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What You Need to Know Now About the CFPB's Debt Collection Proposal

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On July 28, 2016, the Consumer Financial Protection Bureau ("CFPB" or "Bureau") issued its outline of proposals under consideration for the regulation of debt collection. This 117-page release, entitled "Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered" ("Outline"), was announced in connection with the CFPB's field hearing on debt collection in Sacramento, California ("Field Hearing"). The Outline is in preparation for the convening of a Small Business Regulatory Enforcement Fairness Act Panel ("SBREFA Panel"), a process mandated by the Dodd-Frank Act for CFPB rules anticipated to have a significant impact on small businesses. The release kicks off the next step in the CFPB's promulgation of a final rule, the SBREFA Panel process. The SBREFA Panel meetings are scheduled for late August 2016.

In his remarks at the Field Hearing, CFPB Director Richard Cordray summed up the work ahead for the CFPB: "Today we are considering proposals that would drastically overhaul the debt collection market." Given the ambitious sweep of this statement, it is important to carefully examine, and fully understand the scope of, the Outline and related issuances.

Below is a high-level overview of the Outline, in the form of a Q&A. We will follow this with a review and analysis of the potential impact of the Outline and related issuances on financial institutions, attorneys representing financial institutions, debt collection agencies and service providers to these parties.

WHAT DEBT COLLECTION ACTIVITY WOULD BE COVERED?

The CFPB's Advance Notice of Proposed Rulemaking on Debt Collection Practices¹ ("ANPR") suggested that the agency's debt collection rulemaking would include both third-party debt collection and first-party debt collection. The Outline, however, only covers third-party debt collection. In his remarks at the Field Hearing, CFPB Director Cordray stated, "Our rules would apply to third-party debt collectors and others covered by the Fair Debt Collection Practices Act. . . . As part of our overhaul, we also plan to address first-party debt collectors soon, but on a separate track." In the Outline (at p. 4), the Bureau said that the rulemaking would be limited to "debt collectors" as defined in the Fair Debt Collection Practices Act ("FDCPA"). So, the Bureau, in effect, has bifurcated its consideration of additional regulation of "traditional" debt collectors and debt buyers and its consideration of new and perhaps novel regulation covering collection of debt or accounts in ordinary two-party transactions.

¹ 78 Fed. Reg. 67,848 (Nov. 12, 2013).

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HAS THE CFPB ISSUED A PROPOSED RULE?

The Outline is *not* a proposed rule under the Administrative Procedure Act. The Outline represents the next step in an overall agency administrative proceeding that began almost three years ago. The SBREFA Panel is required to issue a report within 60 days of convening, and the Bureau is required to consider the SBREFA Panel's report in developing a proposed rule. It can be expected that within about three months from the completion of the SBREFA Panel report, the Bureau will issue a proposed rule for comment under the Administrative Procedure Act. Starting with this assumed timeline, a reasonable forecast for conclusion of the comment period on the proposed rule would be the second quarter of 2017, with a final rule to follow sometime in 2017. It is virtually certain that a final rule will require significant systems, documentation and process changes for both creditors referring debt for collection or legal action and parties handling debt collection, including collection agencies and law firms. The CFPB in previous rulemakings commonly has considered administrative, operational and technological challenges arising from its new rules. It follows that an effective date for a final rule very well could be set for the early part of 2018.

The velocity of the Bureau's consideration of regulation of first-party debt collection is not known at this time, but bears careful watching. Obviously, an agency initiative that would affect virtually every entity providing credit or permitting deferral of payment of accounts has the potential to be much more far-reaching than one on third-party debt collection. Finally, it is worth noting that the sustained energy of regulators and consumer advocates directed at debt collection and debt buying reform means that the chance of the CFPB changing direction toward a less encompassing approach to regulation of third-party debt collection is slim.²

IS THE CFPB PLANNING TO RELY ON UDAAP TO EXPAND ITS FDCPA RULEMAKING AUTHORITY?

The CFPB has express authority to promulgate debt collection regulations under a long-established consumer protection law, the FDCPA, as well as Dodd-Frank Act authority to regulate unfair, deceptive or abusive acts or practices ("UDAAP") under Section 1031 of the Dodd-Frank Act. The ANPR suggested that the CFPB was considering regulating debt collection activities, particularly first-party collection of debt, under its UDAAP authority. It appears from the Outline and the Field Hearing that the Bureau is electing to consider new rules primarily under the FDCPA. However, per the Director's remarks at the Field Hearing and as evidenced in other actions of the agency, particularly enforcement actions against debt collectors, facts and circumstances giving rise to UDAAP concerns undoubtedly are influencing the Bureau's direction. Moreover, the Congressional findings and declaration of purpose section of the FDCPA refers to "abusive debt collection practices,"³ and the statute covers unfair practices in debt collection.⁴

² For example, the ANPR generated 23,500 comments. In this regard, the Bureau stated in the Outline that, for this SBREFA proposal, it considered these comments, engaged in extensive consultation with both industry and consumer stakeholders and conducted its own analysis. The Bureau's due diligence was reflected in its "[Study of Third-Party Debt Collection Operations](#)" (July 2016), issued concurrently with the Outline. The Outline also referred to the three major debt collection research projects the Bureau conducted in the time period leading up to the Outline.

³ Section 802, 15 USC § 1692.

⁴ Section 808, 15 USC § 1692f.

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WHAT ARE THE HIGHLIGHTS OF THE BUREAU'S OUTLINE?

The proposals in the Outline are wide-ranging. Topics covered for SBREFA Panel consideration include:

- data integrity;
- debt substantiation and validation;
- debt transfers, including initial transfer of accounts and subsequent debt sales (i.e., transfer of accounts from debt collector to debt collector);
- debtor contact frequency and communication methods;
- statutes of limitation and litigation procedures;
- validation notices and other consumer notices tied to consumer comprehension and consumer challenges of indebtedness;
- debt of decedents;
- collector-imposed charges and fees;
- use of technology in the process of assigning and collecting debts; and
- record keeping.

It can be said, again within a third-party debt collection and debt-buying framework, that the Outline represents a compilation of practically all significant concerns related to debt collection previously raised by federal government agencies (such as the Federal Trade Commission and the CFPB), state consumer protection and law enforcement agencies and consumer advocates. For instance, the CFPB cited in the materials alleged unlawful collection conduct remediated in settlements between industry participants and the agency.⁵ It is important to understand, however, the purpose of the Outline. The Outline is intended to present for consideration by the SBREFA Panel numerous elements of possible proposed regulations, together with potential impacts of these proposals on small businesses. Indeed, the CFPB's proposals for SBREFA Panel consideration are extensive. It is typically the case, however, that not all elements presented by the CFPB for consideration by a SBREFA Panel find their way into a proposed or final rule.

The Outline and related issuances covered several major themes:

- **Data Integrity and Substantiation.** The Outline addresses in some detail proof and procedural issues in debt collection, such as ensuring that creditors and debt collectors can substantiate the existence and terms of debts under collection. This would include assurance of data integrity and proper transmission of account documentation at the outset of the collection process, to be confirmed by careful document reviews and data-scrubbing routines to eliminate "unsubstantiated" consumer accounts. The Outline refers to "fundamental information" about a consumer and his or her indebtedness that must be extant and transferred to a debt

⁵ See also Fair Debt Collection Act: CFPB Annual Report 2016, http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf.

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collector or debt buyer to support lawful collection efforts.⁶ The Bureau explained that data integrity can be compromised when accounts are placed or sold from a creditor to a debt collector and to a subsequent debt collector thereafter. Accordingly, the CFPB designed the proposals to require debt collectors to validate claims of indebtedness in early communications with the consumers to a greater extent than currently required under the FDCPA. Debt collector review of information provided by the owner of the debt would be reviewed for “red flags” arising not just from individual accounts but entire transferred portfolios. Debt collectors and debt buyers would be required to ensure that critical account-level information, such as details of disputes, bankruptcies and payments, would be retained by the original owner of the debt and supplied to subsequent debt collectors.

- **Consumer Comprehension.** Under the aegis of “consumer understanding,” the CFPB clearly believes there is significant work to be done by way of regulation. The agency, in the Outline, sought to grant “control” over the debt collection process to the consumer, including the consumer’s ability to challenge his or her indebtedness at any time and temporarily stop collection activities. In the Outline, the CFPB presented for consideration a new series of mandatory disclosures to assist consumers in understanding and managing debt collection processes. The content of disclosures, outlined in detail in Appendices D & E to the Outline, would be meant to inform consumers about their rights, including the right to dispute claims. The Outline, in Appendix F, describes extensive information that would be needed in debt validation notices and provides a mandatory form of debt validation and dispute notice. This new form, as the law says today, would be required to be provided to every consumer subject to debt collection. The new form includes a “tear-off” portion for consumers to send back to the debt collector. The tear-off portion would include check-off boxes for the consumer to identify a dispute or indicate willingness to pay the debt, as well as the consumer’s election to require the debt collector to send him/her the name and address of the original creditor. The “validation and dispute” notice would need to be accompanied by a new “Statement of Rights,” the form and content of which are described and provided in Appendix G to the Outline. The Outline introduced a requirement that debt collectors make disclosures regarding future and potential litigation as well as statements as to whether the debt is time-barred or obsolete. The Bureau included in the proposals under consideration a ban on filing suit or threatening to file suit on time-barred debt.
- **Limitations on Communications and Means of Communication.** Perhaps the most pervasive criticism arising from the CFPB’s initiative to rein in debt collection is the frequency and content of debt collector communications with consumers. It is obvious that the CFPB, as well as other consumer-side stakeholders, believe that the current FDCPA protections are deficient. The Director cited in his Field Hearing remarks egregious examples of collection conduct – “calling at all hours of the day or night, threats of arrest or criminal prosecution, or threats of physical harm to consumers and even their pets.” In the Outline and at the Field Hearing, the CFPB cited debt collection as generating the highest number of consumer complaints to the agency, with a significant percentage of such complaints directed at collector contact; that is, consumer complaints that debt collectors too frequently contact consumers by telephone and otherwise engage in questionable behavior on telephone calls.⁷ In response, the CFPB’s proposal would significantly limit the number of times a debt collector would be permitted to contact a consumer in a given week, as well as where

⁶ Data elements making up “fundamental information” are listed in Appendix C to the Outline.

⁷ See, e.g., Outline at p. 22.

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a debt collector may contact a consumer. The CFPB stated that consumers should have the right to stop collectors from using specific channels to contact them by permitting consumers to block collectors from calling on a particular phone line (such as a work phone or even a cellphone). The Outline recognized that today's technology for contacting consumers, such as email, text messaging and cellular telephones, did not exist when the FDCPA was enacted 40 years ago. But the Outline seemed to focus on the perils of such technology (citing to the Telephone Consumer Protection Act's limitations on cellphone contacts and use of predictive dialers) and the cost to consumers arising from contact by cellphones, email and text messaging. On a promising note, the CFPB said it is considering a bright-line test for solving the case law conundrum brought on by the *Foti* line of cases, not just for telephone calls but for emails and text messages as well.⁸

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Technically, in the absence of a proposed debt collection rule at this time, it may seem early in the Administrative Procedure Act process. With the introduction of the Outline, however, the initiatives of the Bureau to "overhaul" debt collection are gaining steam. For example, it is clear that the Bureau carefully studied and extensively incorporated into the Outline its findings from previous studies, comments on the ANPR and stakeholder input. These efforts in effect form a strong administrative record, as a practical matter reducing the need of the Bureau to conduct significant fact-gathering and additional research in connection with an actual proposed rule. If past is prologue, many (but not all) of the reforms put forth in the Outline for SBREFA consideration will find their way into the proposed rule. Affected parties are well served to study the Outline and monitor the SBREFA Panel process to prepare for the issuance of a proposed rule in the coming months.

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⁸ *Foti v. NCO Financial Systems*, 424 F.Supp. 643 (S.D.N.Y. 2006).

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