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CFPB's Proposed Rule on Time-Barred Debt Disclosures

As most lenders and servicers are aware, the Consumer Financial Protection Bureau (CFPB) is revising and implementing new regulations relating to the Fair Debt Collection Practices Act (FDCPA) and has proposed to amend Regulation F, 12 C.F.R. § 1006, which deals with time-barred debt and disclosures relating to the revival of time-barred debt (Proposed Rule). On March 3, 2020, the CFPB published a Supplemental Notice of Proposed Rulemaking extending the comment period for the Proposed Rule until June 5, 2020. The summary below is an overview of the Proposed Rule, and a comparison with the regulations issued by New York State Department of Financial Services (NY Regulations).

Summary

The FDCPA currently prohibits a debt collector from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt,"[1] and from misstating the "legal status" of a debt, which likely includes whether a debt would be considered time barred. The Proposed Rule clarifies these prohibitions and requires debt collectors to make certain disclosures when collecting time-barred debts, as follows:

- Debt collectors will be prohibited from suing or threatening to sue consumers to collect a debt that they know or should know is time barred, and must disclose the same to the consumer.[2]
- Debt collectors are required to disclose to a consumer that the debt collector's right to sue on a time-barred debt can be revived in certain circumstances, where applicable.[3]

Comparison With 23 N.Y.C.R.R. § 1, et seq.

The FDCPA currently permits states to issue consumer protection laws affording greater protection than that provided by § 1692n of the FDCPA. The NY Regulations on time-barred debt are similar to the Proposed Rule and afford greater consumer protections than the FDCPA does in its current state. Under the NY Regulations, a debt collector is required to maintain reasonable procedures for determining whether the statute of limitations applicable to the debt being collected has expired.[4] In New York, if a debt collector knows or has reason to know the debt is time barred, the debt collector must provide the consumer with a "clear and conspicuous notice, in the same medium (such as via telephone or electronic communication) by which the debt collector will accept payment" stating:

- We are required by regulation of the New York State Department of Financial Services to notify you of the following information. This information is NOT legal advice:
- Your creditor or debt collector believes that the legal time limit (statute of limitations) for suing you to collect this debt may have expired. It is a violation of the FDCPA, 15 U.S.C. § 1692 et seq., to sue to collect on a debt for which the statute of limitations has expired. However, if the creditor sues you to collect on this debt, you may be able to prevent the creditor from obtaining a judgment against you. To do so, you must tell the court that the statute of limitations has expired.
- Even if the statute of limitations has expired, you may choose to make payments on the debt. However, be aware: if you make a payment on the debt, admit to owing the debt, promise to pay the debt, or waive the statute of limitations on the debt, the time period in which the debt is enforceable in court may start again.
- If you would like to learn more about your legal rights and options, you can consult an attorney or a legal assistance or legal aid organization.[5]

As noted above, the CFPB has proposed the same standard as New York be used such that certain prohibitions and disclosures are triggered when a debt collector "know[s] or should have known" the statute of limitations to enforce a debt has expired. Recognizing that this standard may be difficult to ascertain, the CFPB has requested comments on the Small Business Review Panel's strict liability standard as well. Under the strict liability standard, the debt collector would be liable under the FDCPA for suing or threatening to sue a consumer on a time-barred debt even if it neither knew nor should have known the debt was time barred. Significantly, the Proposed Rule also provides for a similar, although simpler, disclosure than that required by the NY Regulations. The NY Regulations require a debt collector who knows or has reason to know the statute of limitations may be expired to provide the consumer with the requisite disclosure, ***in the same medium*** by which the debt collector will accept payment, "such as via telephone or electronic communication,"[6] before accepting payment on such a debt. Unlike the NY Regulations, the Proposed Rule does not state whether it requires the disclosure to be provided in the same medium. The CFPB has developed a series of model forms (the Proposed Forms) (85 FR 12672-01) with disclosure language appropriate for different circumstances under the Proposed Rule. Model Form B-4 provides for language that may be included in a standard debt validation notice under the FDCPA:

- The law limits how long you can be sued for a debt. Because of the age of this debt, we will not sue you for it.

The Proposed Forms also provide additional form language for disclosures where a time-barred debt may be revived under applicable law (as provided below).

Proposed Model Language for Revival Disclosures

Proposed Model Forms B-5 through B-7 provide for tailored disclosures where the time-barred debt may be revived. The forms provide:

- Model Form B-5, to be used if applicable law permits revival when the consumer makes a payment or acknowledges the debt in writing:
    - The law limits how long you can be sued for a debt. If you do nothing or speak to us about this debt, we will not sue you to collect it. This is because the debt is too old. BUT if you make a payment or acknowledge in writing that you owe this debt, then we can sue you to collect it.
- Model Form B-6, to be used if applicable law permits revival only when the consumer makes a payment:
    - The law limits how long you can be sued for a debt. If you do nothing or speak to us about this debt, we will not sue you to collect it. This is because the debt is too old. BUT if you make a payment, then we can sue you to collect it.
- Model Form B-7, to be used if applicable law permits revival only when the consumer acknowledges the debt in writing:
    - The law limits how long you can be sued for a debt. If you do nothing or speak to us about this debt, we will not sue you to collect it. This is because the debt is too old. BUT if you acknowledge in writing that you owe this debt, then we can sue you to collect it.

Takeaways

The CFPB has proposed an effective date of the final rule to be one year after publication of the final rule in the *Federal Register*. As previously stated, comments may still be submitted until June 5, 2020 on the Proposed Rule, the proposed standards and the proposed effective date of the final rule. Debt collectors should consider submitting comments to the CFPB on the Proposed Rule, particularly in light of the CFPB's consideration of using a strict liability standard, as noted above. Such a standard may leave debt collectors without the ability to argue they did not "know or should have known" that the statute of limitations had actually expired because they have arguments against the expiration that the courts (including the highest state appellate courts) may find viable. This could leave debt collectors in a defenseless situation with the enforcement agencies as well as in lawsuits filed by borrowers under the FDCPA.

[1] 15 U.S.C. § 1692e,(2)(A).

[2] A Proposed Rule by the Consumer Financial Protection Bureau, 85 Fed. Reg. 12672 (proposed May 21, 2019) (to be codified at 12 C.F.R. § 1006.26(c)(1)(i)).

[3] A Proposed Rule by the Consumer Financial Protection Bureau, 85 Fed. Reg. 12672 (proposed May 21, 2019) (to be codified at § 1006.26(c)(1)(ii)).

[4] 23 N.Y.C.R.R. § 1.3(a).

[5] 23 N.Y.C.R.R. § 1.3(b)-(c).

[6] 23 N.Y.C.R.R. § 1.3(b).

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