

Client Alert.

July 11, 2013

CFPB Issues FDCPA and UDAAP Guidance for Creditors and Their Service Providers

By Andrew Smith, Obrea Poindexter and Ryan Rogers

On July 10, 2013, the Consumer Financial Protection Bureau (CFPB) issued two Bulletins that address debt collection practices. The first Bulletin, CFPB Bulletin 2013-07, discusses acts or practices that could potentially constitute an unfair, deceptive or abusive act or practice (UDAAP) in violation of the UDAAP provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).¹ The second Bulletin, CFPB Bulletin 2013-08, addresses representations regarding the effect that debt payments may have on a consumer’s credit report, credit score or creditworthiness and sets forth the CFPB’s supervisory expectations on these issues.²

The Bulletins were accompanied by a set of form letters intended for consumers to use when communicating with debt collectors, and they also coincide with a field hearing in Maine on debt collection that marks the CFPB’s acceptance of debt collection complaints through its consumer response system. This alert focuses on the two Bulletins.

CFPB BULLETIN 2013-07

The CFPB explains that the first Bulletin is intended to “clarify” the legal obligations of covered persons and their service providers under the Dodd-Frank Act with respect to UDAAP violations related to the collection of consumer debts. The Bulletin effectively imposes the principles of the federal Fair Debt Collection Practices Act (FDCPA) on creditors and does so without a formal notice and comment process. Although creditors are generally exempt from the FDCPA, the Bulletin makes clear that creditors and their service providers must abide by the FDCPA by proxy through UDAAP principles and guidance when engaged in collection practices.

The Bulletin draws heavily from, and in large measure is a restatement of, UDAAP guidance contained in the CFPB’s Exam Manual.³ The Bulletin also draws from the unfairness and deception standards developed by Federal Trade Commission (FTC), including by citing to several FTC enforcement actions.⁴ The Bulletin provides a “non-exhaustive” list of 10 examples of conduct related to the collection of consumer debt that could constitute UDAAPs and states that the CFPB “will be watching these practices closely.” Several of the examples are drawn from provisions of the FDCPA. Specific areas of concern identified by the CFPB in the Bulletin include:

¹ CFPB Bulletin 2013-07 is accessible on the CFPB’s Web site at: http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf.

² CFPB Bulletin 2013-08 is accessible on the CFPB’s Web site at: http://files.consumerfinance.gov/f/201307_cfpb_bulletin_collections-consumer-credit.pdf.

³ More than half of the legal citations in the first Bulletin are to the provisions of the CFPB’s Exam Manual on UDAAP.

⁴ The CFPB states in a footnote that “to the extent [the Bulletin] cites FTC guidance or authority, such references reflect the view of the FTC, and are not binding upon the [CFPB] in interpreting the Dodd-Frank Act’s prohibition on UDAAPs.”

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- Collecting or assessing a debt and/or any additional amounts in connection with a debt (including interest, fees, and charges) not expressly authorized by the agreement creating the debt or permitted by law;
- Failing to properly post payments in a timely manner and then charging consumers late fees;
- Revealing the consumer's debt, without the consumer's consent, to the consumer's employer and/or co-workers;
- Misrepresenting whether information about a payment or nonpayment would be furnished to a credit reporting agency; and
- Misrepresenting to consumers that their debts would be waived or forgiven if they accepted a settlement offer, when the company does not, in fact, forgive or waive the debt.

As a supervisory matter, a view expressed by the CFPB in the guidance, for which no citation to existing guidance is provided, is that the CFPB will look at "implied representations" and whether such representations about the consumer's debt can be supported. On this point, the CFPB states the following: "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." The Bulletin concludes by stating that original creditors, other covered persons and their service providers involved in collecting debt are subject to the prohibition against UDAAPs in the Dodd-Frank Act.

CFPB BULLETIN 2013-08

The second Bulletin is based on deception principles and focuses on statements and representations to consumers about the impact that payments on debts in collection may have on credit reports, credit scores and creditworthiness. According to the CFPB, the guidance in the Bulletin is being provided in response to practices observed during supervisory examinations and enforcement investigations.

According to the CFPB, creditors and debt buyers (together referred to in the Bulletin as "debt owners") and third-party debt collectors have been making what is described in the Bulletin as "material" misrepresentations intended to persuade consumers to pay debts in collection. The CFPB expresses concern about the following types of representations:

- Statements about improvements in a consumer's credit report when the consumer pays debts in collection.
- Statements about improvements in a consumer's credit score when the consumer pays debts in collection.
- Statements about improvements in a consumer's creditworthiness, or enhanced likelihood of a consumer receiving credit or more favorable credit terms from a lender when the consumer pays debts in collection.

The Bulletin is clear that "will" statements with respect to these issues are deceptive and are viewed by the CFPB as deceptive under the FDCPA and the UDAAP provisions of the Dodd-Frank Act. For example, the CFPB explains in the Bulletin that statements by debt owners or third-party debt collectors that paying debts in collection will improve a consumer's credit report or credit score are deceptive. The CFPB's position in the Bulletin regarding statements about an improved credit reporting and scoring is based on the view that "numerous factors" bear on such scores and that a payment may not improve a particular consumer's credit score. In essence, these examples expand on the types of debt collection practices enjoined in the CFPB's consent order against American Express.

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Additional statements in the Bulletin suggest that the CFPB could view any representations about credit-worthiness or lending terms by debt owners and third-party collectors as possible deception. According to the CFPB, the nature and extent of the impact of a payment on a particular debt in collection to a prospective borrower's creditworthiness can vary and may be based on factors that debt owners or third-party debt collectors will not know. The CFPB goes on to state the following in the Bulletin: "Debt owners or third-party debt collectors may well deceive consumers if they make representations about the nature or extent of improved creditworthiness that result from paying debts in collection."

The Bulletin states that the CFPB may review communication materials, scripts, training manuals and related documentation to assess whether owners of debts and third-party debt collectors are making the types of representations addressed in the guidance and the factual basis for them.

Contact:

Andrew M. Smith

(212) 887-1558

andrewsmith@mofo.com

Obrea O. Poindexter

(202) 887-8741

opoindexter@mofo.com

Ryan H. Rogers

(212) 887 1507

rrogers@mofo.com

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