



COMPLIANCE CHALLENGES

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CFPB Proposes Rule for Debt Collectors Under Fair Debt Collection Practices Act



By Kris Kully

While the pace of mortgage regulations has slowed, the Consumer Financial Protection Bureau (CFPB) has turned its sights on an industry about which it receives the bulk of its consumer complaints—debt collection.

The CFPB recently issued a proposed rule that would, for the first time, provide guidance on certain requirements and prohibitions under the federal Fair Debt Collection Practices Act (FDCPA).

The FDCPA applies to third-party debt collectors, which are companies that collect debts owed to another. It does not directly apply to, for instance, a credit union servicing its own mortgage loans (or other loans or credit card accounts), or even to a person servicing loans on behalf of another, if those loans were not in default when the person began servicing them.

RULES INDIRECTLY AFFECT CREDIT UNIONS

While the FDCPA and the CFPB's current rulemaking may not directly apply to many credit unions, they should still pay attention. Federal and state regu-

lators often follow the FDCPA when scrutinizing all servicing and collection activities.

Also, when credit unions engage third-party debt collectors, the credit unions will want to ensure the collectors understand how to treat members fairly in accordance with the law.

Debt collection is largely about communication, and the FDCPA addresses communications not just with debtors themselves, but with other persons.

For instance, collectors must disclose, in the initial communication with the consumer, that it is attempting to collect a debt, and must subsequently identify itself as a debt collector. How-

ever, a collector also is generally prohibited from communicating about the debt with any person other than the consumer (with the exception of, for example, the consumer's attorney).

Those guardrails can lead to a conundrum—if a collector calls and gets the consumer's voice mail, the collector cannot leave a message without identifying itself, but upon doing so is at risk that a third party may overhear. Courts and regulators have addressed this problem in differing ways, making compliance difficult. Debt collectors often decide not to leave a message, but must then resort to repeated call attempts to establish contact.

'LIMITED CONTENT MESSAGE' PROPOSED

To resolve this problem, the CFPB proposed a "limited content message" that collectors may safely leave. The collector could leave a message that consists of the consumer's name, a request that the consumer reply to the message, the name of a natural person for the

consumer to contact, and a telephone number (other than a “vanity” number that may identify the collector).

If the collector is communicating electronically, it also would have to provide a way for the consumer to opt out of further communication attempts. The collector also may include a generic statement that the message relates to an account, and suggested dates/times for the consumer to reply. This limited content message may alleviate compliance uncertainty, as well as unnecessary call attempts.

The FDCPA also prohibits communications at any unusual time or place, or at the consumer’s place of employment if the debt collector has reason to know that the employer prohibits those communications.

These time-and-place restrictions were arguably more manageable when calling land lines. Consumers today may prefer, and be more likely to respond to, communications via cell phones, email, or text messages. However, when calling a cell phone, collectors cannot always be sure that the number has not been reassigned or where the consumer is located. It also is not always immediately clear whether an email is going to a consumer’s work account.

PROPOSAL OFFERS SAFE PRACTICES

The CFPB’s proposed rule would offer some safe practices. If the collector maintains procedures for using an email address, or a telephone number for text messages, that the consumer recently used to contact the collector, the collector would have a valid defense against a claim of improper third-party disclosure.

Similarly, the collector may be protected against an improper disclosure claim if it clearly notifies the consumer that it might use an email address or telephone number, and provides the consumer a reasonable opportunity to opt out.

The proposed rule also would permit

a debt collector to communicate with the consumer at a time that would be convenient in all of the locations at which the collector’s information indicates the consumer might be located. For instance, if the collector’s information indicates that the consumer lives in the Eastern time zone, but has a cell phone area code from the Pacific time zone, the debt collector must attempt to communicate at a time that is not unusual in either time zone.

In the proposed rule’s attempts to address current communication methods, it would draw the line at social media. The proposed rule would generally prohibit a collector from communicating about a debt by a social media platform that is viewable by a person other than the consumer.



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The CFPB reportedly believes that resorting to social media viewable by others, when other communication methods are available, is likely intended to harass or embarrass debtors. However, the proposed rule seeks comments on possible non-harassing purposes for communicating using public-facing social media (such as for limited content messages).

OTHER PROVISIONS OF PROPOSAL

The proposed rule also would clarify how many calls is too many. The CFPB would prohibit a collector from placing a call to a person in connection with a particular debt (a) more than seven times within seven consecutive days, or (b) within a period of seven consecutive days after having had a telephone conversation with the person in connection with the debt.

The CFPB also proposes to prohibit a collector from bringing or threatening a legal action if it knows or should know



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the debt is time-barred.

States generally impose a deadline for bringing an action to enforce a debt (often called a statute of limitations), although the deadline does not extinguish the debt itself. Courts and regulators have often held that it is unfair or deceptive for collectors to sue or threaten to sue on stale debts.

While the proposed rule would prohibit a collector from suing on debts it knows or should know are stale, it would not prohibit the collector from pursuing other collection efforts on those debts.

Many welcome the proposal’s guidance. However, consumer groups are concerned that while the proposal limits phone calls, it would not prohibit collectors from sending a barrage of emails and texts. The rule would,

however, provide consumers an opt-out right, and the FDCPA still prohibits collectors from harassing consumers.

The proposal contains many other detailed provisions, and may change in response to public comments, which are due by August 19, 2019. The CFPB proposes to make the new requirements effective one year after a final rule is published.

Notwithstanding the controversies, clearer guidance will be helpful in promoting compliance by debt collectors while seeking to protect consumers from unfair harassment. ▲

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