

2019 TCFA Annual Convention

Legal Update

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Today's Topics

- CFPB Proposes New Rules on Debt Collection
- CFPB Revisits Payday Rule
- Expedited Payment Fee

CFPB Proposed Debt Collection Rule

- Summary
 - Certain parts likely apply to first-party collection
 - Call frequency limitations
 - Limited content messages (communicating with third-parties)
 - Text, email, and other electronic communications
- See CFPB's Fact-Sheet
 - Attached to Legal Update Memo

CFPB Proposed Debt Collection Rule

- Application to first-party collection
 - FDCPA only applies to third-party collection
 - “Debt collector” is defined as a third-party collector
 - Rule does not change definition of debt collector, BUT . . .
 - Dodd-Frank Act is also a basis for parts of the rule
 - Dodd-Frank Act allows CFPB to regulate unfair, deceptive, abusive acts or practices (UDAAPs)
 - UDAAP regulation applies broadly, including to first-party collectors
 - Violations of certain debt collection rules likely to be considered UDAAPs

CFPB Proposed Debt Collection Rule

- Examples of UDAAPs that have been cited by CFPB
 - Field visits
 - Collection calls to work
 - Calls to third parties
 - Disclosure of debt or delinquency to third parties
 - Credit reporting violations

CFPB Proposed Debt Collection Rule

- Call Frequency Limitations
 - Limit of 7 calls in 7 consecutive days
 - On a per-debt basis (whether you call debtor or third-party)
 - Wrong number does not count
 - Limit does not apply to text, email, or other electronic communication
 - No calls within 7 consecutive days after making contact
 - Clock starts even if customer initiated telephone conversation

CFPB Proposed Debt Collection Rule

- Limited Content Messages
 - Addresses communications with third parties
 - Problem: need to identify self, but can't disclose existence of debt
 - If communicate only a “limited content message,” then do not convey information about a debt
 - Required content only, nothing more:
 - Consumer's name
 - Request that consumer reply to the message
 - Name or names of one or more natural persons for consumer's reply
 - Telephone number that consumer can use for reply
 - If applicable (texts), clear statement of how to opt out of calls to number
 - Subject to call frequency limit

CFPB Proposed Debt Collection Rule

- Text, email, and other e-communications
 - No call frequency limits, BUT right to opt out
 - Must include an option for consumer to unsubscribe from future electronic communications
 - Still subject to prohibition on communication at unusual and inconvenient times and places
 - No social media—only private messaging allowed
 - No work emails (violation if you knew or should have known)

CFPB Proposed Debt Collection Rule

- Timeline

- Proposed May 21, 2019
- Comment period ends August 19, 2019
- Likely several months for CFPB to review comments
- Effective 1-year after Final Rule published

CFPB Revisits Payday Rule

- Ability-to-repay (underwriting) provisions delayed to Nov. 19, 2020
 - These provisions under reconsideration by CFPB
- Did NOT delay the payment provisions
 - i.e., repeated attempts to withdraw payment from consumer account after prior failed attempts for NSF
- Court previously continued stay of lawsuit challenging the rule until Aug. 19, 2019 (compliance date for rule)
 - Status report from parties due Aug. 2, 2019, at which time court could lift the stay on payment provisions

Expedited Payment Fee

- Background

- Lenders cannot charge convenience fee for debit card transactions
 - Texas Anti-Surcharge Law (now under Atty General enforcement)
 - Chapter 342, Tex. Fin. Code, does not authorize such a charge
- *Roswell v. Pettijohn*, 336 F. Supp. 3d 724 (W.D. Tex. 2018)
 - Court found Texas Anti-Surcharge Law to be unconstitutional
 - Only dealt with credit card portion of law (not debit card portion)
 - Debit-card portion is virtually identical
 - Technically, only unconstitutional as to the specific plaintiffs

Expedited Payment Fee

- OCCC Advisory Letter
 - March 2019 – meeting with OCCC
 - May 6, 2019 – OCCC responded to follow-up communication
 - States parameters for passing through an expedited payment fee
 - From Texas Finance Code and OCCC perspective ONLY
 - Advisory only—NOT an official interpretation by Finance Commission

Expedited Payment Fee

- OCCC Advisory Letter—Requirements

- Entire expedited payment fee is remitted to a third-party payment processor;
- No direct or indirect benefit from expedited payment fee tendered to lender from third-party payment processor;
- Expedited payment fee is not required (i.e., other payment methods are available to the borrower); and
- Lender retains adequate documentation to support that expedited payment fees are remitted entirely to third-party payment processor.

Expedited Payment Fee

- OCCC Advisory Letter—Attorney General
 - OCCC cautioned that Attorney General may still enforce
 - Prior Attorney General opinion:
 - Maintain clear separation and an arm's length transaction with third-party payment processors; and
 - Do not pass through an expedited payment (debit card) fee to borrowers who pay in-person with a debit card
 - This way, you are not charging for use of debit card, but rather for convenience of processing by phone or online
 - We understand that Visa/Mastercard require anyway