

Debt Collection Rulemaking: Proposal Highlights and Key Dates

By [Jonathan L. Pompan](#), [Alexandra Megaris](#), and [Andrew E. Bigart](#)

The Consumer Financial Protection Bureau (CFPB or Bureau) is poised to take a significant step towards new regulation of the debt collection practices of consumer financial services providers. On July 28, the CFPB announced and published an [Outline of Proposals under Consideration and Alternatives Considered](#) (Outline) in preparation for a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel as its next step in regulating debt collectors and debt buyers.

The announcement, and the Outline in particular, is important for three reasons. *First*, somewhat surprisingly, the CFPB announced its decision to bifurcate the SBREFA consultation process into two tracks: one covering debt collectors that are subject to the Fair Debt Collection Practices Act (FDCPA) (e.g., third party collectors, debt buyers, collection law firms, loan servicers collecting on debt acquired in default) and a second for creditors and others engaged in collection activity who are covered persons under the Dodd-Frank Act but who may not be “debt collectors” under the FDCPA. *Second*, the Outline sheds light on the topics the proposed rules likely will cover and how the CFPB intends to address those topics. *Third*, industry finally has some clarity regarding the timeline for the rulemaking process. We discuss each below.

Dual Track Rulemaking

Almost three years have passed since the CFPB issued an Advanced Notice of Proposed Rulemaking (ANPR) for debt collection in November 2013 in which it sought information from the public about debt collection issues in preparation for a Notice of Proposed Rulemaking (NPR). The ANPR expressly covered first party and third party collections; while the FDCPA does not apply to most first party collection practices, the CFPB has the authority under Dodd-Frank to regulate debt collection activities of “covered persons,” which include creditors seeking to collect on debts that relate to a consumer financial product or service.

The CFPB’s announcement revealed its plan to bifurcate the process. As stated in the Outline, the upcoming SBREFA consultation process only applies to “debt collectors” that are subject to the FDCPA. Regarding first party collections:

The Bureau expects to convene a second proceeding in the next several months for creditors and others engaged in collection activity who are covered persons under the Dodd-Frank Act but who may not be “debt collectors” under the FDCPA. The Bureau believes that holding separate SBREFA consultation processes is the most efficient way to proceed, particularly it will enable participants to provide more focused and specific insights.¹

What’s not clear, however, is whether the Bureau intends to also issue two separate notices of proposed rulemaking. As described below in our Rulemaking Timeline section, this could significantly impact the timing of the proposed rules (and, as such, the final rules).

What the Proposed Rules Will Cover and How

The Outline addresses four broad areas relating to collections: (1) information integrity and substantiation of claims of indebtedness, (2) litigation-related disclosures, (3) communications with consumers, and (4) debt transfers and recordkeeping.

1. Information Integrity and Substantiation

Many of the themes and specific requirements set forth in the various consent orders settling the CFPB’s enforcement actions appear in the proposal. Although the CFPB has moved slowly in this rulemaking, its enforcement activity in this area has been very active.

Since 2011 when it first opened its doors, the CFPB has brought over two dozen debt collection-related enforcement actions. A recurring theme of many of these actions, in particular the ones brought against large creditors and debt buyers, is the quality and availability of reliable data and underlying documentation to substantiate claims—both implicit and explicit—made by debt collectors about a debt (such as who owes it and how much is owed).

Substantiation of Indebtedness Requirements

The CFPB is considering requiring debt collectors to establish a reasonable basis for claims of indebtedness, the exact nature of which would depend on the stage of collections and context of the debt. Below is a table that summarizes the substantiation requirements under consideration:

Summary of Substantiation Requirements under Consideration		
When	Actor(s)	Actions
Prior to making initial claim of indebtedness	Collector	<ul style="list-style-type: none"> Review information sufficient to substantiate claims of indebtedness <ul style="list-style-type: none"> May obtain list of fundamental information and representation of accuracy from debt owner, as discussed in Appendix C of the Outline and discussed below Determine whether there are warning signs Obtain and review additional information or documentation as needed to address any warning signs discovered during initial review
During the course of collections generally	Collector + subsequent collector, if applicable	<ul style="list-style-type: none"> Look for warning signs that may arise during the course of collections Cease claims of indebtedness to the consumer until collector obtains and reviews information or documentation as needed to address any warning signs discovered during ongoing review
After a dispute generally	Collector + subsequent collector, if applicable	<ul style="list-style-type: none"> Cease claims of indebtedness to the consumer until collector reviews documentation as needed to address the dispute submitted by the consumer <ul style="list-style-type: none"> May obtain and review documentation for relevant dispute category, as specified in Appendix D of the Outline, discussed below Collector that receives dispute must note dispute status when transferring debt If collector has not responded to dispute, subsequent collector must review documentation as needed to address the dispute submitted by the consumer before making initial claims of indebtedness to the consumer
After a written dispute within 30 days of the validation notice	Collector + subsequent collector, if applicable	<ul style="list-style-type: none"> General dispute requirements described above, plus collector must provide consumer copy of verification responsive to consumer’s dispute (or subsequent collector, if applicable, must address dispute)
After an oral dispute within 30 days of the validation notice	Collector + subsequent collector, if applicable	<ul style="list-style-type: none"> General dispute requirements described above, plus either notify consumer of right to receive verification in response to written disputes within 30 days of the validation notice or simply provide verification in response to timely oral disputes
Prior to making claim of indebtedness in litigation	Collector	<ul style="list-style-type: none"> Review documentation sufficient to substantiate claims of indebtedness May obtain and review all of the documentation specified in Appendix D of the Outline, discussed below

Fundamental Information Prior to Making Initial Claim of Indebtedness

Of note, the Outline in Appendix C lists specific items of “fundamental information” that a collector may obtain and review for warning signs, in addition to the debt own-

er’s representation of accuracy, to support initial claims of indebtedness. As proposed, a collector who has each of these specific elements (plus a representation of accuracy and no warning signs of problems) would have a reasonable basis for claims of indebtedness. The Bu-

reau acknowledges a collector nevertheless may be able to acquire a reasonable basis without each specific element. However, as proposed, the collector would bear the burden of justifying its alternative approach. For each debt, the Bureau is considering identifying the following fundamental information:

- The full name, last known address, and last known telephone number of the consumer;
- The account number of the consumer with the debt owner at the time the account went into default;
- The date of default, the amount owed at default, and the date and amount of any payment or credit applied after default;
- Each charge for interest or fees imposed after default and the contractual or statutory source for such interest or fees; and
- The complete chain of title from the debt owner at the time of default to the collector.

Collector Obligations for Responding to Disputes

Appendix D to the Outline provides additional detail on the proposals under consideration regarding collector obligations for responding to consumer disputes. Collectors could also support claims of indebtedness in other ways, such as by reviewing other documentation, but would bear the burden of justifying any alternative approach.

- For timely, written disputes, the Bureau is considering proposing that collectors provide documentation to the consumer establishing the information specified in the relevant category of dispute.
- For oral or non-timely disputes, the Bureau is considering proposing that the types of documentation specified below may be reviewed to establish reasonable support for claims of indebtedness in certain categories of consumer disputes.

The proposal under consideration would establish four general categories of dispute: (1) generic disputes; (2) wrong amount disputes; (3) wrong consumer disputes; (4) wrong collector disputes. Each of these dispute categories would correspond to a box consumers could check on the tear-off part of a proposed validation notice, a model of which is in Appendix F to the Outline.

Additionally, the proposal under consideration would require that collectors have documentation (not just

information) to verify disputes in each of these categories. The documentation requirement could be satisfied through collector review of copies of account-level documents establishing the required information. In the case of a timely written dispute, the proposal under consideration would require collectors to mail that documentation to consumers.

Review and Transfer of Certain Information

The Bureau also is considering requiring:

- Subsequent collectors to obtain and review certain information arising from past collection activity (such as whether the debt was disputed, any time, place, or method of communication the consumer stated is inconvenient, and whether the collector has provided the time-barred debt disclosure), as discussed in Appendix E to the Outline;²
- Debt collectors to forward certain information they receive from consumers (such as consumer payments, bankruptcy discharge notices, and disputes) to debt owners after returning the debt to the owner (or after selling it to a new buyer);³
- Debt collectors to include additional data points about the debt and a new Statement of Rights in the validation notice. Appendix F to the Outline contains a list of information that the proposals under consideration would require be included in the validation notice. Appendix G of the Outline contains a list of information that the proposal under consideration would require in the Statement of Rights. It also is considering whether to require the use of notices translated in other languages;⁴ and
- Debt collectors to communicate directly with consumers about any debts it plans to furnish information to the credit bureaus about.

2. Litigation Disclosures and Time-Barred Debt

The CFPB also is proposing new consumer-facing disclosures, including:

- A specific “litigation disclosure” in all written and oral communication in which a debt collector expresses an intent to sue;
- A “time-barred debt” disclosure whenever a debt collector seeks payment on time-barred debt; and
- An “obsolescence disclosure” explaining whether a debt can or cannot appear on a credit report.

Moreover, the CFPB is considering whether to prohibit collectors from collection on time-barred debt that can be revised under state law unless they waive the right to sue on the debt.

3. Communications with Consumers

The CFPB is considering several proposals governing communications between debt collectors and consumers.

Summary of Communication with Consumer Proposals	
Communication Type	Proposals
Frequency of Consumer Contact Attempts	Weekly numerical restrictions (per unique phone number/address, per third party, and per account), depending on whether the collector has successfully established contact with the consumer, as described below.
Frequency of Third-Party Location Contact Attempts	Weekly numerical restrictions (per unique phone number/address and total attempts), depending on whether the collector has successfully established contact with the consumer, as described below.
Leaving Messages with Consumers	Voicemail not considered a communication under the FDCPA if message only conveys the debt collector’s name, consumer’s name, and toll-free method that the consumer can use to reply to the collector.
Inconvenient Times	When debt collector has conflicting location information for the consumer, and in the absence of knowledge to contrary, must establish that it’s convenient in all of the locations in which the collector’s information indicates the consumer might be.
Inconvenient Places	The following would be presumptively inconvenient places for consumers (unless consumer consents): <ul style="list-style-type: none"> • Medical facilities • Places of worship • Places of burial or grieving • Daycare or childcare centers
Inconvenient Communication Methods	Email address that collector knows or should know is the consumer’s workplace email (unless consumer consents).
Decedent Debt	Generally permissible for collectors to contact surviving spouses, parents of deceased minors, and designated personal representatives of an estate under state law, but only after 30 days after consumer’s death.

As described above, the proposals under consideration would set limits on permissible consumer contacts (or contact attempts) per account, per week.

Summary of Proposed Permissible Consumer Contacts Per Week		
Collector Activity	Collector Does Not Have Confirmed Consumer Contact	Collector Has Confirmed Consumer Contact
Attempts per unique address or phone number	3	2
Total contact attempts	6	3
Live communications	N/A	1

As described above, the proposals under consideration would set limits on permissible number of location con-

tacts (or contact attempts) to a third party per account, per week.

Summary of Proposed Permissible Location Contacts to a Third Party Per Week		
Collector Activity	Collector Does Not Have Confirmed Consumer Contact	Collector Has Confirmed Consumer Contact
Attempts per unique address or phone number per third party	3	0
Total contact attempts per third party	6	0
Total contact attempts across all third parties	No specific limit	0
Live communications per third party (total, not weekly)	1	0

In addition, Appendix H to the Outline discusses certain collector practices that the Bureau is considering specifying violate the FDCPA (sections 806 through 808), as well as provide some clarification about practices that would be permitted. The proposals under consideration cover such topics as (1) collector contact information, (2) unavoidable charges for communications, (3) certain false, misleading or unsubstantiated claims, (4) identifying information about the debt collector, and (5) incidental fees.

4. Debt Transfers and Recordkeeping

The CFPB has proposed additional limits on debt buyers. For example, it is considering a prohibition on the placement or sale of debt to an entity that lacks any license to purchase or collect debt, as applicable.

Finally, the proposal would impose a three year record retention requirement on all records documenting a debt collector's action with respect to a debt and that were relied upon for the validation notice and other claims of indebtedness.

Rulemaking Timeline

The convening of the SBREFA panels, the first of which is slated for August 25, 2016, sets in motion a series of

procedural steps, many of which have prescribed timing requirements. Specifically, the law requires a SBREFA report within 60 days of the panel convening. The SBREFA panel report is then published with the NPR.

If the CFPB bifurcates the entire rulemaking process into two separate sets of notices of proposed rulemaking for comment, it is possible the NPR for third party collections could be published as soon as the end of October 2016. However, because the CFPB is planning to convene a second SBREFA panel in the next several months for proposed rules governing first party collections, it is possible that the NPR stemming from the Outline and its pending proposal for first party collections could be combined and issued all at once, at a later date.

When a NPR is published in the Federal Register, it typically has a public comment period of 60 days or more. The notice and comment process is used to obtain feedback on the proposed rules, and may be used by proponents and opponents to set the stage for support of or challenges to new regulations. Depending on the number and substance of comments received (the ANPR received over 23,000 comments), and the decisions the Bureau makes on the proposed rule, the Bureau could either announce another round of proposals and requests for public comment or a Final Rule.

Event	Estimated Date*
Proposal for Small Business Advisory Review Panel	July 28, 2016
Small Business Advisory Review Panel	Week of August 22, 2016
Small Business Advisory Review Panel Report Completed	Within 60 days of panel convening
<i>*All dates are estimates only and subject to change.</i>	

Event	Estimated Date*
Notice of Proposed Rulemaking	As early as late October 2016/November 2016 (if only applicable to "debt collectors" subject to FDCPA)
Close of Comment Period	As early as Q1 2017 (if NPR only applicable to "debt collectors" subject to FDCPA)
Final Rule Released	Late 2017/2018 (if NPR only applicable to "debt collectors" subject to FDCPA)
<i>*All dates are estimates only and subject to change.</i>	

There is no standard number of months between a NPR and a Final Rule. The time period will depend on the number and nature of the public comments received, as well as other factors at the CFPB, including the other rulemakings it is undertaking, such as one on small-dollar lend-

ing. Moreover, there is no “standard” period of time between the issuance of a Final Rule and its effective date.

Finally, as part of the SBREFA process, the CFPB also released a report, “[Study of Third-Party Debt Collection Operations.](#)”

Related Articles and Presentations

[CFPB Turns Five: The Evolving Legal and Regulatory Landscape for Debt Collection](#) (Article)

[How to Prepare for and Survive a CFPB Examination](#) (Article)

[Navigating CFPB Debt Collection Investigations and Enforcement Actions](#) (Presentation)

[New OCC Guidance on Debt Sales](#) (Article)

[CFPB Debt Collection \(Regulation F\) Rulemaking FAQs](#) (Article)

[CFPB Shines Debt Collection Spotlight on Creditors and First-Party Collections](#) (Article)

[Data Furnishers: Reducing Supervision and Enforcement Risk](#) (Article)

[Furnishing Information to the Bureaus? Make Sure It Is Accurate](#) (Article)

[Jonathan L. Pompan](#), partner in the Washington, DC office of Venable LLP and co-chair of the Consumer Financial Protection Bureau Task Force practice, [Alexandra Megaris](#), associate, and [Andrew E. Bigart](#), counsel, routinely advise on consumer financial services matters and represent clients in investigations and enforcement actions brought by the CFPB, FTC, state attorneys general, and regulatory agencies.

For more information about this and related industry topics, see www.Venable.com/cfpb/publications.

[1] Outline at 4.

[2] Outline at 14.

[3] Outline at 14.

[4] Outline at 16-17.

© 2016 Venable LLP. This alert is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address. ATTORNEY ADVERTISING.