Consumer Finance Monitor (Season 4, Episode 35): Preparing for the CFPB Debt Collection Rule's November 30, 2021 Effective Date

Speakers: Christopher Willis, Stefanie Jackman, and John Culhane

Chris Willis:

Welcome to The Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers and the industry. I am your host, the co-leader of Ballard Spahr's Consumer Financial Services Practice Group, and today you're going to be hearing a recording of me together with two of my partners, Stefanie Jackman and John Culhane, talking about the revised old effective date of the CFPB's debt collection rules, going back to the original effective date of November 30. You'll hear us talk about what we think the next steps in connection with the rulemaking may be and also the practical implications both for creditors and for debt collectors. And for those of you who want even more information, don't forget about our blog, ConsumerFinanceMonitor.com. We've hosted the blog since 2011, so there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those of us in the industry, so to subscribe to our blog or to get on the list for our webinars, visit us at balladspahr.com. If you like our podcasts, let us know. Leave us a review on Apple Podcasts, Google or wherever you get your podcasts.

Chris Willis:

Now let me introduce my co-speakers for today's podcast. We have Stefanie Jackman who is our partner in the Atlanta office and Stefanie is one of our greatest experts on anything collection-related. She was very heavily related in the comments and discussions with the CFPB rulemaking team leading up to the CFPB's debt collection rule and has been working tirelessly since the rule was finalized late last year to help clients both on the creditor side and the third party side get ready for the effective date of the rule, which is now different than we thought it was going to be, and then in addition we're joined by our senior partner, Don Culhane, who is one of our most senior and knowledgeable regulatory lawyers on all issues including collections, and he has taught Stefanie and me more about collections than I think we would ever have known otherwise. So I want to welcome Stefanie and John to today's webinar.

Chris Willis:

Let me tell you in the audience that today's webinar is going to be a little bit different from our normal format. Rather than going through a series of presentations, I actually just have a series of questions. Highly practical questions that I'm going to ask Stefanie and John and sometimes even myself to respond to related to the effective date of the new debt collection rules in November and what does that mean for everybody, both on the creditor side and on the third party debt collection side, and although normally we are not able to take your questions live during the webinar, in this instance we probably will be able to do so. So send your questions to us in the Q&A box, we will see them and we will address them during the webinar if we're able to. If not we'll send you an email later, if it's something we can't address live. But I do want you to know that we will be addressing those live, so feel free to just throw those in the question and answer whenever you like.

Chris Willis:

So let's get started into the meat of our program, with the first of our questions. So John, the CFPB originally, when it released the two bits of the debt collection rule late last year, stated that the effective date was going to be November 30 of this year.

Then a little bit earlier this year, the bureau proposed, formally proposed, to extend the compliance date, the effective date for those rules, until January 30 of 2022, stating that it thought that the industry needed more time to come into compliance, and then most recently and what triggered this webinar was the CFPB said, "Oh, never mind. It's going to be November 30 after all. We're not extending the date." So what's going on here? What happened?

John Culhane:

Yeah, that's a good question, Chris. I think the best explanation of what happened in this sequence is after this extensive rulemaking proceeding, the CFPB came out with the two parts of Regulation F, and then we had a change in administrations. So we had new leadership, sort of new leadership, at least an acting CFPB director who is more or less a Democratic appointee, and that prompted I think the notice offering to extend inviting the comments on extending the comment period. Then we had this long period for comments and the CFPB decided they weren't going to extend it after all which is sad. The reasons for that seem to be twofold. First industry commenters told the CFPB that they would be geared up and ready to go on November 30, and consumer groups who supported an extension of the effective date really seemed to be doing that in large part because they wanted the CFPB to weigh back in on portions of the rule that they didn't like. Maybe pick up new issues that hadn't been addressed and sort of start rulemaking all over again.

John Culhane:

That's extraordinary difficult to do, and I think the CFPB recognized that. We've all been watching for the last four years the Trump administration defend just a plethora of challenges to its rulemaking and guidance, where it tried to overturn or walk back rules and interpretive guidance promulgated going back to the Obama administration and the Trump administration was litigating administrative procedure act issues left and right and losing about 90% of them. So I think what happened was the CFPB recognized that to the extent that parts of this might be interpretive rules, it didn't really have the basis for changing those interpretations without a serious challenge that it was acting in an arbitrary, capricious fashion and to the extent that it might be invited to go back and revisit issues that the entity had come to a recent decision on, they just didn't have the information or record to do that.

John Culhane:

Agencies can go back and change their mind and revise their rules, but in the absence of significant changes in the facts or changes in the law. That's really hard to do. It's not enough to just have the typical reasoned explanation for administrative action. There's a heightened level that an agency has to meet in order to have its changes be upheld in court, and I don't think the CFPB had any basis for doing that. They just had no substantial explanation as to why things had changed so dramatically that they could revisit the rule and rewrite parts of the rule. So that's how we got to where we are.

Chris Willis:

Yeah, it makes sense, John. So this seems like it could have been kind of a head fake from the industry standpoint of, "Oh, the deadline is actually January, oh no, it's November." So Stefanie, has the industry been having a cow about this and saying. "Oh no, what are we going to do? This isn't expected?" Or is the industry generally okay with it? What's your perspective from talking to both the third party and the creditor side of the industry?

Stefanie Jackman:

Well I think you made the exact point Chris that it depends on which segment of the industry, the receivables industry, the collections industry we are. Are we in the first party context, are we in the creditor context, or are we in the third party FDCPA context? And then some of the questions that have already been coming in, I've been responding individually saying, "We're going to talk about the ways in which we believe Reg F," and we've been saying this for some time, and I have it on

good authority from private conversations as well as public panels where I've shared the stage with members of the CFPB who are on the rulemaking team and who are in different capacities within the organization, both before and after the election. So this isn't a new thing, it's not a result of the Biden administration or anything else, but they agree that there are principles of Reg F that they think creditors need to pay attention to although I want to be clear, creditors are not directly subject to Reg F and we'll also get into how it impacts state laws and how they're interpreted and applied that can sometimes be broader and are patterned on the FDCPA. So stay tuned on that.

Stefanie Jackman:

But coming back to your point Chris, I think that creditors, many of them are still perhaps evaluating or a bit unsettled in how they want to approach Regulation F, both with their vendor who may perform FDCPA, I'll call that third party collections on their behalf. When I say that I mean collections that are subject to the Fair Debt Collection Practices Act, as well as internally, with how they want to implement the principles of the rule that myself and others think will be applied to them. So creditors I think would have appreciated a little more time just because they're still wrestling with that. Nobody wants to get way out ahead of what the rest of their industry segment may do, but I also think there continues to be a lot of misinformation about what people are doing.

Stefanie Jackman:

So I'm going to go out on a limb and I'm going to tell all our creditors who are listening, the advice I've been giving to creditors, I've been talking about this development with both ... From the time that the final rule was published last year. I think the CFPB will prioritize for retention creditors who act as if Reg F doesn't exist. What that may require internally that you evolve or think about or react to does vary I think by circumstance. I think it does vary by industry, and even within an industry. I think about auto for instance. There may be times that it's actually in the consumer's interest to attempt to contact them a little bit more than seven and seven, like while their car is out for an active repossession. I don't know how any of these will be perceived by the CFPB, but trying to help my creditor clients through this, that's where the conversations are. But I want to underscore what I said before, creditors who do not pay attention to Reg F will absolutely have an opportunity to defend your decision not to do so, with the CFPB and probably in court.

Stefanie Jackman:

Conversely on the third party FDCPA side, my sense is most of them don't actually care at all. It was only two months, they've already been working. It doesn't mean they're all ready to go. In fact, to be fair to our third party creditors, there are parts of the rule that you just ... There aren't answers for. It's one of the reasons we're really hoping that the CFPB will give some of the promised guidance that they have suggested they'll provide and solicited questions from industry groups and stakeholders and consumer advocates to try to give guidance.

Stefanie Jackman:

The clock is ticking on that. I don't know, I think that's one of the things we're going to get into so I'll wait but I think that the third party world already knows this is coming, they know it's coming for a while, there's no question about how it applies from a legal perspective, and instead their efforts have been very much focused on mitigating risk, trying to learn what their creditor partners can do and support them in to mitigate risk, but also needing to still continue to be able to collect accounts. So I'm seeing lots of them say these safe harbors are well and good, but they're not operationally necessary and we don't actually think they're required to collect in a compliant way and they're very narrow. They just give us a safe harbor against an authorized third party disclosure, and so far experience prior to Reg F, using email and text communication for instance, has meant that that doesn't happen very much. So the first party seems a little hurry up, I'm not sure where I'm going with this and maybe needing to invest a little more effort there. Third party I think is as ready to go as they can be.

John Culhane:

Yeah, I would just add that I think the consumer group reaction here is a lot of disappointment that the Democratic CFPB didn't just sort of bow to their wishes and reopen the whole rulemaking proceeding and rewrite the portions of the rule they don't like. So what I think they're doing is they're marshaling evidence for further activity, looking for areas where they can get additional rulemaking and preparing to watch very carefully the compliance of debt collectors and the actions of creditors. So there's a lot going on.

Stefanie Jackman:

I agree, like you were saying, I almost said it and then I just ... I didn't but you brought it up again, so I will. I agree with you that part of the reason that they didn't extend it is they didn't have the record on which to justify it for purposes of the Administrative Procedures Act and rulemaking requirements, and somebody has told me at a conference I was at recently, they're like, "Really the consumer advocates missed the opportunity to give them the record they needed to do that." So I was reflecting on ... I'm not saying I agree with that characterization or not, I don't know. I'm not working for consumer advocates. But I think that a lot of the consumer advocates work for a certain segment of the overall consumer population, some of the most vulnerable consumers. I know from some of the roundtables that I've participated in or gotten information back through industry groups where they hosted these events that they're very concerned about consumers who don't have say internet access. But I can't help but think that hopefully that is a relatively small and I think it is a relatively small population of the entire world of the consumer credit space and I think that could be why for advocates, they've said what they need to say and I agree with you, they're marshaling that evidence to try to protect the most vulnerable.

Stefanie Jackman:

But for consumers who maybe are not in that circumstance, they do have internet access, they're not the most vulnerable in some ways. I think that the plaintiff's bar is planning to do this through litigation and that's another reason why you didn't see a real effort from that particular segment. I don't know, but it is interesting that the CFPB really didn't have the record and you're right, that consumer advocates very much think time-barred debt disclosure should be on every piece of paper that goes out the door. If it's a time-barred debt, regardless of whether it's required by law, email and text should have hard caps, you should have to have consent to use them in all instances, and those are not the current state of the rules. So I agree with you, it's an interesting position and I don't think we're done.

John Culhane:

Yeah, I don't think we're done either, and I also think consumer groups are likely to take their issues to the states because we don't have these as hard caps that can't be impacted by developments at the state level.

Stefanie Jackman:

Yeah, I mean look at D.C. D.C. is about to implement a three call per ... I think it's like consumer in a seven day period if the current emergency bill that then has a temporary bill and then has a version that would need to be approved by Congress and become permanent. Your point's exactly right, John.

Chris Willis:

So speaking of what's to come, as you both referenced, the consumer groups were fairly agitated about the rule not being protective enough of consumers, especially as it relates to contact frequency limits, both telephone and electronic, about time-barred debt disclosures and I was thinking that the CFPB would very rapidly move to revise those aspects of the rule, but for the reasons you both have explained, you don't think the bureau is going to do that immediately. Does that mean they're never

going to do it or what are you expecting in terms of a subsequent rulemaking to perhaps address those issues that the consumer advocates have complained so loudly about? John, why don't you go first?

John Culhane:

Well I think there will be subsequent rulemaking but I think we shouldn't expect any activity for at least a year, maybe two years at the earliest. Because what the CFPB has to do is see what happens under the current rules. So with time-barred debt, it's got to see more evidence of confusion, deception, collection of time-barred debt. With the absence of limits on emails, it's got to gather information or hear from consumers and consumer groups that there is something intrusive about not having limits on emails and have multiple emails come in to your inbox. So it's got to really build out a fairly solid record for further rulemaking and further changes, and I just don't see that happening immediately. As I said I think that's going to be at least one to two years down the road at the earliest.

Chris Willis:

It makes sense to me, and you would think that given the very high volume of consumer complaints related to debt collection, that that would be a valuable source of information for the bureau to justify changes in the rule. That would at least be my thinking about it. Stefanie, turning to you though, if there's not going to be an immediate rulemaking, like within the next year or two as John has just mentioned, do you think the bureau is going to give us any further guidance on the rule? I mean we have the rule, we have reasonably extensive official commentary and we have the small entity guide now, I think that's all we've got. Do you think anything else is coming in the immediate future?

Stefanie Jackman:

How about I say gosh I hope so. There was outreach, very deliberate outreach by the bureau, to stakeholders on both sides of the aisle so to speak for areas where clarification is needed. But I also ... Like I said, we're getting close. There's still time, it's the end of August. We've got September, October, November, got three months. So there's time and I know that feedback was accepted or I should say received and is being discussed and there's been follow-up. It's hard to know where that stands, but the thing that is starting to give me a little bit of pause is we're getting really close to the effective date and instead of getting resources directed to FAQs and answering questions that were submitted many, many, many months ago, instead we had this, "Well let's reopen the comment period," for two months. So I'm wondering where resources are or aren't going here, and then also switching gears a little bit but thinking about like the Hunstein decision out of the 11th Circuit, and as a quick update, the 11th Circuit has not ruled yet on whether it will rehear that or not, but stay tuned, it's probably coming between now and October. But looking at the fact that there were a lot of calls from the CFPB to file an amicus brief there, and they didn't.

Stefanie Jackman:

I've been one of the people saying, "Well, I can actually understand why they wouldn't do that. It's sort of stepping on the rights of courts." The Regulation F and whether it contemplates the use of these outside mail vendors, etcetera, wasn't before the court, the rule hadn't been published by the time briefing closed. It's sort of coming out of left field and kind of punching a little bit in the face of the checks and balances and separations of power that are the underpinnings of our constitution.

Stefanie Jackman:

I can sort of see some of that possibly coming into play here as well, and letting courts have an opportunity to sort out some of the ambiguities instead of coming in and telling them what the answer should be. Now I'm not saying that I agree that's the position the bureau should take, in fact I think as the agency with the power to interpret and enforce the FDCPA and they just put out a rulemaking, they should be giving that kind of guidance. But I'm wondering if that's planted in their mind a little bit?

My fear, to clarify the point, we're going to end up with decisions that are all over the place, it's going to be just like TCPA, FCRA, Hunstein right now, and once that happens, I think it's a little bit more difficult for an agency to come in and kind of reign it back in. It doesn't mean they don't try, but it will be so much better to have it now. So to circle back to where I started, I hope so. But I don't know.

John Culhane:

Yeah. I'm concerned that we're not going to get the kind of guidance we'd like to have, FAQs or formal revisions to the commentary, and what we're going to get is examinations and supervisory highlights that elaborate on different aspects of the rules and how they'll be interpreted by the CFPB.

Chris Willis:

Okay, thank you both. Let me go on to my next set of questions. Stefanie, this one is going to come to you. Obviously there are things in the rule that are mandatory, like the new requirements for the validation of it. There are things that are safe harbors, like using the model form validation notice or using certain procedures for emails or texts. So given the fact that we have a looming compliance deadline, let's talk about third party collectors first. What do you think are the areas that the third party collectors need to be prioritizing in order to be ready on November 30 for the effective date of the rule?

Stefanie Jackman:

Definitely, and thank you. By the way for the creditors on, so I've looked at the attendee list and there's a number, this is also going to dovetail into some of the things on the next slide when we talk about you. But for third party collectors and debt buyers, what should you be prioritizing among many things that you ultimately do need to comply with, and in my view, the first and most important thing for you is to know how are you going to get your validation notices out. Because you can't do anything unless you're able to collect and resolve the debt in your initial communication, which does happen sometimes. Otherwise, you have an obligation within five days of the right party contact to send the validation notice and the rule has made a lot of changes on what that notice needs to contain. While the model form, the use of the model form is optional, the information within it is not. The itemization, the breakdown, the post-itemization date charges. Not putting multiple addresses, the one for disputes is the one that's supposed to be there, et cetera. So the model form has put those all together in a way that the CFPB says if you present all the required information in this template with this format with this bolding and this language and this juxtaposition.

Stefanie Jackman:

Because I got questions about this and I absolutely believe that the placement of items on the first page, in the columns, the way it's laid out, is deliberate. I know it is. I was involved in trying to work through a working group and trying to develop different templates and suggesting different approaches that the bureau at least received. So I do think that that matters. That's a safe harbor against claims that the validation notice is not sufficient under 1692(g). But you don't have to use it, and you can alter it a little bit and still argue it's substantially similar, but I see companies I think altering even just the layout in ways that I think really undermines that. So what are you doing? Are you using the model form or not? What changes are you going to have to make on the model form and are you comfortable that they are really aligned or not? Are you going to have a strong, substantially formed argument or not? Are you sending it by mail or are you going to try to take advantage of electronic channels like email and text? Are you going to have some form or fashion, eSign consent is required if it's not your first communication but if it's your very first communication, there's an argument to be made you don't need to eSign.

Stefanie Jackman:

Some companies are not even going to have consent. They're going to make the validation notice, their very first communication, whether by email or text with the consumer. They're going to not have any sort of direct consent to them, but, the collectors, safe harbor type consent. They're definitely not going to have eSign consent. Where are you sourcing those emails? Are they going to be something that the creditor used? That the consumer provided to the creditor? And there's a broad contractual, "Hey, if you give us this, it can used not just by us but our agent". If you're not going to have anything like that, how confident are you that you're sending this to the right person? You need to have that dialed in.

Stefanie Jackman:

Additionally, if you send things out electronically and the consumer responds, because you have to then give them the ability to respond electronically to request validation, if you don't have eSign, you can't send it back via email, so how are you going to deal with that? Some of the thoughts I've had is that you can use that as an opportunity to email the consumer back and say, "Hi, we have received your validation request. We would be happy to provide that. Would you like us to do it by mail or electronically?" That could help rebut arguments that if you just do it by mail that the consumer because they requested it by email didn't pay attention to their mail and then never received it and you are in violation of the FDCPA. Maybe enough to survive a motion to dismiss, maybe not, I don't know. I'm just thinking of ways to avoid it.

Stefanie Jackman:

If they say, "I'd love to get it by email," guess what? Then you can walk them through giving you eSign consent that's required. You got to have that dialed in because if you can't get your validation notice and validation request responses out, you can't collect. You got to have contact frequency under control. You have to have a plan in place for seven, seven day waiting period. That is only for calls and voice messages, including ringless voice messages. It does not seven and seven, seven day waiting period. I feel like I can't say this enough. They have not applied the email and text communications. Including two-way email and text communications. That is not the language of the rule. However your time and place, your inconvenience, don't call me at dinner, don't call me when the moon is eclipsing the sun, whatever they identify, those do apply across all channels. Unless of course they're specific, if the consumer just says, "Don't email me." "Okay well then you can still call." But what do you have in place for that? How are you going to manage that?

Stefanie Jackman:

Because I think validation notice and starting to test if your modified model form is sufficiently similar or substantially similar for safe harbor protection, and alleged time, place, contact frequency violations are going to be what the consumer bar comes out of the gate like I said jokingly as we prepared for this on December 1, and John kindly was like, "Well I think you've got to have a few days past," right. Those are the first claims you're going to see in private litigation and I think a lot of the pressure in the third party space is at least initially going to come through litigation in court and I think the CFPB understands that too and I think, I don't know, that they'll let that happen for a little bit to see how things are shaking out.

Stefanie Jackman:

Then as I noted with electronic communications, are you getting consent, are you not getting consent, are you going to try to send legally required notices for which eSign consent is required? That includes things like post-dated check deposit notices. Are you going to use texts, do you use an ATDS, are you sending pre-recorded messages because PCPA is not completely dead yet. What is your basis? What are the risks you're taking on? You have got to have a game plan because these are the places where right out of the gate, I think your challenges are most likely.

Stefanie Jackman:

Those are my thoughts on third party collector and to be honest with you, they're in the order that I would suggest prioritizing them. Have your validation notice strategy laid out, whatever it may be. Some companies are just going to keep mailing for now and let other people be adventurous. Have your seven and seven and waiting period dialed in, be able to look at time-place controls across, have people trained, have a plan, some clients are saying, "Well my concern is my agents will overmark things as cease and desist or do not call. One of the things I talk a lot with people is can you have a kind of separate team that re-reviews those? You can sometimes bring in call analytics to assist with that. But have a plan and are you using email or text because you want to have a plan around that. If you're doing anything other than safe harbor, you're going to get sued. That doesn't mean you won't win, you're just going to get sued. So you want to have your defensive strategy in place and I think there are defensive strategies for not having consent within the safe harbors to use those communications. So those are some of my thoughts, but Chris and John, I don't know what you're thinking.

John Culhane:

Well I absolutely agree on the validation notice. I think these are all the priority items but you have to expect that the first thing that's going to happen with your first round of new validation notices is the consumer's going to take them to a plaintiff's attorney, the plaintiff's attorney is going to put it right up against the model form, and anything, any variation is going to risk litigation. I always worry about the substantially similar standard because it sounds good and we know that allows you to do somethings with type size, and maybe a little bit with the text, but the line for when something substantially similar and not problematic and the line from where it's materially different and problematic, it's nowhere near as clear as we would like it to be. Chris, do you agree?

Chris Willis:

Yeah I do, and one of the biggest disappointments to me of this rule is that I was hoping that it was going to bring an end to all the diversity of opinions among federal courts about validation notices and what you can and can't or must or must not put in them, and we have a single uniform national form to use and the problem is we did not get it. Because there's a lot of ambiguities and difficulties with the CFPB's model form and then of course the CFPB left it wide open for individual courts to impose new requirements on validation notices just like they were doing prior to the rulemaking and have those be required optional disclosures that go on the back of the form. So the bureau didn't do the industry any favors whatsoever with the model validation notice I don't think, and I think that will continue to be an area of very, very high litigation filings.

Stefanie Jackman:

No, you make a great point, and -

Chris Willis:

So we've had a lot, a lot of questions from the audience about impacts on creditors. So why don't we go ahead and get to that. So John, let me start with you, and I want to divide up the creditor conversation to two pieces, what creditors need to think about for their own internal collection operations, and then what do they need to do both to support and oversee third party collectors. So we'll talk about those in two different batches. Let's start with the first batch, for a creditor's internal collection operations, how will the effective date of the rule affect them? Because they're not explicitly covered by the rule, but can they just ignore it?

John Culhane:

I guess the good part about both these rules that got consolidated for creditors is that the CFPB was very specific in saying that it wasn't imposing these requirements on creditors. But it didn't rescind CFPB Bulletin 2013-7, which purports to make creditor conduct that violates the requirements of the Fair Debt Collection Practices Act and presumably Regulation F. Separately unfair deceptive and abusive acts and practices that subjected a creditor to litigation or regulatory risk. So you can't just ignore this and I think you have to tease out the important parts of the rule for your internal communications, particularly call frequency. I think we're going to see a renewed focus on the call frequency for creditors and although Stefanie commented about this earlier with auto, maybe there are situations where a seven day waiting period doesn't make sense, but I think the seven-seven-seven rule is going to just infiltrate the creditor ecosystem and regulators, state and federal regulators are going to expect compliance. Private litigants are going to be looking for compliance, and anything outside of those boundaries is just going to be inviting litigation. Stefanie, do you have thoughts about other aspects of the rule that creditors should be focusing on?

Stefanie Jackman:

So those of you that may have attended webinars in the past where I've spoken on this, I really think there's like the three underlying principles and I think you need to gear your efforts towards that internally, because of UDAAP risk and people go, "The FDCPA doesn't apply to us." I know. "Well they removed it from the final rule, they said they're not enacting it under their UDAAP authority." I know. What they didn't do though is say we won't apply parts of the rule or what we're trying to accomplish against you creditors through UDAAP. We don't need to look any further than CFPB Bulletin 2013-07 which applies the UDAAP provisions if you will of the FDCPA to creditors through the Dodd-Frank UDAAP authority the bureau has. They've been doing that consistently for almost a decade now. They're going to do the same thing here.

Stefanie Jackman:

So that's why I go to these three principles, and here's what they are. They don't want consumer phones ringing multiple times a day every single day, including if you've actually made a contact. Number two, they want to put consumers in the driver's seat. As uncomfortable as I know that is for many people to embrace because these people have ... They owe money to you that they've used for ... Right? They can just shut you down? Yes. The CFPB wants to put them in the driver's seat about how, when and whether you contact them, and they want it to be easy, which gets to principle number three, your electronic communications have to have opt-outs. Every single ones.

Stefanie Jackman:

So those are really the three principles that when I'm talking with my creditor clients about what do they need to be thinking about internally, I focus on with them. Vendor oversight is a different discussion, we'll get there in a second because I see it's a question on the slide. So for most clients in the creditor space, many of them are already doing the opt-outs and email and text already and I encourage any who aren't to do that because the CFPB believes that these are widely used already and that's why they're telling third parties they shouldn't be hard for you to do. So I think that's a really important thing but it's something that for most of our creditor clients, it's not a big issue. Okay, cool. If we're not doing that we can build that and it's not a big lift.

Stefanie Jackman:

We had questions about time and place, that's part of that how, when and whether. Time and place, across channels. Do we need to look across all of the products? Like if we're a bank for instance that might have student loan, auto, mortgage, et cetera, and we had discussions around that and the short answer is there's no specific answer. There's the answer that I think the rule actually lays out, but then there's the CFPB perhaps coming in and trying to evolve that to a more conservative

position in certain circumstances. I don't know if they'll do that or not, that's a lot of words to say it's a risk tolerance in business decision about whether you're going to see it across different verticals but definitely within. So if you have a consumer who has three credit cards with your bank or your credit card company, yeah, if they tell you they don't want to be contacted on Saturdays, that goes across those credit card accounts for sure in my view.

Stefanie Jackman:

So that's a challenge that people have been trying to work through and getting comfortable with and then it's how many calls I make. What I am seeing there is there are companies, they tend to be larger banks, who already have email, text, online portals. They do a lot of electronic engagement and online engagement. Same with fintech. I mean some of them require electronic engagement as a condition of getting the loan. So then the calls, why not just do seven and seven because really we're already calling less than that. So that makes sense for them. But others, it's a real shift. I see this a lot in subprime so there's also an assumption that if they're struggling with you, they may be struggling with others and sometimes just being the one that gets them on the phone is how you can recover something or get some plan in place. So I have a lot of questions of how many more can I do than seven.

Stefanie Jackman:

The first thing I do is try to sit down and say, "Well let's talk about how we can maybe just reallocate the calls you make. Maybe do three on Monday, three on Wednesday, two on Friday, that's eight, three on Friday, that's nine. Nothing Saturday Sunday," and they say, "Oh no problem. I already don't call Saturday Sunday." Or they say I do and I talk about can you replace some of the other ones with text and email? Can you drive consumers to an online presence? Can you think about strategies to invite consumers to ask you to contact them back and make it more of a two-way? Just thinking about if you can't get down close to seven in a week, I mean really. It doesn't mean it's a hard limit. I don't know. Do I think the CFPB is going to get real fired up for eight or nine or ten calls a week by a creditor? I don't know. What if they're getting eight or nine or ten calls on five different accounts that you have, right? That looks different to me because that could be 50 calls a week versus one. So that's why it's very circumstantial and so I think you have to as a creditor look at this specific to your organization.

Stefanie Jackman:

If you're going to go above seven by maybe one or two, I think you're probably going to fare better. Can't promise, I don't know. But if you're starting to want to do more than that, I think you really have to have data and experience that suggests that's better for the consumer and that can be hard to justify in some contexts. But places I've seen companies thinking about it is like, "What about when their car for instance is out in active repossession? I mean somebody could take it in the middle of the night." I hear you, and I think the CFPB is also perhaps willing to consider that. I don't know about courts. But that doesn't mean that you can call seven times a day every day for four weeks. So it's very circumstantial and I think that call adjustments have been one of the more difficult conversations where creditors seem a little bit stuck.

Stefanie Jackman:

So I am here to assure you I've had people tell me I am hearing no one is going to comply with that. That's not correct. It's just not. People will be complying and people will be adjusting in the creditor space, and I think it's important because we had a question that I said we would address live which is state laws. Like California, the Rosenthal Act. Maryland, which incorporated the entire FDCPA and applied it to creditors say for I would argue validation notice requirements. Florida can be weird, but it has an FDCPA provision and then you have other state laws where they maybe don't expressly incorporate some or all the FDCPA, but they're patterned on it, and there is arguments to be made, I want people to understand, there's arguments to be made, many arguments and I think some of them are good arguments and strong arguments, to courts about why they shouldn't just take Reg F and apply it blindly to how they interpret their FDCPA incorporation of similarly patterned restrictions. I do think the CFPB in the final rule will put some language in the commentary about that not being appropriate

because they didn't evaluate creditor situations in promulgating the rule. But I think also being able to show to a court like in California that you're reduced and that you're reasonable and that you're mostly in alignment will serve dividends because those lawsuits are going to be filed.

Stefanie Jackman:

So that's the other big risk. We're talking about the CFPB and I do think that right out of the game, I think the CFPB will be focusing more on creditors who have not acknowledged that Reg F exists and have made no changes to reflect that they understand these underlying principles for supervision and enforcement, and there was a question, so I think it will all be through consent order, regulation by enforcement. Not in the creditor space I think right out of the gate. Maybe not in third party. But longer term, some of these state court claims will start popping up once the third party ... We don't even have to wait until they've all been levied against the third party, but they're going to start in the third party world because that's 50 states, right? But you will see, an I'm seeing in the Hunstein world right now, which is again an FDCPA issue, we're starting to see creditor demands and creditor lawsuits. It will come, so you have to be mindful of that. So these strategies that I'm thinking about and how I'm suggesting creditors approach this internally I think translate to those states as well.

Chris Willis:

Thanks Stefanie. So let's talk about the second piece that involves creditors. That is what do you need to do with respect to the third parties whom you may engage to collect debt on your behalf? Contact agencies, debt collection firms, maybe even debt buyers. So John, what are the implications of the effectiveness of the rule from the standpoint of the creditor and its relationship with the third parties? In that vein, I'd like you to address both the monitoring sort of vendor oversight requirements that we all know the CFPB and other regulators are so insistent on, but also what creditors need to be prepared to do to even enable the third parties to comply with the mandatory aspects of the new rule?

John Culhane:

Yeah. The vendor oversight part I think is relatively straightforward in the sense that nothing has changed about vendor oversight. It's just the rules that apply to your vendor have changed and you have to be monitoring them for compliance. So you may have to step up. Maybe it's appropriate to have sort of a mini due diligence, to start over and review their compliance for Regulation F in a way that you wouldn't with say other minor changes in the law. But you're definitely going to have to review their policies and procedures, you're going to have to make sure that the validation notices are compliant and that the communication frequencies comply with Regulation F. Those are all things, mostly things that you should be doing now but I do think you may have to step back and sort of take another fresh look at what the debt collectors you have engaged are doing.

John Culhane:

You should have in your vendor agreements appropriate representations and warranties about compliance with the Fair Debt Collection Practices Act. I would think those are, the ones that we typically see are generally drafted in a way that they would pick up changes with adoption of Regulation F. Worth taking a look at, probably not the most important thing that you have to do. But Chris mentioned the need to communicate with your debt collector in a way that enables them to move forward. Obviously there's a lot of information that you now have to provide in order for them to have a compliant validation notice and you have to have procedures in place for providing that information and updating it. I think that's going to be one of the key things to focus on. To the extent that you are trying to turn over email addresses, I don't know that we're really going to see that happening much because debt collectors don't seem to be asking for it. But remember, you've got timing requirements for those emails and very specific and very elaborate notice requirements that have to be in place if you want to turn over an email address, and it's got to be the right kind of email address. It's got to be a good domain name that can be used by the collector.

John Culhane:

I think those are really key parts. I guess the question then about how much communications you want about account activity, cease and desist, opt-outs, coming back. It's probably prudent to know everything that the collector knows and has been told about the account so you have that information in your records. Stefanie, anything I missed that you want to add?

Stefanie Jackman:

No. I just think it's really, really important to be communicating with your third party agencies and debt buyers about what they intend to do. Because I think you're going to see there's different instances and you as a creditor have to think about that. For instance I do think you're going to hear vendors or collection agencies and debt buyers ask you not to transmit opt-out information. I feel differently about that in different circumstances. If it's an opt-out that you as a creditor obtained using your own people, it's your record, you created it, you made it, gosh I see some UDAAP risk in not doing that and I would advise that you still give it to them. Whether they choose to use it or not is a different story and I know on the third party side is not ideal. But there's case law and things like ... There's positions that are currently taken about do not calls and cease and desist being specific to the party they're given to. But if you're not passing that along, the rule doesn't require, I want to be clear, the rule doesn't require your collection agency and debt buyer partners to get that information. But man, that's one where I just see risk through a UDAAP lens for everyone.

Stefanie Jackman:

But let's say you've had a couple of placements with outside agencies before you sell to the debt buyer. Or you've recalled the accounts from your first agency and now you're transmitting it to a second. That to me is a different scenario. Those aren't all information that you acquired, right? It's not your record, it's put in by those agencies, and I doubt that any creditor is going to become the ensurers of accuracy and veracity of that if down the road it turns out that prior agency made a mistake and the new agency are debt buyers getting sued. So this is why the conversations are just really important. Does your collection agency plan to email and text? Do they want to take advantage of a safe harbor? If so, are you okay with that, because as a creditor, you're going to have to build some processes to support them in that effort because the safe harbor notice has to be sent by the creditor and then the creditor could receive opt-outs during the 35-day opt-out period. They got to forward that to the debt collector.

Stefanie Jackman:

I think that's just really important and it means taking a look at your current relationships, your current debt sale and debt placement agreements, and working together to figure out what best supports both of you and historically many, at least the impression I get from many in the third party space is that creditors don't engage in that conversation and that puts the third party in a really difficult space and it's a space that I don't think they'll be able to survive being in as we move forward. So that collaboration is essential, and if you haven't reached out yet, today is the day. Reach out to your third party partners, your debt purchase partners. If you're a third party listener, reach out to your creditors. Don't be afraid. Everybody's dealing with this and the sooner we start managing it and figuring out how we can work together to best protect everyone's interest and serve the consumers' needs, in my view, the better.

Chris Willis:

Thanks to both of you, and I'll answer the next question on this slide which is what do we see creditors doing now to manage the risk. The answer is really inherent in the answers that both of you gave a moment ago which is we perceive in general, particularly for larger creditors, that they are both moving in the direction of compliance with certain aspects of the rule in their own internal collection operations, like the call frequency limits, inconvenient time and place, things like that, and moving in the direction of being able to have the system capability to support their debt collection partners with providing for example

information for validation notices and with providing them rapid responses to disputes or original creditor requests or validation requests because again if the creditor can't help the debt collector respond to those, then collections are at a halt with respect to that account and that's not in the business interest of everyone.

Chris Willis:

So let's go to our final slide and some opportunity for everybody to give sort of some parting thoughts. What are the biggest risk areas going forward? Stefanie, let me start with you and again with the third party side. What's the biggest risk for debt collectors once the new rules become effective in the end of November of this year?

Stefanie Jackman:

There's going to be a flood of litigation. It's all going to be punitive class action. It's going to allege that your validation notice is not exactly the form is not clear and they're going to cite the form as, "The easy solution to have avoided this in the first place, your honor." So you need to prepare to rebut those arguments. You also need to be prepared to defend your use of electronic communications. There are a lot of really great agencies out there right now that are using them, and they're having a pretty good experience. I hope that continues, but I am worried that with the very clear provisions, restrictions and suggestions in the rule about how to use those communications, that all of a sudden, whereas an email before, generally it wasn't something you were seeing a lot of unauthorized third party claims or disclosure claims for instance, there's going to be a run at trying out some theories there to get a foothold, just like we see with the TCPA for instance and the FCRA.

Stefanie Jackman:

I just think you need to be prepared for that and to defend that and to be thinking about is this more appropriate and this is hard in the third party space, and I know your insurance carriers don't necessarily like this approach either. But is this more appropriate for an early summary judgment motion where you can actually prove out some facts? Get some discovery on whether there really was an unauthorized third party disclosure? Put in evidence that the same consumer who is claiming now that you disclosed the debt to somebody used to talk about it all the time with a creditor? Versus a motion to dismiss where it can be a little bit more difficult. Those are the things I think right out of the gate, and it dovetails with what I said earlier, to prioritize getting the strategies in place, not just on an operational perspective and compliance perspective, but from a litigation defense perspective as well.

Chris Willis:

So thanks for that Stefanie and how about on the creditor side? John, what do you perceive to be the greatest risk for creditors that might be triggered by the effective date of the new rules coming later this year?

John Culhane:

I think we've talked about this, Stefanie and I, as we have gone through the various aspects of the rule. The big risks here are the assertion that the standard seven in Regulation F are fundamental standards and violation of those standards results in unfair deceptive abusive conduct. We've got CFPB Bulletin 2013-07 out there, just sort of hanging in the air like the Sword of Damocles over the creditor, and then we've got the various states that Stefanie mentioned, California probably being the biggest one, that incorporate the Fair Debt Collection Practices Act into the requirements for creditors. So you really are going to have to be cognizant of what your current collection practices are, where you are approaching or might be exceeding limits that would be violations of Regulation F if that conduct was engaged in by a debt collector, and you've just got to assess the importance of that kind of conduct and ways you might mitigate risk. As Stefanie mentioned, looking at your call frequency. You really need all of the calls that you're making, are there ways to move from calls to electronic communications? Those are going to be I think the key elements for creditors. Watching the development in state laws where the state incorporates the

Fair Debt Collection Practices Act into its State Collection Practices Act and then watching what the FPB, other regulators and plaintiff's attorneys assert is conduct that is unfair, deceptive or abusive when engaged in by creditors.

Chris Willis:

Thanks, John. So let me just close with the last bullet point on the slide which is evolving issues with time-barred debt. I feel like the CFPB left us in a very unsatisfactory place with respect to time-barred debt disclosures in the rulemaking release because the bureau didn't adopt a time-barred debt disclosure, but nevertheless implied in the commentary of the rule, not the official commentary but the discussion of the rule and the rulemaking release, that not making a disclosure would be deceptive to consumers. So the bureau seems to have said, "A disclosure seems to be required but we're not going to tell you which one to use. Just don't use the one we proposed because nobody liked it." That was sort of the talk-off on this, and so I think we're likely to see not necessarily rulemaking changes there but perhaps things like supervisory highlights and enforcement on the issue of time-barred debt as well as state law enforcement by state regulators et cetera and so I think the issues with time-barred debt are still very much front and center, even though a disclosure didn't make it into the final rule and that would be my message to our listeners, both on the first party and the third party side.

Chris Willis:

With that, we're at the end of our hour. I wanted to thank both John and Stefanie for sharing their wisdom and insights on the CFPB's new debt collection rule today, and of course thank you to all of the members of our audience. We hope you will join us again for our next webinar, and in the meantime stay in touch with us through the blog and through our podcast. Have a good day.

Chris Willis:

I want to thank all of our podcast subscribers for listening in to today's episode, and be sure to visit our website, ballardspahr.com, where you can subscribe to our show in Apple Podcasts, Google, Spotify, or your favorite podcast platform. And again, don't forget to check out our blog, consumerfinancemonitor.com, for daily insights about the financial services industry. If you have any questions or suggestions for our podcast, please email us at podcast@ballardspahr.com, and stay tuned each Thursday for a new episode. Thank you all for listening.