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Debt Collection in the Post Dodd-Frank Enforcement Era

Since passage of the Dodd-Frank Act, government agencies have increasingly focused on entities operating in the debt-collection space. Where government agencies have identified practices they believe constitute unfair, deceptive, or abusive acts and practices or other violations of law in the collection of consumer debts, enforcement actions generally have ensued. The authors identify key takeaways for debt collectors from recent government actions and provide possible options regarding continued regulatory compliance.

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Since passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act[1](the "Dodd-Frank Act") in 2010, government agencies have paid heightened attention to the activities of entities operating in the debt-collection space. In particular, over the last two years, agencies such as the Consumer Financial Protection Bureau (CFPB), the Federal Trade Commission (FTC), the Department of Justice (DOJ), and the Office of the Comptroller of the Currency (OCC), have made efforts to inform debt-collection entities of the consequences of committing what may be perceived as unfair, deceptive, and abusive acts and practices (UDAAP) or other violations of law in the collection of consumer debts—and have initiated enforcement actions where they have identified alleged violations.

Important lessons can be drawn from these enforcement actions, lessons that should be considered by any party engaged in debt collection—whether a traditional debt collector acting on behalf of another or a creditor collecting its own debt—and applied where appropriate. This article identifies key takeaways from recent government actions and sets out possible options for assuring ongoing compliance with regulatory expectations.

APPLICATION OF DEBT-COLLECTION STANDARDS TO CREDITORS

Overview of Creditor Risk. Although expressly exempt from the provisions of the Fair Debt Collection Practices Act (FDCPA),[2] recent CFPB action suggests that creditors may be expected to operate under the same regulatory standards as debt collectors. The CFPB, for example, has stated its intent to use its UDAAP[3] authority to regulate the collection practices of creditors in much the same way that the FDCPA is used to regulate equivalent practices of debt collectors.[4] The CFPB has also warned creditors, as well as entities subject to the FDCPA, that unsubstantiated representations made to consumers about the impact of payments on their credit reports, credit scores, or creditworthiness are of "significant concern to the CFPB" given their potential to constitute a deceptive practice and thus a violation of both the FDCPA and UDAAP provisions of the Dodd-Frank Act.[5]

[1] P.L. 111-203, Title X, 124 Stat. 1376 (2010).

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[2] P.L. 95-109; 91 Stat. 874, codified as 15 U.S.C. § 1692–1692p.

[3] The Dodd-Frank Act empowers the CFPB to issue regulations that "[identify] as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financing product or service or the offering of a consumer financial product or service." 12 U.S.C. § 5531(b).

[4] CFPB Bulletin 2013-07.

[5] CFPB Bulletin 2013-08.

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Recent CFPB enforcement actions further confirm the Bureau's intent to use its UDAAP powers as a proxy to regulate creditors' debt-collection practices.[6] In July 2014, the CFPB settled an action against a payday lender that alleged the lender used illegal debt-collection tactics, including harassment and false threats of negative credit reporting, lawsuits, and criminal prosecution, to pressure borrowers into taking out additional loans to pay their overdue debts.[7] As part of that settlement, and in what amounts to a significant departure from the exemption granted creditors under the FDCPA,[8] the lender is required to cease collection efforts upon receipt of a dispute until such time as the lender has conducted a reasonable investigation into that dispute and provided written notice of the results to the consumer, similar to the debt validation requirements set forth in the FDCPA.[9]

Recent settlements clearly demonstrate the CFPB's willingness to read at least certain parts of the FDCPA into the Dodd-Frank Act's UDAAP provisions.

At the heart of these settlements are issues similar to those identified as potentially problematic in CFPB Bulletins 2013-07 and 2013-08, and they clearly demonstrate the CFPB's willingness to read at least certain parts of the FDCPA into the Dodd-Frank Act's UDAAP provisions. In addition, they may signal the CFPB's desire to incorporate other FDCPA requirements into its UDAAP standards as a way to apply those requirements to creditors.[10]

Indeed, at least one state regulator has done exactly that. In 2012, the Massachusetts Attorney General issued regulations which, among other things, make it an unfair or deceptive act or practice for *creditors* to fail to provide a delinquent customer certain debt validation information within five days after the creditor's initial communication with the debtor.[11] In doing so, Massachusetts formally extended FDCPA-like debt validation requirements to creditors collecting their own debts.[12] Extension of such requirements presents challenges to creditors, especially given the failure to specify the exact type of conduct that triggers the debt validation obligation.[13]

Forward-Looking Compliance Strategies. Creditors all over the country could face similar challenges as the CFPB continues to apply FDCPA standards to creditors through its UDAAP authority. To forestall problems, creditors should:

- *Implement appropriate policies and procedures.* Adopting appropriate written policies and procedures, setting forth expectations and the creditor's overall compliance approach, is an important first step.
- *Engage in appropriate training of collectors.* Consider implementation of both initial and regular periodic training of employees engaged in collection activities, including a post-training test. Training programs need to be updated on a regular basis to ensure they address both long-standing and emerging issues; this calls for ongoing monitoring of regulatory, litigation, and enforcement activities in the debt-collection space.
- *Monitor collection activities.* Monitoring of collection activities can occur both in real time, whether through the use of on-site team supervisors hearing telephone calls or via remote monitoring, and post-call through the use of recorded calls. Advances in predictive technology may also present opportunities for improved monitoring.
- *Take appropriate action.* A compliance strategy is often only as effective as the willingness of the institution to take action, both positive and negative, in support of that strategy. Consider how to implement an appropriate program to both reward positive behavior and discipline those who engage in inappropriate conduct.

UPSTREAM RISK TO CREDITORS BASED ON CFPB SUPERVISION OVER LARGER PARTICIPANTS

The Dodd-Frank Act gave the CFPB supervisory authority over "larger participant[s]" in markets for consumer financial products and services.[14] To act

[6] See, e.g., In the Matter of Ace Cash Express, Inc., No. 2014-CFPB-0008 (July 10, 2014); In the Matter of DriveTime Automotive Group, Inc. and DT Acceptance Corp., No. 2014-CFPB-0017 (Nov. 19, 2014).

[7] *In the Matter of Ace Cash Express*, supra note 6, ¶¶ 12–15.

[8] 15 U.S.C. § 1692a(6)(F)(ii), (iii).

[9] *In the Matter of Ace Cash Express*, supra note 6, ¶ 32(e); 15 U.S.C. § 1692g.

[10] Advance notice of proposed rulemaking: Debt Collection [hereinafter "Debt Collection ANPR"], 78 Fed. Reg. 67848, 67853 (Nov. 12, 2013) ("[T]he Bureau believes it is important to examine whether rules covering the conduct of creditors collecting in their own names on their own debts that arise out of consumer credit transactions are warranted.").

[11] 940 Mass. Code Regs. 7.08(1).

[12] See 15 U.S.C. § 1692g(a).

[13] While conduct that is "not the collection of debts" is excluded from the scope of the Massachusetts debt validation provisions, the Massachusetts legislature has provided no clarification with respect to the type of conduct by a creditor that does and does not constitute the collection of a debt. See 940 CMR 7.02.

[14] 12 U.S.C. §§ 55114(a)(1), (A), (C)-(E); 55114(a)(1)(B).

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upon that authority, however, the CFPB is required to issue a rule establishing a framework by which an entity can determine whether it is considered a "larger participant" within a particular market.[15] Accordingly, in late 2012, the CFPB published a final rule setting forth the framework for determining if an entity is a "larger participant" in the debt-collection market.[16] Under the final rule, consumer debt collectors, including debt buyers, third-party debt collectors, and collection attorneys with more than $10 million in annual receipts are deemed "larger participants" and thereby are subject to the CFPB's supervisory authority and the examination process.[17]

But debt buyers, third-party debt collectors, and collection attorneys aren't the only members of the debt-collection community impacted by the "larger participant" rule. Creditors may also be subject to greater exposure as a result of the CFPB's ability to directly examine those third-party debt collectors and collection attorneys with which creditors do business.

In fact, the CFPB has publicly warned that legal responsibility for violations of consumer financial protection laws by supervised service providers, such as third-party debt collectors and debt-collection attorneys considered larger participants in the debt-collection market, may lie with the supervised bank or non-bank with which the larger participant does business.[18] Liability to the creditor could flow in one of two ways:

1. To the extent it identifies a potential violation when conducting an examination of a third-party debt collector or collection attorney, the CFPB could impute liability for the violation to the creditor with whom the subject entity is doing business;[19] or
2. The CFPB could take action against a creditor for violations of consumer protection laws by a third-party debt collector or collection attorney with which the creditor does business, based on the creditor's perceived failure to maintain adequate supervision and controls over its service provider.[20]

To address the potential risks extending from the CFPB's rule regarding larger participants in the debt-collection market, creditors should develop a standardized process for managing their relationships with all service providers, whether at the time of initial retention or periodically thereafter, including third-party debt collectors and collection attorneys, and monitoring those service providers' compliance with applicable consumer financial laws.

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FDCPA COMPLIANCE IN THE CONTEXT OF SOCIAL MEDIA AND OTHER NEW TECHNOLOGIES

Although advancements in communication technologies can present increased opportunities, they may also present increased challenges for debt collectors. This was made clear last year when the FTC brought an enforcement action against a debt collector based on its use of text messages in the collection of debts.[21] In that action, the FTC required the debt collector to pay $1 million to settle charges it violated the FDCPA by (1) failing to disclose its status as a debt collector and (2) misrepresenting itself as a law firm in text messages sent to consumers.[22] The FTC also identified FDCPA violations based on the debt collector's practice of sending text messages to the mobile

[15] Peggy Twohig & Steve Antonakes, "The CFPB launches its nonbank supervision program" (CFPB Blog, Jan. 5, 2012), available at http://www.consumerfinance.gov/blog/the-cfpb-launches-its-nonbank-supervision-program/.

[16] 12 C.F.R. §§ 1090.105(b); 1090.100 (Jan. 2, 2013).

[17] Id.

[18] See CFPB Bulletin 2012-03.

[19] Resolution of enforcement actions brought against Capital One, American Express, and ACE Cash Express, Inc. demonstrate that the CFPB is not afraid to impute responsibility and liability to supervised entities for the bad practices and misconduct of their service providers, including providers of debt-collection services. In the Matter of American Express Centurion Bank, No. 2012-CFPB-0002, ¶ 9 (Oct. 1, 2012); In the Matter of American Express Bank, FSB, No. 2012-CFPB-0003, ¶¶ 4,7 (Oct. 1, 2012); In the Matter of American Express Travel Related Services Company, Inc., FSB, No. 2012-CFPB-0004, ¶¶ 5-9 (Oct. 1, 2012); *In the Matter of ACE Cash Express*, supra note 6, at ¶¶ 8, 12, 14.

[20] See CFPB Bulletin 2012-03 ("The CFPB expects supervised banks and nonbanks to have an effective process for managing the risks of service provider relationships," and thus has indicated that "legal responsibility may lie with the supervised bank or non-bank as well as with the supervised service provider," for violations of consumer financial laws committed by the supervised service provider).

[21] See United States v. National Attorney Collection Services, Inc., No. 2:13-cv-06212, Complaint, (Aug. 23, 2013).

[22] Id. at ¶¶ 22-25, 26, 37-38.

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numbers of third parties regarding collection of consumers' debts.[23]

The FTC action demonstrates that various provisions of the FDCPA may be implicated by debt collectors' use of new technologies, such as text messaging, emails, and social media. Therefore, debt collectors should be mindful of the following potential problem areas:

- *Mini-Miranda disclosures:* Regardless of any text, email, or social media character restrictions, debt collectors should provide the mini-Miranda warning or disclose their identity as a debt collector as required when communicating with consumers.[24]
- *Inappropriate third-party access to communications made through new technologies:* Because providers of email, text, and social media services, including employers, may retain rights to access an individual's email, inappropriate disclosure of the names of consumers who allegedly refuse to pay their debts could occur when certain new technology platforms are used.[25]
- *Communication charges incurred by consumers:* Debt collectors may not cause charges to be made to any person for communications by concealment of the true purpose of the communication. However, certain cell phone plans result in charges to consumers for text or email communications, which may make it more difficult for debt collectors that use such technology to comply with this restriction.[26]
- *Satisfaction of "in writing" requirements through electronic communications:* The CFPB appears to be considering whether the "in writing" requirements of the FDCPA, related to consumers' right to dispute a debt or request that a collector cease communications, may be satisfied through electronic communication. As a result, debt collectors may consider establishing policies which firmly reflect how the debt collector treats those writing requirements, while creditors may be well served to review collector policies and procedures in this area.[27]
- *Uncertainty regarding compliance with convenient-hour requirements:* Using email, text, or social media to communicate with customers could present difficulties in ensuring compliance with the convenient-hour requirements of the FDCPA given that debt-collection entities are unlikely to be able to control the time at which such a communication actually will be delivered to a consumer's phone and, likewise, the time at which a consumer will be notified about such delivery.[28]

Using email, text, or social media to communicate with customers could present difficulties in ensuring compliance with the convenient-hour requirements of the FDCPA.

In light of these potential problems, debt collectors may wish to consider whether and how best to add a component to their compliance management program that allows them to identify, measure, monitor, and control for the risks associated with new technologies.

SUBSTANTIATION IN COLLECTION COMMUNICATIONS

The FTC and CFPB appear to share the view that debt collectors must possess information to support claims made to consumers as part of the debt-collection process.[29] Indeed, both agencies have brought enforcement actions based on allegedly unsubstantiated claims made to consumers.[30]

Unsubstantiated claims that have served as the basis for FTC and CFPB enforcement include false threats of lawsuits, criminal prosecution, or other action that could be taken based on a debtor's failure to pay—for example, claims that third-party collectors would "hassle" the debtor and failure to pay would result in the garnishment of a consumer's wages.[31] So too have false claims, including implied misrepresentations, that a collector would report a consumer's failure to pay to the credit bureaus or assess collection fees based the consumer's failure to pay been the cause of claims of improper actions.[32]

[23] Id.

[24] 15 U.S.C. § 1692e(11); Debt Collection ANPR, supra note 10, at 67872.

[25] 15 U.S.C. § 1692d(3); Debt Collection ANPR, supra note 10, at 67871.

[26] 15 U.S.C. § 1692f(5); Debt Collection ANPR, supra note 10, at 67873.

[27] 15 U.S.C. § 1692g(a)(4), (a)(5); Debt Collection ANPR, supra note 10, at 67859.

[28] 15 U.S.C. § 1692c(a)(1); Debt Collection: advance notice of proposed rulemaking, 78 Fed. Reg. 67848, 67865 (Nov. 12, 2013).

[29] Debt Collection ANPR, supra note 10 at, 67870.

[30] Debt Collection ANPR, supra note 10, at 67870; *In the Matter of ACE Cash Express*, supra note 6, at ¶¶ 8, 12, 14.

[31] *In the Matter of ACE Cash Express*, supra note 6, at ¶¶ 13, 14; United States of America v. Baker and Associates et al., No. 12-cv-1145, Complaint, ¶¶ 23-24 (C.D. Ill. May 11, 2012); United States v. Asset Acceptance, LLC., No. 12-cv-182, Complaint, ¶¶ 30-34 (M.D. Fla. Jan. 30, 2012).

[32] *In the Matter of ACE Cash Express*, supra note 6, at ¶¶ 13, 14.2014).

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It is precisely these types of claims and representations that Bulletins 2013-07 and 2013-08 warned could constitute UDAAPs and that the CFPB indicated it would be "watching . . . closely."[33]

Because of the CFPB's and FTC's heightened focused on claims made in the debt-collection process, entities involved in the collection of debts should ensure that their policies and procedures prohibit collectors from using any false claims, or implied misrepresentations, in communications with consumers. Collector call scripts and training materials should also be carefully developed to prevent collectors from using claims that might create even a slight misimpression with consumers. Further, entities should monitor calls and take action where they identify a collector is using false claims as a means to collect on a consumer's debt.

ACCURATE REPORTING OF DELINQUENT ACCOUNTS

Accurate reporting of information to consumer reporting agencies (CRAs) also remains a key area of focus for the CFPB. In 2014 alone, two separate creditors were required to pay fines to the CFPB based on their alleged failure to fix known instances of inaccurate reporting of consumer information to CRAs.[34]

Debt collectors that furnish information to CRAs should ensure that their process for reporting is governed by comprehensive policies and procedures. More specifically, the compliance program of a debt collector that furnishes information to CRAs should include (1) uniform methods for investigating consumer disputes and (2) a component aimed at detection and correction of any inaccuracies in reporting. Failure to incorporate a uniform process for investigation of disputes or controls for detection and correction of inaccuracies reported to CRAs could result in increased exposure. And, continued reporting of information that is known to be inaccurate is not recommended; wait until the issue is resolved before resuming reporting.

FCRA "REASONABLE" INVESTIGATION STANDARD APPLIED TO DISPUTED DEBTS

Upon receipt of a written dispute from a consumer regarding a debt, a debt collector "may either cease collection efforts without investigation or may investigate the dispute with the intent of providing verification [of the debt] to the consumer."[35] Neither the FDCPA itself nor the CFPB, however, has detailed the type of investigation that must be conducted to ensure compliance with these requirements.[36]

In contrast, the FTC has suggested that the "reasonable investigation" standard applied in context of disputes under the Fair Credit Reporting Act (FCRA)[37] be similarly applied to disputes arising under the FDCPA.[38] The CFPB has stated that "whether an investigation is reasonable, depends on the circumstances," but has also warned debt collectors and debt buyers specifically that, in the FCRA context, furnishers "should not assume that simply deleting that item [that is disputed] will generally constitute a reasonable investigation."[39] Further, the CFPB has advised furnishers to "take immediate steps to ensure they are fulfilling their obligations," with respect to their investigation of disputed information.[40]

Collector call scripts and training materials should be carefully developed to prevent collectors from using claims that might create even a slight misimpression with consumers.

Entities subject to the FDCPA should take note of the FTC's suggestion and consider how best to address the potential risk that may be posed through implementation of differing investigation standards. In considering how to proceed, due consideration should be given to both current regulatory expectations and operational considerations, while at the same time considering potential issues that may arise in the future.

SCRA ISSUES IN DEBT COLLECTION

As we move into 2015, Servicemembers Civil Relief Act (SCRA)[41] enforcement remains a key area of focus for the DOJ and others, and—as other regulators have expanded their focus to debt-collection activities—we expect the DOJ to expand its focus to additional credit products and debt-collection strategies going forward.

[33] CFPB Bulletin 2013-07.

[34] In the Matter of First Investors Financial Services Group, Inc., No. 52014-CFPB-00012, ¶¶ 9–27 (Aug. 20, 2014); *In the Matter of DriveTime Automotive Group*, supra note 6, at ¶¶ 34–51.

[35] Debt Collection ANPR, supra note 10, at 67861.

[36] Note, however, that certain states have enacted regulations imposing specific investigation standards on parties engaged in debt collection in the recent past, including, in the case of Massachusetts, on creditors collecting their own debt. See, e.g., 940 Code Mass. Regs. 7.01 et seq.; 23 New York Codes, Rules & Regulations, Part 1.

[37] Codified at 15 U.S.C. § 1681 et seq.

[38] Debt Collection ANPR, supra note 10, at 67861.

[39] CFPB Bulletin 2014-01.

[40] Id.

[41] Codified at 50 U.S.C. app. §§ 501–597b.

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Interest Rate Benefit. In the largest SCRA settlement of 2014, the DOJ required a student loan servicer to pay $60 million to student loan borrowers for alleged errors in applying the SCRA's interest rate benefit.[42] The interest rate benefit requires a creditor, after receiving both a "written notice" for the interest rate benefit and a copy of the servicemember's active duty orders, to reduce the interest rate on any debt incurred prior to active duty to 6 percent.[43] Not only was this settlement the DOJ's first student loan SCRA action, but the DOJ considers it a stern warning to creditors. According to Attorney General Eric Holder: "[W]e are sending a clear message to all lenders and servicers . . . this type of conduct is more than just inappropriate; it is inexcusable. And it will not be tolerated."[44]

SCRA enforcement remains a key area of focus for the DOJ and others, and—as other regulators have expanded their focus to debt-collection activities—we expect the DOJ to expand its focus to additional credit products and debt-collection strategies going forward.

Buried within the settlement terms, however, were some particularly telling provisions that may suggest what the DOJ will seek in future settlements. The settlement goes well beyond the statute by defining an order as "any document prepared exclusively by a branch of the military . . . that indicates that the borrower is on active duty."[45] Further, if a debtor provides a request for SCRA interest rate benefits and the Defense Manpower Data Center (DMDC) website[46] shows the debtor to be on active duty, then the servicer must provide SCRA benefits under the settlement.[47] Finally, the servicer must extend SCRA benefits if a debtor submits military orders to the servicer without providing a written notice.[48]

The DOJ's settlement was accompanied by an additional $36 million settlement with the FDIC to address both SCRA-related claims and other claims.[49] The FDIC, however, framed its concerns as unfair or deceptive acts or practices (UDAPs). The FTC also has UDAP authority and, in many instances, has asserted its UDAP authority against debt collectors. The FDIC's settlement shows that, even if the DOJ does not decide to take SCRA action against a debt collector, the FTC may attempt to exercise its UDAP authority to reach essentially the same outcome.

Debt-Collection Specific SCRA Concerns. Certain provisions of the SCRA are more likely to affect debt collectors; as the DOJ shifts its SCRA focus to new products, debt collectors should be aware of two areas where they may be at greater risk:

1. The SCRA affords certain servicemembers protections against garnishments. If military service affects a servicemember's ability to comply with a court judgment or order, including an order garnishing a servicemember's wages, the court may stay or vacate the garnishment order.[50] A servicemember may request the protection or the court may decide to grant it *sua sponte*, but this protection is not automatic—rather, it requires the court to issue an order providing the protection.
2. The SCRA bars a creditor from terminating an installment contract for purchase or lease, or from repossessing an automobile, while the borrower is on active duty without first obtaining a court order.[51] Recently, however, creditors have begun using starter interrupter devices to disable vehicles when borrowers fail to make their required payments. While there are good arguments that activating a starter interrupter is not a repossession, creditors should be wary of the DOJ's expanding focus and consider the SCRA implications of using a starter interrupter.[52]

[42] United States v. Sallie Mae, Inc., no. 1:99-mc-09999 (D. Del. Sept. 29, 2014) [hereinafter "Sallie Mae Consent Order"]. The consent order was announced by DOJ and filed on May 13, 2014.

[43] 50 U.S.C. app. § 527.

[44] Department of Justice, "Justice Department Reaches $60 Million Settlement With Sallie Mae to Resolve Allegations of Charging Military Servicemembers Excessive Rates on Student Loans" (Press Release, May 13, 2014), available at http://www.justice.gov/opa/pr/justice-department-reaches-60-million-settlement-sallie-mae-resolve-allegations-charging.

[45] Sallie Mae Consent Order, supra note 42, at ¶ 23(j).

[46] The DMDC website is an online database maintained by the Department of Defense Manpower Data Center, and is available at https://www.dmdc.osd.mil/appj/scra/scraHome.do. It allows a creditor—using a debtor's last name and either Social Security number or date of birth—to determine if an individual is in active duty military service or has been at any point in the past. While the DMDC website is the only official source out there, in our experience it has a known (and in some instances significant) error rate.

[47] Sallie Mae Consent Order, supra note 42, at ¶ 23(j).

[48] Id. at ¶ 23(g).

[49] In re Sallie Mae Bank, Consent Order, Order for Restitution, and Order to Pay Civil Money Penalty, nos. FDIC-13-0366b; FDIC-13-0367k (FDIC May 13, 2014).

[50] 50 U.S.C. app. § 524(a).

[51] Id. at § 532.

[52] For a more detailed discussion of this issue, see Kirk Jensen, John Redding, Sasha Leonhardt & Alex Dempsey, "Starter Interrupters Expose Lenders to SCRA Risks" (Law360, Nov. 3, 2014), available at http://www.buckleysandler.com/news-detail/starter-interrupters-expose-lenders-to-scra-risks.

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Forward-Looking SCRA Compliance Strategies. The DOJ and other regulators expect creditors and debt collectors to have policies and procedures in place to provide servicemembers with the required benefits under the law. This expectation, however, also serves as an opportunity for debt collectors to take affirmative steps to streamline their SCRA practices servicing and mitigate the risk of both enforcement and debtor suits. Some of the easiest ways to efficiently address SCRA compliance are:

- *Build "waypoints" for DMDC checks into business processes.* SCRA errors regularly occur at the same points in the life cycle of a debt. In particular, debt collectors should check for active duty status upon acquiring debt from the prior creditor, when moving for a default judgment, prior to seizing collateral under a contract, and prior to setting up or removing the SCRA's interest rate benefit.
- *Use standardized documents.* Many of the key documents related to SCRA servicing—military affidavits, waivers, call scripts, and SCRA-specific letters—are excellent candidates for creating one quality standardized form which can be reused for many eligible accounts.
- *Specialize in SCRA servicing.* Create a dedicated team of SCRA specialists who understand both the statute and how to review complicated military orders.
- *Leverage federal SCRA expertise for state SCRA compliance.* Many states have their own versions of the SCRA that vary from the federal statute. Rather than learning each state's SCRA individually—a timely and difficult process—take advantage of the similarities in building a servicing plan.
- *Use waivers.* If asked, servicemembers are often willing to waive the SCRA's benefits so they can be freed of old debt and begin the process of repairing their credit report. Once a creditor has a proper signed waiver, the creditor can collect upon this debt just as it would any other debt.
- *Encourage employees to elevate any SCRA- or military-related issues.* In most instances, front-line employees will be aware of SCRA-related issues in an account, but their incomplete understanding of a complicated statue can lead to mistakes. Encourage employees to elevate SCRA and military issues to specialists or management to ensure that these accounts are handled properly.

EXPECTATION REGARDING DEBT SALES AND TRANSFERS OF DEBT

The CFPB clearly expects "creditors and other debt sellers to employ adequate policies and procedures to ensure the accuracy of data associated with any debts they sell" and will evaluate such policies and procedures during the course of an examination.[53] Moreover, in November 2013, the CFPB announced that it was "considering using its rulemaking authority to develop requirements related to the transfer of specified information or documents as part of the sale of a debt or the placement of a debt with a third-party collector." [54]

To the extent that it chooses to exercise its rulemaking authority, the CFPB may be guided by a bulletin recently published by the OCC on the topic of debt sales.[55] The OCC bulletin advises national banks and federal savings associations (collectively "Banks") of the agency's expectations "for structuring debt-sale arrangements in a manner that is consistent with safety and soundness and promotes fair treatment of customers."[56] Notably, the OCC guidance details specific information that should be provided by Banks to debt buyers and identifies certain types of debts that are not "appropriate for sale" as well as debts that Banks should "refrain" from selling.[57] The bulletin further addresses due diligence, contract, and monitoring expectations associated with debt sales.

Non-bank creditors, and other entities that sell or transfer debt, may wish to begin considering the implications of the guidance issued by the OCC, including its list of required information and documents to be provided, particularly in light of the potential for similar requirements to be mandated by rule by the CFPB in the future.

Non-bank creditors, and other entities that sell or transfer debt, may wish to begin considering the implications of the guidance issued by the OCC, including its list of required information and documents to be provided, particularly in light of the potential for similar requirements to be mandated by rule by the

[53] CFPB, Spring 2014 Supervisory Highlights, available at http://files.consumerfinance.gov/f/201405_cfpb_supervisory-highlights-spring-2014.pdf; CFPB Examination Manual, Debt Collection, available at http://files.consumerfinance.gov/f/201210_cfpb_debt-collection-examination-procedures.pdf.

[54] Debt Collection ANPR, supra note 10, at 67855.

[55] Office of the Comptroller of the Currency, Bulletin 2014-37, Risk Management Guidance, Consumer Debt Sales, (Aug. 4, 2014).

[56] Id.

[57] Id.

CFPB in the future.[58] Similarly, it may be worthwhile to consider the types of debts being or to be sold or transferred, such as those that have been settled or are in the process of settlement, debt of deceased account holders, debt of borrowers subject to SCRA benefits and similar types of higher profile debt, as well as the nature of the debt seller's controls around those particular types of debt sales. Of course, the challenge will be determining the appropriate standards to apply in identifying accounts that, for example, involve borrowers "seeking" bankruptcy protection, lack "clear" evidence of ownership, or are "close" to the statute of limitations.

CONCLUSION

Regulatory expectations for entities operating in the debt-collection space have evolved tremendously since passage of the Dodd-Frank Act. Such expectations will certainly continue to evolve in the coming year, particularly given the CFPB's recent assumption of supervisory authority of third-party debt collectors, debt buyers, and collection attorneys and its stated intent to issue rules implementing provisions of the FDCPA. As this evolution continues, those involved in debt collection would be well advised to continue actively monitoring regulatory expectations, litigation, and enforcement actions to ensure their ability to identify—and quickly adapt to—any new guidance or matters impacting the way they do the business or their ability to comply with relevant consumer financial laws. ■

[58] Id. (stating that the bank should provide the debt buyer with copies of underlying account documents, and the related account information, as applicable and in compliance with record retention requirements, including the following: (1) a copy of the signed contract or other documents that provide evidence of the relevant consumer's liability for the debt in question; (2) copies of all, or the last 12 (whichever is fewer), account statements; (3) all account numbers used by the bank (and, if appropriate, its predecessors) to identify the debt at issue; (4) an itemized account of all amounts claimed to be owed in connection with the debt to be sold, including loan principal, interest, and all fees; (5) the name of the issuing bank and, if appropriate, the store or brand name; (6) the date, source, and amount of the debtor's last payment and the dates of default and amount owed; (7) information about all unresolved disputes and fraud claims made by the debtor. Information about collection efforts (both internal and third-party efforts, such as by law firms) made through the date of sale; and (8) the debtor's name, address, and Social Security number).