

**Session 2**  
**Sprinting Around the Capitol: A View from the Hill**

Tuesday, July 13, 2021  
1:20pm – 2:20pm CT

Join us for a roundtable discussion with Congressman Ed Perlmutter, member of the Financial Services Committee and Chair of the Consumer Protection and Financial Institutions Subcommittee, to discuss current happenings inside the halls of Congress. The roundtable discussion will focus on Congress' approach to the Financial Services industry as the pandemic comes to a conclusion, including discussions on extension of the moratoria, the CFPB's proposed amendment to Regulation X, the future of the FDCPA, and other pertinent topics to the industry.

**FDCPA Final Rule**

- General aspects
  - Released on 10/30/2020; effective November 30, 2021
  - 653 pages
  - Represents most comprehensive changes since enactment of FDCPA
  - Modernizes Regulation F (implementing regs for FDCPA)
  - Focus - bring FDCPA practices, especially communication, into the 21st century
    - Give consumers more control over how to communicate, when and how often
  - Related practices of debt collectors and how they relate to newer technologies
  - Created some safe harbors but not rigid in only one way to comply
  - Especially focused on process to obtain consent in email and text
- Communication provisions
  - Communication in more than one language – need mini-Miranda for each language
  - Retains prohibition against repeated or continuous telephone calls
    - No more than 7 in 7 days regardless of mode
      - Offers rebuttable presumption not harassment and not violate if not exceed this limit/places calls within 7 days after conversation
      - Presumed to be in compliance if not exceeded
      - Assessed per account rather than per consumer
      - Offers ways to rebut presumption based on what said – threaten criminal action, etc.
        - List of circumstances can rebut presumption/expect litigation around particular circumstances as very fact-specific
        - No limitations on electronic communication
          - NOTE - Official Commentary indicates how can violate alone/in combination with other means – Must review carefully
- Exceptions to communication provisions
  - With prior consent given directly and within period no longer than 7 days after received prior consent
  - Not connect to dialed number

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- Call placed to certain professional people may offer a mitigation of sorts (not safe harbor) for calls deemed not intended to annoy, abuse or harass
- Retains private cause of action
- Prohibitions against third-party disclosures when communicate by text or email
- New concept introduced - Safe Harbor for Limited Content Message
  - No safe harbor for electronic communication or live calls.
  - Allowed ONLY for voice mail left for consumer not conveying information about debt
    - Voicemail can't contain information subject to restrictions of FDCPA
    - Regulates what can and can't be included
      - Content must include – debt collector business name which NOT indicate is debt collector
      - Not identify the consumer by name, request consumer reply to message
      - Provide name/names of one or more people consumer can contact and telephone number(s) can use.
      - May also include - salutation, date and time of message, recommended date and time to reply to message and if replies can speak to any representative
      - Message knowingly left for a third party is not a limited content message.
      - Note- admitted that there maybe states law regulating communication that do not allow use of limited message safe harbor.
- 3rd party disclosures
  - One of the major concerns with electronic media was risk of 3rd party disclosure, particularly text messages as common for phone numbers to be reassigned.
    - May not attempt to communicate through social media platforms if viewable by public or their social media contacts.
  - Statute prohibits communication with third party in connection with collection of debt
  - Debt collector can't communicate with 3rd parties other than consumer, attorney, reporting agency, creditor, creditor's attorney or debt collections attorney except location info (place of abode, telephone # or place of employment) without prior consent given to collector by consumer or as reasonably necessary to effectuate a judgment
  - Added procedures collector must follow to obtain safe harbor from civil liability against risk of third-party disclosures when send text or email message.
    - Must have procedures reasonably adapted to avoid error
  - Attorney representation – can't communicate if knows represented
    - Can't determine name/address unless attorney fails to respond to communication within a reasonable time
    - This is a key addition. If consumer-initiated communication and record indicates represented – is considered to have given prior consent to communicate and may respond to consumer. May inquire if still represented by counsel

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- Employer contact
  - Can't communicate **only** if knows or has reason to know that employer prohibits contact during employment
  - Generally, use of work email prohibited- can't send an email to an address the collector knows is provided to consumer by employer (subject to certain exceptions).
- Third party communication safe harbor
  - Protection against civil liability if unintentional disclosures to third party if follow rules, when communicate by text or email
  - But not saying must use safe harbor if determine other method to avoid disclosure but lose the de facto finding that reasonable
  - If account given to debt collector and to avail self of safe harbor against 3<sup>rd</sup> party disclosures with email, must send hand off letter 35 days before debt transfer using email address. Must clearly/conspicuously disclose debt has or will be transferred to debt collector
- Debt Validation Notice (DVN) Form
  - DVN must be provided within 5 days of initial communication unless validation information provided in the initial communication or debt satisfied
  - Can be in writing or electronically
  - Notice must include:
    - Statement is from a debt collector
    - Account number
    - Names/ mailing address of debt collector, debtor and creditor
    - Detailed debt itemization
      - P and I, payments, credits through date of DVN
      - Itemization can be as of date of judgment, last statement, write off, etc.
    - Outstanding debt amount as of date of DVN
    - Statement of rights to dispute debt /request original creditor information
    - Rights relative to 30 days to request/time frame to dispute debt/request information
    - Direct to CFPB website for debt collection protections
    - If electronic form, instructions on how to respond electronically
  - Optional content (provided not more prominent than required)
    - Customized payment disclosures
    - Reference code used to identify debt
    - Electronic communication info (collector's website/email address, etc.)
    - Debt collector's phone number
- DVN Model Form/permitted variations/substantially similar forms offer Safe Harbor
  - Use of the model form satisfies clear and conspicuous standard
  - Avoids accusation of overshadowing
  - No safe harbor for delivery/timing
  - Can add/omit optional disclosures
  - Risk of adding disclosures not covered in Regs- may lose safe harbor

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**Proposed Amendments to Regulation X**

- Summary of Proposed Rule
  - Regulation X would establish a temporary COVID-19 emergency pre-foreclosure review period that would generally prohibit servicers from making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process until after December 31, 2021.
  - Exemptions from this proposed restriction that would permit servicers to make the first notice or filing before December 31, 2021, if the servicer (1) has completed a loss mitigation review of the borrower and the borrower is not eligible for any non-foreclosure option or (2) has made certain efforts to contact the borrower and the borrower has not responded to the servicer's outreach.
  - The Bureau proposes to permit servicers to offer certain streamlined loan modification options made available to borrowers with COVID-19-related hardships based on the evaluation of an incomplete application.
  - The Bureau proposes amendments to the early intervention and reasonable diligence obligations to ensure that servicers are communicating timely and accurate information to borrowers about their loss mitigation options during the current crisis.

**Interim Final Rule Addressing Debt Collector Conduct Associated With the Eviction Moratorium Issued by the CDC**

- This interim final rule amends Regulation F, which implements the FDCPA, to require debt collectors to provide written notice to certain consumers of their protections under the CDC Order's eviction moratorium and to clarify that certain misrepresentations are prohibited.
- COVID-19 Pandemic and CDC Order
- Rental Evictions and Debt Collectors
- COVID-19 Pandemic Impacts on Renters, Evictions, and Debt Collectors

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