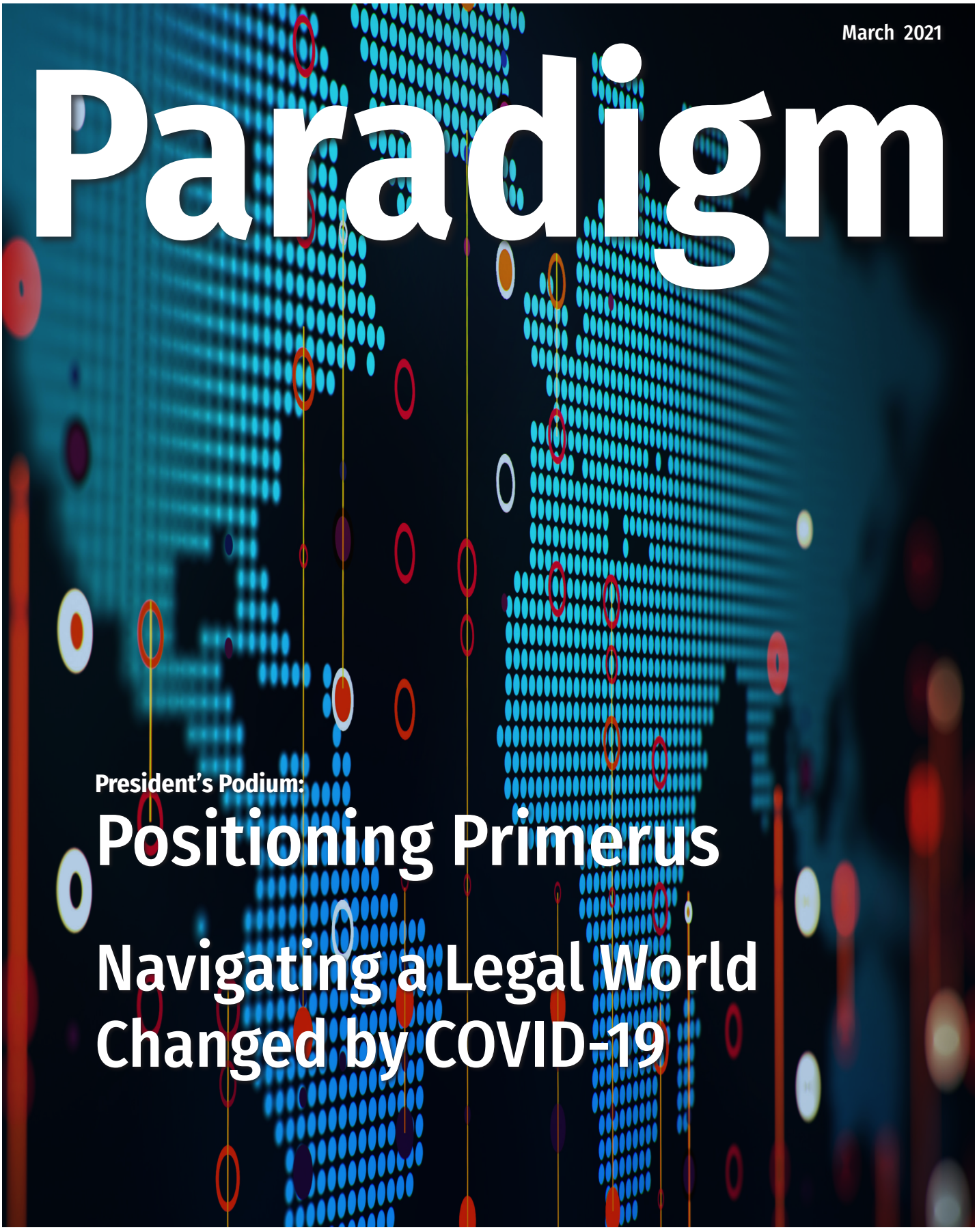

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New Fair Debt Collection Rules Impact Consumer Financial Services Industry

The Consumer Financial Protection Bureau (CFPB) has published its final rule on debt collection (the Rule). 12 C.F.R. Part 1006. Unless further modified by the new administration, the Rule will take effect November 30, 2021.

Addressing technological advancements since the Fair Debt Collection Practices Act (FDCPA) was enacted in 1977, the Rule expands significantly on the provisions of the FDCPA while attempting to clarify how debt collectors can use new communication technologies including email, voice mail and text messages. The Rule establishes rules for engaging in communications with consumers and identifies certain policies and procedures that, if implemented, would create safe harbors for debt collectors. Of particular note, the Rule contains a robust official commentary which includes sample language for such things as opt out notices and a model form for debt validation notices. This article will highlight some of the more noteworthy provisions of the Rule.

Who's Covered

While the proposed rule raised concerns as to whether first party creditors were included, the final version of the Rule expressly states it applies only to "debt collectors" as that term is defined in the FDCPA. First party creditors, however, need to be mindful of the CFPB's warning that the Rule is not intended to address whether activities performed by entities not subject to the FDCPA would violate other statutes, including the unfair, deceptive or abusive act provisions (UDAAP) found in the Dodd-Frank Act. In other words, it is foreseeable that the CFPB will use the Rule as a framework for enforcement actions against banks and other covered financial service providers.

Limited Content Messages

Limited Content Messages are a new concept introduced by the Rule in its definitional section (1006.1) and are intended to provide a safe way for debt collectors to leave non-substantive messages for a consumer requesting a return call, while not inadvertently disclosing the debt to third parties. The Rule and its comments make clear that Limited Content Messages are not communications regarding a debt. To qualify as a Limited Content Message, the message must be left by voice mail and only contain the specified limited content set forth in the Rule.

Call Frequency Limitations

Section 1692d(5) of the FDCPA prohibits a debt collector from causing a telephone to ring and from engaging a person in telephone conversations repeatedly or continuously with the intent to annoy, abuse or harass. Section 1006.14 of the Rule creates clearly defined numeric limitations on the placing of telephone calls. In its final version, the Rule creates presumptions of compliance and violation. Generally, and subject to certain very limited exceptions, a debt collector is presumed to have violated the provision if: (a) it places telephone calls to a particular person in connection with a particular debt more than seven times within seven consecutive days; or (b) after having had a telephone conversation with a particular person regarding a particular debt, makes a call within seven days of that conversation. The converse is also true. The

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Caren Enloe leads Smith Debnam's consumer financial services litigation and compliance group. Caren currently serves as chair of the Debt Collection Practices and Bankruptcy subcommittee for the American Bar Association's Consumer Financial Services committee and as co-chair of the National Creditors Bar Association's Bankruptcy Section. Most recently, she was elected to the Governing Committee for the Conference on Consumer Finance Law. In 2018, Caren was named one of the "20 Most Powerful Women in Collections" by *Collection Advisor*, a national trade publication. An active writer and speaker, Caren oversees a blog dedicated to consumer financial services and has been published in various publications.

debt collector is presumed to have complied if it stays within the call frequency limitations. First party creditors, including banks and financial service companies, should take notice of this section as it is a likely point of enforcement for the CFPB against first parties using its Dodd Frank UDAAP authority.

Use of Electronic Communications

The Rule allows for the use of email and text messaging and sets forth procedures which provide the debt collector with a safe harbor if followed. Section 1006(d)(4) allows for email communications to the consumer: first, by allowing the use of an email address the consumer has either used to communicate with the debt collector (and has not subsequently opted out) or the consumer has provided prior express consent to use; and second, by allowing an email address used previously by the creditor or a prior debt collector subject to certain limitations and conditions. Section 1006(d)(5) allows for text messaging subject to similar conditions. The Rule further requires debt collectors allow consumers to opt out of electronic communications and further requires debt collectors provide a clear and conspicuous statement describing a "reasonable and simple method" for opting out. Banks and other financial service providers should be reviewing their credit applications and consumer facing contractual agreements to determine whether they have made or want to make provision for electronic communications and that the same comply with the E-Sign Act.

Reinventing the Debt Validation Notice

Section 1692g of the FDCPA requires debt collectors to provide consumers with a validation notice which includes the name of the creditor, the amount of the debt and the disclosure of certain statutorily prescribed consumer protection rights. The Rule reinvents the Debt Validation Notice by requiring significantly more robust disclosures. These disclosures fall roughly into three categories: (a) information to help consumers identify the debt; (b) information about consumer protections; and (c) information to help consumers exercise their rights, including a tear off dispute form with prescribed prompts. The Rule includes a model form and a safe harbor for those that use the model form. Deviations are allowed provided that the content, format and placement of information are substantially similar to the model form.

While the debt validation notice has no direct impact on banks and other financial service providers, it will have significant indirect impact as the Rule introduces a new concept – the "itemization date." The Rule now requires the debt collector identify an "itemization date" and provide an itemization of the debt from that date forward. Section 1006.34(b) allows debt collectors to choose one of five specified reference dates as their "itemization date" including:

- the date of the last periodic statement or written account statement or invoice provided to the consumer by the creditor;
- the charge-off date;
- the last payment date;
- the transaction date; or
- the judgment date.

Because of the nature of the "itemization date," its point of origin is the creditor. Banks and financial service providers should begin coordinating with their third party debt collectors to provide the requisite documentation to support the itemization date, the amount of the debt as of that date, and an itemization of any charges and fees accruing after the itemization date.

Restrictions on Credit Reporting

Banks and other financial service providers that rely on third party debt collectors to credit report should additionally be aware of the Rule's restrictions on credit reporting. Section 1006.30(a) generally prohibits debt collectors from furnishing information to a consumer reporting agency about a debt before the debt collector either speaks to the consumer about the debt in person or by telephone or sends its validation notice and then waits for a reasonable period of time to receive a notice of undeliverability. The Rule further presumes that a reasonable period of time is 14 consecutive days after the date that the initial communication is sent.

The Rule allows for the use of email and text messaging and sets forth procedures which provide the debt collector with a safe harbor if followed.

What's Next

The CFPB is looking at additional interventions, including the debt collector's obligation to substantiate debts. With the Rule in place, there are now clearer rules of the road for debt collectors, but the Rule remains ripe for litigation.

While first party creditors have avoided direct implications from the Rule thus far, there remain indirect implications. Third party vendor management requirements will need to be revisited and updated to reflect changes and to ensure compliance by third party vendors. By the same token, compliance departments for third party debt collectors, including law firms, should begin carefully reviewing the Rule and its comments and align their policies, procedures, media content and scripts to conform with the Rule and take advantage of the safe harbors contained within the Rule. Compliance with the debt validation requirements will additionally require increased cooperation and communication between debt collectors and their creditors to ensure information is accurately conveyed.

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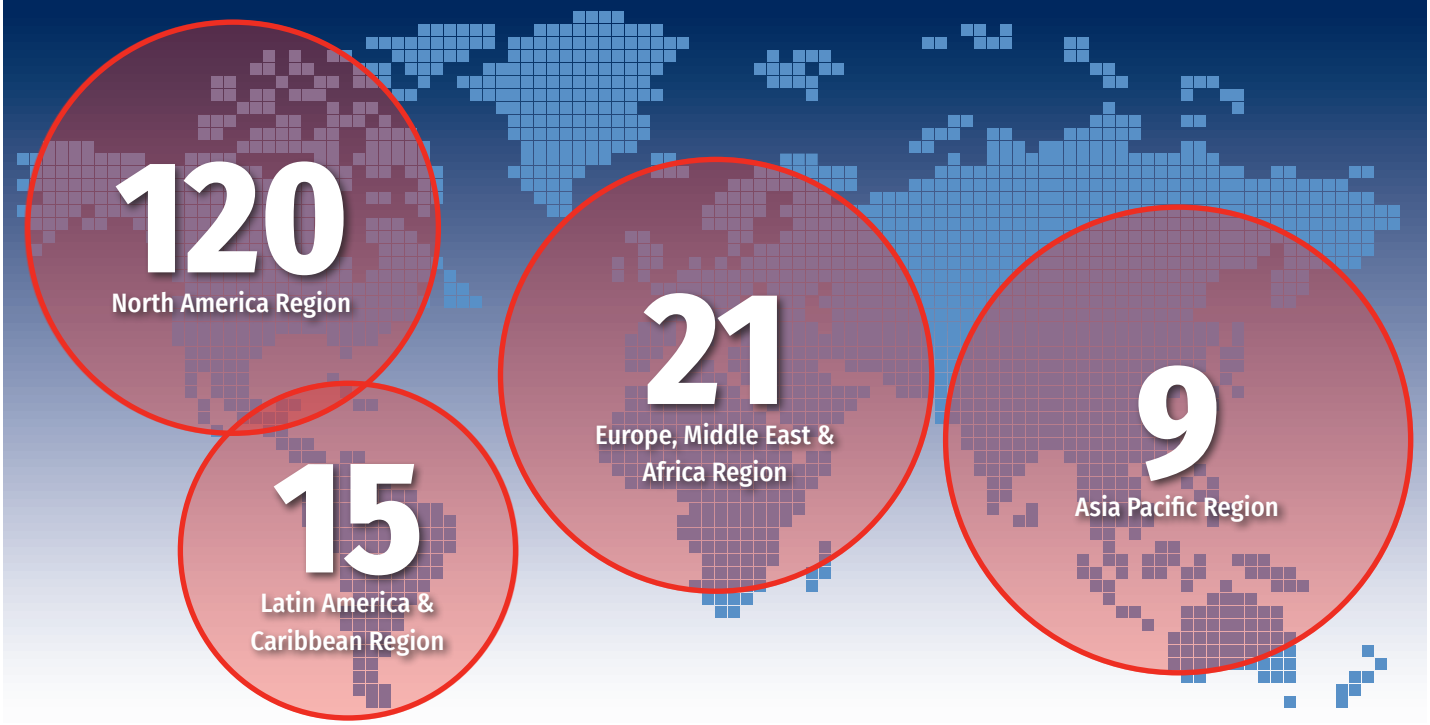

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