

Consumer Financial Protection Bureau Releases Rules for Comprehensive Reform of Debt Collection Industry

June 3, 2019

On May 7, the Consumer Financial Protection Bureau (“CFPB” or the “Bureau”) released a Notice of Proposed Rulemaking (“NPRM” or “Notice”) to increase regulation of the debt collection industry.¹ The much-anticipated Notice is the outgrowth of the CFPB’s 2016 Outline of Proposals (the “Outline” or the “2016 Outline”), which was a cornerstone of the Obama Administration’s efforts to protect consumers and overhaul all aspects of consumer finance (see our August 10, 2016 client alert on the Outline [here](#)). One presidential election and two CFPB Directors later, CFPB Director Kathleen

**Debevoise
& Plimpton**

Kraninger announced a more limited plan to put in place substantial protections, but which rejects some of the 2016 Outline’s more ambitious proposals. The NPRM would overhaul the industry by, for example, requiring that debt collectors make no more than seven attempts by telephone per week to reach consumers about specific debts, and allow debtors to opt out of allowing collectors to contact them via e-mail, text messages, or other media. However, the proposal fails to address many of the Outline’s calls for increased regulation of substantiation of debt, decedent debt, and transfer of information to subsequent collectors (among other things).

Parties have until August 19, 2019, to submit comments to the Bureau. The rule will take effect one year from the date that the final rule is published in the Federal Register, likely to occur no earlier than fall 2020.

In this client update, we provide an overview of the Bureau’s debt collection actions to date, the main topics addressed by the Notice and how these requirements differ from the 2016 Outline. We also discuss key insights, including with respect to changes in compliance obligations.

¹ Proposed Rule, Debt Collection Practices (Regulation F), 12 Fed. Reg. Vol. 84, 23274 (proposed May 7, 2019) (to be codified at 12 C.F.R. pt. 1006).

BACKGROUND

The NPRM is the culmination of a six-year-long effort by the CFPB to enact additional rules governing the debt collection industry. In 2013, the Bureau stated that it intended to use its authority under Dodd-Frank and the Fair Debt Collection Practices Act (“FDCPA”) to promulgate rules that would cover not only activity by third-party collectors (currently covered by the FDCPA), but also the conduct of first and third-party collectors falling under the Bureau’s authority to prohibit unfair, deceptive, and abusive acts and practices (“UDAAPs”).

In November 2013, the CFPB issued an Advance Notice of Proposed Rulemaking (“ANPR”), announcing that the CFPB intended to closely monitor the debt collection industry’s practices to determine whether additional regulation was warranted. In the ANPR, the Bureau requested information on a wide range of debt collection activities to assist it in considering which practices would be suitable for further regulation.

After the ANPR’s release, the Bureau received and studied thousands of consumer complaints and began field hearings to consider industry views of the market. The CFPB also conducted a broad industry review on the practices of debt collectors of different sizes for the purpose of better understanding the operational costs of debt collection firms and the potential burdens of implementing any new rules. In connection with the Outline, the CFPB released its report on the nature of the debt collection business, describing the technological and operational systems by which debt collection firms operate.² In addition, the Bureau brought over 25 debt collection enforcement actions from 2013 to 2016, many of which addressed the same issues that the Bureau raised in its Outline. Then-Director Richard Cordray hoped the new rule would “drastically overhaul the debt collection market.”

As discussed, in July 2016, the CFPB released its Outline of proposals to regulate the debt collection industry (see our August 10, 2016 client alert on the Outline [here](#)). Four months later, Donald Trump was elected President. Despite President Trump’s election, Director Cordray remained at the helm of the CFPB until November 2017, and the Bureau pursued additional debt collection regulation until Cordray’s resignation. In January 2017, the CFPB released the results of a survey of consumers, which found that over one in four consumers had felt threatened by debt collectors. Over forty percent of consumers had asked collectors to stop contacting them and, of these consumers, three in four reported that the collectors did not honor their request to cease contact.

² CFPB Consumer Response Ann. Rep. Jan. 1 – Dec. 31, 2016 (Mar. 2017).

Meanwhile, more than half of consumers reported that at least one collection effort was mistaken in some way.³

In June 2017, Director Cordray announced that the Bureau would proceed with a proposed rule on disclosures and treatment of consumers by debt collectors,⁴ a plan that the Bureau echoed in July when it announced that it would issue a proposed debt collection rule later in 2017. In September 2017, some commentators thought that release of the rule was imminent.⁵

However, in November 2017, Richard Cordray stepped down as head of the CFPB, before any proposed rule was issued. Trump appointee Mick Mulvaney became Acting Director of the Bureau.

Acting Director Mulvaney immediately departed from the approach of his predecessor and took numerous steps to rein in the Bureau's actions.⁶ The number of enforcement actions dropped and rulemaking slowed. However, in October 2018, the Bureau announced that it would issue an NPRM in the spring of 2019.

In December 2018, Kathleen Kraninger became Director of the Bureau. In her first major speech as Director, Kraninger announced that the Bureau's proposed debt collection rules would:

[P]rotect consumers with clear, bright-line limits on the number of calls they may receive from debt collectors on a weekly basis. We will propose to provide clarity on how collectors may communicate via newer technology such as email or text messages. We will propose that collectors provide consumers with more and better information at the outset of collection to help them identify debts

³ See CFPB Survey Finds Over One-In-Four Consumers Contacted By Debt Collectors Feel Threatened (Jan. 12, 2017), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-survey-finds-over-one-four-consumers-contacted-debt-collectors-feel-threatened/>.

⁴ Richard Cordray, Prepared Remarks of CFPB Director Richard Cordray at the Consumer Advisory Board Meeting (June 8, 2017), available at <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-consumer-advisory-board-meeting-june-2017/>.

⁵ Alan S. Kaplinsky, Issuance of Part I of CFPB Debt Collection Rule is Imminent (Sept. 5, 2017), available at <https://www.consumerfinancemonitor.com/2017/09/05/issuance-of-part-i-of-cfpb-debt-collection-rule-is-imminent/>.

⁶ Nicholas Confessore, Mick Mulvaney's Master Class in Destroying a Bureaucracy from Within (Apr. 16, 2019), available at <https://www.nytimes.com/2019/04/16/magazine/consumer-financial-protection-bureau-trump.html?action=click&module=Top%20Stories&pgtype=Homepage>.

and understand their options, including their rights in disputing debts or paying them.⁷

In the time that the Bureau has been considering this rule, a number of states have issued comprehensive debt collection rules. For example, in December 2014, the New York Department of Financial Services (“NYDFS”) issued final regulations that bear similarities to the Outline. Similarly, California,⁸ Colorado,⁹ Maryland,¹⁰ and West Virginia¹¹ all updated or expanded their debt collection regimes over the last four years.¹²

KEY PROVISIONS AND CHANGES

The CFPB’s 2016 Outline covered three main areas of debt collection: (1) collection communication practices; (2) information integrity and substantiation of debts; and (3) other prohibited practices.¹³ Below, we discuss some of the NPRM’s proposals and how they differ from the Outline.

Collection Communication Practices

The FDCPA forbids repetitious harassing phone calls, threatening violence, making misrepresentations about the debt, calling certain locations or at times that collectors know are inconvenient, or disclosing the existence of the debts to unauthorized third parties. The NPRM reflects the Bureau’s interpretation of these prohibitions, providing additional context on the restrictions on various aspects of collectors’ communications with consumers.

- **Frequency.** The NPRM prohibits collectors from calling a borrower more than seven times within a seven-day period. However, no such explicit prohibition exists with respect to text message or e-mail communications. In contrast, the 2016 Outline would have limited collectors’ communications (and attempts) to six per

⁷ Kathleen L. Kraninger, Speech at the Bipartisan Policy Center by Kathleen L. Kraninger, Director, Consumer Financial Protection Bureau (Apr. 17, 2019), available at <https://www.consumerfinance.gov/about-us/newsroom/kathleen-kraninger-director-consumer-financial-protection-bureau-bipartisan-policy-center-speech/>.

⁸ 2018 Cal. Stat. 93.

⁹ 2017 Colo. Sess. Laws 1577.

¹⁰ 2018 Md. Laws ch. 549.

¹¹ 2015 W. Va. Acts 2, No. 542.

¹² Note that California and Maryland updated their laws in 2018, Colorado in 2017, and West Virginia in 2015. In addition, the NRPM allows individual states to enact protections stronger than those put in place by the rule.

¹³ Additional information relating to the Outline can be found in our prior client update [here](#).

week through any point of contact unless the collector had reached the consumer or the consumer's representative.

Under the NPRM, once a collector makes telephone contact with the consumer, the collector cannot call again for seven days. However, this limit is debt specific, so calls regarding one debt do not count toward the limit for calls about a different debt (with exceptions). *Id.* § 1006.14(b)(2).

- **Method and time of collection.** Under the NPRM, if a consumer objects to collection via a certain method or at a certain time (e.g., a particular phone line, during working hours), then the collector must abide by the consumer's wishes. Moreover, the NPRM prohibits collectors from communicating or attempting "to communicate with a consumer in connection with the collection of any debt at the consumer's place of employment, if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication." *Id.* § 1006.6(b)(3).
- **Content of messages.** The NPRM allows collectors to leave messages, including voicemails, for consumers, but limits the content of such messages to the individual debt collector's name, the consumer's name and a toll-free method by which the consumer can reply to the collection. See *id.* §§ 1006.2(d), (j), 1006.6(d).

Validation of Debts, Consumer Disputes, and Disclosures

The 2016 Outline attempted to address concerns that debt collectors often seek to collect debts from the wrong consumer, for the wrong amount, or that are not legally enforceable, as well as concerns regarding the sufficiency of information that consumers currently receive that enable these consumers to easily determine whether the debt claimed is in fact theirs or whether there is some error. To address these concerns, the 2016 Outline included three categories of additional requirements: (1) substantiation of debt prior to collection; (2) transfer of certain information provided by consumers to subsequent collectors; and (3) the FDCPA-mandated validation notice and a Statement of Rights. Only the Outline's requirement that debt collectors disclose "validation information" to consumers prior to or simultaneously with the initial communication—which is already expressly required by the underlying statute—made it into the NPRM. *Id.* § 1006.34(a)(1), (c).

Other Prohibited Practices

- **Reporting to consumer reporting agencies.** Debt collectors are prohibited from furnishing information to credit reporting agencies unless they have communicated directly with a consumer. *Id.* § 1006.30(a).

- **Prohibition on the sale, transfer, or placement of certain debts.** The NPRM prohibits collections when a debt collector knows or should know that the debt has been paid, settled, or discharged in bankruptcy, or that an identity theft report was filed with respect to the debt. *Id.* § 1006.30(b).

Key Departures from the CFPB's Outline

- **Warning signs regarding information integrity.** The Outline enumerated several proposals to help combat data integrity concerns and to ensure the validity and accuracy of a consumer's debt, such as a requirement for collectors to review "warning signs" that the debt is inaccurate, *e.g.*, missing data, implausible debt, consumer disputes or the inability to obtain underlying documents; if a collector found warning signs, it would be required to obtain additional support for the debt prior to any further collection efforts. No such requirements were included in the NPRM.
- **Transfer of information to subsequent collectors.** The 2016 Outline contained several proposals to enhance the integrity of data throughout the collection stream, such as requiring downstream collectors to obtain and review certain information related to prior collection activity, and requiring collectors to forward certain information received from consumers after a debt has been returned to the debt owner or otherwise sold. Notably, the NPRM does not contain any such similar provisions.
- **Foreign language preferences.** While the Outline proposed requiring the Statement of Rights to conform to language preferences other than English, the NPRM *permits* a disclosure regarding a consumer's ability to request a Spanish-language translation of a validation notice, but does not otherwise require collectors to provide foreign-language translations. *Id.* § 1006.34(d)(3)(vi), (e).
- **Decedent debt.** The Outline addressed several interpretive issues that may arise in the context of decedent debt, and proposed creating a 30-day waiting period after the consumer has passed away during which collectors cannot communicate with the decedent's survivors. No such requirement is addressed in the NPRM.

KEY INSIGHTS

The NPRM is clearly designed to bring major change to the debt collection industry, though it is not as far-reaching as some consumer advocates may have hoped. A few aspects stand out:

The CFPB under Director Kraninger is still reasonably robust—for example, there has been an uptick in enforcement actions. While the NPRM fails to address many of the 2016 Outline’s proposals, the NPRM indicates the Bureau’s intent to put in place many of them.

The NPRM does not cover the activities of first-party collectors. While it seems unlikely that the Bureau will go forward with its planned first-party collector rule, one could imagine the Bureau applying the NPRM’s requirements to first-party collections via enforcement actions by alleging that violation of these requirements is a UDAAP.

Alternatively, after the rule is instituted, the Bureau may reduce the number of enforcement actions in this space as the regulation will help clarify what the Bureau believes is a UDAAP or other violation of law in this market. There have been many complaints (including by former Acting Director Mulvaney) that the CFPB has historically engaged in “regulation by enforcement,” particularly in deploying UDAAP allegations. This rule will provide definitive guidance for third-party debt collectors.

CONCLUSION

The NPRM promises to bring significant change to the debt collection industry. While Acting Director Mulvaney and Director Kraninger have been heralded as taking a softer approach than Director Cordray, industry participants should be aware of the multiple changes proposed by the NPRM. The CFPB under Director Kraninger appears to be taking a more aggressive approach towards debt collection, so industry participants should be sure to review and implement these regulations. While the post-Cordray CFPB may be taking a less robust approach, the NPRM demonstrates that the Bureau is still a major player in this area.

* * *

Please do not hesitate to contact us with any questions.

NEW YORK



Matthew L. Biben
mlbiben@debevoise.com



Courtney M. Dankworth
cmdankwo@debevoise.com



Mary Beth Hogan
mbhogan@debevoise.com



Gregory J. Lyons
gjlyons@debevoise.com



David T. Imamura
dimamura@debevoise.com



Alexandra N. Mogul
anmogul@debevoise.com