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IMPLICATIONS OF THE CFPB'S FIRST ANNUAL REPORT REGARDING THE FAIR DEBT COLLECTION PRACTICES ACT

ROBERT E. BOSTROM, GARY L. GOLDBERG, STEPHEN F.J. ORNSTEIN, SCOTT D.
SAMLIN, AND JENNIFER MAREE

The authors suggest that the Consumer Financial Protection Bureau may pursue a far more active agenda under the Fair Debt Collection Practices Act than did the Federal Trade Commission.

The Consumer Financial Protection Bureau (“CFPB” or “Bureau”) has submitted its first Annual Report (“Report”) to Congress regarding its administration of the Fair Debt Collection Practices Act (“FDCPA”) during the previous year. Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) many consumer protection responsibilities were transferred from the Federal Trade Commission (“FTC”) to the CFPB and the CFPB now has primary responsibility for administering the FDCPA.

Dodd-Frank also gives the CFPB the authority to take enforcement action to combat unfair, deceptive, and abusive (“UDAAP”) debt collection practices. To that end, the *CFPB Supervision and Examination Manual*, released in October 2011, details examination procedures related to UDAAP and instructs examiners to evaluate whether servicing and collection practices raise potential UDAAP concerns.

The authors, attorneys with SNR Denton, can be reached at robert.bostrom@snrdenton.com, gary.goldberg@snrdenton.com, stephen.ornstein@snrdenton.com, scott.samlin@snrdenton.com, and jennifer.maree@snrdenton.com, respectively.

The report:

1. Provides background on the FDCPA and the debt collection market
2. Summarizes the number and types of consumer complaints the FTC received in 2011
3. Describes the Bureau's supervision program as it relates to debt collection
4. Presents recent developments in FTC law enforcement and the Bureau's advocacy program
5. Discusses recent research and policy initiatives
6. Discusses plans for coordination and cooperation between the CFPB and the FTC in the administration of the FDCPA.

CONSUMER COMPLAINTS

The FTC receives more complaints about the debt collection industry than any other specific industry. These include complaints about both third party debt collectors and in-house collectors. In 2011, the FTC received 142,743 such complaints, 27.16 percent of all consumer complaints that the FTC received.

Consumers complained to the FTC about several types of conduct by such third party and in-house collectors. In descending order of frequency, the following conduct received the most complaints:

1. Harassment of the alleged debtor or others
2. Demanding an amount other than that which is permitted by law or the contract
3. Failing to send required written notice of the debt to the consumer
4. Threatening dire consequences if a consumer fails to pay the debt, such as civil or criminal proceedings, wage garnishment, or seizure of property despite the fact that the law does not permit such activities
5. Callers failing to identify themselves to the consumer as a debt collector
6. Revealing the consumer's alleged debt to third parties, such as employers

7. Making impermissible calls to the consumer's place of employment
8. Failing to verify debts that a consumer has disputed in writing
9. Continuing to contact the consumer after receiving a "cease communication" notice.

CFPB SUPERVISION OF DEBT COLLECTION ACTIVITIES

Under Dodd-Frank, the CFPB has the authority to supervise debt collection activities. Specifically, Section 1024 of Dodd-Frank authorizes federal supervision of certain nonbank entities, including payday lenders, that engage in debt collection activities. The Bureau can also supervise such nonbank entities' service providers, including third party debt collectors.

Generally, the CFPB's supervision activities will include gathering reports from, and conducting examinations of, supervised entities. The examination process will be an ongoing process of pre-examination scoping and review of information, data analysis, onsite examinations, regular communication with supervised entities, and follow-up monitoring. The Bureau will focus primarily on the risks to consumers in its nonbank supervision program. In determining the scope of individual examinations for supervised entities, the Bureau's focus is on consumer risk, including the risk that an entity will not comply with federal consumer financial law. The CFPB will direct its resources to areas of higher degree of risk and will determine on an exam-by-exam basis whether the degree of risk from collection activities relative to other areas warrants that such activities be examined.

In addition to the *Supervision and Examination Manual*, the manual's "Small-Dollar Lending Examination Procedures and Mortgage Servicing Examination Procedures" update each includes instructions designed to ensure that the servicers and small dollar lenders are complying with the FDCPA to the extent applicable.

On February 16, 2012, the Bureau published its proposed rule, *Defining Larger Participants in Certain Consumer Financial Product and Services Markets*. The proposed rule, the first of several such larger participant rules, would establish, for the first time, federal supervision over the debt collection and consumer reporting industries. The proposed rule, if adopted, would authorize

the Bureau to exercise its supervisory authority over nonbank covered persons in the consumer debt collection market with more than \$10 million in annual receipts. Nonbank covered persons in the consumer reporting market with more than \$7 million in annual receipts would also qualify as larger participants and thus be subject to the Bureau's supervision authority.

FTC ENFORCEMENT ACTIONS

The FTC has brought or resolved seven debt collection cases over the past year — the largest number of such cases it has brought or resolved in a single year. The FTC settled its case against Asset Acceptance, LLC ("Asset") for failing to obtain and provide verification of debts; for furnishing inaccurate information to credit reporting agencies; and for collecting time barred debts, among other violations. Asset was required to pay a \$2.5 million civil penalty, the second largest civil penalty ever obtained by the FTC for a case alleging violations of the FDCPA.

The FTC also brought an enforcement action against defendants collecting on payday loan debts. In *FTC v. American Credit Crunchers, LLC*, the FTC claimed the defendants contacted consumers from call centers located in India and made misrepresentations and threats to convince these consumers to pay debts arising from payday loans, which consumers either had not taken out, or were time barred from being collected through suit. The FTC has already obtained an *ex parte* temporary restraining order with an asset freeze, immediate access to the premises, and the appointment of a receiver in this case, which remains pending.

In 2011, the FTC litigated two other actions related to debt collection of payday loans. In the first case, *FTC v. LoanPointe, LLC*, the FTC alleged the defendants were sending false wage garnishment orders to consumers' employers in violation of the FDCPA and the FTC Act, in which the defendants misrepresented their right to obtain a wage garnishment without a state court order. The FTC eventually obtained a permanent injunction against the defendants and a court order that the defendants pay the FTC \$294,436 in monetary relief.

In the second case, *FTC v. Payday Financial, LLC*, a case brought by the FTC against a payday lending operation that is said to be associated with a

Native American tribe, the FTC's complaint again alleged that the lender was sending false wage garnishment orders, in violation of the FTC Act. The parties stipulated to and subsequently entered into a preliminary injunction to halt the alleged unlawful conduct. This case also remains pending.

CFPB ENFORCEMENT ACTIVITIES WITH RESPECT TO DEBT COLLECTION

The CFPB says that it is currently conducting non-public investigations of debt collection practices to determine whether they violate the FDCPA or Dodd-Frank. In addition, the Bureau filed three amicus briefs in cases arising under the FDCPA — two of them in federal courts of appeals and a third, in coordination with the solicitor general and the FTC, in the U.S. Supreme Court.

RESEARCH AND POLICY INITIATIVES

Among its many responsibilities, the Deposits, Cash, Collections, & Reporting office of the CFPB's Research, Markets and Regulations Division is tasked with analyzing consumer financial markets and behavior, identifying areas where there is the need to consider improving the functions of a particular consumer financial market, and developing rules where a decision is made to proceed through regulation. As part of the Bureau's outreach efforts, members of the CFPB's markets team have attended many collection and debt buying industry conferences, met with relevant trade association representatives, and held over two dozen meetings with collections companies, debt buyers, collection attorneys, and consumer groups to better understand the debt collections market.

COOPERATION AND COORDINATION BETWEEN THE CFPB AND THE FTC

In January 2012, in an effort to protect consumers and avoid duplication of federal law enforcement and regulatory efforts, the CFPB and the FTC entered into a Memorandum of Understanding ("MOU") to create a strong

and comprehensive framework for coordination and cooperation. Among other things, the two agencies have agreed to:

- Meet regularly to coordinate upcoming law enforcement, rulemaking, and other activities
- Inform the other agency prior to initiating an investigation or bringing an enforcement action
- Consult on rulemaking and guidance initiatives to promote consistency and reflect the experience and expertise of both agencies
- Cooperate on consumer education efforts to promote consistency of messages and maximum use of resources
- Share consumer complaints.

OBSERVATIONS

First, while the CFPB's FDCPA activities, at least initially, will be informed by the past efforts of the FTC, it is important to remember that the CFPB was given the lead responsibility for various consumer protection activities, including the FDCPA, because of dissatisfaction on the part of many in Congress with the vigor with which federal consumer protection activities were pursued. While most liberal commentators did not consider the FTC to be as lax with respect to consumer protection as the federal banking regulators, many members of Congress still want to see the FDCPA enforced more aggressively. Given the reasons for the transfer of this responsibility to the CFPB and the predisposition of many in the CFPB's senior leadership to exercise the CFPB's authorities to their outer limits, it is quite possible that the Bureau will pursue a far more active agenda than did the FTC.

Second, given the complete absence of precedent as to what constitutes an "abusive" practice for purposes of the CFPB's new UDAAP authority and the extremely subjective open-ended nature of such an assessment, there are very substantial risks, the extent of which cannot yet be quantified, that collection activities that heretofore have never been considered unlawful could nonetheless be deemed "abusive" under the CFPB's UDAAP authority. The resulting burdens for debt collectors and the opportunities for overreach by

the Bureau are enormous.

Finally, while the CFPB and the FTC may well be satisfied that they have developed a division of labor through their Memorandum of Understanding that will both protect consumers and avoid duplication of effort, the activities of the CFPB and the FTC could still overlap substantially in ways that would be tremendously unfair and burdensome to participants in the debt collection market. Careful vigilance and monitoring will be required to ensure that the CFPB's FDCPA supervisory efforts do not result in costly and unnecessary burdens for participants in the debt collection market.