



THE CFPB RELEASES PART ONE OF THE FINAL DEBT COLLECTION RULE

On October 30th, the Consumer Financial Protection Bureau (“CFPB”) released part one of its final debt collection rule (known as Regulation F, to be codified at 12 C.F.R. Part 1006) under the federal Fair Debt Collection Practices Act (“FDCPA”). Part one focuses on collection communications and related consumer protection provisions and becomes effective one year after the rule is published to the federal register.

The CFPB plans to issue part two of the rule in December 2020. Part two of the rule will focus on disclosure-related provisions, including the validation of debt notice requirement, time-barred debt and the credit reporting limitation in the proposed rule. The CFPB is conducting additional qualitative disclosure testing on the proposed model validation of debt notice. To what extent the forthcoming December 2020 rule will address the validation of debt notice is unclear.

On a high-level, part one of the final rule provides guidance on (i) the use of newer communication technologies in collections and (ii) compliance with existing FDCPA communication provisions. The CFPB did not finalize the provisions in part one of rule exactly as proposed. After receiving comments from various stakeholders, the CFPB made the following significant changes:

- The new concept of a “limited-content message” is limited to voicemails. “Limited-content messages” do not include text messages or oral conversations. The required and optional content of a “limited content message” was revised to (i) include, among other things, the business name of the debt collector, if the name does not indicate that the debt collector is in the debt collection business, and (ii) omit the consumer’s name and that the message relates to an account.
- The CFPB altered the methods to confirm a consumer’s email address and phone number for text messages, in the procedures that are reasonably designed to avoid third party disclosures of debts. A debt collector may follow such procedures to qualify for a safe harbor from civil liability for third party disclosures of debts. The final rule provides more confirmation options for an email address than a phone number.
- While the bright-line call frequency standard was not changed, following the call frequency standard will create only a

presumption that a debt collector did not engage in repeated or continuous telephone calls or conversations, and violating the call frequency standard will create only a presumptive violation of the same. The Official Interpretations to Regulation F identify factors that could rebut these presumptions. For example, if a debt collector placed calls in accordance with the frequency standard but the calls were all made within a few hours on a single day, the specific close call intervals could cause a debt collector to violate Regulation F, even though the debt collector generally followed the call frequency standard. The CFPB also narrowed the type of calls that are exempted from the call frequency count. The CFPB adopted a rebuttable presumption standard instead of a bright-line rule to provide more flexibility and account for various calling scenarios that harm or benefit consumers.

- The CFPB did not finalize the safe harbor for meaningful attorney involvement because no comments supported the safe harbor. The CFPB indicated that it will continue to monitor case law on meaningful attorney involvement and may make a rule in the future to provide clarity.
- The so-called “mini-Miranda” notice (the identification and debt collection purpose disclosure) must appear in the same language or languages as is used in the rest of the communication that includes the disclosure. This translation requirement did not appear in the proposed rule.
- The CFPB adopted only a “knowledge” standard for the prohibition on sending emails to an email address provided by an employer and set forth a few exceptions to the prohibition. The proposed rule included a “show know” standard for the employer-provided email prohibition.
- Instead of adopting prescriptive standards for delivering certain notices required under Regulation F, the CFPB adopted a general disclosure delivery standard and identified relevant factors in Regulation F’s Official Interpretations for whether a debt collector satisfied the standard. Regulation F also requires a debt collector to comply with the E-SIGN Act. The CFPB did not finalize a proposed exception to the E-SIGN Act, which would have expressly allowed a debt collector to rely on the E-SIGN consent that a creditor obtained from a consumer provided that other conditions were satisfied.
- The CFPB clarified its guidance on the prohibition on

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communicating at an inconvenient or unusual time or place. Specifically, the CFPB clarified that a communication must be convenient in all of the locations where a consumer may be located based on a debt collector's information only when the debt collector has no knowledge of the consumer's actual whereabouts or has conflicting or ambiguous information regarding a consumer's location. A debt collector does not have to track a consumer's actual location. The CFPB also recognized that some communication channels like a mobile phone are not associated with a specific place. The CFPB clarified that a debt collector is not prohibited from communicating through such medium unless the debt collector knows that a consumer is at an unusual place.

This is not an exhaustive list of all of the changes made in part one of the final rule.

Another significant change in part one of the final rule is that the rule is no longer based upon the CFPB's authority under Section 1031 of the Dodd-Frank Act to prevent unfair, deceptive or abusive acts or practices ("UDAAP"). The final rule is based on the FDCPA and other laws. In commentary accompanying the rule, the CFPB addressed comments expressing concern that Regulation F may apply directly to creditors and other first party collectors. The CFPB stated that Regulation F applies to debt collectors subject to the FDCPA. The CFPB said that Regulation F is not intended to address whether activities performed by entities that are not subject to the FDCPA may violate other laws like the UDAAP prohibition under the Dodd-Frank Act. The CFPB also declined to clarify whether any particular actions by a creditor or first-party collector, who are not subject to the FDCPA, would constitute a UDAAP.

Regulation F represents the first substantive regulation under the FDCPA since the FDCPA was passed in 1977. Regulation F affects more financial services providers than just debt collectors subject to the FDCPA. Regulation F could impact creditors and first party collectors directly and indirectly. Many creditors have vendor oversight responsibilities and must have an adequate background on the requirements of the FDCPA and Regulation F to oversee any third party collection agencies effectively. A few creditors may themselves be directly subject to the FDCPA and Regulation F based upon their particular activities.

Creditors and first-party collectors are prohibited from engaging in UDAAPs under the Dodd-Frank Act or UDAPs under Section 5 of the Federal Trade Commission Act. Engaging in certain prohibitive collection conduct under Regulation F could be the basis of a UDAP/UDAAP claim.

We can help analyze Regulation F and its affects on third-party and first-party collections, including collection agreements. We will, of course, update our Firm's DEBT COLLECTION DIGEST over the coming months to reflect all parts of Regulation F as they are issued. Feel free to reach out with questions.

✧ *Mike Tomkies and Susan Seaman*