

PUBLICATION

The CFPB's Overhaul of Debt Collection Regulation

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Yesterday, the CFPB continued its march towards the overhaul of debt collection regulation by releasing its [proposals for a new rule](#). An [Advance Notice of Proposed Rulemaking \(ANPR\)](#) back in November 2013 signaled a lot of what is in the announcement. Since that date, debt collection has been a top priority for the CFPB.

Yesterday's outline of the proposed rule is what the Bureau prepared for the Small Entity Representatives (SERs) who will participate in a panel and provide input pursuant to the Small Business Regulatory Enforcement Fairness Act (SBREFA). The Bureau will consider the SERs' feedback and the panel's report as it prepares the final rule on debt collection.

A key focus of the new rule is "information integrity" – when collectors seek to recover from the wrong consumer or in the wrong amount – which is the most common consumer complaint the CFPB sees in the debt collection space. The CFPB proposes the following to combat this issue:

- (1) A requirement that debt collectors "substantiate," or possess a reasonable basis for, claims that a particular consumer owes a particular debt. This general requirement would likely be combined with provisions describing more specific steps that collectors can take to satisfy in part their obligation to substantiate claims of indebtedness made initially, during the course of collections and before filing litigation.
- (2) A requirement that certain information that the consumer provides in the course of collections with one collector be passed on and reviewed by downstream collectors.
- (3) A requirement that debt collectors provide an improved FDCPA validation notice and a statement of rights to provide consumers with the most critical information needed to determine whether they owe a particular debt and to navigate the debt collection process more generally.

The CFPB also proposes rules related to litigation, since a primary means for debt recovery is through litigation. The Bureau points out that in lawsuits consumers rarely appear or file an answer, and collectors often obtain default judgments. The CFPB argues that consumers most likely are unaware of their rights in debt collection actions and the possible defenses that could be raised. The CFPB proposes the following rules:

- (1) A requirement that debt collectors include a brief "litigation disclosure" in all communications in which they must disclose their intent to sue. The disclosure would inform the consumer that the debt collector intends to sue; that a court could rule against the consumer if he or she fails to defend a lawsuit; and that additional information about debt collection litigation, including contact information for legal services programs, is available on the CFPB's website and by calling the Bureau's toll-free number.
- (2) A time-barred debt disclosure that would require the debt collector to disclose when it is time-barred from filing litigation to collect on a debt. (Note: There remains a question as to whether this requirement will apply only if a collector knew or should have known that the debt was time-barred or whether the collector will be held strictly liable.)

(3) A requirement that once a debt is disclosed as time-barred, all subsequent purchasers of that debt will be required to refrain from suing on the debt. (Note: When you extrapolate this rule, it would seem that secondary purchasers of debt will have to review a complete list of disclosures that were sent to a consumer to determine if the debt was disclosed as time-barred. Even if the debt was not time-barred but was communicated as such by a prior debt collector, the secondary purchaser would apparently be blocked from bringing suit.)

The Bureau is also considering requiring disclosures that would advise a consumer whether a time-barred debt can or cannot be reported to a credit reporting agency. Finally, in certain states, loans that are time-barred can be revived if a consumer acknowledges the debt or begins to pay on the debt. The CFPB is considering whether to prohibit debt collectors from collecting on time-barred debt that can be revived under state law unless the collectors waive the right to sue on that debt if revived.

Noting that the second largest source of consumer complaints in debt collection is debt collectors' communication practices, the CFPB proposed the following updates:

(1) Regulations to govern contact frequency and the leaving of messages (the Bureau's proposed per week limits on frequency depend on whether the debt collector has confirmed contact with the consumer);

Collector Activity	Collector Does Not Have Confirmed Consumer Contact	Collector Has Confirmed Consumer Contact
Attempts per unique address or phone number	3	2
Total contact attempts	6	3
Live communications	N/A	1

(2) Regulations to govern the time, place and manner of debt collector contacts; and

(3) Regulations relating to situations in which the consumer alleged to owe the debt dies (decedent debt).

One section of the proposal that should be welcomed by industry participants clarifies what a collector can say on a voicemail or to a third-party on the phone. The CFPB has explained, "The Bureau is considering a proposal that would provide that no information regarding a debt is conveyed – and no FDCPA 'communication' occurs – when collectors convey only: (1) the individual debt collector's name, (2) the consumer's name and (3) a toll-free method that the consumer can use to reply to the collector. For example, a voicemail could state, 'This is John Smith calling for David Jones. David, please contact me at 1-800-555-1212.' This would allow collectors to leave such limited-content messages in a voicemail message, with a third-party in a live conversation, or through another method of communication (e.g., in a text message or an email), without triggering the requirement to provide the FDCPA warnings. If the collector succeeds in reaching the consumer or if the consumer contacts the collector after receiving the message, these FDCPA requirements would apply immediately."

Such a change should put compliance officers at ease after years of back and forth discussions with their operations counterparts as to what message can a collector leave on a voicemail or with a third-party without violating Section 803(2) of FDCPA, which defines a 'communication' with a consumer under the statute.

These proposals only apply to debt acquired in default and to collection agencies, debt buyers, collection law firms and loan servicers, which is contrary to the industry's expectations that CFPB would require first-party collectors to abide by the same regulations that apply to third-party collectors. The Bureau stated that it "expect[s] to convene a second proceeding in the next several months for creditors and others engaged in collection activity who are covered persons under the Dodd-Frank Act but who may not be 'debt collectors' under the FDCPA." The CFPB is tackling debt collection reform in a two-step process, convening this SBREFA panel for those traditionally thought of as third-party collectors, and later addressing first-party collectors in a separate panel.

Like any new regulation promulgated by the CFPB, the best approach to compliance is to start as soon as possible. If you fall into the category of collection governed by this outline, it would be wise to designate an implementation team to begin to review the outline of the proposals and identify what changes may be necessary to your policies and procedures in advance of the anticipated rule changes. If you operate as a first-party collector, you should be looking out for the outlined proposal that will govern your operations, as that will be coming shortly. If you have any questions regarding FDCPA compliance, exam management or any issues with best practices under the CFPB rules, please contact a member of Baker Donelson's CFPB team.