

PUBLICATION

The CFPB's New Debt Collection Rule is Coming

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The CFPB published its [fifth annual report summarizing activities to administer the Fair Debt Collection Practices Act \(FDCPA\)](#) on March 22. The report does not provide a date to expect the CFPB's new rule on debt collection, but does provide a summary of rule promulgation efforts to date. The rule has been on the agenda of the CFPB for quite some time and as such it is widely suspected the rule will be issued sometime this year or possibly early 2017. If we look at the original Advance Notice of Proposed Rulemaking (ANPR), the CFPB's customer complaint data and the recent amicus briefs filed by the CFPB on FDCPA issues, we can make a good guess at what the rule will look like.

The ANPR

In its [ANPR](#), the CFPB highlighted multiple areas of concern they have in the debt collection space. Some of the top issues were:

1. The integrity and flow of information within the debt collection system; emphasizing that the amount of information provided by a debt owner placing a debt with a collector may vary significantly depending on the sophistication of the debt owner and the debt collector. As such, I would expect to see some type of standardization of what information must be included in the sale or transfer of debt to a collector in the new rule.
2. Validation Notices and the possible need to increase the information required in them.
3. Time-barred debts. The CFPB points out there are no requirements in the FDCPA or the Dodd-Frank Act as to how to handle time-barred debts. The CFPB is contemplating how and when a collector should be required to disclose that a collector cannot lawfully sue to collect. As such it's highly likely a finalized version of the rule will include sections addressing how and when collectors will be required to disclose when a debt is time barred.
4. Unfair Deceptive and Abusive Acts and Practices (UDAP). Here the CFPB states greater clarity and specificity as to how prohibited conduct could make it easier for collectors and others to know what they must do to comply with the law. I would expect to have the new rule codify any court interpretations of what conduct has been deemed unfair, deceptive or abusive in various jurisdictions. I also believe the CFPB will jump at the chance to include a wide range of activity that may have been in a grey area under the FDCPA.
5. First-Party Collectors. Throughout the ANPR the CFPB references first-party collectors and makes statements such as, "The Bureau can exercise the Dodd-Frank Act rulemaking authority above with regard to any 'covered person'....'Covered persons' for purposes of the Dodd-Frank Act includes first-party collectors and third-party collectors who are collecting or attempting to collect on debts that arise out of consumer credit transactions." They go on to later question if they should "harmonize any rules it develops for third-party collectors and first-party collectors" and that "experience since passage of the FDCPA suggests that first-party collections are in fact a significant concern in their own right." The CFPB also issued guidance in [CFPB Bulletin 2013-07](#) in which they sent a frank reminder that although first-party collectors may be vastly exempt from the FDCPA, the CFPB would enforce its power under UDAAP to these parties. As such, evidence points strongly to the fact first-party debt collectors will come under the purview of the FDCPA in the CFPB's new rule.

It's interesting to note the Department of Financial Services in New York issued their final regulations governing Debt Collection last year. A substantial amount of the issues raised by the CFPB in their ANPR are codified in NY's new debt collection rules. Some believe that the CFPB may borrow a substantial amount of New York's regulation. If you are not already familiar with New York's rule it would behoove you to take a read and learn what the whole industry may be in for.

Customer Complaints

The CFPB does not hide the fact that they use the data aggregated by their [complaint database](#) partly to inform their decisions on what to cover in exams, who to examine, where to focus on investigations and how to guide its rulemaking efforts. Therefore you should focus on the top complaints coming in to the CFPB regarding debt collection to glean insight as to what will be written into the new rule. The top four categories are (1) continued attempts to collect debt not owed; (2) communication tactics (for example the frequency of the calls); (3) disclosure about and verification of debt; and (4) taking/threatening an illegal action. It is almost a certainty that you will see revisions in the new debt collection rule to govern operations around each of these issues raised by consumers in their complaints, including more robust language and possibly higher liability.

Amicus Briefs

The CFPB routinely files amicus briefs throughout each year, and goes as far to solicit cases on their [website](#). They state, "strong candidates typically are cases that have been or will soon be filed in a federal court of appeals or state supreme court and that present one or more important legal questions involving the interpretation or application of a federal consumer financial protection statute or regulation that we interpret and enforce." As such, anytime they file one you know what their opinion is and how they want a rule to be interpreted. Therefore you also know how they would like to construct the new rule.

The CFPB has addressed the FDCPA through their amicus program three times since August 2015. In *Vien-Phuong Thi Ho v. Recontrust, Company, N.A.*, the CFPB argued that a trustee engages in debt collection if it sends consumers foreclosure notices stating that foreclosure will occur unless the consumers make payment on their debt. The brief also argued that such conduct can qualify as debt collection under the general definition regardless of whether the conduct is also related to the enforcement of a security interest. In *Daniel Brock, Jr. v. Pressler & Pressler, LLP* the CFPB argued that an attorney engages in a deceptive debt-collection practice in violation of the FDCPA when he files a debt-collection lawsuit without meaningfully reviewing it first. And finally in *Carmen Franklin v. Parking Revenue Recovery Services, Inc.*, the CFPB argued that the parking fees and penalties are "debts" subject to the FDCPA because they were "obligation[s] or alleged obligation[s] of a consumer to pay money arising out of a transaction." The CFPB also takes this opportunity to argue that neither a failure by the consumer to pay the amounts owed nor the classification of the payment obligations as "fines" precluded those obligations from being "debts" under the FDCPA. I would expect the elements in each of these briefs to show up in the new rule. The trend seems to be an expansion of what's covered under the FDCPA, and I would imagine this trend of expansion will also be seen in the new rule.

Steps to Take Now

If you have not done so already, now is the time to begin to focus on the rule promulgation of the CFPB in the debt collection space. Operations and compliance departments should begin to consider what the rule will look like so when it is issued their businesses will not be caught flat-footed and can be ahead of the curve when it comes to implementation. It is never too early to start looking at what may become problem areas. And on the flip side the new rule should contain sections that will be a welcomed change. For example, in the ACA's detailed response to the ANPR (which is also very informative and worth rereading now), they state in response to a CFPB question regarding advances in technology, "The benefits both for industry and

consumers to be able to use post-1977 communications technology would be enormous." Possible positive changes must be studied as well. You will need to be well-positioned to maximize any benefit against the competition in this competitive industry and the best way to do that would be to start planning now for both the negatives and the positives that will arise from the new CFPB rule on debt collection.