

FINALLY! CFPB Issues Groundbreaking Final Rule Implementing the FDCPA

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The Consumer Financial Protection Bureau (“CFPB”) issued last week a final rule to implement the Fair Debt Collection Practices Act (“FDCPA”), in a sea change for consumer privacy and debt collection. 12 CFR Part 1006 *et seq.* The Final Rule is the most significant development affecting the debt collection industry since the FDCPA came into law 43 years ago.

The FDCPA was enacted in 1977. It prohibits harassing and abusive and unfair debt collection practices as well as false and misleading representations by debt collectors. Since the FDCPA’s passage, the debt collection industry in the United States has rapidly expanded, generating billions in revenue each year and spawning more than 8,000 debt collection firms.

The Final Rule, which reflects a seven-year rule-making process, provides clear consumer rights and limitations for debt collectors on using modern technologies to communicate with each other. The CFPB Director Kathleen L. Kraninger hailed this accomplishment as addressing technological developments following the FDCPA’s passage and providing “clear consumer rights and limitations for debt collectors on using modern technologies to communicate with each other.” <https://www.consumerfinance.gov/about-us/blog/cfpbs-clear-rules-road-debt-collector-communications-lead-stronger-consumer-rights/>.

The Final Rule is extremely complex, spanning 653 pages. It takes effect one year after its date of publication in the Federal Register. CPW will be providing a two-part analysis of this monumental development, with Part 1 providing a general overview of the Final Rule and discussing important provisions regarding debt collection communications. Part 2 will provide an overview of certain safe harbor provisions and other consumer disclosures. Read on to learn more.

Preliminary Matters

Is the Final Rule the CFPB’s Last Say on the FDCPA This Year?

No. Notably, the CFPB also announced it intends to issue a disclosure-focused final rule in December 2020 – stay tuned for additional information from CPW on this important topic.

Does The Final Rule Assume Consumers Are Sophisticated Parties?

No. The Final Rule notes its incorporation of an “**unsophisticated**” consumer standard. This is an adoption of prior federal court rulings reasoning that the FDCPA’s prohibition on false, deceptive, or misleading representations incorporates an objective, “unsophisticated” consumer standard that “protects the consumer who is uninformed, naive, or trusting” (although it purportedly contains a so-called objective element of reasonableness).

Does the Final Rule Apply to First Party Debt Collectors?

No. The Final Rule does not apply to first-party debt collectors, as was requested by some commenters. The CFPB explicitly noted its rejection of this proposed approach in the Final Rule.

Do Debt Collectors Only Need to Comply with FDCPA?

Nope. The Final Rule does not address whether activities performed by entities that are not subject to the FDCPA may violate other laws, including ones prohibiting unfair, deceptive, or abusive practices. To put it simply, just because a certain consumer practice is permissible under the Final Rule, that does not mean it passes muster under other federal and state consumer protection laws.

Does the Final Rule Clarify What Messages Are “Communications” Under the FDCPA?

Sort of. The Final Rule introduces a new term within the context of the FDCPA – a “**limited-content message**.” If a message meets this definition, then it is not a “communication” under the FDCPA.

What is a limited content message? The Final Rule defines it as voicemail messages that are left for a debtor and regulates what content may and may not be included in the voicemail. Required content for a voicemail to fall under the exemption for “limited-content message” are:

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 natural persons whom the consumer can contact to reply to the debt collector; and
4. A telephone number or numbers that the consumer can use to reply to the debt collector.

Additional content that may be included in a limited content message include one or more of the following:

1. A salutation;
2. The date and time of the message;
3. Suggested dates and times for the consumer to reply to the message; and
4. A statement that if the consumer replies, the consumer may speak to any of the company’s representatives or associates. (1006.2(j))

Overview of Communications Requirements

For debt collection communications, the Final Rule focuses on two areas: (1) clarifications regarding a variety of debt collection communications between debt collectors and consumers and (2) consumer control over the means by which debt collectors can initiate contact with them regarding debts. These changes were intended to address concerns that debt collection communications could constitute harassing, abusive or otherwise oppressive conduct.

Does the Final Rule Have Time and Place Communication Restrictions? (§ 1006.6(b))

Yes. The Final Rule clarifies restrictions on the times and places at which a debt collector may communicate with a consumer, including by clarifying that a consumer need **not** use specific words to assert that a time or place is inconvenient for debt collection communications.

Except as otherwise provided a debt collector **may not** communicate or attempt to communicate with a consumer in connection with the collection of any debt:

1. At any unusual time, or at a time that the debt collector **knows or should know** is inconvenient to the consumer (in the absence of knowledge of circumstances 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 under the Final Rule).
2. Under circumstances when the debt collector knows the consumer is represented by an attorney with respect to such debt and knows, or can readily ascertain, the attorney's name and address, absent certain exceptions.
3. Under circumstances when debt collector **knows or has reason to know** that the consumer's employer prohibits the consumer from receiving such communication.

These restrictions do not apply if a consumer has given prior consent "directly to the debt collector during a communication that does not violate [the Final Rule]" or alternatively if the communication is made upon the express consent of a court of competent jurisdiction.

Does the Final Rule Have Third Party Communication Prohibitions? (§ 1006.6(d))

Yes. The Final Rule also prohibits certain third party communications. Specifically, a debt collector must **not** communicate, in connection with the collection of any debt, with any person other than:

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.

There are certain exceptions to these prohibitions however, including: (i) for the purpose of acquiring location information, as provided in § 1006.10; (ii) with the prior consent of the consumer given directly to the debt collector; (iii) with the express permission of a court of competent jurisdiction; or (iv) as ***reasonably necessary*** to effectuate a post-judgment judicial remedy.

The Final Rule additionally imposes a requirement of reasonable procedures for email and text communications to avoid a bona fide error in sending an email or text communication to a third party that would violate this subsection.

Does the Final Rule Regulate Communications Regarding Location Information? (§ 1006.10)

Yes. The Final Rule defines "***location information***" as a consumer's: (i) place of abode and telephone number at such place; or (ii) place of employment. A debt collector communicating with a person ***other than the consumer*** for the purpose of acquiring location information must:

1. Identify himself or herself individually by name, state that he or she is confirming or correcting the consumer's location information, and, only if expressly requested, identify his or her employer;
2. Not state that the consumer owes any debt;
3. Not communicate by postcard;
4. Not use any language or symbol on any envelope or in the contents of any communication by mail indicating that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and
5. After the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond to the debt collector's communication within a reasonable period of time.

Moreover, absent certain circumstances set forth in the Final Rule, a debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer must not communicate ***more than once with such person***.

Does the Final Rule Restrict Debt Collector Telephone Calls to Consumers? (§ 1006.14)

Yes. The Final Rule provides that a debt collector must not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.

This includes certain presumptions adopted for telephone calls. Under the Final Rule, a debt collector is presumed to violate the FDCPA if the debt collector places a telephone call to a person ***more than seven times within a seven-day period or within seven days after engaging***

in a telephone conversation with the person. By contrast, a debt collector is presumed to comply with that prohibition if the debt collector does not exceed the telephone call frequencies. There are three exceptions:

1. Telephone calls placed with such person's prior consent given directly to the debt collector and within a period no longer than seven consecutive days after receiving the prior consent;
2. Telephone calls that do not connect to the dialed number; and
3. Calls placed to certain professional persons.

While these restrictions apply on a per debt basis, a composite approach is taken in regards to student loans (all student loan debts that a consumer owes or allegedly owes that were serviced under a single account number at the time the debts were obtained by a debt collector).

Does the Final Rule Contain Other Restrictions on Debt Collector Telephone Calls to Consumers? (§ 1006.14)

Yes. Additionally, the Final Rule also includes other prohibitions regarding communications involving harassment, oppression or abusive conduct. This includes:

1. Use or threats of violence or other criminal means to harm "the physical person, reputation, or property of any person";
2. Use of obscene or profane language;
3. Publication of a "debtors list" of a list of consumers who allegedly refuse to pay debts (except as permitted under the FCRA); and
4. Coercive advertisements, whereby a debt collector advertises for sale any debt to coerce payment of the debt.

Does the Final Rule Have Other Restrictions on Electronic Communications?

Yes. The Final Rule explains that newer communication technologies, such as emails and text messages, may be used in debt collection within certain limits.

1. **Opt-Out Option:** The Final Rule provides that a debt collector who communicates or attempts to communicate with a consumer electronically in connection with the collection of a debt by email, telephone or mail must include (or attempt to communicate) an opt-out option. (1006.6(e)). In connection with the opt-out the debt collector may not require, directly or indirectly, that the consumer, in order to opt out or pay any fee to the debt collector.
2. **Ordinarily Use of Work Email Prohibited:** The Final Rule provides that a debt collector may ordinarily not 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, subject to certain exceptions. (1006.22(f)(3)).

3. **Social Media Platforms:** Additionally, a debtor collector may not 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 or the person's social media contacts. (1006.22(f)(4)).

Conclusion

The significance of the Final Rule on the debt collection industry and consumers cannot be understated. Other updates to be discussed in the forthcoming Part 2 CPW post on the Final Rule are just as important. Depending on the results of the November election, Congress may consider additional legislative enactments measures in regards to consumer debt. And even in the absence of additional legislative action in the short term, the CFPB will issue additional FDCPA regulations in December that will have an additional impact on the debt collection industry. CPW will be there to cover these developments as they occur.

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National Law Review, Volume X, Number 309

Source URL: <https://natlawreview.com/article/finally-cfpb-issues-groundbreaking-final-rule-implementing-fdcpa>