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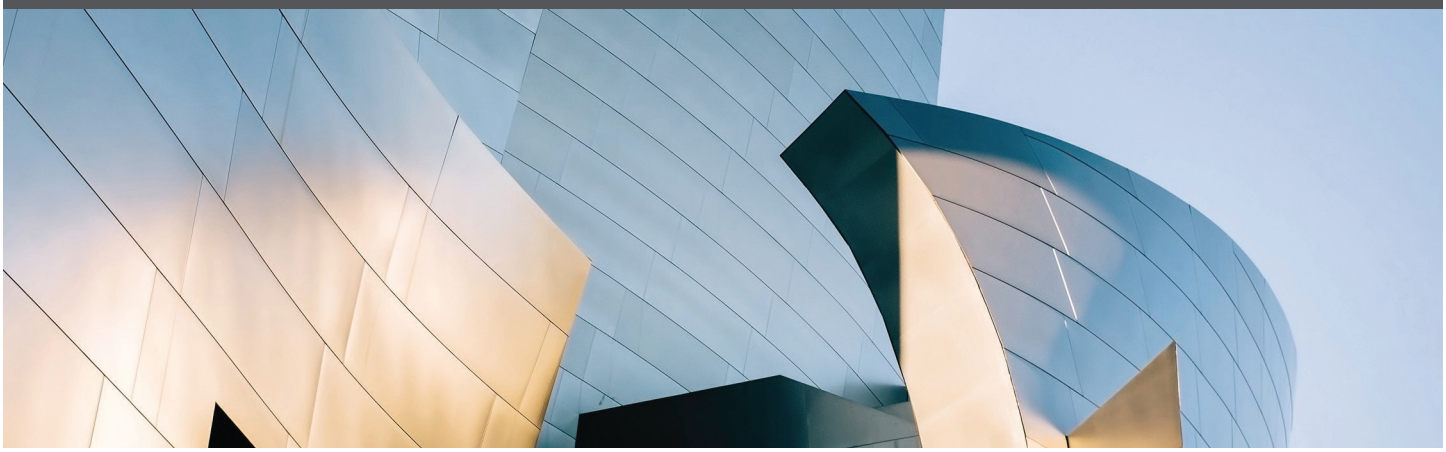
## Consumer Finance Litigation



MAY 2019 • NO. 5

# CFPB Proposes Regulations to Clarify, Modernize, and Implement the Fair Debt Collection Practices Act

*Financial institutions and debt collectors should take note of, and provide comments on, the CFPB's recent Notice of Proposed Rulemaking, which attempts to provide consumers with "clear protections against harassment by debt collectors and straightforward options to address or dispute debts."*

On May 7, 2019, the Consumer Financial Protection Bureau ("CFPB") released its long-awaited Notice of Proposed Rulemaking ("NPRM"), aiming to clarify and modernize the Fair Debt Collections Practices Act ("FDCPA"). The over 500-page NPRM marks the CFPB's latest half-decade long effort to issue the first set of substantive rules interpreting the FDCPA since its passage in 1977.

## BACKGROUND

Seeking to curb abuses in the debt collection industry, Congress enacted the FDCPA in 1977. However, with the passage of time and the creation of new technologies, ambiguities and uncertainties in the industry developed. Without any federal agency delegated authority to write substantive rules interpreting the FDCPA, the courts were left with the sole burden of doing so. That changed in 2010, when Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") delegating authority to the CFPB.

Citing the ongoing and abundance of consumer complaints, as well as the need to adapt the FDCPA for modern technologies, the CFPB called for public input on potential new regulations in 2013, and again in 2016, releasing an outline of proposals under consideration. This week's NPRM incorporates many of those ideas with some adjustments. The NPRM will be open for 90 days for public comment following its publication in the *Federal Register*.

## SUMMARY OF NEW RULES

With the stated goal of providing "clear rules of the road where consumers know their rights and debt collectors know their limitations," the CFPB's proposed rules would:

- **Limit the number of call attempts and telephone conversations allowed**: The proposed rule limits debt collectors to *no more than seven telephonic attempts per week* to reach a consumer about a specific debt. Once a telephone conversation between the debt collector and consumer takes place, the debt collector must wait at least a week before calling the consumer again.

- **Provide clarity on how debt collectors may use technology to communicate with consumers:** The proposed rule clarifies how collectors may use technologies developed after the FDCPA was enacted, such as voicemails, emails and text messages, to communicate with consumers. Further, the proposed rule provides protections for consumers seeking to opt out of such communications by, among other things, allowing them to unsubscribe from future communications through these methods.

- **Require specific disclosures to help consumers identify debts and understand their options:** The proposed rule clarifies how collectors may provide required disclosures electronically. Further, debt collectors would be required

to provide consumers a disclosure containing certain information about the debt and related consumer protections, which would include, for example, an itemization of the debt and plain-language information about how a consumer may respond to a collection attempt, including by disputing the debt. Additionally, the proposal requires the disclosure to include a "tear-off" that consumers can send back to the debt collector to respond to the collection attempt.

- **Require communication before credit reporting:** The proposed rule also prohibits debt collectors from furnishing information about a debt to a credit reporting agency unless the debt collector has communicated about the debt to the consumer by, for example, sending the consumer a letter.

- **Address the friction between leaving messages with mandatory information and the prohibition against third-party disclosures:** Under the *Foti* line of cases, a voicemail message from a debt collector must contain certain information, also known as the "mini-Miranda." However, because the message must include information about a consumer's debt, leaving messages with the mini-Miranda could lead to liability if a third party were to overhear the message.[1] The proposed rule provides that no information regarding a debt is conveyed—and no FDCPA "communication" occurs—when debt 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 debt collector.

## CONCLUSION—IMPACT ON THE INDUSTRY

The NPRM is the culmination of the CFPB's ongoing efforts to provide regulatory guidance and fill the void left by Congress' failure to update the FDCPA to account for the technological innovations that have taken place in the last 40 years. This NPRM is a step in the right direction to provide clarity to an antiquated statute. By emphasizing the use of modern technology and how that technology interplays with the FDCPA, debt collectors should have more comfort in acting. However, many questions still exist and need to be reviewed further during the comment period. Specifically:

- What effect will the proposed change from "least sophisticated consumer" to "unsophisticated consumer" have, and will "unsophisticated" be defined or left to judicial interpretation?

- While the proposed regulations spell out how debt collectors can contact consumers using text messages, voicemail, and e-mails, they leave open questions regarding the interplay with the E-Sign Act, the Telephone Consumer Protection Act, and the potential adoption of adaptive signaling technology.

- The NPRM does not propose a cap on the volume of e-mails or texts a debt collector can send to a consumer. Does this mean an unlimited number is permissible?

- What account level information will debt collectors need to analyze and integrate to determine warning signs that may raise questions as to the adequacy or accuracy of information?

- How will material inconsistencies between the CFPB's proposed rules and state/municipal requirements be resolved?

While many concerns remain, and the FDCPA is still imperfect, the NPRM appears to be a positive development for the credit and accounts receivable management industry and consumers alike.

*Mr. Streibich would like to thank Diana M. Eng, Jonathan M. Robbin, Nicole R. Topper, Scott E. Wortman, and Paul Messina Jr. for their assistance in developing this alert.*

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See footnote on the following page

1. In ***Foti v. NCO Financial Systems, Inc.***, 424 F.Supp.2d 643 (S.D.N.Y.2006), the court held that a prerecorded voice message that did not specifically reference a debt still constituted a communication under the FDCPA, while rejecting the argument that defendant was presented with a "Hobson's Choice" of complying either with the disclosure requirements or the prohibition on third party communications. ***See also Gryzbowski v. I.C. Sys., Inc.***, 691 F. Supp. 2d 618 (M.D. Pa. 2010) (Collector violated the FDCPA when it called and left messages on the debtor's cellular phone without identifying itself as a debt collector); ***Edwards v. Niagara Credit Sols., Inc.***, 586 F. Supp. 2d 1346 (N.D. Ga. 2008), aff'd on other grounds, 584 F.3d 1350 (11th Cir. 2009) (debt collector's messages constituted "communications" subject to FDCPA); ***Berg v. Merchants Ass'n Collection Div., Inc.***, 586 F. Supp. 2d 1336, 1344 (S.D. Fla. 2008) (The court is aware that this ruling will make it difficult, though perhaps not impossible, for debt collectors to comply with all of §§ 1692c(b), 1692d(6), and 1692e(11) at once in a message left on the consumer's voicemail. However, we follow reasoning similar to ***Foti*** to find no reason that a debt collector has an entitlement to use this particular method of communication.).

Endnotes