White Paper

Getting ready for CFPB Fair Debt Collection Practices Rules

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As lenders face the prospect of a potential spike in delinquent loans in early 2021, the Consumer Financial Protection Bureau (CFPB) has released its final rules to implement updates to the Fair Debt Collection Practices Act (FDCPA). The current version of the FDCPA was approved in 1977, so a revision was long overdue to reflect evolving consumer preferences, the near-universal adoption of mobile phones, and the rise in digital outreach channels. These new rulings are also released in the midst of a global pandemic and consequent economic downturn, so debt collectors will need to navigate through a variety of challenging issues over the course of the next several months.

The first and most fundamental question for lenders is what portions of the new FDCPA rules are applicable to them and their agency partners, and, where appropriate, how best to comply with them. Different lenders are currently making different interpretations about what portions of the guidance apply to them and their first party agencies, and the exact interpretation from regulators will become clearer over time.

Regardless of the exact interpretation, these new rules will help catalyze a large shift to digital channels, especially in later stages of collections and in recoveries, which have typically been very phone-based. Even in early stages of collections, this change gives lenders an opportunity to shift outreach towards digital channels which are more efficient and also preferred by customers. More and more lenders are viewing collections as an opportunity to cure and retain valuable, long-term customer relationships, not simply mitigate losses. An improved customer experience has been shown to lead to higher retention, especially for customers who are simply forgetful in making their monthly payments and will quickly revert to being current. To that extent, the shift to digital contact that the new rules enable should be a welcome benefit for lenders.

To navigate the full range of seismic shifts related to COVID, new technologies, and the regulatory environment, debt collectors will need to build new capabilities and invest to maximize their value. This will require collections organizations to develop new areas of expertise like cross-channel optimization, digital marketing, customer research, and managing an extensive testing agenda.

The October 30, 2020 updated FDCPA regulations cover four main areas of change:

- Definition of "Debt Collector"
- Impacts on Dialing Strategy
- Impacts on Electronic Communication
- Ownership of Debt

Each of these areas has important implications for lenders and third-party debt collectors that we expect will drive change to strategies in this space.

Definition of "Debt Collector"

As written, the new rules outlined in CFPB's final ruling apply only explicitly to “debt collectors” as defined by the FDCPA regulations. The CFPB’s wording notes this does not include first party creditors[1]. While the rules may not immediately apply to financial institutions, there will be effects for these creditors to consider within both their strategy and compliance departments. First of all, there is the possibility that these rules could eventually be applied explicitly to creditors, under the new presidential administration. The final version of the FDCPA clarifies that the UDAAP (Unfair, Deceptive, or Abusive Acts or Practices) regulations and other statutes do apply to creditors’ collections practices, so breaches of the rule’s language could therefore possibly be pursued by the CFPB using other means beyond the new FDCPA regulations.

To date, most big banks were already adhering to the prior FDCPA rules despite similar scope and definitions of the term “debt collector”. Given the risk of non-compliance, we expect many creditors, especially large banks, to comply with most of the new rules both to be prepared for future interpretations, as well as, in some cases, to signal to regulators that their adherence indicates they take consumer protection seriously in all their collection practices. However, there is still a question as to whether or not they will comply with the restrictions on outbound dialing right away, especially given the credit risk associated with the pandemic. At the very least, there are several actions that creditors should quickly take to both test and understand the potential impacts upon their business should the application of these rules be extended.

[1] Page 32 “The Bureau declines to expand the rule to apply to first-party debt collectors who are not FDCPA debt collectors, as requested by some commenters. The proposal was intended to implement provisions of the FDCPA, and the Bureau did not solicit feedback on whether or how such provisions should apply to first-party debt collectors. This rule also is not intended to address whether activities performed by entities that are not subject to the FDCPA may violate other laws, including the prohibitions against unfair, deceptive, or abusive practices in DoddFrank Act section 1031”

Since third-party outsourcing of collections activity is explicitly in the scope of these regulations, one immediate decision creditors now have to face is the impact on outsourcing strategy. The decision will not be the same for each financial institution, but the relative economics of commission-based third-party outsourcing versus insourcing will definitely change as third parties will have to significantly change their outreach strategies in the coming year. As we discuss in later sections, these rules could put a third-party outsourcing model at a disadvantage compared to in-house collections operations or first-party outsourcing.

Beyond strategy implications, creditors will be responsible for the compliance of their outsourced suppliers, so it's critical that their vendor management policies and controls are updated and well managed to reflect the new guidance.

Impacts on Dialing Strategy

Introduction of new dialing caps - The new rules impose a new limit on attempts to collect a debt over the phone. Debt collectors are now only allowed seven attempts over a rolling consecutive seven-day period of time. They also are no longer able to attempt a communication for seven days after successfully contacting a consumer over the phone. While the new rule does allow for additional outreach through digital channels during this cooling off period, these additional attempts could be considered harassment[2]. While we have included the stated definition of harassment in the footnote, the new regulations do not provide a clear definition of harassment. Many institutions will choose to be conservative in this area, though, and we believe that there may be ways to engage the customer during this cooling off period that can be beneficial to the consumer and the collector (e.g., to confirm a promise to pay or offer to follow up on a conversation). These new dialing caps are also explicitly set at the per debt level as opposed to the

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[2] A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation:

1. The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.
2. The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.
3. The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency.
4. The advertisement for sale of any debt to coerce payment of the debt.
5. Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.
6. The placement of telephone calls without meaningful disclosure of the caller's identity.

per consumer level, with the exception of student loans which are bundled into one debt for the purposes of this rule.

This will have a significant impact on dialing strategies for debt collectors today as most currently exceed the new calling caps for a large portion of their accounts. While we do not anticipate this to dramatically reduce effectiveness, it will have an appreciable effect on the agencies' ability to collect debt. The increased holdout period after a successful contact will also have an impact, but we expect this to be much less, since most debt collectors already have a holdout policy in place (though it is typically around three days.). Typically, if you are able to get in contact with a consumer once, then the likelihood of contacting them again soon is higher, and so the reduction in attempts will have a larger impact on overall effectiveness, all else being equal.

The limit on attempts at an individual debt level rather than a customer level is very helpful to debt collectors in terms of both financial impact and operational complexity. Both creditors and debt collectors often manage multiple delinquent or written-off debts per customer, and applying the "seven attempts in seven days" rule across multiple debts would increase the financial impact and would lead to an increase in operational risk, requiring stronger enterprise-level tracking of both CRM data and attempt data than most in the industry currently are able to execute.

Limited Content Messages - Per the new FDCPA rules, Limited Content Messages (LCMs) are voicemail messages[3] left for the consumer that are considered an attempt to communicate, but not a communication. This means that leaving a LCM voicemail for a consumer would count against the new attempt limits (seven attempts in a rolling seven days), but debt collectors would not be subject to the seven day holdout period after leaving an LCM. Because there are different disclosures required for communications, and there is a risk that the collector could be talking to (or overheard by) by someone other than the consumer, the LCM now provides a debt collector with a standard method to leave a voicemail that should protect them from future scrutiny. Note that while an LCM is considered an attempt to communicate, it is not double counted in the event that a debt collector leaves a voicemail subsequent to making a phone call.

[3] A LCM (as defined in § 1006.2(j) of the Final Rule) as a specific type of communication that must contain only a specific set of information in order to be considered an LCM. If it contains more information it is not considered a LCM. A LCM must contain the following:

1. A request that the consumer reply to the message.
2. The name or names of one or more natural persons whom the consumer can contact to reply to the debt collector.
3. Requires debt collectors to include a business name for the debt collector that does not indicate that the debt collector is in the debt collection business but not the name of the consumer.

Given the final ruling still considers a LCM an attempt to collect we do not believe this will replace actual phone calls but will give debt collectors a way to leave messages for consumers after unsuccessful outbound attempts.

Impacts on Electronic Communications

While many creditors and debt collectors have already begun using digital channels (email, SMS, phone app, social media) in increasingly sophisticated ways, the revised FDCPA has provided the industry with guidance from the CFPB on how to properly use these channels. While the CFPB did not impose specific caps on the number of communications within a given week or month, there are still important considerations they did highlight in order to provide guardrails for debt collectors' digital outreach strategies.

Opt-out Policy - It is paramount that within each contact channel used by debt collectors consumers are given proper and consumer-friendly avenues through which to opt out, if so desired. The rule states that debt collectors must include in each communication a reasonable and simple method for the consumer to opt out of additional communications or attempt to communicate, such as an unsubscribe button for emails and “Reply STOP" option to stop future SMS. Consumers should have the ability to opt out of a specific channel (e.g., SMS only) or all channels. They must be able to opt out of any channel through any medium (verbal, written, email, text). This means that a consumer could inform a debt collector to stop sending SMS messages or telephoning them through an email response; or, while speaking with an agent on the phone, the customer could tell them to stop using digital channels.

It is very important for all debt collectors to ensure they properly track and maintain opt outs across all channels. The cross-channel opt-out ability for consumers will be the trickiest thing to implement for third-party debt collectors today, and potentially for first party creditors in the future. Opting out of a different communication channel than the one the consumer is currently using to communicate will introduce non-traditional opt-outs that debt collectors may not be prepared to capture and apply today. If debt collectors do not have the ability to capture consent and opt-outs in each channel and then apply them to individual channels, then they may have to take a conservative approach and view any opt-out as an opt-out of all communication. This will

greatly affect the ability to collect and so we would encourage that everyone in the debt collection space (creditors, debt collectors, debt buyers, etc.) to invest in technology that allows these capabilities.

The new rule does not specifically dictate cross product opt-out policies, such as whether opting out of collections e-mails for the customer's credit card would automatically apply to the customer's other loans with the same bank. While the new contact caps are being set at the debt level, we would expect opt-outs to eventually be applied at the consumer level. If a consumer requests to not be contacted by SMS about their credit card loan they would likely expect that the same collector would not then send an SMS about their auto loan or mortgage. If this were to apply to creditors in the future this may prove a difficult problem to solve as different products do not always utilize the same system of record and/or have easy ways to share data across systems.

If a consumer does choose to contact a debt collector through a channel from which they had previously opted-out, then the debt collector may reach out to the consumer in that channel one more time (this applies to all subsequent communications and/or responses as well). This does not automatically remove the opt-out for the consumer. The debt collector would need to re-establish an opt-in from the consumer in order to continually communicate through that channel. This same rule applies to contacting a consumer at a previously defined inconvenient time or place.

Limitations on Digital - While the CFPB did not put a limit on allowable e-mails and SMS communications, there is still an expectation that debt collectors will not harass consumers through these channels. The CFPB also placed the same existing restrictions on electronic communications surrounding inconvenient times and places that already exist for phone communications in the prior version of FDCPA. Similar to opt-outs, it will be important to ensure connectivity, cross-channel monitoring and reporting between phone, e-mail, and SMS platforms.

There is uncertainty regarding the regulatory definition of "harassment" as it relates to frequency of digital outreach. Within the industry, there is a wide range of frequencies for outbound e-mail and SMS, and in the last two years the use of these channels has increased dramatically. Many creditors send out between six and ten collections e-mails and four to six SMS per month. Lenders have found these channels are at least as effective in generating payments, less expensive, and considered less intrusive by the borrower than outbound dialing. As the industry adopts the new guidelines for outbound calling, there will be upward pressure on usage of e-mail and SMS, and

there will be greater focus on optimizing these channels in terms of the content, tone, timing, and frequency. In a world of tighter call caps, digital will become an even more powerful tool especially for those issuers which can effectively micro-segment and send different digital communications to different sub-segments.

Work E-Mail Addresses - The new regulations require that debt collectors not use a consumer's email address that is known to be provided by the consumer's employer. We would suggest that debt collectors consider a policy of using only general domain names to prevent unintentional non-compliance.

Social Media - The CFPB rules that debt collectors can use social media as a platform to communicate with the consumer. Any attempts to communicate through this medium should be made through private message and must not be viewable by the general public. While social media use as a collections channel is generally limited today, we expect it to increase over the next several years.

Transfer/Ownership of Debt

Transfer of Consent - One issue highlighted for both creditors and debt collectors is that before an account is placed with a third party, a consumer should be made aware that there is a chance their account could be placed with a third party and then provided with an opportunity to opt out of any communication channels that were previously allowed by the creditor. In addition to transferring contact information and consent to third parties, the debt collectors should also note inconvenient times to contact the consumer. Given the consumer could have already communicated these times to the creditor, they could reasonably expect this information would be shared with a third party.

Creditors do have the responsibility to the consumer to make them aware of what information could be passed on to a third party, and give the proper amount of time to opt out of any information as the debt collection moves to a third party. The key will be managing opt-outs well, in particular when a borrower was comfortable with collections activity from their creditor but not from a third party debt collector.

Providing this notice may also have an upside for the creditors' internal collection efforts. We have seen that deadlines and movement of an account to a third party can often spur action from the consumer. While in the past this has mostly applied to being placed with an external law firm, we believe making the consumer aware that the account could be moving to any third party could be the call to action they need to get back in contact and attempt to resolve their debt.

Non-Transferable Debt - the CFPB also ruled that a debt collector cannot sell or transfer a debt if the collector knows or should know the debt has been paid, settled or discharged in bankruptcy. While we believe that most debt collectors are already following this practice it is critical to ensure proper controls are placed around any debt either flowing in or out of the collections firm. We would suggest adding an additional buffer of time in which an account is not being worked both prior to and after transfer to allow time for the payment information to come through.

Estates - For purposes of estates, the term "consumer" is to include executors and administrators and any person obligated or allegedly obligated to pay any debt. This allows debt collectors to contact these consumers as a responsible party for the debt, even though these consumers may not be fully aware they are now responsible for this debt.

Attorney Involvement - A debt collection communication sent under an attorney's name may violate the FDCPA if the attorney was not meaningfully involved in the preparation of the communication. We would urge creditors, debt collectors and attorney networks to review any existing communication where an attorney name may be referenced and ensure all parties are agreed on the wording in the communication.

Necessary Adaptations to Strategy and Operations

We believe the biggest impact from this new ruling is the new dialing restrictions placed on debt collectors, and we are pleased to see the CFPB recognize digital channels as a viable and increasingly important way to contact consumers about delinquent debt. Complying with these new regulations will lead to immediate, significant changes to strategy and process for third party debt collectors, with a strong likelihood that the regulations will eventually apply to creditors. Even if creditors choose to not immediately comply, we suggest they set up ongoing tests to understand the potential impact on credit losses, expenses, and customer experience. Here are several actions that creditors should take immediately:

Outsourcing Strategy and Management Processes

1. Thoroughly understand the dialing practices of the third-party collections agencies with which creditors are currently working. This is critical to understanding the impact from reduced dialing. This will impact agency placement strategy over the coming months as it is likely that relative performance between third parties could change drastically as they begin to adopt these rules. It is also possible some third parties are already operating effectively within these new rules and could thus become more attractive partners in both the short term and the long term. When judging the effectiveness of their third-party partners, creditors should take the level of compliance with new regulations into account.
2. Be critical in evaluating the decision to place with a third party as opposed to keeping accounts in house. Given creditors' ability to make frequent calls will be less restricted than third party agencies, it may now be worth investing in the internal capabilities and resources for the segments which the creditor is outsourcing today. We believe this decision could vary for different creditors as cost pressures and efficiency ratios are more important than ever given COVID-19, but the long-term loss mitigation benefits may soon be too large to ignore.

Technology Upgrades

3. Build out the capability to capture and apply opt-outs and consent across all communication channels (e.g., capture a phone opt-out via e-mail or SMS). Developing these capabilities now will make eventual compliance much easier to implement.
4. Invest heavily in digital outreach, especially in upgrading collections e-mail and SMS strategies, as well as potentially app push, chat and other digital channels. Creditors and

debt collectors are usually very simplistic in their digital collections strategies, and as the new regulations restrict dialing, digital collections becomes much more important.

5. Build a "best-time-to-contact" model to maximize the impact of a smaller number of outbound attempts. This sort of model had very little upside when creditors called 2-3 times per day or more, but is more valuable in a dialing-constrained world.

Improve Quality and Sophistication of Digital Outreach

6. We suggest viewing digital collections as a multi-channel marketing opportunity, and build out the capabilities for more sophisticated creatives, segmented customer journeys and extensive testing. Creditors and debt collectors need to be investing and constantly testing to ensure they have the right frequency of outreach and the correct messaging to drive action.
7. Creditors and debt collectors also need to make sure they are allowing for the right amount of self-service, which should improve customer experience and also better help manage call center costs and potential capacity issues in the face of a potential recession.

Ensure Compliance

8. Ensure proper controls and oversight. We urge both debt collectors and creditors to ensure that all controls are updated to reflect the new rules. This applies to both internal rules as well as third party management controls for creditors. It will also be critical to ensure that all systems are talking with one another across channels (phone, e-mail, SMS) to capture any opt-out or inconvenient times to contact a consumer.
9. Make sure processes related to transferring debt are well defined and tightly managed. All parties (creditors, debt collectors, attorney networks) should ensure that any debt being transferred in or out of their institution has the appropriate contact information, consent for each contact channel and payment information.

Creditors Should At Least Be Ready to Comply

10. Creditors need to prepare for the possibility that they will be in the scope of the new regulations. If the creditor chooses to not immediately comply, it should at least implement a test stream with the reduced dialing limits to get a grounded read on the loss and expense impact of the new rules. This provides a clear operational and financial understanding of the effect of reducing outbound dialing.

Conclusion

While these new regulations create significant compliance hurdles and increase complexity, they can be a catalyst for greater investment in digital collections outreach. A well-designed and segmented multi-channel outreach strategy will outperform a phone-only strategy, even at lower levels of phone intensity. Digital collections can be a “win-win-win” for the creditor, in that it can be more effective in curing delinquency and reducing losses, more efficient, and greatly preferable for the borrower. We recommend both creditors and debt collectors use this moment to envision a digital-first collections strategy and transform their collections strategy, operating model, and technology accordingly.

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