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Legal Update

The Debt Collection "Overhaul" Is Officially Here: CFPB Issues Final Rule Implementing the Fair Debt Collection Practices Act

On October 30, 2020, the US Consumer Financial Protection Bureau ("CFPB" or the "Bureau") announced a final rule (the "final rule"), Regulation F, to implement the Fair Debt Collection Practices Act ("FDCPA").[1] The final rule comes nearly 18 months after the proposed rule[2] and more than four years after the CFPB first released an initial outline of debt collection proposals.[3] The final rule does not deviate substantially from the proposals, but covered entities should take careful note of the final rule's many detailed procedures and examples, particularly with respect to email and text communications, time and place restrictions, frequency of telephone contact, and communications via social media. With an implementation deadline looming in approximately one year, covered entities should begin preparing now for the many changes ahead.

In this Legal Update, we provide a brief background on the FDCPA; summarize the CFPB's rulemaking, including key definitions and substantive rules for debt collectors; and discuss next steps. We have highlighted here aspects of the final rule that may be most material to covered entities' operations going forward.

Background and History of the FDCPA

Congress passed the FDCPA in 1977 in order to protect consumers by eliminating abusive debt collection practices and regulating debt collector conduct, having found "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors."[4]

The FDCPA applies to "debt collectors," who are generally third-party entities (i.e., not original creditors) who either (i) regularly collect debts on behalf of others or (ii) have purchased or otherwise acquired defaulted debt (but only if the entity's "principal purpose" is the collection of debts).[5] 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, so-called "mini-Miranda" notices, and self-identification.

No federal agencies promulgated any significant regulations under the FDCPA in the subsequent forty-three years – indeed, until the Dodd-Frank Act became effective, no federal agency even had the authority to do so.[6] 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.

In order to at least partially resolve this confusion, and to establish standards with respect to new communication techniques and other modern debt collections practices that were not envisioned in the 1970s, the CFPB proposed a new Regulation F on May 7, 2019 (the "proposed rule").[7] On October 30, 2020, the Bureau announced the final rule implementing a number of its proposals, including, among other things, with respect to communications in connection with debt collection and prohibitions on harassment or abuse, false or misleading representations, and unfair debt collection practices. The Bureau also signaled that it intends to issue a separate disclosure-focused rule in December 2020 to implement and interpret FDCPA requirements regarding consumer disclosures and certain related consumer protections, including by (i) clarifying the information that a debt collector must provide to a consumer at the outset of its debt collection efforts, (ii) promulgating a model debt validation notice, and (iii) addressing requirements with respect to furnishing consumer reporting information and collecting time-barred debt.

Scope of the Final Rule

The CFPB decided not to use its broad authority under the Dodd-Frank Act to expand or otherwise modify the scope of the FDCPA through the final rule, and the Bureau explicitly declined to expand the scope of the final rule to apply to first-party debt collectors, nor does it provide any guidance on what the Bureau considers to be first-party collections.[8] The Bureau explained that the final rule is intended to implement the FDCPA and not any other laws that the CFPB administers.[9] Additionally, in a departure from the proposed rule, the final rule does not contain provisions that apply only to debt collectors when they are collecting consumer financial product or service debt.[10] The proposed provisions would have relied on the Bureau's Section 1032 authority, which authorizes the Bureau to prescribe rules to ensure that the features of any consumer financial product or service are "fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances."[11]

Definitions

Some of the final rule's most significant provisions appear in the definitions section, as the defined terms will dictate how debt collectors must comply with the corresponding substantive obligations under the final rule and the FDCPA. We discuss some of the more material definitions adopted in the final rule below.

Communicate or communication. The final rule defines these terms, largely as proposed, to mean "the conveying of information regarding a debt directly or indirectly to any person through any medium."[12] According to the Bureau, general advertising that includes no information about a specific debt likely would not meet the definition of a communication.[13] Notably, a "limited-content message" is not a communication.

Attempt to communicate. The FDCPA imposes restrictions not only on a debt collector's communications with a consumer, but also on a debt collector's attempts to communicate with a

consumer even where such attempts are not successful (e.g., where a consumer does not answer a debt collector's call). An attempt to communicate includes leaving a "limited-content message," as discussed below. The final rule narrows the definition of "attempt to communicate" by limiting it to acts to initiate a communication or contact "about a debt."[14] Accordingly, the Bureau acknowledges in its section-by-section analysis that general marketing to groups of consumers and personal communications should not be deemed attempts to communicate.[15]

Consumer. Under the final rule, a consumer is "any natural person obligated or allegedly obligated to pay any debt," and for purposes of a debt collector's communications, may include a spouse, parent of a minor, legal guardian, estate executor, or confirmed successor in interest.[16] The Bureau left open whether it will further define this term to clarify its application when the consumer is deceased, which may be useful in the context of debt validation notices.

Debt collector. The final rule's definition of a debt collector is much as predicted, as it is materially identical to the definition under the FDCPA and the proposed rule.[17] In response to commenters' requests to clarify the scope of the term as interpreted by the Supreme Court in *Henson v. Santander Consumer USA Inc.*,[18] the final rule clarifies that a company may collect defaulted debts that it has purchased from another without being an FDCPA debt collector.[19] The Bureau expressly declined to exclude lawyers or mortgage servicers from the definition of a debt collector, despite receiving comments urging it to do so.[20] The Bureau noted that the FDCPA does not exempt lawyers or servicers who otherwise meet the definition of a debt collector, so interpreting the definition otherwise would be a significant departure, on which the public did not have an opportunity to comment.[21]

Limited-content message. A debt collector may leave a voicemail message for a consumer that is not a communication under the FDCPA or final rule (and therefore not subject to certain requirements or restrictions) provided it is a "limited-content message." To be a "limited content message," the voicemail *must* include (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.[22] The voicemail may include certain optional content, and nothing more.[23] This is narrower than the proposed rule, which would have allowed for limited-content text messages or oral messages in addition to voicemail messages.[24]

Rules for Debt Collectors

As with the proposed rule, the final rule in many ways largely mirrors the statutory language of the FDCPA. However, there are certain substantive aspects of the final rule that may require changes to how debt collectors currently do business, particularly with respect to electronic communications, treatment of time and place restrictions, frequency of telephone contact, communications at employer-provided email addresses and on social media, and the sale and transfer of certain debts.

ELECTRONIC COMMUNICATIONS

The final rule does not prohibit electronic debt collection communications, including emails and text messages, nor does it establish explicit rules for such communications. Instead, it sets forth guardrails for email and text communications in its discussion of third-party communications. Section 1006.6(d)(3) establishes a safe harbor from civil liability for third-party disclosures resulting from email or text communications if the debt collector establishes procedures to reasonably confirm and document that

the debt collector emailed or texted the consumer in accordance with certain established procedures.[25] Unlike the proposed rule, the final rule separates out the safe harbors for emails versus text messages.

Email Communications

There are three methods by which the debt collector can use the safe harbor for email communications:

1. The "**consumer-use**" method allows email communications where the consumer either used the email address to communicate with the debt collector about the debt and has not since opted out, or the debt collector received prior consent to use that email address and the consumer has not withdrawn that consent.[26] Such consent may be provided orally, in writing, or electronically,[27] and provision of the email address via website or online portal is considered consent.[28]
2. The "**prior creditor-use**" method allows the debt collector to send an email to an email address that the creditor used to communicate with the consumer if five specific criteria are met.[29] One of these criteria is that the prior creditor provided a notice and opt-out. Rather than establishing a stand-alone notice-and-opt-out method for both debt collectors and creditors, as originally proposed, the final rule incorporates this method only into the creditor-use method, and allows debt collectors to use the creditor-use safe harbor only with respect to email addresses for which the creditor clearly and conspicuously provided, among other things, a notice and opt-out period for email communications.[30] Notably, these disclosures must be provided "reasonably contemporaneous[ly] with potential debt collection communications" (i.e., not at the time of account opening, but closer to the time the debt collector begins collecting on the debt)[31] and creditors must provide at least 35 days for the consumer to opt out.[32] The commentary clarifies that opting out does not constitute a cease-communication request, unless the separate cease communication request criteria are also met.[33]
3. The "**prior debt collector use**" method allows the debt collector to use an email address that the prior debt collector used to communicate with the consumer if it was obtained in accordance with the consumer-use or prior creditor-use methods, the immediately prior debt collector used that email address for communications with the consumer about the debt, and the consumer did not opt out of such communications.[34]

Text Messages

The final rule provides a safe harbor for text messages under two circumstances: where consumers have used the telephone number to communicate with the debt collector, via text message, about the debt ("consumer-use" method) or where the debt collector has received direct prior consent to use that number for text messages.

The "**consumer-use**" method allows debt collectors to text a phone number where: (1) the consumer used that number to communicate with the debt collector about the debt by text message; and (2) the consumer has not since opted out of text communications to that number; and, within the past 60 days, either: (a) the consumer sent a text message to the debt collector from that phone number; or (b) the debt collector confirmed, using a complete and accurate database, that the phone number has not been re-assigned since the date of the consumer's most recent text message to the debt collector from that phone number.[35] The consumer-use text message safe harbor does not apply where the consumer only used the phone number to communicate with the debt collector via telephone call.[36]

Alternatively, there is a safe harbor to use the phone number for texts if the debt collector received directly from the consumer **prior consent** to use the telephone number to communicate by text

message, the consumer has not since withdrawn that consent, and within the past 60 days the debt collector either: (1) obtained the prior consent or renewed consent from the consumer; or (2) confirmed, using a complete and accurate database, that the telephone number has not been reassigned from the consumer to another user since the date of the consumer's most recent consent to use that telephone number to communicate about the debt by text message.[37]

Opt-Out Notice

The final rule requires any electronic communications to include a clear and conspicuous opt-out notice describing a "reasonable and simple method" for opting out.[38] Debt collectors may not require consumers to pay any fees or provide any information other than the consumer's opt-out preferences in order to opt out.[39] The official commentary to the final rule includes examples that meet the "reasonable and simple" standard for opt-out methods. Notably, the opt-out notice provisions apply to *all* electronic communications; not just emails and text messages. According to the Bureau, this provision applies to direct messaging communications on social media and communications in an application on a website, mobile telephone, or computer.[40]

TIME AND PLACE RESTRICTIONS

The Bureau attempted to address industry concerns regarding the ambiguity of the FDCPA's general prohibition on attempting to collect debts at any time or place "known or which should be known" to be inconvenient to a consumer[41] by adding additional examples in the commentary to the final rule, rather than establishing more explicit instructions on how a consumer must communicate "inconvenient" time and place to debt collectors. The Bureau's view is that the consumer is the "best source of information" and the debt collector can ask follow-up questions to clarify when a time or place is inconvenient to the consumer. However, the final rule does *not* establish a "duty of inquiry"; debt collectors can, but are not required to, ask consumers at each communication with the consumer whether the time or place is convenient.

Comment 6(b)-1 provides a number of examples of where a consumer may inform a debt collector of "inconvenient times" including where a consumer responds "no" when a debt collector asks if there is a convenient time to call on a weekend.[42] However, if a consumer initiates communications from a previously designated inconvenient time or place, the debt collector may respond only once at that time or place through the same medium, such as by sending an automated reply to an email message.[43] The time and place restrictions apply equally to phone and electronic communications, including text messages and emails.[44]

In the absence of knowledge to the contrary, a time before 8:00 a.m. and after 9:00 p.m. local time at the consumer's location is inconvenient.[45] The final rule adopts the approach that many debt collectors already use to determine a consumer's location for the purpose of the FDCPA's communications time restrictions where there is conflicting or ambiguous information regarding the consumer's location. In this circumstance, the debt collector may only use a time that would be convenient in all of the locations at which the debt collector's information indicates the consumer might be located.[46] Debt collectors do not have to attempt to determine the consumer's actual location.

The CFPB did not adopt a "decedent debt waiting period" in connection with the inconvenient time place restrictions. Additionally, the final rule essentially restates the FDCPA's language regarding restrictions on communications with consumers known to be represented by lawyers[47] as well as the restrictions on communicating with consumers at their place of employment.[48]

HARASSING, OPPRESSIVE, OR ABUSIVE CONDUCT

The final rule sets forth a non-exhaustive list of prohibited conduct, the natural consequence of which is to harass, oppress, or abuse a person in connection with the collection of a debt.[49] The final rule does not establish limits on communications media other than telephone calls. The Bureau explained that "debt collectors do not presently engage in widespread use of electronic communications" and left open the possibility of future rules.[50] Additionally, the final rule removes the cross reference from the proposed rule to the Dodd-Frank Act's prohibition on unfair acts or practices.

The final rule adopts a "rebuttable presumption" approach to **call frequencies**, rather than a bright-line rule. Debt collectors are presumed compliant with the final rule's limitations on repeated or continuous phone calls "with intent to annoy, abuse, or harass" if they make no more than seven telephone calls to a debtor within seven consecutive days, nor makes a call within seven days after having had a telephone conversation with the debtor in connection with the collection of the debt.[51] This applies on a per-consumer and per-debt basis, except with respect to student debts, where all student debts that were serviced under a single account number at the time the debts were obtained by the collector count as a single debt for purposes of the call frequency limits.[52] These restrictions on placing a telephone call apply to conveying a ringless voicemail, but not text messages or emails that may be received on a mobile phone.[53]

The frequency limits do not apply to calls (1) placed with the person's prior consent and within a period no longer than seven consecutive days after receiving the prior consent; (2) not connected to the dialed number; or (3) placed to the consumer's lawyer, a consumer reporting agency, the creditor, the creditor's attorney, or the debt collector's lawyer.[54] The final rule does not adopt the proposed rule's exclusion of calls made to respond to a request for information.

Per the official commentary, certain factors may rebut the presumption of compliance, including the frequency, pattern, and intervals of the calls (e.g., whether the calls were placed in rapid succession or in a highly concentrated manner);[55] the frequency, pattern, and intervals of voicemails left for the person;[56] the content of prior communications;[57] and the debt collector's conduct in prior communications or attempts to communicate.[58]

The final rule also restricts use of violence or criminal means, obscene or profane language, debtor's lists, coercive advertisements, non-meaningful disclosure of identity, and prohibited communication media (where the person has requested that the debt collector not use that medium to communicate with the person).[59]

As described above, the final rule contains certain **exceptions**: debt collectors may send electronic confirmation of the person's opt-out request and also respond once to communications from previously restricted media where the person initiates the contact.[60] The final rule also adopts a new exception for legally required communications, enabling a debt collector to communicate or attempt to communicate with a person in connection with the collection of any debt through a medium of communication that the person has requested the debt collector not use to communicate with the person *if otherwise required by applicable law*.[61]

UNFAIR OR UNCONSCIONABLE MEANS

The final rule largely adopts the proposed rule's prohibitions on using unfair or unconscionable means to collect or attempt to collect any debts, which also largely mirror the statutory language.[62] The final rule clarifies certain restrictions. First, for post-dated payments, the final rule cites to 5 U.S.C. § 6103(a) for a list of legal public holidays for the purpose of calculating the timing of the consumer's request.[63] Second, the final rule restricts debt collectors from communicating with consumers by sending an email to an employer-provided email address that the debt collector knows is employer-provided, unless the email

address meets the procedures for email addresses in the rules for communications in connection with debt collection.[64] The final rule removes the "should have known" standard from this restriction. Finally, the final rule clarified the restrictions on communicating with persons via social media, prohibiting communications that are viewable by the general public or the person's social media contacts.[65] This provision does not apply to private messages sent through these platforms.[66]

SALE AND TRANSFER OF DEBTS

The final rule prohibits debt collectors from selling or transferring *for consideration* or placing for collection debts that the debt collector knows or should know have been paid or settled or discharged in bankruptcy.[67] The rule contains exceptions to this prohibition where the debt collector transfers the debt (1) to the debt's owner; (2) to a previous owner (if authorized under the original contract between the debt collector and previous owner); or (3) as a result of a merger, acquisition, purchase and assumption transaction, or a transfer of substantially all of the debt collector's assets.[68] Unlike the proposed rule, the final rule also excepts secured claims in bankruptcy and securitizations and pledges of debt as collateral in connection with a borrowing.[69] The final rule also removes the proposed rule's prohibition on transferring debts where an identity theft report had been filed with respect to the debt. The prohibition applies where the debt collector transfers the debt itself to another party, and not where the debt collector simply sends information about the debt to another party.[70]

OTHER KEY PRACTICE PROVISIONS

- **Cease communication requests:** The final rule largely adopts the statutory language regarding cease communication requests and exceptions, and requires debt collectors to honor written cease communication requests (including electronic written communications under the E-SIGN Act).[71] The final rule does not require debt collectors to honor oral cease communication requests. Consumers can request that debt collectors stop communicating with them via a particular medium (e.g., phone calls), if the person has requested, either orally or in writing, that the debt collector not use that medium of communication.[72]
- **Communications with third parties:** The final rule restricts communications with anyone other than the consumer, consumer's lawyer, consumer reporting agency, creditor, creditor's lawyer, or debt collector's lawyer, except: (1) for the purpose of acquiring location information, (2) with the prior consent of the consumer given directly to the debt collector, (3) with express permission of a court of competent jurisdiction, or (4) as reasonably necessary to effectuate a post-judgment judicial remedy.[73] The final rule does not adopt the proposed rule's commentary which would have provided a safe harbor for "limited content messages" left with third parties who answer the consumer's home or mobile phone numbers.
- **Location information:** The final rule adopts the proposed rule's requirements for communications with third parties for the purpose of acquiring location information (which generally reflects the statutory language).[74] Per the official commentary, a violation could occur regardless of the medium (in-person interactions, calls, audio recordings, paper documents, mail, email, texts, social media, or other electronic media)[75] and based on the cumulative effect of the conduct.[76]
- **Friend requests:** The final official commentary to the final rule's provisions on "false, deceptive, or misleading" conduct indicates that the restrictions on false representations or deceptive means applies in the social media context, including "friend requests" and use of social media to engage with third parties.[77]
- **Mini-Miranda:** The final rule largely mirrors the FDCPA's mini-Miranda provision, which requires debt collectors to disclose in its initial communication with a consumer that the debt collector is attempting to collect a debt and that any information will be used for that purpose. If the debt collector's initial communication with the consumer is oral, the debt collector must make the disclosure again in its initial

written communication with the consumer. In subsequent communications, the debt collector must disclose that the communication is from a debt collector.[78] The final rule does not provide additional clarity regarding when an "initial" communication ends and a "subsequent" communication begins, particularly with respect to electronic communications. With respect to voicemails, debt collectors can leave "limited-content messages," (discussed in the definitions section above) which do not include the mini-Miranda. The final rule also includes a new provision regarding translated disclosures, requiring debt collectors to make the mini-Miranda disclosures in the same language or languages used for the rest of the communications in which the debt collector provided the disclosures.[79]

- **Disputes:** The final rule largely adopts the proposed rule regarding requirements for debt collectors' handling of disputed debts, including the FDCPA's prohibition on "overshadowing" communications/debt collection activities and debt collection activities after receipt of requests for original-creditor information.[80] The final rule includes official comments noting that consumer disputes submitted "in writing" include electronically submitted disputes through the debt collector's email address or website portal.[81]
- **Electronic disclosures:** The final rule requires debt collectors to send disclosures, either in writing or electronically, "in a manner that is reasonably expected to provide actual notice, and in a form that the consumer may keep and access later."[82] Required notices that are sent electronically (such as validation of debt notices) must be done in accordance with the E-SIGN Act.[83]
- **Litigation:** The final rule also removes the proposed rule's safe harbor for lawyers and law firms where there was meaningful lawyer involvement in debt collection litigation submissions.[84] The Bureau indicated that most commentators opposed this proposal, including debt collection lawyers and consumer advocates (albeit for different reasons). In promulgating the final rule, the Bureau stated its position that the "meaningful attorney involvement" legal theory has a basis in the text of the statute.[85]

Record Retention

The final rule requires debt collectors to retain records that are evidence of compliance with the FDCPA and Regulation F for three years.[86] The record retention period begins on the date the debt collector begins collection activity on a debt, and runs until three years after the debt collector's last collection activity on the debt.[87] While a transfer of a debt to another debt collector would be the last collection activity that begins the three-year record retention period for the transferor collector, a discharge in bankruptcy would not necessarily trigger the three-year record retention period if the debt collector continues to make collection efforts on the debt, such as by attempting to enforce a lien on the security for the debt that survives a bankruptcy discharge.[88]

The Commentary sets forth examples of records that must be retained by a debt collector, including telephone call logs, which would evidence compliance or noncompliance with the prohibition against harassing telephone calls, and copies of documents provided to consumers as evidence that the debt collector provided validation of debt notices and met the delivery requirements set forth in the final rule.[89] The Rule does not require debt collectors to maintain paper copies of records; records may be retained using any method that can reproduce accurate records and ensures that the debt collector can "easily" access the records.[90]

The final rule provides a special rule for retaining telephone call recordings. If the debt collector records telephone calls that are made in connection with the collection of the debt, then the collector must retain the recordings for each call until three years after the date of the call, notwithstanding that collection activity might be ongoing when the three-year period expires with respect to a call recording.[91]

Relation to State Laws

The final rule provides that neither the FDCPA nor the final rule have the effect of exempting any person subject to the FDCPA or the final rule from compliance with any state laws regulating debt collection practices, except to the extent state laws are inconsistent with the FDCPA or the final rule.[92] In the event of a conflict, state laws are only preempted with respect to the inconsistency.[93] The final rule clarifies that a state law is not inconsistent with the FDCPA or the final rule if the state law affords consumers greater protection than the FDCPA or final rule.[94] In doing so, the final rule largely restates section 1692n of the FDCPA.[95] The FDCPA and the final rule effectively operate as a "floor" for debt collectors' compliance obligations, but state laws may further restrict collection practices, impose additional compliance obligations, or otherwise provide consumers greater protections. The Bureau clarified that any safe harbor provided by the final rule is a safe harbor only with respect to compliance with the FDCPA and the final rule, and does not necessarily provide an exemption from or safe harbor with respect to compliance with any state laws (unless the state law specifically incorporates FDCPA standards into the state law scheme).[96]

EXEMPTION FOR STATE REGULATION

- The final rule implements a procedure under section 1692o of the FDCPA for states to apply for a determination from the Bureau that a class of debt collection practices within that state is exempt from the FDCPA, if the Bureau is satisfied that the state's requirements are substantially similar to the FDCPA and the final rule and that there is adequate provision for state enforcement of the requirements.[97] The final rule adds a new Appendix A that sets forth the exact procedures and criteria for the application and granting of the exemption.[98] Appendix A provides specific criteria that must be met for a state law to be deemed "substantially similar" to the FDCPA, including that:
- Definitions and rules of construction import a meaning and have an application that are substantially similar to those prescribed by relevant federal law;
- Debt collectors provide all of the applicable notices required by relevant federal law, with the content and in the terminology, form, and time periods prescribed pursuant to relevant federal law;
- Debt collectors take all affirmative actions and abide by obligations substantially similar to those prescribed by relevant federal law under substantially similar conditions and within substantially similar time periods as are prescribed under relevant federal law;
- Debt collectors abide by prohibitions that are substantially similar to those prescribed by relevant federal law;
- Consumers' obligations or responsibilities are no more costly, lengthy, or burdensome than consumers' corresponding obligations or responsibilities under relevant federal law; and
- Consumers' rights and protections are substantially similar to those provided by relevant federal law under conditions or within time periods that are substantially similar to those prescribed by relevant federal law.[99]

The FDCPA state exemption provision is rarely invoked and only one state—Maine—has obtained an exemption since the FDCPA was enacted.[100]

Next Steps

The final rule becomes effective one year after publication in the *Federal Register*, which has not yet happened as of the date of this Legal Update. To support entities in complying with the final rule, the CFPB has created a webpage where it will post additional guidance and has also published an interactive version of the regulation.[101] The CFPB has not yet published a compliance guide or examination manual.

The final rule is incredibly complex, but some of the more challenging FDCPA issues such as time-barred debt and debt validation notices are still forthcoming. Covered entities can begin preparing now for the communications-related restrictions and processes under the final rule.

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Endnotes

[1] *Final Rule, Debt Collection Practices (Regulation F)*, Docket No. CFPB-2019-0022 (to be codified at 12 C.F.R. pt. 1006) [hereinafter *Final Rule*], https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_final-rule_2020-10.pdf

[2] https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2019/06/issues-debt-collection-rules.pdf

[3] https://www.mayerbrown.com/en/perspectives-events/publications/2016/08/a-debt-collection-overhaul-is-upon-us-the-cfpbs-pr

[4] 15 U.S.C. § 1692(a).

[5] *Id.* § 1692a(6). *See also Barbato v. Greystone Alliance LLC*, 916 F.3d 260 (3d Cir. 2019).

[6] The Federal Trade Commission has issued periodic staff opinions and guidance, but has not published comprehensive guidelines regarding requirements under the FDCPA.

[7] https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2019/06/issues-debt-collection-rules.pdf

[8] *Final Rule* at 32. First-party debt collectors are entities that collect debts on their own behalf, not on behalf of another entity such as a creditor or assignee of a debt.

[9] *Id.* at 32-33.

[10] *See* 12 C.F.R § 1006.1(c). The proposed rule contained restrictions relating to harassing, oppressive, or abusive conduct; validation of debts; consumer protection disclosures; and sale, transfer or placement of debts; all of which applied only to debts deriving from a consumer financial product or service, as that term is defined in the Dodd-Frank Act.

[11] 12 U.S.C. § 5532.

[12] 12 C.F.R § 1006.2(d).

[13] *Final Rule* at 39.

[14] 12 C.F.R § 1006.2(b).

[15] *Final Rule* at 36.

[16] 12 C.F.R §§ 1006.2(e), 1006.6(a).

[17] *See id.* § 1006.2(i) for the full definition of "debt collector" and exemptions. The final rule does not address de facto employees.

[18] 137 S. Ct. 1718 (2017).

[19] "A person who collects or attempts to collect defaulted debts that the person has purchased, but who does not collect or attempt to collect, directly or indirectly, debts owed or due, or asserted to be owed or due, to another, and who does not have a business the principal purpose of which is the collection of debts, is not a debt collector." Comment 2(i)-1 to 12 C.F.R. § 1006.2.

[20] *Final Rule* at 46.

[21] *Id.*

[22] 12 C.F.R § 1006.2(j)(1).

[23] *Id.* § 1006.2(j)(2). A limited-content message *may* also contain the following optional content: a salutation, the date and time of the message, suggested dates and times for the consumer to reply to the message, and a statement that if the consumer replies, the consumer may speak to any of the company's representatives or associates. The limited-content message may not include any other information beyond the required and optional content.

[24] *Final Rule* at 51.

[25] 12 C.F.R. § 1006.6(d)(3).

[26] *Id.* § 1006.6(d)(4)(i).

[27] Comment 6(d)(4)(i)(B)–1 to 12 C.F.R. § 1006.6.

[28] Comment 6(d)(4)(i)(B)–2 to 12 C.F.R. § 1006.6.

[29] 12 C.F.R. § 1006.6(d)(4)(ii).

[30] *Id.* § 1006.6(d)(4)(ii)(C).

[31] *Final Rule* at 187. Note that the final rule does not contain a specific timing requirement.

[32] 12 C.F.R. § 1006.6(d)(4)(ii)(C)(5).

[33] Comment 6(d)(4)(ii)(D)–2 to 12 C.F.R. § 1006.6.

[34] 12 C.F.R. § 1006.6(d)(4)(iii).

[35] *Id.* § 1006.6(d)(5)(i).

[36] Comment 6(d)(5)(i)–1 to 12 C.F.R. § 1006.6.

[37] 12 C.F.R. § 1006.6(d)(5)(i)(ii).

[38] *Id.* § 1006.6(e).

[39] *Id.*

[40] *Final Rule* at 225.

[41] 15 U.S.C. 1692c(a)(1).

[42] Comment 6(b)(1)-1ii to 12 C.F.R. § 1006.6.

[43] Comment 6(b)(1)-2, 6(b)(1)-2iv to 12 C.F.R. § 1006.6.

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

[45] 12 C.F.R. § 1006.6(b)(1)(i).

[46] Comment 6(b)(1)(i)-2 to 12 C.F.R. § 1006.6.

[47] 12 C.F.R. § 1006.6(b)(2).

[48] *Id.* § 1006.6(b)(3) (prohibiting debt collectors from communicating with a consumer in connection with the collection of any debt at the consumer's place of employment, if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication).

[49] *Id.* § 1006.14.

[50] *Final Rule* at 255-56.

[51] 12 C.F.R. § 1006.14(b)(2).

[52] *Id.* § 1006.14(b)(4). The official commentary provides an example where a debt collector is collecting on three outstanding debts (one medical and two credit card). Even if the debt collector intends to speak to the consumer about all three debts, the debt collector is presumed to comply with the restrictions if it placed 21 unanswered phone calls within a period of seven consecutive days (seven for each of the three debts). Comment 14(b)(4)-2i to 12 C.F.R. § 1006.14. The commentary provides various iterations of this example. For example, where the debt collector calls a consumer about the medical debt, connects the call, and the consumer does not want to discuss the medical debt, but does want to discuss the credit card debts, the debt collector is treated as having (1) placed and engaged in a telephone call regarding the medical debt (even though the consumer did not want to discuss it) and (2) engaged in a telephone conversation regarding the credit card debts (even though the debt collector did not initiate the call regarding the credit card debts). Comment 14(b)(4)-2vi to 12 C.F.R. § 1006.14.

[53] Comment 14(b)-1 to 12 C.F.R. § 1006.14.

[54] 12 C.F.R. § 1006.14(b)(3).

[55] Comment 14(b)(2)(i)-2i to 12 C.F.R. § 1006.14.

[56] Comment 14(b)(2)(i)-2ii to 12 C.F.R. § 1006.14.

[57] Comment 14(b)(2)(i)-2iii to 12 C.F.R. § 1006.14.

[58] Comment 14(b)(2)(i)-2iv to 12 C.F.R. § 1006.14.

[59] 12 C.F.R. §§ 1006.14(c)-(g).

[60] *Id.* §§ 1006.14(h)(2)(i), (ii).

[61] *Id.* § 1006.14(h)(2)(iii).

[62] *Id.* § 1006.22.

[63] *Id.* § 1006.22(c).

[64] *Id.* § 1006.22(f)(3) (referring to the procedures outlined in 1006.6(d)(4)(i) and (iii)).

[65] *Id.* § 1006.22(f)(4).

[66] *Final Rule* at 377.

[67] 12 C.F.R. § 1006.30(b).

[68] *Id.* § 1006.30(b)(2)(i).

[69] *Id.* § 1006.30(b)(2)(ii).

[70] Comment 30(b)(1)-1 to 12 C.F.R. § 1006.30.

[71] 12 C.F.R. § 1006.6(c)(1).

[72] *Id.* § 1006.14(h)(1). For example, if a consumer says "stop calling," that would be considered a request to no longer use telephone calls to communicate with the consumer and the debt collector would be prohibited from making additional phone calls to the person. *Final Rule* at 142.

[73] 12 C.F.R. §1006.6(d)(1). "Consumer" is defined to include a spouse, parent (if the debtor is a minor), legal guardian, estate executor/administrator, and successor in interest. *Id.* § 1006.6(a).

[74] *Id.* § 1006.10.

[75] Comment 14(a)-1 to 12 C.F.R. § 1006.14.

[76] Comment 14(a)-2 to 12 C.F.R. § 1006.14. In other words, even though certain conduct, on its own, may not be prohibited, such conduct, combined with other debt collection activities could trigger the restrictions. This subjective commentary appears to provide the CFPB with some discretion in how it will enforce potential violations of the restrictions on communications with third parties.

[77] Comment 18(d)-1 to 12 C.F.R. § 1006.18.

[78] 12 C.F.R. § 1006.18(e).

[79] *Id.* § 1006.18(e)(4).

[80] *Id.* §§ 1006.38(b), (c).

[81] Comment 38-1 to 12 C.F.R. § 1006.38.

[82] 12 C.F.R. § 1006.42(a).

[83] *Id.* § 1006.42(b).

[84] Proposed rule 12 C.F.R. §1006.18(g).

[85] *Final Rule* at 361.

[86] 12 C.F.R. § 1006.100(a).

[87] *Id.*

[88] Comment 100(a)-1 to 12 C.F.R. § 1006.

[89] Comment 100(a)-4 to 12 C.F.R. § 1006.

[90] Comment 100(a)-3 to 12 C.F.R. § 1006.

[91] 12 C.F.R. § 1006.100(b).

[92] *Id.* § 1006.104.

[93] *Id.*, *see also* 15 U.S.C. § 1692n.

[94] *Id.*

[95] *Id.*

[96] *Final Rule* at 460.

[97] 12 C.F.R. § 1006.108.

[98] *See* Appendix A to 12 C.F.R. § 1006.

[99] *Id.*

[100] *See* 60 Fed. Reg. 66972 (Dec. 27, 1995).

[101] https://www.consumerfinance.gov/policy-compliance/guidance/other-applicable-requirements/debt-collection/