Takeaways From CFPB's Fair Debt Collection Rule Changes

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Years in the making, the Consumer Financial Protection Bureau's final rules amending the Fair Debt Collection Practices Act take effect on Nov. 30. Given President Joe Biden's increased enforcement and monetary penalties for unfair and deceptive acts and practices, are you prepared to ensure your business complies with the new FDCPA requirements?

Who the Amendments Apply to

The CFPB considered amending the definition of a debt collector under the FDCPA — including changing the definition to include an entity seeking to collect its own debt — but ultimately decided to stick to the statutory text and legislative history of the FDCPA.

The CFPB defines a debt collector as:

any person who uses any instrumentality of interstate commerce or mail in any business the principal purpose of which is the collection of debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due, or asserted to be owed or due, to another.[1]

A debt collector can also be a "creditor that, in the process of collecting its own debts, uses any name other than its own that would indicate that a third person is collecting or attempting to collect such debts."[2] The FDCPA still only applies to consumers, expanded to include a person authorized to act on behalf of a deceased consumer's estate.[3]

The Do's and Don'ts of Collecting a Debt

These final rules are the result of the CFPB's efforts since 2013 to clarify and update the provisions of a law enacted in 1977 — before Nintendo or the internet existed.

They outline do's and don'ts regarding harassing, oppressive or abusive conduct; unfair or unconscionable means to collect a debt; communicating about a debt; and other various prohibited practices.

Don't repeatedly call at unusual or inconvenient times and places.

The final rule prohibits calls at a time the debt collector knows is inconvenient, which, absent evidence to the contrary, means calls before 8 a.m. and after 9 p.m. in the consumer's geographic location,[4] or at an unusual or inconvenient place.[5]

What constitutes an unusual place isn't defined, although newer technology, like a cell phone number and email, are not associated with a consumer's place for purposes of this rule. Two exceptions include the permission of the consumer and the express permission of a court of competent jurisdiction.[6]

The final rules also prohibit repeated or continuous phone calls,[7] which are more than seven times within seven consecutive days or within seven days after having a phone conversation with the person in connection with the collection of the debt.[8]

A single call above and beyond this time frame constitutes a rebuttable presumed violation.[9]

Don't make threats or use naughty language.

In case it wasn't obvious, violence or obscene or profane language constitute harassing, oppressive and abusive conduct.[10]

Don't utilize a medium you were told not to use.

The consumer controls the means of communication with a debt collector.

If a consumer tells you not to communicate with him or her through a certain technology, you must respect their wish.[11]

There are certain exceptions: (1) if you can confirm the opt-out request using the same medium; (2) if the consumer contacts you through the medium he or she previously opted out of; or (3) if you are otherwise required by applicable law to communicate using that medium.[12]

Do take advantage of new technology.

The CFPB recognizes that technology and communication methods have evolved and now permits the use of new technology in collecting debts, with limits.

You may now email a consumer, but only if: (1) the consumer used the email address to communicate with you and has since not opted out of communications to the email address; (2) you received prior consent directly from the consumer to use the email address; or (3) a creditor obtained the email address from the consumer and was not asked to stop using it and, prior to its use, the creditor provided some information to the consumer about the account or debt being transferred to the debt collector.[13]

The new rules also prohibit communicating with a consumer at a work email address, absent one of the exceptions above.[14]

Similarly, you may now text message a consumer regarding a debt but only if: (1) the consumer text messaged the debt collector about the debt; (2) there has been no opt-out within 60 days of either sending a text message to the debt collector, or the debt collector has confirmed the phone number has not been reassigned; or (3) the debt collector received prior consent from the consumer.[15]

If you utilize an electronic medium to contact a consumer, you are required to provide opt-out language, which must include "a clear and conspicuous statement describing a reasonable and simple method" to opt out of further electronic communication at that address or telephone number.[16]

Examples include a text message with "Reply STOP to stop texts to this telephone number," or a hyperlink in an email labeled "Click here to opt out of further emails to this email address."[17]

Notably, the CFPB explicitly forbids a debt collector, directly or indirectly, requiring a consumer to pay a fee to opt out.[18]

Consumer voicemails must be limited-content messages,[19] which include the following: (1) the business name of the debt collector; (2) a request that the consumer reply to the message; (3) the name of an individual the consumer can call back; and (4) a telephone number that the consumer can use to reply to the voicemail.[20]

Social media debt collection is not permissible if the communication is visible to the general public or the consumer's social media contacts.[21]

Don't contact a consumer represented by counsel or at work — unless the rules say otherwise.

The FDCPA already prohibited debt collectors from directly contacting consumers it knew were represented by counsel of a known name and address.[22] But there are now two exceptions: (1) if the attorney fails to respond within a reasonable period of time; or (2) if the attorney consents to the debt collector contacting the consumer directly.[23]

The rules do not define a reasonable period of time and the use of the term "reasonable" evidences that this will be a fact- and case-specific inquiry. A good rule of thumb: The longer you can wait, the better.

If the consumer contacts you when you know he has an attorney, you may respond. However, you should not otherwise communicate with the consumer in this situation.[24]

The final rules also prohibit communicating with a consumer at work if you know the employer prohibits such communications.[25] How would a debt collector know this? If the consumer says she cannot take such calls at work, you must honor their wish.[26]

There are two exceptions: (1) prior consent, or (2) the express permission of a court.[27]

Don't contact third parties — but there are exceptions.

The rules prohibit communicating with third parties about the debt.[28]

This does not apply to communications to: (1) the consumer; (2) the consumer's attorney; (3) a consumer reporting agency, if otherwise permitted by law; (4) the creditor; (5) the creditor's attorney; or (6) the debt collector's attorney.[29]

Exceptions include: (1) for the purpose of acquiring location information; (2) with the prior consent of the consumer; (3) with the express permission of a court; or (4) as reasonably necessary to effectuate a post-judgment judicial remedy.[30]

Don't file suit on time-barred debt.

This might seem obvious, and while some courts have held that filing suit on a time-barred debt violated the FDCPA, Title 12 of the Code of Federal Regulations, Section 1006.26(b), explicitly prohibits a debt collector from bringing or threatening legal action against a consumer to collect a time-barred debt.

This is a strict liability statute, so if you file suit on a time-barred debt, whether you knew it was time-barred or not will not matter for purposes of liability.

Many commentators asked the CFPB to go further and prohibit any type of collection activities surrounding a time-barred debt. However, the CFPB refused to go that far, noting that "a debt is not extinguished when the statute of limitations expires. Rather, in these jurisdictions, a debt collector still may collect the debt using nonlitigation means, such as telephone calls and letters."

Check and confirm the applicable statute of limitations before filing suit. If the statute of limitations has passed or there is a serious question about timing, it is to attempt collection through nonjudicial means.

Feel free to furnish information to a consumer reporting agency.

The rules permit passive debt collection, i.e., furnishing information to a credit reporting agency.

However, in order to engage in such passive activity, a debt collector must either first speak to the consumer about the debt in person or by telephone, or send a writing about the debt and wait a reasonable period of time — 14 days, according to the comments — to receive a notice of undeliverability.[31]

Note, a debt collector only has to undertake these efforts one time.

What happens if you wait the 14 days, hear nothing and furnish information, only to belatedly receive a notice of undeliverability? Fortunately, this does not constitute a violation.[32]

Take advantage of the safe harbor provisions.

The final rules carve out various safe harbor provisions that a debt collector can and should utilize. For example, Title 12 of the Code of Federal Regulations, Section 1006.34, outlines the validation information a debt collector must provide to a consumer shortly after its initial communication about the debt.

The rules provide a model form a debt collector can use that includes the validation information. The use of the model form, or a substantially similar one, affords debt collectors a safe harbor against claims surrounding the sufficiency of the validation information.[33] Note, this safe harbor does not provide cover for a debt collector alleged to have engaged in harassing, abusive or oppressive conduct.

The new rules also provide a bonafide error defense related to email or text messages that might otherwise violate the FDCPA.

Specifically, a debt collector has a defense to an FDCPA violation of communicating with a prohibited third party via text or email if it maintains reasonable procedures and includes steps to reasonably confirm and document that the debt collector: (1) communicated with the email address provided by the consumer or text message, and (2) did not communicate with the consumer by sending an email to an email address or a text message to a telephone number that it knows has led to a disclosure prohibited by Title 12 of the Code of Federal Regulations, Section 1006.6(d)(1).[34]

Conclusion

The Final Rules provide clarity for debt collectors and update the use of new technologies when collecting a debt. Finally, the Final Rules provide various safe harbor provisions that a debt collector can take advantage of when collecting debts.

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[1] 12 C.F.R. § 1006.2(i).

[2] Id.

[3] See comments to 12 C.F.R. §§ 1006.34(a)(1) and 1006.38.

[4] 12 C.F.R. § 1006.6(b)(1).

[5] 12 C.F.R. § 1006.6(b)(ii).

[6] 12 C.F.R. § 1006.6(b)(4).

[7] Not all calls count towards this "repeated or continuous phone calls" prohibition. Specifically, calls that are placed with the consumer's prior consent, the debt collector fails to connect with dialed phone number, or calls placed with consumer's attorney, creditor's attorney, or consumer reporting agency, are exempt. 12 C.F.R. § 1006.14(3)(i), (ii), (iii).

[8] 12 C.F.R. § 1006.14(b)(2)(i)(A), (B).

[9] 12 C.F.R. § 1006.14(b)(2)(ii).

[10] 12 C.F.R. § 1006.14(c), (d).

[11] 12 C.F.R. § 1006.14(h).

[12] 12 C.F.R. § 1006.14(h)(2)(i), (ii), (iii).

[13] 12 C.F.R. § 1006.6(d)(4).

[14] See 12 C.F.R. § 1006.22(f)(33).

[15] 12 C.F.R. § 1006.6(d)(5).

[16] 12 C.F.R. § 1006.6(e).

[17] See Comment 1(i), (ii).

[18] Id.

[19] 12 C.F.R. § 1006.6(j).

[20] 12 C.F.R. § 1006.6(j)(1)(i)-(iv).

[21] 12 C.F.R. § 1006.22(f)(4).

[22] 12 C.F.R. § 1006.6(b)(2).

[23] 12 C.F.R. § 1006.(b)(2)(i), (ii).

[24] Comment 1 to 12 C.F.R. § 1006.(b)(2).

[25] 12 C.F.R. § 1006.6(b)(3).

[26] See Comment 1 to 12 C.F.R. § 1006.6(b)(3).

[27] 12 C.F.R. § 1006.6(b)(4).

[28] See 12 C.F.R. § 1006.6(d)(1).

[29] 12 C.F.R. § 1006.6(d)(i)-(vi).

[30] 12 C.F.R. § 1006.6(d)(2).

[31] 12 C.F.R. § 1006.30(a)(1).

[32] Comment, 3, 12 C.F.R. § 1006.30(a)(1).

[33] 12 C.F.R. § 1006.34(d)(2).

[34] See 12 C.F.R. § 1006.6(d)(3)(i), (ii).

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