Less is More: Why the CFPB Should Not Regulate Debt Collectors

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The Consumer Financial Protection Bureau (“CFPB”) has slowly been increasing its supervisory responsibilities since its inception. Continuing the trend, the CFPB will begin overseeing debt collectors in January 2013. However, such oversight brings with it excessive costs for both the CFPB and the debt collectors for the oversight itself, coordination with such oversight, and compliance. In addition, the CFPB is unlikely to discover substantive violations due to the examination guidelines, and the collectors the CFPB will oversee are the most likely to comply with the federal laws, making the benefits of such action small. Instead, to best ensure compliance with the FDCPA while costing the government and the taxpayer nothing, Congress should increase the amount of punitive damages available in private litigation for a statutory violation of the FDCPA. The increased potential costs of litigation will force the companies to better self-regulate and come into compliance with the applicable federal laws, while costing the CFPB and the taxpayer nothing.

The CFPB’s New Oversight

To the CFPB.\textsuperscript{1} With over 30 million Americans subject to some sort of debt collection, debt collectors have ample opportunity for misstep.

The Dodd-Frank Act gave the CFPB supervisory authority over various institutions and affiliates involved in debt collection.\textsuperscript{2} Section 1025 of the Dodd-Frank Act gave the CFPB authority to supervise large insured depository institutions. Section 1026 of that same Act allows the CFPB to require reports from smaller insured depository institutions and to include its examiners with prudential regulator’s examinations of these smaller entities. The CFPB’s new rule includes larger debt collectors in the “larger participants” group and sets forth the CFPB’s supervisory powers.

The debt collectors subject to the new rule include depository institutions, nonbank entities in residential mortgage lending, payday lending, and private education lending. The rule also covers nonbank entities who are “larger participants,” defined as an institution with annual receipts from debt collection over $10 million a year.

**Content and Problems with Examination**

The CFPB’s new oversight is just that, oversight. The Bureau will employ examiners to investigate the approximately 175 companies that are subject to the CFPB’s new authority. These examiners will search for common debt collection problems that the CFPB has identified, including: failure to provide required disclosure, failure to provide accurate information, and failure to communicate civilly and honestly with customers. The CFPB has stated that they want to “ensure that debt collectors are upfront and clear with consumers.”\textsuperscript{3}

The examiners will inspect samples of records of the companies, including “documents and recordings, including hard copies or electronic copies of letters, voice recordings of telephone communications, and notes made during or after telephone calls or personal visits.” However, inspection of a sample of written records and calls will likely be ineffective. The companies that the CFPB will review are the largest, most successful of the debt collectors. The likelihood that such companies have improper written communications is small. These companies undoubtedly send out form letters, so any mistake would be made in a large portion of the letters. If there is a mistake in a number of these letters, the company would have likely had lawsuits, even class action lawsuits, filed against it. To protect themselves against so much litigation, the companies letters are likely consistent with the federal laws.

In terms of oral and telephonic communication, the examiners will listen to voice recordings of telephone communications, notes made during conversations, and samples of collection calls. Again, due to the costs of litigation, these larger companies are more likely to have adequate training in place for their employees to ensure consistency with the federal laws. Any records of debt collection violations, furthermore, would likely be destroyed to prevent such litigation.

Even live observation would not likely produce any discovered violations. Assuming live observations of collection calls are included in the “sample of collection calls” examiners could listen to collectors on the phone with consumers. However, the debt collection company is undoubtedly aware of the examiner’s presence, so the company will likely have forewarned their collectors to be careful to comply with the law in all of their calls during the time the examiner is there. A debt collector, then, would coach their own statements to give the examiner no reason to bring a suit against the company.

The best, most effective way for the examiners to find substantive violations of any of the applicable federal laws would be to review complaints, and the examination procedures do provide for the inspection of these complaints. These complaints, and follow up interviews with the complaining witness, would provide first-hand accounts of the debt collector’s practices. However, many people who have valid complaints do not actually complain to the FTC or the CFPB at all. Many complaints that are made lack credibility or violations of the federal debt collection laws. The sheer amount of complaints made and the amount of work that goes into reviewing the complaints makes this process work intensive for the CFPB and for the FTC. Despite the work, complaint investigation offers the best opportunity for the CFPB to find substantive violations of the federal debt collection laws.

**Costs and Benefits of Compliance**

The examiners will prepare reports for the CFPB to either bring suit against the collection company or work with the collector to adjust their collection practices. Examinations, however, require the company to devote employee time to answering document requests and correspondence from the CFPB. The CFPB is not totally sure how much this examination could cost the debt collector in terms of employee time and expenses, but estimates range from $12,000 to $68,000. The CFPB expects to examine some of the larger participants every other year, and most of the remaining organizations around once every five years.\(^5\) For a company at the low range of the spectrum of covered companies, this cost could represent an excessively burdensome amount.

Obviously there are potential benefits to such supervision. Compliance with the federal laws will probably ensure a fairer, more civilized debt collection process for consumers. If these larger participants are already abiding by the federal laws concerning debt collection, then the costs to them of dealing with examinations and modifying their activities will likely be lower. However, there

is still the base cost of the examination itself. These excess costs could very well drive up the amount of interest charged on debts in order for companies to make up the money they have lost.

The regulation also seems to target the wrong debt collectors. Small debt collectors have more to gain from unlawful debt collection practices. They collect less, so face a much lower amount of civil liability for their violations. Attorneys would also be less likely to take on class-actions against these smaller debt collectors because the expected recovery would be smaller due to the lower amount of debt collected. At the same time, they might not be as complex and well-versed as some of the larger collectors. The costs of oversight of these individuals by the CFPB would be a larger amount of their income although the overall cost to the individual collector would be smaller (less records to go through, etc).

The CFPB, however, does not have the statutory authority to oversee these smaller collectors. Because of the large number of these smaller debt collectors, the CFPB could randomly examine collectors in such a way that the collector does not face the cost of an examination every few years. The CFPB could make an example of individuals, or could just randomly examine the collectors. Then, a collector who is examined would not have to worry about the cost of being examined again for an extended period of time, longer than the five years of the larger participants. Any cost would be carried out over a long period of time to help minimize it. The CFPB need only re-examine a collector sooner if they discover substantive violations. While this strategy also faces a lot of costs, the benefits could be much greater because smaller collectors are more likely to violate federal collection laws.

**Curtailing FTC/CFPB Overlap**

In January of 2012, the FTC and CFPB entered into a Memorandum of Understanding to coordinate efforts to protect consumers without duplicating federal enforcement and regulation. The two parties agreed not to prosecute the same individuals for the same conduct “except in
unusual circumstances.” They have further agreed to inform one another of their investigations and to share consumer complaints by creating a new computer system that will allow the parties to independently search for actions the other is taking.

The FTC takes a three prong approach to enforcing the FDCPA. First, the FTC’s debt collection enforcement focuses on investigation and filing suits in federal court seeking relief against organizations identified through complaints. Second, the FTC tries to educate consumers through speeches and presentations, one-on-one guidance, and written materials. They distributed 110,900 brochures explaining the FDCPA in plain language in 2008 alone. The FTC also has a call center to respond to consumer’s questions and administers advisory opinions. Third, the FTC researches the debt collection industry to identify trends and offer recommendations to address problems in different areas of the debt collection process.

Enforcement by the FTC centers around consumer complaints. FTC receives complaints for debt collection issues, 142,743 in 2011 alone. In fact, consumer complaints about debt collection make up a large portion of the complaints that the FTC receives, 27.16% of all the complaints in 2011. Many consumers, though, do not file complaints with the FTC or the CFPB. Many consumers file complaints only with the debt collector themselves, or not at all. Now, complaints to the FTC will be shared with the CFPB, and, at some point in the future, a system will be developed that allows both parties to search for the enforcement actions of the other.

The CFPB comes under the most scrutiny for the duplicative actions that the Bureau takes. The CFPB conducts the same enforcement actions as the FTC, in addition to the oversight they now have. Ideally speaking, the system outlined in the Memorandum of Understanding between the CFPB and FTC will work perfectly: the parties will take on no case that the other has, will investigate no individual that the other is currently investigating, and will share all the information.

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that they have with one another. But, even ideally, this creates an increased amount of duplicative work and additional cost for the two organizations to coordinate with each other. Now, both the FTC and the CFPB will look at the same group of complaints to determine which ones to investigate. Debt collection complaints will have to be shared with one another. In essence, you have two organizations doing the exact same job.

The MOU, or some other document, needs to iron out the details of the relationship of the two parties in respect to debt collection. Effectively, all the MOU does is state that the FTC and the CFPB must coordinate their actions so that there is no overlap in litigation, research, or education initiatives. However, the two sides both sides enforce, research, and educate about the FDCPA and debt collection practices without any clear division of the subject matter. The FTC should be completely responsible for, say, litigation, and allow the CFPB to be in charge of research and education. The parties could also divide the violations that they will investigate and enforce, for instance fraudulently collecting old debts, or the FTC and CFPB could divide the size of company that they would investigate, such as individual debt collectors v. large companies. This would minimize overlap as each side would know without having to check any database that they could bring a suit against a company.

While the FTC has the experience on its side, the CFPB is a new organization that recently has received a lot of national attention. This attention gives it an ability to reach out and educate consumers on a national stage, through interviews, etc., that the FTC might not have. The CFPB, then, might be able to handle the education prong of the enforcement strategy, while the FTC litigates lawsuits. While the CFPB oversees the debt collection groups with annual inspections, which the FTC does not do, the parties need to clearly divide some aspects of their debt collection work so that each side does not have to continually check with the other side as to their jurisdiction.
Such a division would reduce the amount of duplication between the two parties and cut down on costs for all.

**Another Possible Solution: Private Litigation**

The issue comes down to a cost/benefits analysis and raises key questions for the CFPB, Congress, and the taxpayers. The companies subject to CFPB review are the largest of the debt collectors in the market. These collectors have the most contact with the government and have the most at stake should they commit a violation. When a large collector violates the federal laws governing debt collection, they face a lawsuit from a large class of consumers. But, the potential cost of litigation remains small. The FDCPA currently allows for civil liability of all debt collectors in the amount of actual damages plus punitive damages of $1,000 in an individual action and in a class action, $1,000 per each named plaintiff and the lower of $500,000 or 1% of the debt collector’s net worth, whichever is less, to be divided amongst the entire class, plus attorney’s fees.\(^7\)

The average debt of an individual is currently $1,400. Under the FDCPA, the average consumer who paid, for instance, $300 toward an uncollectable debt would receive $1,300. This amount is less than the amount of the average debt. Actual damages, much less a statutory violation, is often difficult to prove. The average consumer might not ever complain to a government organization or file a lawsuit. From an economic perspective, the debt collector will make more money than they will lose by going after even expired debts because the amount that a litigating consumer might recover, combined with the chance that he brings a case and wins the case, is less than the potential amount that the debt collector could recover. The damages allowed under the FDCPA in effect incentivize collectors to go after bad debts. Even if 50% of the injured debtors brought claims against the debt collectors and won, on average, the debt collector would still be making money.

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Instead of putting into place expensive oversight rules, the government could instead increase the amount of civil liability that a debt collector faces for violations of the FDCPA. The punitive damages awarded for a violation should be greater than the average debt, or $1,4000, in order to better incentivize companies to comply with the law. Treble damages would also prohibit improper debt collection by making the average cost of improper collection more than the average benefit the companies might receive. These greater recovery amounts would encourage self-regulation by the companies instead of the government. Government oversight is expensive, and the CFPB’s new rules create additional cost, for both the companies being regulated and for the American taxpayer, resulting from coordination with the FTC, examination procedures, and the inspector employees themselves.

**CONCLUSION**

The CFPB already faces a lot of criticism for practices that many in Congress find duplicative with the actions of other federal agencies. To keep this duplication to a minimum, the CFPB and FTC should divide the aspects of enforcement, research, and education in such a way that they do not have to check with each other on every individual case and there are clear lines of their respective jurisdictions. This separation will allow faster, cheaper enforcement and could be outlined in an amendment to the MOU or in another document entirely.

To allay the associated expenses, Congress should also increase the punitive damages available to individuals in civil actions against debt collectors for violations of the FDCPA. This would provide a means to effectively enforce the federal debt collection laws without costing the taxpayer anything more. With a debated budget and a tough economy, duplicative work could hurt the CFPB and the debt collectors more than it actually helps the consumer. For this industry at least, the federal government might want to harken to the old adage, “less is more.”