CFPB'S New-and-Improved Reg F Provides Opportunities for Lenders to Protect Down-The-Line Debt Purchasers

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The Consumer Financial Protection Bureau ("CFPB") recently rolled out a comprehensive set of provisions to the new-and-improved Reg F.

Regulation F, 12 CFR part 1006 ("Reg F"), implements the Fair Debt Collection Practices Act ("FDCPA") and has, until recently, largely been devoid of guidance to lenders and debt collectors in their efforts—when utilizing newer methods of communication. No longer. The Consumer Financial Protection Bureau ("CFPB") recently rolled out a comprehensive set of provisions to the new-and-improved Reg F, which went into effect November 30, 2021.

As it stands, Reg F will significantly alter best practices for both originating and collecting loans. The *new* Reg F's most notable changes will offer guidelines for modern modes of communication, namely text message and email communications with a borrower, and, provide a safe harbor for inadvertent prohibited third-party disclosures.

I. A Shift to Newer Communication Methods

In the past, debt collectors have avoided the use of email and text message communications because of legal uncertainty amidst statutory silence. In the new Reg F, the CFPB seeks to provide clarity to debt collectors when utilizing these newer communication methods. At the same time, Reg F limits the number of phone calls a debt collector may place to a consumer but creates a presumption of compliance within that limit. Thus, we may see debt collectors shifting away from traditional methods (calling) to newer methods of communication (emails and text messages) in their debt collection efforts.

Reg F clarifies the definition of "harassing, oppressive, or abusive" telephone communications and now includes placing a call to a consumer either (1) more than seven times within seven consecutive days; and (2) within a period of seven consecutive days after having had a telephone conversation with the consumer in connection with collection of a debt (including the date of the conversation as day "1").[1] However, within this limit, the debt collector has presumptively complied.

Additionally, we may see lenders getting more involved in protecting down-the-line debt collectors at the origination phase. Reg F provides broad categories of safe harbors for debt collectors that made an inadvertent prohibited third-party disclosure. **Importantly, this safe harbor can be based on prior "reasonable procedures" by the debt collector *or* the lender.** This will almost certainly give rise to new demand in the debt market for (and with a premium upon) loans that come with the safe harbor protections prepackaged.

II. Safe Harbor for Inadvertent Third-Party Disclosures

The FDCPA generally prohibits third-party disclosures of debt collections to non-debtors.[2] Reg F, as written, will provide a safe harbor from liability for such disclosures over email or text message if it is determined, after the disclosure that the debt collector or, in some cases, the lender followed certain "reasonable procedures" to avoid inadvertent disclosures before they happen.[3]

For email communications, the safe harbor can be based on past acts ("reasonable procedures") by the lender if:

> 1) the lender obtained the email address from the consumer;
> (2) the lender used the email address to communicate with the consumer "about the account" (i.e., not general solicitations) *or* the consumer consented to use of the email address;
> (3) the consumer did not opt out;
> (4) the lender sent the consumer a written or electronic notice that "clearly and conspicuously" made certain disclosures before the debt collector used the email address (such as that the debt will be transferred to a debt collector); (5) the lender provided a "reasonable and simple" opt-out procedure; and
> (6) the consumer was given 35 days to opt out.

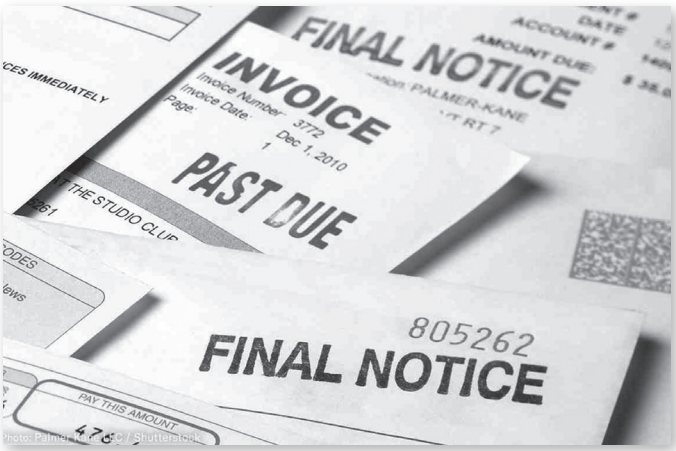
The CFPB's Official Interpretation of Reg F provides that prior communications by the lender "about the account" may include, for example, required disclosures, bills, invoices, periodic statements, payment reminders, and payment confirmations but does not include, for example, marketing or advertising materials unrelated to the consumer's account.

If the lender has not met all of the procedures listed in Reg F, then the debt collector's reliance on the safe harbor must be based on its own "reasonable procedures," which means the debt collector must have "received directly from the consumer" prior consent to use the email address to communicate with the consumer about the debt.

Unlike safe harbor for email communications, the safe harbor for text message communications cannot be based on prior acts by the lender, but only on the debt collector's own "reasonable procedures." A debt collector utilizes reasonable procedures in text message communications if the consumer consents, or, if the debt collector confirms that the telephone number belongs to the consumer and has not been reassigned. Reg F also provides certain procedures for confirming a consumer's telephone number, such as receiving a text message from the consumer, or searching a complete and accurate database of telephone numbers.

The Official Interpretation further provides that "prior consent" to communications may be obtained when a consumer provides an email address or phone number to a lender **or** debt collector, including by registering on the lender's **or** debt collector's website if the website discloses clearly and conspicuously that the lender **or** debt collector may use the email address or phone number to communicate with the consumer about the debt. Under this standard, lenders should consider obtaining prior consent in the loan origination documents.

Finally, all electronic communications must be accompanied by a "clear and conspicuous statement" describing "reasonable and simple" opt-out procedures. The CFPB's Official Interpretation provides samples of reasonable and simple opt-out procedures,



such as a link in an email address or responding "STOP" to a text message. The Official Interpretation likewise provides, by way of example, unreasonable opt-out procedures, such as requiring opt-out by postal mail, telephone, or visiting a website without providing a link.

III. Limited Content Messages

As a threshold matter, the FDCPA generally only regulates "communications," defined in Reg F as the "conveying of information regarding a debt directly or indirectly to any person through any medium." Limited content messages are excluded from this definition.[4]

A limited content message is a voicemail message that must contain:

(i) a business name for the debt collector that does not indicate that it is a debt collector or engaged in the collection of debt (e.g. not "Debt Collectors Inc." or John Smith with the "credit card receivables group");
(ii) a request that the consumer reply;
(iii) the name or one or more natural persons whom the consumer may contact; and
(iv) a telephone number that the consumer can use to reply.

A limited content message may, but is not required to contain:

(i) a salutation;
(ii) a date and time of the limited content message;
(iii) a preferred date and time for the consumer to reply; and/or
(iv) a statement that if the consumer replies, the consumer may speak to any of the company's representatives or associates.[5]

IV. Conclusion

Reg F has provided some clarity and guidance as to how lenders and debt collectors can, by instituting reasonable procedures to avoid the inadvertent disclosure of debt collection efforts to third-parties, avail themselves of the safe harbor provision of 12 CFR 1006.6(d). It is also important for lenders to take note as they will likely see a quick demand from the debt market for debt that comes with the safe-harbor protections prepackaged. And this issue is likely to be of increasing importance as the new CFPB indicates plans to hold lenders and debt collectors more accountable than we've seen in the recent past.

Reg F is not a panacea for all questions FDCPA, however, and lenders and debt collectors will still be left relying on counsel to guide them through *ad hoc* and court-made definitions and tests for when communications are "in connection with the collection of a debt," or when a message is "false, deceptive, or misleading."

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1 12 CFR part 1006.14(a)(2).

2 15 U.S.C. § 805(b).

3 12 CFR part 1006.6(d).

4 12 CFR part 1006.2(d).

5 12 CFR part 1006.2(j).