

## **Communicating with Consumers after the CFPB's Debt Collection Final Rules Take Effect**

*By Alan Leeth and Katherine West*

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### **I. Introduction**

On November 30, 2021, the Bureau of Consumer Financial Protection's ("CFPB") October and December 2020 Final Rules take effect. See 86 FR 48918-01.<sup>1</sup> Among other things, the October and December 2020 Final Rules address communications with consumers under the Fair Debt Collection Practices Act ("FDCPA"). Created in 1977, the FDCPA was intended to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 USC § 1692(e). The October and December 2020 Final Rules seek to clarify the application and implementation of the FDCPA in light of the ever-changing world of communication technologies. This article highlights some of the key provisions on communicating with consumers provided in the October and December 2020 Final Rules.

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<sup>1</sup> In April 2021, the CFPB proposed delaying the effective date of the rules to January 29, 2022. See *id.* The CFPB later withdrew that proposed extension, meaning the Final Rules will go into effect on November 30, 2021. See *id.*

## II. The October 2020 Final Rule

The October 2020 Final Rule "addresses, among other things, communications in connection with debt collection and prohibitions on harassment or abuse, false or misleading representations, and unfair practices in debt collection," particularly as they relate to newer communication technologies. See 85 FR 76734-01. For example, the October 2020 Final Rule clarifies that the FDCPA's definition of communication "includes newer electronic media, such as email, text messaging, and social media." CONSUMER FIN. PROT. BUREAU EXECUTIVE SUMMARY OF THE OCTOBER 2020 DEBT COLLECTION FINAL RULE. 1, 2 (2021), available at [https://files.consumerfinance.gov/f/documents/cfpb\\_october\\_2020\\_debt\\_collection\\_executive\\_summary.pdf](https://files.consumerfinance.gov/f/documents/cfpb_october_2020_debt_collection_executive_summary.pdf) [hereinafter OCTOBER 2020 EXECUTIVE SUMMARY]. More specifically, the October 2020 Final Rule clarifies how debt collectors may communicate with consumers about a debt via the telephone, email, text messages, and social media; how debt collectors may interact with the estates and/or personal representatives of deceased consumers; and how consumers can set limitations on communications from debt collectors. See 85 FR 76734-01.<sup>2</sup>

### A. Communications with Consumers Generally

Under the FDCPA, debt collectors are generally prohibited from communicating with a consumer at unusual times or places, at times or places the debt collector knows or should know are inconvenient to the consumer, at the consumer's place of employment (if the debt collector knows or has reason to know that the employer prohibits such communications), and if a debt collector knows the consumer is represented by an attorney. See 15 USC § 1692c(a). The October 2020 Final Rule clarifies that these prohibitions apply to "calls to mobile telephones and electronic communications, such as email or text messages[.]" OCTOBER 2020 EXECUTIVE SUMMARY, at 3. However, calling a consumer's telephone or sending an electronic communication is not a violation of the FDCPA's prohibitions on communications at unusual or inconvenient places unless the debt collector knows the consumer is at an unusual or inconvenient place. See *id.* at 3–4.

The October 2020 Final Rule further prohibits debt collectors "from communicating or attempting to communicate with a person through a specific medium of communication (for example, email or telephone calls) if the person has requested that the debt collector not use that medium." OCTOBER 2020 EXECUTIVE SUMMARY, at 4. The October 2020 Final Rule defines "attempt to communicate" (12 CFR § 1006.2(b)) as "any act to initiate a communication or other contact about a debt with any person through any medium, including by soliciting a response from such person." 85 FR 76744. The October 2020 Final Rule further clarifies that "an act to initiate a communication or other contact about a debt with a person is an attempt to communicate regardless of whether the attempt, if

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<sup>2</sup> The October 2020 Final Rule also addresses bans on debt transfers, disputes with consumers, and record retention requirements. See *id.* Because this article focuses on communications with consumers, these topics are not addressed herein.

successful, would be a communication that conveys information regarding a debt directly or indirectly to any person[.]" OCTOBER 2020 EXECUTIVE SUMMARY, at 2.

The FDCPA also prohibits debt collectors from engaging "in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." 15 USC § 1692d. The October 2020 Final Rule "clarifies that this prohibition applies to telephone calls as well as other communication media, such as email and text messages." OCTOBER 2020 EXECUTIVE SUMMARY, at 6. When determining whether a debt collector's conduct violates this prohibition, "all of a debt collector's conduct, taken together, is considered . . . even if, individually, the conduct would not have violated the prohibition." *Id.*

## 1. Telephone Communications

The October 2020 Final Rule also provides that certain voicemail messages, called "limited-content messages," are considered attempts to communicate, but not communications. *Id.* at 2; *Debt Collection Rule FAQs*, CFPB, <https://www.consumerfinance.gov/compliance/compliance-resources/other-applicable-requirements/debt-collection/debt-collection-rule-faqs/#limited-content-messages> (last visited Nov. 3, 2021). A limited-content message is:

a *voicemail* message for a consumer that includes: (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.

OCTOBER 2020 EXECUTIVE SUMMARY, at 3. A limited-content message may also 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.

*Id.* If, however, the voicemail includes "any content beyond the required or optional content," it is not a limited-content message. *Debt Collection Rule FAQs, supra.* Additionally, "[a] message knowingly left for a third party is not a limited-content message" because the message must be left *for the consumer*. OCTOBER 2020 EXECUTIVE SUMMARY, at 3.

The FDCPA also prohibits "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number." 15 USC § 1692d(5). The October 2020 Final Rule clarifies that this prohibition *does* apply to a telephone call that goes directly to

voicemail (*i.e.*, a ringless voicemail), but *does not* apply to sending an electronic message, such as a text message or an email. OCTOBER 2020 EXECUTIVE SUMMARY, at 6. The October 2020 Final Rule also sets forth rebuttable presumptions of compliance with and violation of this prohibition. See *id.* at 6–7. Pursuant to the rebuttable presumption of compliance:

A debt collector is presumed to *comply* with the prohibition 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.

*Id.* at 7 (footnotes omitted). The presumption of compliance may be refuted by factors such as (1) the frequency and pattern of telephone calls the debt collector places to a person; (2) the frequency and pattern of voicemails the debt collector leaves for a person; (3) the content of prior communications between the person and the debt collector; and/or (4) the debt collector's conduct in prior communications or attempts to communicate with the person. See *id.* This list is non-exhaustive, so other factors may also refute the presumption of compliance. See *id.*

The rebuttable presumption of violation, on the other hand, provides:

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.

*Id.* The presumption of violation may also be refuted by a non-exhaustive list of factors such as (1) whether the debt collector placed the call to comply with applicable law; (2) whether the call was directly related to active litigation involving the collection of a particular debt; (3) whether the debt collector placed a telephone call in response to a consumer's request for additional information (when the exclusion for the consumer's prior consent given directly to the debt collector does not apply); and/or (4) whether a debt collector placed a telephone call to convey information giving the consumer an opportunity to avoid a demonstrably negative effect (if the negative effect is outside of the debt collector's control and time is of the essence). *Id.* at 8.

It is also important to note that certain calls do not count toward the seven calls, "including calls placed with the consumer's prior consent, calls not connected to the dialed number, and calls placed to certain professionals." *Id.* at 7.

## **2. Electronic Communications (Email and Text Messages)**

As noted above, the October 2020 Final Rule clarified that the FDCPA's definition of communication includes email and text message communications. Indeed, the October 2020 Final Rule clarifies that the FDCPA prohibition on conduct the natural result of which

is to harass, oppress, or abuse any person in connection with the collection of a debt applies to electronic communications. *Id.* at 6. The October 2020 Final Rule further provides that debt collectors are generally prohibited "from communicating or attempting to communicate with a consumer using an email address that the debt collector knows is provided to the consumer by the consumer's employer." *Id.* at 4.

Additionally, each electronic communication between debt collectors and consumers must include "a reasonable and simple method that the consumer can use to opt out of additional communications and attempts to communicate." *Id.* If a consumer opts out, the debt collector may respond once to confirm the consumer's opt out request and state that the debt collector will honor it. *See id.*

The October 2020 Final Rule also provides procedures for raising bona fide error defenses for email and text message communications. *See id.* at 5. To raise a bona fide error defense for an email communication, the debt collector must "maintain[] procedures to reasonably confirm and document that it did not communicate with the consumer by sending an email to an email address that the debt collector knows has led to a prohibited third-party disclosure" and communicated with the consumer via email through a direct communication with the consumer, a creditor communication with the consumer, or a prior debt collector communication with the consumer. *Id.*

To constitute a direct communication with the consumer, the email address must be an email address that the consumer used to communicate with the debt collector about the debt or one the consumer previously gave consent for the debt collector to use. *See id.* The consumer also must not have subsequently opted out of communications to that email address. *See id.* To use an email address based on communications by the creditor, the following conditions must be met:

- (1) the creditor obtained the email address from the consumer; (2) 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; (3) 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 . . . ; (4) the opt-out period has expired and the consumer has not opted out; and (5) 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.

*Id.*

To qualify as a prior debt collector communication with the consumer, the following conditions must be met:

- (1) any prior debt collector obtained the email address from the consumer in accordance with either of the two procedures described above; (2) the immediately prior debt collector used the email address to communicate

with the consumer about the debt; and (3) the consumer did not opt out of such communications.

*Id.*

To raise a bona fide error defense in relation to text messaging, the debt collector must "maintain[] procedures to reasonably confirm and document that it: did not communicate with the consumer by sending a text message to a telephone number that the debt collector knows has led to a prohibited third-party disclosure." *Id.* The text message communication must also use 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.

*Id.* at 6.

### **3. Social Media Communications**

The October 2020 Final Rule also clarifies how the FDCPA's prohibitions apply to social media communications between debt collectors and consumers and attempts to obtain location information. *See id.* at 8. For example, the October 2020 Final Rule prohibits debt collectors from posting messages "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." *Id.*

Nonetheless, provided the consumer has not requested that the debt collector not communicate with them over social media, a debt collector may send a private message over social media to the consumer. *See id.* If a debt collector privately requests to be added as one of the consumer's social media contacts, the debt collector "must disclose his or her identity as a debt collector." *Id.* It should also be noted that it is a violation of the FDCPA and the October 2020 Final Rule to communicate with the wrong person through a private social media message. *Id.* at 9. Debt collectors utilizing social media to communicate with consumers should, therefore, be certain they are communicating with the correct person.

#### **B. Limitations on Communications Set by Consumers**

The October 2020 Final Rule clarifies that a debt collector is only in violation of the Rule regarding unusual or inconvenient places if the debt collector calls a consumer's

mobile telephone or sends an electronic communication while knowing that the consumer is at an unusual or inconvenient place. See OCTOBER 2020 EXECUTIVE SUMMARY, at 3. Consumers are not required to use the word "inconvenient" to indicate that a time or place is inconvenient. See *id.* The October 2020 Final Rule therefore permits debt collectors to ask follow-up questions to clarify a consumer's requested designations. See *id.*

Consumers may also limit the methods of communication debt collectors use by asking debt collectors not to communicate or attempt to communicate with them in certain ways, such as via email, text message, or phone. See *id.* Once such a request is made, the debt collector is prohibited from communicating with the consumer through that mode of communication. See *id.* The October 2020 Final Rule also "provides that a consumer may submit a written cease communication request using an electronic communication medium, such as email or through a website portal where the debt collector accepts electronic communications from consumers." See *id.* at 4. Additionally, if a consumer notifies the debt collector in writing that the consumer refuses to pay the debt, the debt collector is required to cease communicating with the consumer regarding that debt. See *id.*

### **III. The December 2020 Final Rule**

The December 2020 Final Rule, among other things, "clarifies the information that a debt collector must provide to a consumer at the outset of debt collection communications, prohibits debt collectors from bringing or threatening to bring a legal action against a consumer to collect a time-barred debt, and requires debt collectors to take certain actions before furnishing information about a consumer's debt to a consumer reporting agency." 86 FR 5766-01.<sup>3</sup> Because this article focuses on the communication provisions of the October and December 2020 Final Rules, the discussion of the December 2020 Final Rule is limited to the validation requirements debt collectors are required to make when they begin communicating with a consumer.

Pursuant to the FDCPA, debt collectors are required to provide certain information when they first communicate with the consumer to collect the debt or shortly thereafter. DECEMBER 2020 EXECUTIVE SUMMARY, at 2. The December 2020 Final Rule "implements the FDCPA's validation information requirement" and permits the validation information to be provided in writing or electronically through a "validation notice." *Id.* The December 2020 Final Rule also specifies the required contents of the validation notice, the timing and delivery requirements of the validation requirements, validation period requirements, and the model notice safe harbors. *Id.* at 3. Due to the December 2020 Final Rule's changes to the definition of "consumer," validation notices must be provided "either to the living consumer, or, if the debt collector knows or should know the consumer is deceased

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<sup>3</sup> It should be noted that the CFPB did not finalize the time-barred debt disclosures that were proposed in the 2020 Supplemental Proposal in the 2020 December Final Rule. CONSUMER FIN. PROT. BUREAU. EXECUTIVE SUMMARY OF THE DECEMBER 2020 DEBT COLLECTION FINAL RULE. 1–2 (2020), [https://files.consumerfinance.gov/f/documents/cfpb\\_december\\_2020\\_debt\\_collection\\_executive\\_summary.pdf](https://files.consumerfinance.gov/f/documents/cfpb_december_2020_debt_collection_executive_summary.pdf) [hereinafter DECEMBER 2020 EXECUTIVE SUMMARY].

prior to providing the validation notice, to the person authorized to act on behalf of the deceased consumer's estate[.]" *Id.* at 6.

It should be noted that formal civil action pleadings (including proof of claims filed in bankruptcy proceedings) are not considered initial communications for purposes of providing validation information. *Id.* Forms or notices that are "not related to the collection of debt and that [are] expressly required by the Internal Revenue Code, Title V of the Gramm-Leach-Bliley Act, or any federal or state law or regulation mandating notice of a security breach or privacy risk" are also not considered an initial communication for purposes of providing validation information. *Id.*

### **A. Required Content for Validation Notices**

Pursuant to the December 2020 Final Rule, the validation notice must include: (1) a statement indicating the communication is from a debt collector; (2) names and mailing addresses for the debt collector, the consumer who owes the debt, and the name of the current creditor;<sup>4</sup> (3) the full or truncated account number associated with the debt; (4) an itemization of the current amount of the debt reflecting interest, fees, payments, and credits since the itemization date;<sup>5</sup> (5) the current amount of the debt; (6) information about consumer protections;<sup>6</sup> and (7) prepared statements and prompts the consumer may use to take certain actions disputing the debt. *Id.* at 3–4. The foregoing must be readily understandable. *Id.* at 4. If the notice is provided in writing or electronically, the location and type size must also be readily noticeable and legible to consumers. *Id.* The December 2020 Final Rule provides a model notice, which is available here: [https://files.consumerfinance.gov/f/documents/cfpb\\_model-validation-notice\\_2020-12.pdf](https://files.consumerfinance.gov/f/documents/cfpb_model-validation-notice_2020-12.pdf).

### **B. Optional Content for Validation Notices**

Debt collectors may also include the following optional content in the 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 [as] the debt collector's website or email address,
- 5) certain Spanish-language disclosures regarding how a consumer may

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<sup>4</sup> If the validation information is provided in connection with a debt related to a consumer financial product or service, the debt collector must also provide the name of the creditor as of the itemization date. *Id.* at 3.

<sup>5</sup> "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 transaction date; or 5) the judgment date." *Id.* at 3–4. The "itemized" information may be provided on a separate page in the same communication as the validation notice as long as the debt collector includes a statement referring to the separate page in the place where the itemization would have appeared. *Id.*

<sup>6</sup> These are "[s]tatements about the consumer's right to dispute the debt and request original-creditor information, and the rights that apply if the consumer completes those actions." *Id.* at 4. Pursuant to the December 2020 Final Rule, the date the validation period will end must be included in the statements. *Id.* If the debt is for a consumer financial product or service, a statement directing the consumer to the CFPB's website with more information regarding consumer protections in debt collection must also be included. *Id.*



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.

*Id.* at 4–5.

The December 2020 Final Rule allows debt collectors to vary the format or content of the notice in certain places, such as including hyperlinks or including fillable fields for consumer response prompts, if the validation information is provided electronically. *Id.* at 5. The optional content, however, may not be more prominent than the required content. *Id.* at 4.

### **C. Delivery Method and Timing Requirements**

Debt collectors must provide the validation notice "either: 1) in the debt collector's initial communication to the consumer or 2) within 5 calendar days after the initial communication." *Id.* at 5. If, however, the consumer pays off the debt before the validation is required to be sent, the debt collector does not have to provide the validation information. *Id.* The December 2020 Final Rule imposes different requirements on the validation notice depending on when the validation notice is provided. See *id.* at 5–6.

For example, if the debt collector includes the validation notice in the initial communication, the debt collector can provide the validation information in the same method it uses for the initial communication. *Id.* at 5. If the validation information is provided with the initial communication and the initial communication is sent electronically, the debt collector is not required to comply with E-SIGN requirements. *Id.* The debt collector must still, however, "comply with the general disclosure delivery requirements" and electronic disclosure requirements set forth in the October 2020 Final Rule. *Id.*

If, however, the debt collector provides the validation notice separately from the initial communication, "the debt collector generally must provide the validation notice no more than *5 calendar days after the initial communication.*" *Id.* If the debt collector provides the validation notice during this 5-day period, the debt collector "must meet the general disclosure delivery requirements" set forth in the October 2020 Final Rule. *Id.* Additionally, if the validation information is provided electronically, the debt collector must comply with the electronic disclosure requirements set forth in the October 2020 Final Rule and have E-SIGN consent. *Id.* at 5–6.

### **D. Validation Period Requirements**

The December 2020 Final Rule provides for a validation period during which consumers may dispute the debt or request original-creditor information about the debt. *Id.* at 6. The validation period begins on the day the consumer receives (or is assumed to have received) the validation notice and expires 30 days later. *Id.* The consumer is assumed to have received the validation notice 5 business days – not including Federal holidays, Saturdays, and Sundays – after the debt collector sent the validation notice. *Id.*

A debt collector may calculate the end of the validation period based on the assumed receipt date even if the debt collector later learns when the consumer actually received the notice. *Id.* During the validation period, the debt collector is prohibited from engaging in collection activities and "communications that overshadow, are inconsistent with, or would interfere with the consumer's rights to dispute the debt or request original-creditor information." *Id.* If, during the validation period, the consumer disputes the debt or requests original-creditor information in writing, the debt collector is required to cease collection of the disputed portion of the debt until it provides verification information for the debt or the original-creditor information. *Id.* at 6–7.

#### **E. Safe Harbor for Model Validation Notice Use**

The December 2020 Final Rule provides a safe harbor for debt collectors that use any of the specified variations of the provided model notice or a notice that is substantially similar to the model notice. *Id.* at 7. The safe harbor also applies if the debt collector "add[s] any of the optional disclosures specifically identified in the rule, omit[s] optional disclosures that appear on the model notice, or provid[es] certain disclosures on a separate page, as provided for in the Rule." *Id.* The safe harbor, however, generally does not apply to the entire validation notice if the validation notice includes additional disclosures beyond the required validation information, the optional disclosures identified in the Rule, or any changes to the form that still leave the form substantially similar to the model notice in substance, clarity, and meaningful sequence. *Id.*

Under the safe harbor, "a debt collector who uses the model validation notice complies with the [December 2020 Final] Rule's content requirements, including that the notice be clear and conspicuous." *Id.* Using the model notice also does not "constitute a violation of the October 2020 [Final] Rule's prohibition on conduct that 'overshadows' a consumer's rights during the validation period." *Id.* The safe harbor does *not* cover the delivery method and timing requirements of the validation notice. *Id.*

#### **F. Translation into Other Languages**

Generally speaking, debt collectors have the option to send the validation notice completely and accurately translated into any language. *Id.* If a debt collector opts to send a translated validation notice, the debt collector must include a validation notice in English in the same communication. *Id.* However, if the debt collector has previously provided the English-language validation notice, it may send a separate translated validation notice. *Id.* at 8.

If the debt collector's validation notice includes the optional disclosure offering consumers the option to request a Spanish translation and a consumer requests a Spanish translation, the debt collector must provide the consumer with a validation notice that is completely and accurately translated into Spanish. *Id.* The CFPB provides a complete and accurate Spanish translation of the model English validation notice, which is available here: [https://files.consumerfinance.gov/f/documents/cfpb\\_debt-collection\\_model-validation-notice\\_spanish.pdf](https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_model-validation-notice_spanish.pdf).

#### **IV. Conclusion**

The October and December 2020 Final Rules clarify many of the FDCPA's requirements and provide new regulations for debt collectors. Debt collectors should review the October and December 2020 Final Rules and ensure their practices are compliant before the October and December 2020 Final Rules go into effect on November 30, 2021.