



CFPB Debt Collection Rule Takes Effect November 30: Is Your Team Ready?

Part 1: Overview and Communication with Debtors

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Today's Presentation





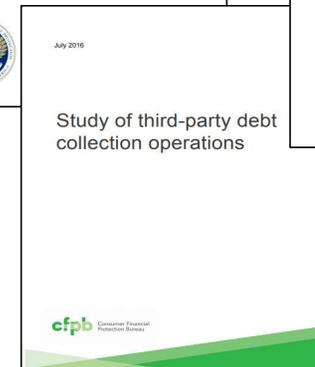
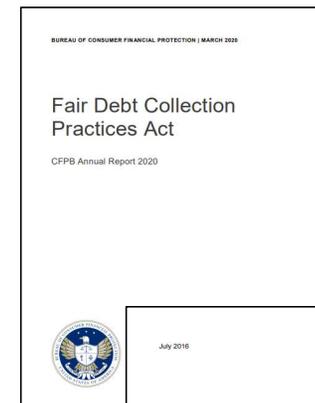
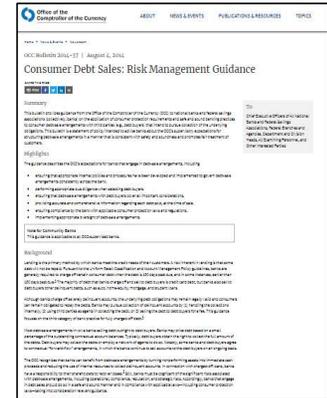
Background

Fair Debt Collection Practices Act (FDCPA)

- In 1977, Congress passed the Fair Debt Collection Practices Act (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

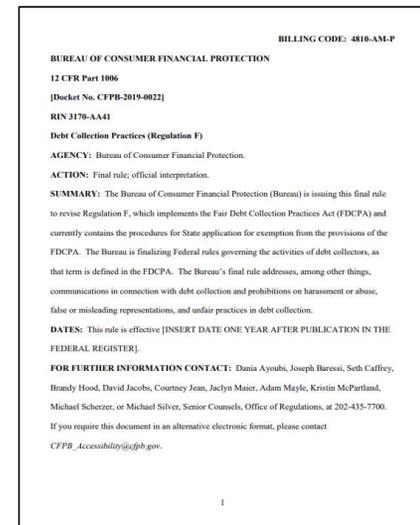
- Creditors and “Debt Collectors” under continuous scrutiny
 - CFPB supervises “larger participant” debt collectors, and FTC and CFPB regularly investigate and bring enforcement actions
- CFPB received about 82,700 complaints in 2020
 - 4 major FDCPA enforcement actions in 2020
 - 2020, major enforcement action against debt buyer for violation of consent order, settled.
 - 2020 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 7 debt collection cases against 39 defendants, and “debt parking” case
- Operation Corrupt Collector – October 2020 – FTC, CFPB and state Attorneys General
- CFPB COVID-19 Response Exams / CARES Act Requirements and Compliance
- Resumption of Supervisory Exams Spring 2021



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CFPB Debt Collection Rule

- Started in 2013, Proposed Rule in 2019
- Two Final Rules released—Amending Regulation F, 12 CFR part 1006, Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 et seq.
 - October 30, 2020 - 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.**
 - December 18, 2020 - Final Rule to interpret the FDCPA’s requirements regarding **consumer disclosures and certain related consumer protections.**
- The “Debt Collection Rule” takes effect on November 30, 2021.



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

Coverage and Definitions

- **The Debt Collection 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 Debt Collection 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.



What is a “Communication” Under the Debt Collection Rule?

Communications Basics

- The Debt Collection Rule defines “communicate” or “communication” to mean the conveying of information regarding a debt directly or indirectly to any person through any medium.
- A communication can occur through any medium, including any oral, written, electronic, or other medium.
- A communication can involve conveying information regarding a consumer’s debt to any person, not just the debtor.
- Marketing or advertising that does not contain information about specific debt or debts is **not** a communication under the Debt Collection Rule.
- Any “attempt to communicate” is any act to initiate a communication or other contract about a debt with any person through any medium, including by soliciting a response from such person.

Limited-Content Messages: What Are They?

- “Limited-Content Messages” are *voicemail* messages left for the *debtor*:
 1. That must include all of the following content:
 - A business name that does not indicate that caller is in the collection business
 - A request that the consumer reply to the message.
 - Name of one or more natural person whom consumer can contact.
 - A telephone number.
 2. And can include any of the following content:
 - A salutation
 - Date and time of message
 - Suggested times for consumer to reply.
 - A statement that if consumer replies, the consumer can speak to any representative.
 3. But, cannot include any other content.

Limited-Content Messages: So What?

- Good news:
 - They are **not** communications for purposes of the Debt Collection Rule.
 - Therefore, if a voicemail meets the definition of a limited-content message, it does **not** violate the FDCPA (and Debt Collection Rule) requirement to meaningfully disclose the caller's identify.
- Bad news:
 - They are, however, “attempts to communicate.”
 - Therefore, they are subject to time and place restrictions and the limits on frequency.



Time & Place Restrictions on Communications

Unusual or Inconvenient Times

- The Debt Collection Rule clarifies definition of “consumer” to include “successor-in-interest,” surviving spouse, parent, legal guardian, and executor.
- Inconvenient to call before 8:00 a.m. and after 9:00 p.m. at consumer’s location.
 - Unless a consumer consents to receiving a call outside this window.
- How to determine what time it is at consumer’s location
 - Debt collector not required to know where consumer actually is.
 - But, if there is conflicting information re a consumer’s location (e.g., zip code suggests one time zone and area code suggests a different one), can only contact at a time that would be convenient in both locations.
 - Electronic communications – deemed to be made when debt collector sends them, not when consumers receives them.

Unusual or Inconvenient Places

- Again, “consumer” includes “successor-in-interest,” surviving spouse, parent, legal guardian, and executor.
- Place of employment is presumptively inconvenient if collector knows—or has reason to know—employer prohibits consumer from receiving such communications.
 - Not required to track which employers prohibit personal communications at the workplace.
 - Can contact person at work if consumer gives consent.
- There's also the risk of third-party disclosure when contacting people at work.

Consumer Consent

- If a consumer gives her **direct prior consent** to receive calls outside the presumptively convenient call window or to receive calls at work, they are permissible.
 - Direct: consent must be given to the debt collection company making the call.
 - Consent to a prior debt collector or the creditor does not count here.
 - Prior: the consent must be obtained prior to making the impermissible call (and not during it).
 - You cannot call someone at 7:00 am local time and say, “Is it OK to talk now?”

Times or Places Designated by Consumer as Inconvenient

- Collectors also cannot contact consumers at a time or place it knows is inconvenient for them; in other words, when a consumer designates the time or place as inconvenient.
 - Inconvenient is not a magic word! The word “inconvenient” does not have to be used by the consumer.
 - Collector may ask follow-up questions to clarify unclear statements by the consumer to determine if a future communication would be at an inconvenient time or place.
- One-time exception for consumer-initiated communication at a time or place the consumer previously designated as inconvenient.



Electronic Communications



What requirements apply to electronic communications?

- No communications at inconvenient times/place
- No harassment or intimidation through communication methods, communications, or through content or substance of communications
- No third-party disclosure
- No postcards or published debt classified, media, etc.
- Now.....modern communication methods will have some guardrails....

Email & Text Communications & Bona Fide Error Defenses

- **Basics:**

- Section 1006(d)(3)-(5) sets forth “**bona fide error**” defense procedures to avoid third-party disclosure when using e-communications (email and text)
- Time & Place Restrictions apply
- Option to Unsubscribe
 - Opt-out notice must describe a reasonable and simple method by which the consumer can opt out of further electronic communication.
 - Example: Hyperlink, “stop,” but cannot require postal mail, telephone, or website without providing a link.
 - Cannot charge a fee to opt out
 - No specific period for processing an opt out request, but may have liability if procedures not adapted to avoid error.

Email Communications

Debt Collection Rule has three separate procedures for email messages, but not required to adopt or maintain any or all these email procedures.

Debt Collector's Prior Communications with Consumer:

- Consumer use – debt collector sends email to address that consumer has used to communicate with the debt collector about the debt, and consumer has not opted out. Different debt does not qualify.
- Direct prior consent – debt collector has received direct prior consent from the consumer to use the email address to communicate about the debt, and consumer has not opted out.
 - Consent does not transfer from third party, including creditor or prior debt collector.
 - Consent must be in advance of communicating or attempt to communicate.
 - May be provided through any medium.

Must accept and track complaints regarding third-party receipt of email messages, as procedures must also include steps to reasonably confirm and document that the debt collector did not communicate with the consumer by sending an email message to an address debt collector knows has led to a violation of prohibition on third-party communications.

Email Bona Fide Error Defense (cont'd)

Email Based on Communication by Creditor

- Creditor obtained email address from the consumer. Narrow definition and does not include any person that receives an assignment or transfer of a debt in default solely to facilitate collection of a debt for another.
- Creditor used email address about the account underlying the debt, and consumer did not opt out.
- Before the debt collector used the email address to communicate with the consumer about the debt, the creditor send the consumer a written or electronic notice to an address the creditor obtained from the consumer and used to communicate, and the notice clearly and conspicuously disclosed all of the following:
 - The debt has or will be transferred to the debt collector, with name of collector
 - Email address will be transferred and may be used by the debt collector
 - If others have access to the email address, that its possible others may see the emails
 - Instructions for opt out
 - The date by which the debt collector or the creditor must receive the consumer's opt out request, which must be at least 35 days after the date the notice is sent
- The opt-out period clearly and conspicuously disclosed in the creditor's notice to the consumer has expired, and the consumer has not opted out.
- The email address has a domain name that is available for use by the general public and the debt collector does not know that the email address is an employer-provided email address.

Procedures must also include steps to reasonably confirm and document that the debt collector did not communicate with the consumer by sending an email message to an email address that the debt collector knows has led to a violation of the prohibition on third-party communications.

Email Bona Fide Error Defense (cont'd)

- Creditor written notice:

“We are transferring your account to [debt collector’s name], and we are providing [debt collector’s name] with the following email address for you: [email address]. [Debt collector’s name] may use this email address to communicate with you about the debt. If others have access to this email address, then it is possible they may see the emails. If you would like to opt out of communications by [debt collector’s name] to [email address], please fill out the enclosed form and return it in the enclosed envelope so that we receive it by [date].”

- Creditor email notice:

“We are transferring your account to [debt collector’s name], and we are providing [debt collector’s name] with the following email address for you: [email address]. [Debt collector’s name] may use this email address to communicate with you about the debt. If others have access to this email address, then it is possible they may see the emails. If you would like to opt out of communications by [debt collector’s name] to [email address], please click here by [date].”

Email Bona Fide Error Defense (cont'd)

Email procedures based on communication by a prior debt collector

1. A prior debt collector obtained the email address in accordance with the procedures previously described. The prior debt collector must have adopted such procedures prior to obtaining the email address and followed such procedures when obtaining the email address.
2. The immediately prior debt collector used the email address to communicate with the consumer about the debt. The immediately prior debt collector is the debt collector immediately preceding the current debt collector.
 - For example, if ABC, Inc. returns a debt to the creditor and the creditor places the debt with Ficus Debt Collection Services, ABC, Inc. is the immediately prior debt collector for this purpose. Comment 1006.6(d)(4)(iii)-1.
3. The consumer did not opt out of such communications (i.e., email communications with the immediately prior debt collector using the specific email address).

Procedures must also include steps to reasonably confirm and document that the debt collector did not communicate with the consumer by sending an email message to an email address that the debt collector knows has led to a violation of the prohibition on third-party communications.



Text Communications

- The Debt Collection Rule describes two sets of procedures that a debt collector can adopt and follow to obtain a bona fide error defense when sending a text message.
- A debt collector could adopt either or both of the procedures depending on whether the consumer has communicated with the debt collector by text message or whether the consumer has directly consented to the debt collector sending communications by text message.
 - Procedures for text messages must include steps to reasonably confirm and document that the debt collector did not communicate with the consumer by sending a text message to a telephone number that the debt collector knows has led to a violation of the prohibition on third-party communications.

Text Communications Bona fide Error Defense (cont'd)

- The consumer used the telephone number to communicate with the debt collector about the debt by text message. This prong is not satisfied if the consumer used the telephone number to communicate with the debt collector about the debt only by telephone call. Comment 1006.6(d)(5)(i)-1.
- The consumer has not since opted out of text message communications to that telephone number.
- Within the past 60 days, either
 - the consumer sent a text message to the debt collector from that telephone number, or
 - the debt collector confirmed that the telephone number has not been reassigned from the consumer to another user since the date of the consumer's most recent text message to the debt collector from that telephone number.
 - The debt collector must confirm that the telephone number has not been re-assigned using a complete and accurate database.
- The debt collector received prior consent directly from the consumer to use the telephone number to communicate with the consumer about the debt by text message.
- The consumer has not since withdrawn that consent.
- Within the past 60 days either
 - the debt collector obtained or renewed the consumer's consent to use the telephone number to communicate by text message, or
 - the debt collector confirmed that the telephone number has not been reassigned from the consumer to another user since the date of consumer's most recent consent to use that telephone number to communicate about the debt by text message.
 - The debt collector must confirm that the number has not been re-assigned using a complete and accurate database.



Use of Social Media and General Advertising

Use of Social Media Communications

- The Debt Collection 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 Debt Collection 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

- 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 Debt Collection Rule regulating attempts to communicate.



Telephone Call Frequency

Telephone Call Frequency Rebuttable Presumption

- The Debt Collection Rule creates a rebuttable-presumption framework for the prohibition against “causing a telephone to ring” if the natural consequence is to harass, oppress, or abuse any person.
- The Debt Collection Rule also provides non-exhaustive lists of factors that may be used to rebut the presumption of compliance or of a violation.
- **“7/7/7 Rule”**: A debt collector is **presumed to violate** the FDCPA if the debt collector **places a telephone call to a person**
 - **more than 7 times within a 7-day period, or**
 - **within 7 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 either of these rules.
- Some calls are exempted, and do not count towards the count.

Breaking Down the 7/7/7 Rule

- This prohibition only 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.
- When does the 7-day clock start running? They date of the phone conversation.



Example 1: Compliant

On Wednesday, December 1, ABC Inc. first attempts to communicate with a consumer in connection with the collection of a credit card debt by placing a phone call and leaving a limited-content message.

Between Thursday, December 2, and Tuesday, December 7, ABC Inc. places 6 more phone calls to the consumer about the debt, all of which go unanswered.



Example 2: Compliant

On Thursday, December 2, a consumer places a phone call to, and initiates a phone conversation with, ABC Inc. regarding a particular debt.

ABC Inc. does not place a phone call to the consumer in connection with the collection of that debt again prior to Thursday, December 9.



Example 3: Non-compliant

On Wednesday, December 1, ABC Inc. first attempts to communicate with a consumer in connection with the collection of a mortgage debt by placing a phone call and leaving a limited-content message.

On each of the next three business days (*i.e.*, on Thursday, Dec. 2, Friday, Dec. 3, and Monday, Dec. 6), ABC Inc. places two additional calls to the consumer about the debt, all of which go unanswered.

On Tuesday, December 7, ABC Inc. places an additional call to the consumer about the debt.



Multiple Debts

- CFPB adopted a **per-debt approach** to counting for the call frequency restriction (not a “per-consumer” approach).
 - However, for **student loan debts**, they are aggregated if serviced under a single account number at the time the debts were obtained by a debt collector.
- If you are collecting multiple debts owed by the same person, things can get hairy...

Example: Multiple Debts

On December 1, ABC, Inc. begins attempting to collect a medical debt, a credit card debt, and a residential mortgage debt from the same consumer.

On that day 1, ABC, Inc. places a call to the consumer, intending to discuss all three debts, but the consumer does not answer. The caller leaves a voicemail message that does not specifically refer to any particular debt. ABC, Inc. may count the voicemail as one call placed toward any one of the particular debts, even though it intended to discuss all of the debts if the call had resulted in a telephone conversation.

For purposes of the telephone call frequency limits, assume ABC, Inc. counts the call as having been placed with respect to the credit card debt. In order to have a presumption of compliance, between December 1 and December 8, ABC, Inc. can place no more than

- an additional six calls regarding the credit card debt,
- seven telephone calls regarding the medical debt, and
- seven telephone calls regarding the residential mortgage debt.

Further, if during that period, ABC, Inc. speaks with the consumer about any particular debt, it cannot place any additional calls regarding that debt for a period of 7 consecutive days from the date that of the conversation to meet the requirements of the second prong of rule.



Telephone Call Frequency – Exclusions

- The following calls do **not** count towards 7/7/7 count:
 - Calls placed with person’s “direct prior consent” (only lasts for 7 days)
 - Calls that do not connect to the dialed number (i.e., busy signals, phone numbers not in service)
 - Calls about a debt placed to the consumer’s attorney, the creditor, or credit bureaus.

Examples: Prior Consent

1. On Friday, December 3, ABC Inc. places a telephone call to a consumer. During the ensuing conversation in connection with the collection of a debt, the consumer tells ABC Inc. to “call back on Monday.”
2. Between Wednesday, December 1 and Friday, December 3, ABC Inc. places 3 unanswered calls to a consumer in connection with the collection of a medical debt. On Friday, December 3, ABC Inc. sends the consumer an email message in connection with the collection of the medical debt. The consumer responds by email on Saturday, December 4, requesting additional information about available repayment options related to the debt and writes, “You can call me at 123-456-7891 to discuss the repayment options.” After receipt of the email, ABC Inc. places 8 unanswered telephone calls to the consumer between Monday, December 6 and Wednesday, December 8.

Telephone Call Frequency – Recap

- A debt collector could STILL 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.
- State laws still apply!
- What is a rebuttable presumption???

The CFPB published FAQs that are helpful:

<https://www.consumerfinance.gov/compliance/compliance-resources/other-applicable-requirements/debt-collection/debt-collection-rule-faqs/>

Join us for Part 2 Next Thursday at 11 am ET

and

- **FTC's Notice of Penalty Offenses: What Do They Mean For You?, Wednesday, October 27 at 2 pm ET**
 - The Federal Trade Commission (FTC) recently announced that it had sent Notices of Penalty Offenses to for-profit colleges regarding earnings and success claims and to over 700 advertisers and advertising agencies regarding endorsement and testimonial claims. A panel of Venable lawyers will examine the FTC's authority in this area, as well as the substance of the two notices and what they mean for advertisers that received the notices and businesses more broadly.
- **Defending Consumer Financial Protection Investigations and Enforcement Actions, Wednesday, November 10 at 2 pm ET**
- **Details at [Venable.com](https://www.venable.com)**



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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, and the Receivables Management Association International (RMAI) Annual Conference.



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Alex Megaris focuses on complex regulatory investigations and government enforcement matters involving state attorneys general, the Federal Trade Commission (FTC), the Consumer Financial Protection Bureau (CFPB), state regulatory agencies, and the U.S. Congress. Alex also works closely with Venable's government affairs team in advocating for clients before these agencies. She has extensive experience with consumer protection laws, such as state unfair, deceptive and abusive practices (UDAAP) laws, the FTC Act, the Consumer Financial Protection Act, the FTC's Telemarketing Sales Rule, and product-specific regulations, including those regulating credit reporting, loan servicing, and debt collection.

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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