

Reg. F: Finally bright line rules come to debt collection

By Joseph Cioffi, Esq., and Nicole Serratore, Esq., Davis+Gilbert LLP

APRIL 27, 2022

Though it may seem counterintuitive, what is protective for consumers could also be protective for debt collectors, and good for business overall. Regulation F, with its bright line rules for debt collectors to follow, gives greater control to consumers over methods and timing of communications and in doing so, lowers the legal exposure of collectors that abide by consumers' expressed preferences.

It's a timely set of rules given inflation and rising interest rates which are creating the potential for a severe economic downturn and a significant rise in consumer delinquencies across all markets, especially subprime sectors.

As Regulation F is one of the most comprehensive changes in debt collection regulation, below is a summary of the rules that must be followed and their significance.

Background and entities covered

The Consumer Financial Protection Bureau (CFPB) implemented Regulation F on Oct. 30, 2020, and Dec. 18, 2020, interpreting the Fair Debt Collection Practices Act (FDCPA). The FDCPA is designed to protect consumers from abuse and harassment during debt collection and make sure they receive transparent, accurate information relating to their debts. Dodd-Frank amended the FDCPA, giving authority to the CFPB to create rules with respect to debt collection.

Regulation F is one of the most comprehensive changes in debt collection regulation.

Effective as of Nov. 30, 2021, the CFPB's new rules set out a clear framework that debt collectors must work within.

The rules apply to debt collectors, and generally not creditors. This would include any person who uses interstate commerce or mail in a business for the principal purpose of collecting debts, or who directly or indirectly regularly collects or attempts to collect debts owed or asserted by another party. In addition, a creditor who uses a name other than their own in collection process "that would indicate that a third person is collecting or attempting to collect such debts" would be covered under the rules.

Consumer communications covered

Regulation F places certain limits upon debt collectors in their contacts with consumers in an effort to be sure the consumer is not abused or harassed in this process.

Who Can Be Contacted: Debt collectors can only communicate with the following people in connection with the collection of a debt:

- The consumer.
- The consumer's attorney.
- A consumer reporting agency, if otherwise permitted by law.
- The creditor.
- The creditor's attorney.
- The debt collector's attorney.

When and Where: Debt collectors may not contact a consumer:

- At an unusual time or a time known (or should be known) to be inconvenient,
- At an unusual place or a place that is known (or should be known) to be inconvenient to the consumer, or
- At their place of employment if the collector knows or has reason to know that the employer prohibits the consumer from receiving such communication.

How Often: Debt collectors may not contact a consumer:

- More than seven times within seven consecutive days nor
- Within a period of seven consecutive days after a phone conversation with the consumer in connection with the collection of such debt.

There are exceptions to the issue of call frequency. For instance:

- Where the consumer has given prior consent directly to the debt collector.
- Where the telephone call does not connect to the dialed number (busy signal, number not in service).
- Where the debt collector is contacting the consumer's attorney, a consumer reporting agency, the creditor, the creditor's attorney or the debt collector's attorney.

However, if a consumer requests the debt collector not communicate with them through a certain medium then the debt collector must refrain from using that medium. If the consumer

opts out of receiving electronic communications from the debt collector, the debt collector may send an electronic communication to confirm that request to opt-out but with no other information in that communication. If the consumer uses the prohibited medium to contact the debt collector, the debt collector may respond once via that medium.

Avoiding false, deceptive or misleading representations or means

A central tenet of these regulations is that the debt collector must not use any false, deceptive, or misleading representations or means in connection with the collection of any debt.

Some examples of prohibited behavior include:

- Suggesting the debt collector is affiliated with the federal or state government.
- Suggesting that an individual is an attorney.
- Suggesting the consumer has committed any crime or conduct in an effort to disgrace the consumer.

In addition, the collector cannot falsely represent the character, amount, or status of the debt. A collector cannot threaten with arrest, imprisonment, garnishment, attachment or sale of property unless those actions are lawful and the creditor intends to take such actions.

A central tenet of these regulations is that the debt collector must not use any false, deceptive, or misleading representations or means in connection with the collection of any debt.

A debt collector cannot take action or threaten to take action that cannot be legally taken. Nor can they threaten to take some action that they do not actually intend to follow through on.

Debt collectors cannot use written communications that simulates or falsely represents the document is authorized, issued, or approved by a court, state, or government official or agency.

The regulations also define a time-barred debt, and a debt collector is not permitted to bring or threaten to bring a legal action over a time-barred debt.

Meeting consumers where they are

In attempting to modernize and keep up with how customers want to communicate, the new regulations address electronic communications. Debt collectors may use email and text messages, but the debt collector must maintain reasonable procedures with respect to emails and texts to avoid sending communication to unauthorized third parties. So, the debt collector must be mindful of how they obtained the email address and whether the consumer has consented to its use.

For instance, a debt collector may send email communications:

- If a consumer communicated to the debt collector using an email address and the consumer has not opted out of email communications or
- If the debt collector has received prior consent directly from the consumer to use the email address to communicate about the debt and that consent has not been withdrawn or
- If a creditor obtained the email address from the consumer or
- If the creditor used the email address to communicate with the consumer about the account and the consumer did not request the creditor to stop.

A debt collector may send text messages if:

- The consumer used that phone number to communicate with the debt collector about that debt via text message and has not since opted out of text communications and the debt collector has further reassurances such as:
 - Within the past 60 days, the consumer sent a new text message to the debt collector from that number; or
 - Within the past 60 days, the debt collector confirmed that phone number had not been reassigned from the consumer to someone else since the date of the consumer's most recent text.
- Alternatively, the debt collector received prior consent to use the number to communicate with the consumer about the debt by text message and the consumer has not withdrawn that consent and the debt collector has further reassurances such as:
 - Within the past 60 days, the debt collector obtained that prior consent or renewed consent from the consumer or
 - Within the past 60 days, the debt collector confirmed the phone number had not been reassigned to someone else since the date of most recent consent.

There is a bona fide error defense under the FDCPA (Section 813(c)). If the debt collector has followed the text message and email procedures described in detail in Regulation F and implemented reasonable procedures to keep the communications limited to only the permitted parties, then they fall within the safe harbor.

Looking ahead

Although the parameters of Regulation F are more detailed than we've summarized here, the overall takeaway is that this guidance will take out the guesswork in debt collector-consumer interactions. It will likely also require investment in technology as collectors will need to ensure their automated systems integrate these regulations into their processes and train their teams carefully. In the long run, the bright lines will make the collection process more predictable and reduce compliance risk.

Joseph Cioffi is a regular contributing columnist on consumer and commercial financing for Reuters Legal News and Westlaw Today.

About the authors



Joseph Cioffi (L) is a partner at **Davis+Gilbert LLP** in New York City, where he is chair of the Insolvency + Finance practice. He uses transactional, insolvency and litigation experience in sectors marked by significant credit and legal risks, such as, subprime lending and emerging industries, to help clients address their needs. He can be reached at jcioffi@dglaw.com. **Nicole Serratore** (R) is an attorney in the Insolvency, Creditors' Rights + Financial Products Practice Group in New York City. She can be reached at NSerratore@dglaw.com.

This article was first published on Reuters Legal News and Westlaw Today on April 27, 2022.