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CFPB's New Debt Collection Rule Would Modernize the FDCPA for Voice Mail, Text and Email

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The Consumer Financial Protection Bureau (CFPB) released on May 7 a 538-page Notice of Proposed Rulemaking (the Rule) that would update the Fair Debt Collection Practices Act (FDCPA). The Rule would be the first major update to the FDCPA since its enactment in 1977 and gives much-needed clarification on the bounds of federally-regulated activities of "debt collectors," as that term is defined in the FDCPA, particularly for communication by voicemail, email, and texts. It is important to remember that the Rule is only a proposal, and it is already drawing fire from consumer advocates. Once the Rule is published in the Federal Register, it will be open for public comment for 90 days, after which the CFPB will either issue a final rule or issue another proposed rule.

Troutman Sanders will be hosting a webinar to discuss the impact of the Rule on Wednesday, May 15 from 3:00 – 4:00 p.m. EST. You can register for the webinar here.

Please click the relevant section below for key changes proposed and what's next:

Resources relating to the proposed Rule can be found here:

- CFPB Press release
- Text of the proposed rule
- CFPB Fast Facts summary of the proposed rule
- Flowchart on the proposed rule's electronic disclosure options

Background

The FDCPA was originally enacted in 1977. In 2010, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress delegated rulemaking authority for the FDCPA to the CFPB. The rulemaking process began in 2013 when the CFPB released an Advanced Notice of Rulemaking requesting public comment on changes to the debt collection regulatory framework. At that time, the CFPB signaled the rules would encompass first-party creditors (those entities collecting their own debt, in their own name) and third-party debt collectors (those collecting the debt of another). The CFPB received over 20,000 comments to this original proposal. Director of the CFPB Kathleen L. Kraninger stated yesterday: "The CFPB is taking the next step in the rulemaking process to ensure we have clear rules of the road where consumers know their rights and debt collectors know their limitations."

In 2016-2017, the CFPB proposed first addressing communications and consumer disclosures, and separately addressing first-party creditors. The proposed Rule, as released, is directed only to "debt collectors" and not first-party creditors. In addition, while the Rule does hit several compliance hot spots in the FDCPA, overall the Rule is heavily focused on modernizing the FDCPA for voicemail, text and email communications.

The CFPB believes the Rule would provide consumers with clear protections against harassment by debt collectors and straightforward options to address or dispute debts, by, among other things, setting clear, bright-line limits on the number of calls debt collectors may place to reach consumers on a weekly basis; clarifying how collectors may communicate lawfully using newer technologies, such as voicemails, emails and text messages, that have developed since the FDCPA's passage in 1977; and requiring collectors to provide additional information to consumers to help them identify debts and respond to collection attempts.

Coverage of the Rule – Sections 1006.2(e) and 1006.2(i)

The Rule would not make any dramatic expansions to the FDCPA's coverage. The definition of "debt collector" in Section 2(i) generally mirrors that within the FDCPA. The commentary to this definition references recent high-profile cases (see our previous coverage of these cases here, here and here), stating "[c]onsistent with the Court's holding…the proposed definition thus could include a debt buyer collecting debts that it purchased and owned, if the debt buyer either met the 'principal purpose' prong of the definition or regularly collected or attempted to collect debts owned by others, in addition to collecting debts that it purchased and owned."

The Rule would clarify certain points of confusion as to the coverage of the FDCPA. For instance, Section 2(e) of the Rule defines "consumer" to include a deceased natural person "obligated or allegedly obligated to pay any debt." This is one of several attempts in the Rule to give more clarity around the collection of decedent debt. The CFPB writes in its commentary on the Rule, "the CFPB notes that debt collectors often collect or attempt to collect debts from deceased consumers (i.e., from their estates), which presents many of the same consumer-protection concerns as collecting or attempting to collect debts from living consumers." The Rule proposes that a person acting on behalf of an individual's estate, such as an executor or administrator, would operate as the consumer for purposes of receiving the validation notice and having the right to dispute a debt. For purposes of the communication regulations in Section 6, a "consumer" would include a confirmed successor in interest as well as the executor or administrator of a deceased consumer's estate.

Third-party disclosure safe harbor in voicemail, email and text messages – Section 1006.2(j)

A recurring and vexing issue under the FDCPA is communications with debtors using means that could be shared, on the consumer's end, with others. A voicemail, email or text message might be sent and seen by, for example, a family member. Complicating the problem is that some courts have held that a communication with a debtor in, for example, a voicemail must include information, such as the creditor's company name, that would indicate to a third party that the call is a debt-collection call. Much litigation has resulted. The Rule would address this problem by creating a safe harbor procedure for debt collectors who unintentionally communicate with an unauthorized

recipient by email or text, and authorization to send a message without the company name.

Under Section 2(j) of the Rule, a "limited-content message" is defined as not being a "communication" with a third party, and therefore receipt of the message by a third party would not be a violation of the FDCPA's prohibition on third-party communication of information about a consumer's debt. To be protected by the safe harbor, the content of the message must contain:

(1) the consumer's name;

(2) a request that the consumer reply to the message;

(3) the names of one or more natural persons to whom the consumer can reply to contact the debt collector;

(4) a telephone number that can be used to reply; and

(5) when communicating using a specific email address, text message or other electronic medium address, an opt out notice as required by Section 6(e) of the Rule.

The message optionally may include, among other items, a "generic statement that the message relates to an account." The Official Commentary gives two examples of compliant messages: "This is Robin Smith calling for Sam Jones. Sam, please call me at 1-800-555-1212"; and "Hi, this message is for Sam Jones. Sam, this is Robin Smith. I'm calling about an account. It is 4:15 p.m. on Wednesday, September 1. You can reach me or, Jordan Johnson, at 1-800-555-1212 today until 6:00 p.m. eastern, or weekdays from 8:00 a.m. to 6:00 p.m. eastern."

Addressing safe harbor for unintended third-party disclosure by email or texts – Section 1006.6(d)(3)

In addition to a safe harbor under Section 2(j) for "limited content messages," Section 6(d)(3) of the Rule would provide a second safe harbor that would cover messages sent by email or text that reach third-parties, but do not qualify for the limited content message safe harbor. Debt collectors have faced claims for sending texts in particular to telephone numbers that the consumer once held but since have been reassigned to a different person, and claims based on unintended communications that reach, for example, an employer.

Under this safe harbor an erroneously addressed email or text does not violate the FDCPA provided that the debt collector "maintains procedures that includes steps to reasonably confirm and document" that the communication fits into one of three regimes:

(1) A direct communication consent regime, where the debt collector communicated with the consumer using:

a. An email address or telephone number for text messaging "recently" used by the consumer to contact the debt collector;

b. The "recent" use by the consumer was not for the purpose of option out of electronic communication;

(2) A opt out regime, where the debt collector communicated with the consumer using a non-work email address or non-work telephone number for texting messaging if:

a. The creditor or debt collector provided the consumer with "clear and conspicuous" notification, through a different communication channel, that it might use the specific email address or telephone number for communication "no more than 30 days" before the debt collector's first email or text message;

b. The "clear and conspicuous" notification contains specific content disclosing the consumer's right to opt out of receiving further communications at the email address or telephone number for texts; and

c. The consumer has not exercised the opt out right; or

(3) A pre-assignment consent regime, where the debt collector communicated with the consumer using a non-work email address or non-work telephone number for texting messaging if:

a. Prior to the debt being placed with the debt collector, the original creditor or prior debt collector had "recently" sent communications to the address or telephone number, and the consumer did not request that the creditor or debt collector stop using the address "to communicate about the debt"; and

b. The debt collector took "additional steps"

to prevent communicating with a consumer using an email address or telephone number "the debt collector knows had led" to a prohibited third-party disclosure.

"Recently" is not defined. It appears that the Rule contemplates that debt collectors receiving an account may need to resort to the opt out procedure to clear an email address or telephone number for texting for use. The opt out procedure is laid out in detail in Section 6(d)(3) and in the Official Commentary.

Electronic disclosures – E-Sign Act Approach vs. Alternative Approach – Section 1006.42

The FDCPA requires three disclosures be provided to consumers in writing: (1) debt validation notice; (2) original creditor disclosure; and (3) validation-information disclosure for disputed debts. The Rule permits all three required written disclosures to be sent to consumers electronically. It details two different electronic delivery approaches: (1) E-Sign Act Approach; and (2) Alternative Approach.

The E-Sign Act Approach has a very detailed process that applies prior to and in conjunction with sending the required debt collection disclosures. Under the E-Sign Act Approach, debt collectors must obtain the consumer's affirmative consent to receive electronic communications prior to providing the required disclosures, and the required disclosures must comply with section 101(c) of the E-Sign Act (15 U.S.C. § 7001(c)). Section 101(c) of the E-Sign Act requires detailed and extensive pre-consent disclosures, which includes a clear and conspicuous statement of computer / telephone hardware and software requirements. It also requires the consumer electronically consent that s/he can access the information electronically, which requires a valid electronic signature. The E-Sign Act Approach requires a consumer consent experience separate from providing the electronic debt collection disclosures. For example, as a practical matter it may require a debt collector to set up a separate web page solely dedicated to collecting the E-Sign consent, and consent will depend on a consumer's willingness and ability to complete an opt in process electronically. Therefore, practically and operationally, it may not be feasible or desirable for many entities covered by the Rule to follow the E-Sign Act Approach.

The Alternative Approach provides an opt out regime. Disclosures may be sent via email or text message to an email address or phone number that the creditor or a prior debt collector could have used to provide electronic disclosures. The disclosures must be either in the body of an email, or on a secure website that is accessible by clicking on a clear and conspicuous hyperlink in the email or text message. There are additional requirements for the Alternative Approach that are only applicable if the disclosures are hyperlinked to a website, such as making the disclosure accessible for a reasonable period of time that can be saved or printed, and giving the consumer notice and an opportunity to opt out of the hyperlinked disclosure delivery. The Alternative Approach is much more streamlined and may make more sense both practically and operationally for many debt collectors.

Telephone call frequency limits – Section 1006.14(b)(2)

One of the highest profile and likely controversial parts of the Rule is a proposal to cap the number of calls a debt collector may make to any particular person regarding a particular debt. The proposal responds to the patchwork of district court decisions on the number of telephone calls that may constitute harassing or abusive behavior, calling out a specific standard of seven calls a week.

The limits apply to a "particular debt," which the CFPB has defined as "each of a consumer's debts in collection," with a special exception for student loans. In other words, if a consumer has multiple non-student loan debts with a collector, each debt is treated separately when taking into account frequency limits.

The Rule would prohibit more than seven telephone calls to a consumer within seven consecutive days. It also forbids calling a consumer within the next seven days of having had a telephone conversation with the person in connection with the collection of the debt, where the date of the conversation serves as the first day of the seven-day period.

However, certain telephone calls do not count toward the frequency limits and can be made in excess of the stated frequency limits. Specifically, telephone calls that are:

(1) made to respond to a request for information from the person;

(2) made with the person's prior consent given directly to the debt collector;

(3) not connected to the dialed number; or

(4) with the consumer's attorney,

(5) with a consumer reporting agency, if otherwise permitted by law; or

(6) with the creditor on the account.

Telephone calls that the debt collector later learns were made to a wrong number likewise would not count toward the frequency limit.

All FDCPA-covered debt collectors would be required to abide by the frequency limits set forth in this Section. Moreover, if a FDCPA-debt collector is attempting to collect a "consumer financial product or service debt," a violation of the frequency limits will also constitute a violation of § 1031 of the Dodd-Frank Act. Conversely, the proposed provision makes clear that a debt collector that complies with these frequency limits does not violate the FDCPA or the Dodd-Frank Act.

Citing a lack of evidence, the CFPB refused to apply the portion of the Section on telephone communications, including the frequency limits, to communications by mail, text message, or email. With respect to mail communications, specifically, the CFPB's recent debt collection consumer survey reflected a consumer preference for mail as the method of communication for debt collection communications. While noting that these other methods of communication could fall within the general prohibition on harassing or abusive conduct, the CFPB has requested comment on whether to broaden the scope of the portions of the Rule covering telephone calls specifically, including the frequency limits, to include these other methods of communication.

Communication media restrictions – Section 1006.14(h)

The Rule would prohibit communications, including attempted communications, with a consumer through a medium of communication if the consumer has requested that the debt collector not use that medium to communicate with the consumer. The term "consumer," as it applies to this provision, includes a consumer's spouse, parent (if the consumer is a minor), legal guardian, personal representative, or confirmed successor in interest.

A debt collector does not violate this prohibition by responding to a consumer's written request to opt out of receiving electronic communications. However, a debt collector may only respond once, and the response must be limited to confirming the consumer's request; the response may not contain any other information or statements.

If a consumer contacts a debt collector from an address or telephone number that the consumer previously requested the debt collector not use, the debt collector does not violate this rule by responding to the consumer-initiated communication, as long as it only does so once.

Opt out notice for emails and texts – Section 1006.6(e)

In what appears to be a significant new consumer protection requirement and a major change in law, Section 6(e) of the Rule would require that texts, emails and communications to any "other electronic-medium address" contain a clear and conspicuous statement describing one or more ways that a consumer can opt out of future communications to that specific address or telephone number. Under current law, providing an opt out notice may be a best practice but is not required.

The Official Commentary says a compliant opt out in an email:

(1) would be in textual format;

(2) would be, in a size no smaller than other text in the email; and

(3) explain that consumer "may opt out of receiving further email communications from the debt collector to that email address by replying with the word 'stop' in the subject line."

The Official Commentary provides an example of a compliant opt out notice for a text: "Reply STOP to stop texts to this telephone number."

One important subtlety to the Rule is that it indicates the required opt out would only be specific to the telephone number or address, and that an opt out response would not, therefore, constitute a general do not contact request. This

may be one area where comments could lead to the CFPB specifically addressing whether this interpretation is consistent with its intention.

Time and place restrictions for electronic communications – Section 1006.6(b)(1)

The Rule maintains the current FDCPA prohibition on attempting communications before 8:00 a.m. or after 9:00 p.m. local time for the consumer's location. These time periods apply to telephone calls and electronic communications, such as emails and text messages.

When calculating the time periods for electronic communications, the time the debt collector sends the communication, not the time the consumer opens it, is determinative. If a debt collector is unable to determine a consumer's location, the CFPB includes a safe harbor in the Rule. Debt collectors would comply with the FDCPA by only communicating at a time that would be convenient "in all of the locations at which the debt collector's information indicated the consumer might be located."

The CFPB also noted that there is considerable confusion regarding what constitutes proper notice that a debt collector is contacting a consumer at an inconvenient time or place. Due to this apparent confusion, the CFPB has stated that a collector knows or should know that it is contacting a consumer at an inconvenient time or place if the consumer specifically uses the word "inconvenient."

A consumer may also indicate that the debt collector is contacting the consumer at an inconvenient time or place using other words or phrases. As an example, the CFPB provided an example where a consumer told the debt collector that he was "busy" or could not talk during a specific time-frame during weekdays. The CFPB stated that this communication from the consumer would provide it with notice not to contact the consumer during those times on the identified days.

In the event a consumer directly provides a debt collector with prior express consent, the debt collector still may not contact the consumer at a time or place that the debt collector knows or should have known was inconvenient. Debt collectors can also attempt to obtain prior express consent during communications where the consumer has indicated the debt collector is communicating at an inconvenient time or place. However, the debt collector may not attempt to obtain prior express consent during that communication for the time or place the consumer has indicated is inconvenient.

Use of workplace email addresses and social media platforms – Section 1006.22(f)(4)

In addition to the currently existing prohibitions on communications with consumers via post card and mail bearing language or symbols that suggests the communication is from a debt collector, the Rule seeks to add communications to a consumer's work email or social media page as similarly unfair and unconscionable conduct.

A debt collector knows or should know that an email address is associated with a consumer's place of work, and should refrain from sending emails to that address, if the email address contains a domain name or top-level domain name that is not typically associated with non-work email addresses, such as "springsidemortgage.com" or ".gov." A debt collector will also be found to have had knowledge if it knows the name of the consumer's employer and the employer's name, or an abbreviation, appears in the consumer's email address.

However, a debt collector may contact a consumer at a consumer's work email address if the debt collector has prior express consent to use that address or if the debt collector receives an email from the consumer at that address.

The Rule also prohibits a debt collector from communicating with a consumer via the consumer's social media page if the communication is viewable by the general public or the consumer's social media contacts. The Rule does not prohibit communications to consumers via a social media platform's private message feature as long as the message is indeed private to the consumer. The Rule would also not prohibit communications on the consumer's social media page that are only viewable by the consumer, the consumer's attorney, a consumer reporting agency, the creditor, the creditor's attorney, or the debt collector's attorney.

Of course, the consumer can request the debt collector cease communications using the consumer's social media. Moreover, these communications could constitute violations of other

provisions of the FDCPA, such as harassing or abusive contact.

Communicating before credit reporting – Section 1006.30(a)

In an apparent merger of the current FDCPA provisions on "Multiple debts," "Legal actions by debt collectors," and "Furnishing certain deceptive forms," the CFPB is proposing in the Rule an all-encompassing provision of the Rule for "Other prohibited practices." In addition to the previously mentioned provisions, the new provision prohibits a debt collector from furnishing data on a consumer to a consumer reporting agency (CRA) prior to it communicating with the consumer about the debt.

As stated in Section 6.2(d), a debt collector "communicates" with a consumer when it provides information about the debt directly or indirectly to the consumer through any medium. Per the CFPB, a validation notice sent to the consumer is considered a communication for the purpose of this provision because the validation notice must include certain information about the debt. However, a limited-content message is not considered a communication.

This requirement that debt collectors communicate with consumers prior to furnishing data to CRAs is meant to target and eliminate what the CFPB terms "passive collection practices," which is the reporting of consumer data without making any direct attempts to collect the debt with the consumer.

The proposed section also includes rules governing the transfer of paid, settled, and discharged debts as well as debt that the consumer or another has challenged via a filed identity theft report.

Decedent debt – Section 1006.6(a)

Addressing the industry's concerns, the Rule provides some clarity on collecting debts owed by deceased consumers.

As a threshold matter, the Rule clarifies the definition of "consumer" by including in its scope: any natural person, whether living or deceased; the executor or administrator of the deceased consumer's estate; and a confirmed successor in interest. The CFPB proposes to interpret the terms "executor" and "administrator" to include the decedent's personal representative which, the CFPB further clarifies, includes any person who is authorized to act on behalf of the deceased consumer's estate.

This broad definition of the term "consumer" is meant to simplify the process of decedent debt resolution and avoid the formal probate process which can be costly, especially for small estates. The CFPB has borrowed the definition of "confirmed successor in interest" from the Real Estate Settlement Procedures Act which includes in its purview all persons who receive an ownership interest in a decedent's property as a result of a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety. This further aids debt collectors in locating the persons who can help to resolve the decedent debt.

The Rule provides that a debt collector may obtain location information for a deceased consumer by obtaining location information for the person with the authority to act on behalf of the deceased consumer's estate. The CFPB is seeking comments regarding the particular disclosures that the debt collector is allowed to make when attempting to obtain location information. The CFPB's concern is that any reference to an outstanding debt can potentially mislead the decedent's representative into believing that he or she is personally liable for the debt. Accordingly, the CFPB proposes to limit the disclosure to the phrase "who is authorized to act on behalf of the deceased."

Under the Rule, a debt collector has to send any required validation notice to a named person who is authorized to act on behalf of the deceased consumer's estate. This will limit the practice of addressing validation notices to deceased consumers or unnamed executors, administrators, or personal representatives because a debt collector would be required to identify a person who is authorized to act on behalf of the deceased consumer's estate before sending a validation notice.

The Rule also makes the debt verification requirements applicable to deceased consumers' debts. It provides that, if a person who is authorized to act on behalf of the deceased consumer's estate submits either a written request for original-creditor information or a written dispute to the debt collector during the validation period, then the debt

collector must respond to that request or dispute as required under the FDCPA.

In sum, by including deceased consumers and their representatives in the term "consumer," the Rule imposes on collecting decedent debt the same requirements and restrictions that apply to the collection of debts owed by living consumers.

Collection of time-barred debts – Section 1006.26

For years, the industry has faced claims arising from legal actions, or threats of a legal action, to collect a debt on which the statute of limitations has expired. Courts have generally held that such legal actions or threats to sue violate the FDCPA.

The Rule would echo the courts' rulings and prohibit debt collectors from "bring[ing] or threaten[ing] to bring a legal action against a consumer to collect a debt that the debt collector knows or should know is a time-barred debt." The requirement of knowledge, actual or constructive, is meant to address the situations where a debt collector is genuinely unclear whether the statute of limitations has expired with respect to a specific debt. However, the CFPB is specifically requesting a comment on using a "knows or should know" standard because of the potential uncertainty in applying it.

The CFPB is also seeking a comment on the strict liability standard instead which will make a debt collector liable even if it did not know nor should have known that the debt is time-barred. Application of this standard is likely to result in harsh consequences because it leaves no room for error in frequently complex determinations of when a statute of limitations has expired on a particular debt.

The CFPB has kept under consideration whether to require special disclosures to consumers when collecting time-barred debts. Such disclosures could include a notice to the consumer that, because of the age of the debt, the debt collector cannot sue to recover it and, where applicable, that the right to sue on a time-barred debt can be revived. To make the final decision, the CFPB intends to conduct a web-based survey to test consumers' comprehension and decision-making in response to sample debt collection disclosures relating to time-barred debt.

Prohibition on debt transfers – Section 1006.30(b)

While the FDCPA does not prohibit debt transfers, it reflects Congress' intent to prevent collection of debts that consumers do not owe. To achieve this objective, the Rule would impose an express prohibition on sales, transfers, and placements of a debt "if the debt collector knows or should know that the debt was paid or settled, the debt was discharged in bankruptcy, or an identity theft report was filed with respect to the debt."

The commentary to the Rule clarifies that a debt collector knows or should know that an identity theft report was filed if it has received a copy of the identity theft report. In light of the ambiguity of the "know or should know" standard, the CFPB has requested comments on whether clarification is needed to it.

The Rule would provide four "narrow exceptions" to this prohibition on transfers. In particular, a debt transfer is permissible if the debt collector:

(1) transfers the debt to the debt's owner;

(2) transfers the debt to a previous owner of the debt under the terms of the original contract between the debt collector and the previous owner;

(3) securitizes the debt or pledges a portfolio of such debt as collateral in connection with a borrowing; or

(4) transfers the debt as a result of a merger, acquisition, purchase and assumption transaction, or transfer of substantially all of the debt collector's assets.

The rationale for the first two exceptions is that debt collectors frequently return debts to their owners or sell debts back to the previous owners if the debt collections efforts are unsuccessful. Allowing such transfers is likely to benefit consumers because their interactions with debt owners are frequently less adversarial than with debt collectors.

The third exception reflects the CFPB's understanding that, if a debt collector securitizes or pledges a portfolio of debt, the debt collector may be unable to exclude the subject debts from the portfolio. Similarly, the fourth exception addresses non-debt collection transfers in the process of business acquisitions where exclusion of specific

categories of debt from such transactions may not be practicable.

As written, the Rule's "know or should know" standard could become a source of increased private litigation.

Debt validation notices – Section 1006.34

Section 809(a) of the FDCPA generally requires a debt collector to provide certain information to a consumer either at the time that, or five days after, the debt collector first communicates with the consumer in connection with the collection of a debt. The Rule provides extensive discussion of the requirements for this "validation notice" and contemplates validation notices being provided both in written or electronic format.

In addition to current requirements, all of which remain, the Rule would require the validation notice to include:

- The date certain that the debt collector considers the end of the consumer's protected 30-day validation period (to be recalculated with any subsequent validation notices);
- An itemization of the debt that reflects the interest, fees, payments, and credits since the itemization date, as currently required by the State of New York;
- The name of the creditor to whom the debt is owed and, if different, the name of the creditor as of the "itemization date" (which is defined as either the date of last statement, charge-off date, the last payment date, or the transaction date);
- If the account is for a credit card debt, the merchant brand, if any, associated with the debt, to the extent that it is available to the debt collector;
- A link to the CFPB website for consumer protections in debt collection; and
- A tear off with specific consumer responses, such as disputing the debt (and why).

The Rule includes a model validation notice form at Appendix B.

Validation notice foreign language disclosures – Section 1006.34

In addition to changes to the validation notice itself, the Rule also changes the language in which a validation notice can be communicated. It specifically permits a debt collector to include supplemental information in Spanish that specifies how a consumer may request a Spanish-language validation notice.

The Rule also authorizes translation into other languages if the debt collector uses an "accurately translated" validation notice and sends an English-language validation notice in the same communication, unless it has already provided an English-language validation notice. Translated validation notices obtained from the CFPB's website will be considered "complete and accurate" translations, however, debt collectors are permitted to use other validation notice translations so long as they are complete and accurate.

State law compliance – Section 1006.104

While designed to standardize and modernize debt collection rules, and provide broad coverage to debt collectors nationwide, the Rule does not preempt state law to the extent that it provides more consumer protections.

Section 104 of the Rule, which mirrors Section 816 in the FDCPA, explicitly states that the only instance where the Federal rules might exempt an entity from complying with state law is when the state laws are inconsistent with the Federal rules, and then only to the extent of the inconsistency. Specifically, a state law that provides a consumer with greater protection than the federal rule is not considered inconsistent and would still be applicable. The CFPB requested comments on whether disclosures required by state or local laws are inconsistent with the disclosures required under the Rule and any specific burdens caused by that inconsistency. As written though, the federal Rule would only preempt in the instance of a conflict where it would be impossible for an entity to comply with both the state and the federal law at the same time. If it is possible to comply, even if expensive or burdensome, a business would be responsible for complying with both.

Therefore, while the Rule might strive to standardize federal law with respect to debt collection, businesses still need to pay attention to state specific requirements. In particular, the Official Commentary states "[a] disclosure required

by applicable State law that describes additional protections under State law does not contradict the requirements of" the FDCPA or the Rule. This assumes the CFPB's detailed familiarity of all state law disclosure requirements, and its conclusion that as they currently stand they do not put a debt collector in a situation where it cannot comply with both. One of the factors businesses should weigh, when assessing the Rule and making any comments, is how they will address compliance with it in parallel with their state obligations.

The Rule does contain the option for a state to apply for an exemption of certain debt collection practices from the federal Rule. This option currently exists under Regulation F, but the proposed Rule gives further guidance on the process to obtain that exemption. Covered in Section 108 and Appendix A, this process would allow a state to submit laws that cover a class of debt collection practices that are substantially similar or greater than those practices covered under the federal Rule. The state would need to show that there is an adequate state provision for enforcement of those provisions. The Rule updates the materials states must submit for consideration of an exemption. In it, as in the current version of Regulation F, any proposed exemption would be released by the CFPB for notice and public comment, which gives businesses a chance to weigh in on how a state exemption might help (or burden) their businesses practices.

What's next

The CFPB is proposing these changes and opening the proposal for notice and comment from the public, including industry stake holders. The comment period will be open for 90 days from when the rule is published in the Federal Register (it has yet to be formally published, but the comment period will likely end sometime in August 2019).

Comments may be submitted through any of the following methods:

- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.
- Email: 2019-NPRM-DebtCollection@cfpb.gov. Include Docket No. CFPB-2019-0022 or RIN 3170-AA41 in the subject line of the email.
- Mail: Comment Intake – Debt Collection, Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, DC 20552
- Hand Delivery/Courier: Comment Intake – Debt Collection, Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, DC 20552.

All comments must include the agency name (CFPB) and the docket number for the rulemaking, Docket No. CFPB-2019-0022 or the Regulatory Information Number (RIN) for the rulemaking, 3170-AA41. Note that all comments become part of the public record and are subject to public disclosure and so confidential or sensitive information should not be included.

The CFPB will then review all comments received and either issue another proposed rule, if there are substantial changes they wish to make, or issue a final rule.

The proposed effective date of the Rule would be one year from the publication of the final rule, as opposed to the publication of the Proposed Rule. This means that a new rule might take effect, at the earliest, at the end of 2020.