# What's Missing? The CFPB's Notice of Proposed Rulemaking on Debt Collection Fails to Resolve a Number of Compliance Issues

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**Introduction**

This article is part of a series of articles and webinars Hudson Cook will present over the coming weeks addressing the CFPB's Notice of Proposed Rulemaking on Debt Collection (the "Proposals"). While the Proposals, if adopted, would bring a welcome update to the Fair Debt Collection Practices Act's 1970s-era regulatory framework and patchwork of case law, there are a number of issues left unresolved by the Proposals. While the article briefly addresses how the Proposals could minimize risk for debt collectors, we devote most of the article to describing the issues that the Proposals fail to address with any certainty. Creditors and debt collectors considering whether to comment on the Proposals would be wise to review not only the substance of the Proposals, but also the issues they do not address.

**Background**

The CFPB issued the Proposals under its authority to make rules interpreting the federal Fair Debt Collection Practices Act ("FDCPA") and the Dodd-Frank Act's prohibition on unfair, deceptive, or abusive acts or practices ("UDAAPs"). The Proposals are the latest step in public-facing rulemaking activity that began in November of 2013 with the CFPB's advance notice of proposed rulemaking.

The CFPB will accept comments on the Proposals until Monday, August 19, 2019. The CFPB will then publish a final rule (there are no timing requirements for publishing the final rule), which is proposed to become effective one year after publication of the final rule in the Federal Register.

If adopted as proposed, the Proposals would apply only to persons who are "debt collectors" as defined in the federal FDCPA, and not to creditors.

**Issues Addressed by the Proposals**

The Proposals attempt to clarify a number of issues that have been the topic of FDCPA litigation over the years. The Proposals also attempt to clarify how debt collectors can use technology (including text messages and emails) to collect debt. We summarize the new issues addressed by the Proposals here and here.

Many of the Proposals could ease litigation risk for debt collectors who comply, including, for

example, the model debt validation notice, and the safe harbor status it provides, the bright line rule for telephone contact frequency, the express authorization to communicate via text message and email, the limited content message meant to resolve the "Foti dilemma," and the guidance on "meaningful attorney involvement." Most of these issues arise frequently in litigation or else have caused compliance headaches for debt collectors attempting to communicate with consumers in a convenient and modern way under a regulatory regime developed in the 1970s. Some of the Proposals are highly technical and will create added compliance burdens for debt collectors, including, for example, the detailed requirements for obtaining the debtor's consent to receive text messages and emails and allowing debtors to opt out of such communications. We will continue analyze the new requirements and restrictions in the Proposals in more detail in subsequent articles and webinars.

**Issues Not Clearly Addressed by the Proposals**

The Proposals have not provided total clarity on all issues of concern and risk for debt collectors (and creditors). Below, we discuss some potential uncertainty in the Proposals and some areas where debt collectors and creditors might want clarity, but did not receive any from the Proposals:

- **Skip Tracing:** The Proposals effectively re-state the FDCPA's limits on skip tracing (in the FDCPA, "skip tracing" refers to the practice of contacting a third party to obtain location information about a debtor). Since its inception, the CFPB has targeted the skip tracing practices of creditors and debt collectors alike, taking issue with repeated contacts to third parties for skip tracing purposes, contacting third parties when the debt collector still has good location information for the debtor, and inappropriate conversations with third parties that not only seek location information but also reveal the existence of the debt to the third party. For the most part, the CFPB has been consistently applying the FDCPA's limits on skip tracing to creditors and debt collectors. Given that the CFPB provided almost no additional guidance on skip tracing, it appears that the CFPB may believe the statutory limits are sufficiently consumer-protective and clear for debt collectors to understand. But, the CFPB could have clarified the circumstances under which a debt collector may engage in skip tracing (e.g., returned mail from the debtor's last known address, all voicemail boxes full, last known phone numbers disconnected, etc.). Or, it could have interpreted the exceptions in the FDCPA to "one contact" rule for skip tracing by explaining how a debt collector might demonstrate that an exception applies.
- **Time-Barred Debt:** The CFPB effectively proposes to codify the least controversial time-barred debt cases under the FDCPA. Specifically, the Proposals would re-state the long-accepted rules that a debt collector may not sue or threaten to sue on time-barred debt (almost every court to consider these issues has found that lawsuits and threats to sue on time-barred debt violate the FDCPA). However, in recent years, the case law has become murky around what it means to "threaten to sue" on a time-barred debt. Are implied threats to sue sufficient? What type of language would imply that the debt collector is going to sue? Different courts around the U.S. have held that language like "settle" and "resolve" could imply that the debt collector has a right to sue, but there is no consensus on what it means to "threaten to sue" on a time-barred debt. The CFPB did not, in its Proposals, attempt to define "threaten to sue" or clarify what types of

language could violate the FDCPA beyond simply an express threat to sue. This leaves the door wide open for continued litigation over what it means to threaten to sue on a time-barred debt.

- **Right-Party Contact:** The CFPB did not provide any guidance on what sort of information a debt collector must obtain to establish right-party contact. "Right-party contact" is not a legal term; instead, it is short-hand for how a debt collector or creditor ensures that it is speaking with its customer before discussing the debt with the customer (including by providing a mini-Miranda warning that would necessarily reveal the existence of the debt to a third party). While the federal FDCPA does not expressly prohibit a debt collector from speaking to a person before confirming right-party contact, it does prohibit a debt collector from revealing the existence of the debt to a third party. To avoid revealing the existence of the debt to a third party, a debt collector should generally take steps to ensure right-party contact at the beginning of a communication, unless there are clear indicators that the debt collector is communicating with the debtor (e.g., she sends an email from an email address for which the debt collector has already established right party contact). While the safe harbor procedures in the Proposals for electronic communications appear to address right-party contact in that specific context (sending emails and text messages to debtors), the CFPB has left open how a debt collector would obtain right-party contact during an ordinary phone call.
- **Overshadowing:** The CFPB has proposed a safe harbor debt validation notice that the debt collector may use to provide the information required by section 1692g of the FDCPA. According to the supplementary material, the additional language in the safe harbor beyond the required information would not, as a matter of law, overshadow the discussion of the consumer's debt validation rights. In other words, the safe harbor would be both a safe harbor for the required language, and a safe harbor against an overshadowing claim. However, any communications sent during the validation period, not just information in the validation notice, can overshadow the debtor's validation rights. The CFPB did not provide any further guidance, though, on what types of statements or other communications (such as billing statements, returned payment notices, payment reminders, and collection letters) sent during the validation period could overshadow the information in the validation notice. The case law under the FDCPA has not been consistent with respect to what language or practices may overshadow the debtor's debt validation rights. As a result, guidance from the CFPB on overshadowing would have been helpful.
- **Creditors:** Perhaps the greatest open question following the Proposals is how the CFPB will apply any rule it promulgates under the FDCPA to creditors collecting their own debts. The Proposals define "debt collector" in the same way as the FDCPA, which expressly does not apply to creditors. However, as explained above, some provisions of the Proposals are promulgated not only under the CFPB's authority to make rules interpreting the FDCPA, but also under its authority to make rules prohibiting UDAAPs. Any act or practice that the CFPB has deemed unfair, deceptive, or abusive with respect to debt collectors could conceivably be applied to a

creditor collecting its own debts. Further, the CFPB has made clear that it will enforce many provisions of the FDCPA against creditors collecting their own debts under a UDAAP theory. Therefore, even those provisions promulgated under the FDCPA could conceivably be applied to creditors collecting their own debts under a UDAAP theory. The CFPB has provided very little in the way of guidance to creditors on how it will view the Proposals in the UDAAP enforcement context. To its credit, the CFPB may want to afford itself some flexibility in how it wields its UDAAP authority and interprets the extent to which the FDCPA and any rules it promulgates under the FDCPA apply to creditors – the interests and business practices of creditors vary widely, and require some regulatory nimbleness. Nonetheless, certain vague statements about creditors in the supplementary material to the Proposals have sparked concern within trade groups representing creditors about the extent to which the CFPB might apply any rules it makes under the FDCPA or under its UDAAP authority to creditors collecting their own debts. And, the CFPB could certainly use the supplementary material in its final rule to elaborate more on its enforcement priorities with respect to creditors without tying its hands. This issue is ripe for comment by creditor groups.

**Conclusion**

The issues that the CFPB did not address are nearly as important as those that it did, given the risks posed by, and costs of, continued uncertainty. These issues are certainly worth commenting on. Even if the CFPB does not address them when it issues its final rule, it will at least be aware of areas where the rule can be improved in the future.