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A Paradigm Shift in Consumer Collections: How the CFPB's Final Rule is Certain to Affect Creditors and Debt Collectors

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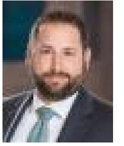

The Fair Debt Collection Practices Act (FDCPA) is a dense federal statute that governs debt collection.

If you have read some of my previous articles on the topic, you will recall that this set of laws, in conjunction with similar state laws, were enacted to protect consumers from abusive and unfair practices by debt collectors. However, since being enacted, the FDCPA has been extensively litigated to clarify its broad application and remains a source of much confusion.

The Consumer Financial Protection Bureau (CFPB) was created in part to make rules and regulations that implement the FDCPA. In October 2020, after several years of soliciting and reviewing comments, the CFPB issued its 'final' debt collection rule meant to interpret and advance the goals of the FDCPA, entitled "Regulation F." Regulation F (which is set to take effect on November 30, 2021) will not only tighten some of the restrictions already in place, but it will potentially alter how debt collectors and creditors manage communications with debtors and operate their businesses going forward.

The FDCPA and Regulation F apply to "debt collectors," which is generally anyone that collects or attempts to collect a debt owed to another, including law firms, property management companies, and debt collection agencies. The creditor to whom the debt is owed typically falls outside of this definition. Nevertheless, creditors should also be aware of the new restrictions, as they are likely to impact many internal policies and procedures, which may need to be updated to comply with the new regulations.

The following is a non-exhaustive list of some of the changes that will take effect once the new regulation is codified in November.

> **Telephone communications**
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> Regulation F severely restricts debt collector communications with consumers via telephone. First, debt collectors may not call a particular consumer more than seven times in seven consecutive days. Second, debt collectors may not call a consumer within seven days of their previous telephone conversation with that particular consumer. Third, debt collectors may only call a consumer between the hours of 8:00 A.M. and 9:00 P.M. and may not call the consumer at any time or place known to be inconvenient to the consumer – such as at their place of employment. Finally, if leaving a voicemail message, the debt collector is limited to a very specific script, which severely limits the information that the debt collector

may transmit to the consumer in the voicemail. Unfortunately, there are no exceptions for parties actively engaged in litigation, which may lead to additional hurdles when navigating settlement communications with a particular consumer.

Electronic communications

In order for a debt collector to use email or text messages when communicating with a consumer, they must first obtain consent directly from the consumer. In addition, the CFPB has provided form language that creditors should use to inform consumers that they intend to share their email address with a debt collector, and the debt collector must use reasonable means to confirm that the creditor has followed all required procedures before utilizing a consumer's email address. In addition, the consumer is given the right to "opt-out" of communications by text or email, so long as they notify the creditor or debt collector that they wish such communications to cease.

Time barred debt

It has been a long-standing rule in North Carolina that debtors can plead any applicable statute of limitations to the collection of a debt as an affirmative defense in litigation. However, Regulation F strictly prohibits debt collectors from bringing, or threatening to bring, legal action against a consumer where they know, or should have known, that the statute of limitations to collect the debt has expired. This is a significant change in the law, as it creates a strict liability cause of action that can be asserted against the debt collector for pursuing the potentially stale debt. While already a best practice, there is now a significant incentive for a creditor and their debt collector to discuss the debtor's potential defenses in detail before sending any initial communications to the debtor to ensure that a valid claim would exist should litigation be necessary.

Credit Reporting and Transfer of Debt

Regulation F limits when a debt collector may furnish information to a consumer reporting agency in an effort to prevent the use of passive credit reporting as a collection tool. In addition, there are new prohibitions against the transfer of a debt when a debt collector knows or should know that the debt has been paid, settled, or discharged in bankruptcy.

Debt Validation Notices

Regulation F also greatly expands the information which must be disclosed to a consumer within five days of the initial communication from a debt collector. In addition to the other disclosures required by the FDCPA, a debt collector must provide a long list of additional disclosures (including an itemized breakdown of the payoff) to assist the consumer in identifying the debt at issue and how the balance was calculated. Thankfully, the CFPB provided a form notice which can be used as a "safe-harbor" to avoid violations of the new rule. However, to comply fully with the rule and fill in the form correctly, creditors will need to work closely with their attorneys and/or collection firms to ensure they have internal processes in place and are ready to track the necessary information.

Record retention

Debt collectors are required to retain all records that evidence compliance with the FDCPA and Regulation F for a minimum of three years since the last collection activity. This rule also applies to all records of telephone conversations or other communications in connection with a debt collection.

While it is clear the regulations being implemented by Regulation F will have a profound impact on how *debt*

collectors operate, it is equally important for *creditors* to be aware of the changes. The new regulations force creditors to play a more active role in preparing for collection efforts by providing more detailed information to their attorneys and debt collection firms. As such, creditors will need to review and change their internal policies and procedures to ensure they keep pace with the law and so they can provide this more detailed information.

In order to prepare for the implementation of the new regulation on November 30, 2021, creditors and debt collectors should take steps to review their current policies and procedures and ensure that they are in compliance.

At a minimum, creditors and debt collectors should:

- If necessary, reach out to existing customers to obtain updated contact information.
- Review and adjust internal accounting procedures to make sure they can provide detailed statements that itemize, by date of accrual, all principal, interest, and fees for each consumer account.
- Review and adjust internal records policies to adequately document all phone calls, discussions, emails, and text messages with a consumer, and ensure they are held for a minimum of 3 years.
- Revise all form demand letters and debt collection notices to include the new detailed validation notice required for all initial communications.
- Provide adequate training to all staff who engage in telephone conversations with consumers about their debts, so they understand what information can (and cannot) be shared in voicemail messages.
- Monitor the timing and frequency of all telephone calls with consumers about their unpaid debts.

Regulation F is the largest and most significant change to the implementation of the FDCPA since its enactment over 40 years ago. It will have a profound effect on how all creditors and debt collectors do business. We strongly recommend that any person or business engaged in debt collection, whether they be a creditor or an agency that acts on their behalf, discuss the new regulation with legal counsel to ensure they are adequately prepared when Regulation F goes into effect.

As is generally the case with any new law, there is sure to be plenty of uncertainty in its application down the road. But, by gaining a firm grasp of its implications and implementing the necessary changes ahead of time, creditors and debt collectors can place themselves ahead of the curve and reduce the chances of being accused of a violation.

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