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Change Order: The CFPB Previews Its Proposed FDCPA Regulations

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The Consumer Financial Protection Bureau (“CFPB”) recently took the next step toward promulgating regulations under the Fair Debt Collection Practices Act (“FDCPA”) by releasing its “Outline of Proposals under Consideration and Alternatives Considered” (the “Outline”). The Outline sheds light on the approach the CFPB may take in regulating the debt-collection industry. As detailed below, the proposed approach would implement comprehensive and substantial changes.

Background

The FDCPA governs the ways in which third-party debt collectors may collect debts owed to or purchased from others. The purpose of the statute is to curb what Congress perceived as unfair and abusive debt collection tactics that were prevalent when the statute was passed in the 1970s. As originally enacted, the FDCPA (unlike other federal consumer credit laws) did not authorize the agency then charged with enforcing it—the Federal Trade Commission (“FTC”)—to promulgate binding, interpretive regulations. Thus, courts have not had to defer to FTC statements regarding the FDCPA as they might to interpretations of statutes by agencies charged with promulgating regulations under those statutes.

Federal district courts and courts of appeals, but not the U.S. Supreme Court, have had frequent occasion to interpret the various provisions of the FDCPA during its nearly forty-year history. As a result, at times courts in different jurisdictions have reached differing interpretations of the same provision of the Act. Businesses subject to the FDCPA—including financial services institutions that might constitute a covered “debt collector” only part of the time—had to grapple with a patchwork legal landscape.¹

In 2010, however, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act² (the “Dodd-Frank Act”), which created the CFPB and transferred enforcement of the FDCPA from the FTC to the CFPB. Significantly, the Dodd-Frank Act also authorized the CFPB to promulgate binding, interpretive debt collection regulations.³ The CFPB took the first step in exercising that authority by issuing an Advanced Notice of Proposed Rulemaking in November 2013.⁴ The CFPB’s July 28, 2016 Outline is the next step in the process, a precursor to a formal Proposed Rule and an official

¹ The scope of the FDCPA is limited by its definition of “debt collector,” which contains several exclusions and exceptions, one of which carves out a debt that was not in default at the time the person seeking to collect it obtained the right to do so. See 15 U.S.C. § 1692a(6).

² Pub. L. No. 111-203, 124 Stat. 1376 (2010).

³ 15 U.S.C. § 1692(d).

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

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notice-and-comment period.⁵

The CFPB's Outline

In the Outline, the CFPB posits that “differing court decisions or decisions in different jurisdictions have created some splits in the FDCPA’s interpretation,” and concludes that “[t]hese decisions can create uncertainty for consumers and industry alike.”⁶ The CFPB also notes that changes in business practices and technology have overtaken both the FDCPA and courts, creating “uncertainty” that the CFPB plans to “decrease” through its rulemaking.⁷ And, the Outline suggests that the CFPB intends its regulations to have widespread effect. Not only does the CFPB state that it “is considering proposals to address many aspects of the debt collection lifecycle,”⁸ the Outline also indicates that the CFPB is considering exercising its general rulemaking authority (to regulate unfair, deceptive, and abusive acts and practices in consumer financial products and services) to reach entities that engage in debt collection practices that are not covered by the FDCPA, such as creditors that collect the debt they originate.⁹

Although far from a complete overview of the CFPB’s forthcoming proposed regulations, the Outline nevertheless highlights areas within the debt-collection industry that the CFPB views as requiring regulation. For instance, the Outline devotes considerable attention to issues arising from inaccurate information concerning consumer debt. These issues include the exchange of incorrect or incomplete information during the sale of debt or servicing rights as well as the disclosure of incorrect information to borrowers.¹⁰ To combat these perceived problems, the Outline suggests potential solutions such as (1) imposing obligations to transfer complete data regarding a debt (regardless of the technical issues and costs associated with such transfers) and to substantiate debt-related data, and (2) mandating a form of validation-of-debt notice.

The Outline also focuses on increasing consumer understanding of the rights and restrictions of debt collectors. In particular, the CFPB is weighing possible mandatory disclosures regarding litigation and credit reporting, including disclosures concerning debt for which collection efforts may be barred by an applicable statute of limitations.¹¹ Other areas covered by the Outline include communication practices (such as the frequency of

⁵ Just days later, on August 4, 2016, the CFPB further exercised its authority to interpret and enforce the FDCPA under the Dodd-Frank Act. Specifically, in conjunction with the promulgation of its Final Rule: Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), the CFPB issued an advisory ruling creating certain safe harbors from liability under the FDCPA’s prohibition against communicating with borrowers who have submitted valid cease-communication requests, see 15 U.S.C. § 1699c(c), for communications made in compliance with the new rule. See Bur. of Consumer Fin. Prot., Safe Harbors from Liability under the Fair Debt Collection Practices Act for Certain Actions Taken in Compliance with Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z),

http://www.consumerfinance.gov/documents/811/20160804_cfpb_Bureau_Interpretations_Safe_Harbors_from_Liability_under_FDCPA.pdf. For more on K&L Gates’s coverage of the Mortgage Servicing Rules, click [here](#).

⁶ Outline at 2.

⁷ *Id.* at 3.

⁸ *Id.* at 4.

⁹ See *id.* at 3; see also 12 U.S.C. § 5531.

¹⁰ See Outline at 5-18.

¹¹ See *id.* at 18-22.

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communications, time-and-place restrictions, and issues arising from leaving voicemails), the role of consumer consent in debt collection, restrictions on the types of entities to which businesses may sell debt, and the keeping of debt collection business records.

Conclusion

It remains to be seen how the CFPB's issuance of the Outline will influence the Proposed Rule to follow. The Outline suggests that the CFPB intends to cast a wide net, perhaps even broader than the FDCPA itself. And, if the CFPB's prior rulemaking is any indication of future efforts, the Proposed Rule will likely be substantial, covering nuanced aspects of debt collection subject to the FDCPA but not discussed in the Outline.

To be sure, a uniform approach to federal debt collection restrictions and requirements may help the debt-collection industry by setting a more consistent baseline across jurisdictions for the application of the FDCPA. Yet, an attempt to over regulate the industry, which remains subject to various state and local laws, including state consumer protection laws, may erase any such benefit.

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