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A Deep Dive Into New CFPB Debt Collection Rules: Part 1

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In 1977, gas cost 62 cents per gallon; the first Apple II computers became available for sale; even the most primitive mobile phones were half a decade away from being released to the public; and debt collectors relied on landline phones, the U.S. mail or in-person conversations to collect the debts assigned to them. When Congress passed the Fair Debt Collection Practices Act that year, it could not have envisioned a world where consumers communicate instantly using cellphones, text messages, emails and social media.

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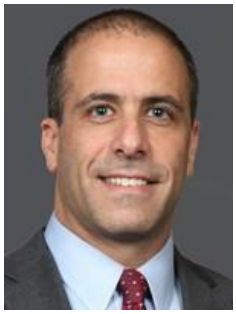

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No federal agencies promulgated any significant regulations under the FDCPA in the 40 subsequent years. Until the Dodd-Frank Act became effective, no federal agency even had the authority to do so. In the absence of any controlling regulations, courts were free to fashion their own standards and interpretations of the FDCPA. Given the voluminous amount of FDCPA litigation, courts across the country quickly created inconsistent standards and a maze of differing interpretations. Fortunately for entities seeking simple, practical and uniform standards for FDCPA compliance in the modern age, the Consumer Financial Protection Bureau issued its proposed Regulation F under the FDCPA on May 7, 2019.

In the first part of this article, we provide a brief overview of the FDCPA and discuss the proposed rule's definitions and procedures for electronic communications. The second part of the article will discuss the proposed rule's provisions regarding call frequency, validation of debt, and other unfair or deceptive debt collection practices.

We do not rehash all 538 pages of the bureau's proposal, but instead summarize some of the most significant developments that FDCPA-regulated entities should review when considering whether to provide comments to the bureau regarding the proposed rule.

Overview of the FDCPA

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Before we discuss the content of the proposed rule, we briefly remind our readers of the basic structure of the

FDCPA.

Congress passed the FDCPA in 1977 in order to combat "[d]isruptive dinnertime calls, downright deceit, and more."[1] The FDCPA applies to "debt collectors," who are generally third-party entities (i.e., not original creditors) who either (1) regularly collect debts on behalf of others or (2) obtained defaulted debts, but only if the entity's "principal purpose" is the collection of debts.[2]

In general, the FDCPA prohibits a debt collector from using unlawful, abusive, deceptive or unfair collection tactics in connection with the collection of debts. The FDCPA contains an extensive (but not exclusive) list of practices that are prohibited under this standard.

They include tactics such as calling a debtor at unreasonable hours; calling a debtor at work when the debt collector knows that the debtor's employer does not allow the debtor to receive calls; letting the phone ring incessantly in order to harass the debtor' threatening to take actions that the collector does not intend to or cannot legally take; communicating with unauthorized third parties about the debt; and making any collection-related communication that would tend to confuse the "least sophisticated consumer." The FDCPA also imposes several affirmative disclosure requirements on debt collectors, including with respect to debt validation notices, "mini-Miranda" notices and self-identification.

The proposed rule generally restates the FDCPA definition of a "debt collector" with only minor changes.[3] Even if a collector is not covered by the FDCPA, the bureau views the practices prohibited by the FDCPA as potentially unfair, deceptive, and/or abusive acts or practices, or UDAAPs, that could violate the Dodd-Frank Act when undertaken by any person engaged in collection activities.[4] As a result, even entities such as first-party collectors, or servicers of performing mortgage loans that later become delinquent, should review the proposed rule and consider revising their practices as a matter of best practices and UDAAP risk control.

Definitions

The proposed rule clarifies a number of terms used in the FDCPA that have been the root of significant litigation and enforcement actions since the passage of the FDCPA. We explain the proposed rule's clarifications below.

Communication and Limited-Content Messages

The FDCPA prohibits a debt collector from communicating with third parties about the consumer's debt, unless the third party is the consumer's lawyer, a consumer reporting agency, the creditor or the creditor's lawyer, or the debt collector's lawyer.[5] In addition, a debt collector communicating with a consumer must provide the so-called "mini-Miranda" notice to inform the consumer that the communication is from a debt collector.[6]

As a result, debt collectors frequently were tripped up by inadvertently having a communication overheard by a third party, especially if the debt collector chose to leave voicemails for debtors after an unsuccessful attempt to establish contact with the consumer. If a debt collector left a voicemail identifying itself as a debt collector and implied or revealed the existence of the consumer's debt, it could unknowingly violate the FDCPA if the debtor lived with a roommate or other third parties who might have access to the voicemail box. On the other hand, if the voicemail was considered to be a communication in connection with the collection of the debt, the collector would violate the FDCPA if it did not identify itself and disclose that it is a debt collector.

Several federal appeals courts have reached the conclusion that contacts from a debt collector that do not refer to or imply the existence of a debt, and do not reveal information about the debtor's debts, are not "communications" for purposes of the FDCPA.[7] However, the law remained unsettled and, as recently as 2017, the Federal Trade Commission entered into a stipulated judgment with a debt collector to settle allegations that the collector left voice messages in a manner that could reveal the existence and status of the consumer's debt to an unauthorized third party.[8] The bureau ultimately believed this conflict led collectors to err on the side of not leaving voicemails, which in turn led to more frequent call attempts so that collectors could ensure they established live, right-party contact.[9]

The proposed rule resolves this conflict by clarifying that a debt collector does not convey information regarding a debt "directly or indirectly to any person" if the debt collector provides only a "limited-content message."[10] A limited-content message must include only the expressly required content set forth in the proposed rule, and nothing more (except the optional content described below). The proposed rule requires that a limited-content message include all of the following:

- The consumer's name;
- A request that the consumer reply to the message;
- The name or names of one or more natural persons whom the consumer can contact to reply to the debt collector;
- A telephone number that the consumer can use to reply to the debt collector; and
- If applicable, a clear and conspicuous statement describing one or more ways the consumer can opt out of further attempts to communicate by the debt collector to that telephone number (discussed in further detail below in the "Opt Out" section).[11]

In addition to the required content, a debt collector leaving a limited-content message may also opt to include a salutation, the date and time of the message, a generic statement that the message relates to an account, or suggested dates and times for the consumer to reply to the message.[12] If a collector includes information in a message that exceeds the permitted information and conveys information about the debt, such as information revealing that the message relates to the collection of a debt (such as the consumer's account number), the collector loses the protection of the limited-content message exception.[13]

As the name of the debt collector is not among the required or optional content, a collector may lose the protection of the limited-content message exception if a message included the collector's name. Consistent with this view, the bureau noted that email cannot be used to transmit a limited-content message because email messages "typically require additional information (e.g., a sender's email address) that may in some circumstances convey information about a debt."[14]

Although a limited-content message is not a "communication" under the proposed rule, it is nonetheless considered an attempt to communicate, and is subject to the restrictions in the proposed rule regarding attempts to communicate with a consumer regarding a debt (such as the seven-call limit discussed below).[15]

Consumer

As noted above, the FDCPA strictly prohibits communication of a consumer's debt to third parties besides a limited list of persons.[16] The limited scope of the exceptions to this prohibition presented several difficulties for debt collectors.

First, debt collectors were hampered in resolving the debts of a deceased person with an estate or executor, since discussing the deceased person's debts would be prohibited by the FDCPA.[17] Second, the bureau's Regulation X mortgage servicing rules require a mortgage servicer to promptly communicate with successors-in-interest regarding a mortgage loan upon death of the borrower.[18] If the mortgage loan was in default when the servicer obtained servicing, the servicer would be mandated by Regulation X to communicate with a successor-in-interest, but would be prohibited by the FDCPA, since successors-in-interest are not among the limited list of persons with whom a collector may convey information about a debt.

Acknowledging this conflict, the bureau previously issued an interpretive rule providing a safe harbor from FDCPA liability when servicers communicate with a successor-in-interest in compliance with Regulation X.[19] The proposed rule formally resolves this conflict by adopting a definition of "consumer" that includes the executor, administrator or personal representative of the debtor's estate, if the debtor is deceased, as well as a confirmed successor-in-interest as defined in Regulation X and Regulation Z.[20] As a result, mortgage servicers who are subject to the FDCPA would be free to comply with Regulation X without worrying whether they are inadvertently violating the FDCPA.

Procedures for Text and Email Communications

Despite setting forth a litany of unfair, deceptive and otherwise prohibited debt collection practices, the FDCPA provides that a debt collector has no civil liability for a violation if the debt collector shows, by preponderance of the evidence, that the violation was not intentional and resulted from a bona fide error, notwithstanding the collector's maintenance of procedures "reasonably adapted" to avoid such an error.[21]

Recognizing that debt collectors now frequently attempt to contact consumers using text messaging and email, the bureau's proposed rule clarifies how a collector can maintain procedures for text and email communications that allow the collector to avail itself of the "bona fide error" defense. The proposed rule provides that, for purposes of the "bona fide error" defense, a collector maintains procedures that are "reasonably adapted" to avoid inadvertent communication with an unauthorized third party if its procedures include steps to reasonably confirm and document that:

- The debt collector communicated with the consumer using an email address or, in the case of a text message, a telephone number that the consumer recently used to contact the debt collector for purposes other than opting out of electronic communications;

- If the collector communicates using the consumer's nonwork email address or telephone number, the creditor notified the consumer clearly and conspicuously other than through the specific nonwork email address or nonwork telephone number that the collector might use that email address or telephone number for email or text communications, the collector provided the notification no more than 30 days before the collector's first text or email communication, and the notification identified the legal name of the collector and the nonwork email address or telephone number the collector proposed to use, described one or more ways the consumer could opt out of such communications, provided the consumer with a reasonable period in which to opt out, and the opt-out period expired without the consumer opting out;

- The debt collector used a nonwork email address or telephone number that a creditor or prior debt collector obtained from the consumer to communicate about the debt if the creditor or prior debt collector recently sent communications about the debt to that number or address, and the consumer did not request that the creditor or prior debt collector cease communications to that email address or phone number; or

- The debt collector took additional steps to prevent communications using an email address or telephone number that the collector knows has led to a disclosure of the consumer's debt to an unauthorized party.[22]

The proposed rule also addresses another significant operational difficulty for collectors and FDCPA-covered entities. The FDCPA prohibits a covered entity from attempting to communicate with a customer at a time that is known or should be known by the collector to be inconvenient, or at times other than between 8 a.m. and 9 p.m. local time at the consumer's location.[23]

In the era of landline telephones, determining the consumer's local time was easy — the collector could simply verify the local time at the consumer's listed area code and proceed accordingly. In the modern era, fewer consumers are maintaining landline telephones, and instead are using cellular telephones as a primary source of communication.[24] A consumer's cellular phone area code may not match their physical location — for example, a consumer with an area code assigned to Los Angeles may reside in New York. A collector calling the consumer at 7 p.m. Los Angeles time would therefore violate the FDCPA, as the call would be received at 10 p.m. New York time — outside of the window permitted by the FDCPA.

The proposed official interpretations to the proposed rule attempts to resolve this complication by providing that a debt collector complies with the FDCPA if, in the absence of knowledge to the contrary, the collector communicates or attempts to communicate with the consumer at a time that would be convenient in all of the locations at which the collector's information indicates the consumer might be located.[25] In the example above, if the collector's information reflects that the consumer resides in New York, then the collector should only attempt to call within the time limits applicable to both New York and Los Angeles, rather than just to Los Angeles.[26]

The proposed rule also provides that it is an unfair practice for a collector to communicate, or attempt to communicate, with a consumer using an email address that the collector knows or should know is provided to the consumer by the consumer's employer.[27] The proposed rule requires the collector to exercise a degree of judgment in determining whether an email is provided by the consumer's employer. The bureau noted that addresses with certain domains, such as .gov or .mil, are unlikely to be a personal email, or addresses where the domain includes a corporate name that is not commonly associated with personal email addresses, are likely to be work emails.[28]

However, the bureau acknowledged that a collector "neither would know nor should know that an email address is provided to the consumer by the consumer's employer if the email address's domain name is one commonly associated with a provider of non-work email addresses."[29] Notwithstanding the prohibition, a collector may use a work email address if the collector has previously received either consent from the consumer to be contacted at that address, or an email from that email address.[30]

The proposed rule also prohibits a collector from communicating or attempting to communicate with a consumer through social media in connection with the collection of a debt if the social media is viewable by an unauthorized third party.[31] This prohibition applies broadly and includes even limited-content messages.[32] However, if the social media platform allows a collector to send a private message to the debtor that is not viewable by unauthorized third parties, then a collector may send a private message concerning the debt without violating this prohibition (although the FDCPA may otherwise prohibit the message if the consumer has requested the collector cease communications, for example).[33]

Procedures for Supplying Electronic Disclosures

The proposed rule creates a process flow for collectors to deliver certain FDCPA-required notices electronically. The proposed rule allows for three disclosures to be provided electronically: the validation of debt notice, the original creditor information that a collector must provide if requested in writing by the debtor, and the validation information that a collector must provide if the debtor disputes his or her debt in writing.[34]

If the collector chooses to provide electronic copies of these notices, it must comply with the federal Electronic Signatures in Global and National Commerce Act and provide the disclosures in a form that provides the consumer with actual notice, and that the consumer can keep and access later.[35] The proposed rule sets forth the procedures for debt collectors to satisfy the E-Sign Act when supplying electronic disclosures. Importantly, only these three specific notices must meet the notice-and-retainability requirement. Other routine electronic communications that are not expressly required by the FDCPA or proposed rule, such as settlement offers, payment requests and scheduling messages, need not be provided in a form the consumer can keep and access later.[36]

The proposed rule provides two ways for a collector to provide disclosures electronically. First, the collector may comply with Section 101(c) of the E-Sign Act after the consumer provides affirmative consent directly to the debt collector.[37] Alternatively, the collector may provide the disclosure by sending an electronic communication to an email address or phone number that the creditor or a prior debt collector could have used to provide disclosures under the E-Sign Act.[38]

If the collector opts to take the alternative approach, the collector may place the disclosure on a secure website that is accessible by clicking on a hyperlink included within an electronic communication.[39] The disclosure must be available on the website for a reasonable period of time in an accessible format that can be saved or printed, and the consumer must receive notice and opportunity to opt out of hyperlinked delivery.[40] The collector may also place the disclosure in the body of an email so that the disclosure's content is viewable within the email itself.[41]

No matter which option a debt collector chooses, the proposed rule would require a debt collector to:[42]

- Identify the purpose of the communication by including, in the subject line of an email or in the first line of a text message transmitting the disclosure, the name of the creditor to whom the

debt currently is owed or allegedly is owed and one additional piece of information identifying the debt, other than the amount;[43]

- Permit receipt of notifications of undeliverability from communications providers, monitor for any such notifications, and treat any such notifications as precluding a reasonable expectation of actual notice for that delivery attempt;[44] and

- If providing the validation notice electronically, provide the disclosure in a responsive format that is reasonably expected to be accessible on a screen of any commercially available size and via commercially available screen readers.[45]

Opt Out for Electronic Communications

The proposed rule provides an opt-out right to a consumer receiving electronic or text communications from a debt collector. The proposed rule states that if a debt collector communicates, or attempts to communicate, using text, email or another electronic medium, the collector must include in each communication or attempt a clear and conspicuous statement describing one or more ways the consumer can opt out of further electronic communications to that email address or phone number.[46] The proposed rule prohibits a collector from requiring that the consumer pay any fee to exercise the opt-out right, or to provide any information other than the email address, telephone number for text messages or other electronic address subject to the opt-out right.[47]

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[1] Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1720 (2017).

[2] 15 U.S.C. § 1692a(6). See also Barbato v. Greystone Alliance LLC, 916 F.3d 260 (3d Cir. 2019).

[3] Proposed 12 C.F.R. § 1006.2(i)(1).

[4] See CFPB Bulletin 2013-07 (Jul. 10, 2013).

[5] 15 U.S.C. § 1692c(b).

[6] Id. § 1692e(11).

[7] See Scribner v. Works & Lentz, Inc., 655 F. App'x 702, 703-04 (10th Cir. 2016) (call to manager of debtor's apartment complex; caller did not identify herself or her employer as debt collector or refer to any debt owed by debtor); Brown v. Van Ru Credit Corp., 804 F.3d 740, 743 (6th Cir. 2015) (voicemail left with debtor's business; voicemail did not mention debtor, his alleged debt, or that caller was debt collector); Marx v. Gen. Revenue Corp., 668 F.3d 1174, 1177 (10th Cir. 2011) (fax to debtor's work location; fax indicated its purpose was to verify employment and did not reference any debt).

[8] See Stipulated Order for Permanent Injunction and Civil Penalty Judgment, United States v. GC Servs. Limited Partnership, Civ. No. 17-1461 (S.D. Tex. Mar. 2, 2017).

[9] Proposed rule with request for public comment: Debt Collection Practices (Regulation F), Docket No. CFPB-2019-0022 ("Notice of Proposed Rule"), at 60.

[10] Proposed 12 C.F.R. § 1006.2(b).

[11] Id. § 1006.2(j).

[12] Id.

[13] Comment 2(j) to Proposed 12 C.F.R. § 1006.2.

[14] Notice of Proposed Rule at 63.

[15] Proposed 12 C.F.R. § 1006.2(b).

[16] 15 U.S.C. § 1692c(b).

[17] Notice of Proposed Rule at 73.

[18] 12 C.F.R. § 1024.38(b)(1)(vi).

[19] 81 Fed. Reg. 71977 (Oct. 19, 2016).

[20] Proposed 12 C.F.R. § 1006.2(e); Comment 6(a)(4) to Proposed 12 C.F.R. § 1006.2.

[21] 15 U.S.C. § 1692k(c).

[22] Proposed 12 C.F.R. § 1006.6(d)(3).

[23] 15 U.S.C. § 1692c(a)(1).

[24] See, e.g., Victor Luckerson, "Landline Phones Are Getting Closer to Extinction," Time Jul. 8, 2014, available at http://time.com/2966515/landline-phones-cell-phones/.

[25] Comment 6(b)(1)(i) to Proposed 12 C.F.R. § 1006.6.

[26] If the consumer were in fact in Los Angeles, then a call at 8 a.m. New York time would be at 5 a.m. in Los Angeles.

[27] Proposed 12 C.F.R. § 1006.22(f)(3).

[28] Comment 22(f)(3)-3 to Proposed 12 C.F.R. § 1006.22.

[29] Id.

[30] Proposed 12 C.F.R. § 1006.22(f)(3).

[31] Id. § 1006.22(f)(4).

[32] Comment 22(f)(4) to Proposed 12 C.F.R. § 1006.22(f)(4).

[33] Id.

[34] Proposed 12 C.F.R. § 1006.42.

[35] Proposed 12 C.F.R. § 1006.42(a)(1).

[36] Notice of Proposed Rule at 301.

[37] Proposed 12 C.F.R. § 1006.42(b)(1).

[38] Id. § 1006.42(c)(1).

[39] Id. § 1006.42(c)(2)(ii).

[40] Id.

[41] Id. § 1006.42(c)(2)(i).

[42] See https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-electronic-disclosure-flowchart.pdf.

[43] Proposed 12 C.F.R. § 1006.42(b)(2).

[44] Id. § 1006.42(b)(3).

[45] Id. § 1006.42(b)(4).

[46] Id. § 1006.6(e).

[47] Id.