

CLIENT UPDATE

CFPB BEGINS COMPREHENSIVE RULEMAKING PROCESS ON DEBT COLLECTION

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On November 6, 2013, the Consumer Financial Protection Bureau (“CFPB”), in an Advance Notice of Proposed Rulemaking (“ANPR”), requested comment on expanded protections for consumer debtors under the Fair Debt Collection Practices Act (“FDCPA”) and the Dodd-Frank Act. The ANPR includes over 150 questions related to a wide variety of debt collection topics. Responses to the ANPR’s questions and comments on the ANPR are due February 10, 2014. This ANPR is especially important, because it signals an effort on the part of the CFPB to expand dramatically the category of debt collectors subject to such federal regulation. Previously, only third-party debt collectors were governed generally by the FDCPA, but the ANPR indicates that the CFPB is considering invoking its authority under the Dodd-Frank Act to cover first-party creditors who collect debts on their own behalf as well.

BACKGROUND

In the ANPR, the CFPB notes that debt collection is a significant consumer issue, citing large volumes of complaints about and lawsuits filed concerning debt collection activities. The ANPR also notes that the CFPB has authority under both the FDCPA and the Dodd-Frank Act, including the unfair, deceptive or abusive acts or practices standard, to prescribe rules for both first-party and third-party persons who are collecting debts that arise out of consumer credit transactions. Before Dodd-Frank, no agency had rulemaking authority under the FDCPA. Dodd-Frank also grants the CFPB other new rule-making powers, including the power to define what constitutes unfair, deceptive, and abusive acts or practice in debt collection (“UDAAPs”), and the powers to require institutions to provide consumers with disclosures and to make certain information available to consumers.

The information the ANPR requests, and the new rules the CFPB has indicated it is considering, touch on a broad array of debt collection practices and issues. Topics include first-party (as opposed to third-party) debt collectors; the quality of information in the debt collection system, such as validation notices, disputes and access of information upon sale of debts; conduct of debt collectors when interacting with consumers, particularly using new technological methods; debt collection issues that implicate state law; and, more generally, recordkeeping, monitoring and compliance.

Previously, the CFPB has used its Dodd-Frank-granted powers to establish supervisory authority over nonbank third-party debt collectors with over \$10 million in annual receipts, and the proposed rule that results from this ANPR is likely to expand further the CFPB’s regulation of debt collection activities. Indeed, the CFPB has been quite active in the debt collection area over the past year. For example, the Bureau brought its first enforcement action involving debt collection practices in October 2012, and in that same month issued its Larger Participant Rule establishing supervisory authority over approximately 175 larger debt collectors. In July 2013, the CFPB held a field hearing, in which it announced guidance in the form of two supervisory bulletins, one addressing unfair, deceptive, and abusive acts and practices in debt collection, the other focused on representations regarding credit reports and credit scores in the debt collection process. At the hearing, the Bureau also released template letters to assist consumers in their correspondence with debt collectors. In June 2013, the CFPB and the Federal Trade Commission held a joint roundtable on data integrity and information flows in debt collection. Between 2009 and 2013, both the Bureau and the Federal Trade Commission also released a number of reports concerning debt collection.

Information: Quality, Transfers, and Access

One focus of CFPB concern in the ANPR is transfers of information related to debt when debts are sold or placed for collections with third parties. The CFPB seeks comment on ways to improve the process by which such information is transferred to better ensure the accuracy of information concerning the debtor's identity, the amount of the debt, and the documentation related to the debt. The Bureau is also looking for ways to ensure that consumers are adequately informed of their legal rights under the FDCPA and have access to clear information about their debts and any disputes that arise in connection with those debts.

Disputes

The CFPB is focused on disputes between consumers and debt collectors, especially insofar as the transmission of incorrect information from a debt collector or creditor to another party may make it difficult for a debt collector to provide adequate information to enable a consumer to dispute a debt. The Bureau has also identified consumer difficulty in receiving adequate information about their legal rights as a problem in the dispute context. The CFPB is especially interested in suggestions regarding how debt should be itemized in the new, mandatory disclosures to debtors it is contemplating and how debt collector investigations of creditor-debtor disputes should be regulated.

Collector Communications

Another area of focus of the ANPR concerns how first- and third-party collectors communicate with consumers and whether there are additional "harmful communication tactics" not specifically addressed by the FDCPA, such as certain kinds of false threats made against consumers.

Technological Developments

In the communications context, the ANPR indicates that the CFPB is also concerned with collectors' communications via newly developed platforms, such as social media and text messages. These media were not addressed in the FDCPA, because they did not yet exist, and the ANPR suggests significant interest by the Bureau regarding how best to adapt debt collection rules to such new media, both to resolve conflicts among different provisions in the FDCPA and to avoid possible abuses.

UDAAP

Under Dodd-Frank, debt collectors and service providers are prohibited from engaging in unfair, deceptive, or abusive practices in connection with consumer financial products and services. The CFPB is considering expanding the range of prohibited practices including through regulations aimed at prohibiting others from assisting collectors in engaging in prohibited acts and practices.

Time-Barred Debt

The CFPB has expressed concern that consumers often lack knowledge of their rights with respect to the collection of time-barred debts, *i.e.*, debts on which the statute of limitations has expired. The CFPB is considering mandating that debt collectors disclose to consumers when the collector cannot lawfully sue to collect such a debt, as well as disclosing the effect of partial payments that may revive an otherwise expired statute of limitations period.

Consumer Complaints Database

The most immediate action the CFPB has taken is to begin adding consumer complaints regarding debt collection (with personal information redacted) to its public Consumer Complaint Database, which already includes complaints regarding mortgages, student loans, and credit cards, among other topics. Consumer complaints the CFPB received regarding debt collection primarily concern collection activities, credit reporting, and the failure of collectors to provide verification that the consumer in fact owes a debt. The Consumer Complaint Database allows the public to see what consumers complained about, why, how, and when the company in question responded and whether the response was timely.

Please do not hesitate to contact us with any questions.

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November 12, 2013