

# The Consumer Financial Protection Bureau's Impact on the Practice of Law

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# Legal Disclaimer

This information is not intended to be legal advice and may not be used as legal advice. Legal advice must be tailored to the specific circumstances of each case. Every effort has been made to assure this information is up-to-date. It is not intended to be a full and exhaustive explanation of the law in any area, however, nor should it be used to replace the advice of your own legal counsel.

# CFPB and the Practice of Law

- Lawyers can be a “Larger Participant” under the “debt collection” classification
- Lawyers can be a “Service Provider” under Bulletin 2012-03
- Lawyers can be a “risk”
- Lawyers can be recipients of a CID

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It is questionable whether the CFPB may regulate *all conduct* of attorneys primarily engaged in consumer debt collection.

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# CFPB and the Practice of Law



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## Attorney Regulation

*[T]he Bureau may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law.*

§ 5517(e)(1)

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## Attorney Regulation

*12 U.S.C. 5517(e)(3) preserves the Bureau's authority over attorneys who are otherwise subject to any "enumerated consumer law" within the meaning of the Act.*

Larger Participant Rule, 10/24/12

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## Attorney Regulation

*Collection attorneys are subject to the Fair Debt Collection Practices Act . . .*

*See Heintz v. Jenkins, 514 U.S. 291 (1995).*

Request for Comments, 2/8/12, fn. 28

# CFPB and the Practice of Law

## Attorney Regulation

Prior to Dodd-Frank, the FDCPA did not permit the FTC to make regulations

*Neither the Commission nor any other agency . . . Shall promulgate trade regulation rules or other regulations . . .*

§ 1692l(d), prior to 7/21/10

*Except as provided in [12 USCS § 5519(a)], the Bureau may prescribe rules with respect to the collection of debts by debt collectors . . .*

§ 1692l(d), on 7/21/10



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## Scope of Impact

Larger Non-Bank Participant – Supervision,  
Enforcement and Regulation

Service Provider – Enforcement, Regulation and  
“on-site” examinations

CID, “Risks” - Enforcement and Regulation

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## Scope of Impact

### Larger Non-Bank Participant

- Annual receipts resulting from consumer debt collection of more than \$10 million, based on the average of last three fiscal years (or life of business, if shorter)
- Definition of “receipts”: “total income” plus “cost of goods sold” as defined and reported on IRS tax return forms

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## Scope of Impact

### Service Provider

- “[A]ny person that provides a material service” to certain insured depository institutions, credit unions or non-bank, Larger Participants, “in connection with” their “offering of a consumer financial product or service.”

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## Scope of Impact

### “Risks”

- “[E]ngaging, or has engaged, in conduct that poses risks to consumers” in connection with consumer financial products or services.

# Enforcement Underway

- Discover, Amex, Capital One, Debt/Mortgage Settlement
- Why are they targeted?
  - Information from other regulators
  - Complaints
  - Litigation
  - Media
  - Web postings and social media

# Supervision and Exam

## Initial Contact

- A letter 60 days before the scheduled on-site date
- The letter will include “Information Requests” which may seek:
  - Reports, records, manuals, written policies, procedures and similar compliance management materials
  - Scripts for live calls and pre-recorded messages, collection letters, required notices and disclosures (e.g. FDCPA validation notice), other “consumer-facing” documents and things
  - Information about consumer complaints and their resolution
  - Audits, self-assessments or quality control measurements relating to compliance with laws or dealings with customers
- Will set an on-site start date

# The Examination

## Quality and Substantial Compliance

- Qualitative analysis of the compliance risk management system for avoiding violations of applicable federal consumer financial laws (e.g. FDCPA, FCRA, UDAAP)
- Determine if the company has violated applicable federal consumer financial laws
  - Collection practices CFPB identifies as presenting an increased risk of a violation are likely to receive closer review

# Quality Risk Management

Partner/Shareholder participation and supervision

Compliance program containing policies and procedures, and training in communications with debtors, third-parties; privacy protections; payments

Consumer complaint tracking and response system that integrates with an effort to improve compliance

Compliance audit and self-assessment



# Substantive Compliance

- Having a quality program is not enough – must also demonstrate substantive compliance
- For collection attorneys, substantive compliance will include, at a minimum, EFTA, GLBA, FDCPA, the FCRA, UDAAP principles (abusive, deceptive), and possibly, the TCPA.
- Review of account records, documents, recorded calls, to assess compliance with every potentially applicable statutory or regulatory provision.

# Sharing Information

CFPB has agreed in MOU to share exam information and reports with FTC

Not certain if exam information will be shared with state authorities

CFPB's enforcement unit will have access to exam information and its on-site exam team likely to include one or more members of enforcement unit

# Time-Barred Debt

## Heightened interest in collection of time-barred debt

Mentioned in relief section of Amex consent order, but no violation alleged relating to this issue

Mentioned in Larger Participant Final Rule, but without statement of its position

FTC's statements in connection with Asset Acceptance Consent Order (2/12) and RJM Letter Closing Investigation (8/12) were far clearer – disclose debt is time barred, cannot file a suit and impact of payment on restarting limitations period

This Presentation is available at:  
*The Consumer Financial Services Blog*  
<http://consumerfsblog.com/NJCBA201302>

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