

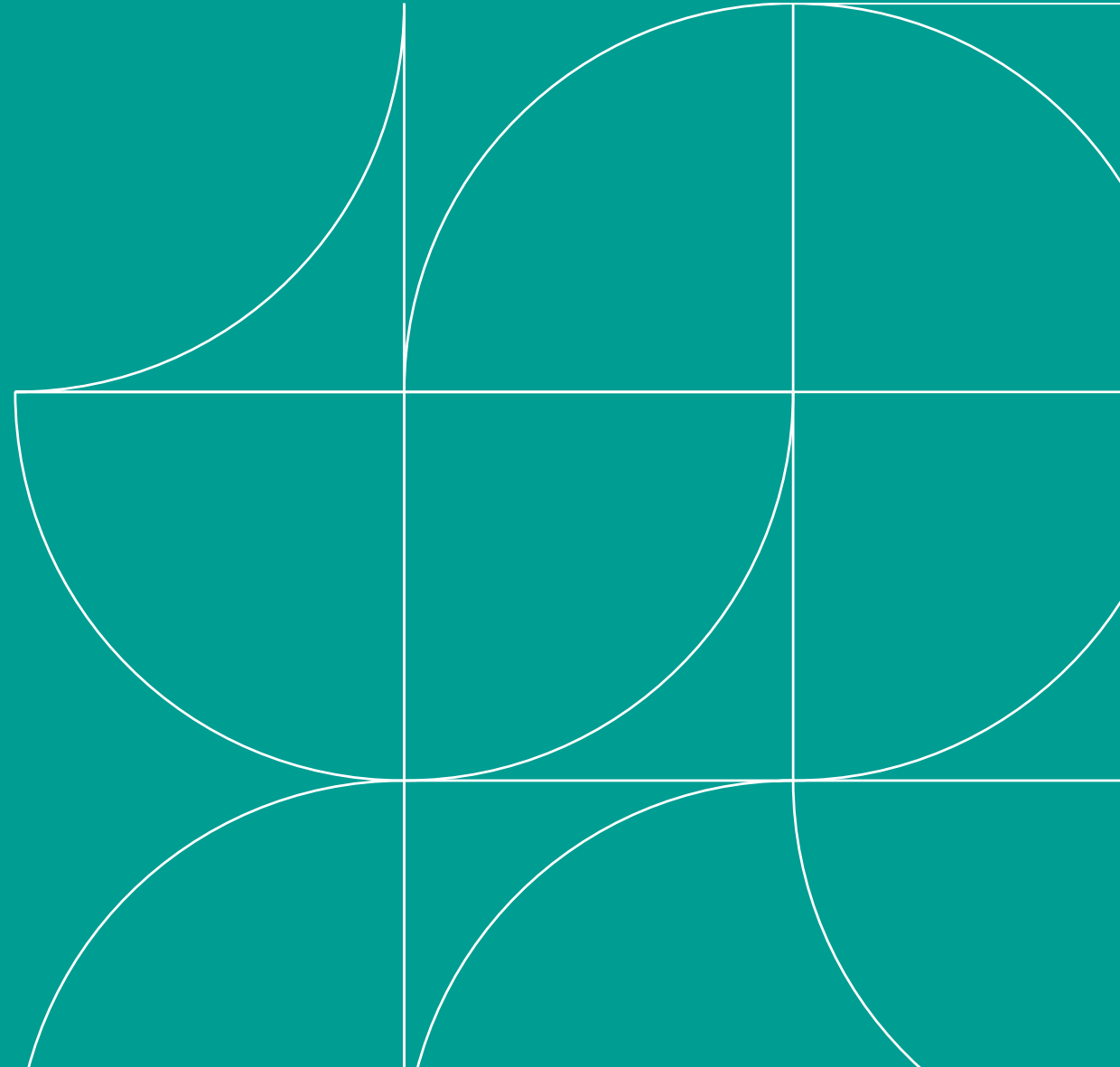


What the CFPB's New Debt Collection Rules Mean for You

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and J. Patrick Kennedy

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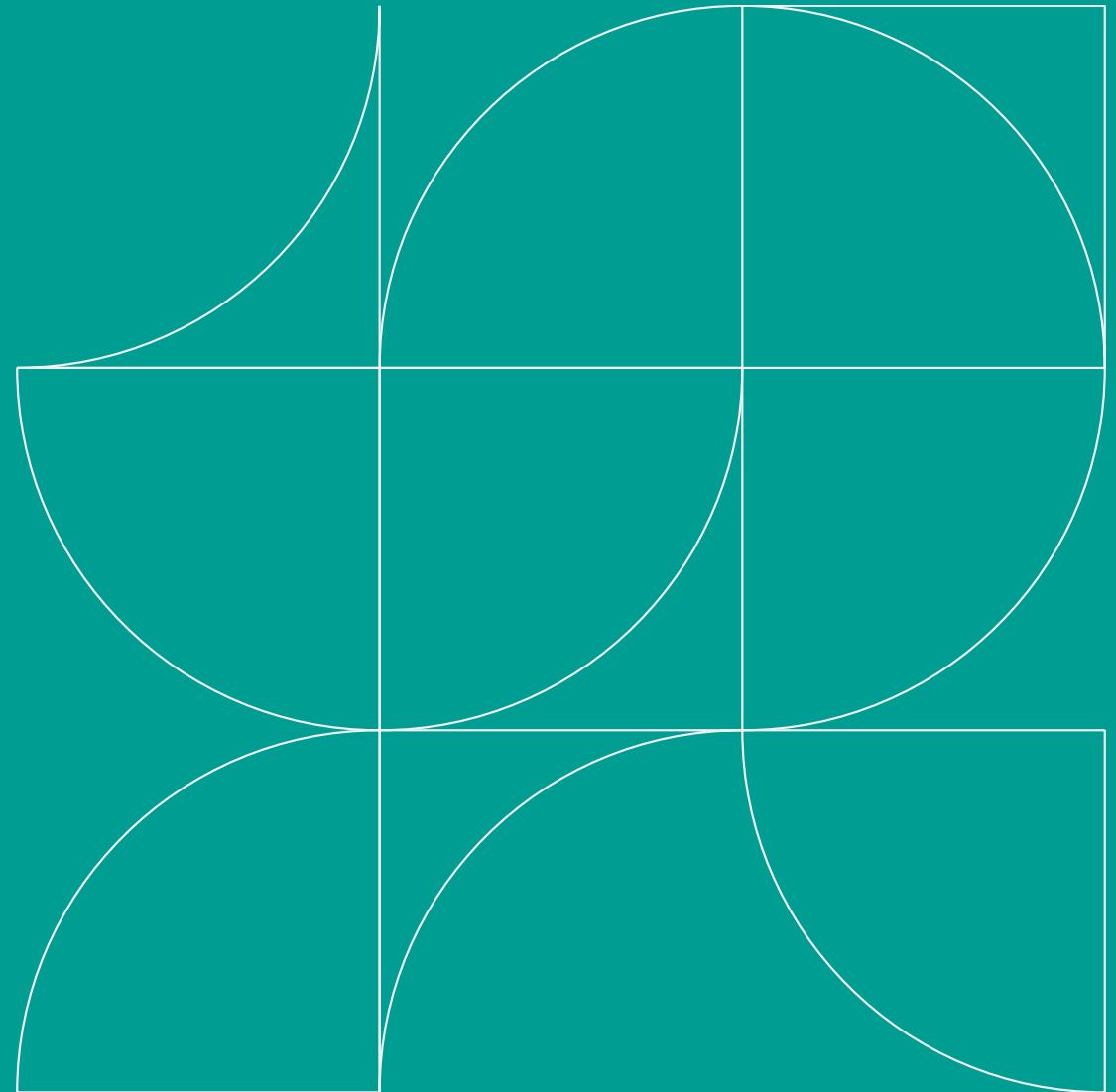


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Agenda

- 01** Overview of the FDCPA and Rulemaking that led to the Fall 2020 new regulations
- 02** Highlight of changes and key provisions in the new FDCPA regulations
- 03** Recent CFPB actions to delay and supplement the new FDCPA regulations
- 04** The 11th Circuit's *Hunstein* Decision and its impacts

Overview of the FDCPA and Rulemaking that led to the promulgation of Regulation F in Fall 2020



Fair Debt Collection Practices Act

- Enacted in 1977 and codified at 15 U.S.C. § 1692, *et seq.*
- Passed in response to “abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors.”
- Statute is intended to:
 - curb abuses
 - promote consistent State action to protect consumer
 - ensure that debt collectors who do not engage in abusive debt collection practices are not put at a competitive disadvantage

What does the FDCPA do?

- Establishes broad consumer protections:
 - requires debt collectors to provide certain disclosures (“Mini-Miranda”);
 - puts privacy protections in place;
 - enables consumers some control over when and how debt collectors contact them;
 - prohibits harassment or abuse, and false or misleading representations by debt collectors.
- Private cause of action provided for violations.
 - Remedy is actual damages, statutory damages (\$1000 per violation) and attorneys’ fee.
 - Class action can substantially multiply damages.

Implementation and Enforcement of the FDCPA

- Currently enforced by the Consumer Financial Protection Bureau (“CFPB”) per authority granted by the Dodd-Frank Wall Street Reform and Consumer Protection Act enacted in 2010.
 - Previously administered by FTC.
 - Federal courts have interpreted FDCPA and added judicial gloss since FDCPA enacted in 1977.
- FDCPA leaves room for State regulations that are not inconsistent with the FDCPA.
- In May 2019, CFPB published proposed debt collection rules under the FDCPA; final rule (Regulation F) published December 2020 and to be effective in November 2021.

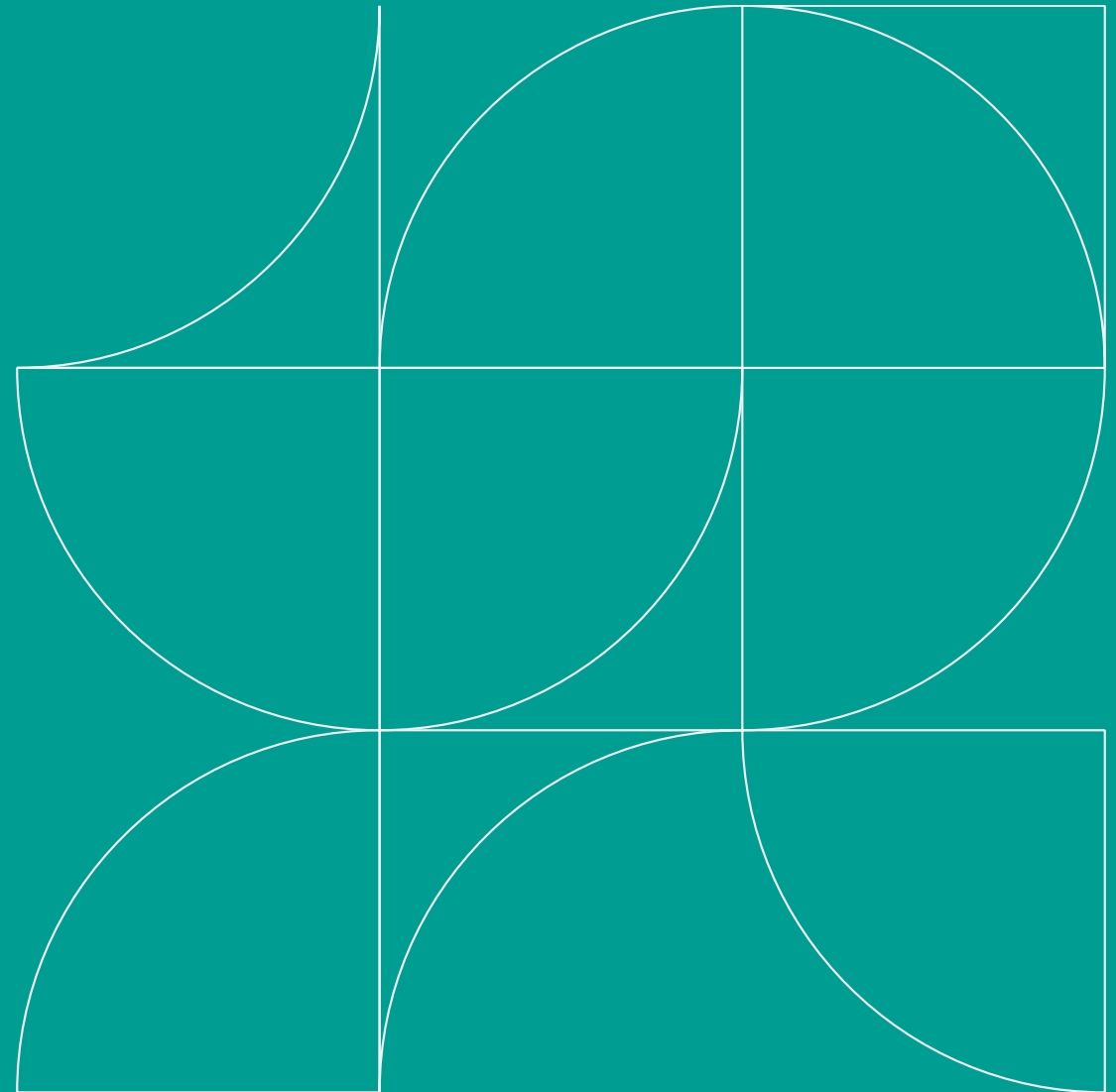
Who does the FDPCA apply to?

- Statute is targeted towards “debt collectors”, as defined in 15 USC 1692a(6).
- “[A]ny person who uses any instrumentality of the interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”
 - Generally does not apply to creditors seeking to collect debts owed to them.
 - But it **may include** creditor collecting its own debts using a name other than its own.

Key Requirements

- Mini-Miranda disclosure required in initial communication with the consumer.
- Debt collector must attempt to contact consumer prior to furnishing information to a consumer reporting agency (CRA).
- Restrictions on time, place, and manner of communications.
 - May not use false, deceptive, or misleading representations or means.
- Consumer has right to dispute the debt.
- Restrictions on credit reporting with respect to disputed debts.
- Rules regarding filing of court actions.

Highlight of changes and key provisions in the new FDCPA regulations



Final Rule (2020)

- Regulation F – Final Rule Published November 30, 2020.
- Final Rule scheduled to be effective on November 30, 2021 and will be found at 12 CFR Part 1006.
 - *Will it go into effect as scheduled?*
- Final rule covers “debt collectors”, as defined in the FDCPA.
- Text available at: [12 CFR Part 1006 - Fair Debt Collection Practices Act \(Regulation F\) | Consumer Financial Protection Bureau \(consumerfinance.gov\)](#)

“Consumer” Standard and Definition

- New regulations adopt an objective, “unsophisticated” or “least sophisticated” consumer standard.
- Statutory definition of “consumer” interpreted to include deceased individuals
 - person who is authorized to act on behalf of estate (executor, administrative, personal representative) is considered to be the “consumer”;
 - debt collectors must provide representative of deceased consumer with validation information and opportunity to dispute the debt;
 - “know or should know” that the consumer is deceased standard.

Initial Disclosures & Subsequent Communications

- Debt collector must **disclose** in initial communication it is attempting to collect a debt and that any information obtained will be used for that purpose. § 1006.18(e)(1).
 - social media “friend” or “follow” request qualifies.
- Must disclose in subsequent communications that they are from a debt collector. § 1006.18(e)(2).
- If communicating in language other than English, disclosure must be in same language as the rest of the communication, and the translation must be complete and accurate. § 1006.18(e)(4).
- Communications may not be false, deceptive, or misleading. § 1006.18(b).
- Per CFPB interpretation: May not communicate or attempt to communicate with consumer through **social media** if the communication is viewable by the general public **or** by the consumer’s social media contacts.

Additional Requirements for Communications

- Communications must not be made at a time or place that the debt collector knows or should know is inconvenient to the consumer. **§ 1006.6(b)**.
 - *How does social media and email play into this?*
- Debt collector must cease communication attempts upon written notice **§ 1006.6 (c)**.
 - Email, text, or social media message likely sufficient.
- Generally may not communicate with third party about the debt (inc. social media). **§ 1006.6(d)**.
- As before, debt collectors may not “engage in any conduct the natural consequence of which is to harass, oppress, or abuse.” **§ 1006.14**.

Validation Notice

- Requirements set forth in § 1006.34; similar to current practice, with some additions:
- If debt is related to a “consumer financial product or service,” must direct consumer to CFPB’s website for additional information about consumer debt protections.
- **Consumer-response information** required at the bottom of any validation notice;
 - *“How do you want to respond? Check all that apply.”*
 - *“I want to dispute the debt because I think: ...”*
 - *“This is not my debt.”*
 - *“The amount is wrong”; and*
 - *“Other (please describe on reverse or attach additional information.)”*
 - Must also include checkbox for consumer to indicate that, *“I want you to send me the name and address of the original creditor.”*
- “Safe harbor” form is provided (“Model Form B-1”).

Email Communications

- Lays out **Reasonable Procedures** for email and text communications. § 1006.6(d)(4).
 - Compliance permits debt collector to establish either a lack of a violation or the bona fide error defense.
- **Email:**
 - Consumer use or prior consent to use email; OR
 - **Creditor** obtained email and, **before** debt collector used it to communicate, provided written notice (can be electronic) to the consumer that
 - the debt is being transferred to a debt collector,
 - the debt collector might communicate by email,
 - other individuals with access to the email account may see them, and
 - provide opt-out procedure.

Example Creditor Disclosure for Email

- Official interpretation provides model language that a **creditor** may, but is not required, to use:

“We are transferring your account to ABC debt collector, and we are providing ABC debt collector with the following email address for you: [email address]. ABC debt collector may use this email address to communicate with you about the debt. If others have access to this email address, then it is possible they may see the emails. If you would like to opt out of communications by ABC debt collector to [email address], please click here by [date].”

Text Messaging

- Texting requirements in § 1006.6(d)(5).
- A debt collector may text, if:
 - Consumer used number to communicate about debt by text and has not since opted out, and within the past 60 days either:
 - consumer texted debt collector from that number; OR
 - debt collector confirmed, using complete and accurate database, that the number has not been reassigned.
 - **Alternatively**, may text where, debt collector received **prior consent** to text at that number, and with the past 60 days, the debt collector either:
 - had obtained that initial consent or **renewed consent** (i.e., it goes stale after 60 days); or
 - confirmed, using complete and accurate database, that the phone number has not been reassigned.

Credit Reporting

- Must not furnish information to a consumer reporting agency (“CRA”) before:
 - the debt collector “speaks to the consumer about the debt in person or by telephone” **or**
 - the debt collector provides written notice (mail or electronic) about the debt and **waits** a reasonable period to time to receive a notice of undeliverability.
 - If notice of undeliverability received, debt collector “must not furnish information about the debt to a [CRA] until the debt collector” either speaks with the consumer or provides written notice that is **not undeliverable**. § 1006.30(a).
- Potentially onerous requirement if consumer is actively seeking to evade debt collectors.

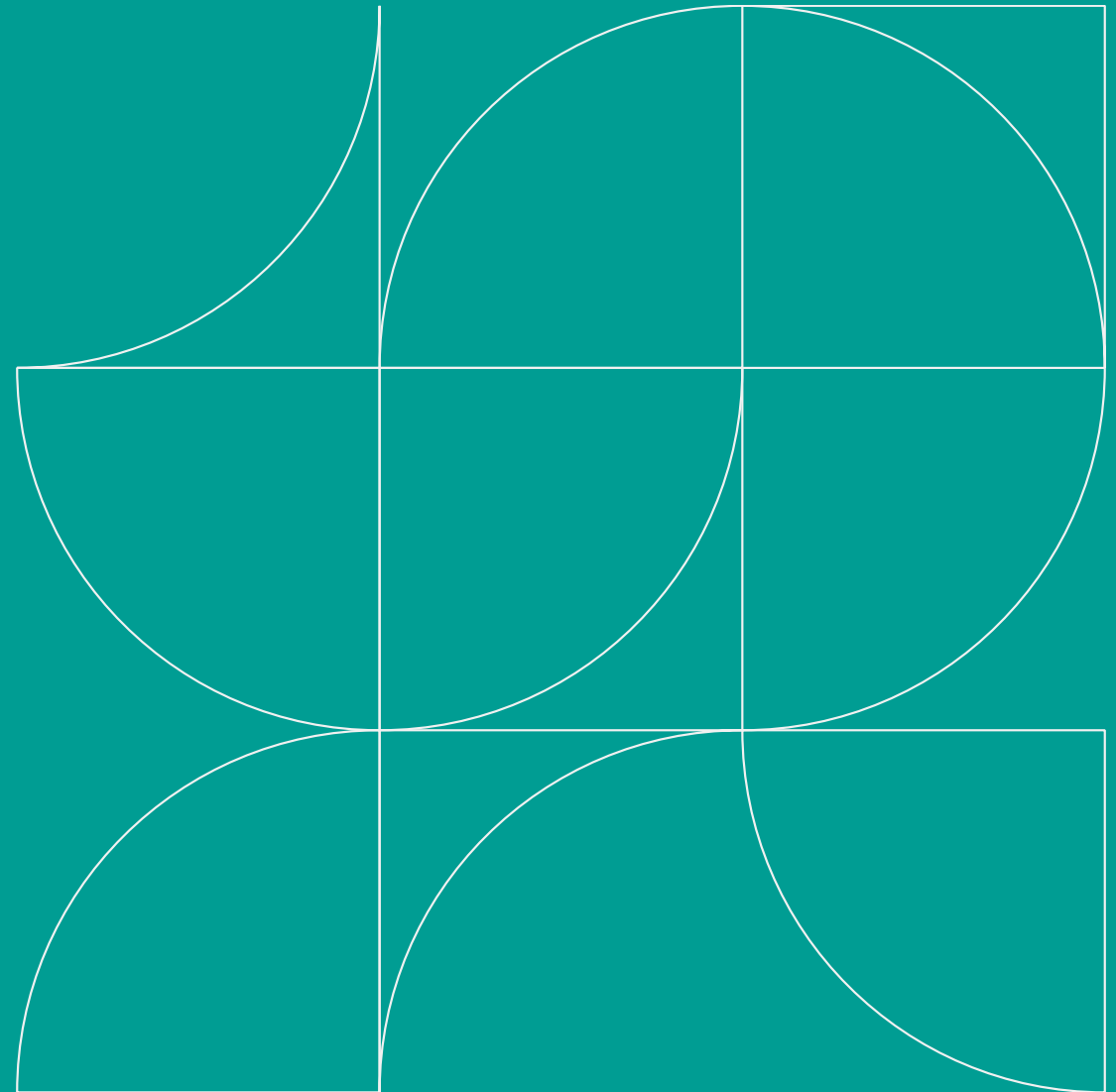
Disputes

- Dispute procedures governed by **§ 1006.38**.
 - During validation period, must not engage in any collection activities or communications that overshadow or are inconsistent with the disclosure of consumer's right to dispute the debt and request name of original creditor;
 - Safe Harbor: that use of the Model Form B-1 as a validation letter (discussed previously) is not a violation of this requirement.
- Original-creditor information may be sent electronically in certain circumstances.

Time-Barred Debts and Litigation

- New rules on attempts to collect “time-barred debt,” interpreted as debt on which the state statute of limitations has run.
- Debt collector violates FDPCA if it sues or threatens to sue to collect a time-barred debt.
 - no “knew or should have known” standard from the debt collector’s perspective; “strict liability standard”;
 - bona fide error defense is available.
 - Debt collector may still use non-litigation tactics (phone calls, letter, etc.) to attempt to collect time-barred debt, as long as those methods do not violate the FDCPA themselves (First Amendment; commercial speech).
 - CFPB declined to adopt a requirement that debt collector disclose that a statute of limitations has expired.

Recent CFPB actions to delay and supplement the new FDCPA regulations



CFPB NPRM to Delay New Rules until 2022 Issued on April 7, 2021

- CFPB Issued a Notice of Proposed Rulemaking (NPRM) on April 7, 2021 to Delay Effective Date of New FDCPA Rules
- New Debt Collection Rules adopted in October and December 2020 originally scheduled to take effect on November 30, 2021
- CFPB's NPRM proposes extending the effective date by 60 days until January 29, 2022
- CFPB's justification is to allow stakeholders additional time to review and implement the New Rules in light of the COVID pandemic

CFPB NPRM to Delay New Rules until 2022 Issued on April 7, 2021

- The first set of FDCPA rules adopted in October 2020 focused on communications with debtors, and clarified prohibitions on false and misleading misrepresentations, and unfair collection practices
- The second set of FDCPA rules adopted in December 2020 focused on disclosures that must be given to debtors at the outset of collection activities and communications
- CFPB's NPRM does not mention or discuss that Debt Collectors will be delayed in relying on substantial new Safe Harbors built into the new FDCPA Rules due to the delay
- 30-Day Comment Period expiring 30 days after publication in Federal Register

CFPB Interim Final Rule Issued on April 19, 2021

- CFPB Interim Final Rule “Clarifies Tenants Can Hold Debt Collectors Accountable for Illegal Evictions”
- Issued in Support of the Center for Disease Control & Prevention’s (CDC) Eviction Moratorium
- CDC’s Eviction Moratorium Originally Enacted in September 2020 after CARES Act Eviction Moratorium Expired
- CDC’s Eviction Moratorium Extended 4 times, currently through June 30, 2021

CFPB Interim Final Rule Issued on April 19, 2021

- CDC Eviction Moratorium prohibits landlords nationwide from evicting tenants for non-payment of rent if tenants submit a written declaration that COVID has impacted their ability to pay full rent and eviction would result in homelessness or a shared living situation
- A temporary health and safety measure in light of COVID, and to mitigate the spread of COVID disease
- CFPB's Interim Final Rule requires Debt Collectors under the FDCPA – including Attorneys – to provide tenants who may have rights under the CDC Eviction Moratorium with a written notice of the CDC protections – on the date of an eviction notice or when filing suit

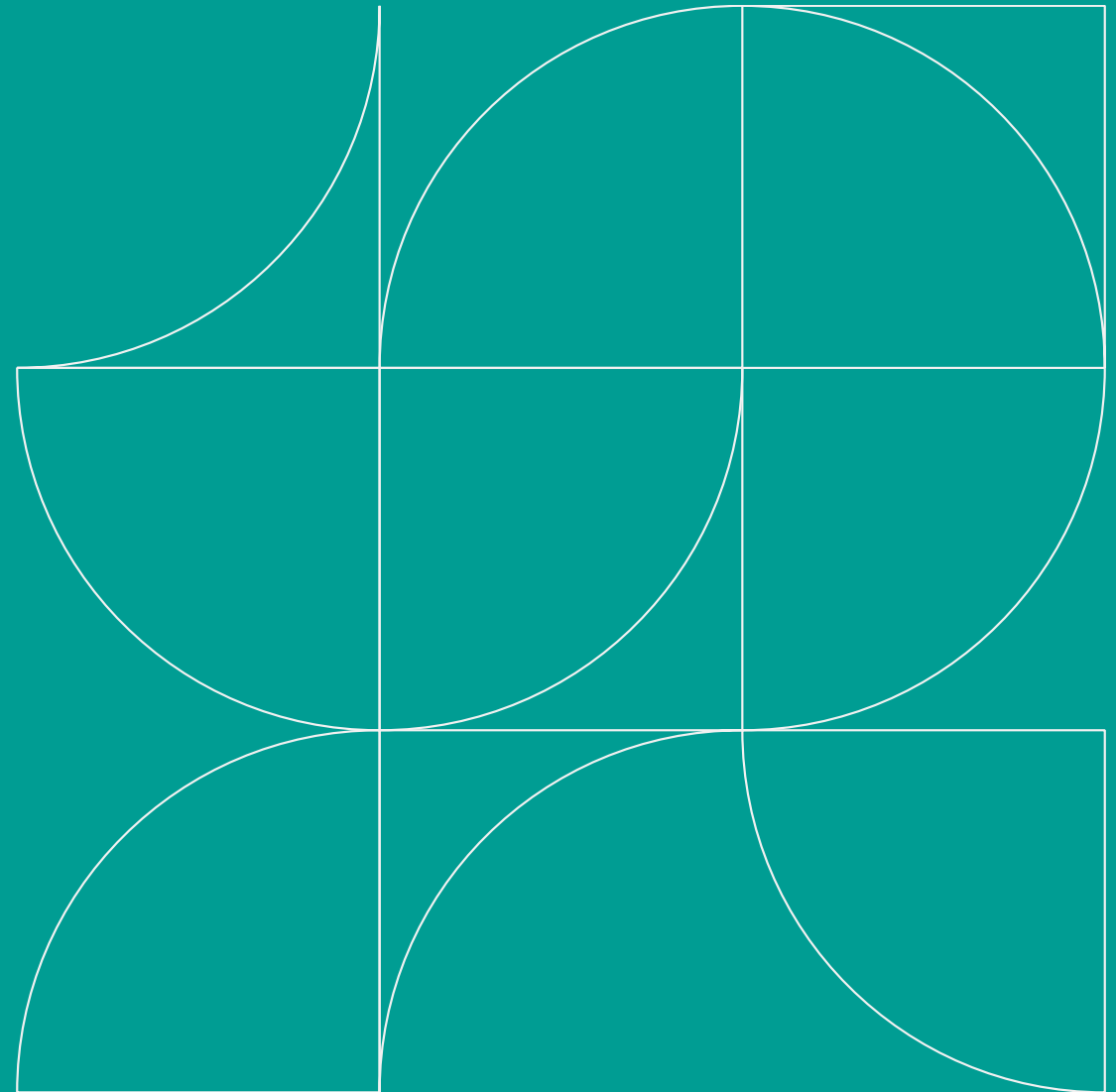
CFPB Interim Final Rule Issued on April 19, 2021

- Failure to provide the written notice to tenants is a per se violation of the FDCPA
- Private right of action against Debt Collectors – including Attorneys – with liability for actual damages, statutory damages and attorney’s fees
- CFPB’s Interim Final Rule does not preempt more protective state law
- CFPB’s Interim Final Rule was sent out for comments under an accelerated schedule – and went into effect on May 3, 2021

CFPB Interim Final Rule Issued on April 19, 2021

- CFPB's Notice of Rulemaking did not discuss several recent decisions by Federal District Courts and one Federal Appellate Court – the Sixth Circuit – that invalidated the CDC's Eviction Moratorium as unconstitutional and beyond its delegated statutory authority
- CFPB issued notices to nation's largest landlords on its effective date – Monday, May 3, 2021 – even though a D.C. District Court invalidated the CDC's Eviction Moratorium in a ruling with nationwide reach the prior week
- Recent lawsuit in the M.D. Tenn. filed challenging CFPB's Interim Final Rule as inconsistent with the FDCPA as requiring false or misleading speech

The 11th Circuit's *Hunstein* Decision and its impacts



***Hunstein v.
Preferred
Collection &
Management
Services, Inc.***

- Eleventh Circuit Decision issued April 21, 2021
- FDCPA case asserting claim for a violation of Section 1692c(b)
- Claim was that the Debt Collector violated the Privacy Provisions by disclosing the Debtor's private information to its mailing vendor
- Common industry practice: use of outside vendors to send so-called "dunning" letters
- A novel claim – no prior court had found liability
- District Court dismissed the case

***Hunstein v.
Preferred
Collection &
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Services, Inc.***

- Liability for violating Section 1692c(b) required a finding that the disclosure was made “in connection with the collection of any debt”
- The 11th Circuit described the case as one of first impression – no prior court in 40+ years of the FDCPA had issued a decision on this issue
- Debt Collector transmitted to its mailing vendor the debtor’s status as a debtor, debt balance, entity to which the debt was owed, that the debt concerned his son’s medical treatment, and the debtor’s name

Hunstein v. Preferred Collection & Management Services, Inc.

- Court found that the communication violated FDCPA Section 1692c(b) – reversing the District Court’s dismissal of this claim
- Court concluded that Consumer had standing under *Spokeo* through a statutory violation with no allegation of actual harm
- Holding on merits: the plain meaning of the key phrase made “in connection with the collection of any debt” “at least ‘concerned,’ was ‘with reference to,’ and bore a relationship [or] association’ to its collection of the debt”
- Court relied exclusively on its plain reading of the statute – citing only Dictionary definitions; no prior case precedents or other persuasive authorities

***Hunstein v.
Preferred
Collection &
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- Court rejected Debt Collector’s argument that the key language required the disclosure to “necessarily entail a demand for payment”
- Court found prior decisions interpreting the same language as used in FDCPA Section 1692e inapplicable – because it would violate canons of statutory construction to render exception language as surplusage
- Court also rejected Debt Collector’s argument that this would upset a common industry practice without any evidence of actual harm
- Court left it to Congress to amend statute

Hunstein v. Preferred Collection & Management Services, Inc.

- What's next following *Hunstein*?
- Possible further judicial review: petition for en banc review to the full 11th Circuit or possible petition for certiorari to the U.S. Supreme Court
- Possible disruption of credit industry – new considerations/alignments
- Debt collection industry participants likely to work together to challenge *Hunstein* and/or develop other solutions
- Industry organizations and associations lobbying and legal advocacy efforts
- Expect the unexpected: not the last novel interpretation of the FDCPA

Contact Us With Questions



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**thank
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