The CFPB's Proposed Debt Collection Rules and The Impact on First-Party Collectors

By Zachary D. Miller May 2019

On May 7, 2019, the Consumer Financial Protection Bureau ("Bureau" or "CFPB") issued a Notice of Proposed Rulemaking ("NPRM") to implement the Fair Debt Collection Practices Act ("FDCPA"). The full NPRM is 538 pages and can be found here. Among other things, the proposal attempts to set limits on the number of calls that debt collectors may place on a weekly basis, clarify how collectors may communicate using new technologies and require collectors to provide additional information to consumers to help them identify debts. The Bureau has set a deadline of Monday, August 19, 2019 for the receipt of all comments related to the NPRM.

On its face, the NPRM only applies to FDCPA-covered debt collectors; however, the proposal will certainly impact the compliance efforts and litigation strategy of first-party collectors. The NPRM specifically states that the Bureau has authority to prescribe rules for first-party collectors who are "engaged in offering or providing a consumer financial product or service," which would include persons "collecting debt related to any consumer financial product or service." The NPRM also states that "covered persons" under the Dodd-Frank Act would include many FDCPA-covered debt collectors, "as well as many creditors and their servicers, who are collecting debt related to a consumer financial product or service."

This memorandum summarizes the major provisions of the NPRM and also provides context for how the Bureau decided to issue these proposals and also how it decided to avoid directly addressing first-party collections. The memorandum then addresses potential problem-areas created by the NPRM for first-party collectors and presents questions that should be asked when evaluating whether compliance and litigation strategy changes are necessary.

Table of Contents

Page

I. History of the Proposed Rules

On July 28, 2016, in coordination with the CFPB's field hearing on debt collection being held the same day in Sacramento, California, the Bureau released a detailed outline of proposals under consideration for debt collection rulemaking. The proposals only covered third-party debt collection issues, but the Bureau indicated that it planned to address first-party collectors and creditors with proposals at a later date. The proposals addressed two main topics: information integrity and collector communication practices. The "information integrity" piece was also referred to as "right party, right amount," and received the most focus because the Bureau stated it was the cause of the greatest number of consumer complaints.

The CFPB did not move forward after issuing the outline and in June 2017, then-Director Richard Cordray indicated that the CFPB would be changing course, instead issuing a separate rule to deal with the "right consumer, right amount" aspect of the outline that would simultaneously address both first-party creditors and third-party debt collectors. Director Cordray noted that the course change was due to the CFPB's receipt of "substantial feedback" from the industry about the difficulties debt collectors face in complying with the "right consumer, right amount" without concurrent rulemaking to ensure first-party creditors and third-party debt collectors were both taking steps to guarantee that accurate information was being transferred between them.

Several months after the June 2017 announcement, Director Cordray stepped down from the CFPB to launch an unsuccessful bid for governor of Ohio. Following an interim period where OMB Director Mick Mulvaney served as interim director, Kathy Kraninger was appointed to lead the CFPB and was confirmed on December 6, 2018. Shortly after her confirmation, Director Kraninger began meeting with consumer advocates and the members of the debt collection industry in anticipation of the release of new debt collection rules. The NPRM was released on May 7, 2019.

II. Analysis of the Proposed Rules

The CFPB is the first federal agency with the authority under the FDCPA (by virtue of powers granted by the Dodd-Frank Act) to prescribe substantive rules with respect to the collection of debts by debt collectors. Until now, interpretation of the FDCPA has been left to the courts, with no regulatory guidance. The NPRM will result in the first regulatory guidelines for interpreting the FDCPA, with those guidelines and rules being codified in Regulation F.

The format of the NPRM is straightforward, largely addressing each section of the FDCPA as the provisions appear in the statute. On many occasions, the NPRM simply restates the statutory text without providing any additional interpretation. The Bureau noted that this was so parties were only required to read Regulation F and would not have to refer back to the statutory text itself.

The Proposed Rule is separated into four subparts:

- Part A: Generally Applicable Provisions (i.e., definitions)
- Part B: Proposed Rules for FDCPA-Covered Debt Collectors
- Part C: Future Debt Collection Rulemakings
- Part D: Miscellaneous Provisions

This memo focuses on Parts A and B, which contain substantive changes to the law.

A. Generally Applicable Provisions

While Part A discusses the Bureau's authority and the purpose of the FDCPA, the most compelling proposals are additions and revisions to the FDCPA's definitions. The following are the definitions contained within the FDCPA, as well as an indication as to whether they were amended. Also included are new definitions to be located solely within Regulation F.

Defined Term	New or Revised Term?	Substantive Change
Attempt to Communicate	New	Definition: "Any act to initiate a communication or other contact with any person through any medium, including by soliciting a response from such person. An attempt to communicate includes providing a limited-content message . . . ." NOTES: - Covers a broader range of activity than "communication" as it does not require the conveying of information regarding the debt. - Includes attempts to communicate that, even if successful, would not have resulted in conveying information about a debt.
Communicate or Communication	Revised	Definition: "Means the conveying of information regarding a debt directly or indirectly to any person through any medium. A debt collector does not convey information regarding a debt directly or indirectly to any person if the debt collector provides only a limited-content message . . ." NOTES: - Clarifies that communication can happen through any medium (oral, written, electronic, other). - Exempts limited-content messages.
Consumer	Revised	Definition: "Any natural person, whether living or deceased, obligated or allegedly obligated to pay any debt." NOTES: - Includes original definition, but interprets to apply to deceased persons.

Consumer Financial Product or Service Debt	New	Definition: "Any debt related to any consumer financial product or service, as that term is defined . . . in the Dodd-Frank Act." NOTES: - Certain proposed provisions would only apply to debt collectors if they are collecting a consumer financial product or service debt. This definition merely attempts to explain what that is.
Debt	No Material Change	NOTES: This definition stays the same.
Debt Collector	Revised	NOTES: - Generally restates the lengthy definition (omitted here). - Clarifies and incorporates *Henson v. Santander* holding that a debt buyer may qualify as a debt collector if it meets the standard definition.
Limited-Content Message	New	Definition: A message for a consumer that includes all of the following content: • The consumer's name; • A request that the consumer reply to the message; • The name or names of one or more natural persons whom the consumer can contact to reply to the debt collector; • A telephone number that the consumer can use to reply to the debt collector; and • An opt-out message. - In addition to the above, a limited content message *may* include one or more of the following: • A salutation; • The date and time of the message; • A generic statement that the message relates to an account; and • Suggested dates and times for the consumer to reply to the message. NOTES: - New definition meant to allow limited communications to be made in certain situations (discussed below). - Attempts to resolve disputes regarding third-party disclosures and when debt information is communicated in voicemails, text messages and other communications.
Person	New	Definition: "Person includes natural persons, corporations, companies, associations, firms, partnerships, societies, and joint stock companies." NOTES: - Largely superfluous, but incorporates the term "person" used throughout the U.S. Code but absent from the statutory definition.

The changes contained in the definition section are, for the most part, routine. However, the inclusion of the definitions for "attempt to communicate" and "limited-content message," as well as the sections addressing those terms below, will have a wide-spread impact on how debt collectors may communicate with consumers.

B. Proposed Rules for FDCPA-Covered Debt Collectors

1. Communication, Generally (1692c).

a. Attempts to Communicate.

Section 1006.6(b) clarifies that a debt collector is prohibited from attempting to communicate with a consumer in the same circumstances in which the FDCPA section 1692c(a) prohibits the debt collector from communicating with the consumer. Additionally, an unanswered call would be an attempt to communicate that could be considered harassment under section 1692d(5).

b. Unusual Times or Places.

Section 1006.6(b)(1) would clarify that calls to mobile telephones and electronic communications, such as texts and emails, are subject to the FDCPA's prohibition on communicating at unusual and inconvenient times and places. The proposed rules would clarify that the "time" at issue is the time that the message is sent, not when the consumer receives or reviews it.

The proposed comments also explain how a consumer may notify a debt collector that a time or place is "inconvenient." A consumer using the word "inconvenient" would be effective, but even if that word is not used, the debt collector nevertheless may know, or should know, based upon facts or circumstances, what is inconvenient. The proposed comment provides four different factual examples of situations which may result in a debt collector learning that a certain time is inconvenient to contact the consumer. The proposed comment also allows a debt collector to respond to a consumer-initiated message *once* that is from a time or place that the consumer previously designated as inconvenient. After the one response, the debt collector must not communicate further during that time period.

As for the standardized "inconvenient times" of before 8:00 a.m. and after 9:00 p.m., the proposed rules would clarify that if a debt collector's information indicates that a consumer may be in multiple time zones (i.e., street address and area code are from different time zones), the debt collector must use the most conservative approach and only call at times that would be convenient in both time zones.

c. Attorney Communications.

No changes or clarifications are contemplated to this section.

d. Place of Employment Limitations.

No changes or clarifications are contemplated in this section, generally. However, the Bureau is proposing adding § 1006.22(f)(3), which would prohibit the debt collector from communicating or attempting to communicate with the consumer using an email address that the debt collector knows or should know is provided by the consumer's employer, unless the debt collector has received directly from the consumer either prior consent to use that email address or received an email from that address.

e. Communications after Refusal to Pay or Cease Communication Notice.

In general, the current statutory provision would not be significantly altered. However, the Bureau proposes to apply the E-SIGN Act to a consumer electronically notifying a debt collector that the consumer wants to cease communications if the collector accepts electronic communications (for example, allowing a consumer to notify the collector through email or a website portal).

f. Communications with Third Parties.

Generally, the FDCPA's prohibition on communications with third parties would be largely unchanged. However, proposed comment § 1006.6(d)(1) states that because a limited-content message is not a communication, a debt collector does not violate the FDCPA if the debt collector leaves a limited–content message for a consumer orally with a third party who answers the consumer's home or mobile telephone.

g. Communications via Email and Text Message.

The Bureau proposes a safe harbor for collectors to avoid a claim for a third-party disclosure when sending an email or text message. The proposed rules state that a debt collector may avoid a violation of 1692(c) by committing a *bona fide* error if the debt collector maintains procedures to reasonably confirm and document that:

(i) the debt collector communicated with the customer using:

(A) an email address, or text message, that the consumer recently used to contact the debt collector;

(B) a non-work email address or non-work telephone number if:

(1) the creditor or debt collector notified the consumer clearly or conspicuously that the debt collector might use that email address or telephone number for debt collection communications and provided notice more than 30 days before such communication, provided the email address or the telephone number to be used, described one or more ways the consumer could opt-out and provided the consumer with a specified reasonable period in which to opt out; and

(2) the opt-out period has expired and the consumer has not opted out;

(C) a non-work email address or non-work telephone number that the creditor obtained from the consumer to communicate about the debt if, before the debt was placed with the debt collector, the creditor or the prior debt collector recently sent communications about the debt to that number or email address and the consumer did not opt out.

A debt collector who communicates with a consumer electronically must include in such communication a clear and conspicuous statement describing one or more ways the consumer could opt out of future electronic communications.

h. Acquisition of Location Information.

This provision would not be materially changed.

2. Harassment (1692d).

Most of the specific examples of harassment currently contained in Section 1692d are unaffected by the proposed rules. However, the Bureau placed a heavy focus on the prohibition against repeated or continuous telephone calls or telephone conversations.

a. Call Limitation Provisions.

For the first time, the Bureau is proposing to add specific limitations on customer contact. Section 1006.14(b)(2)(i) would prohibit attempting to *call* a consumer more than seven times within seven consecutive days in connection with the collection of a particular debt. Section 1006.14(b)(2)(ii) would prohibit placing a telephone call within seven days after having had a telephone conversation with the person in connection with the collection of a particular debt. This section focuses on attempts, not actual contacts.

Certain telephone calls are excluded from the frequency limits. For example, the following would not count:

1) a call made to respond to a request for information from a person;
2) a call made with the person's prior consent given directly to the collector;
3) a call not connected to the dialed number; or
4) a call with the consumer's attorney, a consumer reporting agency, a creditor, a creditor's attorney or a debt collector's attorney.

The proposed rules then define "particular debt" as each of the consumer's debts in collection. However, the Bureau clarifies that for student loan debts, the term "particular debt" means all student loan debts that a consumer owes or allegedly owes that were serviced under a single account number.

It is also worth noting that proposed § 1006.14(b)(4) would clarify that the effect of complying with the frequency limits would mean that a debt collector would *per se* comply with the prohibition on calling with such frequency as would harass, oppress or abuse the person. The Bureau also admitted that "debt collection provides substantial benefits to the consumer credit marketplace" and that "debt collectors may need to make telephone calls up to the frequency limits to collect debts effectively."

b. Prohibited Communication Media.

Section 1006.14(h)(1) would prohibit a debt collector from communicating or attempting to communicate with a consumer through a medium of communication if the consumer has requested that the debt collector not use that medium to communicate with the consumer. The proposed section does not require the consumer to notify the collector of the opt-out in writing.

There are two exceptions to this prohibition:

> (1) If a consumer opts out in writing of receiving electronic communications from a debt collector, a debt collector may reply once to confirm the consumer's request to opt out, provided the reply contains no information other than a confirmation of the request, and

(2) if a consumer initiates contact with a debt collector using an address or a telephone number that the consumer previously requested the debt collector not use, the debt collector may respond once to that consumer-initiated communication.

3. Misleading Communications (1692e).

Section 1692e of the FDCPA prohibits a debt collector from using any false, deceptive, or misleading representations in connection with the collection of any debt. While Section 1692e of the FDCPA contains 16 different non-exhaustive examples of such prohibited conduct, the proposed rules merely restate and reorganize the statute with only minor word changes for the majority of these provisions. However, the proposed rules do contemplate clarifications and interpretations for Sections 1006.18(e) through (g).

a. Required Disclosures.

Section 1006.18(e) implements Section 1692e(11) of the FDCPA, which requires debt collectors to provide the mini-*Miranda* in their initial communications with consumers. The proposal requires the mini-*Miranda* be provided regardless of whether the initial communication is written or oral, and regardless of whether the debt collector or consumer initiated the communication. Additionally, the proposed rule states that a mini-*Miranda* warning does not need to be included with a limited-content message.

b. Assumed Names.

Section 1006.18(f) provides that nothing in Section 1692e prohibits a debt collector's employee from using an assumed name when communicating or attempting to communicate with a person, provided the employee uses the assumed name consistently and that the employer can readily identify the employee even if the employee is using the assumed name.

c. Safe Harbor for Meaningful Attorney Involvement.

Section 1006.18(g) states that a debt collector does not violate Section 1692e when submitting a pleading, written motion, or other paper to the court in a debt collection litigation if the attorney personally:

(1) drafts or reviews the pleading, written motion, or other paper; and

(2) reviews information supporting such pleading, written motion, or other paper and determines, to the best of the attorney's knowledge, information and belief that, as applicable:

(A) the claims, defenses and other legal contentions are warranted by existing law;

(B) the factual contentions have evidentiary support; and

(C) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or lack of information.

4. Unfair or Unconscionable Means (Section 1692f).

Section 1692f prohibits a debt collector from using unfair or unconscionable means to collect or attempt to collect any debt and lists eight non-exhaustive examples of such conduct. The majority of these

provisions are simply restated in the proposed rules, but the Bureau has recommended changes in two main areas.

a. Restrictions on Use of Certain Media.

Section 1006.22(f)(3) would prohibit a collector from communicating with a consumer using an email address that the debt collector knows or should know is provided to the consumer by the consumer's employer, unless the debt collector has received directly from the consumer either prior consent to use that email address or an email from that email address. The Bureau proposes this rule because of the unusually high risk of third party disclosure in the workplace environment.

Section 1006.22(f)(4) prohibits a debt collector from communicating with a consumer in connection with the collection of a debt by a social media platform that is viewable by another person, with limited exceptions.

b. Safe Harbor for Certain Emails and Text Messages.

Section 1006.22(g) states that a debt collector who communicates with a consumer using an email address or telephone number and follows the procedures described in § 1006.6(d)(3) (as set forth above) does not violate Section 1692f by revealing in the email or text message the debt collector's name or other information indicating that the communication relates to the collection of a debt.

5. Collection on Time Barred-Debt.

Section 1006.26 would prohibit a debt collector from bringing or threatening to bring a legal action against a consumer to collect a debt that the collector knows or should know is a time-barred debt. This new provision comes from the Bureau's authority to prescribe rules under Dodd-Frank. This provision defines "statute of limitations" as the "period prescribed by applicable law for bringing a legal action against the consumer to collect a debt." The proposed rule also defines "time-barred debt" as a debt for which the applicable statute of limitations has expired.

6. Other Prohibited Practices.

Section 1006.30 contains several new measures designed to protect consumers:

- **Furnishing Information to CRAs:** Section 1006.30(a) would prohibit a debt collector from furnishing information to a CRA before communicating with a consumer about the debt.
- **Selling/Transferring Debt:** Section 1006.30(b) prohibits a debt collector from selling, transferring, or placing for collection a debt if the debt collector knows or should know that:
  - (A) the debt has been settled;
  - (B) The debt has been discharged in bankruptcy; or
  - (C) an identity theft report was filed with respect to the debt.

  This provision does have some limited exceptions.
- **Multiple Debts:** If a consumer makes a single payment to a debt collector with respect to multiple debts, the debt collector:
  - (1) must apply any single payment in accordance with the directions given by the consumer, if any; and
  - (2) must not apply the payment to any debt that is disputed by the consumer.

7. Disclosure Proposals

The proposed rules also address changes to the disclosure proposals contained within the FDCPA. For example, Section 1006.34 clarifies and interprets the Section 1692(g) validation notice provisions. The proposal requires a debt collector to include in the validation notice certain information about the debt, including the account number and itemization of the debt; certain information about consumer protections, including information about the right to dispute a debt; and a consumer response form that consumers could use to take certain actions, including submitting a dispute or requesting original creditor information.

Section 1006.34(d)(vi) permits a debt collector to include statements in the validation notice informing consumers how they may request the notice in Spanish, if the collector chooses to provide a Spanish-language translation. Section 1006.34(e) would permit a debt collector to provide a validation notice translated into any language, if the debt collector also sends an English-language validation notice in the same communication or if the debt collector previously sent an English-language validation notice. The proposed rules would permit a debt collector to comply with the FDCPA's validation requirements by using Model Form B-3.

Section 1006.42 would permit a debt collector to provide required disclosures in a manner that is reasonably expected to provide actual notice and in a form the consumer may keep and access at a later time. A debt collector providing the required disclosures electronically would need to comply with either the E-SIGN Act or a set of alternative procedures.

8. Additional Proposals

Section 1006.100 requires a debt collector to retain evidence of compliance for three years after the debt collector's last communication or attempted communication.

Section 1006.104 states that nothing in the FDCPA nor Regulation F would annul, alter, affect or exempt any person from complying with the laws of any State, except to the extent those laws are inconsistent with any provision of the Act or Regulation F. The proposals clarify that a State law is not inconsistent with the Act if the protection such law affords any consumer is greater than the protection provided by the Act.

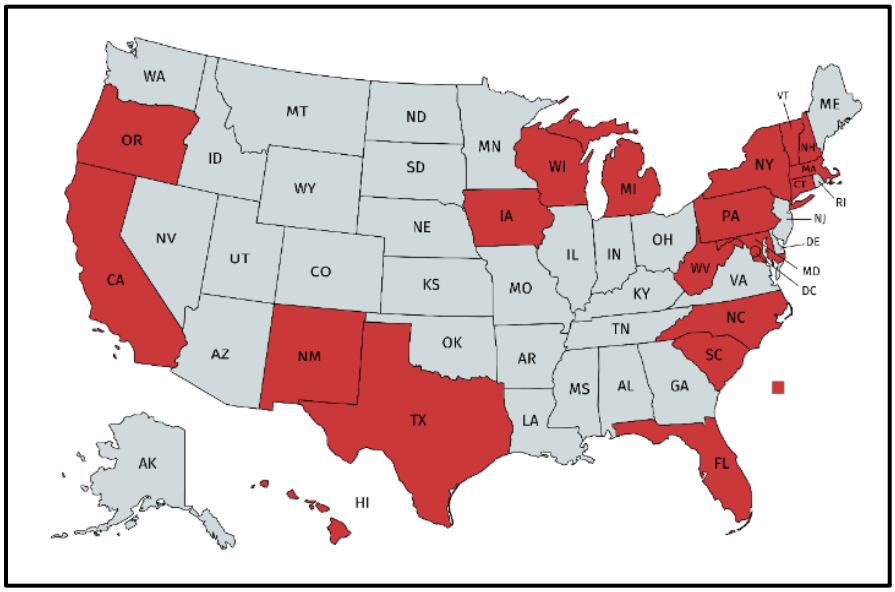
III. Potential Impact of Proposals on First Party Creditors and Collectors

The proposed rules make it clear that they are applicable to FDCPA-covered debt collectors. However, the Bureau also states that it "proposes certain provisions of the regulation based upon the Bureau's Dodd-Frank Act rulemaking authority" and that the "Bureau's authority under the Dodd-Frank Act generally may address the conduct of those who collect debt related to a consumer financial product or service, as that term is defined in the Dodd-Frank Act." This reads like a warning to first-party collectors who are collecting their own debt that the Bureau may seek to use the standards articulated in these proposals to reach beyond FDCPA-covered debt collectors.

This expansion of the Bureau's authority beyond FDCPA-covered debt collectors appears particularly likely when applied to Sections 1692d and 1692f of the FDCPA, which specifically define some behaviors as

abusive or unfair. It seems very likely that the Bureau would borrow principles from these statutory provisions and Regulation F to bring enforcement proceedings against first-party collectors.

Moreover, many states, including *inter alia*, California and Florida, have state debt collection statutes that either specifically reference the provisions of the FDCPA or have established court decisions that have held federal interpretations of the FDCPA are to be given "due consideration and great weight" by state courts interpreting their own statues. It is very likely these states will borrow concepts from the NPRM. A list of states with statutes that apply certain debt collection prohibitions to first-party collectors is below:



Moreover, first-party collectors who eventually seek to market past-due accounts to debt collectors and debt buyers will need to have a process in place for monitoring certain account activity. For example, several of the proposals allow a consumer's consent to receive certain electronic communications to transfer from the creditor to the collector and require the debt collector and/or creditor to keep records of the consumer's prior E-SIGN consent and any attempt to opt-out. Failure to keep track of consent and opt-outs will place subsequent assignees at a severe collections disadvantage and prohibit the use of certain electronic communications to collect on an account.

Thus, based on the likelihood that the Bureau borrows ideas from these principles for sections 1692d and 1692f, and the likelihood that first party states do the same, we recommend that first-party collectors pay particular attention to the following sections:

- Call frequency
- Unusual time and location limitations
- Prohibited communication media
- Restrictions on use of certain media
- Safe harbor for certain emails and text messages

We have also created a list of potential questions that may provide a jumping-off point for your compliance review:

- Do you currently have limitations on the number of calls that can be placed to a specific consumer during a specific time period, and can those limitations be applied on a per-account basis?
- Do you have the ability to notate whether you made a right party contact and, if so, stop calls for a certain period of time?
- Do you have the ability to limit calls and other communications to a consumer based upon the consumer's notification that a certain time or location is inconvenient for the consumer?
- Do you have the ability to limit calls to a certain time based upon ***both*** the consumer's area code and address?
- What types of methods are currently used to contact consumers? (i.e., phone, text, email, fax, etc.)
- Do you have a method for monitoring opt-out requests for certain types of media?
- Will you be providing the opt-out disclosure notice in electronic communication so that subsequent debt buyers or debt collectors may contact the accountholder using electronic media?
- Do you have a system for notating and recording "opt-out" requests even if they are not made in writing?
- Do you have a means for identifying employer-provided email addresses and eliminating those email addresses from the consumer's contact database?
- Do you have a method for tracking whether a consumer has provided consent to be emailed at an employer-provided email address or phone number?
- Do you conduct any collection efforts through social media platforms and, if so, are any of those efforts visible to third parties?

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