

## CFPB Issues Long-Awaited Proposed FDCPA Regulation

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Today, the Consumer Financial Protection Bureau issued a proposed rule implementing the Fair Debt Collection Practices Act pursuant to its authority under Section X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. As promised in recent months, the proposed rule focuses on consumer communications - both the substance of the communications and time-and-place requirements and restrictions. If you have been tracking the progress of the rulemaking, you'll recall that this proposed rule is six years in the making. The Bureau requests comments on the proposed rule within 90 days after publication of the proposed rule in the *Federal Register*. The proposed rule includes a proposed effective date of one year after publication of the final rule in the *Federal Register*.

Here is a summary of some of the most important elements of the proposal:

1. Definitions and Scope: The proposed rule retains most of the definitions from the FDCPA, does not expand the scope of the law, and applies to what we have come to know as FDCPA "debt collectors" who acquire debts for collection at a time when those debts are in default. There is no proposal to expand or contract the FDCPA's definition of "debt collector" in the proposed rule. The proposed rule defines "consumer" to clarify that it includes deceased consumers.
2. Model Debt Validation Notice: As suggested in the Bureau's [Outline of Proposals Under Consideration in 2016](#), the proposed rule includes a [model debt validation notice](#) (see 12 CFR § 1006.34 as proposed). The proposed rule requires a debt collector to itemize the amount of the debt as of certain dates (depending on the type of debt), broken down to show interest and fees added to the debt, as well as payments received and applied to the debt, as of the date of the letter. The model notice does not include disclosures about other FDPCA consumer rights (like the right to demand a cease in communications) as had been suggested. The model notice, if adopted, will give debt collectors a "safe harbor" for compliance with the requirements of proposed 12 CFR § 1006.34, which will be a welcome development for debt collectors. Finally, the proposed rule allows debt collectors to deliver the debt validation notices electronically under certain circumstances and to offer translations of the notice for consumers who do not speak English.
3. Telephone Contact Frequency: Under proposed 12 CFR § 1006.14(b), if the debt collector places a telephone call to a person in connection with the collection of a particular debt either:
  - (i) more than seven times within seven consecutive days; or
  - (ii) within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt,

the debt collector is committing the unfair practice of placing telephone calls or engaging a person in telephone conversation repeatedly or continuously in connection with the collection of such debt, such that the natural consequence is to harass, oppress, or abuse any person at the called number. Certain calls do not count toward the above limits, including call-backs responsive to a request, calls made with the consumer's consent, calls not connected to the dialed number, or calls to persons with whom the debt collector is allowed to speak about the debt who are not the obligor on the account (i.e., the consumer's attorney, a consumer reporting agency, the creditor, the creditor's attorney, or the debt collector's attorney).

4. Electronic Communications: 12 CFR § 1006.6(d)(3) allows the debt collector to take certain steps in the context of electronic communications (e.g., text messages and email) to allow the debt collector to communicate with the consumer by electronic means unless and until the consumer opts out of such communications. The model debt validation notice referenced above includes an opt-out section. The proposed rule also establishes a means for the debt collector to provide the debt validation notice, the "original creditor" disclosure, and any validation information by electronic means as long as the consumer provides E-Sign consent or the debt collector uses an alternative means of obtaining consent to receive electronic disclosures through a secure website. The Bureau has provided a [helpful aid](#) for debt collectors who would like to use electronic communications.

5. Work Email and Social Media: The proposed rule would prohibit debt collectors from communicating with consumers at an email address the debt collector knows or should know is an email address provided by the consumer's employer. The proposed rule also prohibits contacts with consumers on social media platforms (except by direct private message).

6. Voicemail: The proposed rule attempts to solve the voicemail conundrum presented by the holdings in the now-famous case of *Foti v. NCO Financial Systems*, 424 F. Supp. 2d 643 (S.D.N.Y. 2006) and its progeny. As first described in the Outline of Proposals Under Consideration in 2016, the Bureau proposes a "limited content message" that includes only the consumer's name, a request that the consumer reply to the message, the name or names of one or more natural persons the consumer can contact to reply to the message, a telephone number and, if applicable, an opt-out for electronic communications. The Bureau proposes a definition of "communicate" that makes clear that a "limited content message" does not convey information about a debt directly or indirectly to any person. Based on the proposed rule, debt collectors will be able to leave a "limited content message" for consumers without the concerns raised in the *Foti* case and the tomes of consumer litigation that followed it.

7. Time-Barred Debt: Under proposed 12 CFR § 1006.26, and consistent with FDCPA case law, a debt collector may not sue or threaten to sue on a debt that the debt collector knows or should know is outside of the applicable statute of limitations. The Bureau explains in the supplementary information to the proposed rule that it is testing disclosures relating to time-barred debt and may, at a later date, propose required disclosures for debt collectors to provide when collecting time-barred debt.

8. Passive Debt Collection: Under proposed 12 CFR § 1006.30(a), a debt collector may not furnish information about a consumer to a consumer reporting agency without first communicating with the consumer about the debt. The Bureau indicates that it is seeking to limit passive debt collection practices, like reporting delinquent debt to the consumer reporting agencies without first alerting the consumer to the fact that she has a debt in collection, which the Bureau believes can be coercive and reduce consumer information and choices.

9. Limits on Debt Transfers: Proposed 12 CFR § 1006.30(b)(1) would, with certain exceptions, prohibit a debt collector from transferring a debt under certain circumstances, including when:

- a. the debt has been paid or settled;
- b. the debt has been discharged in bankruptcy; or
- c. an identity theft report as defined under the Fair Credit Reporting Act has been filed with respect to the debt.

This outline does not cover everything in the proposed rule but highlights some of its major provisions. Please stay tuned for more communications and in-depth analysis about the proposed rule.

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7037 Ridge Road, Suite 300, Hanover, Maryland 21076  
410.684.3200

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