REGULATORY UPDATE

TCPA and FDCPA/ Regulation F Text Messaging

March 2024

I. Introduction

Solutions by Text ("SBT") offers its clients the ability to deliver text messages using SBT's proprietary software ("FinText™ Platform") and suite of related products and services. This white paper presents standards in the federal Telephone Consumer Protection Act[1] ("TCPA") and Regulation F,[2] which implements the federal Fair Debt Collection Practices Act ("FDCPA"), as applicable to text messages and explains how SBT's FinText™ Platform enables clients to send compliant text messages. This white paper is limited to federal law and does not address specific state laws.

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1 47 U.S.C. § 227 et seq.

2 12 C.F.R. Part 1006. Referred to as "Regulation F" or the "Regulation" throughout.

II. TCPA Compliance

The TCPA was enacted over thirty years ago, long before consumers regularly used text messaging on mobile devices. The initial intent of the TCPA was to regulate unrequested "robocalls." The original TCPA required consent to use an "automatic telephone dialing system" ("ATDS") or a prerecorded message, regulated the transmission of facsimile advertisements, and created limited do-not-call rights for consumers to stop unwanted telemarketing calls.[3] The TCPA gave rulemaking authority to the Federal Communications Commission ("FCC") to adopt regulations implementing the TCPA. For years, the FCC was the major mechanism with which the TCPA would evolve in scope. More recently, federal courts have provided more clarity as to what conduct violates the TCPA, most recently for the benefit of those who want to initiate texting campaigns to consumers.

Text messages were not something Congress contemplated when the TCPA was enacted, and for a long time there was a question as to whether text messages were even considered "telephone calls" under the statute. The FCC first established that text messages are "telephone calls" under the TCPA in 2003.[4] The FCC reaffirmed this position in a 2015 Declaratory Ruling and Order.[5] Courts across the country have followed the FCC's guidance and have similarly held that text messages constitute "telephone calls" under the TCPA.[6]

3 See 47 U.S.C. § 227.
4 2003 TCPA Order, 18 FCC Rcd. 14014, 14115, para 165 (July 3, 2003).
5 2015 TCPA Order, 30 FCC Rcd. 7961, 8017, para 107 (July 10, 2015).
6 *See*, e.g., *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir.2009) ("[A] text message is a 'call' within the meaning of the TCPA"); *Dominguez on Behalf of Himself v. Yahoo, Inc.*, 894 F.3d 116, 118 (3d Cir. 2018) ("Although the text of the statute refers only to 'calls,' we have held that, under the TCPA, that term encompasses text messages"); *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 156, 136 S. Ct. 663, 667, 193 L. Ed. 2d 571 (2016), as revised (Feb. 9, 2016) ("A text message to a cellular telephone, it is undisputed, qualifies as a "call" within the compass of § 227(b)(1)(A)(iii)"); *Keating v. Peterson's Nelnet, LLC*, 615 F. App'x 365, 370 (6th Cir. 2015) ("Although the term 'call' is not defined in the TCPA, the Federal Communications Commission (FCC) has ruled explicitly that the statute's prohibitions "encompass[ ] both voice calls and text calls to wireless numbers[...])"; *Cranor v. 5 Star Nutrition, L.L.C.*, No. 19-51173, 2021 WL 2133433, at *3 (5th Cir. May 26, 2021) ("The TCPA also includes text messaging in its prohibitions...").

a. Prohibition on the Use of an Automatic Telephone Dialing System

As technology has evolved since the enactment of the TCPA, so have the legal arguments concerning what constitutes an ATDS. Among its restrictions, the TCPA prohibits calls made to a cell phone without the consent of the called party. Specifically, the TCPA prevents unconsented calls made to cell phones using an ATDS or an artificial or pre-recorded voice.[7] For SBT's clients, the most relevant consideration is whether the client employs the use of an ATDS when texting its customers.

The statutory definition of an ATDS has stayed the same since the TCPA was enacted. An ATDS is defined as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[8]

The definition contains several terms that have been open to judicial interpretation, including what "equipment" the court should consider, and what "capacity" means. However, the main phrase that has caused the most dissension among federal courts was what the equipment had the capacity to do, namely "to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial those numbers."[9] The Ninth, Second, and Sixth Circuits adopted a broad definition of an ATDS in a line of cases that interpreted the definition of an ATDS to mean equipment that had the capacity to (1) store telephone numbers to be called **or** (2) to produce numbers to be called, using a random or sequential number generator, **and** to dial such numbers automatically.[10] This broad reading would bring predictive dialing technology under the umbrella of the TCPA. This interpretation would also arguably encompass everyday technology such as cell phones themselves, as by the broad definition, a cell phone can store numbers to be called and dial those numbers automatically.

The Third, Seventh, and the Eleventh Circuits adopted a narrower definition. These courts held that the phrase "random and sequential number generator" modified both the verbs "store" and "produce."[11] Thus, the key question in these cases was whether the technology employed the use of a random or sequential number generator. Most predictive dialers used in the collection industry dial from a stored list of numbers in an order based on complex algorithms to determine the time most likely to reach customers and times when an agent is available to speak to a consumer.

7 47 U.S.C. § 227(b)(1)(A) ("It shall be unlawful for any person within the United States, or any person outside the United States (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice (iii) to any telephone number assigned to a cellular telephone service").

8 47 U.S.C. § 227(a)(1).

9 *Id.*

10 *See Marks v. Crunch San Diego, LLC*, No. 14-56834, (9th Cir. 2018); *see also Duran v. La Boom Disco*, No. 19-600 (2nd Cir. 2020); *Allan v. Pa. Higher Ed. Assist. Agency*, No. 19-2043 (6th Cir. 2020). *Marks* also held that the D.C. Circuit overturned all prior FCC ATDS rulings in *ACA International v. FCC*, No. 15-1211 (D.C. Cir. 2018).

11 *Dominguez v. Yahoo, Inc.*, No. 17-1243 (3rd Cir. 2018), *Gadelhak v. AT&T Servs. Inc.*, No. 19-1738 (7th Cir. 2020), *Glasser v. Hilton Grand Vacations*, No. 18-14499 (11th Cir. 2020).

b. *Facebook, Inc. v. Duguid*

The Supreme Court granted Certiorari to settle the federal circuit split as to what was required for dialing technology to be considered an ATDS in the case *Facebook, Inc. v. Duguid*.[12] In *Duguid*, the Plaintiff alleged that Facebook used an ATDS to send text messages to his cell phone without his consent. The Plaintiff did not have a Facebook account and had not provided his number to Facebook. As part of its policy of automatically sending a computer-generated text message to a user's cellphone when his/her account is accessed from an unknown device, the Plaintiff alleged he received unwanted texts from Facebook. Facebook's dialing platform only dialed numbers that had been stored in its system.

A unanimous Court held that a plain reading of the statute showed that the definition of an ATDS under the TCPA means having equipment which has the capacity to "store numbers, **using a random or sequential number generator**, or produce telephone numbers **using a random or sequential number generator**, and to dial those numbers."[13] Therefore, Facebook's text messages to the Plaintiff's phone number without his consent did not run afoul of the TCPA's prohibition on sending messages using an ATDS without consent of the called party.

Overall, the *Duguid* case is a significant win for the telecommunications industry; however, the Court left a few loose ends for interpretation that will likely continue to impact TCPA jurisprudence. The Court left open the question as to what constitutes "equipment." Many dialing systems employ multiple individual parts consisting of different servers and platforms, some of which have the capacity to operate as a random or sequential number generator but cannot dial numbers on their own. The Court also left open what "capacity" means—is the definition of an ATDS met if the dialer could possibly use a random or sequential number generator, or does it actually have to use those functions in making the calls to violate the TCPA after *Duguid*? Plaintiffs have long argued that the narrow reading of the TCPA cannot be correct, because it would be superfluous to have equipment that merely stored numbers using a random or sequential number generator without also later producing them.[14] In addressing this argument, the Court opined "for instance, an auto dialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list."[15] Plaintiffs' firms have argued, to some success, that the example the Court gave is exactly the type of dialing technology that predictive dialers employ, using a random number generator to determine the order in which the numbers are dialed.

Since *Duguid*, district courts have been charged with applying the Supreme Court's holding. Most district courts that have applied *Duguid* have required or alluded to the requirement that the technology must have **used** some random or sequential number generator in making calls or text messages.[16] However, some district courts have drawn from Footnote 7's reasoning and have even found that a system that has the capacity to use a random or sequential number generator to select a dialing sequence might very well be an ATDS.[17]

12 *Facebook, Inc. v. Duguid*, No. 19-511 141 S.Ct. 1163 (2021).

13 *Duguid*, 141 S. Ct. at 1167 (2021).

14 See *Duran v. La Boom Disco, Inc.*, 955 F.3d 279, 284 (2d Cir. 2020) ("'Where possible we avoid construing a statute so as to render a provision mere surplusage[,]' deferring instead to another interpretation of the statute if one exists.")

15 *Duguid*, 141 S. Ct. at 1172, n. 7.

16 *Montanez v. Future Vision Brain Bank*, 2021 U.S. Dist. LEXIS 67091 (D. Col. Apr. 7, 2021) (allowing ATDS allegations to survive pleading stage but stating that it is 'critical' that a random or sequential number generator be "utilized" to prove an ATDS at summary judgment); *McEwen v. NRA of Am. & Infocision*, 2021 U.S. Dist. LEXIS United (D. Me. Apr. 14, 2021) (ruling ATDS must make "use" of a random or sequential number generator, not just have the capacity to do so); *Camunas v. Nat'l Republican Senatorial Comm.*, 2021 U.S. Dist. LEXIS 100125 (E.D.Pa. May 26, 2021) (allegations system "calls phone numbers from a stored list using a random or sequential number generator to select those phone numbers" were insufficient to state a claim without more); *Barnett v. Bank of Am., N.A.*, 2021 U.S. Dist. LEXIS 101171 (W.D.N.C. May 28, 2021) (holding a predictive dialer not an ATDS due to lack of evidence of a random or sequential number generator); *Timms v. USAA Fed. Sav. Bank*, 2021 U.S. Dist. LEXIS 10803 (D.S.C. Jun. 15, 2021) (holding an Aspect predictive dialer not an ATDS, no evidence of use of a random or sequential number generator, and footnote 7 of Duguid limited to circumstances where a random or sequential number generator is used to determine number sequence).

17 *See Carl v. First Nat'l Bank of Omaha*, 2021 U.S. Dist LEXIS 1118899 (D. Me. Jun. 15, 2021) (The dialing system involved could possibly be considered an ATDS even after *Duguid* due to footnote 7); *Atkinson v. Pro Custom Solar LLC*, 2021 U.S. Dist. LEXIS 112396 (W.D. Tex. Jun. 16, 2021) (holding ATDS allegations survive the pleadings stage where present use of random or sequential number generator to determine dial sequence alleged) cf. *Watts v. Emergency Twenty Four*, No. 20-cv-1820, 2021 U.S. Dist. LEXIS 115053 (N.D. Ill. Jun. 21, 2021).

Although the *Duguid* decision was an unequivocal win for callers and texters, there will still be some points of interpretation that will affect how far the TCPA reaches in the future. Clients should still seek to obtain proper consent before making calls. Additionally, clients should continue to scrub numbers in their calling lists to determine if those numbers are still owned by individuals who have given prior consent or whether those numbers have been reassigned.

SBT's FinText™ Platform does not have the capacity to store numbers using a random or sequential number generator, or produce telephone numbers using a random or sequential number generator, and to dial those numbers. However, even in light of *Duguid*, clients utilizing SBT's FinText™ Platform should still adhere to the TCPA's consent requirements to minimize risk and ensure compliance with applicable wireless carrier requirements and best practices.

c. TCPA Consent

The TCPA requires "prior express consent" for certain non-marketing communications but requires "prior express written consent" for certain marketing communications.[18] The "prior express consent" standard is triggered by non-marketing telephone calls that are initiated to a telephone number assigned to a cellular telephone service or any other service for which the called party is charged for the call.[19] The "prior express written consent" standard applies to telephone calls that include or introduce an advertisement or constitute telemarketing, if the call is to a cell phone and uses an automatic telephone dialing system or a prerecorded message or the call is to a landline and uses a pre-recorded message.[20]

The "prior express written consent" standard applies to telephone calls that include or introduce an advertisement or constitute telemarketing, if the call is to a cell phone and uses an automatic telephone dialing system or a prerecorded message or the call is to a landline and uses a prerecorded message.[21] This standard also becomes important in the context of TCPA actions filed for violation of the do-not-call rules, which will be discussed *infra.*

As noted above, the TCPA requires senders of text messages to have the recipient's "prior express consent" to send a non-marketing text message using equipment that satisfies the TCPA's "auto dialer" standard. Neither the TCPA nor the FCC's TCPA rule defines this "prior express consent" standard. In a 1992 Report and Order, the FCC stated: "[P]ersons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary. Hence, telemarketers will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached."[22] The FCC reaffirmed this position in a 2008 Declaratory Ruling: "Because we find that autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the 'prior express consent' of the called party, we clarify that such calls are permissible. We conclude that the provision of a cell phone number to a creditor, *e.g.,* as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt."[23]

18 47 C.F.R. § 64.1200(a)(1)(iii); 47 C.F.R. § 64.1200(a)(2).
19 This consent standard also applies to calls to any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency; the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or any telephone number assigned to a paging service, specialized mobile radio service, or other radio common carrier service. 47 C.F.R. § 64.1200(a)(1)(i)-(iii).
20 The FCC defines "prior express written consent" as "an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing message to be delivered. 47 C.F.R. § 64.1200(f)(9).
21 47 C.F.R. § 64.1200(a)(2).
22 1992 TCPA Report and Order, 7 FCC Rcd. 8752, 8769, para. 31 (October 16, 1992).
23 23 FCC Rcd. at 564-65, paras. 9-10.

This constitutes consent only if the consumer volunteered his or her cell phone number to the creditor—this does not extend to phone numbers captured by technological means or provided by third parties.

The FCC's guidance does not require creditors to provide a disclosure at the time the consumer volunteers his or her phone number in order to establish valid consent. However, the FCC encourages companies to provide a disclosure informing the consumer that, by providing his or her phone number, the consumer is consenting to receive autodialed and prerecorded message calls from the creditor at that number. This 2008 guidance also establishes that a creditor can share customers' "prior express consent" with third-party debt collectors contacting consumers on the creditor's behalf."[24] The TCPA does not include an express recordkeeping requirement in connection with the "prior express consent" standard. However, the FCC has made it clear that text message senders bear the burden of demonstrating that a non-marketing text message sent using an auto dialer was based on valid "prior express consent."[25]

Although the TCPA does not expressly grant a right of revocation to consumers who no longer wish to be contacted on their cell phones by auto dialers, the absence of an express statutory grant of this right does not mean that the right to revoke does not exist.[26] Consumers have a right to revoke consent by any reasonable means.[27] However, at least two circuits prior—and one recent district court opinion issued after *Duguid*—have held that any phone number conveyed as part of an application is one that is the result of a "bargained-for exchange" and requires mutual assent to revoke that consent.[28] This exception is applicable generally for companies collecting their own debts, which may not be relevant for most debt collectors.

Another definitional question under the TCPA is who is a "called party?" The TCPA is a strict liability statute, and there is no safe harbor for callers intending on communicating with individuals who have provided consent, but whose numbers have been reassigned to other individuals.[29] A collector using text messaging cannot avoid liability if it sends messages inadvertently to a wrong number.

d. TCPA Enforcement

The enforcement structure for the TCPA's rules provision requiring consent to use an auto dialer to send text messages is set out in the statute itself. Individual text message recipients have a private right of action under the TCPA. Each text message is an independent TCPA violation, and the per-violation recovery is $500 in statutory damages or actual damages, whichever is greater.[30] Courts do not have discretion to award less than $500 per violation, but they can award up to three times that amount based on a finding that a violation was willful or knowing.[31] The private right of action accrues to the actual recipient of the unlawful text message (i.e., the subscriber of the receiving telephone number).[32]

24 23 FCC Rcd. at 565, para. 10 ("Calls placed by a third-party collector on behalf of that creditor are treated as if the creditor itself placed the call").

25 23 FCC Rcd. at 564-65, para. 10; 30 FCC Rcd. at 7990; 7998-99, paras. 47; 70.

26 *Ammons v. Ally Fin.*, Inc., 326 F. Supp. 3d 578, 592–93 (M.D. Tenn. 2018); *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 270 (3d Cir. 2013); *Schweitzer v. Comenity Bank*, 866 F.3d 1273, 1280 (11th Cir. 2017) (applying Osorio and holding that consent can also be partially revoked depending on context); see also, e.g., *Bally v. First Nat'l Bank of Omaha*, No. 17-10632, 2017 WL 4841420, at *2 (E.D. Mich. Oct. 26, 2017) (citing Osorio and holding that "[a] party may revoke his consent in writing or orally by "clearly express[ing] his or her desire not to receive further calls"); *Kerner v. ConServe*, Civil No. 16-cv-209-LM, 2017 WL 1025781, at *2 (D.N.H. Mar. 16, 2017) (citing *Gager* and *Osorio* and explaining that the majority of courts hold that revocation can be accomplished in writing or orally); *see also Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1048 ("Concluding that the reasoning of our sister circuits is persuasive and the FCC's interpretation of the TCPA is reasonable, we agree that the TCPA permits consumers to revoke their prior express consent to be contacted by telephone autodialing systems."); *Johnston v. USAA Fed. Sav. Bank*, No. 12-CV-02486-LTB-KLM, 2014 WL 5439965, at *3–4 (D. Colo. Oct. 27, 2014) (holding that "the weight of authority suggests that consent may be revoked under the TCPA"); *Hitchman v. Nat'l Enter. Sys., Inc.*, No. 12-61043-CIV, 2014 WL 912363, at *2 (S.D. Fla. Mar. 10, 2014) (collecting cases concluding that consent may be revoked under the TCPA).

27 *Thompson-Harbach v. USAA Fed. Sav. Bank*, 359 F. Supp. 3d 606, 628 (N.D. Iowa 2019).

28 *See Medley v. Dish Network, LLC,* No. 18-13841 (11th Cir. 2020); *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 56 (2d Cir. 2017); Carl, 2021 U.S. Dist. LEXIS 111889.

29 N. L. by *Lemos v. Credit One Bank, N.A.*, 960 F.3d 1164, 1167 (9th Cir. 2020) ("Credit One's intent to call a customer who had consented to its calls does not exempt Credit One from liability under the TCPA when it calls someone else who did not consent"); see also *Osorio v. State Farm Bank*, F.S.B., 746 F.3d 1242, 1251–52 (11th Cir. 2014); *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 639–43 (7th Cir. 2012).

30 47 U.S.C. § 227(b)(3).

31 *Id.*

32 Article III standing challenges to TCPA cases have generally been unsuccessful. Article III standing requires the plaintiff to assert a valid injury. Some defendants have argued that the mere existence of a TCPA violation does not satisfy this injury requirement. Courts have generally rejected these challenges, reasoning that the invasion of privacy that comes with a TCPA violation is sufficient for standing. See, e.g., *Schaevitz v. Braman Hyundai, Inc.*, 437 F. Supp. 3d 1237, 1249 (S.D. Fla. 2019); *Melito v. Experian Mktg. Sols,. Inc.*, 923 F.3d 85, 95 (2d Cir. 2019). An exception to this general rule has been applied to "professional" plaintiffs, who have attempted to attract TCPA violations. *See, e.g., Stoops v. Wells Fargo Bank, N.A.*, 2016 WL 3566266 (W.D. Penn. June 24, 2016).

The "subscriber" can be either the person who pays the bill for the service provided at the phone number or a customary user of the receiving telephone number who does not pay the bill for service at that number.[33]

For defendants, the party that initiates or sends the text message faces direct liability for any TCPA violations. If that party was acting on behalf of a third-party, who directed the text messaging campaign, that third-party can face direct or vicarious liability, depending on the circumstances. Vicarious liability for another's conduct requires a showing of some kind of agency relationship: formal agency, apparent authority, or ratification.[34] In cases of text messages inadvertently sent to a wrong number or a number that has been reassigned to an unrelated third- party, the fact that the sender had valid consent to contact the intended recipient is not a defense to a claim of a TCPA violation by the actual recipient. Every text message inadvertently sent to a wrong number is a TCPA violation, with a private right of action accruing to the actual recipient of the message.

e. TCPA Compliance and SBT's FinText™ Platform

SBT's FinText™ Platform does not have the capacity to store numbers using a random or sequential number generator, or produce telephone numbers using a random or sequential number generator, and to dial those numbers.[35] Nevertheless, SBT strongly encourages its clients to maintain full compliance with the TCPA as wireless carrier requirements and best practices incorporate various requirements found in the TCPA, namely concerning consent. Pursuant to FCC guidance, SBT's clients should have valid "prior express consent" to send account management text messages based solely on the consumer volunteering his or her cell phone number to the creditor in connection with a business transaction. Consent is brand-specific. This means that clients cannot transfer consent associated with one brand to a another brand, which is consistent with FCC guidance on this issue.[36] SBT's recommended opt-in confirmation message includes opt-out instructions: "To opt-out reply STOP" or similar language. All subsequent message templates for account management text messages that SBT makes available to clients should include opt-out language (NOTE: for some industries, opt-out language is required). Consumers who use that instruction and send a "HELP" message in response to an account management text message receive a text message providing a customer service phone number and instructions for opting out via text message for example: "To cancel msgs reply STOP or call 888-555-1212." SBT recommends "STOP" content for subsequent account management text messages. Because most clients are required to use SBT's message templates, this ensures that all account management text messages sent through the SBT FinText™ Platform will include a means for consumers to revoke consent. Virtually all consent revocations are submitted by a consumer texting "STOP." When consumers reply "STOP" to opt-out, SBT will automatically send one final message confirming receipt of the consumer's consent revocation. The FCC has expressly established that this confirmation message is permitted.[37] SBT's clients are responsible for monitoring inbound text messages to ensure that any replies from subscribers that do not trigger SBT's automated "STOP" process are reviewed and, as applicable, subscribers are manually unsubscribed.

33 30 FCC Rcd. at 8000-01, para. 73.
34 2013 TCPA Declaratory Ruling, 28 FCC Rcd. 6574, 6584, 6586-87, 6592-93; paras. 28, 33-34, 45-47 (May 9, 2013).
35 SBT is able to share information about its platform with clients to allow them to satisfy themselves about whether the platform is an "auto dialer" upon request.
36 23 FCC Rcd. at 565, note 38.
37 30 FCC Rcd. at 7994, para. 57; 2021 TCPA Declaratory Ruling, 27 FCC Rcd. 15391, 5397, para. 11 (November 29, 2021). The FCC has explained that the consumer's previous "prior express consent" extends to a single message confirming the consumers opt-out, provided that the confirmation does not include any marketing content. The confirmation message should be sent within five minutes of the consumer's opt-out text message request.

SBT offers UI and API options to facilitate clients' ability to manage customer opt-out requests. This allows clients to ensure that revocations are honored across all applicable forms of communication, even if they are submitted other than by replying to a text message. The UI and API options allow clients to communicate customer consent revocations to SBT for processing via SBT's Stop Safety Net™. The FCC's expansive approach to the consumer's right to revoke consent means that consumers could communicate their consent revocation directly to an SBT client. The client bears responsibility for processing those revocations. When a consumer revokes consent by replying "STOP" to a text message that a SBT client sends via the SBT interface, SBT's Stop Safety Net™ processes those consumer consent revocations. The consumer's consent revocation is communicated to the client and recorded in SBT's client database. If a client attempts to send a subsequent text message to a phone number for which consent has been revoked, SBT will stop-fail the message and prevent it from being sent unless there is a subsequent opt-in event. With this process, SBT effectuates consumer consent revocations instantly. The only way SBT clients can override a consumer's consent revocation is if a subsequent opt-in event occurs for the phone number. SBT strongly suggests its clients obtain customers' cell phone numbers only from the customers directly.

If a text message is attempted to a cell phone number that has been deactivated and is subject to reassignment, SBT receives a report including deactivated numbers and processes the number as if it had been opted out or unsubscribed. SBT's FinText™ Platform will block all subsequent attempts to send text messages to the deactivated number until/unless a subsequent opt-in event occurs. There is still a risk that a client will attempt to send a text message to a deactivated number where SBT has not had an opportunity to learn that the number has been deactivated. In supporting the one-contact limited safe harbor for reassigned numbers, the FCC's position is that there are tools available in the marketplace to help business identify reassigned numbers.[38] The FCC also points to the sender's option of asking customers to alert the sender when they change numbers and of using the limited one-contact safe harbor to track reassigned numbers. Regardless of how effective these measures are, SBT's clients bear the burden of avoiding texting deactivated or reassigned numbers. Clients should consider adopting the measures suggested by the FCC to mitigate this burden and the associated risk. The FCC has indicated that text message senders bear the burden of proving that their messages were sent with valid consent and otherwise in compliance with the TCPA.[39] SBT maintains records of consent and consent revocation done via text message for seven years, which extends beyond the applicable statutes of limitation for TCPA enforcement actions.

38 *See* 30 FCC Rcd. at 8007, para. 86, note 301.

39 *See* 23 FCC Rcd. at 565, para. 10.

f. Do-Not-Call List Actions

An additional TCPA concern that clients should be aware of is the TCPA's Do-Not-Call list restrictions and regulations related to telemarketing text messages. The TCPA, and the FCC's promulgated regulations, prohibit telemarketing to a "residential telephone subscriber" before 8:00 AM and after 9:00 PM in the recipient's time zone. Additionally, the regulations prohibit calls to a "residential telephone" that has been placed on the national "do-not-call" registry. Such requests must be honored indefinitely. Although the regulations discuss residential numbers, courts have found that cell phones operating as an individual's residential phone number can qualify as well.[40] A company will not be liable under three exceptions. First, if it can demonstrate that the violation is the result of an error that occurred despite showing the company, as part of its routine practice, has certain policies and procedures to prevent and document such possible violations.[41] Second, if the company receives prior express written consent from the consumer.[42] And third, if the company has an established business relationship with the consumer.[43] The regulations also require certain minimum standards, including: maintaining a written policy (available on demand); do-not-call training for personnel; recording and disclosure of do-not-call requests; caller identification requirements; and internal do-not-call lists.[44] The FCC has provided a 31-day safe harbor in which to scrub for numbers that have been added to the do-not-call registry.[45] The TCPA creates a private right of action for a person who receives more than one telephone call within any 12-month period, from an entity who fails to maintain the described procedures, with penalties the same as those who violate the auto dialer provisions of the statute.[46] Text messaging clients who use SBT's services are responsible for scrubbing the national do-not-call registry regularly. Additionally, clients should be aware of state restrictions that prohibit calling residential numbers that are also registered with state created databases.

40 Implementing the Tel. Consumer Prot. Act of 1991, 18 F.C.C. Rcd. at 14039, *Hodgin v. Parker Waichman Llp*, No. 3:14-CV-733-DJH, 2015 WL 13022289, at *3 (W.D. Ky. Sept. 30, 2015); *Izor v. Abacus Data Sys., Inc.*, No. 19-CV-01057-HSG, 2019 WL 3555110, at *2 (N.D. Cal. Aug. 5, 2019), *Hand v. Beach Ent. KC, LLC*, 456 F. Supp. 3d 1099, 1120 (W.D. Mo. 2020).
41 47 C.F.R. § 64.1200(c)(i).
42 47 C.F.R. § 64.1200(c)(ii).
43 47 C.F.R. § 64.1200(f)(15)
44 47 C.F.R. § 64.1200(d).
45 47 C.F.R. § 64.1200(c)(2)(i)(d).
46 47 U.S.C. § 227(c)(5).

III. FDCPA Compliance

The federal Fair Debt Collection Practices Act ("FDCPA") was enacted in 1978 to curb abusive collection practices by debt collectors. The FDCPA only applies to "debt collectors" who collect "debts." The definition of "debt collector" is broad: [A]ny person who uses any instrumentality of 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 to another.[47] There are numerous exceptions from the definition of "debt collector" in the FDCPA, including one that excludes a person collecting debts owed to another if that person began collecting (or servicing) before the debt went into default.[48] A "creditor" who collects its own accounts using its own name is not a "debt collector" under the FDCPA.[49] Rather, a creditor under the FDCPA is any person who offers or extends credit creating a debt or to whom a debt is owed. The definition of "creditor" specifically excludes "any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another."[50] The FDCPA defines a "debt" as [A]ny obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to a judgment.[51]

In 2017, the Supreme Court held that a debt buyer is not a debt collector under the second prong of the debt collector definition, i.e. it does not collect debts owed by another.[52] The Court did not, however, decide whether a debt buyer fulfills the definition as to whether it is engaged in a business with the "principal purpose" of collecting debts. Since *Henson*, it remains an open question, and often an issue of fact to determine whether a particular debt buyer qualifies under the "principal purpose" prong.[53]

At the time when Congress enacted the FDCPA, text messaging did not exist. In the years since, text messaging has grown as a very common form of personal communication. Consumers have increasingly expressed a desire to receive personal business communications, such as payment reminders and past due notices, by text message. The FDCPA has not been amended to address new technology, like text messages and emails. But the Consumer Financial Protection Bureau ("CFPB"), which has enforcement, rulemaking, and supervisory authority under the FDCPA, has agreed with courts that held and made clear that while collectors may use text messages to collect debt, the messages are "communications" subject to the FDCPA.[54] After considerable consumer research and an extensive rulemaking process, the CFPB finalized regulations authorized by the FDCPA, 12 CFR Part 1006, referred to as Regulation F, effective

47 15 U.S.C. § 1692a(6), 12 C.F.R. § 1006.2(i)(1).
48 15 U.S.C. § 1692a(6)(F)(iii), 12 C.F.R. § 1006.2(i)(2)(vi)(C).
49 15 U.S.C. § 1692a(6)(F), 12 C.F.R. § 1006.2(i)(2).
50 15 U.S.C. § 1692a(4), 12 C.F.R. § 1006.2(g).
51 15 U.S.C. § 1692a(5), 12 C.F.R. § 1006.2(h).
52 *Henson v. Santander Consumer USA, Inc.*, 137 S.Ct. 1718, 1726 (2017).
53 *See e.g. Norman v. Allied Interstate, LLC*, 310 F. Supp. 3d 509, 514–15 (E.D. Pa. 2018), *Reygadas v. DNF Assocs., LLC*, 982 F.3d 1119, 1123–24 (8th Cir. 2020); *McAdory v. M.N.S. & Assocs., LLC*, 952 F.3d 1089, 1097 (9th Cir.2020).
54 *Frazier v. Am. Credit Resol., Inc.*, No. 18-CV-07729-TSH, 2019 WL 5310718, at *6 (N.D. Cal. Oct. 21, 2019) (holding two text messages were FDCPA communications).

November 30, 2021.[55] The rules enacted in Regulation F are designed primarily to allow debt collectors and consumers to figure out between them the best and most convenient way to communicate about their debts. Among other efforts to specifically address the implications of the FDCPA's restrictions on common modern communication methods, the CFPB outlined techniques debt collectors subject to the FDCPA could use to obtain consumer consent to use text messaging as a means of communication with consumers who agree and opt in to text messaging. Most debt collectors know the risks implicated by text messaging in the regulatory environment that preceded the enactment of Regulation F. The paragraphs that follow review those risks and the ways in which Regulation F addresses them.

a. Time and Place Restrictions

The FDCPA and Regulation F broadly prohibit debt collectors from communicating in connection with the collection of a debt "at any unusual time or place, or a time or place known, or which should be known, to be inconvenient to the consumer."[56] In Official Commentary to Regulation F, the CFPB clarifies that consumer designations of inconvenient times or places can be explicit or based on the totality of facts and circumstances based on information a debt collector receives regarding the consumer. Further, if a consumer initiates a communication with a debt collector at a time or place that was deemed inconvenient, the debt collector may respond once through that medium at that time or place.[57] The debt collector cannot then continue to communicate with the consumer at that time or place unless the consumer conveys that the time or place is no longer inconvenient.[58] And in determining times that may be inconvenient to a consumer, the regulations create a presumption that calls made before 8:00 AM and after 9:00 PM in the time zone of the consumer are inconvenient, unless the debt collector has knowledge contrary to those parameters.[59] These guidelines apply to all forms of communications, *including* text messages. In the case of conflicting or ambiguous information concerning the local time at the consumer's location, a debt collector complies with the regulations if the debt collector communicates or attempts to communicate with the consumer a time that would be convenient in all the locations at which the debt collector's information indicates the consumer might be located.[60] For example, if a debt collector has information indicating a consumer has a mobile number with an area code associated in the Eastern time zone and residential address in the Pacific time zone, the convenient times to communicate with the consumer are after 11:00 AM Eastern time (8:00 AM Pacific time) and before 9:00 PM Eastern time (6:00 PM Pacific time). In the specific context of text messaging, these time constraints are tracked from when the collector sends the message, not when the consumer receives or views it.[61]

In determining places that are inconvenient, certain modes of communications are considered more associated with a certain place than others. Regulation F specifically cites mailing addresses and landline telephone numbers as especially associated with a place.[62] Conversely, the Regulation identifies mobile numbers and e-mail addresses as data points not necessarily associated with a place.[63] Unless the debt collector knows that the consumer is at an unusual place

55 12 C.F.R. §§ 1006 *et seq.* (2021).
56 15 U.S.C. § 1692c(a)(1); 12 C.F.R. § 1006.6(b)(1)(i)-(ii).
57 12 C.F.R. § 1006.6(b)(1), Cmt. 6(b)(1)-2.
58 *Id.*
59 12 C.F.R. § 1006.6(b)(1)(i).
60 12 C.F.R. § 1006.6, Cmt. 6(b)(1)(i)-2.
61 12 C.F.R. § 1006.6, Cmt. 6(b)(1)(i)-1.
62 12 C.F.R. § 1006.6, Cmt. 6(b)(1)(ii)-1.
63 *Id.*

or a place inconvenient to the consumer, the place restrictions will not normally come into play for debt collectors and creditors who use text messaging to communicate with consumers.[64]

However, one location that has additional protection is a consumer's place of employment. A debt collector must not communicate or attempt to communicate with a consumer in connection with the collection of any debt at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.[65] For example, a debtor may inform a collector that she is not allowed take calls during the day at work. A debt collector is allowed to ask follow-up questions to determine whether someone may be able to receive calls or texts at work. Regulation F does not require that debt collectors track which employers prohibit communications.[66]

b. Knowledge of Attorney Representation

The FDCPA and Regulation F also protect consumers if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address. Unless the attorney fails to respond within a reasonable period of time to a communication from a debt collector or unless the attorney consent to direct communication, a debt collector cannot contact a represented consumer.[67] The CFPB's Section-by-Section analysis in the Regulation F rulemaking defines the "reasonable period" for an attorney response as dependent on the facts and circumstances.[68] Like the other time and place prohibitions, a consumer who is represented by an attorney may reach out to the debt collector (including by text message), which permits the debt collector to respond once. However, such communication does not negate the knowledge that a debt collector knows a consumer is represented by an attorney.[69] Additionally, this prohibition from communicating with a represented consumer is debt- specific ("with respect to such debt"). Thus, a debt collector's knowledge that a consumer is represented by an attorney for one debt does not require a debt collector to assume representation as to other debts the debt collector may be working for other creditor clients.[70]

SBT's clients are responsible for appropriately handling customers who are represented by attorneys as SBT's clients are in the best position to know when a customer is represented by an attorney, and when the exceptions to communicating with a represented consumer apply. Clients are responsible for communicating to SBT any cease communication requests that relate to a customer being represented by an attorney.

For each of the above restrictions based on time, place, or knowledge of representation, a debt collector may still contact a consumer if the consumer provides prior consent to communicate.[71] In order to obtain valid prior consent, a debt collector must receive such consent directly from the consumer before the collector communicates with the consumer in a way that otherwise violates the FDCPA and Regulation F.

64 *Id.*
65 15 U.S.C. § 1692c(a)(3). 12 C.F.R. § 1006.6(b)(3).
66 12 C.F.R. § 1006.6, Cmt. 6(b)(3)-1.
67 15 U.S.C. § 1692c(a)(2); 12 C.F.R. § 1006.6(b)(2).
68 12 C.F.R. Part 1006, Supp. at 124.
69 12 C.F.R. § 1006.6(b)(2), Cmt. 6(b)(2)-1.
70 12 C.F.R. Part 1006, Supp. at 127.
71 15 U.S.C. § 1692c(a); 12 C.F.R. § 1006.6(b)(4). The rules also except such communications if required by court order.

For example, a debt collector who texts a consumer at 10:00 PM local time, who then receives consent from the consumer to continue to communicate at that time, would still run afoul of the regulations for the initial 10:00 PM communication.[72] Regulation F also prohibits a debt collector from asking the consumer to consent to the continuation of that initial impermissible communication.[73] As another example, if a debt collector who communicates with a consumer at time when the FDCPA and Regulation F allow the debt collector to assume is convenient for the consumer, but the consumer then informs the debt collector that a particular time is inconvenient for the consumer, the debt collector may then only ask what time or place would be convenient to communicate.[74] Additionally, prior consent given to one debt collector does not transfer over to a subsequent debt collector.[75]

SBT's clients are responsible for complying with the FDCPA's restrictions on contacting consumers at inconvenient times or places. Clients are in the best position to determine whether a communication is being sent at a convenient time—for example, the client might know if its customer works nights, and only wants to receive text messages at night, or that the customer is traveling abroad to a different time zone. Clients are also in the best position to determine, based on their experiences with their customers, the best time to contact customers. Accordingly, SBT defers to its clients to decide when to send text message to their customers based on the parameters of the FDCPA and Regulation F, as described above.

c. Cease-Communication Requests

Another key prohibition in the FDCPA is that debt collectors may not continue to communicate with a consumer if the consumer notifies the debt collector in writing that (a) he or she refuses to pay the debt or that (b) he or she wants the debt collector cease further communication with respect to that debt.[76] Like the attorney prohibition, this rule is also debt-specific. If a consumer notifies a debt collector in writing that he refuses to pay the debt or that the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with respect to such debt.[77]

Further, Regulation F affirmed that the consumer has to make such a request in writing, and that it is effective on receipt.[78]

The FDCPA and Regulation F provide that a consumer still has the option of orally asking for communications to stop via certain media, even if an oral request will not stop all communications.[79] Thus an oral "stop calling" request is a valid request to cease communications via telephone. And because electronic text messages are considered "writings" under Regulation F, particularly if the debt collector receives electronic communications, a text message asking the debt collector to cease some or all communications, or telling the debt collector that the consumer refuses to pay the debt, is sufficient written notification.[80] The CFPB declined to put in a specific time period within which a debt collector must cease communications with a consumer under this rule, but instead chose that it must be done within a "reasonable time" after notification.

72 "The Bureau interprets a consumer's prior consent to be consent obtained in the absence of conduct that would compromise or eliminate a consumer's ability to freely choose whether to consent. A communication that would violate § 1006.6(b)(1) through (3) (e.g., consent obtained from a consumer at an unusual or inconvenient time or place) is likely to compromise or eliminate a consumer's ability to freely choose whether to consent." 12 C.F.R. Part 1006, Supp. at 136.
73 Comment 6(b)(4)-1.
74 15 U.S.C. § 1692c(a); 12 C.F.R. § 1006.6(b)(4)(i).
75 12 C.F.R. Part 1006, Supp. at 138, 15 U.S.C. § 1692c(a).
76 15 U.S.C. § 1692c(c); 12 C.F.R. § 1006.6(c).
77 *Id.*
78 *See* 12 C.F.R. § 1006.6(c), Cmt. 6(c)-1.
79 12 C.F.R. § 1006.14(h)(1).
80 12 C.FR. § 1006.6(c)(1), Cmt. 6(c)(1)-2.

The FDCPA has three narrow exceptions to this ban on communications after a request to cease, including: (1) to advise the consumer that the debt collector's further efforts are being terminated; (2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or (3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.[81] If a consumer sends a cease communication request by text message (texting the word "STOP"), SBT will place an immediate automatic stop on text messages to that phone number. As a result of an automatic stop, the client cannot send any more text messages via SBT's platform to the consumer until another opt-in event occurs. Accordingly, SBT's platform allows clients to honor a cease communication request virtually immediately if the request is received via text message. SBT is not responsible for how the client handles cease communication requests received via other modes of communication outside of text messages. For instance, if a consumer tells a client over the phone (or by mail or email) that he or she wants the client to stop contacting her altogether, it is the client's responsibility to handle the cease communication request and communicate it to SBT so that SBT can impose a system control to keep additional texts from going out until another opt-in event occurs.

d. Third-Party Disclosure Risk

The FDCPA prohibits a collector from disclosing the existence of a debt to a third party without the consumer's prior consent, or if a debt collector is seeking location information on the debtor.[82] Specifically, a debt collector must not communicate, in connection with the collection of any debt, with any person other than: (i) the consumer; (ii) the consumer's attorney; (iii) a consumer reporting agency, if otherwise permitted by law; (iv) the creditor; (v) the creditor's attorney; or (vi) the debt collector's attorney.[83]

Text message communications generally present a risk of third-party disclosure, and in debt collection messaging is no exception. For example, the consumer's employer may have issued her a phone that he or she could also use as a personal phone, and reserved the right to review the phone usage, including messaging. In another example, the consumer may share a phone with someone else or allow friends or family to access to his or her phone. Further, the consumer's cell phone receiving the message could reveal it on the phone screen as it arrives in the form of an alert.

Regulation F creates some safe harbor protection for debt collectors when it comes to avoiding liability for third-party disclosures.[84] This protection requires debt collectors to show they maintained reasonable text messaging procedures designed to prevent disclosure of the consumer's debt to third parties. If a debt collector's procedures satisfy the safe harbor requirements, Regulation F provides an affirmative defense (bona fide error defense) for the debt collector for any inadvertent disclosure, but not complete immunity from liability.

The safe harbor rules for third-party disclosures only apply to e-mail and text messages (for purposes of this white paper, we focus on the rules related only to text messaging). The Regulation requires that a debt collector maintains procedures that reasonably confirm and document that the collector communicated with the consumer via text message and the debt collector did not communicate with the consumer to a telephone number the debt collector knows has led to a third-party disclosure.[85]

81 15. U.S.C. § 1682c(c), 12 C.F.R. § 1006.6(c)(2).
82 15 U.S.C. § 1692c(b), 12 C.F.R. § 1006.6(d).
83 *Id.*
84 12 C.F.R. § 1006.6(d)(3); 12 C.F.R. § 1006.6(d)(5)
85 12 C.F.R. § 1006.6(d)(3).

For the purposes of the safe harbor, knowledge can be imputed to the debt collector if any person has informed the debt collector that a communication to a telephone number has led to a third-party disclosure.[86]

The Regulation specifically outlines procedures for safe text messaging.[87] There are two main paths for a debt collector communicating with consumers by text message to fall within the safe harbors of the regulations. First, the consumer must have: (1) used the telephone number to communicate with the debt collector about the debt by text message; (2) the consumer must have not since opted out of text message communications to that that number; and (3) within the past 60 days either (A) the consumer sent a text message to a debt collector from that telephone number, or (B) the debt collector confirmed, using a **complete and accurate database**, that the telephone number has not been reassigned since the date of the consumer's most recent text message to the debt collector.[88] The phone number must be provided by text message, and must be about the debt.[89] The rules have specifically referred to the FCC's future Reassigned Numbers Database as an example of a "complete and accurate" database.[90] The rules permit the use of any commercially available database substantially similar to the reassigned numbers database.[91]

The second avenue in which to come under the protection of Regulation F's safe harbor involves the receipt of prior consent from the consumer. For procedures to qualify for this safe harbor, the debt collector must have: (1) received prior consent from the consumer to receive text messages from that telephone number; (2) must not have withdrawn that consent; and (3) within the last 60 days, obtained or renewed that consent, or confirmed that the number still belongs to the consumer using a complete and accurate database.[92] Prior consent can be provided from the consumer through any medium—for example, a consumer can tell a collector over the phone that he or she consents to receive text messages.[93] To reiterate, a debt collector can only successfully raise a bona fide error defense if it maintains reasonable procedures, as explained herein, and the bona fide error defense does not provide complete immunity.

SBT encourages clients to ensure text messages only go to consumers who have specifically asked for text messages, who have acknowledged the possibility of inadvertent third-party disclosure, and who have given prior consent to that disclosure. SBT can provide clients with a sample text message policy can be tailored to fit their business needs. SBT also recommends that the policy include certain disclosures, among them a warning to the consumer about the possibility of other people seeing the text messages and the acknowledgment of the consumer that he or she wants to receive text messages about her debt notwithstanding that risk. **The sample text message policy includes the following warning:**

> You understand that the text messages we send may be seen by anyone with access to your phone or your text messages. Accordingly, you should take steps to safeguard your phone and your text messages if you want them to remain private. You acknowledge and agree that you want to receive text messages regarding your account from us, even though there is a risk another person could access those messages.

Clients should ensure that any such warning or consent provision works for their organization, but the warning above makes clear that text messages may not be a private or secured form of communication and requires the consumer to acknowledge that a third-party may view his or her messages if he or she does not take care to safeguard them. Adoption of this consent language should mitigate the risk that a consumer will complain that the "debt collector" exposed his or her debt information to third parties. If the consumer does make that complaint, the debt collector can refer to the consent language and acknowledgment to gently remind the consumer that he or she gave express consent to the communication, notwithstanding the risk.

86 12 C.F.R. § 1006.6(d)(3)(ii), Cmt. 6(d)(3)(ii)-1.
87 *See* 12 C.F.R. § 1006(d)(5).
88 12 C.F.R. § 1006.6(d)(i).
89 12 C.F.R. § 1006.6(d)(5)(i), Cmt. 6(d)(5)(i)-1; Supp. at 208.
90 12 C.F.R. § 1006.6(d)(5)(i), Supp. at 210-211.
91 SBT currently obtains information on deactivated and ported numbers from a database on a nightly basis directly from the carriers. Any deactivated numbers are treated as if the subscriber opted-out.
92 12 C.F.R. § 1006.6(d)(5)(ii).
93 12 C.F.R. § 1006.6(d)(5)(ii), Cmt. 6(d)(4)(i)(B)-1.

e. Opt-Outs

Regulation F also requires debt collectors who communicate with consumers by text message to provide telephone numbers for consumers to use to opt-out of receiving text communications.[94] For each communication to a phone number via text message, a collector must include a "clear and conspicuous statement" describing a "reasonable and simple method" to opt-out of receiving text messages.[95] An opt-out process cannot require any additional fees (e.g. by certified mail) to be effective, but this rule does not include charges incurred via text to a debt collector.[96] A collector cannot respond to the opt-out notice except to ask to confirm the consumer's phone number and particular communication preferences of the consumer.[97] The comments in Regulation F provide an example of such a reasonable opt-out, wherein a text message includes the instruction "Reply STOP to stop texts to this telephone number."[98] There is no exhaustive list of words or phrases a debt collector can use to effectuate an opt-out, nor is there any particular defined processing period or method in the Regulation.[99] Conversely, asking a consumer who receives text messages to opt-out of continuing text messages by regular mail, telephone call, or visiting a website without providing a link does not constitute a "reasonable and simple method" for opting out.[100]

The CFPB adds additional clarity as to the breadth of the opt-out. For example, a consumer's request to opt-out of text messages is not a request to opt-out of telephone calls to that number.[101] Nor does a consumer's request to opt-out bind subsequent debt collectors. The CFPB refers to an example where a consumer who objects to the use of text messages by one debt collector might not object to another debt collector using text messages for one reason or another.[102] However, an opt-out to one debt collector for a particular debt also applies to future text message communications about other debts from that debt collector.[103] Such a request does not go beyond the specific number or method of communication.[104]

Once a consumer opts out of receiving communications by a specific medium, a debt collector may no longer communicate with the consumer via that medium.[105] A consumer can request that a debt collector no longer communicate by one or both numbers.[106] Exceptions include a statement confirming the person's request and that the debt collector will honor it, if a person initiates contact with a debt collector using a medium previously requested the debt collector not use, they may respond once through the same method, or if required by law.[107]

94 12 C.F.R. § 1006.6(e).
95 *Id.*
96 12 C.F.R. Part 1006, Supp. at 222.
97 12 C.FR. Part 1006, Supp. at 231.
98 12 C.F.R. § 1006.6(e), Cmt. 6(e)-1(i).
99 The rules define "clear and conspicuous" as "readily understandable, taking into account location, type-size, and legibility."12 C.F.R. § 1006.6(d)(4)(ii)(C), Cmt. 6(d)(4)(ii)(C)-1.
100 *Id.*
101 12 C.F.R. Part 1006, Supp at 226.
102 12 C.F.R. Part 1006, Supp at 226-27.
103 12 C.F.R. Part 1006, Supp at 229.
104 12 C.F.R. Part 1006, Supp at 226.
105 12 C.F.R. § 1006.14(h)(1).
106 12 C.F.R. § 1006.14(h)(1), Cmt. 14(h)(1)-2.
107 12 C.F.R.§ 1006.14(h)(2).

f. Content and Manner Restrictions

The FDCPA and Regulation F also seek to regulate the content and character of attempts to collect debts through text messaging. Generally, 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.[108] Regulation F provides specific examples, although not an exhaustive list, of ways a debt collector can violate the FDCPA. Relevant to the use of text messages specifically, the Regulation discusses: repeated or continuous telephone calls; the use or threat of the use of violence or criminal means to harm the physical person, reputation or property of any person; the use of obscene or profane language; a lack of meaningful disclosure of a caller's identity; and communicating with a consumer by way of media he or she has previously requested the collector not use.[109] The Regulation provides presumptive limits on the number of telephone calls made by debt collectors; however, the CFPB specifically did not apply such a limit to text messages.[110] A word of caution—the CFPB also alludes to a scenario where cumulative communications can be considered harassing, relying on other regulations in the rules to curb excessive text messages.[111]

SBT's clients are responsible for complying with the FDCPA's limits on communication frequency, including by determining how many text messages within a specific time period is too many text messages. SBT recognizes that different clients have different business needs and priorities, and that clients should have flexibility to set text message frequency based upon their individual business needs. As a result, SBT does not set specific stops on contact frequency—SBT requires clients to set those limits for SBT to program. We note, however, that the Stop Safety Net™—which prevents any text messages from going to a consumer immediately after the consumer sends a "STOP" text message—could mitigate potential claims of harassment and excessive contact, because it empowers the consumer to shut off the flow of text messages at any time.

SBT consultants assist clients with selecting text message templates for the clients' libraries of text communications. The text message templates available in SBT's library should not include any language that could be considered deceptive, abusive, or harassing in violation of the FDCPA. However, SBT's clients should review the content of the text message templates with their independent counsel to determine whether the messages pose a risk of harassment, deception, or abuse in the context the clients plan to use the messages and to ensure the templates are compliant with applicable law.

108 15 U.S.C.§ 1692d.
109 12 C.F.R. § 1006.14 (b)-(h).
110 12 C.F.R. Part 1006, Supp. at 252-53, 255.
111 12 C.F.R. § 1006.14(b)(1), Cmt. 14(b)(1)-2.

g. Meaningful Disclosure of a Caller's Identity

The FDCPA and Regulation F prohibit a debt collector from placing telephone calls without meaningful disclosure of the caller's identity.[112] The U.S. District Court for the Western District of New York, in an unreported case, summarily held that a text message from a debt collector that failed to disclose the identity of the sender violated the FDCPA.[113] All of SBT's text message templates for debt collectors begin with a disclosure of the debt collector's name, and afterward in the message, the word "debt collector" or some similar identification/description. Accordingly, SBT's text message templates allow clients to adequately identify the sender, both by name and as a debt collector, as is required by the FDCPA.

Regulation F also identifies certain "unfair practices" among its interpretations of the FDCPA.[114] For collectors using text messages, this includes causing charges to be made to any person for communication by concealment of the true purpose of the communication.[115] The Regulation also incorporates the safe harbor procedures into the "unfair practices" provision by stating that a debt collector who communicates with a consumer by sending a text message in accordance with the safe harbor procedures described above does not violate the general prohibition on unfair practices by revealing in the text message the debt collector's name or other information indicating that the communication relates to the collection of a debt.[116]

Some mobile phone plans feature a per-message charge for sending or receiving text messages or impose charges for data usage arising from text messages. As long as a text message does not somehow conceal its true purpose, the fact that the debtor may incur a charge to read the text message is not a concern under the FDCPA. Therefore, the appropriate way to mitigate the risk of violating the prohibition against causing a consumer to incur a charge for text communications by concealment of the true purpose of the communication is by making clear in the body of the text message that the purpose of the message is to collect a debt. All of the collection texts available on SBT's platform for FDCPA "debt collectors" include a clear disclosure within the message that the sender is a debt collector (i.e., the Mini-Miranda notice) and are drafted to be clear, straightforward messages about the purpose of the message—like payment reminders and past due payment notices. As a result, the opening of the message makes clear that it is for collection purposes, and that the message not a pretext (e.g., the collector posing as a friend or business opportunity to "trick" the consumer into accepting the text or responding). Accordingly, SBT's recommended "debt collector" disclosure sufficiently mitigates the risk of causing the consumer to incur charges for the text message by concealing its true purpose.

112 15 U.S.C. § 1692d(6), 12 C.F.R. § 1006.14(g).
113 *Vibar v. Audubon Financial Bureau*, 2013 WL 5937010 (W.D.N.Y. 2013).
114 15 U.S.C. § 1692f(5), 12 C.F.R. § 1006.22(a).
115 12 C.F.R. § 1006.22(d).
116 12 C.F.R. § 1006.22(g).

h. Mini-Miranda Disclosure

The FDCPA also requires debt collectors to include a specific disclosure in every attempt to communicate with a debtor (commonly referred to as the "Mini-Miranda" notice or warning).[117] A debt collector violates the FDCPA if a debt collector fails to disclose in the initial written communication with the consumer that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, as well as the failure to disclose in subsequent communications that the communication is from a debt collector.[118] Case law under the FDCPA is clear that the exact statutory language—i.e., "this communication is from a debt collector—is not required.[119] The provisions of Regulation F add additional detail. Specifically, if an initial communication with the debtor is oral, the debt collector must make the Mini-Miranda disclosure again in its initial written communication with the consumer.[120] For example, if a consumer initiates a conversation with a debt collector, in its first response the debt collector must provide the mandatory disclosure.[121] Additionally, the Regulation adjusts to the fact that some debtors do not communicate in English as their primary language. This means a debt collector must make the required Mini-Miranda disclosure in the same language or languages used for the rest of the communications in which the debt collector conveyed the Mini-Miranda.[122]

SBT assumes that the first text message sent by a debt collector using the SBT FinText™ Platform will not be the debt collector's initial communication (either oral or written) with the consumer. As a result, the only requirement that applies to text messages sent using SBT's platform is the requirement to disclose in communications after the initial communication that the communication is from a debt collector. In the context of text messages, where there are space constraints, the Mini-Miranda warning for subsequent communications should be brief but must convey the required information: that the communication is from a debt collector. SBT's text message templates for debt collectors state at the beginning of every message the name of the debt collector, followed by the words "debt collector." It is clear from this immediate disclosure that the text messages are from a debt collector. Accordingly, SBT's text message templates should mitigate the Mini-Miranda disclosure risk under the FDCPA.

117 State-specific disclosures may require a special hyperlink and landing page to accommodate state law.
118 15 U.S.C. § 1692e(11).
119 *See*, e.g., *Dikeman v. National Educators, Inc.*, 81 F.3d 949, 952 (10th Cir. 1996) ("We also take note that § 1692e(11) does not place the required disclosure in quotation marks or set forth any specific required wording for the disclosure but merely defines what the content of the required disclosure will be…"); *Emanuel v. American Credit Exchange*, 870 F.2d 805, 808 (2d Cir. 1989) ("[T]here is simply no requirement that the letter quote verbatim the language of [Section 1692e(11)]."); *Shanker v. Fair Collection & Outsourcing, LLC*, 2009 WL 1767580 (D.N.J. June 19, 2009) ("[C]ourts… have not required 'magic words' or specific phrases to meet the strictures of 1692(e)."); *Reed v. Global Acceptance Credit Co.*, 2008 WL 3330165 (N.D. Cal. 2008) ("In determining § 1692e(11) violations, courts have focused on whether the communication would suggest that the message was from a debt collector."); *Kagan v. Selene Fin. L.P.*, 210 F. Supp. 3d 535, 544 (S.D.N.Y. 2016) ("To begin, 'there is no requirement in the FDCPA that a debt collector quote the statute's language verbatim.'").
120 12 C.F.R. § 1006.18(e).
121 12 C.F.R. § 1006.18(e)(1), Cmt. 18(e)(1)-1.
122 12 C.F.R. § 1006.18(e)(1), Cmt. 18(e)(4)-1.

IV. Creditors Collecting Their Own Debts

We have reviewed the FDCPA rules for text messaging by "debt collectors" above—but, as noted, creditors (who are not debt buyers) are not "debt collectors," and neither are servicers whose model does not include servicing that begins after a debt is in contractual default. Such creditors and servicers to whom the FDCPA and Regulation F do not apply can still benefit from using FDCPA-compliant text message templates and adherence to the time-and-place and other restrictions described above. As a practical matter, SBT understands that many creditors and most servicers generally try to comply with the FDCPA and Regulation F as a matter of "best practices" in debt collection, but also because some state laws require it. [123]

While the "safe harbors" described above will typically not benefit creditors and servicers, adherence to the principles evident in the FDCPA and Regulation F can help creditors and servicers avoid claims that their messages and messaging practices were somehow unfair or that they constitute harassment, whether as a general matter or specifically under state debt collection laws.

123 Please recall that this white paper does not address any specific state laws.

CONCLUSION

Text with Trust

solutions by text

solutionsbytext.com

At **Solutions by Text**, we build compliance into every aspect of our business. From the language in our messaging templates to our consultative approach to program development, SBT is a true partner in making your engagement successful.

For more information on how to text with trust, set a meeting with an SBT compliance expert.

LET'S TALK