Katten

CORPORATE ADVISORY

The CFPB's Debt Collection Rule: New Industry Requirements Will Assist Debt Collectors in Minimizing Litigation Risk

November 12, 2020

KEY POINTS

- The Consumer Financial Protection Bureau released the first part of final rules on permissible communications in connection with the collection of consumer debt, called the Final Rule.
- This advisory outlines what the Final Rule permits, what it lacks, and how it updates permissible technology-driven collections practices.

On Friday, October 30, the Consumer Financial Protection Bureau (CFPB) released the first part of final rules related to permissible communications in connection with the collection of consumer debt (the Final Rule).[1] The Final Rule reflects significant changes in communications and technology that have occurred since the passage of the Federal Fair Debt Collection Practices Act (FDCPA) in 1977 and provides important guardrails to consumer debt collectors in their efforts to obtain payment on outstanding consumer debts.

Set forth as amendments to Regulation F, the Final Rule is important with respect to what it permits, as well as with respect to what it lacks: namely, the Final Rule does not address model disclosure notices (including debt validation notices), which the CFPB stated will be published in December.

The commentary to the Final Rule makes clear that first party/originating creditors who are not FDCPA debt collectors are not covered by the Final Rule. In promulgating the Final Rule, the CFPB does not rely upon Section 1031 of the Dodd-Frank Act (DFA) (which prohibits unfair, deceptive and abusive acts and practices in connection with the provision of consumer financial products and services). As such, although the Final Rule generally does not extend to first party creditors, it is possible that such creditors could be liable under Section 1031 for their debt collection activities to the extent that such activities were unfair, deceptive or abusive.

The Final Rule is effective one year after publication in the Federal Register.

The Final Rule is 653 pages long and includes new regulations as well as corresponding Official Staff Commentary that provide illustrative hypotheticals and factual scenarios against which debt collectors can measure their policies, procedures, and conduct. Set forth below, we have summarized the highlights of the newest requirements included in Regulation F.

[1] The Final Rule is issued by the CFPB pursuant to its authority under the FDCPA and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Public Law 111-203) (the "DFA"). The CFPB is the first federal agency to have substantive authority to issue rules implementing the FDCPA.

NEW DEFINITIONS

Limited Content Messages (LCMs): Defined as a *telephonic voicemail* left for a consumer with no other content except the prescribed components. LCMs are *not* communications because they do not convey information regarding a debt directly or indirectly to any person.

LCMs are *required* to contain: (1) business name (cannot be a name that indicates business is in the debt collection business); (2) request for consumer to reply to the message; (3) name or names of natural persons whom the consumer can contact; and (4) the business's telephone number. The voicemail *may also contain* the following: (5) a salutation; (6) date and time of message; (7) suggested dates and times to reply; and (8) a statement that the consumer may speak to any of the business's representatives or associates.

> *Example of permitted LCM*: "Hi, this is Robin Smith calling from ABC Inc. It is 4:15 pm on Wednesday, September 1. Please contact me or any of our representatives at 1-800-555-1212 today until 6:00 pm Eastern time, or any weekday from 9 am to 6 pm Eastern time."

Third party messages cannot qualify as LCMs either in live conversations or as voicemail messages. Moreover, as described below, even though the Final Rule permits LCMs, certain state laws may preclude debt collectors from using LCMs. *See* "State Law Preemption" below.

Attempt to Communicate: Defined as "any act to initiate a communication or other contact about a debt with any person through any medium, including by soliciting a response from such person." LCMs are attempts to communicate.

NEW RULES

Communications with Consumers: A debt collectors may not (1) communicate with a consumer[2] at an unusual time[3] or at an unusual place,[4] or (2) communicate with the consumer at a place of employment if the debt collector knows or has reason to know that the employer prohibits such communications.[5]

Consumer states in writing that it will not pay the debt or that the debt collector should cease communication: A debt collector can initiate no further contact except to inform the consumer that (1) the debt collector will cease contact; (2) the debt collector or creditor may invoke specified remedies; or (3) the debt collector or creditor intends to invoke a specific remedy. An electronic notice satisfies the "in writing" requirement if the consumer uses a medium of electronic communication through which a debt collector accepts electronic communications.[6] Notification is deemed complete upon the debt collector's receipt of that information.[7]

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[2] The term "consumer" in this instance includes the consumer's spouse, the consumer's parent, the consumer's legal guardian, or the executor or administrator of the consumer's estate.

[3] For purposes of determining the "time" of an electronic communication (email or text), the electronic communication occurs when the debt collector sends it, not when the consumer receives or reviews it. Before 8 am and after 9 pm local time are, by definition, "inconvenient." If the debt collector has conflicting information on the consumer's location, then, "in the absence of knowledge of circumstances to the contrary, the debt collector is in compliance with the regulations if it attempts communications at times that are convenient to *all* of the locations where the consumer might be located." This means that there can be a narrowed window in which to communicate with a consumer if the debt collector has both Pacific Time and Eastern Time location data for a consumer.

[4] A debt collector should know that a time or place is inconvenient if the consumer uses the word "inconvenient" and in other instances where the consumer has expressed an unwillingness to communicate at a certain time or place. Official Staff Commentary § 6(b)(1). If the consumer initiates a communication with a debt collector at a time or from a place that the consumer previously designated as inconvenient, the debt collector may respond once at that time or place through the same medium of communication used by the consumer. No further communications at that time or place may be initiated until the consumer conveys that the time or place is no longer inconvenient or an exception applies, such as the exception that permits a debt collector to send an automated reply generated in response to a message sent by a consumer at a time that the consumer previously designated as inconvenient.

[5] A debt collector is deemed to know this if the consumer tells the debt collector that personal calls cannot be taken at work. Official Staff Commentary § 6(b)(3).

[6] Official Staff Commentary § 6(c)(1).

[7] Official Staff Commentary § 6(c)(1).

Procedures to avoid liability for prohibited communications with third parties about a consumer's debt (email and text message). A debt collector must ensure that it communicates only with the consumer about the consumer's debt. A debt collector will be able to avoid liability if an otherwise impermissible communication occurs, if it adopts the following procedures to confirm that:

1. *EMAIL*

    a) *Debt collector communications*: the debt collector communicated with the consumer by sending an email to an email address that the consumer has used with the debt collector to communicate about the debt[8] or has the consumer's prior consent, neither of which have been withdrawn by the consumer; OR

    b) *Consumer communications with creditor*: the creditor used the email address that was obtained from the consumer to communicate with the consumer about the account,[9] and such consent was not withdrawn, and the creditor has sent a prescribed notice[10] to the consumer disclosing the transfer of the debt to the debt collector, which includes an ability for the consumer to opt out for 35 days after the date the notice is sent.[11]

    c) *Prior debt collector communication*s: a prior debt collector has obtained an email address in accordance with (a) or (b) above; the immediately prior debt collector used the email address to communicate with the consumer about the debt; and the consumer did not opt out of such communications.

2. *TEXT MESSAGE*

    a) The consumer used the telephone number to communicate with the debt collector about the debt by text, the consumer has not opted out, and within 60 days either (1) the consumer sent a text message or a new text message to the debt collector from that telephone number, or (2) 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; or

    b) The debt collector received directly from the consumer prior consent to use the telephone number to communicate with the consumer about the debt by text message and the consumer has not withdrawn consent and within 60 days either (1) obtained prior consent or renewed consent from the consumer or (2) confirmed 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.

Ability to opt out: A debt collector who communicates or attempts to communicate[12] with a consumer electronically in connection with a debt using a specific email address, telephone number, or other electronic medium must include in each communication or attempt to communicate a clear and conspicuous statement describing a reasonable and simple way to opt out[13] of further electronic communications or attempts to communicate to that email address or telephone number.

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[8] This provision does not apply if the consumer used the telephone number to communicate only by telephone call with the debt collector about the debt. Official Staff Commentary § 6(d)(5)(i).

[9] "Communications about the account" include required disclosures, bills, invoices, periodic statements, payment reminders and payment confirmations and exclude marketing or advertising materials. Official Staff Commentary Section 6(d)(4)(ii)(B).

[10] Other requirements related to this notice include: (1) the email address and the fact that the debt collector might use the email address to communicate with the consumer about the debt; (2) that it is possible that others may see the email if they have access to the email address; (3) instructions for a reasonable and simple method by which the consumer can opt out; (4) the opt out period has expired and the consumer has not exercised his right to opt out; and (5) the email address has a domain name that is available for use by the general public, unless the debt collector knows the address is provided by the consumer's employer.

[11] The notice may instruct the consumer to respond to the debt collector or the creditor but not both. Official Staff Commentary § 6(d)(4)(ii)(C)(5).

[12] An act to initiate a communication or other contact about a debt is an attempt to communicate regardless of whether the attempt is successful. Official Staff Commentary § 2(b). General marketing and advertising directed to groups of consumers or the general public, or personal communications, should not be considered attempts to communicate.

[13] "Reasonable and simple" methods for opting out do *not* include a requirement that a consumer who receives the opt out notice electronically exercise their opt out right by postal mail, telephone, or visiting a website without providing a link. Official Staff Commentary § 6(d)(4)(ii)(C)(4).

Presumption of no harassment/telephone calls: A debt collector is presumed to comply with Regulation F's provisions prohibiting harassment of consumers if (1) there are no more than seven calls made within seven consecutive days with respect to a particular debt, and (2) no calls are made within a period of seven consecutive days after having had a telephone conversation with the person.

Restrictions on certain media: A debt collector (1) cannot communicate or attempt to communicate with a consumer by sending an email to an email address that the debt collector knows is provided to the consumer by the consumer's employer unless an exception applies,[14] or (2) communicate or attempt 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.

State law preemption: State laws are only preempted if they are inconsistent with the CFPB's debt collection regulations. Any state laws that impose *greater* protections for consumers are not to be deemed inconsistent. Practically speaking, this means that any state that imposes certain disclosure requirements on voicemails left by debt collectors that require more or different information from that required of an LCM will not be able to use the LCM in connection with consumer debt collection in that state.

Advisory Opinions: Requests for advisory opinions may be submitted to the CFPB in accordance with the specific procedures set forth in Appendix C to Part 1006, *Issuance of Advisory Opinions*.

[14] See 12 CFR § 1006.6(d)(4)(i) or (ii). A debt collector knows that an email address is provided by the consumer's employer if any person has informed the debt collector that the address is employer provided. It does not require a debt collector to conduct a manual review of consumer accounts to determine whether an email address might be employer provided. Official Staff Commentary § 6(d)(4)(ii)(E).

CONTACTS

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