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News

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CFPB and FCC Disconnect: Debt Collection and Call Blocking

On May 21, the CFPB published its long-awaited proposed rule on debt collection practices ("Proposed Rule") in large part to address application of the Fair Debt Collection Practices Act ("FDCPA") to modern collection issues. The CFPB, however, should have called the FCC before publishing a debt collection rule so heavily focused on telephone calls. In its ongoing efforts to tackle the proliferation of unwanted "robocalls," the FCC **just released a draft order** that would authorize all voice services providers to offer their customers call blocking as a default service, with a right for the consumer to opt out. By blocking, the FCC means stopping the call from reaching the consumer so that the phone never rings. Clearly, the FCC's proposed blocking regime could result in the blocking of many legitimate communications—such as payment reminders, debt relief programs or other debt servicing calls from creditors, debt collectors and loan servicers.

Like the FCC, the CFPB is concerned about invasive illegal or unwanted calling, citing it as a major reason for setting significant limits on how legitimate collections calls can be made. Today's most popular communication technologies—mobile phones, text messaging, email and social media—did not exist when the FDCPA was enacted in 1977. There has been considerable uncertainty regarding how the FDCPA applies, if at all, to these modern technologies, with courts frequently issuing inconsistent decisions. This legal uncertainty has increased risk and costs for both industry and consumers. The need for bright-line rules addressing today's communication technologies is amplified further because consumers and debt collectors increasingly prefer communicating with each other using these modern means, as they can provide greater efficiency, convenience and privacy.

The Proposed Rule seeks to address this uncertainty while protecting consumer privacy. Among other things, it would set specific limits on the number of calls debt collectors may place to consumers each week; clarify how debt collectors may communicate using modern technologies; and require debt collectors to provide additional information to consumers to help them identify debts and respond to collection attempts. The proposed changes include the following:

- **Call Frequency Limits**—Subject to certain exceptions, the Proposed Rule would establish a bright-line rule regarding call frequency. The Proposed Rule prohibits a debt collector from placing a telephone call to a person (1) more than seven times within a seven-day period or (2) within seven days after engaging in a telephone conversation with the person. The proposed limits would apply on a per-debt, rather than per-consumer, basis. Thus, a debt collector who is attempting to collect two debts from the same consumer could, for example, place up to 14 calls to that consumer in one week. Further, the frequency limits would apply to any person (subject to certain exceptions), not only to the alleged debtor. Calls placed to the wrong number would not count toward the frequency limit. A debt collector who exceeds the frequency limits

would per se violate the FDCPA's prohibitions on repeated or continuous telephone calls with intent to annoy, abuse or harass, while a debt collector who stays within the frequency limits would per se comply with those provisions. Email, text messages or other electronic communications would not be subject to the proposed limits. Compliance with the CFPB rules, however, would not insulate companies from TCPA liability.

Among other issues, the CFPB requests comments on the proposed frequency limits and the measurement of calls on a per-week and per-debt basis. The CFPB encourages commenters who believe a higher or lower call limit is appropriate "to provide data supporting any recommended numbers, such as data regarding the frequency of calls that debt collectors currently make and how that frequency relates to the time needed to establish right-party contact and payments received from consumers."

- **Option to Opt Out**—The proposal would require a debt collector to include—in emails, text messages and other electronic communications—a "clear and conspicuous" option for the consumer to opt out of such future communications. The CFPB requests comment on whether to include a non-exclusive list of words or phrases that express an opt-out instruction.
- **Communication Media Restrictions**—The proposed rules would allow a consumer to restrict the means a debt collector may use to communicate by designating a particular medium—such as a specific telephone number or email address—as one that cannot be used for debt collection communications.
- **Time and Place Restrictions**—The Proposed Rule clarifies that calls to mobile phones and other electronic communications, such as texts and emails, are subject to the FDCPA's prohibition on communicating at unusual and inconvenient times and places.
- **Use of Workplace Email**—Subject to certain exceptions, the proposal would prohibit a debt collector from contacting a consumer using an email address that the debt collector knows or should know is provided by the consumer's employer.
- **Social Media Platforms**—The Proposed Rule would prohibit debt collectors from contacting consumers through social media platforms except through a private messaging function.
- **Limited-Content Message**—The proposal would define a "Limited-Content Message" that a debt collector could send by voicemail or text. The Limited-Content Message would not be considered a "communication" and, therefore, would not constitute a prohibited third-party disclosure if disclosed to someone other than the debtor.

The CFPB believes that the proposed call frequency limits, along with the other proposed changes, will benefit both consumers and industry. As to calling limits, "By establishing a clear standard for call frequency," the CFPB states, "the proposed provision would make it easier for debt collectors to know what calling patterns are permitted and avoid the costs of litigation and threats of litigation." But the Proposed Rule recognizes that the proposal could also impose significant costs on collectors:

> First, it would mean that debt collectors must track the frequency of outbound telephone calls, which would require many debt collectors to bear one-time costs to update their systems and train staff, and which would create ongoing costs for some debt collectors. Second, for some debt collectors, the proposed provision would require a reduction in the frequency with which they place telephone calls to consumers, which could make it harder to reach consumers and delay or reduce collections revenue.

While some larger collection agencies may already have these systems in place, the Proposed Rule acknowledges that "[s]maller debt collectors and collection law firms are less likely to have existing systems that track or limit calling frequency, and may therefore face larger costs to establish systems to do so."

Because of the FCC's call blocking efforts, the costs to debt collectors may soon, however, be even greater—with many of the collection calls permitted by the CFPB's proposed changes potentially never reaching consumers. Though not required to offer the call blocking services under the FCC's draft order, voice providers have been encouraged by the FCC to begin offering them immediately and for free. The default call blocking service would be based on "reasonable analytics" designed to identify illegal or unwanted calls. The FCC lists various indicia of unwanted calls, such as calls based on large bursts of calls in a short time frame, low average call duration, low call completion ratios, and invalid numbers placing a large volume of calls, among others. These analytics thus could sweep in legitimate collection calls, failing to distinguish them from illegal scam calls promoting tax relief or cruise lines. The draft order provides no mechanism for callers to challenge the blocking of legitimate calls, or that would inform consumers which calls have been blocked. The draft order would also allow voice providers to block all calls, on an opt-in basis, except those that the consumer specifies, such as calls from persons on the consumer's contact lists. The FCC is slated to consider this order at its June 6, 2019, open meeting and interested parties have until May 30 to propose changes.

The CFPB's efforts to revamp the FDCPA are significant and will have an industrywide impact. But these efforts to promote reasonable and beneficial communications between consumers and debt collectors may be largely mooted by the FCC's pending call blocking order. Therefore, parties who find themselves at the intersection of these seemingly conflicting developments should act quickly to promote agency coordination.

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This document is intended to provide you with general information regardinga CFPB Proposed Rule that addresses the FDCPA's application to modern collection issues. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.