



Understanding the CFPB Debt Collection Final Rule

An Association of Corporate Counsel - Financial Services Network - ACC Legal Quick Hit

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Today's Presentation

Debt Collection Legal Landscape	Rulemaking Background	Coverage and Definitions	Communications Time & Place Restrictions	Electronic Communications
Use of Social Media and General Advertising	Telephone Call Frequency Rebuttable Presumption	Voicemail & Limited-Content Message	Disputes	Disclosures
Ban on Certain Debt Transfers	Record Retention	Key Takeaways	Q & A	



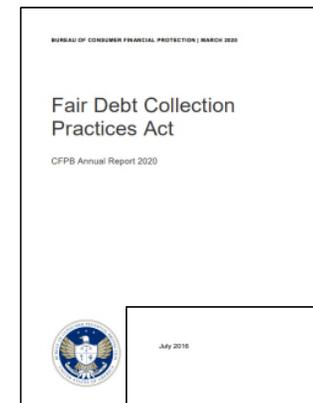
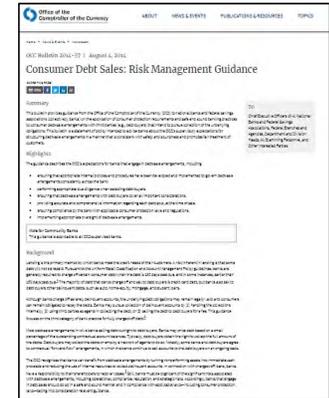
Debt Collection Legal Landscape

Fair Debt Collection Practices Act (FDCPA)

- In 1977, Congress passed the FDCPA to:
 - eliminate abusive debt collection practices by debt collectors;
 - ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged; and
 - promote consistent action to protect consumers against debt collection abuses.
- With limited exceptions, the FDCPA applies only to entities that qualify as “debt collectors.”
- The FDCPA defines “debt” to include only obligations incurred “primarily for personal, family, or household purposes” such as credit card debt and medical bills. Regulates when, where, how, and under what circumstances debt collectors can communicate with consumers and third parties.
- Requires debt collectors to provide consumers with written notice that discloses certain information and allows the consumer to dispute the debt’s validity.
- Restricts the forums in which a collector may pursue legal action against a debtor.
- Prohibitions:
 - False, deceptive, or misleading representations or means in connection with the collection of any debt.
 - Unfair or unconscionable means to collect any debt – such as a fee or expense not authorized by agreement or otherwise permitted by law.
 - Harassment or abuse, including threats of violence.
- Bona fide error defense - A court may not hold a debt collector liable under the FDCPA if it can prove that (1) the violation resulted from an unintentional good-faith error, and (2) the collector maintained “procedures reasonably adapted to avoid any such error.” Nor will a debt collector be liable for “any act done or omitted in good faith in conformity with any advisory opinion” issued by the CFPB.
- Enforcement: Federal agencies, including FTC, CFPB; State Attorneys General; and Private Right of Action.
- No federal agency had authority to issue substantive rules until 2010 when CFPB is created by Dodd-Frank Act.
- States enforce min-FDCPA laws, although some are broader and cover first party creditors, business debt, and require registration/licensure.
- Does not supplant UDAAP and UDAP Statutes, e.g., FTC Act.

Debt Collection Legal Landscape

- Creditors and “Debt Collectors” under continuous scrutiny
 - CFPB supervises “larger participant” debt collectors, and FTC and CFPB regularly investigate and bring enforcement actions
- 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
 - Consumer Credit Card Market with insight into major credit card issuers’ collection practices
 - 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
- CFPB COVID-19 Response Exams / CARES Act Requirements and Compliance



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CFPB Rulemaking Background

CFPB Debt Collection Final Rule

- Started in 2013, Proposed Rule in 2019, Final Rule released October 30, 2020 –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 intends to issue a disclosure-focused final rule to interpret the FDCPA’s requirements regarding **consumer disclosures and certain related consumer protections** in December 2020.
- 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.

BILLING CODE: 4810-AM-P

BUREAU OF CONSUMER FINANCIAL PROTECTION
12 CFR Part 1006
[Docket No. CFPB-2019-0022]
RIN 3178-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 Baresi, Seth Caffrey, Brandy Hood, David Jacobs, Courtney Jean, Jaclyn Maier, Adam Mayle, Kristin McParland, 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.

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For a comprehensive overview, see our article at
<https://www.venable.com/insights/publications/2020/11/final-debt-collection-rule-issued-by-cfpb>.



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 Creditor customers will need to update policies, procedures, and practices – and vendor management programs.



Coverage and Definitions

Coverage and Definitions

- **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.”

- CFPB **declined to expand the rule to apply to first-party debt collectors** who are not FDCPA “debt collectors.”
- The CFPB 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.



Communications Time & Place Restrictions

Communications in Connection with Debt Collection

(Section 1006.6)

- 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.



Electronic Communications

Email & Text Communications & Bona Fide Error Defenses

(Section 1006.6)

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



Use of Social Media and General Advertising

Use of Social Media Communications

(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 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.
- Not possible for debt collectors to leave limited-content messages using social media as was contemplated in the Proposed Rule.
- Relevant question is whether the communication or attempt to communicate is viewable, not whether the platform itself is viewable.



General Marketing & 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.



Telephone Call Frequency Rebuttable Presumption

Telephone Call Frequency Rebuttable Presumption

(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 non-exhaustive lists of factors that may be used to rebut the presumption of compliance or of a violation.
- 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.
- 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.
- This prohibition relates to "placing telephone calls."
 - Commentary: "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.
- 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.



Voicemail & Limited-Content Message

Voicemail & Limited-Content Voicemail Message

(Section 1006.2(j))

- 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.
- A “limited-content message” is defined as a voicemail message for a consumer that includes:
 1. a business name for the debt collector (that does not indicate that the debt collector is in the debt collection business);
 2. a request that the consumer reply to the message;
 3. the name (or names) of one or more person(s) whom the consumer can contact to reply to the debt collector; and
 4. a phone number (or numbers) that the consumer can use to reply to the debt collector.
- A limited-content message also may include: (1) a salutation; (2) the date and time of the message; (3) suggested dates and times for the consumer to reply to the message; and (4) a statement that if the consumer replies, the consumer may speak to any of the company’s representatives or associates.
 - An example of a limited-content voicemail message is: “This is Robin Smith calling from ABC Inc. Please contact me or Jim Johnson at 1-800-555-1212.”
- 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.



Disputes

Disputes

- Rule restates FDCPA's requirement that a debt collector must cease collection of a debt, or any disputed portion of a debt, when a debt collector receives a written dispute.
- A debt collector may not resume collection of that debt until the debt collector responds to the consumer's dispute in writing or electronically. If the consumer has submitted a dispute, a debt collector must provide a verification of the debt or of a judgment to the consumer.
- If a debt collector determines that the consumer's dispute is duplicative of an earlier dispute, as defined in the Rule, a debt collector must either:
 - 1) provide the consumer with a brief statement of the reasons for the determination and refer the consumer to the debt collector's response to the earlier dispute; or
 - 2) send a verification of the debt or of a judgment to the consumer.



Disclosures

Disclosures

- The Rule generally restates the FDCPA’s requirement that a debt collector must disclose in their initial, and in each subsequent communication with the consumer that the communication is from a debt collector (i.e., the “mini-Miranda” disclosure).
- The Rule requires a debt collector to make these disclosures in the same language, or languages, used for the rest of the communication in which the disclosures are conveyed. The Debt Collection Rule clarifies that all required disclosures must be sent in a manner that is reasonably expected to provide actual notice and required written disclosures must be sent in a form that the consumer may keep and access later.
- To meet the general standard when sending required written disclosures (e.g., the validation notice described in FDCPA section 809—if that notice is not in the initial communication, responses to consumer requests for original-creditor information, and responses to consumer disputes of debts) electronically, a debt collector must send the disclosures in accordance with the Electronic Signatures in Global and National Commerce Act (E-SIGN Act)’s consumer-consent requirements.
- The Rule creates a safe harbor for sending required disclosures if the debt collector mails a printed copy of the disclosure to the consumer’s last known address. This safe harbor applies unless the debt collector, at the time of mailing, knows or should know that the consumer does not currently reside at, or receive mail in, that location.



Ban on Certain Debt Transfers

Debt Sale, Transfer, & Placement if BK

(Section 1006.30(b)):

- Final Rule prohibits a debt collector from selling, transferring for consideration, or placing a debt for collection if a debt collector knows or should know that the debt has been paid or settled, or discharged in bankruptcy.
- The Rule provides exceptions to this general ban for:
 - 1) transfers to the debt's owner or to a previous owner (if authorized under the original contract between the debt collector and the previous owner);
 - 2) transfers as a result of a merger, acquisition, purchase and assumption transaction, or a transfer of substantially all the debt collector's assets;
 - 3) sales, transfers, or placements of secured debt discharged in bankruptcy if certain conditions in the Rule are met; and
 - 4) securitization of debt or pledging of a portfolio of debt as collateral.



Record Retention



Record Retention

(Section 1006.100)

- Debt collector required 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.
- 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.



What's *Not* in the Final Rule?

What's Not In 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.



Key Takeaways

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.

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.



What's Next?

What's on the Horizon?

- CFPB Director
 - President Biden may make the decision to fire Kathy Kraninger (or resignation), but may take time for new confirmed Director
 - An Acting Director – unlikely to make immediate sweeping changes (and could be head rulewriter, Tom Pahl)
- Supervision and Enforcement
 - Not all original creditors and debt collectors subject to supervision and examination
 - Enforcement historically has focused on creditors, debt buyers, and collectors
 - Regulation by Enforcement
 - Focus on Gaps?
- Additional Rulemaking
 - Disclosures (December 2020)
 - First Party Creditors and Debt Sales?
 - Revisions / Enhancements to Final Rule?
- Congress
 - Even if Congress introduces legislation or a Congressional Review Act challenge, getting the support of both Chambers is a big task and blunt tool
- Advisory Opinions
- FTC, States, and Private Plaintiffs

What Does This Means for Collectors and Creditors Today?



One Year Ramp Up
Period



Compliance Policy,
Procedures, and
Practices



Preparing for Vendor
Management
Oversight



Contracts, Creditor
Notices Prior to
Placement

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, PerformLine's COMPLY! Conference, OLA Compliance University, Lend360, LeadsCon, Education Finance Council, ACA International Annual Convention, and the Receivables Management Association International (RMAI) Annual Conference.



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Alex has recent experience providing strategic advice and counsel to high-profile political ventures, including a high-net-worth individual exploring federal office and a presidential campaign. Through these experiences and her government litigation and investigations work, Alex brings a legal, business, and crisis-management sensibility to her clients, their management, and boards, offering thoughtful, creative, and pragmatic solutions to often thorny issues to help them manage their legal and reputational risks.

Alex is the hiring partner in Venable's New York office.

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