

The CFPB Debt Collection Rule: Where it is and Where it is Going

Richard J. Perr, Esq. — Co-Managing Partner, Philadelphia
Office; Chair of Consumer Financial Services Practice Group

Monica M. Littman, Esq.



KAUFMAN DOLOWICH VOLUCK LLP



Mid-Atlantic Collectors Association

Serving members in Delaware, Maryland, Pennsylvania, West Virginia, and the District of Columbia

Rick Perr is the Co-Managing Partner of the Philadelphia Office and Chair of the Consumer Financial Services Practice Group at Kaufman Dolowich & Voluck. He focuses his practice in complex commercial litigation and professional liability defense. He is a nationally recognized authority and lecturer on creditor's rights, representing creditors, law firms and agencies against individual and class action allegations invoking federal and state consumer protection laws, including the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Telephone Consumer Protection Act, and the Perishable Agricultural Commodities Act. He serves on the Mid-Atlantic Collectors Association's Board of Directors and ACA International's Board of Directors. He also served as ACA International President in 2017/18.



Mr. Perr also advises entities and individuals on matters related to compliance in the credit and collection industry, including review, implementation and auditing of policies and procedures, especially in adherence with governmental regulatory bodies such as the Consumer Financial Protection Bureau ("CFPB").

Monica M. Littman is an attorney at Kaufman Dolowich & Voluck. She represents creditors, law firms and agencies against individual and class action allegations invoking consumer protection laws. She advises clients on compliance and regulatory matters in the ARM industry. She currently serves as Secretary of the Mid-Atlantic Collectors Association's Board of Directors. She has served as the ACA International State Chair Attorney for Pennsylvania since 2017. She also serves on ACA International's Member Attorney Program Committee.



CFPB New Debt Collection Rule



Consumer Financial
Protection Bureau

- The CFPB issued final debt collection rules on October 30, 2020 and December 18, 2020
- These will be combined into one new rule which amends Regulation F, 12 C.F.R. part 1006, which implements the Fair Debt Collection Practices Act (“FDCPA”).
- The final Rule is effective November 30, 2021.
- The new Rule represents the first update to the FDCPA since it was enacted in 1978.

Impact of the Biden Administration on the ARM Industry

- Expect Increased Regulation
- Potential for changes to the Rule before it goes into effect
- Rohit Chopra—President Biden's Nominee for CFPB Director



Limited Content Message – Requirements

A “limited-content message” is defined under the Rule as a voicemail message for a consumer that must include:



(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.



- Cannot use limited content message for email or text messages
- Because a limited-content message must be “for a consumer,” a message knowingly left for a third party is not a limited-content message.

Limited Content Message – Optional Information

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.



Examples of Limited Content Messages

A limited-content message may only include the required and optional information.

“This is Robin Smith calling from ABC Inc. Please contact me or Jim Johnson at 1-800-555-1212.”

- No mention of consumer’s name – no mention of “account.”

“Hi, this is Robin Smith calling from ABC Inc. It is 4:15 p.m. on Wednesday, September 1. Please contact me or any of our representatives at 1-800-555-1212 today until 6:00 p.m. Eastern time, or any weekday from 8:00 a.m. to 6:00 p.m. Eastern time.”

- This includes required and optional content.
- Do not vary from the definition of “limited-content message” and optional information. If you deviate from the elements you risk “communicating” with the consumer, which triggers additional requirements under the FDCPA.
- Discuss with your compliance manager, in-house counsel, and outside counsel about updating your scripts.

Model Validation Notice

North South Group
P.O. Box 123456
Pasadena, CA 91111-2222
(800) 123-4567 from 8am to 8pm EST, Monday to Saturday
www.example.com

To: Person A
2323 Park Street
Apartment 342
Bethesda, MD 20815

Reference: 584-345

North South Group is a debt collector. We are trying to collect a debt that you owe to Bank of Rockville. We will use any information you give us to help collect the debt.

Our information shows:

You had a Main Street Department Store credit card from Bank of Rockville with account number 123-456-789.

As of January 2, 2017, you owed:	\$	2,234.56
Between January 2, 2017 and today:		
You were charged this amount in interest:	+ \$	75.00
You were charged this amount in fees:	+ \$	25.00
You paid or were credited this amount toward the debt:	- \$	50.00
Total amount of the debt now:	\$	2,284.56

How can you dispute the debt?

- **Call or write to us by August 28, 2020, to dispute all or part of the debt.** If you do not, we will assume that our information is correct.
- **If you write to us by August 28, 2020,** we must stop collection on any amount you dispute until we send you information that shows you owe the debt. You may use the form below or write to us without the form. You may also include supporting documents. We accept disputes electronically at www.example.com/dispute.

What else can you do?

- **Write to ask for the name and address of the original creditor, if different from the current creditor.** If you write by August 28, 2020, we must stop collection until we send you that information. You may use the form below or write to us without the form. We accept such requests electronically at www.example.com/request.
- **Go to www.cfpb.gov/debt-collection to learn more about your rights under federal law.** For instance, you have the right to stop or limit how we contact you.
- Contact us about your payment options.
- Póngase en contacto con nosotros para solicitar una copia de este formulario en español.

Notice: See reverse side for important information.

Mail this form to:
North South Group
P.O. Box 123456
Pasadena, CA 91111-2222

Person A
2323 Park Street
Apartment 342
Bethesda, MD 20815

How do you want to respond?

Check all that apply:

- I want to dispute the debt because I think:**
 - This is not my debt.
 - The amount is wrong.
 - Other (please describe on reverse or attach additional information).
- I want you to send me the name and address of the original creditor.**

I enclosed this amount: \$

Make your check payable to *North South Group*. Include the reference number 584-345.

- Quiero este formulario en español.**

Model Validation Notice

- Section 1692g of the FDCPA Validation Requirements

The validation notice must be provided either:

- 1) in the debt collector's initial communication to the consumer or
- 2) within 5 calendar days after the initial communication.

- New Rule addresses requirements when the validation requirements are provided in notices that are sent via letters or electronic delivery. If provided electronically, you can vary the content and format in certain places to allow for hyperlinks or consumer responses in fillable fields.

Model Validation Notice - Requirements

- “Must be “**clear and conspicuous**,” which means “**readily understandable**.” If the validation notice is provided in writing or electronically, the location and type size also must be readily noticeable and legible.
- The validation notice can be provided electronically without complying with the E-SIGN act but only if this notice is the initial communication.
- If the validation notice is provided within 5 days after the initial communication and it is sent electronically, you must have consent under the E-SIGN act.
- Model Notice – Not one size fits all for your clients.
- Work with your letter vendors to create the form.

Model Validation Notice - Requirements

- **Debt collector communication disclosure**: A statement that indicates the communication is from a debt collector.

- **Name and mailing information**:
 1. The debt collector's name and mailing address;
 2. the name and mailing address of the consumer who owes the debt; and
 3. the name of the creditor to whom the debt is currently owed.
 - The name of the debt collector and the creditor can be listed as a "trade name" or DBA instead of a legal name.
 - Also, if the validation information is provided in connection with a debt related to a consumer financial product or service (e.g., credit card debt, mortgage-related debt), the name of the creditor as of the itemization date must be included.

- **Account Number**: The account number (full or truncated) associated with the debt.

Model Validation Notice - Requirements

- **Itemization-related information**: An itemization of the current amount of the debt reflecting interest, fees, payments, and credits since the itemization date.
 - The “itemization date” reflects an event in the debt’s history that provides a reference point that consumers may recognize. The debt collector may select one of five reference dates as the itemization date:
 1. the last statement date;
 2. the charge-off date;
 3. the last payment date;
 4. the last transaction date; or
 5. the judgement date
- **Current amount of the debt**: The amount of the debt as of when the validation information is provided.

Model Validation Notice - Requirements

- **Information about consumer protections:**
 - consumer's right to dispute the debt and request original-creditor information, and rights that apply if the consumer completes those actions.
 - date the validation period will end.
 - for consumer financial product or service debts, a statement directing the consumer to a page on the CFPB's website with more information regarding consumer protections in debt collection.
- **Consumer-response information:** Prepared statements and prompts that the consumer may use to take certain actions, such as disputing the debt. This is formatted as a tear-off portion that the consumer may detach and return to the debt collector. If the notice is provided electronically, you must advise the consumer how the consumer can take the actions electronically.

Optional Content for Model Validation Notice

- 1) the debt collector's telephone contact information;
- 2) a reference code the debt collector uses to identify the consumer or the particular debt;
- 3) certain payment disclosures,
- 4) certain electronic communication information, such the debt collector's website or email address;
- 5) certain Spanish-language disclosures regarding how a consumer may request a Spanish-language validation notice;
- 6) the merchant brand, affinity brand, or facility name associated with the debt; and
- 7) disclosures specifically required under (or that provide safe harbor under) other applicable law.

Validation Period Requirements

- A consumer has **30 calendar days from the date the consumer receives, or is assumed to have received, the validation notice**, to dispute the debt or request original-creditor information about the debt. This is the “validation period.”
- A debt collector may use the date on which the consumer is assumed to receive the validation notice to calculate the end date of the validation period (even if the debt collector later learns when the consumer received the notice). A consumer is assumed to have received the validation notice 5 business days after the date the debt collector sent it.
- Overshadowing restrictions have not changed.
- Need to determine how your agency can best calculate the 30 days which is listed on the notice.



Safe Harbor – Model Validation Notice



- The Safe Harbor protection is focused on the content of the notice. It does not apply to validation notice delivery method and timing requirements.
- Once the Rule goes into effect, use of the model validation notice complies with the Rule’s content requirements, including that the notice be clear and conspicuous, and it will not constitute “overshadowing.”
- If you use any additional disclosures beyond the required items, optional items, or any changes that still leave the form substantially similar in substance, clarity, and meaningful sequence to the model notice, then the safe harbor generally does not apply.

Call Frequency - Rebuttable Presumption



- A debt collector is **presumed to comply** with the prohibition against harassing conduct if the debt collector places telephone calls to a particular person in connection with the collection of a particular debt **seven or fewer times within seven consecutive days and not within seven consecutive days 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 date of the telephone conversation is the first day of the seven-consecutive-day period.
- Calls that do not count toward these frequencies: calls placed with the consumer's prior consent, calls not connected to the dialed number, and calls placed to certain professionals.
- Always check your state's law for limits on call frequency.

Factors That May Rebut the Presumption of Compliance – Call Frequency

The examples provided by the CFPB are illustrative and there could be others. The factors could be considered individually or in combination with other factors.

- Frequency and pattern of telephone calls the debt collector places to a person, (for example, rapid succession calling);
- Frequency and pattern of voicemails that the debt collector leaves for a person;
- 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
- Debt collector's conduct in prior communications or attempts to communicate with the person (for example, if a debt collector previously used obscene language).

Factors That May Rebut the Presumption of A Violation – Call Frequency

- 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;
- 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.

Time-Barred Debt

- Time-barred debts are debts for which the applicable statute of limitations has expired. The statute of limitations is the period during which a person can bring a legal action to collect the debt.
- The CFPB did not adopt a disclosure requirement for time-barred debt. Consumer advocates had pushed for this.
- Under new Rule, **a debt collector is prohibited from bringing or threatening to bring a legal action against a consumer to collect a time-barred debt.** Proofs of claim filed in connection with a bankruptcy proceeding are not included in this prohibition.
- The CFPB adopted a strict liability standard, declining to adopt the proposed knows or should know standard.
- Always check your state's law for specific disclosure language.

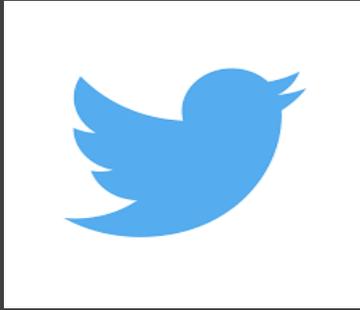
Credit Reporting

- A debt collector must do one of the following before furnishing information to a Consumer Reporting Agency (“CRA”):
 1. Speak with the consumer in person about the debt;
 2. Speak with the consumer by telephone about the debt;
 3. Mail the consumer a letter about the debt and wait a reasonable period of time to receive a notice of undeliverability; or
 4. Send the consumer a message about the debt by electronic communication and wait a reasonable period of time to receive a notice of undeliverability.

Credit Reporting

- A debt collector is required to wait a reasonable period of time to receive a notice of undeliverability regarding the aforementioned notice (even if sent electronically) before furnishing information to a CRA. This is defined as fourteen (14) calendar days after the communication was sent.
- During the fourteen (14) day period, the debt collector must permit receipt of, and monitor for, notifications of undeliverability from communications providers.
- If you receive a notice of undeliverability during the “reasonable period of time,” you must not furnish information about the debt to a CRA until you resubmit the information about the debt to the consumer using one of the methods identified above.
- Will clients continue to expect debt collectors to credit report?

Social Media



- FDCPA's definition of communication now includes email, text messaging, and social media.
- **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.
- You 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 you 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.
- A debt collector **violates the FDCPA and the Rule** by communicating with the **wrong person through a private message**.

Electronic Communication – Email

What if the email address you have for the consumer is incorrect?

Bona Fide Error Defense for email communication - Need to demonstrate that you have **procedures to reasonably confirm and document** that you did not communicate with the consumer by sending an email to an email address that you know has led to a prohibited third-party disclosure and **communicated with the consumer by email using one of the methods below:**

(1) 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.



Electronic Communication – Email (continued)

(2) Creditor communication with the consumer: You can use an email address provided by the creditor if:

- (a) the creditor obtained the email address from the consumer;
- (b) 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;
- (c) 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);
- (d) the opt-out period has expired and the consumer has not opted out; and
- (e) 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.**



Electronic Communication – Text Messages

Bona Fide Error defense for text messages

You must maintain procedures to reasonably confirm and document that you: did not communicate with the consumer by sending a text message to a telephone number **that you know has led to a prohibited third-party disclosure;** and communicated with the consumer **by text message using a telephone number that:**

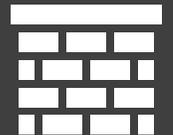
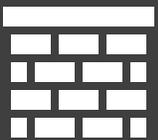
(1) The consumer used to communicate about the debt with the debt collector by text message, as long as the consumer has not since opted out; and (2) in the past 60 days, the consumer used to send a text message to the debt collector or the debt collector confirmed had not been reassigned from the consumer to another user; 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.



Opt-out of Electronic Communications

- In each electronic communication or attempted electronic communication, **you must include** 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 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.



To Do Checklist

- Now is the time to start preparing.
- Start evaluating your policies and procedures now to get into compliance with the Rule.
- Start drafting new written policies.
- Consult your compliance officer, in-house counsel, and outside counsel.
- Do you need new scripts for telephone calls?
- Discuss with your vendors regarding any letter template changes.
- Do you need to update your technology systems?
- Do you need to set up new training classes for your employees?

