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Practice Group:

Consumer Financial Services

It's a Whole New World: CFPB Proposed Plans to Supervise the Activities of Debt Collectors Responsible for Almost Two-Thirds of All Collection Receipts

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The Consumer Financial Protection Bureau ("CFPB" or "Bureau") recently took a major step forward in establishing its supervisory authority over the nation's largest debt collectors. On February 17, 2012, the Bureau proposed a rule (the "Proposed Rule") that would bring the largest 175 or so of the nation's debt collectors under the Bureau's nonbank supervision program.[1]

Debt collectors are already subject to oversight by various federal and state agencies. However, supervision by the CFPB likely will be more intrusive and in-depth. Debt collection companies should strongly consider taking advantage of the opportunity to submit comments to the CFPB before the proposed rule becomes final.

Note that the Proposed Rule is really two distinct (but related) proposed rules. One would identify debt collection as a market the larger participants of which will be subject to the Bureau's supervisory authority, and define who the largest participants in that market are. The other proposed rule would do the same for consumer reporting. This Alert focuses on the part of the Proposed Rule that relates to debt collection.

I. Overview of the Bureau's Supervisory Authority

To understand the Proposed Rule, it is helpful to understand the types of authority that the Bureau has over "covered persons." Broadly speaking, the Bureau has three types of authority over covered persons:

Regulatory Authority: The authority to prescribe rules that will govern the activities of covered persons.

Enforcement Authority: The authority to investigate potential violations of consumer financial protection laws, and to bring enforcement actions in response to violations.

Supervisory Authority: The authority to conduct routine examinations of covered persons, and to require covered persons to submit periodic reports.

The difference between regulatory authority and the other two types of authority is straightforward. *Regulatory authority* concerns the ability to make substantive rules that covered persons must follow. The other two kinds of authority allow the Bureau to ensure that covered persons actually follow those rules. But the difference between *enforcement authority* and *supervisory authority* is more subtle.

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An investigation is something a government agency does when it has specific reason to believe that a person has violated the law. An investigation is usually (or, at least, is supposed to be) relatively targeted toward the suspected wrongdoing. Investigations fall under the "enforcement" umbrella. In contrast, an examination is something that an agency does routinely. That is, an agency may conduct an examination without any specific reason to suspect wrongdoing. Conducting examinations is a type of *supervision*. The Bureau also can require covered persons subject to the Bureau's supervisory authority to submit reports on their activities.[2]

The Bureau has enforcement authority over any "covered person" under Title X of the Dodd-Frank Act. This basically includes almost any person that provides financial services to consumers (subject to some exceptions). (For more on the definition of "covered person," see Melanie Hibbs Brody & Stephanie C. Robinson, "Consumer Financial Services Industry, Meet Your New Regulator" (July 7, 2010) (*available at* http://www.klgates.com/consumer-financial-services-industry-meet-your-new-regulator-07-07-2010/)). Thus, the Bureau is empowered to investigate any alleged violations of federal consumer financial laws (including the Fair Debt Collection Practices Act ("FDCPA")) by any of the nation's 4,500 debt collectors (except those that fall under a miscellaneous exception, which probably will be rare). And the Bureau will be able to bring an enforcement action against any of these debt collectors if the Bureau finds a violation of a federal consumer financial law.

The range of covered persons subject to the Bureau's supervisory authority is narrower. The Dodd-Frank Act gives the Bureau supervisory authority over the following covered persons:

- Depository institutions with assets over $10 billion, and their affiliates;
- Mortgage lenders, brokers, and servicers;
- Mortgage loan modification or foreclosure relief service providers;
- Parties that provide private education loans; and
- Payday lenders.

The Dodd-Frank Act also allows the Bureau to supervise any "larger participant of a market for other consumer financial products or services."[3] Congress gave the Bureau the power to decide *which* markets, and how to define "larger participants" in each market. The Proposed Rule is the Bureau's first attempt to exercise this rulemaking authority.

II. Summary of the Proposed Rule

The Proposed Rule would subject the larger participants in the consumer debt collection market to Bureau supervision. The Proposed Rule would define "a larger participant" in this market as a person whose annual "receipts" from consumer debt collection exceed $10 million.[4]

The CFPB says that about 175 of the nation's 4,500 debt collectors have receipts over $10 million.[5] This represents only slightly less than 4% of debt collectors by number.[6] However, the Bureau says that these 175 collectors account for about 63% of all collection receipts.[7]

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A. *Definition of* Consumer Debt Collection

The Proposed Rule would define *consumer debt collection* as "collecting or attempting to collect, directly or indirectly, any debt owed or due or asserted to be owed or due to another and related to any consumer financial product or service."[8] The definition clarifies that a "person offers or provides consumer debt collection" if either:

(1) The person is collecting the debt on behalf of another person; or

(2) The person is collecting the person's own debt, if the person purchased or otherwise obtained the debt while the debt was in default (according to the terms of the contract or other instrument governing the debt).[9]

As discussed below, this definition would capture many activities that fall outside of the FDCPA).

B. *Definition of* Receipts

A debt collector is a larger participant if the debt collector's "receipts" from debt collection exceed $10 million per year. *Receipts* is defined as "total income" plus "cost of goods sold," as both those terms are defined in IRS tax return forms.[10] The definition also backs out the following items (or clarifies that these items should not be included in the first place):

- Net capital gains or losses;
- Taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the entity or its employees; and
- Amounts collected for another (but fees earned in connection with such collections are receipts).[11]

The Bureau borrowed this definition of receipts—and the idea to use receipts as a metric for size—from the Small Business Administration.[12] The Bureau considered other metrics, including "annual receipts" as defined by the U.S. Economic Census.[13] The Bureau decided that the SBA's standard was better for this purpose because the SBA's standard excluded investment income, interest, and dividends.[14] The Bureau opted for the SBA's definition because it was limited to revenue derived from "market activities."

As discussed further below, there are some issues about how the SBA's metric for size will apply in the debt collection context, especially with respect to debt buyers.

C. Disputing Larger Participant Classification

The Proposed Rule would lay out a procedure that a debt collector could follow if it disagreed with the Bureau's determination that the debt collector is a larger participant. When the Bureau sends a letter initiating a "supervisory activity," the recipient has 30 days to dispute that it is a larger participant.[15] The dispute must be sent to the CFPB's Assistant Director, and "must include an affidavit setting forth an explanation of the basis for the person's assertion that it does not meet the definition of larger participant of a market."[16] The person can include any supplemental records or information to bolster its claim. According to the Proposed Rule, the person will waive the right "to rely on any argument, records, documents, or other information that [the person] fails to submit to the Assistant Director" in the dispute.[17] The Assistant Director may demand more information from the person, and then eventually will decide whether the person is a larger participant. There are no provisions in the Proposed Rule for any further appeals within the agency.

III. Effect of the Rule on Debt Collectors

A. Generally

Supervision by the Bureau will represent a significant change for many of the debt collectors that will be "larger participants." Debt collectors that are subsidiaries or affiliates of large banks will not be measurably affected, because the CFPB already has supervisory authority over them. But most—we suspect the vast majority—of the debt collectors covered by the Proposed Rule are not bank affiliates, so the Proposed Rule would effect a sea change in the kind and quantum of regulatory supervision that they face.

Presently, debt collectors not affiliated with banks are not under the general supervision of any federal agency. This does not mean that no federal agency has *enforcement authority* over debt collectors. Even before the Dodd-Frank Act, the Federal Trade Commission had the authority to investigate violations of the FDCPA and certain other federal laws by debt collectors, and to bring enforcement actions against them. And the FTC was not shy about exercising this authority.[18] But, as explained above, there is a difference between *enforcement authority* and *supervisory authority*. The FTC could not conduct routine examinations of debt collectors just to confirm that they were following the law. And until the Proposed Rule is finalized, a debt collector that is not affiliated with a bank also is not presently subject to supervision by the CFPB.

Debt collectors are subject to some level of supervision at the state level in about half of the states, which require debt collectors to be licensed. However, these state examinations are less frequent and less invasive than the Bureau's examinations are likely to be. State examinations of debt collectors generally were limited to a review of forms to make sure that they had the proper disclosures, and a review of a sampling of debt collection files. The CFPB has not issued a debt collection supervision manual yet, so we do not know exactly what CFPB supervision will entail for debt collectors. But the supervision manuals that the CFPB has issued for other kinds of businesses suggest (as most people anticipated) that examination by the CFPB will be similar to traditional examination of banks by banking regulators. This means searching inquiries into the business practices of the debt collector, and significant second-guessing by examiners as to the fairness of assorted practices to consumers—even when those practices do not violate any specific provision of the FDCPA or other law.

B. Schism in the Industry

Not all of the debt collection industry will be subject to supervision, of course. The CFPB says that only about 4% of the nation's debt collectors will be "larger participants" under the Proposed Rule.[19] This means that 96% of the nation's debt collectors—who handle about 37% of the nation's consumer collection volume—will not be subject to the Bureau's supervision.

Being under Bureau supervision might put a debt collector at a disadvantage against its unsupervised counterparts. This is, of course, true to some degree for every entity subject to the Bureau's supervision. But there are at least two reasons to suppose that the dichotomy between supervised and unsupervised debt collectors will prove to be especially significant.

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First, although debt collection is vital to a robust consumer credit system, debt collectors deal with the necessary dirty work that everyone would prefer not have to be done. Even the CFPB recognizes that debt collection is "critical to the functioning of the consumer credit markets." The CFPB concedes that debt collectors "help to keep consumer credit available and potentially more affordable to consumers." But the Bureau still likely will view the world through a consumer protection prism, and consumer complaints will drive its priorities. There is reason to be concerned that the CFPB will lose sight of debt collectors' valuable role in the credit markets and, instead, impose ad hoc and arbitrary notions of what are proper collection efforts.

Second, the rules governing debt collection are especially unclear relative to the rules for other consumer financial service providers. The FDCPA itself broadly prohibits abusive, deceptive, and unfair debt collection practices, and provides debt collectors with examples of such practices to help them that have become long since outdated. (By way of example, the FDCPA tells debt collectors exactly what the rules are for telegrams and post cards, but says nothing about the guidelines for sending emails or text messages to consumers, calling consumers on mobile phones, or even leaving voice mail messages.) Whether an act or practice is abusive, unfair, or deceptive is extremely subjective and open to potentially inconsistent or ad hoc application by individual examiners. Of course, this uncertainty has always been a concern. But it will become more of a problem for the largest debt collectors, with examiners actively making subjective decisions about whether every one of their practices is abusive, unfair, or deceptive.

The question will be whether these examiner-imposed rules really filter down to the 96% of debt collectors who are not subject to routine supervision, or whether those debt collectors will be able to largely avoid following these requirements as long as they do not go so far as to spark a Bureau investigation or enforcement action. And if the Bureau prohibits the debt collectors it supervises from engaging in effective debt collection strategies that the 96% can engage in with relative impunity, it has the potential to shift the competitive landscape in the debt collection industry.

IV. Potential Issues With the Rule

The Proposed Rule is, of course, not final. Interested parties have until April 17, 2012, to submit comments to the CFPB. You should review the Proposed Rule carefully and consider how it will apply to your business, and should consider submitting a comment letter to the CFPB if you believe that any provision of the rule should be changed or clarified.

Below are a few examples of issues with the Proposed Rule that debt collectors and other interested parties might wish to note for the CFPB.

A. Definition of Receipts

As noted above, the Bureau defines receipts as "total income" plus "cost of goods sold." Note that it says "total income," *not* "taxable income." If you receive the IRS forms to which the definition refers, you will see that "total income" refers to everything that the company receives, minus cost of goods sold (which the Bureau's definition of *receipts* puts back in). Most business expenses—such as employee compensation, repairs and maintenance, advertising, taxes, rent, and other overhead expenses—are deducted from *total income* to produce *taxable income*. The Bureau's definition of receipts focuses on "total income"—i.e., income before most costs of doing business are excluded.

IRS Form 1120[20] and its instructions[21] illustrate how these calculations work in practice.

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The net effect of this is that *receipts* is roughly equivalent to gross revenue (although some items, such as net capital gains or losses, and taxes collected, are excluded, even if they might otherwise be included in revenue).

In most instances, this approach to measuring size makes sense. A gigantic company that takes a loss one year might have no taxable income—but still be a very large company. One can see why the SBA (and thus the Bureau) decided to look at income before costs of doing business are deducted to decide whether a company is large or small. (The cost of goods sold is one business expense that is not included in total income for tax purposes, but the SBA/CFPB definition of *receipts* adds this figure to total income to produce the receipts total.) But while this approach might make sense in most situations, it might produce a peculiar result when applied to debt collectors.

Because of how receipts are defined, a debt collector that employs a debt buyer model would have higher receipts than a debt collector that collects on commission and has exactly the same size collection portfolio. Under a debt buyer model, the debt collector buys bad debt from a creditor at a discount and attempts to collect the face value of the debt. Under a commission model, the creditor merely hires the debt collector to collect the debt on the creditor's behalf, without even transferring ownership of the debt to the debt collector. The debt collector then receives a commission if it is successful in collecting the debt.

The definition of receipts explicitly backs out amounts collected on behalf of another. So a debt collector operating under a commission model includes only its commission (and other compensation) in its receipts; the debt collector would exclude payments on the debt that it receives and remits to the creditor. However, a debt collector operating under a debt buyer model does not, by definition, collect amounts *for another*. Because the debt buyer owns the debt, all debt payments it receives are to its own account. The result is that all amounts collected get counted as receipts for the debt buyer, but not for the debt collector operating under a commission model.

To illustrate, suppose the following two debt collectors. One buys a $100 debt for $80. The other is hired by the creditor to collect a $100 debt, and promised 20% of any amounts collected. These two debt collectors are not in exactly the same position (the latter debt collector is not exposed to any risk of non-collection), but both are in a similar position because both are trying to collect a $100 debt, and will earn $20 if they do. However, if the first debt collector succeeds in collecting the full debt, it will count as $100 in "receipts." If the second debt collector collects the full debt, it will count as only $20 in receipts.

The result of this is that a debt collector operating under a debt buyer model is more likely to cross the $10 million receipt threshold than a debt collector with a comparable collection portfolio that is operating under a commission model.

B. The Definition of Debt Collection *Is Broader Than Under the FDCPA*

1. Overview

The FDCPA's complicated definition of "debt collection" generally excludes servicing a loan that was not in default at the time that the loan was acquired for servicing, or collecting one's own debt if the debt was not in default at the time it was acquired. The Proposed Rule's definition of *debt collection* does provide that a debt buyer is engaged in debt collection only with respect to debts that were in default at the time they were acquired. But there is no such qualifier for an entity that is "collecting the debt on behalf of another person."

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This appears to mean that anyone who collects debt on behalf of another person would be engaged in debt collection for purposes of this rule—even if all the debts were current at the time that they were assigned for "collection." Even creditors might be considered to be engaged in debt collection with respect to debts they originated if those debts were securitized or sold servicing-retained, because the creditors will at that point be "collecting" payments on the debts for another. The result conceivably could be that traditional loan servicers and many creditors would become subject to Bureau supervision because they qualify as larger "debt collectors."

This is less of a concern for mortgage loan servicers, because they already are subject to the Bureau's supervision, regardless of their size. But non-mortgage originators and servicers conceivably could get caught up by the larger participants rule for debt collectors if the Bureau does not align the definition of debt collection with the FDCPA.

2. Why It Matters

Dodd-Frank does not say that the Bureau is required to define the debt collection market to mirror the scope of the FDCPA. (It does not even say that the Bureau needs to define the relevant market as "debt collection.") So arguably the Bureau is permitted to define "debt collection" for purposes of the larger participants rule any reasonable way that the Bureau wants, without regard to the FDCPA, as long as it is not arbitrary or capricious and is otherwise consistent with Title X of the Dodd-Frank Act. After all, even if loan servicers and creditors caught up by the Proposed Rule are not subject to the FDCPA, they will still be subject to other federal consumer financial laws under the Bureau's purview—so the Bureau will have plenty to examine with these companies.

Still, it does not appear from the preamble that the Bureau meant for its "debt collection" to capture a significant number of companies that are not traditional debt collectors (i.e., companies that collect seriously delinquent debts for creditors). Nothing in the preamble discusses the fact that the rule would capture traditional loan servicers or creditors that sell their loans servicing-retained. Had the Bureau meant to define the "debt collection market" to include companies not traditionally thought of as debt collectors, then it would presumably have acknowledged it was doing so. Further, the Bureau's statement about why the debt collection market is important to the consumer credit industry shows that the Bureau was contemplating primarily companies that handle delinquent debt: "By collecting *delinquent* debt, collectors reduce creditors' *losses from nonrepayment* and thereby help to keep consumer credit available and potentially more affordable to consumers."[22]

Of course, the Bureau conceivably could respond to comments pointing out the broad sweep of its definition by saying, in effect, "Yep, that's what we wanted to do." But because there is reason to doubt that this is what the Bureau intended, industry commenters should make sure that the Bureau appreciates how broadly the Proposed Rule arguably defines the debt collection market. And commenters should suggest to the Bureau alternative definitions that might more accurately reflect the scope that the Bureau intended. One such suggestion is next.

C. The Definition Should Focus on the Overall Business Objectives

Even if the definition of debt collection were fixed to track the FDCPA, the definition of debt collection still might be broader than the Bureau intended. As every servicer knows, a certain portion of debts that they service will be subject to the FDCPA. Set aside the question of how difficult it will be to separate receipts associated with servicing of debts subject to the FDCPA from receipts associated with servicing debts not subject to the FDCPA—although we anticipate that this would be a difficult task for every servicer's accountants and tax lawyers. There is still reason to question whether traditional loan servicers should be grouped with traditional debt collectors.

Traditional loan servicers and traditional debt collectors play different roles in the consumer credit industry. It might have been necessary for the FDCPA to draw some bright-line rules that wound up capturing traditional loan servicers in order to avoid evasion by debt collectors. But this does not mean that traditional loan servicers who are incidentally captured by the FDCPA for portions of their portfolios should be grouped with traditional debt collectors for industry classification purposes. Commenters should encourage the Bureau to take a different tack, and attempt to craft a definition of "debt collection" that captures only the activities that most people involved in the consumer credit industry—including, we suspect, most consumer advocates—would label true debt collection activities. Such a definition might focus on whether the entity markets its services as being primarily for nonperforming accounts, or require that a significant majority of the accounts be in default when they are transferred to the entity for collection.

Any functional definition based on traditional industry classifications would be subjective to some degree, and therefore require the Bureau to make judgment calls from time to time. But there should be no reason for the Bureau to run from the possibility of having to make the occasional subjective assessment on this issue. If the Bureau is confident that it can spot an "abusive" or "unfair" practice, then there is no reason that the Bureau should doubt its ability to know a debt collector when it sees one.

This approach would not preclude the Bureau from using *receipts* as the metric for size. What it would do is define which activities the receipts of which should be counted when determining whether a company is a larger participant in the debt collection market. That is, it would define which activities constitute "debt collection."

*   *   *   *   *

The K&L Gates Consumer Financial Services Group routinely assists clients in preparing comment letters on proposed rules to federal and state agencies. If you would like assistance preparing a comment letter on the Proposed Rule—or any other proposal by the CFPB or another government agency—please contact us.

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[1] Defining Larger Participants in Certain Consumer Financial Product and Service Markets, 77 Fed. Reg. 9592 (February 17, 2012) (proposed rule).
[2] The Dodd-Frank Act enumerates three stated purposes of an examination: (i) to assess the examined company's compliance with the law, (ii) to collect information about the company's practices and compliance systems, and (iii) to detect new risks to consumers and markets. *See* 12 U.S.C. § 5114(b)(1).
[3] *Id.* § 5514.
[4] The Bureau chose annual receipts because "they are a meaningful measure of the level of participation of an entity in the market and the entity's impact on consumers." 77 Fed. Reg. at 9598.
[5] *Id.* at 9599. The $10 million threshold proposed by the Bureau is slightly higher than the Small Business Administration's $7 million cutoff for whether a debt collection is a small business concern. *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at 9597.
[9] *Id.* at 9596-9597.
[10] *Id.* at 9607 (incorporating I.R.S. Tax Form 1120, U.S. Corporation Income Tax Return (available at http://www.irs.gov/pub/irs-pdf/f1120.pdf)).
[11] *Id.*
[12] *Id.* at 9595.
[13] *Id.*
[14] *Id.* at 9596.
[15] *Id.* at 9608.
[16] *Id.*
[17] *Id.*
[18] According to the Federal Trade Commission website, the FTC has brought 21 lawsuits against illegal debt collection practices since 1998. *See* http://www.ftc.gov/opa/reporter/credit.shtm. This number does not appear to include actions that resulted in a consent decree without litigation.
[19] 77 Fed. Reg. at 9599.
[20] http://www.irs.gov/pub/irs-pdf/f1120.pdf.
[21] http://www.irs.gov/pub/irs-pdf/i1120.pdf.
[22] 77 Fed. Reg. at 9597 (emphasis added).

Consumer Financial Services Practice Contact List

K&L Gates' Consumer Financial Services practice provides a comprehensive range of transactional, regulatory compliance, enforcement and litigation services to the lending and settlement service industry. Our focus includes first- and subordinate-lien, open- and closed-end residential mortgage loans, as well as multi-family and commercial mortgage loans. We also advise clients on direct and indirect automobile, and manufactured housing finance relationships. In addition, we handle unsecured consumer and commercial lending. In all areas, our practice includes traditional and e-commerce applications of current law governing the fields of mortgage banking and consumer finance.

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