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Regulation F Looks to Provide Clarity to the FDCPA, but What About Bankruptcy?

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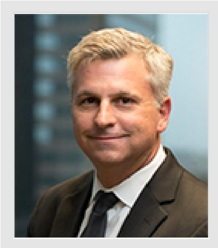
On May 7, 2019, the Consumer Financial Protection Bureau (CFPB or Bureau) issued its long-awaited Notice of Proposed Rulemaking (NPR) for debt collection. These proposals precede a final rule that will be known as Regulation F and will be the first rules issued under the tenure of Director Kathleen Kraninger. The NPR was published in the Federal Register on May 19, 2019. [1]

When the Fair Debt Collection Practices Act (FDCPA or Act) was enacted in 1977, its intent and purpose was to address abusive debt-collection practices and to ensure that debt collectors who did comply with the law would not be otherwise competitively disadvantaged. Forty-two years later, the FDCPA represents an outdated and ineffective law that provides no clarity for the industry and has done little to protect consumers. This quagmire falls squarely upon Congress's failure to provide the Federal Trade Commission (FTC), then the primary regulator for the FDCPA, with any rulemaking authority. Thus, the FDCPA has been left to the inconsistent interpretations of the courts.

Fast forward to 2008 and the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which created the CFPB. Dodd-Frank granted specific authority to the CFPB over certain enumerated consumer-protection laws, including the FDCPA. With this authority, the CFPB was tasked with writing clear rules of the road in order to ensure compliance of industry and to provide consumers with a clear understanding of what constituted appropriate debt-collection activity.

The Bureau started the debt-collection rulemaking process in 2013. The proposals unveiled in the NPR were a culmination of extensive work to understand the nuisances of the debt-collections industry. A topline summary of the proposals are as follows:

Opportunities to Communicate with Consumers by Email and/or Text: Debt collectors will now be able to communicate with consumers by email and text, provided that the consumer is given the reasonable opportunity to opt out of those communications. No other social media channels will be available. Debt collectors will need to have reasonable procedures in place to ensure that emails and texts are sent to the proper consumers and that the consumers were given proper notice that such a communication



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Limited-Content Messages Exempt from the FDCPA: Debt collectors will now be allowed to leave a specific message for consumers, either by phone or text, in an effort to get a call back or response without running afoul of the FDCPA.

Debt Collectors Limited to No More Than Seven Telephone Calls per Week per Account: However, once a debt collector reaches a consumer, subsequent communication is limited to one call every seven days. There are certain exceptions, though, including if a consumer consents to be called or requests a call back from a debt collector.

A Model Validation Notice and Disclosures with the Opportunities to Provide the Same Electronically: The Bureau has proposed a standard model validation notice that provides clear-cut disclosures a debt collector can use when initially communicating with a consumer. The proposed notice also provides consumers with an electronic means of disputing a debt. The Bureau is also considering the electronic delivery of these disclosures, provided the debt collector and/or the original creditor has otherwise complied with E-Sign.

Additional Prohibitive Actions: Debt collectors will not be permitted to sue or threaten suit on a debt if the debt collector knows or should know that the applicable statute of limitations has expired. Further, the rule prohibits debt collectors from reporting collection items to consumer reporting agencies without first communicating with the consumer.

The proposals in the NPR are a clear recognition by the CFPB that modern forms of communication must be incorporated into the debt-collection process and that other updates are necessary. However, while the NPR touches on the bankruptcy discharge with respect to the transfer of debts, [2] it contains no recognition of — or proposed remedies to — the confusion caused when a debt collector subject to the FDCPA is required to communicate with a consumer who has filed a bankruptcy case. With respect to the intersection of bankruptcy and the FDCPA, there are several issues on which the Consumer Bankruptcy Committee believes guidance from the CFPB is essential.

Validation of Debts Impacted by a Bankruptcy Filing: The debt-validation process under the FDCPA and proposed Regulation F creates several problems in the context of bankruptcy. First, the debt-validation provisions create a parallel track to the bankruptcy proof-of-claim process, which could be confusing to the consumer and could lead to conflicting results. Second, the debt-validation notice could be construed as a demand for payment that violates the automatic stay or — if the consumer has been relieved of personal liability in the bankruptcy case — a violation of the discharge injunction. Finally, the financial information in the debt-validation notice (i.e., the amount of the debt) can vary in an active chapter 11, 12 or 13 case, particularly in connection with a cramdown plan, a "maintenance and cure" plan, a lien-strip or certain motor vehicle loans, which can lead to consumer confusion.

Mini-Miranda Disclosures on Communications to Consumers in Bankruptcy: Consumers and debt collectors face additional challenges with respect to conflicts between bankruptcy law and the "Mini-Miranda" disclosures required by Section 1692e(11) of the FDCPA and proposed 12 C.F.R. § 1006.18(e). These provisions require that in an initial communication with a consumer, a debt collector must inform the consumer that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and in later communications the debt collector must disclose that the communications are coming from a debt collector. [3] The FDCPA and proposed Regulation F do not provide a bankruptcy-specific exemption from including the Mini-Miranda disclosure on communications to consumers that have filed a bankruptcy case, which leads to communications that may violate the automatic stay or discharge injunction. Without limitation, and as set forth more fully above, if a communication can be construed as an attempt to coerce payment, courts like will find a stay or discharge violation.

Communications with Consumers Represented by Counsel in a Bankruptcy Case: The FDCPA and proposed Regulation F provide that — without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction — a debt collector may not communicate with a consumer in connection with the collection of any debt if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer. In many bankruptcy cases, the consumer's contact with his or her bankruptcy attorney decreases drastically once the bankruptcy case is filed. The bankruptcy attorney, while closely involved in the preparation of the initial bankruptcy filing and in obtaining confirmation of the consumer's bankruptcy plan, is unlikely to regularly communicate with the consumer regarding ongoing monthly payments to creditors and the specific status of particular loans or accounts. This lack of communication leads to tension among the FDCPA, the Bankruptcy Code and certain CFPB communication requirements set forth in Regulation Z.

The foregoing examples highlight the need for revisions to the FDCPA to ensure that it reflects the realities of bankruptcy practice. Without limitation, the Mini-Miranda disclosure requirement exposes creditors to significant risk in connection with consumers impacted by bankruptcy. Likewise, bankruptcy counsel has little use for bankruptcy-tailored monthly financial information designed to keep the consumer apprised of the account status, yet the lack of specific guidance from the CFPB leaves creditors with no easy choice — absent obtaining a court order — on where the creditor should send statements. ABI's Consumer Bankruptcy Committee is submitting a comment to the CFPB on these issues.

[1] Debt Collection Practices (Regulation F), 84 Fed. Reg. 23,274 (2019) (to be codified at 12 C.F.R. pt. 1006) (proposed May 21, 2019).

[2] *See* Debt Collection Practices (Regulation F), 84 Fed. Reg. 23,274, 23,331 (2019) (to be codified at 12 C.F.R. pt. 1006) (proposed May 21, 2019).

[3] *See* 15 U.S.C. § 1692e(11); Debt Collection Practices (Regulation F), 84 Fed. Reg. 23,274, 23,402 (2019) (to be codified at 12 C.F.R. pt. 1006) (proposed May 21, 2019).

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