

Fair Debt Collection Practices Act (Regulation F)

A review of the 2021 amendments to the federal debt collection rule
(Regulation F) and insight for the mortgage servicing industry.



Prepared by the Legal League 100
Special Initiatives Working Group (SIWG)

A large, faint background illustration of a pair of scales of justice. The scales are centered vertically and horizontally. Two olive branches with leaves extend upwards from the top of the scales, one on each side. The entire scene is set within a circular frame.

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I. OVERVIEW OF 12 CFR PART 1006—FAIR DEBT COLLECTION PRACTICES ACT (REGULATION F)

The Consumer Financial Protection Bureau (CFPB) issued a final rule amending Regulation F, which became effective November 30, 2021. This rule amends Regulation F, 12 CFR part 1006, which implements the Fair Debt Collection Practices Act (FDCPA), to prescribe Federal rules governing certain activities of debt collectors, as that term is defined in the FDCPA. The rule gave clarity on topics like disclosures, harassment, communication requirements, and rules for outreach to consumers.

The final rule details substantive requirements and prohibitions regarding debt collection efforts. Some of the key concepts of the new rule are that it: (1) provides clarity of the information that a debt collector must provide to a consumer at the outset of debt collection communications and provides a model notice containing such information, (2) requires debt collectors to take certain actions before furnishing information about a consumer's debt to a consumer reporting agency, (3) prohibits debt collectors from bringing or threatening to bring a legal action against a consumer to collect a time-barred debt, and (4) provides rules for contact and communication with the consumer. The summary below does not address every provision of the new rule but instead is an overview of a few of the key changes and requirements of the new rule.

A. Validation Notice

The provision in the final rule that is probably most relevant and important to the mortgage industry is the Notice of validation of debts. Under the final rule, debt collectors must provide the consumer with certain information relating to the debt and the consumer's rights (Validation Notice). There are four main categories that the model validation notice provided by the CFPB must include:

1. Disclosure informing the consumer that they are being contacted by a debt collector.
2. Information about the debt.
3. Information about consumer protections.
4. Information about how to respond to the Validation Notice.

The Validation Notice must be provided either in the debt collector's initial communication to the consumer, or within 5 (five) days of the initial communication, and must include the following information:

1. A statement that indicates the communication is from a debt collector.
2. The account number or a truncated version of the account number.
3. For a consumer financial product or service, the debt collector's name and mailing address, the name and mailing address of the consumer who owes the debt, the name of the creditor to whom the debt is currently owed, and the name of the creditor as of the itemization date.
4. An itemization of the current amount of the debt reflecting interest, fees, payments, and credits since the itemization date. The debt collector may select one of five reference dates as the itemization date:
 - i. The last statement date
 - ii. The charge-off date
 - iii. The last payment date
 - iv. The transaction date
 - v. The judgment date
5. Consumer response information, such as prepared statements and prompts that the consumer may use to take certain actions, including disputing the debt.

In addition to the above information about the debt, the Validation Notice must also include information about consumer protections. Specifically, the Validation Notice must include the following:

1. The specific date on which the collector considers to be the last day of the validation period. The creditor must calculate and include the specific date, which is 30 days from the date of the Validation Notice, rather than just state the validation period lasts for 30 days.
2. A statement that if the consumer disputes the debt in writing, on or before the end of the validation period, the debt collector will cease collection of the debt until they can provide validation of the debt to the consumer.
3. A statement that unless the consumer notifies the debt collector that he is disputing the validity of the debt before the validation period expires, the debt collector will assume the debt is valid.
4. A statement that if the consumer requests, in writing, the name and address of the original creditor, the debt collector will stop all collection efforts until information about the original creditor is provided.
5. A statement that informs the consumer that additional information regarding their consumer protections is available at the CFPB website, along with the link to the CFPB website.
6. If the notice is provided electronically, it must contain a statement explaining how the consumer can dispute the debt or request original creditor information electronically.

The final rule incorporates certain requirements relating to translation of the notice into other languages, including a requirement the debt collector must provide a Spanish-language version if it included optional content notifying the consumer of the ability to request Spanish translation.

Also, the final rule revises the definition of “consumer” to include both living and deceased consumers. Thus, if the debt collector knows or should know the consumer is deceased prior to providing the Validation Notice, the notice must be provided to the person authorized to act on behalf of the deceased consumer’s estate.

The CFPB has provided a model form that provides a “safe harbor” for debt collectors using the model form Validation Notice, which may include specific optional content. Using the model form is not a requirement; however, by providing the model validation notice, the CFPB afforded an opportunity to limit litigation based on these letters.

B. Required Actions Before Credit Reporting

CFPB observed that some debt collectors have engaged in “passive collection” or the practice of furnishing collection information about a debt to a credit reporting agency without first taking an action to notify the consumer about the debt. Now such “passive collection” is unlawful. Under the new rule, a debt collector who furnishes information to a credit reporting agency, first, must either speak to the consumer about the debt in person or by telephone, place a letter in the mail, or send an electronic message to the consumer about the debt and wait a reasonable period of time to receive notice of undeliverability.

The final rule provides that a period of 14 calendar days after the letter or electronic message was sent is deemed a “reasonable period of time.” During the “reasonable period of time,” the debt collector must permit receipt of, and monitor for, notifications of undeliverability from communications providers. If the debt collector receives a notice of undeliverability during the “reasonable period of time,” the debt collector must not furnish information about the debt to a credit reporting agency until it resubmits the information about the debt to the consumer using one of the methods identified above.

C. Time-Barred Debt

Under Regulation F, a debt collector is prohibited from bringing or threatening to bring legal action against a consumer to collect a time-barred debt. The final rule defines “time-barred debt” as a debt for which the applicable statute of limitations has expired. Proofs of claim filed in connection with a bankruptcy proceeding are not included in this prohibition. While this may appear to be a straightforward provision of the rule, determining the relevant applicable law is not always an easy answer due to various state laws and the type of debt at issue.

D. Contact, Outreach, and Communication

The new rule provides specific information regarding a debt collector’s contact attempts with a consumer. A debt collector is presumed to have complied with the rule against harassing, oppressive, and abusive conduct if they adhere to the 7-7-7 rule. This means they do not attempt more than seven telephone calls in seven consecutive days to the same person regarding the same debt and they do not place another call within seven days of a conversation.

In addition, the CFPB, through the new rule, is encouraging collectors to invest in technology to modernize their communication with consumers. The new rule requires collectors to take into consideration the consumer’s preferred communication method, which may include but not be limited to phone, email, or text.

Regulation F can easily and quickly become overwhelming for collectors and creditors. However, the general theme of this new rule appears to be to make fewer and more meaningful contacts and communications with consumers. We will continue to see how the new rule is implemented and enforced in the coming months.

II. COMPLIANCE AIDS

The CFPB has provided guidance in the form of compliance aids as set forth in CFPB’s January 2020 policy statement, which states, in pertinent part, “Compliance Aids are designed to accurately summarize and illustrate the underlying rules and statutes. Accordingly, when exercising its enforcement and supervisory discretion, the Bureau does not intend to sanction, or ask a court to sanction, entities that reasonably rely on Compliance Aids.” It goes on to state, “The Bureau does not intend to use Compliance Aids to make decisions that bind regulated entities.” Specifically, the CFPB has issued Frequently Asked Questions and a guidance document, more specifically set forth below.

A. Frequently Asked Questions

In addition to the formal Rules, the CFPB has issued answers to Frequently Asked Questions (FAQ) on their website. These answers provide further clarification on the Rules and address issues related to Limited Contest Message, Call Frequency, Call Frequency Presumption, Call Frequency Excluded Calls, Call Frequency Rebutting the Presumption, Validation information, and Validation Information Specific to Residential Mortgages. There are five FAQs related to Residential Mortgage Debt Validation, and they were last updated on October 29, 2021:

1. **Is there a special rule for residential mortgage debt that may be used when disclosing the required validation Itemization Related Information?**

In this section, the CFPB explains that under 12 CFR § 1006.34(c)(5), the debt collection may use a monthly periodic statement in-lieu of the full itemization generally required under the rules. In order to qualify, the mortgage must be a mortgage loan as defined under Regulation Z, 12 CFR §

1026.41(a)(1), and the servicer must be required to send periodic statements at the time of the notice. When using this Special Rule, the debt collector must include a copy of the most recent periodic statement with the validation notice, and on the notice in the space where the itemization would go, the debt collector must include language directing the borrower to the enclosed statement.

2. What validation information may be omitted if using the Mortgage Special Rule?

The CFPB outlines that the itemization date, the amount of the debt as of the itemization date, detail itemization of the debt (interest, fees, payments, and credits) may be omitted. Even though the itemization date does not have to be disclosed on the statement, the debt collector must still determine the date to properly disclose the name of the creditor and account number. The debt collector must also still disclose the current amount of the debt on the validation notice.

3. If a debt collector uses the Mortgage Special Rule with the model validation notice, can the debt collector obtain the safe harbor for validation information content and format requirements?

A debt collector will receive the safe harbor for the validation information content and format requirements if it complies. It will not, however, receive a safe harbor for the content and format of the periodic statement.

4. What is the most recent periodic statement for purposes of the Mortgage Special Rule?

The most recent periodic statement is the periodic statement required under Regulation Z, 12 CFR § 1026.41, that was most recently provided to the consumer. The statement does not have to have been sent by the creditor and may have been sent a debt collector as long as the statement is the statement required under Regulation Z, 12 CFR § 1026.41. One concern under the rules was whether a statement sent by a mortgage servicer servicing a loan on behalf of another entity would qualify, since generally statements sent by a debt collector do not apply. This clarifies the rule, and will allow the statement sent by servicers servicing loans on behalf of other entities to be utilized under the Special Rule.

5. Does a debt collector using the Mortgage Special Rule use the date of the most recent periodic statement as the itemization date for purposes of disclosing other validation information?

As previously discussed, even though the itemization date does not need to be disclosed on the validation notice when using the Special Rule, for purposes of determining the disclosure other pieces of information, the debt collector will use the statement date as the itemization date.

B. Guidance Document

In addition to the Frequently Asked Questions, the CFPB provided a guidance document that provides additional information with respect to compliance with the itemization information requirements when populating the debt validation information. The guidance document indicates that, when utilizing the Mortgage Special Rule, a mortgage servicer may utilize a periodic statement sent after the loan was acquired and enclose it with the debt validation notice. A servicer is not limited to those statements provided by the prior servicer and sent to borrower prior to the loan being transferred. As long as the most recent statement was required by Section 1026.41 of Regulation Z at the time it was sent, it can be utilized for purposes of the Mortgage Special Rule.

This document provides additional information regarding how the Mortgage Special Rule is intended to work and indicates that mortgage servicers, when utilizing the Mortgage Special Rule, can use the date of the last statement as the itemization date, regardless of whether the most recent statement was provided by an entity that qualified as a debt collector.

III. IMPLICATIONS FOR MORTGAGE SERVICERS

A. Validation Notice

The CFPB's Debt Collection Rule, which requires debt collectors (as defined under Regulation F and the FDCPA) to provide consumers with a Validation Notice and, in theory, allows consumers to identify debts, provides a validation notice option for residential mortgages, apart from the model validation notice set forth for all other debt collectors.

It bears repeating that the CFPB does not require that a certain form be used, but use of the CFPB model validation notice allows safe harbor for content and format requirements. A debt collector may also use a version of the model notice, or not use the model notice, as long as all validation information is included.

As of November 30, 2021, in addition to a traditional Fair Debt Collection Practices Act (FDCPA) notice, debt collectors are required by the CFPB to send debtors a validation notice that includes:

1. An itemization date prior to date of the notice on which the amount of debt is confirmed.
2. Amount of debt as of itemization date.
3. Itemization of current amount of debt sine itemization date, including interest, fees, payments, and credits.
4. Current amount of debt as of date of validation notice.

B. Special Rule for Certain Residential Mortgages

For mortgage servicers, in lieu of using the model notice, they can use notice under a Mortgage Special Rule enacted by the CFPB for certain residential mortgage debt if it is a closed-end consumer credit transaction secured by dwelling and is subject to Mortgage Servicing Rule's periodic statement requirement at time debt collector provides validation notice.

This special rule allows a debt collector to send a required periodic statement in lieu of itemization information required by the model notice. If a debt collector opts for the special rule, he/she must:

1. Provide current amount of the debt as of the date of the validation notice.
2. Provide copy of most recent periodic statement required under Regulation Z (Truth-In Lending Act) to the consumer.
3. Include this periodic statement in the same communication as the validation notice.
4. Provide a statement that refers the consumer to the periodic statement; for example, "See enclosed periodic statement for an itemization of the debt."

Phrased another way, a debt collector may omit the following from a validation notice if they use a periodic statement under Mortgage Special Rule: the itemization date, the amount of debt as of the itemization date, and the itemization of the current amount of the debt.

C. CFPB Guidance: Use of Periodic Statements

Even though no itemization date need be included under the special rule, a debt collector must still determine the itemization date in order to determine validation information such as the name of the creditor to whom the debt is owed and the account number on the itemization date. The CFPB did state in guidance

that a debt collector using the special rule can use the date of the most recent periodic statement as the itemization date for the purposes of disclosing other validation information.

For the purposes of the Mortgage Special Rule only, the most recent periodic statement is the periodic statement required under Regulation Z that was most recently provided to the consumer, even if the latter statement was provided by a debt collector who is not a creditor, which is in contrast to the non-special rule validation notices.

CFPB provided an example:

For example, assume the servicing of a mortgage account was transferred to a mortgage servicer who is also a debt collector (as defined in the Rule) and who plans to use the Special Rule when providing the validation information. A periodic statement (required by Regulation Z, 12 CFR § 1026.41) provided to the consumer by that debt collector after the transfer of servicing can be the most recent periodic statement for purposes of the Special Rule, if it was the last periodic statement provided to the consumer.

D. Further Clarification Required

While the CFPB compliance guidance is helpful, the CFPB offers it only as summaries and illustrations, and not as a substitute for compliance with underlying rules and statutes. In the realm of the Mortgage Special Rule, the guidance indicates that a servicer must use the last periodic statement even if from a debt collector, in contrast to non-mortgage validations, and the guidance also states that a debt collector can use the Mortgage Special Rule with the model validation notice and obtain safe harbor.

This latter guidance involving a “hybrid” notice specifically states that “...the debt collector does not receive a safe harbor for the content and format requirements for the content included in the periodic statement. Further, a debt collector who does not correctly comply with the Special Rule may violate the Debt Collection Rule.”

Questions unanswered by CFPB guidance include:

1. Can a mortgage servicer use a non-periodic statement to satisfy the requirements of the Mortgage Special Rule?
2. Can a mortgage servicer use another date, for example, the origination date, with the Mortgage Special Rule in lieu of using the date of the last periodic statement?
3. Why does the CFPB seem to require that a mortgage servicer use the date of the most recent periodic statement under the special rule, even if provided by a debt collector, in contrast with other validation requirements?

The requirements are fairly new, and when coupled with the uncertainty of post-pandemic servicing, which includes extraordinary effort at loss mitigation, it remains to be seen what issues will develop with validation notices, including the Mortgage Special Rule.