D.N.Y. May 17, 2019), available at https://files.consumerfinance.gov/f/documents/cfpb_forster-garbus_complaint_2019-05.pdf

[41] Id.