

# CFPB Releases FDCPA Rule Outline; Creditor Collection Rule to Come

July 29, 2016

On July 28, 2016, the Consumer Financial Protection Bureau (CFPB) released an [outline](#) of its proposed debt collection rulemaking (Outline). The Outline summarizes proposed Fair Debt Collection Practices Act (FDCPA) regulations that are under consideration.

The CFPB intends to release another outline regarding proposed regulations for creditors and others who collect debt, yet are not regulated by the FDCPA, pursuant to the agency's general authority to prohibit unfair, deceptive, and abusive acts and practices.

The CFPB published the Outline as part of the Small Business Regulatory Enforcement Act process, during which various stakeholders will have the opportunity to provide input on the proposed rule's economic impact before proposed regulations are released.

Based on the Outline, we believe the CFPB intends to establish new debt substantiation requirements, provide clarification on collection communication practices, and increase the number of consumer disclosures. Although the Outline pertains to debt collectors, we also believe that many proposals under consideration will directly affect creditors and also provide insight into the CFPB's creditor summary that is expected in the next few months. We will closely monitor the CFPB's debt collection rulemaking process and publish additional alerts on the developments.

## Information Integrity

The CFPB has made information integrity a key component of the Outline. Citing consumer complaint data, the CFPB believes debt collectors attempt to recover payments either from the wrong consumer or in the wrong amount. To address these concerns, the CFPB is considering a requirement for a debt collector to "substantiate," or possess a reasonable basis, for any claim that a consumer owes a debt. A debt collector may demonstrate a reasonable basis for its claims through a combination of:

- Documenting the presence of specific "fundamental" information;
- Confirming that certain "warning signs" indicating inaccuracies or inadequacies are not present; and
- Obtaining a representation from the debt seller that it has adopted and implemented reasonable written policies and procedures to ensure the accuracy of the transferred information and that the transferred information is identical to the information in the debt seller's records.

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The CFPB acknowledges that permitting debt collectors to rely on creditor representations regarding the accuracy of the data provided by the creditor is, in part, designed to address attempts by creditors to shift liability regarding information integrity to the debt collector. As a result, this proposal would likely impose additional liability on the creditor hiring, or selling debts to, the debt collector if the account data is inaccurate.

The CFPB's proposed list of fundamental information includes basic information about the consumer and the debt, but also includes more detailed information such as: (a) information relating to every charge for interest and fees imposed after default, along with the contractual or statutory source for such interest or fees; and (b) the complete chain of title from the debt owner at the time of default to the collector. While a debt collector could substitute alternative information for items included in the above list, the debt collector would bear the burden of justifying such substitutions. Such a rule, particularly the requirement to identify the contractual or statutory authority for each fee, would require an in-depth due diligence review by all debt collectors prior to commencing any collection activities.

**McGlinchey Insight**

Requiring a debt collector to document the contractual or statutory source for interest and fees after default is a significant development that will affect creditors, servicers, and debt collectors. This proposal may require changes to servicing agreements, due diligence processes, and development of loan-level reviews by collectors. Even if this proposal does not appear in the companion creditor outline, it is likely to impact contractual responsibilities as to data furnishing, legal compliance obligations, and repurchase obligations between creditors, servicers, debt buyers, and collection agencies.

A debt collector that discovers warning signs would need to take additional steps to verify the account data before it would have a reasonable basis to assert its claims. The Outline proposes steps that include obtaining and reviewing additional information from the creditor or obtaining and reviewing data from other sources (such as skip tracers). The list of "warning signs" provided by the CFPB includes information that would be expected to indicate data inaccuracies or inadequacies, such as a significant percentage of the accounts having missing or implausible information or having unresolved disputes.

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This ongoing information integrity requirement is likely to require a creditor to have a continuing obligation to respond to a debt buyer or debt collector's requests for information after a debt is sold or assigned for collection.

The CFPB is also considering a rule that would impose data verification requirements when a consumer disputes any aspect of a debt, orally or in writing. Debt collectors would need to obtain or review certain data before continuing with collection activity, and the Outline includes information that would be deemed "responsive" to

different types of disputes. The CFPB may tailor its proposal to address how debt collectors should respond to written disputes, duplicative disputes, and oral disputes.

## Data Forwarding

The CFPB is also considering a rule that certain information provided by the consumer in the course of collections with one collector must be passed to and reviewed by any future collectors. This aspect of the Outline contains two elements.

First, debt collectors would need to obtain and review information arising from prior collection activity that would impact its obligations to comply with the FDCPA and other federal consumer protection laws, or to facilitate debt collector behavior that would be beneficial to consumers. The information may include whether the debt was disputed; knowledge that the consumer stated that any time, place, or method of communication was inconvenient; whether the debt collector has provided the time-barred debt disclosure; or whether a borrower is an active duty servicemember.

Second, debt collectors would need to forward certain information received from consumers after the debt was placed elsewhere or returned to the creditor. The CFPB is considering a rule to require the following be forwarded: (a) payments by the consumer; (b) bankruptcy discharge notices; (c) identity theft reports; (d) disputes; and (e) any assertion or implication by the consumer that his or her income and assets are exempt under federal or state laws from a judgment creditor seeking garnishment.

This rule would require adjustments to a debt collector's formal record of the debt, even after the debt was returned or sold. As a result, the costs associated with collecting a debt are likely to increase due to the need to maintain an ongoing relationship with a creditor. Further, debt collectors are likely to face a practical compliance challenge because they will not know which entity is acting as the new collection agency or who has purchased the account.

## Communication Practices

One of the largest areas of focus in the Outline is collectors' communication practices. According to the CFPB, communication practices are often the subject of consumer complaints and lawsuits, in part because the FDCPA's provisions are vague and at some points seemingly inconsistent, and both the court system and the debt collection industry have struggled to identify rules and boundaries related to communications. The CFPB is considering some bright-line rules.

For example, the CFPB observes that consumers may feel frustrated and harassed by the number of contacts made by collectors, who often do not leave messages due to the FDCPA prohibitions against revealing information about the debt to third parties, absent consumer consent. To address this dilemma, the CFPB is proposing a safe harbor rule allowing collectors to leave "limited-content messages" for consumers. Under this rule, no FDCPA "communication" would occur if the collector left a message which included only (1) the individual debt collector's name, (2) the consumer's name, and (3) a toll-free call-back number. If the consumer

returned the call, the debt collector would then be required to identify himself as a collector and make the appropriate warnings.

The CFPB is also considering “contact caps” for the number of calls or other contacts made to consumers and to third parties to obtain location information, to clarify when the volume of contacts rises to the level of harassment. In doing so, the CFPB states it is attempting to balance a consumer’s interest in not being harassed with a collector’s need to make actual contact with the consumer for the purposes of collection. Under the proposed rule, the number of allowed calls or contacts would decrease once the collector actually communicated with the consumer who acknowledged his or her identity and confirmed their contact information (confirmed consumer contact). The “confirmed consumer contact” status of an account would pass from collector to collector. The CFPB is considering whether to set hard contact caps or allow some flexibility based on the collector’s specific interactions with a consumer.

However, the proposed rule may include a cap of 3 attempts per unique telephone number (or email address or other contact point) per week, or 6 total attempts per week, where the collector does not have confirmed consumer contact; and 2 attempts per unique contact point, or 3 total attempts, plus 1 live communication per week where the collector does have confirmed consumer contact. Significantly, the proposal would not allow any contacts with third parties for purposes of obtaining location information where the collector has confirmed consumer contact. Where the collector does not have confirmed consumer contact, the CFPB would impose a cap similar to the consumer cap for each third party.

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The consumer protection concerns cited by the CFPB are likely to apply equally to creditors, so similar call volume caps are likely to appear in the companion creditor summary. Current state law restrictions on how often creditors and collectors may call would also need to be considered before implementing an updated call campaign strategy.

The CFPB has also proposed establishing certain locations that would be per se “inconvenient” places for a consumer to receive collection calls or contacts, including hospitals, places of worship, funeral homes, cemeteries, and childcare facilities. The rule would make it easier for consumers to terminate collection calls by indicating their presence at one of these locations, and would place the burden on collectors to avoid inconvenient contacts based on information provided by the individual consumer. The CFPB is also considering including active duty zones for military servicemembers as presumptively inconvenient, while recognizing that servicemembers may benefit from receiving communications regarding the status of their debts.

Notably, the CFPB states it does not intend to include the consumer’s place of employment as a presumptively inconvenient location, as that could severely limit a collector’s ability to communicate with the consumer. However, the CFPB is considering prohibiting collectors from contacting consumers through their work email address based on privacy concerns, unless the consumer authorized use of the account.

The Outline describes a method for collectors to determine which time zone should be used for purposes of establishing convenient call times where the collector has conflicting information about a consumer’s location. In those cases, the collector should assume a call time is inconvenient if it would be inconvenient in all time

zones where the consumer may be located. The proposal may also establish convenient times for using email and other technologies to contact a consumer. The CFPB is considering a rule that the time of sending the message, not the time when the consumer receives or opens it, is determinative.

The CFPB is also considering a requirement that collectors cause a working, inbound toll-free number to display on consumers' caller ID to avoid the harms caused by caller ID blocking or falsification. The rule may also require this information to appear in emails and other types of communications.

Finally, the CFPB is considering imposing a 30-day waiting period for collectors to contact a decedent debtor's surviving family members, and may broaden the definition of "consumer" to include personal representatives.

#### **McGlinchey Insight**

Many of the communication practices proposals would address practical compliance challenges faced by creditors and debt collectors alike. For example, the proposal under consideration would alleviate the need for collectors to use a lengthy "Foti" message.

## **Convenience Fee Prohibition**

The CFPB is also considering a rule to identify specific acts and practices that would violate the FDCPA. Among others, the CFPB is considering a ban on all payment method convenience fees (also referred to as expedited payment fees or speed pay fees) collected directly or indirectly by the debt collector unless: (1) state law expressly permits them; or (2) the consumer expressly agreed to them in the contract creating the underlying debt, and state law neither expressly permits or prohibits the fees. This particular proposal is significant because it would functionally prohibit the assessment of convenience fees by debt collectors even in states where the fees are not prohibited due to the general absence of statutes expressly naming and authorizing convenience fees.

#### **McGlinchey Insight**

The CFPB's stance on convenience fees may foreshadow a similar prohibition in the companion proposal being considered for creditor collection practices. If the CFPB takes the same approach for creditors, it could dramatically impact the permissibility of these fees in the future.

## **Debt Validation**

The CFPB is considering revisions to the debt validation notice that would add information about the consumer's right to dispute the debt. The CFPB is concerned the current debt validation requirement is insufficient and does not adequately explain the consumer's rights under the FDCPA. Testing indicates that consumers cannot determine whether the debt is theirs and if so, whether the amount stated is correct. In addition to adding content to the debt validation notice, the CFPB is considering a rule that would require debt collectors to supplement the validation notice with a "tear off" so the consumer can easily exercise his or her right to dispute

the debt. The CFPB is also concerned that consumers are not aware of their rights under the FDCPA. The Outline discusses a proposal that would require debt collectors to provide consumers with a new Statement of Rights with the debt validation notice. The CFPB has prepared model forms for both communications.

**McGlinchey Insight**

Although a requirement to provide a debt validation notice should not appear in the creditor's rulemaking, the CFPB may consider a similar model statement of consumer rights for creditors to address consumer complaints.

The CFPB is also concerned that consumers with limited English proficiency have difficulty understanding the debt validation notice because it is often only provided in English. To address this issue, the CFPB is considering a rule that would require collectors to send a translated version of the validation notice and Statement of Rights if that collector's initial communication with the consumer was predominately in a language other than English or the collector received information from the creditor or a prior collector indicating the consumer prefers to communicate in a language other than English. The Outline includes an alternative proposal that would require the debt collector to provide a Spanish translation with every validation notice and Statement of Rights. The CFPB is seeking input on both options from small-entity representatives, but the Outline indicates that debt collectors will need to provide some version of a foreign language translation.

The CFPB is also considering a proposal that would prohibit debt collectors from furnishing information to consumer reporting agencies before the validation notice is sent. The CFPB is concerned that some debt collectors believe it is too expensive to communicate with a consumer, and instead simply furnish negative information as a passive collection tactic. To stop this practice, the CFPB is evaluating a rule that would require a collection agency to communicate directly about the debt to the consumer before furnishing information to a consumer reporting agency.

**McGlinchey Insight**

The Outline suggests this communication could be included in the validation notice, but it is unclear if debt collectors would be expected to also wait for the corresponding 30-day validation period to pass before furnishing information to credit reporting agencies.

## Litigation Disclosure

The CFPB suggests that many debt collection lawsuits result in a default judgment because consumers are not familiar with the judicial process or the consequences of not defending a lawsuit, and do not know where to find an affordable attorney. To reduce this risk, the CFPB is considering a rule that would require debt collectors to provide consumers with an additional litigation disclosure. The CFPB does not plan to provide a model disclosure, but would expect a debt collector to state its intent to sue, that a court could rule against the consumer if he or she fails to defend the lawsuit, and that additional information about litigation and legal services programs is available from the CFPB. In contrast with other rulemakings that require the regulated entity to directly provide information about available legal services programs, the CFPB would maintain the website and toll-free phone

number with this information. This disclosure would need to be included in all written and oral communications in which the collector represents, expressly or by implication, that the collector intends to sue.

**McGlinchey Insight**

The Outline indicates this litigation disclosure would be required with any communication containing an implicit intent to sue. Many creditors and collection agencies state they may pursue all legal remedies available, without specifically mentioning the possibility of a lawsuit. The CFPB's proposal under consideration would likely treat these communications as an implicit intent to sue and therefore require the litigation disclosure.

## Time-Barred Debt and Obsolete Debt

All states have statutes of limitation that limit the time within which a debt owner, or a collector acting on behalf of the debt owner, can sue to collect a debt. However, in most states, a consumer must defend the lawsuit and raise the statute of limitations as a defense in order to take advantage of the time limit. If the consumer does not raise the defense, the collector can still obtain judgment on the time-barred debt. Further, in many states the statute of limitations will be "revived," or restart, if the consumer makes a partial payment on the debt or acknowledges that the debt is owed, which may enable the collector to sue when it otherwise could not.

The CFPB is concerned that consumers do not understand that collectors are limited in how long they can sue to collect a debt, do not know when their own debts are time-barred, and do not understand the consequences of making payments on or acknowledging time-barred debt. Similarly, consumers may not understand that certain debts fall off of their credit reports (obsolete debt) after a certain time period, or notice when this has occurred. As such, consumers may feel pressured by collectors to pay debts which they would not pay, including debts not legitimately owed, if they understood the consequences of time-barred or obsolete debt.

The CFPB is considering a proposal to require collectors to provide a disclosure describing the consequences of time-barred debt in the validation notice or first oral communication when seeking to collect time-barred debt, and at subsequent additional intervals. The proposal may or may not require collectors to determine if a debt is in fact time-barred. However, once a debt collector provided the time-barred disclosure with respect to a certain debt, it would be binding on downstream collectors, who would be required to also provide the disclosure. The CFPB is considering a similar disclosure for obsolete debts. Further, the proposed rule may prohibit a collector from accepting payments on time-barred or obsolete debt unless the consumer acknowledges receipt of these disclosures. Finally, the CFPB is considering a rule that would force collectors to waive their right to sue on an otherwise time-barred debt in order to accept payments.

**McGlinchey Insight**

The CFPB's proposal on time-barred debt would effectively prohibit collectors from taking advantage of state laws that allow revival of the statute of limitations based on partial payment or acknowledgment of

the debt. Notably, the CFPB states it considered and rejected alternate proposals which would place an outright ban on the sale or collection of time-barred debt, citing possible harm to consumers if collectors were incentivized to file lawsuits within the limitations period.

## Communication Consent

Section 805 of the FDCPA prohibits debt collectors from engaging in certain communications with consumers or third parties, unless the consumer has given consent directly to the collector. The FDCPA has always included this “direct contact” standard, but the CFPB is considering a proposal to clarify that consent must be given to each debt collector. For example, a creditor who obtains consent to communicate with a consumer before 8:00 a.m. or after 9:00 p.m. cannot convey or assign this consent to the debt collector. Each subsequent debt collector would need to obtain a new consent to waive FDCPA communication restrictions.

### McGlinchey Insight

The Outline suggests that a carefully crafted Section 805 consent that extends to subsequent debt collectors will have no force in the future. The CFPB is also considering a rule to allow consumers the right to revoke this consent at any time, but the Outline does not address how consent can be revoked. The issue of how consent can be revoked was left unresolved and therefore may be tested through litigation if not addressed in the proposed rule.

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