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CFPB Opts to Split Debt Collection Rulemaking Process

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On July 28, 2016, the Consumer Financial Protection Bureau ("CFPB") released a partial outline of debt collection proposals under consideration ("Proposals"), focusing on the third-party debt collection industry. Despite the CFPB's initial focus, the Proposals have clear implications for banks and other first party creditors.

Background

The CFPB issued its Advanced Notice of Proposed Rulemaking ("ANPR") for debt collection in November 2013. In seeking information about both first- and third-party collection issues, the CFPB indicated that it would be conducting a rulemaking under its authority to prevent unfair, deceptive or abusive acts or practices ("UDAAP") under Title X of the Dodd-Frank Act and the Federal Debt Collection Practices Act ("FDCPA"). This approach will enable the CFPB to regulate the debt collection activities of banks and other first-party creditors (that are generally not covered by the FDCPA, but would be covered by the CFPB's UDAAP authority) and debt collectors subject to the FDCPA. In a move unexpected by many agency observers, the Proposals, which were released in advance of a field hearing on debt collection in Sacramento, California, included only those proposals the CFPB is considering that would affect third-party debt collectors and others covered by the FDCPA. The CFPB reportedly expects to release another set of proposals that would apply to first-party creditors and collectors not subject to the FDCPA in the next several months, which would be under consideration pursuant to the CFPB's UDAAP authority.

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By withholding those proposals under consideration that would cover first-party creditors and collectors, the CFPB is requesting industry participants to comment on the Proposals without fully understanding how the agency intends to regulate the role of banks and other first-party creditors when: (1) collecting debt in-house, (2) placing debt with collection agencies or collection law firms, or (3) offloading the debt to debt buyers. Thus, the industry must evaluate the Proposals without the benefit of insight into how the other part of the CFPB's debt collection proposals, which will be based solely on its UDAAP authority, would be integrated or how the yet-to-be released proposals would operate within the agency's oversight of the debt collection industry.

FDCPA

When Congress enacted the FDCPA in 1977, it did not confer rulemaking authority on the Federal Trade Commission ("FTC"), the agency then tasked with enforcing and advising on the Act.[1] As such, the statute's requirements have evolved largely as a result of state and federal case law. The lack of clarity associated with this common law evolution has long complicated industry compliance efforts. At the same time, public concerns associated with debt collection practices have proliferated. With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Congress sought to address those issues by amending section 814 of the FDCPA to provide the CFPB with the authority to "prescribe rules with respect to the collection of debts by debt collectors." Thus, the CFPB's current efforts are expected to culminate in the first federal rulemaking under the FDCPA.

The Proposals Under Consideration

As noted above, the Proposals are directed solely at "debt collectors," as the term is defined by the FDCPA, which the CFPB has identified as "collection agencies, debt buyers, collection law firms, and loan servicers" for "debts acquired in default." Missing from this list are holders of delinquent debts acquired *pre-default* who may be subject to the not-yet released debt collection proposals considered solely pursuant to the CFPB's UDAAP authority. Further, the CFPB has not defined the term "default" nor is there a universally agreed upon definition. As such, determining whether these Proposals apply to a given collector will necessitate understanding whether the acquired debt was merely "delinquent" or actually "in default."

Generally, in addressing the activities of debt collectors, the Proposals cover three broad categories within the FDCPA framework:

1. **Integrity of information.** Under this category, the CFPB is seeking to require that debt collectors substantiate, or possess a reasonable basis for, any claims for indebtedness pursued against consumers. In addition, the agency is proposing to regulate communications between debt collectors and consumers throughout the collections process, including ensuring that information received by a debt collector, from a consumer or otherwise, in the course of collections is transferred to and reviewed by any subsequent debt collector that acquires or assumes the rights or responsibilities to the subject debt. To ensure that debt collectors substantiate claims that a particular consumer owes a particular debt, the CFPB is considering a requirement that the debt collector "have a reasonable basis for claims of indebtedness" at various stages of the collections process. In conjunction with the general requirement that debt collectors possess a reasonable basis for claims, the CFPB is considering a series of "safe harbor" rules that specify the types of information and documentation debt collectors could obtain and review at each stage of the collections process to satisfy the "reasonable basis" obligation. While the Proposals do not explicitly address original creditors (including banks), the proposed requirements would nevertheless impact such creditors as debt collectors would undoubtedly require that creditors provide more fulsome and accurate supporting documentation when selling or placing debt in collection.

2. **Consumer disclosures related to litigation and time-barred debt.** The CFPB is also considering requiring debt collectors to comply with additional consumer disclosure obligations. In particular, the Proposals would make it significantly more difficult to collect on time-barred debt, i.e., debt for which an applicable statute of limitations has run. The CFPB noted its particular concern about information imbalances regarding the collection of time-barred debt, namely that consumers are generally unaware that the statute of limitations applicable to a debt may be used as a legal defense to render claims unrecoverable or bar collectors from bringing suit altogether. To address these types of

information imbalances, the CFPB is considering prohibiting suits and threats of suit on time-barred debt, while also requiring debt collectors to disclose that they are seeking payment on time-barred debt.

In an attempt to avoid consumer confusion, the CFPB is also considering whether to prohibit a subsequent debt collector (e.g., a collector that acquires a debt from a debt collector) from suing if an earlier debt collector provided a time-barred debt disclosure. With these requirements in place, industry participants engaging in subsequent purchases of debt placed in collection will need to perform heightened due diligence on such purchases (and will be obligated to provide relevant information to any subsequent purchaser or assignee).

Another important proposal under consideration would require debt collectors to waive any "revival" of a statute of limitations that would occur if a consumer makes a payment on time-barred debt or engages in another activity that, under applicable state law, would cause the statute of limitations to start anew.

3. **Communications with consumers.** The final category of issues addressed in the Proposals focused on debt collectors' communications with consumers. Chief among the roughly ten proposals under consideration within this category were requirements aimed at limiting the frequency of debt collectors' contacts with consumers and the frequency of third-party contacts for purposes of acquiring location or contact information for a consumer. The CFPB indicated that it is considering whether to establish different frequency restrictions depending on whether a debt collector has successfully established contact with a consumer who is alleged to owe the particular debt. The CFPB also noted that it is considering limiting the number of location contacts (or attempted location contacts) a debt collector could make to third parties when the debt collector does not have confirmed consumer contact information. If this authority is included in a final rule, industry participants will need to assess whether their monitoring systems are adept at tracking this level of information to avoid violating the FDCPA.

Field Hearing

In conjunction with the release of the Proposals, the CFPB held a field hearing that featured remarks by Director Richard Cordray followed by a panel discussion involving members of the debt collection industry and consumer advocates. Director Cordray focused on ways in which the CFPB plans to overhaul and modernize implementation of federal debt collection laws under the FDCPA and the CFPB's UDAAP authority pursuant to the agency's Dodd-Frank mandate. Industry representatives generally urged the CFPB to propose rules that provide clarity on various standards but also refrain from imposing draconian requirements in an attempt to nullify "bad actors," which could cause the credit market to constrict. In contrast, consumer advocates widely praised the Proposals for including mandated disclosures, such as a "Statement of Rights" for consumers, and proposing to limit the frequency and nature of permissible consumer communications by debt collection firms.

Director Cordray also noted, as did several members of the panel, changes in technology that have occurred since the enactment of the FDCPA. In particular, the use of postcards and telegrams, which is regulated by the FDCPA, has declined while the use of e-mail, text messages, and other social media has proliferated. Notwithstanding the acknowledgements that the use of social media could not have been predicted in the 1970s when the FDCPA was enacted, the Proposals noticeably fail to address the changes in technology directly. Throughout the hearing, industry members urged the CFPB to adopt rules to create and/or clarify standards applicable to new forms of technology that would enable debt collectors to more effectively and efficiently communicate with consumers without violating requirements of the FDCPA.

Upcoming August 2016 SBREFA Meeting

Under the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), unless a covered agency, such as the CFPB, can certify that a proposed rule would not have a significant economic impact on a substantial number of small businesses, the agency must convene a Small Business Review Panel ("Panel"). The Panel, which is comprised of officials from the CFPB, the Small Business Administration, and the Office of Management and Budget's Office of Information and Regulatory Affairs, reviews the proposals and, after

soliciting advice and recommendations from identified small entity representatives ("SERs"), considers the impact the proposals would have on small businesses.

At the field hearing, the CFPB announced that it would be convening a Panel to provide affected small businesses an opportunity to participate in the rulemaking process. The Panel invited SERs to participate in an August 2016 outreach meeting to provide advice and recommendations regarding the economic implications of the CFPB's Proposals and any potential regulatory alternatives. By statute, information submitted by the SERs regarding the economic burden of the Proposals and any regulatory alternatives must be considered by the Panel and addressed, where appropriate, by the CFPB in its initial regulatory flexibility analysis or through modifying aspects of the Proposals in connection with any rulemaking efforts.

While it remains an important step in the CFPB's regulatory efforts to implement its strategy in overseeing the debt collection industry, it is unclear how the August 2016 Panel outreach meeting may ultimately influence a proposed or final rule. As we noted in a recent client alert about the CFPB's proposed ban on class action limitations in arbitration agreements, the CFPB's Arbitration Notice of Proposed Rulemaking ("NPRM") was largely silent on concerns raised by SERs and recommendations by the Arbitration SBREFA panel. In fact, the Arbitration NPRM appeared to lay the ground work for the CFPB to sidestep the panel's recommendations by noting that the Arbitration proposed rule would not have a significant economic impact on a substantial number of small entities, despite its decision not to make a certification to such effect.

Implications for Banks and Other First-party Creditors

Although the Proposals are a significant first step for the CFPB in its efforts to promulgate a federal debt collection regulation and clarify the FDCPA proscriptions on third-party debt collection activities, it is also important to note the indirect impact on the debt collection practices of banks and other first-party creditors. The Proposals also indicate the types of debt collection rules that the CFPB may ultimately propose to apply to first-party collection activities solely under its UDAAP authority.

Certainly, the Proposals' requirement that debt collectors substantiate claims that a particular consumer owes a particular debt by obtaining and reviewing a comprehensive set of information and documentation will have a derivative impact on banks and other creditors insofar as banks and other creditors looking to sell or assign debt to collection firms will likely be compelled by those firms to maintain and provide sufficient information and documentation for the debt. Furthermore, it seems reasonable to infer from the CFPB's focus on requiring third-party debt owners and collectors to ensure information and documentation acquired before or during the course of collection accompanies the debt as it is subsequently transferred that the CFPB may use its UDAAP authority to impose similar requirements on first-party creditors directly.

The extent to which the CFPB will leverage its UDAAP authority to regulate the debt collection and related activities and operations of banks and other first-party creditors still remains unknown. Clearly, given the volume of consumer debt that such institutions hold, the manner in which the CFPB uses its UDAAP authority should be closely watched and could dramatically alter operations for retail banks and other consumer creditors.

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[1] To be clear, while the FTC could not promulgate rules implementing the FDCPA, the agency could issue rules containing exemptions in relation to state regulation under FDCPA section 817.