



Dealing with Defaults: Debt Collection Strategies and New Practices

November 10, 2020, 3:15 – 4:00 pm ET



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Debt Collection Legal Landscape

- CFPB received over 75,000 complaints in 2019
 - 5 major FDCPA enforcement actions in 2019
 - \$50m in consumer redress, and \$11.2 CMP
 - 2020, major enforcement action against debt buyer for violation of consent order, settled.
 - Debt Relief Convening & Report; published Consumer Credit Card Market with insight into major credit card issuers' collection practices and Market Snapshot: Third-Party Debt Collections Tradeline Reporting
- FTC filed or resolved 25 debt collection cases, with bands against 23 companies and individuals in 2019
- Operation Corrupt Collector – October 2020 – FTC, CFPB and state Attorneys General
- COVID-19 Response



CFPB Debt Collection Final Rule

- Released October 30, 2020 – Final Rule Amending Regulation F, 12 CFR part 1006, Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 et seq.
- The Final Rule, among other things, addresses electronic communications (e.g., email, text messages, and social media) and interprets and applies prohibitions on harassment or abuse, false or misleading representations, and unfair practices.
- The Final Rule will become effective one year after publication in the Federal Register.
- The CFPB also announced it intends to issue a disclosure-focused final rule in December 2020 to interpret the FDCPA's requirements regarding consumer disclosures and certain related consumer protections.

For a comprehensive overview, see our article at

<https://www.venable.com/insights/publications/2020/11/final-debt-collection-rule-issued-by-cfpb>.

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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1006

[Docket No. CFPB-2019-0022]

RIN 3170-AA41

Debt Collection Practices (Regulation F)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretation.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing this final rule to revise Regulation F, which implements the Fair Debt Collection Practices Act (FDCPA) and currently contains the procedures for State application for exemption from the provisions of the FDCPA. The Bureau is finalizing Federal rules governing the activities of debt collectors, as that term is defined in the FDCPA. The Bureau's final rule addresses, among other things, communications in connection with debt collection and prohibitions on harassment or abuse, false or misleading representations, and unfair practices in debt collection.

DATES: This rule is effective [INSERT DATE ONE YEAR AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Dania Ayoubi, Joseph Baressi, Seth Caffrey, Brandy Hood, David Jacobs, Courtney Jean, Jaelyn Maier, Adam Mayle, Kristin McPartland, Michael Scherzer, or Michael Silver, Senior Counsels, Office of Regulations, at 202-435-7700.

If you require this document in an alternative electronic format, please contact

CFPB_Accessibility@cfpb.gov.

CFPB Debt Collection Final Rule

Bottom Line:

1. The Final Rule is a major development for all participants in the debt collection market and will have a direct impact on enforcement investigations, supervisory examinations, and litigation.
2. Covered Debt Collectors and their Customers will need to update policies, procedures, and practices – and vendor management programs.

Debt Collection Rule: Key Takeaways

- **Debt Collectors** - The Final Rule applies only to “debt collectors,” as defined by the FDCPA, and does not extend to “first party” creditors.
- **Time and Place Restriction** - The Final Rule restricts the times and places at which a debt collector may communicate or attempt to communicate with a consumer, including by clarifying that a consumer need not use specific words to assert that a time or place is inconvenient for debt collection communications.
- **Opt Out** - Consumers may restrict the media through which a debt collector communicates or attempts to communicate by designating a particular medium, such as email or telephone, as one that cannot be used for debt collection communications.
- **Call Frequency** - Debt collectors are presumed to violate the FDCPA’s prohibition on repeated or continuous telephone calls if the debt collector places a telephone call to a person more than seven times within a seven-day period or within seven days after engaging in a telephone conversation with the person.
- **Email and Text:** Debt collectors may use communication technologies such as emails and text messages in debt collection, and the Final Rule provides a safe harbor for collectors when they use these communication with consumers, provided that the Final Rule’s procedural framework is followed. In addition, these communications must include instructions for a reasonable and simple method that consumers can use to opt out.

Debt Collection Rule: Key Takeaways

- **Time & Place Restrictions** - A debt collector is prohibited from communicating or attempting to communicate with a consumer in connection with the collection of any debt at a time or place that the debt collector knows or should know is inconvenient to the consumer.
- **Social Media** - A debt collector is prohibited from communicating or attempting to communicate with a person, in connection with the collection of a debt, through a social media platform if the communication or attempt to communicate is viewable by the general public or the person's social media contacts.
- **Limited Content Message** - The Final Rule defines a new term related to debt collection communications: "limited-content message." If a message meets this definition, then it is not a "communication" under the FDCPA. Limited-content messages are limited to voice mails left with a debtor, and the Final Rule identifies what information a debt collector must and may include in such messages.
- **Sale Restrictions** - A debt collector is prohibited from selling, transferring for consideration, or placing for collection a debt if the debt collector knows or should know that the debt has been paid or settled or discharged in bankruptcy.

Debt Collection Final Rule: Coverage

- **The Final Rule covers “debt collectors,”** as that term is defined in the FDCPA.

“Debt collector” is defined in the FDCPA, subject to certain exceptions, as “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”

A creditor “who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts” is included in the definition.

- The **CFPB declined to expand the rule to apply to first-party debt collectors** who are not FDCPA “debt collectors.” The CFPB also stated the Final Rule is not intended to address whether activities performed by entities that are not subject to the FDCPA may violate other laws, including the prohibitions against unfair, deceptive, or abusive practices (UDAAP) in the Dodd-Frank Act.
- The Final Rule restates nearly all of the FDCPA’s substantive provisions largely in the order in which they appear in the statute, which is intended to provide industry and consumers with a single source for accessing information about the statute and Final Rule. Except where specifically stated in the rule, the restatement of the statutory text is not intended to codify judicial interpretations of the statute.

Debt Collection Final Rule: Communications

Communications (Section 1006.6)

- Definition: Final Rule clarifies definition of “consumer” to include “successor-in-interest,” surviving spouse, parent, legal guardian, and executor
- Time and Place Restrictions:
 - Outside of 8 am- 9 pm at consumer’s location is inconvenient. Safe harbor for conflicting information, based on lack of knowledge of the consumer’s actual location. Knowledge, and may know or should know, in any of the time zones in which the consumer might be located.
 - Electronic communications – deemed to be made when debt collector sends them, not when consumer’s receives them.
 - Responding to consumer’s communication at previously designated inconvenient time or place – once through same medium
 - Prior consent must be given to the debt collector, deemed complete upon receipt

Debt Collection Final Rule: Email & Text Communications

Email & Text Communications (Section 1006.6)

- Time & Place Restrictions apply
- Option to Unsubscribe
- Section 1006(d)(3)-(5) sets forth “bona fide error” procedures to avoid third-party disclosure when using e-communications (email and text)
- For email (key role for creditor):
 - Procedures based on communication between the consumer and the debt collector;
 - Procedures based on communication by the creditor, including mailed notices by email or writing to consumer w/ disclosures, and opt out notice (see Commentary for sample notice)
 - Procedures by prior debt collector.
- For text messages (opt-in):
 - Consumer use to debt collector w/ 60 days
 - Debt collector receipt from consumer prior consent w/ 60 days

Debt Collection Final Rule: Social Media Communications

Social Media Platforms (Section 1006.22(f)(4)) :

- The Final Rule prohibits a debt collector from communicating or attempting to communicate with a person, in connection with the collection of a debt, through a social media platform if the communication or attempt to communicate is viewable by the general public or the person's social media contacts.
- The Final Rule does not, however, prohibit a debt collector from sending a message through a social media platform if the message is not viewable by the general public or the person's social media contacts. The definition of "person" includes a consumer, which under the FDCPA is any natural person obligated or allegedly obligated to pay any debt. According to the CFPB, it will not be possible for debt collectors to leave limited-content messages using social media as was contemplated in the Proposed Rule.
- The CFPB notes that the relevant question is whether the communication or attempt to communicate is viewable, not whether the platform itself is viewable.

Debt Collection Final Rule: Call Frequency Limits

Call Frequency (Section 1006.14(b)(2))) :

- Rebuttable-presumption framework for the FDCPA section 806(5)'s prohibition against "causing a telephone to ring" if the natural consequence is to harass, oppress, or abuse any person. The Final Rule also provides nonexhaustive lists of factors that may be used to rebut the presumption of compliance or of a violation.
- This prohibition relates to "placing telephone calls." Of note, the commentary also provides that "placing a phone call" for purposes of this presumption includes conveying a ringless voicemail but does not include sending an electronic message (e.g., text message or email) that may be received on a mobile telephone. A debt collector is presumed to violate the FDCPA if the debt collector places a telephone call to a person more than seven times within a seven-day period or within seven days after engaging in a telephone conversation with the person. Conversely, a debt collector is presumed to comply with that prohibition if the debt collector does not exceed the telephone call frequencies. The telephone call frequency limit has exclusions.
- CFPB adopted a per-debt approach to counting for the call frequency restriction and declined to adopt a per-consumer approach. Final Rule aggregates student loan debts serviced under a single account number at the time the debts were obtained by a debt collector, although it declines to aggregate medical debts by account number, for purposes of counting telephone call frequencies.
- A debt collector could violate the rule and FDCPA if the natural consequence of another aspect of its telephone calls, unrelated to frequency, is to harass, oppress, or abuse any person in connection with the collection of a debt.

Debt Collection Final Rule: General Marketing and Advertising

General Marketing and Advertising (Section 1006.2(d))

- The CFPB found that general marketing and advertising directed to groups of consumers or the general public, or a debt collector's personal communications, should not be considered attempts to communicate, because the debt collector has not conveyed information regarding a debt.
- These messages or activity may not raise the same consumer protection concerns that motivated other provisions of the Final Rule regulating attempts to communicate.

Debt Collection Final Rule: Limited Content Message

Limited Content Message (Section 1006.2(j))

- The Final Rule defines a new term related to debt collection communications: “limited-content message.” If a message meets this definition, then it is not a “communication” under the FDCPA. Limited-content messages are limited to voicemails left with a debtor, and the Final Rule identifies what information a debt collector must and may include in such messages. No information other than what is specified in the definition may be included in the voice mail for it qualify as a limited-content message.
- The required content is the consumer’s name, a request that the consumer reply to the message, the name(s) of natural persons whom the consumer can contact to reply, a telephone number to reply to, and, if applicable, the opt-out notice.
- By using a qualifying limited-content message, a debt collector may leave a voice mail message for a consumer that is not subject to the more burdensome requirements and restrictions applicable to a “communication” under the Final Rule.
- Examples provided in Commentary.

Debt Collection Final Rule: Sale, Transfer, Placement if BK

Prohibiting the Sale, Transfer for Consideration, or Placement for Collection of Certain Debts (Section 1006.30(b)):

- Subject to narrow exceptions, the Final Rule prohibits a debt collector from selling, transferring for consideration, or placing for collection a debt if the debt collector knows or should know that the debt has been paid or settled or discharged in bankruptcy.
 - The Final Rule expressly states this restriction pursuant solely to the CFPB's FDCPA authority based on a determination of unfairness or unconscionability because the debt collector receives or expects to receive compensation. This restriction does not apply to creditors, except to the extent the creditor is an FDCPA debt collector.
- Exceptions include if debt is transferred to the debt's owner or to a previous owner of the debt; if transfer is authorized under terms of original contract between debt collector and prior owner, or as a result of a merger, acquisition, or a transfer of substantially all assets, or if debt is secured by lien and notice is provided

Debt Collection Final Rule: Record Retention

Record Retention (Section 1006.100)

- This provision requires a debt collector to maintain records that are evidence of compliance or noncompliance with the FDCPA and Regulation F, starting on the date that the debt collector begins collection activity on a debt until three years after the debt collector's last collection activity on the debt or, in the case of telephone call recordings, until three years after the dates of the telephone calls.
- A debt collector need not create and maintain additional records, for the sole purpose of evidencing compliance that the debt collector would not have created in the ordinary course of its business in the absence of the record retention requirement.
- The Final Rule does not require a debt collector to record telephone calls, but if calls are recorded, the recordings are considered evidence of compliance or noncompliance with the FDCPA, and the recording of each such call must be retained for three years after the date of the call.

Debt Collection Final Rule: In and Not in the Rule

- E-SIGN Act consent is necessary only for debt collectors to respond electronically to consumers' initial, nonduplicative disputes. This means there may be situations where a debt collector must respond to the initial dispute in paper form, but where subsequent duplicative disputes may be responded to electronically. The Final Rule does require, however, that certain validation and disclosures must comply with E-SIGN Act section 101(c).
- The CFPB concluded that the transfer of time-barred debt, disputed debt, debt lacking ownership documentation, debt subject to litigation, debt in which the consumer has an uncompleted settlement agreement, or other types of debt suggested by commenters do not present the same unfairness and unconscionability concerns of the same prevalence and magnitude as the debt types to which the prohibition applies.
- Disclosure Notices to be Issued in December 2020: validation notice, furnishing, time-barred debt.
- No safe harbor for meaningful attorney involvement.

Questions & Answers



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Jonathan Pompan, partner and co-chair of Venable's Consumer Financial Services Practice Group, is based in Venable's Washington, DC office. Jonathan has extensive experience representing financial services companies, including some of the largest debt buyers and collectors and advertisers of financial services in the country, other consumer financial services providers, and their service providers. This work gives him considerable insight into successful strategies for satisfying new and evolving regulatory expectations.

Jonathan has assisted clients in bet-the-company government investigations and litigation pursued by federal agencies such as the CFPB and the FTC, as well as in-state enforcement proceedings involving state attorneys general. His experience includes several CFPB investigations and examination preparation and appeals. In addition, he provides ongoing compliance and general counseling advice to several clients in the FinTech, debt collection and credit services, lenders, and advertising and marketing sectors.

Jonathan is a frequent speaker, organizer, and moderator of conference panels, and author on legal and regulatory issues of significance to financial services companies. Recent speaking engagements include Association of Corporate Counsel Financial Services Committee, OLA Compliance University, Lend360, ACA International Annual Convention, and the Receivables Management Association International (RMAI) Annual Conference.

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