

# Understanding the CFPB's Final Rule on Debt Collection

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# What We Will Discuss

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- The basics
- Impacts on creditors
- Call restrictions
- Limited content messages
- Electronic communications
- Validation notices and delivering required disclosures electronically

# The Basics

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- The Rule revises Regulation F, 12 CFR part 1006, which implements the Fair Debt Collection Practices Act (FDCPA)
- It will be effective one year after publication in the Federal Register (as of today, still waiting)
- A second rule addressing validation notices will be released sometime in Dec. with some further outreach in 2021 to help the CFPB prepare for a later assessment of the Rule

# Impacts on Creditors

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- The Rule applies to “debt collectors” as defined by the FDCPA
- Dodd-Frank UDAAP provision is not a basis for the Rule (change from proposed rule).
- An open question whether activities that would violate the Rule, when undertaken by creditors, may violate the UDAAP prohibition. (See CFPB Bulletin 2013-07)
- State laws may implicitly or explicitly incorporate the Rule’s provisions against creditors (e.g., California Rosenthal Act)

# Impacts on Creditors (cont.)

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- Creditors may only transfer e-mail addresses to debt collectors after providing notice and opt-out right; e-mail address must be on a domain that is available to the general public.
- Rule is silent about whether creditors may transfer consumers' consent to receive text messages or electronic communications.
- Provisions relating to validation notices (ETA Dec.) may require creditors to provide itemizations of credits and charges after “itemization date”

# Impacts on Creditors

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**Questions or Comments**

# Call Restrictions – Frequency

- No more than 7 call attempts within 7 consecutive days permitted; 7 day waiting period after a successful contact
  - Rebuttable presumption, not a bright-line rule
  - Limits apply across all student loans serviced under a single account number
  - Voicemails, ringless voicemails, and limited content messages count as “calls”
  - Not included in limits: (1) returning consumer requests for information/a call back within 7 days after receiving consent, (2) calls that do not connect (busy signal, out of service/disconnected message), and (3) calls that went to a number that does not actually belong to the consumer

# Call Restrictions – Inconvenient Time and Place

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- Communications before 8 am or after 9 pm in the consumer's time zone are presumptively inconvenient, and must be determined using both mailing address and telephone area code
- Collectors must abide by information contained in the file provided by the creditor regarding requests not to be contacted at certain times or places.
  - Collectors must obtain direct consent to communicate at time or location identified as inconvenient

# Call Restrictions – Other Issues

- Rule reiterates FDCPA restriction on calling consumers who are represented by attorneys
  - CFPB confirmed in Official Commentary that if represented consumer initiates a communication with the collector, the collector may respond to that specific communication
- Rule reiterates FDCPA restriction on calling consumers at their place of employment (POE)
  - Consumer need not use any specific language to receive protection
  - No requirement to track, in the aggregate, which employers prohibit employees from receiving collection communications.
  - Prohibition applies to work landlines and employer-provided cell phones and email addresses (not personal phone unless collector knows or should know the consumer is at work)

# Limited Content Messages

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- A voicemail message must include the following information to qualify as a limited content message:
  - a business name for the debt collector that does not indicate that the debt collector is in the debt collection business;
  - 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, and
  - a telephone number that the consumer can use to reply to the collector.
- Save for certain other optional information, nothing else can be included in the message for it to retain its status as a non-collection communication.
- Only voicemails can qualify (not text messages or live calls).

# Call Restrictions/Limited Content

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**Questions or Comments**

# Electronic Communications

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- No hard frequency limits
  - General harassment/oppression/abuse standard
  - Time and place limits apply
  - No “limited content” email or text message
- Each message must have opt-out instructions
  - Clear and conspicuous instructions
  - Reasonable and simple opt-out method
  - Opt out cannot be conditioned on payment of a fee or on the provision of other information

# Three Safe Harbors for Emails

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- Communications based on communications between the debt collector and the consumer
- Communications based on email address from the creditor
- Communications based on email address from the prior debt collector (not any prior debt collector)

# Emails – Debt Collector

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- Consumer used the email address to communicate with the debt collector
- Consumer provided the email address to the debt collector
  - May use an address obtained through a portal or other method
  - Must disclose clearly and conspicuously that the email address will be used to communicate about the debt

# Emails – Creditor

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- Two key limitations on the use of an email address obtained and used by the creditor
  - Creditor must have sent a proper written or electronic opt-out notice and provided at least a 35-day opt-out period
  - Domain name must be one that is available for use by the general public
    - Not a branded domain name, such as @springsidemortgage.com
    - Not a name reserved for a type of institution, such as @university.edu

# Emails – Prior Debt Collector

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- Prior debt collector obtained the email address through its communications or from the creditor
- Prior debt collector used the email address to communicate with the consumer
- Consumer has not opted out of communications to that email address

# One Safe Harbor for Texts

- Must be based on communications between the debt collector and the consumer
  - Consumer used the phone number to send a text message to the debt collector
  - Consumer provided consent for the number to be used to text about the debt
- Additional restrictions
  - No opt out; within past 60 days either use/consent or confirmation that phone number has not been reassigned using a complete and accurate database

# Electronic Communications

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**Questions or Comments**

# Validation Notice

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- Additional content and model validation notice coming in December
- No safe harbor for validation notice delivered in the body of initial communication sent by email
- CFPB says in preamble to final rule that this is permissible as ESIGN consent is not required

# Electronic Disclosures

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- Must send in a manner reasonably expected to provide actual notice, as determined by relevant factors
  - Requires identifying information in the subject line of the email
  - Debt collector must permit (not block) and monitor for notifications that message was undeliverable
  - Debt collector must identify itself as sender using name that consumer would recognize

# Electronic Disclosures (cont.)

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- Must be in a form that the consumer may keep and access later
- Requires compliance with ESIGN and thus may lead to greater scrutiny of such disclosures
  - CFPB declined to say whether consent from creditor or prior collector would be transferable
  - CFPB declined to adopt alternative procedures that had been proposed

# Validation Notice/Elec. Disclosures

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**Questions or Comments**

# John L. Culhane, Jr.

SPEAKER

- Partner at Ballard Spahr and a member of the firm's Consumer Financial Services, Mortgage Banking, Bank Regulation and Supervision, Higher Education, and Privacy and Data Security Groups as well as its Marketplace Lending Task Force, Fair Lending Task Force, TCPA Task Force, and Military Lending Act Task Force
- Compliance practice emphasizes counseling clients on the development and implementation of innovative loan, leasing, and payment programs, and includes counseling on fair lending, servicing and collection issues
- Regulatory practice includes preparing clients for banking agency and CFPB targeted fair lending and full spectrum compliance examinations as well as assisting in the defense of consumer class actions, attorney general investigations, and agency enforcement actions
- Named a top consumer financial services lawyer by Chambers USA, 2015-2020
- Charter member of the American College of Consumer Financial Services Lawyers
- Former Chair of the Subcommittee on Fair Lending of the ABA Committee on Consumer Financial Services

# Heather S. Klein

## SPEAKER

- Heather S. Klein is a member of the firm's Consumer Financial Services, Mortgage Banking, and Higher Education Groups as well as its Marketplace Lending Task Force, Fair Lending Task Force, Fintech and Payments Team, and Debt Collection Team
- Heather's practice emphasizes counseling companies on innovative and traditional financing programs, including issues relating to fair lending, credit reporting, marketing, payments, servicing, debt collection, electronic contracting, vendor management, and unfair, deceptive or abusive acts or practices
- She assists clients including student loan servicers, income share providers, and debt collectors with preparing for and responding to federal and state regulatory examinations and investigations, developing new financial products and services, drafting customer-facing disclosures and agreements, conducting regulatory due diligence for M&A transactions, and state licensing
- Heather currently serves as co-vice chair of the Truth in Lending Subcommittee of the American Bar Association's Consumer Financial Services Committee

# Resources

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