

Navigating CFPB Investigations and Enforcement

**Jonathan L. Pompan, Esq.
Partner and Co-Chair CFPB Task Force, Venable LLP**

**Alexandra Megaris, Esq.
Associate, Venable LLP**

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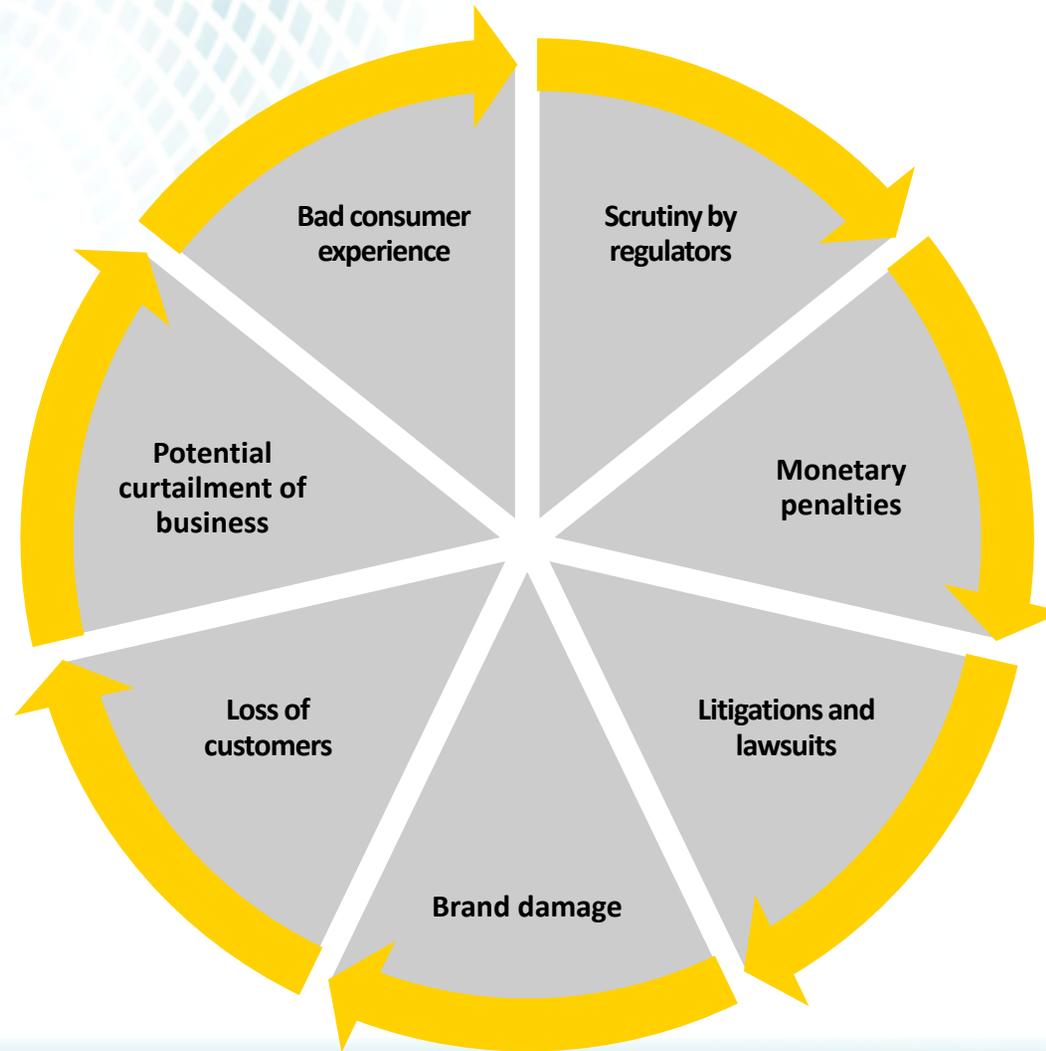
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What's the Impact of an Investigation and Enforcement Action?



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Agenda

- How We Got Here
- Evolving Enforcement Landscape
- Key Steps to Responding to and Managing an Investigation
- Tips
- What to Watch for in the Coming Months



How We Got Here

Who's Subject to a Potential CFPB Investigation?

The CFPB authorizes the Bureau to conduct investigations to ascertain whether any person is or has been engaged in conduct that, if proved, would constitute a violation of any provision of Federal consumer financial law.

- Banks and credit unions
- All mortgage related businesses
- Small dollar lenders
- Private student lenders
- Debt collectors
- Consumer reporting
- Consumer credit and related activities
- Money transmitting, check cashing, and related activities
- Prepaid cards
- Debt relief services
- Financial advisors
- Service Providers
- And more...

CFPB Investigation and Enforcement Authority

- CFPB may investigate, issue subpoenas and civil investigative demands, and compel testimony
- CFPB may conduct hearings and adjudications to enforce compliance, including issuing cease-and-desist orders
- CFPB may initiate actions for civil penalties or an injunction
 - Penalties up to \$1M per day for knowing violations
 - No exemplary or punitive damages
- Criminal referrals to DOJ
- Whistleblower protection
- State attorneys general may also enforce the CFPA with notice to the CFPB
- May enforce rules issued by the FTC to the extent such rules apply to a covered a person or service provider
- No express private right of action under the CFPA

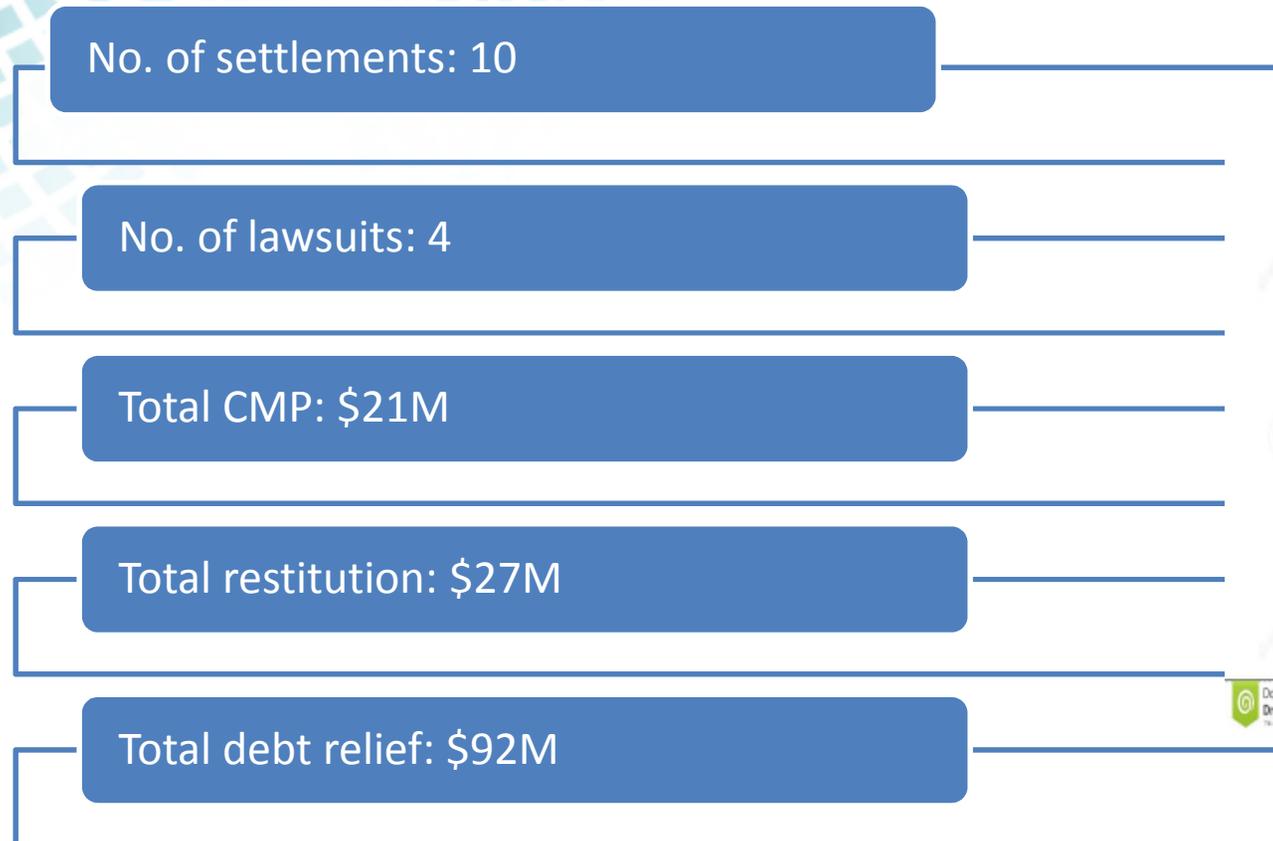
CFPB Investigation Triggers





Evolving Enforcement Landscape

Snap Shot of CFPB Enforcement Actions Involving Debt Collection



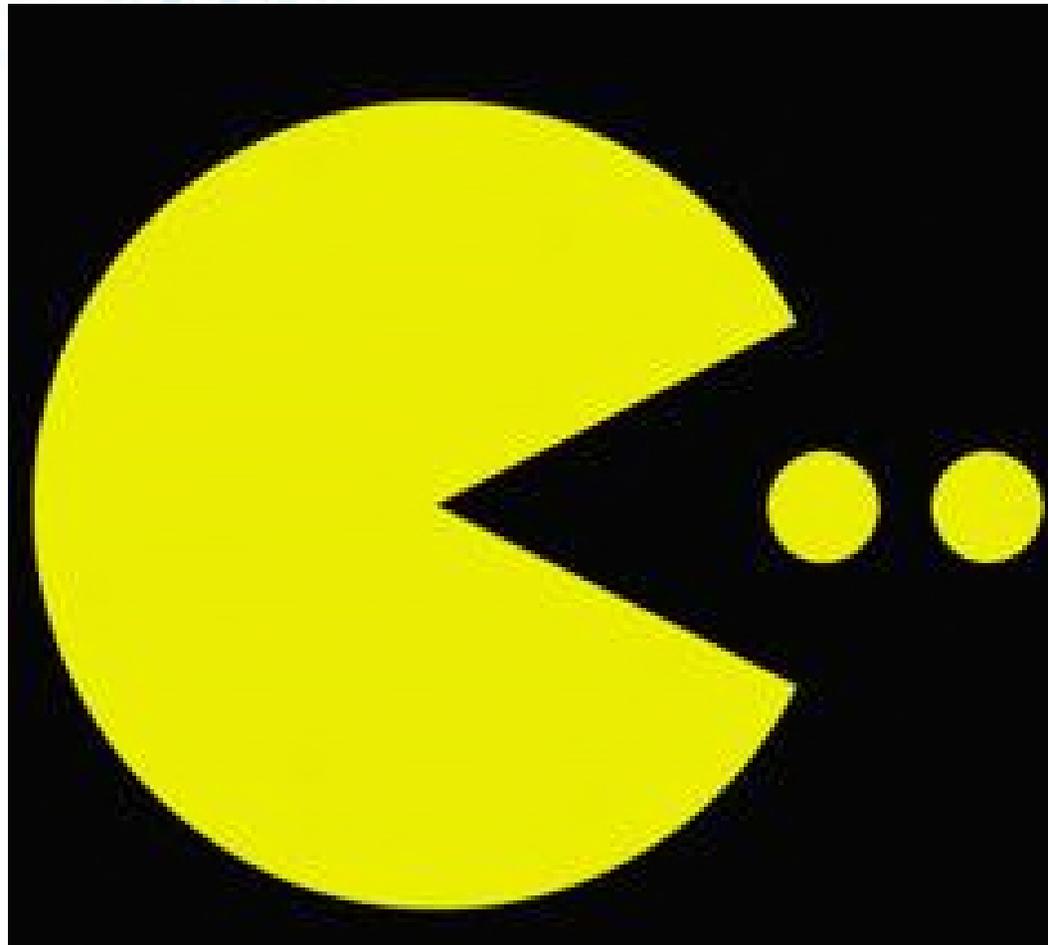
*As of June 28, 2015. Dollar figures are approximate and do not include American Express settlement. Does not include non-public supervisory actions.



Early Investigations Were Broad in Scope: Typical Areas of Focus

- Acts and practices (transactional level data);
- Compliance Management Systems;
- Policies and procedures;
- Training;
- Monitoring;
- Consumer complaints;
- Compliance with enforcement actions; and
- Corrective action

CFPB Enforcement Trends



Deceptive and Misleading Representations: A Moving Target

- Both FDCAP and CFPA prohibit use of deceptive and misleading representations to collect debt.
 - FDCPA includes “non-exhaustive” list of what may be considered deceptive
 - Case law has augmented the list
- FTC and CFPB enforcement actions—virtually all of which are non-litigated settlements—continue to push the envelope.

CFPB Bulletin 2013-07: Prohibition of UDAAP in the Collection of Consumer Debts



1700 G Street, N.W., Washington, DC 20552

CFPB Bulletin 2013-07

Date: July 10, 2013
Subject: Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts

2. Deceptive Acts or Practices

The Dodd-Frank Act also prohibits conduct that constitutes a deceptive act or practice. An act or practice is deceptive when:

- (1) The act or practice misleads or is likely to mislead the consumer;
- (2) The consumer's interpretation is reasonable under the circumstances; and
- (3) The misleading act or practice is material.¹⁶

To determine whether an act or practice has actually misled or is likely to mislead a consumer, the totality of the circumstances is considered.¹⁷ Deceptive acts or practices can take the form of a representation or omission.¹⁸ The Bureau also looks at implied representations, including any implications that statements about the consumer's debt can be supported. Ensuring that claims are supported before they are made will minimize the risk of omitting material information and/or making false statements that could mislead consumers.

To determine if the consumer's interpretation of the information was reasonable under the circumstances when representations target a specific audience, such as older Americans or financially distressed consumers, the communication may be considered from the perspective of a reasonable member of the target audience.¹⁹ A statement or information can be misleading even if not all consumers, or not all consumers in the targeted group, would be misled, so long as a significant minority

would be misled.²⁰ Likewise, if a representation conveys more than one meaning to reasonable consumers, one of which is false, the speaker may still be liable for the misleading interpretation.²¹ Material information is information that is likely to affect a consumer's choice of, or conduct regarding, the product or service. Information that is likely important to consumers is material.²²

Sometimes, a person may make a disclosure or other qualifying statement that might prevent consumers from being misled by a representation or omission that, on its own, would be deceptive. The Bureau looks to the following factors in assessing whether the disclosure or other qualifying statement is adequate to prevent the deception: whether the disclosure is prominent enough for a consumer to notice; whether the information is presented in a clear and easy to understand format; the placement of the information; and the proximity of the information to the other claims it qualifies.²³

Examples of How CFPB Has Interpreted the Deception Standard

- Threatening (legal) action without intention to pursue it
- Implied representations when filing lawsuit
- Collecting fees and interests improperly assessed in the first place
- Impact payment/nonpayment has on credit report and score

CFPB Bulletin 2013-08: Representations Regarding Effect of Debt Payments on Credit Reports and Scores



1700 G Street, N.W., Washington, DC 20552

CFPB Bulletin 2013-08 (Fair Debt Collection Practices Act and the Dodd-Frank Act)

Date: July 10, 2013

Subject: Representations Regarding Effect of Debt Payments on Credit Reports and Scores

In response to recent practices observed during supervisory examinations and enforcement investigations, the Consumer Financial Protection Bureau (CFPB or Bureau) issues this bulletin to provide guidance to creditors, debt buyers, and third-party collectors about compliance with the Fair Debt Collection Practices Act (FDCPA) and sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act)¹ when making representations about the impact that payments on debts in collection may have on credit reports and credit scores.

A. Legal Background

The Dodd-Frank Act granted the CFPB authority to issue regulations and guidance related to the FDCPA and Title X of the Dodd-Frank Act.² The FDCPA makes it illegal for a debt collector to “use any false, deceptive, or misleading representation or means in connection with the collection of any debt.”³ In addition, it is illegal for any covered person or service provider of consumer financial products or services to engage in any deceptive act or practice in violation of the Dodd-Frank Act.⁴ The FDCPA and the Dodd-Frank Act together prohibit covered persons or service providers, including debt collectors, from engaging in deception while collecting or attempting to collect on consumer debts.

B. Deceptive Claim: Regarding Debt Payments and Credit Reports and Scores

While communicating with consumers, creditors and debt buyers (collectively “debt owners”) and third-party debt collectors often make material representations intended to persuade consumers to pay debts in collection.⁵ Such representations may include, but are not limited to, statements regarding the relationship between:

- Paying debts in collection and improvements in a consumer’s credit report;
- Paying debts in collection and improvements in a consumer’s credit score;
- Paying debts in collection and improvements in a consumer’s creditworthiness; or

¹ 15 U.S.C. § 1692 *et seq.*

² 12 U.S.C. §§ 5531, 5536.

³ 15 U.S.C. § 1692(b).

⁴ 15 U.S.C. § 1692a.

⁵ 12 U.S.C. § 5531(a), 5536(a)(1)(B).

⁶ For the purposes of this bulletin, “debts” refers to debts in collection.

consumerfinance.gov

Enforcement Hot Spots

- **Servicemembers**
 - Contacting and threatening to contact commanding officers (*CFPB v. Security National Automotive Acceptance Company*; *CFPB v. Freedom Stores*)
 - Unauthorized billing (*CFPB v. Freedom Stores*)
- **Service providers**
 - Holding service providers not involved in direct collection of debt—such as payment processors and telephone vendors—liable for violations of FDCPA and CFPB (*CFPB v. Universal Debt & Payment Solutions, et. al*)
- **Credit reporting and dispute handling**
 - Providing inaccurate information (*In re DriveTime Automotive Group*; *In re First Investors Financial Services Group*)
 - Failing to report disputed debt
- **Litigation practices**
 - Meaningful attorney involvement (*CFPB v. Hanna & Associates*)
 - Robosigning (*CFPB v. Hanna & Associates*; *Cash America International*)

Evolving Enforcement Landscape

- The CFPB is currently examining the collection practices of participants in the consumer debt buying and collection markets, and first party collectors.
- What positions will the CFPB take with respect to the interpretation of existing legal requirements and the retroactive application of potential requirements from future rulemaking?

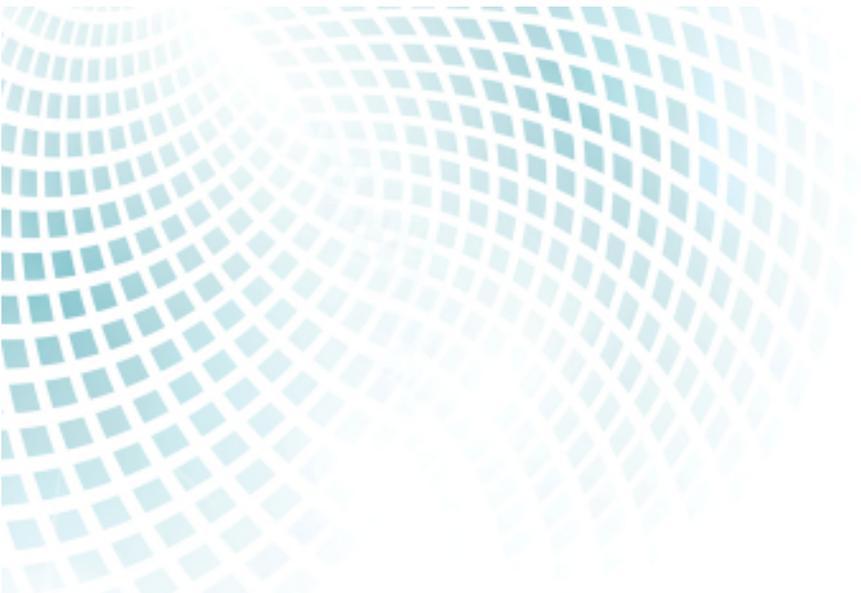
CFPB Coordination with Other Federal and State Enforcement Agencies

- Announced in January 2012 (after State of the Union Address)
- Unit within the Financial Fraud Enforcement Task Force that was created in late 2009, and is led by the DOJ
- CFPB, FTC, DOJ, DoE Inspector General, state AGs, and more are participating



STOPFRAUD.GOV
FINANCIAL FRAUD ENFORCEMENT TASK FORCE

“The newly-created group will work across federal law enforcement and regulatory agencies, and with state and local partners, to strengthen efforts to address consumer-related fraud, including schemes targeting vulnerable populations, such as the unemployed, those in need of payday loans, and those suffering from the burden of high credit card and other debt. The new working group will also focus on scams that exploit prospective students, active-duty military personnel and veterans.” DOJ Press Release (Feb. 10, 2012)



Key Steps to Responding to a CFPB Investigation

Key Steps to Responding to a CFPB Investigation

Step 1: Review the CID –

A review of the CID, among many things, will identify the purpose of the investigation, the assigned staff enforcement attorneys, the production deadline (*e.g.*, 30 days from issuance), the definitions, instructions, and interrogatory and document requests.

Key Steps to Responding to a CFPB Investigation (cont'd)

Step 2: Establish a Response Team –

- Document Collection
- Ensure compliance with legal obligations
- Assess whether responsive information is privileged
- Take proper steps to preserve responsive materials (e.g., implementation of a document preservation policy)
- In addition, a recipient of a CID will need to decide whether public disclosure is required pursuant to other applicable legal and regulatory obligations.
- Activate the “compliance management system,” including Board and management.

Key Steps to Responding to a CFPB Investigation (cont'd)

Step 3: Assess the CID for Possible Modification Requests –

- Determine the scope and timing of the CID response and whether any modifications are needed.
- The scope of the Bureau's authority in issuing the CID also needs to be determined.

Key Steps to Responding to a CFPB Investigation (cont'd)

Step 4: Meet and Confer with Bureau Enforcement Attorneys –

- Within 10 days after receipt of the CID.
- Be prepared, flexible, and knowledgeable.
- Have a long-term strategy.

Key Steps to Responding to a CFPB Investigation (cont'd)

Step 5: Petition to Modify or Set Aside the CID –

- May file a petition to modify or set aside an information request if the request is filed within 20 days of receipt of the CID unless an extension is granted by the head of the Office of Enforcement.
- What's the upside? What's the downside?

Petitions to modify or set aside



As part of our ongoing commitment to transparency, we will post petitions to set aside civil investigative demands as soon as practicable after they are filed. In keeping with our [Rules Relating to Investigations](#), we may redact or withhold from public disclosure any petition or information for good cause shown. You can see an example of the analysis the we apply to determine good cause [here](#).

Petitioner	Filing	Filed	Order Issued
PHH Corp.	Petition to modify or set aside civil investigative demand	8/12/2012	9/20/2012
Next Generation Debt Settlement, Inc.	Petition to modify or set aside civil investigative demand	9/4/2012	10/5/2012
Aspire Financial, Inc.	Petition to modify or set aside civil investigative demand	2/15/2013	4/16/2013
Great Plains Lending LLC, MobilCare LLC, and Plain Green LLC	Joint petition to set aside the civil investigative demands issued to Great Plains Lending LLC, MobilCare LLC, and Plain Green LLC Petitioners' request for confidential treatment of joint petition Petitioners' supplemental request for confidential treatment of joint petition	7/17/2012 7/17/2012 2/8/2013	9/26/2013 9/12/2013
Culver Capital, LLC	Petition to modify or set aside civil investigative demand	1/28/2013	11/13/2013
Colfax Capital Corp.	Petition to modify or set aside civil investigative demand	2/1/2013	11/13/2013
Great Plains Lending LLC, MobilCare LLC, and Plain Green LLC	Joint Petition of Great Plains Lending LLC, MobilCare LLC, and Plain Green LLC for an Order Setting Aside the Civil Investigative Demand Issued to Trust Finance Inc. Petitioners' request for confidential treatment of joint petition	7/17/2012 7/17/2012	12/19/2013 11/26/2013
Checkmate Financial	Petition to modify or set aside civil investigative demand	9/20/2013	1/22/2014
American International Group, Inc.	Petition to modify or set aside civil investigative demand	12/7/2012	
MGIC Investment Corp.	Petition to modify or set aside civil investigative demand Declaration	12/7/2012	
Radac Group, Inc.	Petition to modify or set aside civil investigative demand	12/7/2012	
Genworth Financial, Inc.	Petition to modify or set aside civil investigative demand	12/10/2012	
Old Republic International Corp.	Petition to modify or set aside civil investigative demand	12/19/2012	
Conyarth Colleges, Inc.	Petition to modify or set aside civil investigative demand	9/23/2013	
MoneyMutual LLC	Petition to modify or set aside civil investigative demand	2/18/14	

Key Steps to Responding to a CFPB Investigation (cont'd)

Step 6: Address Electronically Stored Information –

- The identification, collection, review, and processing of electronically stored information, such as emails, poses certain challenges on most businesses.
- The burden and cost continues to increase as the amount of electronically stored information that the average organization or custodian regularly maintains continues to rise.

Key Steps to Responding to a CFPB Investigation (cont'd)

Step 7: Production Considerations -

- The CID instructions will cover specifics regarding production formats and logistics.
- Material that is withheld based on asserting a privilege is required to be identified on a privilege log.
 - Debt collect lawsuits and privilege raise unique issues for CFPB and collectors.
- Consider methods to comply while placing facts in positive light.

Key Steps to Responding to a CFPB Investigation (cont'd)

Step 8: Consider Appropriate Follow-up -

- Company Focused
 - Compliance Audit and Corrective Steps
 - Coordination related to non-CFPB investigations
 - Market Specific Focus
- Advocate to the Bureau
 - White Papers (Tell your side of the story) – Timing Considerations
 - Presentations / Meetings
 - Introduction to the Market

CFPB Early Warning Notice of Potential Enforcement - NORA



- The *Early Warning Notice* is not required by law, but CFPB believes it will promote even-handed enforcement of consumer financial laws.
- The decision to give notice in particular cases is discretionary and will depend on factors such as whether prompt action is needed.

Minimizing Risk / Maximizing Compliance

Understand Inherent Risk

- Nature and structure of debt collection activity
- Consumers debt classes
- Marketing methods
- Ongoing customer relationships?
- Complexity of organization
- Other factors
 - Legal and regulatory landscape
 - Company specific
 - Market / debt class specific

Take Steps to Control and Mitigate Risk

- Board of directors and management
- Authority and accountability for compliance
- Compliance risk management program and oversight
- Product system development and modification
- Training
- Complaint management
- Other factors
 - Service Provider Relationships

CFPB and Service Providers: Who's Minding the Store?



CFPB's Expectations Regarding Due Diligence and Monitoring of Service Providers

Under the CFPB, "Service Providers" may be liable for acts and practices that violate the law or assist others in doing so, ***and vice versa***.

The CFPB recommends that supervised financial institutions take steps to ensure that business arrangements with service providers do not present unwarranted risks to consumers. According to the CFPB, these steps include:

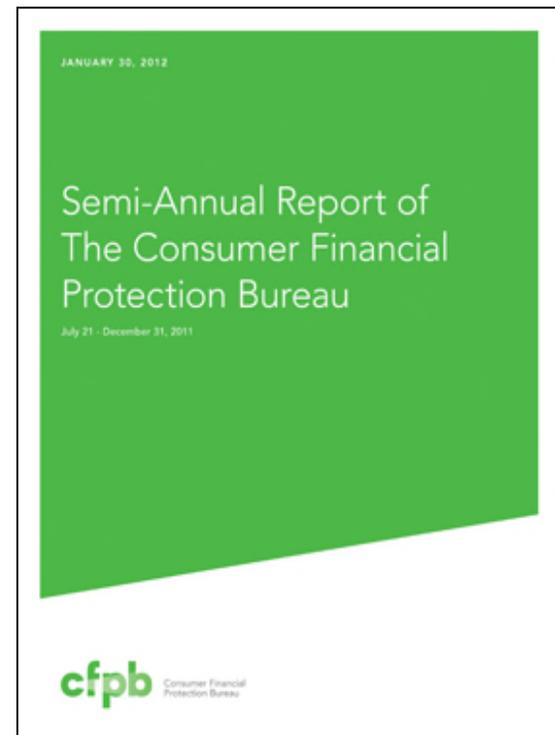
1. Due Diligence;
2. Requesting and reviewing the service provider's policies, procedures, internal controls, and training materials;
3. Appropriate contract provisions;
4. Internal controls and on-going monitoring; and
5. Taking prompt action to fully address any problems identified through the monitoring process.

Similarly, service providers need to screen potential clients, and continually monitor.



What to Watch For in the Months Ahead

- Voluntary disclosures of Non-public CFPB Investigations
- Announcements of settlements or enforcement actions
- Examinations of supervised entities
- Bulletins
- Rulemaking



Proposed Rulemaking on Debt Collection (c. April 2015)

- CFPB is authorized to issue debt collection rules under the FDCPA *and* Dodd-Frank Act's UDAAP provisions.
- In November 2013, CFPB announced Advanced Notice of Proposed Rulemaking, seeking comments, data, and information from the public about debt collection. CFPB received more than 23,000 comments.
- ANPR covered all aspects of debt collection market, including a section on the transfer and accessibility of information upon the sale and placement of debts.
- Rulemaking likely to include specific disclosure requirements, prohibitions on certain abusive or harassing practices, and requirements for substantiation of debt during collections and litigation.
- Next step, which is the issuance of the proposed rules and opening of new comment period, expected in December. Final rules likely will go into effect in 2017.

Thank you - Questions and Answers

Jonathan L. Pompan
Partner and Co-Chair CFPB Task Force, Venable LLP
202.344.4383
jlpompan@venable.com

Alexandra Megaris
Associate, Venable LLP
212.370.6210
amegaris@venable.com

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