

Countdown to Compliance with "Regulation F" of the Fair Debt Collection Practices Act ("FDCPA") Nov. 8 - Nov. 12

It is now 22 days until "Regulation F" of the Fair Debt Collection Practices Act ("FDCPA") takes effect on November 30, 2021. KD continues with our daily alerts in our "Countdown to Compliance" today, with a new highlight for your consideration, as you prepare for the new regulations.

22 Days Left

Time and Place Restrictions—Continued

On Friday, November 5, KD's Countdown discussed Reg F's prohibition on calling consumers at inconvenient times or at places deemed inconvenient. Today, we explore a few common scenarios and how Reg F instructs debt collectors to proceed in order to comply.

8:00 A.M. to 9:00 P.M.

Reg F specifically states that in the absence of a debt collector's knowledge of circumstances to the contrary, the times before 8:00 a.m. and after 9:00 p.m. local time at the consumer's location is inconvenient. But what if the debt collector's contact information is conflicting or ambiguous as to their location?

In the case of multiple time zones, the debt collector is instructed to communicate only at a time that would be convenient in all of the locations at which the debt collector's information indicates the consumer might be located.

Example Question 1: A debt collector's information indicates that a consumer has a mobile telephone number with an area code associated with the Eastern time zone and a residential address in the Pacific time zone. When is it convenient?

Answer: After 11:00 a.m. Eastern time (8:00 a.m. Pacific time) and before 9:00 p.m. Eastern time (6:00 p.m. Pacific time).

Example Question 2: A debt collector's information indicates that a consumer has a mobile telephone number with an area code associated with the Eastern time zone and a landline telephone number with an area code associated with the Mountain time zone. When is it convenient?

Answer: After 10:00 a.m. Eastern time (8:00 a.m. Mountain time) and before 9:00 p.m. Eastern time (7:00 p.m. Mountain time).

Reminder for Electronic Communications: In determining the timing of an electronic communication, such as an e-mail or text message, the communication occurs when the debt collector sends it, not, for example, when the consumer receives or views it.

Prior Consent

An exception to the time and place restrictions in Reg F is that a consumer can give prior consent directly to the debt collector during a communication that does not otherwise violate the time and place restrictions of Reg F.

Consider this scenario:

A debt collector calls a consumer at 10:00 p.m. local time, and asks the consumer if this is a good time to receive phone calls. The consumer responds, “Sure, what is this about?” Even though the consumer provided consent to receive calls after 9:00 p.m., the consent given would be considered invalid, because the communication during which consent was given, was during a call that violated Reg F’s presumed time restrictions.

A debt collector may ask the consumer, during an otherwise inconvenient communication, what time or place might be convenient, but cannot ask the consumer whether they can provide consent to the continuation of the inconvenient communication.

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Third Party Disclosures—Safe Harbors for Electronic Communications

The FDCPA has long prohibited communications in connection with the collection of a debt with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

The FDCPA also has long established that if a debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error, it will not be held liable for such a violation.

As agencies more frequently use electronic communications such as e-mails and text messages, the risk for inadvertent third-party disclosures only increases. Cell phone numbers are often reassigned, multiple individuals have access to the same e-mail accounts, and screens large and small can sometimes be left exposed to wandering eyes. With this in mind, Reg F provides debt collectors opportunities to find a safe harbor from liability, conditioned on showing certain procedures and steps taken to mitigate the inherent risk.

Safe Harbor—Bona Fide Error

In order to assert a “bona fide error” defense to an inadvertent third-party disclosure conveyed via e-mail or text message, the debt collector must show it maintains procedures that are reasonably adapted to avoid a bona fide error in sending an email or text message communication that would result in a third-party disclosure in violation of the rules if those procedures include steps to reasonably confirm and document that:

- (i) The debt collector communicated with the consumer by sending an email to an email address or sent a text message to a telephone number as described in the Rules; and
- (ii) The debt collector did not communicate with the consumer by sending an email to an email address or a text message to a telephone number that the debt collector knows has led to a disclosure prohibited by the rules.

For the purpose of (ii), a debt collector knows that an inadvertent third-party disclosure occurred if any person has informed the debt collector about the disclosure, not just the consumer.

Importantly, even if the debt collector falls within the safe harbor sufficient to assert a bona fide error defense, this merely provides a defense—it does not make debt collector immune from suit.

The specific procedures Reg F requires from debt collectors seeking to obtain the safe harbor depends on whether the disclosure was via e-mail or by text message. The Countdown will explore these specific requirements on Wednesday.

20 Days Left

Safe Harbors for Electronic Communications—E-mails

Yesterday on the Countdown, we discussed Reg F's safe harbor provisions as it pertains to electronic communications and whether a debt collector can show that disclosure to an unauthorized third party is the result of a bona fide error. Reg F distinguishes the procedures required depending on whether the disclosure occurred via e-mail or text message. Reg F further distinguishes e-mail safe harbor procedures based on how the debt collector obtained the e-mail address. The key elements of each are Use, Prior Consent, and lack of Opt-Outs.

Debt Collector Obtained E-mail from Consumer

- The consumer used the email address 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 debt collector received prior consent from the consumer to use the email address to communicate about the debt and the consumer has not withdrawn that consent

Debt Collector Obtained E-mail from Prior Creditor Communications

- A creditor obtained the email address from the consumer;
- 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;
- Before the debt collector used the email address to communicate with the consumer, the creditor sent the consumer a written or electronic notice, to an address the creditor obtained from the consumer and used to communicate with the consumer about the account, that clearly and conspicuously disclosed:
 1. That the debt has been or will be transferred to the debt collector;
 2. The email address and the fact that the debt collector might use the email address to communicate with the consumer about the debt;
 3. That, if others have access to the email address, then it is possible they may see the emails;

4. Instructions for a reasonable and simple method by which the consumer could opt out of such communications; and
 5. The date by which the debt collector or the creditor must receive the consumer's request to opt out, which must be at least 35 days after the date the notice is sent;
- The opt-out period has expired and the consumer has not opted out; and
 - The email address has a domain name that is available for use by the general public, unless the debt collector knows the address is provided by the consumer's employer.

Debt Collector Obtained E-mail by the Prior Debt Collector

- The immediately prior debt collector obtained the email address in accordance with the direct consumer/creditor methods described above;
- The immediately prior debt collector used the email address to communicate with the consumer about the debt; and
- The consumer did not opt out of such communications.

As outlined above, Reg F requires that a debt collector show it has these procedures that include steps to reasonably confirm and document that any inadvertent disclosure occurred despite following those specific procedures. Tomorrow, the Countdown will explore the safe harbor requirements for the use of text messages.

19 Days Left

Safe Harbors for Electronic Communications—Text Messages

Yesterday on the Countdown, we discussed Reg F's safe harbor procedures for e-mail communications. Reg F provides similar procedures for ensuring that the text messages are not inadvertently sent to unauthorized third parties. The biggest concern the CFPB has when it comes to text messages is the frequency in which phone numbers are reassigned. Over 30 million cell phone numbers change hands each year. Thus, the safe harbor provisions have a temporal aspect (60 days) to them as well.

The two options are the "Prior Use" method and the "Prior Consent" method. Unlike the e-mail safe harbors, there is no distinction based who obtained the contact information. But Reg F requires some additional due diligence on the part of debt collectors.

A debt collector may send a text message to a telephone number if:

- The consumer used the telephone number to communicate with the debt collector about the debt by text message, the consumer has not since opted out of text message communications to that telephone number, and within the past 60 days either:
 - The consumer sent the text message described in paragraph (d)(5)(i) of this section or a new text message to the debt collector from that telephone number; or
 - The debt collector confirmed, using a complete and accurate database, that the telephone number has not been reassigned from the consumer to another user since the date of the consumer's most recent text message to the debt collector from that telephone number; or
- The debt collector received directly from the consumer prior consent to use the telephone number to communicate with the consumer about the debt by text message, the consumer has not since withdrawn that consent, and within the past 60 days the debt collector either:
 - Obtained the prior consent or renewed consent from the consumer; or
 - Confirmed, using a complete and accurate database, that the telephone number has not been reassigned from the consumer to another user since the date of the consumer's most recent consent to use that telephone number to communicate about the debt by text message.

Question 1: What if the consumer's prior use of the telephone number at issue was by telephone call, not text message?

Answer: The prior use is invalid for purposes of the safe harbor protection. The prior use must be by text message.

Question 2: What is a complete and accurate database?

Answer: For the purposes of this rule, the database established by the FCC (effective November 1, 2021) qualifies as a complete and accurate database, as does any commercially available database that is substantially similar in terms of completeness and accuracy to the FCC's database.

Question 3: Can a consumer-provided telephone number constitute prior consent?

Answer: Yes, if a consumer provides a telephone number to a debt collector (including on the debt collector's website or online portal), the debt collector may treat the consumer as having consented directly to the debt collector's sending of text messages to that telephone number if the debt collector discloses clearly and conspicuously that the debt collector may use the telephone number to communicate with the consumer about the debt by text message.

18 Days Left

Opt-Outs for Electronic Communications

Reg F acknowledges that the use of electronic media for debt collection communications can further the interests of both consumers and debt collectors. Reg F also identifies the potential risks of pervasive electronic communications, as these methods are easy to use and costs the debt collector little. This makes its use ripe for harassment of consumers and burdensome costs on those who, for

example, do not have unlimited text messaging plans. Reg F thus requires debt collectors to provide consumers a convenient way to opt-out of electronic communications.

A debt collector who communicates or attempts to communicate with a consumer electronically using a specific email address, telephone number for text messages, or other electronic-medium address must include a clear and conspicuous statement describing a reasonable and simple method by which the consumer can opt out of further electronic communications or by the debt collector to that address or telephone number.

The debt collector may not require that the consumer pay a fee or provide any information other than the consumer's opt-out preferences and the address or phone number subject to the opt-out request.

Below are some possible examples (as illustrated by the CFPB):

- Assume that a debt collector sends a text message to a consumer's mobile telephone number. The text message includes the following instruction: "Reply STOP to stop texts to this telephone number." Assuming that it is readily noticeable and legible to consumers, this instruction constitutes a clear and conspicuous statement describing a reasonable and simple method to opt out of receiving further text messages from the debt collector to that telephone number.
- Assume that a debt collector sends the consumer an email that includes a hyperlink labeled: "Click here to opt out of further emails to this email address." Assuming that it is readily noticeable and legible to consumers, this instruction constitutes a clear and conspicuous statement describing a reasonable and simple method to opt out of receiving further emails from the debt collector to that email address.
- Assume that a debt collector sends the consumer an email that includes instructions in a textual format explaining that the consumer may opt out of receiving further email communications from the debt collector to that email address by replying with the word "stop" in the subject line. Assuming that it is readily noticeable and legible to consumers, this instruction constitutes a clear and conspicuous statement describing a reasonable and simple method to opt out of receiving further emails from the debt collector to that email address.

A few more notes on opt-outs:

- There's no minimum type size requirement.
- There is also no requirement as to the time required to honor an opt-out. A reasonable time will be determined from the facts and circumstances. A debt collector can also show that a failure to honor an opt out was caused by a bona fide error.
- An opt-out request as to the collection of one debt by a debt collector carries over to communications for other debts.
- The opt-out requirements apply to all electronic communications, including direct communications on social media or through an online application.
- Absent evidence to the contrary, a consumer's opt-out request of text messages to a particular number is not a request to opt out of telephone calls.
- A consumer's request to opt out does not bind subsequent debt collectors.

Kaufman Dolowich & Voluck's Consumer Financial Services Group is here to assist in your collection preparations to comply with Regulation F. We can also answer other compliance questions you may have.