The Debt Collection
NPRM: A New Age Dawning
1978: FDCPA enacted
2011: CFPB began operations
2013: CFPB Issues First Guidance on FDCPA
2013: Advanced NPRM
2016: SBREFA and Talking Points
2019: NPRM Published
Relevance of NPRM

- Start of an administrative proceeding
- 90 days for the public to provide comments
- Creates a record for review
- Standard of review: arbitrary and capricious
- A challenge to the rule would be to the D.C. Circuit
## Industry Response

### Who should respond?
- Trade groups
- Industry members
- Consumer special interest groups

### What Should a Public Comment look like?
- Issue spotting
- Specific concerns
- Constructive
- Offer alternatives
- Be persuasive
  - Identify harm to consumers
  - Identify cost prohibitive barriers for the industry
  - Operational
  - Litigation
  - Identify conflicts with the law
CFPB proposes to amend Regulation F to prescribe Federal rules governing the activities of debt collectors.

- Proposed rule is based primarily on the CFPB’s authority to issue rules implementing the FDCPA.
- Proposed rule restates FDCPA’s substantive provisions largely in the order that they appear in the statute.
- CFPB proposes certain provisions based solely on its Dodd-Frank Act rulemaking authority.
- Proposed rule has four subparts:
  - Subpart A contains generally applicable provisions.
  - Subpart B contains proposed rules for FDCPA-covered debt collectors.
  - Subpart C is reserved for future debt collection rulemakings.
  - Subpart D contains miscellaneous provisions.
The Highlights

• Treatment of Deceased Consumers

• Debt Validation Notice
  • Added disclosures, itemization requirements
  • Safe Harbor Form
  • Attempts to provide electronic options

• Communications
  • Attempts to communicate
  • Limited Content Communications
  • Limitations on frequency of communications
  • Provides electronic options

• Disputes
  • New debt validation requirements
  • Addresses duplicative disputes

• Meaningful Involvement Trap

• Record retention requirements
§1006.1: Authority, Purpose and Coverage

**Authority**
- FDCPA
- Dodd Frank
- Electronic Signatures Act

**Purpose**
- Purposes of the FDCPA
- Requirements to ensure certain aspects of debt collection are fully, accurately, and effectively communicated to consumers
- Requirements for record retention
- To enable the CFPB to administer and carry out purposes of the FDCPA and Dodd Frank
- To prevent “evasions” of FDCPA and Dodd Frank
- To facilitate supervision of debt collectors and assess and detect risk to consumers

**Coverage**
- Applies to “debt collectors”
- Exclusion for motor vehicle dealers
- Certain provisions only apply when collecting on consumer financial products or service debt
§1006.1: Authority, Purpose and Coverage (15 U.S.C. 1692)

- Coverage is Unclear
  - Who is covered?
    - FDCPA defined debt collectors? YES
    - Creditors collecting their own debt? MAYBE BASIS FOR LIABILITY
      - CFPB proposes certain provisions of the regulation based upon Dodd Frank rulemaking authority for unfair, deceptive and abusive practices
  - 1006.1(c)(2) expands and alters certain provisions of the FDCPA, including 1692e and g
1006.2 Definitions (15 U.S.C. 1692a)

- Includes additional definitions and attempts to clarify 15 USC §1692a
  - Attempts to communicate/communication/limited content messages
  - Expansion of the definition of consumer to include a deceased natural person
  - Debt collector definition supports *Henson v. Santander* regarding debt buyers
  - Person includes corporations, etc.
What is an “attempt to communicate” vs. a “communication”

• 1006.2(b) defines an “attempt to communicate” as being any act to initiate a communication or other contact with any person through any medium
  • Includes limited content messages
  • Includes placing a telephone call regardless of whether the debt collector speaks to anyone
• 1006.2(d) defines “communication” to mean conveying information regarding a debt directly or indirectly to any personal through any medium
  • EXCLUDES limited content messages
• Designed to address the Foti issue and the tension between complying with the mini Miranda requirements and preventing the risk of inadvertent third party disclosure

• May not be made by email
  • Actual rule does not expressly state this, but commentary and official interpretation make it abundantly clear that limited content messages may NOT be communicated by email

• May be made by:
  • Telephone message
  • Text message
  • By communication with a third party
“Required” Content for Limited Content Messages

- Required Content
  - Mandated that the following information be included:
    - Consumer’s name
    - A request for the consumer to follow up with the message
    - A telephone number AND the name of a natural person who the consumer can contact to reply to the message
    - If the message was delivered electronically, a note explaining how the consumer can stop receiving messages through that particular medium
Optional Content

Generally, information will be allowed that is used to “prompt” the consumer to reply:

- Salutation
- Date and time that the message was left
- A generic statement relating to the account
- Suggested dates and times for the consumer to return the message
Are debt buyers “debt collectors”?

- CFPB seems willing to go along with the *Henson v. Santander* carve out
- There is no carve out for attorneys
Who is a “person” and why do we care?

- 1006.2(k): person includes natural persons, corporations, companies, associations, firms, partnerships, societies, and joint stock companies
- Expands standing under the FDCPA
  - 15 USC 1692e
Points to Ponder (1006.2)

- Limited Content Messages (exclusion of email)
- Inclusion of deceased consumers
- Person includes corporations
Communications in Connection with Debt Collectors (15 USC 1692c)

Multiple components

- Definition clarification
- Clarification as to time and place
- Discussion as to consent exceptions
- Cease and desist clarification
- Clarification and rules for electronic written communications

Relates to 1692c
Who is a “consumer” for purposes of 1692c?

- Expressly includes personal representatives and *confirmed* successors in interests as “consumers” for purposes of this section
  - CFPB proposes to include within the definition of “executor or administrator of the consumer’s estate” any personal representative. Defined broadly to include any person who is authorized to act on behalf of a deceased consumer’s estate.
  - Clarifies that spouse and parent also extends to deceased consumer
  - CFPB incorporates their 2016 FDCPA interpretive rule to include *confirmed* successors in interest
Clarification as to Inconvenient Time and Place

- Clarifies that:
  - 1692c includes attempts to communicate as well as communications
  - 8AM – 9PM means local time at the consumer’s location
  - Place of employment
    - Addresses POE emails
    - Addresses POE cell numbers
    - Addresses prior consent
Cease and Desist

- Electronic communications occur when sent not received
- May be made electronically
- Interprets a refusal to pay as a cease and desist
- Issues and needs for further clarification
Sets forth a “bona fide error” standard for written electronic communications

Does not apply to voice mail messages

“Safe Harbor” for electronic written communications

If debt collector shows by preponderance of the evidence that the violation was not intentional, that it occurred as the result of a “bona fide error,” and that it occurred even though the debt collector maintained procedures reasonably adapted to avoid the error, the debt collector will not be held liable for an action under the FDCPA.
1006.6 set forth three “safe harbors”

An email address or phone number that was recently used by the consumer to contact the debt collector for purposes other than opting out

BUT BEWARE, THE INCONVENIENT TIME AND PLACE RULE
2. A non-work email address or non-work telephone number, if the debt collector has notified the consumer that this address or number will be used for debt collection communication, the debt collector provided a compliant notice no more than thirty days before debt collector’s first such contact AND the time period expired AND the consumer did not opt out; or
3. A non-work email address or non-work telephone number that the creditor or another debt collector recently obtained if, before the debt was placed with the debt collector, the prior debt collector or creditor recently sent communications to that non-work email or non-work telephone number and the consumer did not request that the address or number not be used for debt collection.
1006.10 Acquisition of Location Information (15 USC 1692b)

- Generally mirrors 15 U.S.C. §1692b
- Clarifies that the “frequency” restrictions of 1006..14 also apply to location communications
- Clarifies that the definition of location information includes the information for a person authorized to act on behalf of the deceased consumer’s estate
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.
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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.

<table>
<thead>
<tr>
<th>Defined Term</th>
<th>New or Revised Term?</th>
<th>Substantive Change</th>
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<tbody>
<tr>
<td>Attempt to Communicate</td>
<td>New</td>
<td>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 . . . .”</td>
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<td>NOTES:</td>
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<td></td>
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<td>- Covers a broader range of activity than “communication” as it does not require the conveying of information regarding the debt.</td>
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<td>- Includes attempts to communicate that, even if successful, would not have resulted in conveying information about a debt.</td>
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<tr>
<td>Communicate or Communication</td>
<td>Revised</td>
<td>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 . . . .”</td>
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<td>NOTES:</td>
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<td></td>
<td></td>
<td>- Clarifies that communication can happen through any medium (oral, written, electronic, other).</td>
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<td>- Exempts limited-content messages.</td>
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<tr>
<td>Consumer</td>
<td>Revised</td>
<td>Definition: “Any natural person, whether living or deceased, obligated or allegedly obligated to pay any debt.”</td>
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<td></td>
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<td>NOTES:</td>
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<tr>
<td></td>
<td></td>
<td>- Includes original definition, but interprets to apply to deceased persons.</td>
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| **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.


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-\textit{Miranda} in their initial communications with consumers. The proposal requires the mini-\textit{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-\textit{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 statutes. 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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The Proposed Debt Collection Rule

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INTRODUCTION

The Consumer Financial Protection Bureau (the “Bureau”) has published its long awaited proposed Debt Collection Rule (84 Fed. Reg. 23274) (the “Rule”). The Rule “address[es] communications in connection with debt collection; interpret[es] and appl[y]es prohibitions on harassment or abuse, false or misleading representations, and unfair practice in debt collection; and clarif[ies] requirements for certain consumer-facing debt collection disclosures.”

Background

The federal Fair Debt Collection Practices Act (the “FDCPA”) was passed in 1977 to “eliminate abusive debt collection practices by debt collectors, to ensure 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.” Interpretative questions have arisen since the FDCPA was passed in part because of new communication technologies that did not exist at the time of enactment. As a result, there have been inconsistent court decisions and uncertainty in the marketplace. The

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3 See, e.g., Foti v. NCO Fin. Sys., 424. F. Supp. 2d 643, 659 (S.D.N.Y. 2006) (“the fact that NCO may not be able to leave a pre-recorded message that complies with both § 1692e(11) and § 1692c(b) of the Act in no way warrants a conclusion that “communication” should be narrowly interpreted. Rather, it merely suggests that a debt collector is not permitted to leave a pre-recorded message in violation of the FDCPA. Debt collectors, however, could continue to use other means to collect, including calling and directly speaking with the consumer or sending appropriate letters. Thus, the alleged “Hobson’s Choice” in this case is self-imposed by NCO. It is only because of the method of debt collection selected -- calling and leaving the type of pre-recorded messages -- that NCO is faced with this potential dilemma.”).
Rule proposes to clarify how new communication technologies can be used in compliance with the FDCPA and to expand the requirements for consumer-facing disclosure requirements. While the majority of the Rule is based on the Bureau’s authority under the FDCPA, certain provisions are based on the Bureau’s Dodd Frank rulemaking authority and either deviate from the express language of the FDCPA or add additional requirements not found within the four corners of the FDCPA.

SUMMARY OF THE PROPOSED RULE

Scope and Coverage (1006.1)

The Rule draws its authority not only from the FDCPA but also from the Dodd-Frank Act. Specifically, four sections of the Rule draw their authority from Dodd-Frank, 12 U.S.C. § 5481 et seq. These sections either deviate from the plain language of the FDCPA or add additional requirements for debt collectors collecting financial service product or service debts as those terms are defined in Dodd-Frank. The Bureau’s stated position is that it is authorized to prescribe rules applicable to a covered person or service provider to identify and prevent unfair, deceptive or abusive acts of practices pursuant to Section 1031(b) of the Dodd-Frank Act. Additionally, certain portions of the Rule addressing electronic disclosures are issued pursuant to the provisions of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §7004 (the “E-SIGN Act”).

Section 1006.1 carries out the stated purposes of the FDCPA while including new requirements with respect to consumer disclosures and record retention requirements. As

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5 See 84 Fed. Reg. at 23401 (proposed section 1006.14(b)(1)(ii)); Id. at 23403 (proposed section 1006.30(b)(1)(ii)); and Id. at 23404 (proposed sections 1006.34(c)(2)(iv) and 1006.34(c)(3)(iv)).
6 Id. at 23286.
7 Id. 23417 (proposed section 1006.42(b)(1)).
stated within the Rule, it “also prescribes requirements to ensure that certain features of debt
collection are disclosed fully, accurately, and effectively to consumers in a manner that permits
consumers to understand the costs, benefits, and risks associated with debt collection.”
Its
record retention requirements are designed to facilitate “supervision of debt collectors and the
assessment and detection of risks to consumers.”

**Attempts to Communicate (1006.2(b))**

The Rule focuses sharply on the content of communications with consumers and
protections triggered by that content. Section 1006.2(b) defines “Attempts to Communicate”
as the broadest category of communication, including “any act to initiate a communication or
other contact with any person through any medium, including by soliciting a response from
such person.” The definition includes limited-content messages. This definition is an effort to
clarify ambiguity regarding whether a debt collector’s attempts to communicate with a
consumer are covered by the FDCPA even if the consumer is never reached, such as placing
unanswered phone calls, or only limited content is shared with the recipient. Both
“communication” and “limited-content communication” are subsets of attempts to
communicate. The definition of “person” under the federal Dictionary Act includes artificial
entities and courts have upheld the rights of artificial entities such as a corporation or limited
liability company to bring suit under the FDCPA. Debt collectors should be mindful of
communications to entity consumers as well as individual consumers.

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8 Id. at 23399.
9 Id. at 23286.
10 Id. at 23399.
Communicate or Communication (1006.2(d))

Section 1006.2(d) limits the definition of “communication” under 15 U.S.C. §1692a(2). The first sentence of the definition is virtually identical to the FDCPA, emphasizing that the communication can be made through any medium. The second sentence, however, creates a carve out for limited content messages to not meet the requirement of “conveying information.” In other words, limited-content messages are not “communications” under the FDCPA.

Limited-Content Messages (1006.2(j))

Section 1006.2(j) provides resolution to the question of whether communicating—especially with a third party—in a limited way that conveys no information about the debt should be subject to the same regulation as meaningful communications with the consumer about the debt. They should not. A limited content message must include 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, and a telephone number that the consumer can use to reply to the debt collector, and, if applicable, the disclosure required by section 1006.6(e). The definition also permits the debt collector to leave certain optional information, such as recommended callback times and days. The limited-content message

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13 Id. (Section 1006.2(d) states that “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, as defined in paragraph (j) of this section.”).
14 Id.
15 Id. at 23399-23400.
may not state that the message relates to the collection of a debt.\textsuperscript{16} While the message can state that it relates to an account, it cannot include the account number.\textsuperscript{17}

**Communications in Connection with Debt Collection (1006.6)**

Section 1006.6 implements and interprets Section 1692c of the FDCPA. Section 1006.6(a) restates 15 U.S.C. § 1692c(d) with the addition that communications with a consumer include communications with a deceased consumer’s surviving spouse.\textsuperscript{18} Section 1006.6(b) includes only minor revisions to 15 U.S.C. § 1962c(a) which prohibits communicating with (1) the consumer at an unusual or inconvenient time or place, (2) a consumer represented by an attorney unless the attorney, or (3) communicating with a consumer at his or her place of employment.\textsuperscript{19} In each of these instances, Section 1006.6(b) includes both communications and attempts to communicate, indicating that limited-content messages are subject to the prohibitions of 15 U.S.C. § 1692c. Note that, in determining a time not inconvenient to the consumer, the onus is on the debt collector to choose the most conservative option when a consumer’s information includes multiple locations (such as a mailing address in one time zone with a telephone number in another time zone). Section 1006.6(b) also includes an exception for communications with the consumer’s prior consent or pursuant to court order.\textsuperscript{20}

Section 1006.6(c) only slightly revises the language of 15 U.S.C. § 1692c(c) regarding prohibition of further communications with a consumer who informs the debtor that he or she refuses to pay the debt or want the debt collector to cease further communications. However,

\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 23400 (For purposes of section 1006.6, “the term consumer includes...(4)he executor or administrator of the consumer’s estate, if the consumer is deceased...”).
\textsuperscript{19} Id.
\textsuperscript{20} Id.
the Bureau proposes to add an electronic notification mechanism for consumers, such as provided in section 101(a) of the E-SIGN Act.\textsuperscript{21}

Section 1006.6(d) only slightly revises Section 1692c(b) regarding communications with third parties, but creates a meaningful exception for obtaining location information and provides a safe harbor for email and text communications with a consumer.\textsuperscript{22} A bona fide error defense may be available to a debt collector who maintains procedures to reasonably confirm and document that the debt collector communicated with the consumer using (1) an email address or text to a telephone number recently used by a consumer to contact the debt collector for purposes other than opting out of electronic communications, (2) a non-work email or text to a non-work telephone number if the debt collector gave 30 days’ clear and conspicuous notice that the email or telephone would be used debt collection communication and provided opt-out information but the consumer did not opt out within the opt-out period, or (3) a non-work email or text to a non-work telephone number provided by the consumer to the original creditor and the consumer has not requested that the contact no longer be used.\textsuperscript{23} An email address is a non-work email address and a telephone number is a non-work telephone number unless the debt collector knows or should know that the email address is provided to the consumer by the consumer’s employer.\textsuperscript{24}

\textsuperscript{21} Id. at 23411 (Proposed comment 6(c)(1)-1 allows a consumer to notify a debt collector through electronic communication that the consumer either refuses to pay a debt or wants the debt collector to cease communications. The communication is complete upon the debt collector’s receipt of the communication.).

\textsuperscript{22} Id. at 23400.

\textsuperscript{23} Id.

\textsuperscript{24} Id.
Acquisition of Location Information (1006.10)

Section 1006.10 implements and interprets but does not materially change Section 1692b of the FDCPA. Section 1006.10 includes a definition of “location information” to mean a consumer’s place of abode and telephone number at such place or place of employment. This section also permits a debt collector to obtain location information for a person who is authorized to act on behalf of a deceased consumer’s estate.

Harassing, Oppressive and Abusive Conduct (1006.14)

Section 1006.14 implements and interprets Section 1692d of the FDCPA. While Section 1006.14 generally restates 15 U.S.C. §1692d with some minor rewording, it adds two new provisions. Section 1006.14(b) addresses repeated or continuous telephone calls and proposes a bright line test for when call frequencies violate the FDCPA. Further, Section 1006.14(h) allows consumers to prohibit communication through specific mediums.

Call Frequency (Section 1006.14(b))

Section 1006.14(b) implements and interprets 15 U.S.C. §1692d(5) which prohibits a debt collector from causing a telephone to ring or engaging any person in telephone conversations repeatedly or continuously with intent to annoy, abuse or harass any person at the called number. The provision is implemented pursuant to the FDCPA, as well as the Bureau’s authority under Dodd-Frank to prevent unfair acts or practices. Section 1006.14(b) establishes a bright line test by proposing numerical limits on the frequency with which a debt

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25 Id. at 23401.
26 Id. at 23401 (Under its Dodd-Frank authority, the Bureau proposes in 1006.14(b)(ii) to omit the “with intent” language found in 15 U.S.C. §1692d(5), providing instead that a debt collector who is collecting a consumer financial product or service debt violates Section 1031 of the Dodd-Frank Act by placing telephone calls or engaging any person in telephone conversation repeatedly or continuously with the collection of a debt, “such that the natural consequence is to harass, oppress or abuse any person at that called number.”).
collector may place telephone calls to a person. As proposed, section 1006.14(b)(2) prohibits a debt collector from placing a telephone call to a particular person in connection with a particular debt either (a) more than seven times within seven consecutive days; or (b) within a period of seven consecutive days after having a telephone conversation with the person in connection with the collection of such debt.\textsuperscript{27} Section 1006.14(b)(3) excludes certain telephone calls from the frequency limits if they are: (a) made to respond to an informational request; (b) made with the person’s prior consent provided directly to the debt collector; (c) not connected to the dialed number; or (d) with a permissible third party as defined in 1006.6(d)(1)(ii)-(vi). For purposes of Section 1006.14(b), “particular debt” means each of the consumer’s debts in collections except that in the case of student loan debts, the term is aggregated for student loan debts that are being serviced together under a single account number.\textsuperscript{28} Violation of the call frequency limitation is a violation of both the FDCPA and Dodd-Frank.

**Prohibited Communication Media (Section 1006.14(h))**

Section 1006.14(h) addresses 21\textsuperscript{st} century technology by prohibiting debt collectors 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.\textsuperscript{29} Notwithstanding the prohibitions in Section 1006.14(h)(1), if a consumer opts out in writing from receiving electronic communications, the debt collector may reply once to confirm receipt of the opt out as long as the reply contains no information.

\textsuperscript{27} Id. (emphasis added).
\textsuperscript{28} Id. at 23401-23402.
\textsuperscript{29} Id. at 23402.
other than a statement confirming the consumer’s request.\textsuperscript{30} Section 1006.14(h) additionally allows the debt collector to respond once to a consumer initiated communication from an address or telephone number that the consumer previously requested the debt collector not use.\textsuperscript{31}

**False, Deceptive, or Misleading Representations or Means (1006.18).**

Section 1006.18 implements and interprets Section 1692e of the FDCPA. Section 1692e contains a non-exhaustive list of sixteen examples of prohibited false communications under the FDCPA.\textsuperscript{32} Section 1006.18 does not materially change the substance of this list, but reorganizes them into categories of (1) false, deceptive, or misleading representations; (2) false, deceptive, or misleading collection means; (3) false representations or deceptive means (seemingly a catch-all); and (4) required disclosures. Notably, limited-content messages are not subject to the disclosures provided by this section. However, the first communication with a consumer—regardless of whether it is written or oral and initiated by the debt collector or the consumer—must include the statutory “mini-Miranda” disclosure.\textsuperscript{33} This section also allows a debt collector’s employee to use an assumed name so long as it is used consistently and the employer can readily identify the employee by the assumed name.\textsuperscript{34}

Another meaningful change in the Rule is the creation of a safe harbor for meaningful attorney involvement in litigation submissions.\textsuperscript{35} This doctrine is not found in the FDCPA but

\begin{footnotesize}
\begin{itemize}
\item[30] \textit{Id.}
\item[31] \textit{Id.}
\item[33] 84 Fed. Reg. at 23402.
\item[34] \textit{Id.}
\item[35] \textit{Id.} at 23402.
\end{itemize}
\end{footnotesize}
rather is the outgrowth of enforcement action by the CFPB.\textsuperscript{36} In this provision, an attorney submitting a pleading, motion or other paper to a court is compliant with Section 1006.18 if the attorney drafts or reviews the document and reviews the underlying information supporting the filing and determines that the claims, defenses, and other legal contentions are warranted by existing law; the factual contentions have evidentiary support; and the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or lack of information.\textsuperscript{37}

\textbf{Unfair or Unconscionable Means (1006.22)}

Section 1006.22 implements and interprets Section 1692f of the FDCPA which contains a non-exhaustive list of eight examples of unfair or unconscionable means to collect a debt under the FDCPA.\textsuperscript{38} Section 1006.22 does not materially change the substance of this list.\textsuperscript{39} However, Section 1006.22(f) addresses new prohibitions on communications using certain media. In particular, Section 1006.22(f)(3) prohibits communicating or attempting to communicate with a consumer using an email address the debt collector knows or should know is provided by the consumer’s employer, unless the debt collector received consumer’s prior consent to use the work email address or received an email from that address.\textsuperscript{40} The onus would be on a debt collector to determine whether an email address was work email address, such as one ending in “.gov”, includes a domain name with the name of a company, or has a domain name that appears to be an abbreviation of an employer. Note that the consumer

\textsuperscript{37} Id.
\textsuperscript{40} 84 Fed. Reg. at 23403.
could at any time, however, opt out of receiving emails at that address using instructions provided by a debt collector pursuant to Section 1006.6(e), or otherwise request not to receive emails at that address pursuant to Section 1006.14(h). Section 1006.22 also prohibits communications, even limited-content messages, with a consumer through social media platforms viewable to third parties.\(^\text{41}\)

This section also creates a safe harbor to permit a debt collector to reveal its name and that the communication relates to collection of a debt. Specifically, 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) does not violate Section 1006.22(a) 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.\(^\text{42}\)

**Collection of Time-Barred Debts (1006.26)**

Section 1006.26 is a new provision and addresses time-barred debt. This section adds suits or threats of suit on time-barred debt to the Bureau’s interpretation of Section 1692e regarding false, deceptive, or misleading representation or means in connection with the collection of any debt. Because the limitations period to collect a debt varies from state to state, this section defines “statute of limitations” as “the period prescribed by applicable law for bringing a legal action against the consumer to collect a debt” and time-barred debt as “a debt for which the applicable statute of limitations has expired.”\(^\text{43}\) Section 1006.26 prohibits bringing or threatening to bring suit on time-barred debt and aligns with several recent circuit

\(^{41}\) Id.
\(^{42}\) Id.
\(^{43}\) Id.
A debt collector who sues or threatens to sue a consumer on a time-barred debt may explicitly or implicitly misrepresent to the consumer that the debt is legally enforceable, and that misrepresentation likely is material to consumers because it may affect their conduct with regard to the collection of that debt, including, for example, whether to pay it. The Bureau additionally has reserved subsection(c) for a likely future proposal requiring debt collectors to provide certain consumer disclosures when collecting time barred debts. The Bureau has indicated that it is considering disclosures that, if applicable, “would inform a consumer that, because of the age of the debt, the debt collector cannot sue to recover it” and “would inform a consumer that the right to sue on a time-barred debt can be revived in certain circumstances.”

Other Prohibited Practices (1006.30)

Section 1006.30 contains a mix of both new and familiar provisions in the FDCPA. A debt collector may not furnish information to a credit reporting agency before communicating with the consumer about the debt. Debt collectors should remember, however, that “communication” means more than either a failed attempt to reach the consumer or a limited-content message.

Section 1006.30(b) prohibits the sale, transfer, or placement of debts if the debt collector knows or should know that the debt has been paid or settled, the debt has been

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44 See Tatis v. Allied Interstate, LLC, 882 F.3d 422 (3d Cir. 2018); Pantoja v. Portfolio Recovery Assoc., LLC, 852 F.3d 679 (7th Cir. 2017), cert. denied, __ U.S. __, 138 S. Ct. 736, 199 L. Ed. 2d 604 (2018); Daugherty v. Convergent Outsourcing, Inc., 836 F.3d 507 (5th Cir. 2016); Buchanan, 776 F.3d 393 (6th Cir. 2015); McMahon v. LVNV Funding, LLC, 744 F.3d 1010 (7th Cir. 2014).

45 84 Fed. Reg. at 23329.

46 Id. at 23403.

47 Id. at 23399.
discharged in bankruptcy, or an identity theft report was filed with respect to the debt. Violation of this provision is also identified as an unfair act or practice under section 1031 of the Dodd-Frank Act, which indicates that the Bureau may intend to reach first-part creditors as well as debt collectors with this provision.\footnote{Id. at 23403.} The provision carves out exceptions for transferring the debt to its owner or the original creditor, securitizing or pledging it as collateral, or transfers made in the court of a merger or acquisition.\footnote{Id.} Section 1006.30(c) is virtually identical to 15 U.S.C. §1692h, regarding a single payment to a debt collector with respect to multiple debts. Section 1006.30(d) is a slight revision of the venue provision enshrined in 15 U.S.C. §1692i, without further contour to the meaning of the term “judicial district.” Lastly, Section 1006.30(e) reiterates 15 U.S.C. §1692j’s prohibition on the use of deceptive forms.

**Notice of Validation of Debts (1006.34)**

Section 1006.34 offers the Bureau’s proposed interpretation of 15 U.S.C. §1692g(a) and implements additional disclosure requirements under the Bureau’s Dodd-Frank authority. The FDCPA requires debt collectors to provide consumers, within five days of their initial communication, certain information regarding the debt and a disclosure of the consumer’s rights to dispute the debt and request validation of the debt.\footnote{15 U.S.C. §1692g(a) (2006).} The Rule expands those requirements and allows for these communications to be provided electronically consistent with the E-Sign Act, as well as orally.\footnote{84 Fed. Reg. at 23404.}

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\footnote{48 Id. at 23403.} \footnote{49 Id.} \footnote{50 Id.} \footnote{51 Id.}
Deceased Consumers

Consistent with other provisions of the Rule, proposed comment 34(a)(1)-1 clarifies that if the debt collector knows or should know that the consumer is deceased, the validation notice should be provided to a person who is authorized to act on behalf of the consumer’s estate if the validation notice has not been previously provided.52

Validation Information (1006.34(c)(2))

As suggested infra, in addition to the information required to be disclosed pursuant to 15 U.S.C. §1692g(a), Section 1006.34(c) now requires the debt collector to provide additional information about the debt, including the debt collector’s name and mailing address, as well as the consumer’s name and mailing address.53 Proposed comment 34(c)(2)(ii)-1 sets forth the Bureau’s expectation that the debt collector use “the most complete version of the name” based upon information about which the debt collector has knowledge, whether provided by the creditor or another source.54 If the debt is a credit card debt, the merchant brand must also be disclosed if available to the debt collector.55 If the debt is a consumer financial product or service debt, the debt collector must disclose the name of the creditor to whom the debt was owed on the itemization date.56 Additionally, the debt collector must provide: (a) the account number (or a truncated version of the same), if any, associated with the debt on the itemization date; (b) the name of the creditor to whom the debt is currently owed; (c) the itemization date; (d) the amount of the debt on the itemization date; (e) an itemization of the current amount of the debt in a tabular form reflecting the interest, fees, payments and credits since the

52 Id. at 23415.
53 Id. at 23404.
54 Id. at 23415.
55 Id. at 23404.
56 Id.
itemization date; and (f) the current amount of the debt.\textsuperscript{57} Residential mortgage debt subject to the mortgage servicing rules and their periodic statement requirements may be excepted from certain itemization requirements if they provide a copy of the most recent periodic statement provided to the consumer with the validation notice.\textsuperscript{58}

\textbf{Information about Consumer Protections (1006.34(c)(3))}

The notice must advise the consumer of its rights pursuant to 15 U.S.C. §1692g(b) and provide the end date for the validation period.\textsuperscript{59} While 15 U.S.C. §§1692g(a)(3)-(5) provide that the consumer has thirty days to dispute the debt or request validation, Section 1006.34(b)(5) provides that the debt collector may assume a consumer receives the validation information on any date that is at least five days (excluding legal public holidays, Saturdays or Sundays) after the debt collector provides the notice.\textsuperscript{60} The calculation of the end of the validation period should therefore, add a minimum of five days to the thirty day validation period.

The Rule additionally introduces the requirement of a tabular itemization from the “itemization date.” The “itemization date” may be any one of four specified reference dates chosen by the debt collector: (a) the last statement date, which is the date of the last periodic statement, written account statement or invoice provided to the consumer; (b) the charge-off date, which is the date the creditor charged off the account; (c) the last payment date, which is the date the last payment was applied to the debt; or (d) the transaction date, which is the date

\textsuperscript{57} Id.
\textsuperscript{58} Id. at 23405.
\textsuperscript{59} Id. at 23404.
\textsuperscript{60} Id.
of the transaction that gave rise to the debt.\textsuperscript{61} While the Rule requires the debt collector choose an itemization date and disclose it, the Rule does not require the debt collector disclose the itemization date category upon which it relies.

The validation notice must also provide the consumer with a response section which includes dispute prompts under the headings “How do you want to respond?” and “Check all that apply” and requires the inclusion of certain prescribed dispute statements, listed in a prescribed order.\textsuperscript{62} The Rule additionally requires the following prompt: “I want you to send me the name and address of the original creditor.”\textsuperscript{63} If the debt collector is collecting consumer financial product or service debt, it is additionally required to provide a disclosure directing the consumer to the Bureau’s website for additional information.\textsuperscript{64}

\textbf{Form of Validation Notice (1006.34(d))}

The Rule includes a model form and a safe harbor for those that use the model form.\textsuperscript{65} For those that deviate from the model form, the content, format and placement of information must be substantially similar to the model form.

\textbf{Optional Disclosures (1006.34(d)(3))}

The validation notice may also include certain optional disclosures including the debt collector’s telephone contact information and availability and the debt collector’s reference code. Payment coupons and statements inviting the consumer to contact the debt collector regarding payment options are allowable so long as they do not overshadow the validation

\textsuperscript{61} Id.
\textsuperscript{62} Id. at 23404-23405.
\textsuperscript{63} Id. 23405.
\textsuperscript{64} Id. at 23404.
\textsuperscript{65} Id. at 23404; see also Id. at 23409.
Disclosures regarding electronic communications are optional but provided for within the Rule, as are Spanish-language disclosures.67

Disputes and Requests for Original Creditor Information (1006.38)

Section 1006.38 implements and interprets 15 U.S.C. §§1692g(b) and 1692g(c). It additionally attempts to provide clarity to debt collectors with regard to duplicative disputes. Duplicative disputes are defined as being a dispute submitted within the validation period that is “substantially the same as a dispute previously submitted by the consumer in writing within the validation period for which the debt collector already has satisfied” the debt validation requirements; and “does not include new and material information to support the dispute.”68 In the case of a duplicative dispute, the debt collector may either: (a) notify the consumer in writing or electronically in a manner permitted by Section 1006.42 that the dispute is duplicative, provide a brief statement as to the basis for the determination and refer the consumer to the prior response; or (b) provide a second copy of the verification of the debt or of the judgment.69

Providing Required Disclosures (1006.42)

Section 1006.42 implements and interprets portions of Section 1692g of the FDCPA with regard to the ways a debt collector can make disclosures. The objective is to provide disclosures in a manner reasonably expected to provide the consumer with actual notice and in

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66 Id. at 23405.
67 Id.
68 Id.
69 Id. at 23406.
a form that the consumer may keep and access at a later time. If a debt collector provides the notices electronically, then it must comply with the procedures of the E-SIGN Act.

**Other Provisions**

**Record Retention (1006.100)**

The Rule requires debt collectors to retain records evidencing their compliance with the FDCPA and the Rule beginning on the date the debt collector begins collection activity and ending three years after: (a) the debt collector’s last communication or attempted communication in connection with the collection of the date; or (b) the date the debt is settled, discharged or transferred either back to the creditor or another debt collector. Proposed comments address examples of what records should be retained. The proposed comments suggest that records can be retained by any method that reproduces the records accurately and provides ready access.

**Relation to State Laws (1006.104)**

Section 1006.104 implements 15 U.S.C. §1692n and while adding its application to the Rule, closely mirrors the FDCPA.

**Exemption for State Regulation (1006.108)**

Section 1006.108 provides the procedure for states wishing to apply for an exemption for state regulation of debt collection. The procedures for such are set forth in Appendix A of the Rule.

**What Comes Next?**

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70 Id.  
71 Id.  
72 Id. at 23407.  
73 Id. at 23418.  
74 Id. at 23407.
The proposed debt collection rule is not final. The proposed rule was published in the *Federal Register* on May 21, 2019. Comments on the proposed rule were originally due within 90 days of publication, but the Bureau has extended the deadline through and including September 18, 2019. Then, there will be a period of review and revision by the Bureau. After that, the revised rule will be published and will go into effect one year later, most likely sometime in late 2020 or early 2021. Until that time, debt collectors and their first-party creditor partners should begin making plans to create new or augment existing systems, policies, and procedures to comply with the anticipated regulations set forth in the proposed rule.