Consumer Finance Monitor (Season 3, Episode 3): Update on the CFPB's Proposed Debt Collection Rule

Speakers: Chris Willis and Stefanie Jackman

Chris Willis:

Welcome to the Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers and the industry. I'm your host Chris Willis, and I'm the practice group leader of Ballard Spahr's Consumer Financial Services Group. For those of you who want even more information, don't forget about our blog, consumerfinancemonitor.com. We've hosted the blog since 2011. So there's a lot of relevant industry content there.

Chris Willis:

We also regularly host webinars on subjects of interest to those of us in the industry. So to subscribe to our blog or get on the list for our webinars visit us at ballardspahr.com. If you like our podcast, let us know. Leave us a review on Apple podcasts, Google Play or wherever you get your podcasts. Today, I'm lucky to be joined by my partner Stefanie Jackman, who's also in the Atlanta Office of Ballard Spahr with me. Stefanie is one of the foremost experts on debt collection in the country, and that's a good thing, because today we're going to be talking about debt collection.

Chris Willis:

In particular, we're going to be taking stock of where we stand with the CFPB's proposed debt collection rules that came out in May of this year. The comment period closed in September, and Stefanie and I are going to be taking stock of what the comments were from both the consumer and industry sides, and talking about what we expect the CFPB may do after it digests all those comments. Stefanie, welcome to the podcast.

Stefanie Jackman:

Thanks for having me, Chris. I'm excited to be here.

Chris Willis:

Well, there's a number of issues on which consumer groups and industry groups commented with respect to the CFPB's proposed rules, but let's start with one of the most basic issues, and that is, who does the rule cover? The rule as proposed by the bureau explicitly only applies to third party debt collectors, defined as such in the Fair Debt Collection Practices Act, but there's a question about its potential application to creditors. What are the consumer groups saying with respect to that issue?

Stefanie Jackman:

Well, it's been interesting in reading the comments, because on the industry side, there have been a lot of requests for some clarity, myself and Chris and others have been part of helping our clients draft those requests to make sure that we understand, yes, the rule is amending the FDCPA, but how should it be applied or what should be done with states that have similar statutes that are patterned on the FDCPA but more broadly applicable to creditors collecting their own debts or their first party collection service providers? We have state AGs that have state UDAAP statutes and also are empowered to enforce the Dodd-Frank UDAAP authority. So, how should that be working?

Stefanie Jackman:

On the consumer side, it's very clear, they think that it should apply as broadly as possible, including to those entities. If you recall, in 2013, the rulemaking originally began as both the first and third party rulemaking in the advanced notice of proposed rulemaking, only when the SBREFA panels were impaneled in 2016, did we learn that the bureau had narrowed the scope of this effort to be only third party. Then of course, we've all seen in the proposed rule that came out this past May, that there are a lot of statements that the bureau puts in, that the bureau has taken the position should be sufficient to say this is just a third party rule, and of course, we've opined on that.

Stefanie Jackman:

But the consumer advocates are saying the exact opposite, and it should be something that informs the interpretation of similar or in some instances, even identical state statutes that apply more broadly. It should be something that is used by regulators in interpreting and applying their UDAAP authority, and it is something that state AGs and the CFPB, through the Dodd-Frank UDAAP authority where they're empowered to enforce it ought to be also pushing. Just like we saw in the past, we saw a lot of movement by the bureau in bringing FDCPA concepts into the first party world.

Stefanie Jackman:

In fact, they have a bulletin, Bulletin 2013-07 that states, through UDAAP, we are applying a nonspecific list, but here's a couple of things of the FDCPA provision to creditors collecting their own debts, and we have a litany of consent orders after doing that. So, it shouldn't come as a surprise that the consumer advocates are taking that position. Anecdotally and talking to the bureau, the bureau took the position that they thought it was very clear what they were doing, but I actually think it really is setting up to allow for consumer advocates and plaintiffs' attorneys and others to do exactly what they're trying to do, which is to expand the rule.

Stefanie Jackman:

Recently, I noticed there are some bills and these are just bills that have been introduced into the House in our different phases in the House, but there are bills that would expand the FDCPA's protections to cover small business loans that would expand them broader into government debts and municipal utilities, tolls, traffic tickets, court debts, etc. So we're seeing not only the agitation to push into the first party, but efforts by the Democratic led House and the Consumer Financial Services Committee led by Maxine Waters, to expand the definition of who's even subject to the FDCPA all right now. So that leads me to believe, Chris, that consumer advocates would like to see this applied as broadly as possible, and I think their comments reflect that.

Chris Willis:

Yeah, so let's talk next about another big subject of discussion relating to debt collection, and the comments to the proposed rules, and that is the role of information and media in the debt collection process. Now, we've known that accuracy and completeness of information related to debt collection has been a major issue ever since the 2013 original announcement that this rulemaking became underway, and it was the subject of things like the OCC best practices and several consent orders by the CFPB with debt buyers and with debt collection law firms.

Chris Willis:

But what's interesting is, neither the SBREFA outline nor the proposed rules, made any requirement with respect to placing documentation related to debts for regular collection efforts. In fact, the provisions dealing with analysis of accounts that we're going to be required in the SBREFA outline, did not show up in the proposed rules that came out in May of this year. So one of the things that the consumer advocates have done in their comments was to ask the CFPB to attend to this issue.

Chris Willis:

In other words, to impose requirements for certain transfer of information and documentation for any debt collection activity at any stage in the debt collection process, whether it is sale of a debt or resale of a debt, placement with an agency or

placement with a law firm, and she basically put the burden on every party in the chain of the debt collection process to review that documentation and make sure that it supports the debt being collected from the consumer.

Chris Willis:

That's not something that's in the proposed rule now, and in fact, it wasn't even in the SBREFA outline, as I noted, that was put out under director Cordray. But that is nevertheless the subject of a lot of interest by consumer groups held over from the great degree of interest that's been around on that issue since five or six years ago. So, that's the consumer group side of the information and media issue. But Stefanie, what's your perspective with respect to the industry side? There are a lot of requirements of the rules that will impact information flow. So, what's your view on that, and what's the industry's view on that?

Stefanie Jackman:

Well, I think it depends on which side of the industry you're on, if you're on the third party side and receiving the information with that's being placed for collection, or if you're the creditor who's having to provide the information. However, what I think you can say universally, is that we have evolved as an industry, both first party and third party to understand the documentation and media is useful. It's not going away, and it's something that actually can be helpful to get upfront to protect against potential regulatory exposure, litigation and even defense cases.

Stefanie Jackman:

The question is, how much and what do we have to do with it before we can start? The third party industry would appreciate, I think, information transfer. I think they would appreciate a goodbye letter or some communication from the creditor when informing the consumer of the placement with the agency, which isn't required. I think that they would like to receive reasonable amount of information upfront that is sufficient for them to ensure they're collecting on debts that absent additional information from a consumer, facially appears to belong to the person that the creditor represents it does, Social Security matches, name matches, email, street address, whatever else comes in.

Stefanie Jackman:

I don't know that all agencies ... I think it varies, some agencies might want the dispute history, they might want a lot more documentation and account level media, others may not because they're not set up to handle it, the expense associated with maintaining it, data privacy and security issues, perhaps they're able to interface back with the creditor. So it's tricky but they want information. They certainly need information in order to meet the requirements of the sending the debt validation notice, which requires a significant amount of information, and if it's inaccurate, they can face exposure for.

Stefanie Jackman:

But having to go through some page by page analysis or have all of the information upfront or have to do some detailed checking to ensure there are complete files is certainly not what the industry wants. Then the creditors don't perceive to want to do that, they want to transfer sufficient information to enable their agencies to perform collections. Again, it can vary, I think, most appreciated if the collector comes back and asks when they get a dispute or when there's problems on the account, so that the creditor is staying informed and can help work through it.

Stefanie Jackman:

But I don't hear creditors wanting to be able to send the debt validation notice themselves, the third party space, some people are agitating for that, and clarity that ... not the debt validation, I'm sorry, the response to the debt validation, there's case law that has come out where it's been challenging to know if you as the collector have sent it to the creditor, and the creditor validates it back to you, if that's sufficient to meet your obligations under the FDCPA as the agency. I think they'd like some clarity there, but I don't sense that the creditors want to be the one responsible for that, maybe to the same degree.

Stefanie Jackman:

So the media info is a challenging topic, but what I think I could say, my perception creditors and debt collectors would like is clarity, on what needs to be looked at, what needs to be obtained, and how to go forward. Candidly, I think the rules already do that, to some degree. There is a debt validation proposal, there is a proposed form, assuming that's an act, it says what you need to include. So I would then bring that back and say, "Okay, well, then I need the information that's necessary for me as a collector to include that information and be confident in its correctness, that doesn't require that I have to do some advanced review of every piece of documentation I've gotten or go back, if I have a dispute, and look back at every account that's been placed with me by that creditor to make sure it doesn't infect other accounts."

Stefanie Jackman:

I don't think that's how the third party debt agency relationship works, and the reason I'm bringing that up is that, recently I've heard some members of the bureau on the enforcement side suggest that maybe they don't view it that similarly, and that some of them, not saying this will make it up to Director Kraninger, but some of them think that perhaps agencies should be doing more file by file level review. That if they find a problem on one that they should be thinking more broadly, "Do we need to stop all of the collections on our agency placements and look broader at all of the documentation and information provided by that creditor?" To me, that would just ...

Stefanie Jackman:

First of all, it's not appropriate in an agency environment, it would completely grind to a halt, these agencies don't hold the documentation or the accounts that long, it might make sense in the debt purchase environment, but in the agency environment, there should be an ability to go back and forth and talk and confirm. I don't think it's appropriate to require it more broadly, like we might in a debt purchase agreement, or a context ... excuse me, but I'm hearing both in the consumer stuff, and anecdotal experiences with the bureau, perhaps different thinking on that.

Chris Willis:

So let's switch gears to another topic and talk about delivery of validation notices electronically. That's one of the hallmarks of the rule in terms of trying to modernize the debt collection process by the bureau. But the Seventh Circuit threw a little bit of a monkey wrench into the plans of the CFPB in a recent case called Lavallee, in which it seems to imply that the delivery of validation notice that's a hyperlink within an email doesn't comply with the Fair Debt Collection Practices Act, because the statute requires that the disclosures be contained in the message itself, and a hyperlink does not have the disclosures contained in the email.

Chris Willis:

This seems to me to threaten the possibility of electronic delivery of validation notices through hyperlinks. So that was one of the options the bureau gave for delivery of them through email, and the only option for delivery of them through text messages. One of the things that the consumer advocates have done is they've seized on the Lavallee case, and used it to oppose the hyperlink to delivery of validation notices at all, because they don't believe that's good disclosure to consumers, that consumers won't click on the hyperlinks because of fear of viruses or whatever.

Chris Willis:

So, the consumer advocates are really jumping on the bandwagon of the Lavallee case, and saying, "We don't want the option for hyperlink delivery and the rules." Where do you think, Stefanie, the industry is on this hyperlink delivery issue, and what's the industry preference on it? Do you know?

Stefanie Jackman:

Well, that's a difficult question because a lot of companies in the third party industry have been reluctant to start using email and text because of potential exposure and lack of clarity, and that's what the rule is trying to encourage them to do, is give

them rules of the road for how to do so. So I don't know that there's necessarily a preference, I've seen it done with the agencies that have gone to email in different ways. There's been PDFs that are secure, like what we saw in the ... not Lavallee, I'm sorry, PDFs that are secure, and you have to click on them, and then you have to put in a password. We've seen it being in the body of the email.

Stefanie Jackman:

Candidly, I think that's one thing that some of the agencies have been the most resistant to, but yet is probably the best answer now if the rule is enacted as is in light of the Lavallee case, because of third party disclosure concerns before. Then you've seen people doing what we saw the agency doing in Lavallee, where they have a link that brings you to some portal and you have to put in credentials, or you have to access things. What's interesting to me, and I've talked to some clients as they've thought about how would we implement email and use it, because I do think the industry very, very much would like to be able to send debt validation notices by email.

Stefanie Jackman:

It's easier to deliver, it has less cost associated than U.S. mail. It also is something that consumers, in many instances, are saying they would like as well, email correspondence, they pay attention to their email more than their mail. I don't even really open my mail anymore. Because it's all mailers and things that don't matter, my creditors contact me through email. So it's what consumers are accustomed to. The Lavallee case is a real challenge, because certainly within the Seventh Circuit, I would not advise using a hyperlink at all. Then I had a client ask, "Well, should I use a PDF?" Well, that caused me to look at the proposed rule.

Stefanie Jackman:

If you look at the proposed rule, it doesn't talk about PDFs as an option. In fact, the only thing that it mentions relating to PDFs is the consumer suspicion over risk of a virus or things like that. So I didn't read it to be a ringing endorsement of a PDF. Especially when I look at what they did propose to allow, which is either the use of a hyperlink, a secure hyperlink, or putting the actual validation notice in the body of the email itself, and again, that's premised on having consent to correspond with the consumer via email, through different channels. That's a more complex discussion, but there's different ways to do that. That brings in whether we need to do e-sign and such.

Stefanie Jackman:

So I'm not telling clients and I'm saying right now, I don't think using a PDF is a good option period. I don't think it's a good option under the CFPB's thinking and I think it runs square into some of the risks and challenges raised in the Lavallee case. But certainly within the Seventh Circuit, I wouldn't use a link, and until the rule is out saying what is appropriate, perhaps don't use the link elsewhere is something I've been exploring with clients. Because who's to stop right now the Ninth Circuit or 11th Circuit, or Fourth Circuit, or other circuits that tend to be a little bit more consumer oriented on some of these things from saying, "You know what? I agree with the Seventh Circuit, we don't like the link either."

Stefanie Jackman:

That's where I am, is in a holding pattern, if you're using email, right now the only thing that hasn't been definitively said is not okay, and which the bureau it least endorses in its and I know proposed rule, it's not an act and it's not law yet, it's putting it in the body of the email.

Chris Willis:

That's a very interesting issue, Stefanie, and it'll be really interesting to see how the bureau comes out and how it deals with the Lavallee issue. But let's talk about the other aspect of communication that you mentioned several times in your comments, and that's text messages. The way the proposed rules read is that debt collectors could use text messages to communicate with

consumers under certain circumstances, and there is no contact frequency limit for text messages. But there are other restrictions on text messages like the inconvenient time requirements and things like that.

Chris Willis:

So, let's talk for a second about the industry and consumer sides on text messages. From the consumer side, what I see the consumer advocate saying is, they want the same frequency limits applied to text messages that the proposed rules would apply to telephone calls, which is a very strict frequency limit as you know. They don't like the idea of having unlimited text messages coming from debt collectors to consumers, and they view that as an area for potential abuse, although I don't know whether that's really realistic or not, whether debt collectors would actually find that to be a good strategy and do it or not, but nevertheless, that's the consumer advocacy view.

Chris Willis:

But there are significant concerns on the industry side about what is in the proposed rules in terms of restrictions and requirements related to text messages and just some difficulties associated with them. Can you highlight those for us and talk about how they interact with the proposed rules?

Stefanie Jackman:

Yeah. Just to reiterate, you're 100% correct in your read on the consumer advocates position. I mean, they've gone on record saying we think this is just a way that ... basically the bureau has endorsed "harassing consumers" through electronic communications. So, they are very steadfast and not moving on this. This is actually an area where I know we're going to talk at the end of the podcast about some of the things we think the bureau might change.

Stefanie Jackman:

To be candid with you, this is an area where I don't think, if I'm reading the tea leaves, the bureau is going to change. I think that keeping email and text outside the contact frequency limits, is the give and take that the bureau was using to justify putting the limits to its propose on calls, and I don't think that's going to change either, by the way. So I think this is probably going to stay the same. Don't forget the FDCPA has always prohibited communicating with consumers in a harassing manner.

Stefanie Jackman:

So for the consumer advocates to come out and say the bureau has blessed sending a text message every five minutes or an email every five minutes or somehow harassing consumers with these unlimited contact frequencies through these other channels that, by the way, consumers control and can turn off and can access when they want and so forth, in a way that they might not be able to as easily with their telephone, I think that falls a little flat under the law. As some of the industry comment letters have said, in fact, the call frequency limits are not necessary, because so far, the FDCPA has enabled judges to sufficiently limit and avoid harassing strategies for four decades.

Stefanie Jackman:

So it'll be interesting to see how that comes out when the CFPB in the final rule addresses both points, but I don't expect any movement. So let's talk about using text. Because there's a couple other challenges, and these are challenges that are more easily dealt with email. Right? Text is convenient, it's quick, there's a lot of benefit to it, but it's limited. There are SMS limitations. A number of clients have contacted us, and we've been trying to help them figure out how to deal with some of the requirements for using text in collections.

Stefanie Jackman:

Candidly, this is mostly in the first party space, I'll make a prediction, I think that you're going to see the third party world that subject to the FDCPA be more likely to first test the waters with email to the extent they're doing this already, than text if for no other reason, the TCPA is not at play. With the text, the TCPA is at play. But for a creditor, they'll be more willing to use

text because they might have the consent still directly from the consumer, and they don't have to worry about the FDCPA overlay.

Stefanie Jackman:

I think that third party agencies are going to try texting right now, and are taking on a lot of risk. I'm not saying don't do it, there are ways to do it, but we need to just think about the controls to have in place at the outset, it's not something to just jump into because you will run smack into the FDCPA and the TCPA with a text. So here's some other things you have to think about in addition to that potential dual liability and class action groundwork possibility. There are state requirements, there are state requirements for written collection communications, and there are state requirements for verbal collection communications.

Stefanie Jackman:

What's a text? Well, it's in writing, so I see a pretty easy argument for saying you have to comply with those, and what are those? Those are things like giving a Mini-Miranda, those are things like, your office hours, your business address. But there are also some state laws that require, in a verbal context, that you give the name of somebody that can be called back, for instance, in a collection communication. In the TCPA world, texts are treated as calls, i.e, a verbal communication, and you can find cases that characterize them that way. So I think you also have to think about those state requirements.

Stefanie Jackman:

What you're hearing there, are more characters, and there might be some flexibility, you might be able to shorten things, but that's a challenge which brings in, "Okay, well, can we deliver those through a hyperlink?" Well, that brings us back to Lavallee. Yes, it was an email case, but I don't know, and these states haven't said. So point being, it's just a challenge. It's a challenge that I think is going to further cause third party to really go more to email to start than text. Few other things that are going on, though, with it. I mentioned the TCPA, so you're about to have in text and email actually, you have opt in and opt out requirements, and I don't think that's going to change in the final rule.

Stefanie Jackman:

Okay, so all of a sudden, you're going to have this whole body of TCPA case law about what is sufficient consent, i.e, opt in, and what is sufficient revocation, i.e. opt out and how to interpret that and what to do, you're going to see that common get imparted, I suspect into FDCPA litigation, where as before, it was limited to only when you were communicating using a prerecorded message, or an automatic telephone dialing system Under the TCPA. Now, it could be anything including your manually dialed calls and manually sent text, whatever. You're going to see consumer attorneys try to bring that in to broaden the scope.

Stefanie Jackman:

Now there are defenses, but it's something to think about from a litigation perspective in the new rule, that will absolutely exist as an attempt to overlay these two different statutes and what they do with consent and revocation onto each other. Then finally, with text, carriers are blocking them. This is something that's been evolving for a couple months, it's related to the STIR/SHAKEN initiatives with the FCC to try to stop unlawful spammers and robocallers with unsolicited Tella messages, right? Not necessarily collections that are not robocalls that are not unsolicited telemarketing.

Stefanie Jackman:

But collectors are getting caught up in it, because as part of trying to comply with the requirements of STIR/SHAKEN and the TradeStat and giving certifications and knowing your customer, the cellular carriers are blocking text based on language, and its language that would be in a very benign texts like past due, delinquent, debt. So this can be really challenging. I have heard clients saying that they are aware that some carriers ... it's not all by the way, some carriers are blocking even when they use a limited content message. I've heard others saying it's been blocked for Mini-Miranda. Where we are right now, just so

that everybody hears that there is movement, is this is something that has been brought to the attention of CTIA, which is the industry group that handles texting and works with the carriers, the carriers are aware of it.

Stefanie Jackman:

I understand right now that the only one that I ... there's only one that is still blocking based on text indiscriminately, I'm not going to say who they are in this public podcast, but if you'd like to know off the record, let me know and we can talk about it. But that's my understanding, and they are also coming to the table to engage on this, because you can't have carriers trying to comply with requirements in a totally different world, completely up ending and essentially making it impossible to use a communication that the bureau is offering as the give and take on restricting calls. Okay, you can text. So I see a lot of challenges with text right now, Chris, and it comes back to why I think third party at least is going to stay in email for a little bit.

Chris Willis:

Let me now switch gears and talk about what I think is the most disliked or most opposed aspect of the proposed rules, and that is the proposed ... what's labeled as safe harbor for meaningful attorney involvement. Because I haven't yet found any side, either industry or consumer that likes what the CFPB has proposed here. On the consumer side, you have consumer advocates saying there should be no safe harbor for this. The safe harbor doesn't do enough to require actual meaningful attorney involvement by debt collection law firms, and so they don't want the CFPB to go forward with this proposal. But there are some industry views on this too, none of which are favorable to what the bureau has proposed. Can you briefly summarize those for us?

Stefanie Jackman:

Yeah. I know you've been watching this very closely. We have, first of all, the position advanced by NCBA, the National Creditors Bar Association, which is, this isn't proper, that regulating attorneys to this degree should remain with State Bar Associations who do that and the rules that govern the legal profession. There's essentially already, if you will, a licensing regime that has for many, many, many, many, many years been sufficient to regulate the conduct of attorneys, and that is where this should be and the bureau is overstepping, is my high level summary.

Stefanie Jackman:

On the flip side, you have the consumer advocates that don't think that they very much want this and they don't want there to even be the safe harbor that is being proposed in the bureau's current version of the rule to exempt or to say that this is sufficient to have satisfied the meaningful attorney involvement standard. Then you have this middle ground position that's been proposed by someone in this space saying, "Well, okay, we understand, we agree, we think that this should be with the state bars, but if you're not going to do that, because for years, we've been trying to get them to back away from this and the bureau keeps not doing that.

Stefanie Jackman:

We need a lot more specificity in the safe harbor, it's sort of a, "Good Lord, if we can't get you off this, well, you need to give us something that's workable." Because there's really no meat to it, it's just, in my impression, honestly, words that are very subjective and open to differing interpretations. But Chris, I know that you really have some thoughts on this. I mean, do you see how the bureau is going to try to reconcile these or where it's going?

Chris Willis:

Actually I've no idea what the bureau is going to do with this, because it received such negative comments from all quarters with respect to meaningful attorney involvement. In fact, the inclusion of meaningful attorney involvement in the proposed rules was something of a surprise. It wasn't something that was in the SBREFA outline, and it wasn't something that at least I was aware that the bureau was going to deal with in the proposed rule. I mean, I think the easiest thing for the bureau to do

would be just to walk away from it, and not try to do anything, and just continue with whatever agenda it wants to engage in with respect to enforcement. But as to what the bureau will actually do, I don't know.

Chris Willis:

The last thing that I wanted to talk with you about today, Stefanie really concerns the most recent development in the rulemaking process. Our listeners will recall that when the proposed rules were released in May of this year, there was a placeholder for something that the bureau was going to do with respect to time-barred debt, that is debt that's passed the statute of limitations. The bureau said in their release in May, that it was considering imposing a disclosure or other requirements on the collection of time-barred debt, and said basically, "Stay tuned, we're going to come up with something relating to that."

Chris Willis:

Just recently, within the past week or so, the bureau made an announcement that it's considering putting out a proposal specifically for time-barred debt for public comment. So Stefanie, what's going on there, and what are the respective consumer and industry positions with respect to this issue?

Stefanie Jackman:

Yeah. In the rule or the proposed rule, there was a statement that I candidly didn't find very remarkable, it's that you are not allowed to sue or garnish, take legal action on time-barred debt, that's already in the FDCPA, and it got restated. But then the bureau talks about wanting to get comments on whether it should prohibit collection on time-barred debt, whether it should implement disclosures that would need to be put, because as some people don't always understand, you can collect, save for a couple of states, Mississippi in Wisconsin, and then on purchased debt, North Carolina, you can collect on time-barred debt, you can't sue on it or threaten to sue on it, but you can collect, you can ask consumers to pay.

Stefanie Jackman:

There are some states that have requirements around that use that say you have to ... Chris, we've called them in the past, the do not pay me disclosures, the idea that you have to tell the consumer, this is time-barred and what that means, and then in some instances, what paying could actually do, maybe it revives the debtors. What's been surprising is that we called them back in 2014 or '15, the do not pay me disclosures, but it hasn't necessarily had that impact. A number of clients have been using these for years now, and they're still getting paid and they're still able to collect.

Stefanie Jackman:

What's happened instead is there's been just a great deal of FDCPA litigation about whether or not these disclosures are accurate. In an attempt to have efficiency and treat people equally and comply with the most restrictive states, agencies have said, "Okay, well, then we'll give the most restrictive disclosure." But sometimes that doesn't actually reflect how it works in the state the consumer lives in. So there's just been a lot of confusion, and some states are silent, do you need to give these or not, if there's no statute that requires it? So I actually think the industry, if this isn't going to go away, would appreciate some clarity, a model disclosure.

Stefanie Jackman:

In fact, I'm involved in a group that is proposing some, on what we need to do to comply with the FDCPA with regard to time-barred debt, but none of the industry thinks it would be appropriate to do what the consumer advocates want, which is to bar it entirely. As I mentioned earlier, there are a couple of states where upon the running of the statute of limitations, the debt is extinguished. So that means not only can you not sue on it, or threaten to sue on it, but you can't do anything on it. It's as if it never existed. You can't collect the debt that never existed.

Stefanie Jackman:

That is a very much minority position, and I don't think it is proper in my view, for a rulemaking at the federal level to come in and tell 47 other states, how to treat time-barred debt, when they permit right now, some expressly permit by statute collection on it and others are silent. I don't get the sense the bureau is going to do that because we saw it in their rulemaking agenda that was published, that they're moving forward on proposing some disclosures.

Stefanie Jackman:

So I don't think the final rule is going to answer this question, I think that we're going to stay tuned, and we're going to see this evolve over the coming months more and possibly after the rule, it's not clear to me if this will be part of the final rule or not, but it looks like the bureau is moving in the disclosure direction. It's not something the industry should be thinking about. Because some people talked about it in their comment letters, but others didn't. Because I think they might have wanted to see where the consumer advocates were coming in, and then go from there. The rule always seem to suggest there'd be ongoing discussion.

Stefanie Jackman:

That's going to be an area where we need to be attentive, and there will be changes. My gut is, that it's moving towards a disclosure based.

Chris Willis:

Stefanie, let's close with just a big picture prediction. We've got a very extensive rulemaking release, close to 600 pages that came out in May of this year, we've got comments from both consumer and industry groups that criticized numerous aspects of the proposed rules. What's your prediction for the degree of change that you think the CFPB will make to the proposed rules before it finalizes them sometime in 2020?

Stefanie Jackman:

Very little, candidly. I think that this rulemaking has been going on for some time, I think the bureau has actually invested a great deal of time and effort and resources in trying to hear from both sides, the consumer advocates and the industry, and they've done a lot of analysis and contemplation of what is the right balance to strike here. I think they're trying to strike a balance. I won't go far enough for either side because it won't answer all the questions.

Stefanie Jackman:

You know what? To give the bureau a break for a minute, I don't think they can, some of this is ... it just is what it is. They're trying to move the ball, they're trying to give some of the things that both sides have said they want, which is the ability to talk through these other means, to do things other than send letters and make phone calls, to address some of the challenges that have confronted the industry and consumers in litigation. I think that this is really pretty close to final representation of that.

Stefanie Jackman:

A couple of areas I'm thinking there may be some tweaks, might be the limited content message, maybe allowing the creditors name to be disclosed in that, I think that's something that for both sides could be useful. In that it just gives more information to the consumer, which makes the consumer maybe less resistant to the communication, lets the collector feel that they at least weren't lumped in with all these offshore telemarketers that are getting blocked.

Stefanie Jackman:

I think that you will see email and text, maybe not be subject to the proposed 8:00 AM to 9:00 PM time limitations, or they are, but there'll be some movement, or at least some helpful to clarify how to understand when an email is sent, and then what to do with auto replies, if a consumer emails you at midnight, and you have some system that would respond back and say, "We're close, but we'll let you know right in the morning." But that would constitute a violation.

Stefanie Jackman:

I'm hopeful otherwise consumers might send their email into the abyss, and if it's a holiday weekend, not hear back for a few days, which can be very important to consumers trying to resolve their debts, perhaps in order to get some line of credit or who knows what, but they have reasons. Also to collectors, who, when they have an opportunity to correspond with a consumer to resolve their debts certainly want to take advantage of that opportunity and let that consumer know that they've received their communication and they'll be in touch after the holiday or when they're open again.

Stefanie Jackman:

The other thing is, I don't think we're going to get a lot of clarity on first party at all, because I think the bureau thinks it's already clear. So, just one thing for our listeners who are creditors or in the first party space, because I've had a lot ask me, "What are you telling people to do?" Here's my thinking, there are concepts that are underlying the rule. There are concepts like not ringing the phone multiple times a day, having waiting periods after you have a discussion, having opt in, opt out, having consumers exert more control over the way you communicate with them.

Stefanie Jackman:

I think it's important to look at the concepts, not necessarily how they are going to be applied to third party. Then look at your own contact strategies and approaches to collections before you outplace in the third party space, and are those concepts reflected? Do you have a waiting period after ... Maybe it doesn't have to be seven days but do you have a waiting period after you leave a message or have a right party contact? If somebody makes a promise to pay, are you communicating with them prior to the promise to pay date expiring? How often are you calling? Are you using text or email? How are you using them?

Stefanie Jackman:

Thinking about these things, and I'll tell you that, off the record, I've been able to get bureau people to ... they certainly don't tell me they're thinking and nor should they, but they certainly haven't led me to believe that I'm crazy and thinking that these concepts are one of the ways that the first party space might be able to avoid some of the pitfalls of potential UDAAP arguments that say calling somebody 10 times a day is too much. Those are my thoughts on that, Chris, I don't know if you have anything to add?

Chris Willis:

Well, I agree with your assessment. I think the rules were carefully designed to balance between consumer and industry interests, and I don't think there will be large scale changes in the basics of the rules. I think there'll be some things tweaked as you mentioned, but I don't think that main theme of the rule in terms of the balances that were struck in the proposal is likely to change when we see the final rules sometime next year. But Stefanie, I wanted to thank you for joining us today and sharing your insights, and thank you to our audience for tuning into today's podcast.

Chris Willis:

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