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Legal Update

CFPB (Finally) Issues Debt Collection Rules

In 1977, gas cost 62 cents per gallon; the first Apple II computers became available for sale; even the most primitive mobile phones were half a decade away from being released to the public; and debt collectors relied on landline phones, the US mail or in-person conversations to collect the debts assigned to them. When Congress passed the Fair Debt Collection Practices Act ("FDCPA") that year, it could not have envisioned a world where consumers communicate instantly using cellphones, text messages, emails and social media.

No federal agencies promulgated any significant regulations under the FDCPA in the 40 subsequent years. Until the Dodd-Frank Act became effective, no federal agency even had the authority to do so. In the absence of any controlling regulations, courts were free to fashion their own standards and interpretations of the FDCPA. Given the voluminous amount of FDCPA litigation, courts across the country quickly created inconsistent standards and a maze of differing interpretations. Fortunately for entities seeking simple, practical and uniform standards for FDCPA compliance in the modern age, the Consumer Financial Protection Bureau (the "CFPB" or "the Bureau") issued its proposed Regulation F under the FDCPA (the "Proposed Rule") on May 7, 2019.

In this Legal Update, we summarize the CFPB's proposed debt collection rulemaking and describe the consequences for entities engaged in collecting consumer-purpose debts. We do not rehash all 538 pages of the Bureau's proposal but instead summarize some of the most significant developments that FDCPA-regulated entities should review when considering whether to provide comments to the Bureau regarding the Proposed Rule.

Overview of the FDCPA

Before we discuss the content of the Proposed Rule, we briefly remind our readers of the basic structure of the FDCPA.

Congress passed the FDCPA in 1977 in order to combat "[d]isruptive dinnertime calls, downright deceit, and more."[1] The FDCPA applies to "debt collectors," who are generally third-party entities (i.e., not original creditors) who either (i) regularly collect debts on behalf of others or (ii) obtained defaulted debts, but only if the entity's "principal purpose" is the collection of debts.[2] In general, the FDCPA prohibits a debt collector from using unlawful, abusive, deceptive, or unfair collection tactics in connection with the collection of debts. The FDCPA contains an extensive (but not exclusive) list of practices that are prohibited under this standard. They include tactics such

as calling a debtor at unreasonable hours, calling a debtor at work when the debt collector knows that the debtor's employer does not allow the debtor to receive calls, letting the phone ring incessantly in order to harass the debtor, threatening to take actions that the collector does not intend to or cannot legally take, communicating with unauthorized third parties about the debt, and making any collection-related communication that would tend to confuse the "least sophisticated consumer." The FDCPA also imposes several affirmative disclosure requirements on debt collectors, including with respect to debt validation notices, "mini-Miranda" notices, and self-identification.

The Proposed Rule generally restates the FDCPA definition of a "debt collector" with only minor changes.[3] Even if a collector is not covered by the FDCPA, the Bureau views the practices prohibited by the FDCPA as potentially unfair, deceptive, and/or abusive practices ("UDAAPs") that could violate the Dodd-Frank Act when undertaken by any person engaged in collection activities.[4] As a result, even entities such as first-party collectors, or servicers of performing mortgage loans that later become delinquent, should review the Proposed Rule and consider revising their practices as a matter of best practices and UDAAP risk control.

Definitions

The proposed rule clarifies a number of terms used in the FDCPA that have been the root of significant litigation and enforcement actions since the passage of the FDCPA. We explain the proposed rule's clarifications below.

Communication and Limited-Content Messages: the FDCPA prohibits a debt collector from communicating with third parties about the consumer's debt, unless the third party is the consumer's lawyer, a consumer reporting agency, the creditor or the creditor's lawyer, or the debt collector's lawyer.[5] In addition, a debt collector communicating with a consumer must provide the so-called "mini-Miranda" notice to inform the consumer that the communication is from a debt collector.[6] As a result, debt collectors frequently were tripped up by inadvertently having a communication overheard by a third party, especially if the debt collector chose to leave voicemails for debtors after an unsuccessful attempt to establish contact with the consumer. If a debt collector left a voicemail identifying itself as a debt collector and implied or revealed the existence of the consumer's debt, it could unknowingly violate the FDCPA if the debtor lived with a roommate or other third parties who might have access to the voicemail box. On the other hand, if the voicemail was considered to be a communication in connection with the collection of the debt, the collector would violate the FDCPA if it did not identify itself and disclose that it is a debt collector.

Several federal appeals courts have reached the conclusion that contacts from a debt collector that do not refer to or imply the existence of a debt, and do not reveal information about the debtor's debts, are not "communications" for purposes of the FDCPA.[7] However, the law remained unsettled and, as recently as 2017, the FTC entered into a stipulated judgment with a debt collector to settle allegations that the collector left voice messages in a manner that could reveal the existence and status of the consumer's debt to an unauthorized third party.[8] The Bureau ultimately believed this conflict led collectors to err on the side of not leaving voicemails, which in turn led to more frequent call attempts so that collectors could ensure they established live, right-party contact.[9]

The Proposed Rule resolves this conflict by clarifying that a debt collector does not convey information regarding a debt "directly or indirectly to any person" if the debt collector

provides only a "limited-content message."[10] A "limited-content message" must include *only* the expressly required content set forth in the Proposed Rule, and nothing more (except the optional content described below). The Proposed Rule requires that a "limited-content message" include *all* of the following:

- The consumer's name;
- A request that the consumer reply to the message;
- The name or names of one or more natural persons whom the consumer can contact to reply to the debt collector;
- A telephone number that the consumer can use to reply to the debt collector, and
- If applicable, a clear and conspicuous statement describing one or more ways the consumer can opt out of further attempts to communicate by the debt collector to that telephone number (discussed in further detail below in the "Opt Out" section).[11]

In addition to the required content, a debt collector leaving a limited-content message may also opt to include a salutation, the date and time of the message, a generic statement that the message relates to an account, or suggested dates and times for the consumer to reply to the message.[12] If a collector includes information in a message that exceeds the permitted information and conveys information about the debt, such as information revealing that the message relates to the collection of a debt (such as the consumer's account number), the collector loses the protection of the limited-content message exception.[13] As the name of the debt collector is not among the required or optional content, a collector may lose the protection of the "limited-content message" exception if a message included the collector's name. Consistent with this view, the Bureau noted that email cannot be used to transmit a "limited-content message" because email messages "typically require additional information (*e.g.,* a sender's email address) that may in some circumstances convey information about a debt."[14]

Although a limited-content message is not a "communication" under the Proposed Rule, it is nonetheless considered an *attempt* to communicate, and is subject to the restrictions in the Proposed Rule regarding attempts to communicate with a consumer regarding a debt (such as the seven-call limit discussed below).[15]

Consumer: As noted above, the FDCPA strictly prohibits communication of a consumer's debt to third parties besides a limited list of persons.[16] The limited scope of the exceptions to this prohibition presented several difficulties for debt collectors. First, debt collectors were hampered in resolving the debts of a deceased person with an estate or executor, since discussing the deceased person's debts would be prohibited by the FDCPA.[17] Second, the Bureau's Regulation X mortgage servicing rules require a mortgage servicer to promptly communicate with successors-in-interest regarding a mortgage loan upon death of the borrower.[18] If the mortgage loan was in default when the servicer obtained servicing, the servicer would be mandated by Regulation X to communicate with a successor-in-interest, but would be prohibited by the FDCPA, since successors-in-interest are not among the limited list of persons with whom a collector may convey information about a debt.

Acknowledging this conflict, the Bureau previously issued an interpretive rule providing a safe harbor from FDCPA liability when servicers communicate with a successor-in-interest in compliance with Regulation X.[19] The Proposed Rule formally resolves this conflict by adopting a definition of "consumer" that includes the executor, administrator, or personal representative of the debtor's estate, if the debtor is deceased, as well as a confirmed successor-in-interest as defined in Regulation X and Regulation Z.[20] As a result, mortgage servicers who are subject to the

FDCPA would be free to comply with Regulation X without worrying whether they are inadvertently violating the FDCPA.

Procedures for Text and Email Communications

Despite setting forth a litany of unfair, deceptive, and otherwise prohibited debt collection practices, the FDCPA provides that a debt collector has no civil liability for a violation if the debt collector shows, by preponderance of the evidence, that the violation was not intentional and resulted from a bona fide error, notwithstanding the collector's maintenance of procedures "reasonably adapted" to avoid such an error.[21]

Recognizing that debt collectors now frequently attempt to contact consumers using text messaging and email, the Bureau's Proposed Rule clarifies how a collector can maintain procedures for text and email communications that allow the collector to avail itself of the "bona fide error" defense. The Proposed Rule provides that, for purposes of the "bona fide error" defense, a collector maintains procedures that are "reasonably adapted" to avoid inadvertent communication with an unauthorized third party if its procedures include steps to reasonably confirm and document that:

- The debt collector communicated with the consumer using an email address or, in the case of a text message, a telephone number that the consumer recently used to contact the debt collector for purposes other than opting out of electronic communications;
- If the collector communicates using the consumer's non-work email address or telephone number, the creditor notified the consumer clearly and conspicuously *other than* through the specific non-work email address or non-work telephone number that the collector might use that email address or telephone number for email or text communications, the collector provided the notification no more than 30 days before the collector's first text or email communication, and the notification identified the legal name of the collector and the non-work email address or telephone number the collector proposed to use, described one or more ways the consumer could opt out of such communications, provided the consumer with a reasonable period in which to opt out, and the opt-out period expired without the consumer opting out;
- The debt collector used a non-work email address or telephone number that a creditor or prior debt collector obtained from the consumer to communicate about the debt if the creditor or prior debt collector recently sent communications about the debt to that number or address, and the consumer did not request that the creditor or prior debt collector cease communications to that email address or phone number; or
- The debt collector took additional steps to prevent communications using an email address or telephone number that the collector knows has led to a disclosure of the consumer's debt to an unauthorized party.[22]

The Proposed Rule also addresses another significant operational difficulty for collectors and FDCPA-covered entities. The FDCPA prohibits a covered entity from attempting to communicate with a customer at a time that is known or should be known by the collector to be inconvenient, or at times other than between 8 a.m. and 9 p.m. local time at the consumer's location.[23] In the era of landline telephones, determining the consumer's local time was easy—the collector could simply verify the local time at the consumer's listed area code and proceed accordingly. In the modern era, fewer consumers are maintaining landline telephones, and instead are using cellular telephones as a primary source of communication.[24] A consumer's cellular phone area code may not match their physical

location—for example, a consumer with an area code assigned to Los Angeles may reside in New York. A collector calling the consumer at 7 p.m. Los Angeles time would therefore violate the FDCPA, as the call would be received at 10 p.m. New York time—outside of the window permitted by the FDCPA.

The proposed Official Interpretations to the Proposed Rule attempts to resolve this complication by providing that a debt collector complies with the FDCPA if, in the absence of knowledge to the contrary, the collector communicates or attempts to communicate with the consumer at a time that would be convenient in *all* of the locations at which the collector's information indicates the consumer might be located.[25] In the example above, if the collector's information reflects that the consumer resides in New York, then the collector should only attempt to call within the time limits applicable to both New York and Los Angeles, rather than just to Los Angeles.[26]

The Proposed Rule also provides that it is an unfair practice for a collector to communicate, or attempt to communicate, with a consumer using an email address that the collector knows or should know is provided to the consumer by the consumer's employer.[27] The Proposed Rule requires the collector to exercise a degree of judgment in determining whether an email is provided by the consumer's employer. The Bureau noted that addresses with certain domains, such as .gov or .mil, are unlikely to be a personal email, or addresses where the domain includes a corporate name that is not commonly associated with personal email addresses, are likely to be work emails.[28] However, the Bureau acknowledged that a collector "neither would know nor should know that an email address is provided to the consumer by the consumer's employer if the email address's domain name is one commonly associated with a provider of non-work email addresses."[29] Notwithstanding the prohibition, a collector may use a work email address if the collector has previously received either consent from the consumer to be contacted at that address, or an email from that email address.[30]

The Proposed Rule also prohibits a collector from communicating or attempting to communicate with a consumer through social media in connection with the collection of a debt if the social media is viewable by an unauthorized third party.[31] This prohibition applies broadly and includes even limited-content messages.[32] However, if the social media platform allows a collector to send a private message to the debtor that is not viewable by unauthorized third parties, then a collector may send a private message concerning the debt without violating this prohibition (although the FDCPA may otherwise prohibit the message if the consumer has requested the collector cease communications, for example).[33]

Procedures for Supplying Electronic Disclosures

The Proposed Rule creates a process flow for collectors to deliver certain FDCPA-required notices electronically. The Proposed Rule allows for three disclosures to be provided electronically: the validation of debt notice, the original creditor information that a collector must provide if requested in writing by the debtor, and the validation information that a collector must provide if the debtor disputes his or her debt in writing.[34] If the collector chooses to provide electronic copies of these notices, it must comply with the federal E-SIGN Act and provide the disclosures in a form that provides the consumer with actual notice, and that the consumer can keep and access later.[35] The Proposed Rule sets forth the procedures for debt collectors to satisfy the E-SIGN Act when supplying electronic disclosures. Importantly, only these three specific notices must meet the notice-and-retainability

requirement. Other routine electronic communications that are not expressly required by the FDCPA or Proposed Rule, such as settlement offers, payment requests, and scheduling messages, need not be provided in a form the consumer can keep and access later.[36]

The Proposed Rule provides two ways for a collector to provide disclosures electronically. First, the collector may comply with section 101(c) of the E-SIGN Act after the consumer provides affirmative consent directly to the debt collector.[37] Alternatively, the collector may provide the disclosure by sending an electronic communication to an email address or phone number that the creditor or a prior debt collector could have used to provide disclosures under E-SIGN Act.[38] If the collector opts to take the alternative approach, the collector may place the disclosure on a secure website that is accessible by clicking on a hyperlink included within an electronic communication.[39] The disclosure must be available on the website for a reasonable period of time in an accessible format that can be saved or printed, and the consumer must receive notice and opportunity to opt out of hyperlinked delivery.[40] The collector may also place the disclosure in the body of an email so that the disclosure's content is viewable within the email itself.[41]

No matter which option a debt collector chooses, the Proposed Rule would require a debt collector to:[42]

- Identify the purpose of the communication by including, in the subject line of an email or in the first line of a text message transmitting the disclosure, the name of the creditor to whom the debt currently is owed or allegedly is owed and one additional piece of information identifying the debt, other than the amount;[43]
- Permit receipt of notifications of undeliverability from communications providers, monitor for any such notifications, and treat any such notifications as precluding a reasonable expectation of actual notice for that delivery attempt;[44] and
- If providing the validation notice electronically, provide the disclosure in a responsive format that is reasonably expected to be accessible on a screen of any commercially available size and via commercially available screen readers.[45]

Opt-Out for Electronic Communications

The Proposed Rule provides an opt-out right to a consumer receiving electronic or text communications from a debt collector. The Proposed Rule states that if a debt collector communicates, or attempts to communicate, using text, email, or another electronic medium, the collector must include in each communication or attempt a clear and conspicuous statement describing one or more ways the consumer can opt out of further electronic communications to that email address or phone number.[46] The Proposed Rule prohibits a collector from requiring that the consumer pay any fee to exercise the opt-out right, or to provide any information other than the email address, telephone number for text messages, or other electronic address subject to the opt-out right.[47]

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.[48] While some states already cap the number of calls that a collector may place to a consumer

residing in that state,[49] 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.[50] The limit applies on a per-consumer and per-debt basis.[51] With respect to the per-consumer limitation, phone calls concerning the same debt to different numbers owned by the same debtor count equally towards 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.[52] 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.[53] 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."[54]

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.[55] 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.[56] 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.[57] 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.[58] 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.[59]

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.[60] 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.[61] 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 of 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.[62] If the debt is a credit card account, then the validation notice must reflect the merchant co-brand associated with the credit card.[63] 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.[64]

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.[65] 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.[66]

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.[67] 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.[68] Appeals courts are split on whether a validation notice must inform the debtor that disputes must be in writing. The Second, Fourth, and Ninth Circuit Courts of Appeals (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.[69] Under this line of cases, a validation notice that states a debtor must dispute a debt in writing arguably violates the FDCPA. However, the 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.[70]

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).[71] 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.[72] 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.[73]

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.[74] 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.[75]

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.[76] 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.[77] 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.[78] 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.[79]

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.[80] 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.[81]

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.[82] 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."[83] 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.[84] 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.[85]

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."[86] 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.[87] The Bureau alleged that the firm's lawsuits were prepared without meaningful lawyer involvement and were therefore deceptive and violated the FDCPA.[88] 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 August 19, 2019.

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Endnotes

[1] *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1720 (2017).

[2] 15 U.S.C. § 1692a(6). See also *Barbato v. Greystone Alliance LLC,* 916 F.3d 260 (3d Cir. 2019).

[3] Proposed 12 C.F.R. § 1006.2(i)(1).

[4] *See* CFPB Bulletin 2013-07 (Jul. 10, 2013).

[5] 15 U.S.C. § 1692c(b).

[6] *Id.* § 1692e(11).

[7] *See Scribner v. Works & Lentz, Inc.*, 655 F. App'x 702, 703-04 (10th Cir. 2016) (call to manager of debtor's apartment complex; caller did not identify herself or her employer as debt collector or refer to any debt owed by debtor); *Brown v. Van Ru Credit Corp.*, 804 F.3d 740, 743 (6th Cir. 2015) (voicemail left with debtor's business; voicemail did not mention debtor, his alleged debt, or that caller was debt collector); *Marx v. Gen. Revenue Corp.,* 668 F.3d 1174, 1177 (10th Cir. 2011) (fax to debtor's work location; fax indicated its purpose was to verify employment and did not reference any debt).

[8] *See* Stipulated Order for Permanent Injunction and Civil Penalty Judgment, *United States v. GC Servs. Limited Partnership*, Civ. No. 17-1461 (S.D. Tex. Mar. 2, 2017).

[9] *Proposed rule with request for public comment: Debt Collection Practices (Regulation F)*, Docket No. CFPB-2019-0022 ("Notice of Proposed Rule"), at 60.

[10] Proposed 12 C.F.R. § 1006.2(b).

[11] *Id.* § 1006.2(j).

[12] *Id.*

[13] Comment 2(j) to Proposed 12 C.F.R. § 1006.2.

[14] Notice of Proposed Rule at 63.

[15] Proposed 12 C.F.R. § 1006.2(b).

[16] 15 U.S.C. § 1692c(b).

[17] Notice of Proposed Rule at 73.

[18] 12 C.F.R. § 1024.38(b)(1)(vi).

[19] 81 Fed. Reg. 71977 (Oct. 19, 2016).

[20] Proposed 12 C.F.R. § 1006.2(e); Comment 6(a)(4) to Proposed 12 C.F.R. § 1006.2.

[21] 15 U.S.C. § 1692k(c).

[22] Proposed 12 C.F.R. § 1006.6(d)(3).

[23] 15 U.S.C. § 1692c(a)(1).

[24] *See, e.g.,* Victor Luckerson, "Landline Phones Are Getting Closer to Extinction," TIME Jul. 8, 2014, *available at* http://time.com/2966515/landline-phones-cell-phones/

[25] Comment 6(b)(1)(i) to Proposed 12 C.F.R. § 1006.6.

[26] If the consumer were in fact in Los Angeles, then a call at 8 a.m. New York time would be at 5 a.m. in Los Angeles.

[27] Proposed 12 C.F.R. § 1006.22(f)(3).

[28] Comment 22(f)(3)-3 to Proposed 12 C.F.R. § 1006.22.

[29] *Id.*

[30] Proposed 12 C.F.R. § 1006.22(f)(3).

[31] *Id.* § 1006.22(f)(4).

[32] Comment 22(f)(4) to Proposed 12 C.F.R. § 1006.22(f)(4).

[33] *Id.*

[34] Proposed 12 C.F.R. § 1006.42.

[35] Proposed 12 C.F.R. § 1006.42(a)(1).

[36] Notice of Proposed Rule at 301.

[37] Proposed 12 C.F.R. § 1006.42(b)(1).

[38] *Id.* § 1006.42(c)(1).

[39] *Id.* § 1006.42(c)(2)(ii).

[40] *Id.*

[41] *Id.* § 1006.42(c)(2)(i).

[42] *See* https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-electronic-disclosure-flowchart.pdf

[43] Proposed 12 C.F.R. § 1006.42(b)(2).

[44] *Id.* § 1006.42(b)(3).

[45] *Id.* § 1006.42(b)(4).

[46] *Id.* § 1006.6(e).

[47] *Id.*

[48] 15 U.S.C. § 1692d.

[49] 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).

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

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

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

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

[54] Notice of Proposed Rule at 169.

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

[56] *Id.*

[57] 15 U.S.C. § 1692g.

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

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

[60] 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).

[61] *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).

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

[63] *Id.*

[64] *Id.*

[65] *Id.* § 1006.34(c)(5)

[66] *Id.*

[67] 15 U.S.C. § 1692g(a).

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

[69] *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).

[70] *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).

[71] Proposed 12 C.F.R. § 1006.38(b).

[72] *Id.* § 1006.34(c)(3).

[73] *Id.*

[74] *Id.* § 1006.34(c)(4).

[75] *Id.*

[76] *Id.* § 1006.34(b)(5).

[77] *Id.* § 1006.38(c).

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

[79] 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.

[80] *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.").

[81] Proposed 12 C.F.R. § 1006.26(b).

[82] 15 U.S.C. § 1692e(3).

[83] Notice of Proposed Rule at 179.

[84] Proposed 12 C.F.R. § 1006.18(g).

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

[86] *Id.* at 181.

[87] *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

[88] *Id.*