

October 30, 2020

Executive Summary of the October 2020 Debt Collection Final Rule

On October 30, 2020, the Consumer Financial Protection Bureau (Bureau) issued a final rule (Debt Collection Rule or Rule) implementing the Fair Debt Collection Practices Act (FDCPA).¹ The Debt Collection Rule is available at <https://www.consumerfinance.gov/rules-policy/final-rules/debt-collection-practices-regulation-f/>. The Debt Collection Rule will become effective one year after publication in the Federal Register.

Background

In 1977, Congress passed the FDCPA to: eliminate abusive debt collection practices by debt collectors; ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged; and promote consistent action to protect consumers against debt collection abuses.

In 2019, the Bureau issued a notice of proposed rulemaking (2019 Proposal) to amend Regulation F, which implements the FDCPA, to prescribe Federal rules governing the activities of debt collectors. In the 2019 Proposal, the Bureau proposed to, among other things, address

This is a Compliance Aid issued by the Consumer Financial Protection Bureau. The Bureau published a Policy Statement on Compliance Aids, available at <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/policy-statement-compliance-aids/>, that explains the Bureau's approach to Compliance Aids.

¹ The Bureau is not relying on its Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) authority under the Dodd-Frank Act for any portion of the October 2020 Debt Collection Rule.

communications in connection with debt collection; interpret and apply prohibitions on harassment or abuse, false or misleading representations, and unfair practices in debt collection; and clarify requirements for certain consumer-facing debt collection disclosures.

On March 3, 2020, the Bureau published a supplemental notice of proposed rulemaking (2020 Supplemental Proposal). If finalized as proposed, the 2020 Supplemental Proposal would require debt collectors to make certain disclosures when collecting debts for which the applicable statute of limitations has expired, known as time-barred debts.

This summary discusses the Debt Collection Rule issued on October 30, 2020. The Debt Collection Rule finalizes, as proposed or with modifications, most topics addressed in the 2019 Proposal. The Bureau intends to issue a subsequent disclosure-focused final rule in December 2020 regarding certain provisions of the 2019 Proposal as well as the disclosures proposed in the 2020 Supplemental Proposal.

Coverage and Definitions

The Debt Collection Rule implements and clarifies the FDCPA's definitions of "debt collector" and "debt." The Rule applies to "debt collectors" and "debts" as those terms are defined in the FDCPA and the Rule.

The Rule also applies to debt collector "communication" with consumers. The Rule clarifies that the FDCPA's definition of communication includes newer electronic media, such as email, text messaging, and social media.

Attempt to communicate

The Debt Collection Rule includes the term "attempt to communicate," and defines it as any act to initiate a communication or other contact about a debt with any person through any medium. An attempt to communicate includes an act to initiate a communication, or to solicit a response from a person, that is not successful (for example, a debt collector calls a consumer, but the consumer does not answer the phone). A limited-content voicemail message, discussed below, is an attempt to communicate under the Rule.

Limited-Content Message

A "limited-content message" is defined under the Rule as a *voicemail* message for a consumer that includes: (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. A limited-content message also may include: (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. An example of a limited-content voicemail message is: "This is Robin Smith calling from ABC Inc. Please contact me or Jim Johnson at 1-800-555-1212."

A limited-content message may only include the required and optional information above. Because a limited-content message must be "for a consumer," a message knowingly left for a third party is not a limited-content message.

Communications in connection with debt collection

The Debt Collection Rule generally restates the FDCPA's prohibitions on certain communications with a consumer,² including the prohibition on communications: at unusual times or places; at times or places that a debt collector knows or should know are inconvenient to the consumer; at the consumer's place of employment if a debt collector knows or has reason to know that the employer prohibits such communications; and if a debt collector knows the consumer is represented by an attorney. The Rule also prohibits attempts to communicate under these circumstances.

With respect to the FDCPA's prohibition on communicating or attempting to communicate with a consumer at an unusual or inconvenient time or place, the Rule clarifies that a consumer does not need to use the word "inconvenient" to designate a time or place as inconvenient, and that a debt collector may ask follow-up questions to clarify a consumer's requested designations. The Rule clarifies that calls to mobile telephones and electronic communications, such as email or text messages, are subject to the prohibition on communicating or attempting to communicate with a consumer at an unusual or inconvenient time or place. The Rule further clarifies that a debt collector does not violate the Rule regarding unusual or inconvenient places by calling a consumer's mobile telephone or sending an electronic communication, unless the debt collector knows the consumer is at an unusual or inconvenient place.

² The Rule interprets the definition of consumer in FDCPA section 805(d) for certain communications provisions to include personal representatives of a deceased consumer's estate, surviving spouses, parents of deceased minors, and confirmed successors in interest.

The Rule prohibits a debt collector from communicating or attempting to communicate with a person through a specific medium of communication (for example, email or telephone calls) if the person has requested that the debt collector not use that medium. The Rule also generally prohibits a debt collector from communicating or attempting to communicate with a consumer using an email address that the debt collector knows or should know is provided to the consumer by the consumer's employer.

The Rule generally restates the FDCPA's requirement that a debt collector cease communicating with a consumer regarding a debt after the consumer notifies a debt collector in writing that the consumer refuses to pay that debt. The Rule also provides that a consumer may submit a written cease communication request using an electronic communication medium, such as email or through a website portal where the debt collector accepts electronic communications from consumers.

The Rule generally restates and clarifies the FDCPA's prohibition on communications with third parties about a consumer's debt and restates the FDCPA's limitations and requirements on communications to acquire location information. With regard to acquiring a consumer's location information, the Rule clarifies how debt collectors can locate the executor, administrator, or personal representative of a deceased consumer's estate.

Opt-out of electronic communications

The Debt Collection Rule requires a debt collector who communicates or attempts to communicate electronically with a consumer to include in each communication or attempt to communicate a reasonable and simple method that the consumer can use to opt out of additional communications and attempts to communicate (for example, "Reply STOP to stop texts to this telephone number"). This requirement applies to a specific email address, telephone number, or other electronic-medium address (such as a social media name or account). If a consumer opts out of receiving electronic communications from a debt collector, a debt collector may respond once, confirming the consumer's request to opt out and stating that the debt collector will honor it.

Bona fide error defense when communicating by email or text message

The Debt Collection Rule establishes procedures debt collectors can follow to raise a bona fide error defense to civil liability for unintentional violations of the Rule's prohibition against third-party disclosures. The Rule has separate procedures for email messages and text messages.

When using *email*, a debt collector may raise a bona fide error defense if it maintains procedures to reasonably confirm and document that it did not communicate with the consumer by sending

an email to an email address that the debt collector knows has led to a prohibited third-party disclosure and communicated with the consumer by email using one of the methods below.

- *Direct communication with the consumer.* The email address is one that the consumer used to communicate with the debt collector about the debt and the consumer has not since opted out of communications to that email address, or the email address is one for which the debt collector previously received the consumer's consent to use and the consumer has not since withdrawn consent.
- *Creditor communication with the consumer.* All of the following criteria must be met in order to use an email address based on communications by the creditor: (1) the creditor obtained the email address from the consumer; (2) the creditor used the email address to communicate with the consumer about the account and the consumer did not ask the creditor to stop using it; (3) before the debt collector used the email address to communicate with the consumer about the debt, the creditor sent the consumer a written or electronic notice that clearly and conspicuously disclosed the information required under the Rule (including the right to opt out of email communications); (4) the opt-out period has expired and the consumer has not opted out; and (5) the email address has a domain name that is available for use by the general public (e.g., @gmail.com), unless the debt collector knows the address is provided by the consumer's employer.
- *Prior debt collector communication with the consumer.* All of the following criteria must be met in order to use an email based on communication by the prior debt collector: (1) any prior debt collector obtained the email address from the consumer in accordance with either of the two procedures described above; (2) the immediately prior debt collector used the email address to communicate with the consumer about the debt; and (3) the consumer did not opt out of such communications.

When using *text messaging*, a debt collector may raise a bona fide error defense if it maintains procedures to reasonably confirm and document that it: did not communicate with the consumer by sending a text message to a telephone number that the debt collector knows has led to a prohibited third-party disclosure; and communicated with the consumer by text message using a telephone number that:

- (1) The consumer used to communicate about the debt with the debt collector by text message, as long as the consumer has not since opted out; and (2) in the past 60 days, the

consumer used to send a text message to the debt collector or the debt collector confirmed had not been reassigned from the consumer to another user;³ or

- (1) The consumer gave consent to use, as long as the consumer has not since withdrawn that consent; and (2) in the past 60 days, the consumer provided or renewed their consent to use or the debt collector confirmed had not been reassigned from the consumer to another user.

Harassing, oppressive, or abusive conduct

The FDCPA prohibits conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. The Rule clarifies that this prohibition applies to telephone calls as well as other communication media, such as email and text messages. For example, if a debt collector sends a consumer numerous, unsolicited text messages per day for several consecutive days, the debt collector may violate the prohibition. The Rule also clarifies that all of a debt collector's conduct, taken together, is considered in determining whether the debt collector's conduct violates the prohibition on harassing, oppressive, or abusive conduct even if, individually, the conduct would not have violated the prohibition.

Telephone call frequency rebuttable presumption

The Rule restates the FDCPA's specific prohibition against causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. The Rule clarifies that this provision applies to a telephone call that goes directly to voicemail (*i.e.*, a ringless voicemail) but does not apply to sending an electronic message (*e.g.*, a text message or an email). The Rule also creates a rebuttable presumption of compliance with, and of a violation of, this prohibition based on telephone call frequency, as follows:

- A debt collector is presumed to *comply* with the prohibition if the debt collector places telephone calls to a particular person in connection with the collection of a particular debt⁴

³ The Rule requires the use of a complete and accurate database to confirm that the telephone number has not been reassigned from the consumer to another user.

⁴ The Rule defines *particular debt* to mean each of a consumer's debts in collection. However, in the case of student loan debts, the term particular debt means 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.

seven or fewer times within seven consecutive days *and* not within seven consecutive days⁵ after having had a telephone conversation about the debt.

- A debt collector is presumed to *violate* the prohibition if the debt collector places telephone calls to a particular person in connection with the collection of a particular debt more than seven times within seven consecutive days *or* within seven consecutive days of having had a telephone conversation about the debt.

The Rule identifies certain telephone calls that do not count toward these telephone call frequencies, including: calls placed with the consumer's prior consent, calls not connected to the dialed number, and calls placed to certain professionals.

The Rule includes the following non-exhaustive list of factors that may *rebut* the presumption of *compliance*:

- The frequency and pattern of telephone calls the debt collector places to a person, (for example, rapid succession calling);
- The frequency and pattern of voicemails that the debt collector leaves for a person;
- The content of a person's prior communications with the debt collector (for example, a prior communication that the person did not want to be contacted again about the debt); and
- The debt collector's conduct in prior communications or attempts to communicate with the person (for example, if a debt collector previously used obscene language).

The Rule includes the following non-exhaustive list of factors that may rebut the presumption of *a violation*:

- Whether a debt collector placed a telephone call to comply with applicable law;
- Whether a telephone call was directly related to active litigation involving the collection of a particular debt;

⁵ The date of the telephone conversation is the first day of the seven-consecutive-day period for both the presumption of compliance and the presumption of a violation.

- Whether a debt collector placed a telephone call in response to a consumer's request for additional information (when the exclusion for telephone calls made with the consumer's prior consent given directly to the debt collector does not apply); and
- Whether a debt collector placed a telephone call to convey information giving the consumer an opportunity to avoid a demonstrably negative effect, where the negative effect is outside the debt collector's control, and where time is of the essence.

For each list of non-exhaustive factors that may rebut the presumption of compliance or a violation above, the factors may be considered either individually, in combination with one another, or with other factors not listed.

False, deceptive, or misleading representations or means and unfair or unconscionable means

The Debt Collection Rule generally restates the FDCPA's prohibitions regarding the use of false, deceptive, or misleading representations or means and unfair or unconscionable means in connection with the collection of any debt. The Rule clarifies how debt collectors can use an assumed name without violating these prohibitions.

Use of social media

The Debt Collection Rule clarifies how the FDCPA's prohibitions regarding the use of false, deceptive, or misleading representations or means apply to a debt collector's use of social media to communicate with a consumer or to obtain location information. Under the Rule, a debt collector must not post a message regarding the collection of a debt on the public part of a person's social media page, including the part that is viewable only by the person's social media contacts. A debt collector may send a private message over social media unless, for example, the consumer has requested that the debt collector not use that medium to communicate. If a debt collector chooses to send a private social media message requesting to be added as one of the consumer's contacts, a debt collector must disclose his or her identity as a debt collector. The Rule also clarifies that a debt collector violates the FDCPA and the Rule by communicating with the wrong person through a private message.

Other prohibited practices

The Debt Collection Rule generally restates the FDCPA's requirements regarding: the application of payments across multiple debts collected by the same debt collector; where a debt collector may

file lawsuits against consumers: and the FDCPA's prohibitions on furnishing certain deceptive forms.

Ban on certain debt transfers

The Debt Collection Rule generally prohibits a debt collector from selling, transferring for consideration, or placing a debt for collection if a debt collector knows or should know that the debt has been paid or settled, or discharged in bankruptcy. The Rule provides exceptions to this general ban for: (1) transfers to the debt's owner or to a previous owner (if authorized under the original contract between the debt collector and the previous owner); (2) transfers as a result of a merger, acquisition, purchase and assumption transaction, or a transfer of substantially all the debt collector's assets; (3) sales, transfers, or placements of secured debt discharged in bankruptcy if certain conditions in the Rule are met; and (4) securitization of debt or pledging of a portfolio of debt as collateral.

Disputes

Generally, the Debt Collection Rule restates the FDCPA's requirement that a debt collector must cease collection of a debt, or any disputed portion of a debt, when a debt collector receives a written dispute. A debt collector may not resume collection of that debt until the debt collector responds to the consumer's dispute in writing or electronically. If the consumer has submitted a dispute, a debt collector must provide a verification of the debt or of a judgment to the consumer. If a debt collector determines that the consumer's dispute is duplicative of an earlier dispute, as defined in the Rule, a debt collector must either: (1) provide the consumer with a brief statement of the reasons for the determination and refer the consumer to the debt collector's response to the earlier dispute; or (2) send a verification of the debt or of a judgment to the consumer.

Disclosures

The FDCPA requires that debt collectors provide consumers with certain oral and written disclosures throughout the course of their debt collection activities. The Rule generally restates the FDCPA's requirement that a debt collector must disclose in their initial, and in each subsequent communication with the consumer, that the communication is from a debt collector (*i.e.*, the "mini-Miranda" disclosure). The Rule requires a debt collector to make these disclosures in the same language, or languages, used for the rest of the communication in which the disclosures are conveyed.

The Debt Collection Rule clarifies that all required disclosures must be sent in a manner that is reasonably expected to provide actual notice and required written disclosures must be sent in a form that the consumer may keep and access later. To meet the general standard when sending required written disclosures (*e.g.*, the validation notice described in FDCPA section 809—if that notice is not in the initial communication, responses to consumer requests for original-creditor information, and responses to consumer disputes of debts) electronically, a debt collector must send the disclosures in accordance with the Electronic Signatures in Global and National Commerce Act (E-SIGN Act)'s consumer-consent requirements.

The Rule creates a safe harbor for sending required disclosures if the debt collector mails a printed copy of the disclosure to the consumer's last known address. This safe harbor applies unless the debt collector, at the time of mailing, knows or should know that the consumer does not currently reside at, or receive mail in, that location.

Record retention

The Debt Collection Rule requires retention of evidence of compliance or noncompliance with the Rule starting on the date that the debt collector begins collection activity on a debt until three years after the debt collector's last collection activity on the debt. If a debt collector chooses to record telephone calls, a debt collector must retain those recordings for three years after the date of the telephone call.

Additional resources and implementation support

Other implementation resources and updates on future debt collection rulemakings are available at <https://www.consumerfinance.gov/policy-compliance/guidance/other-applicable-requirements/debt-collection/>.