



BORROW SMART COMPLIANCE

COMPLIANCE PROGRAM - POLICIES & PROCEDURES

Fair Debt Collections Practices Act (FDCPA)

Effective Date of New Rule: November 30, 2021

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HIGHLIGHT OF CHANGES TO NEW FDCPA RULE

[11/18/2112/06/21](#)

The following is an outline only of the changes in the new rule. If this document conflicts with the written policy in any way, you should follow the written policy.

The new rule:

1. Does not apply to creditor or first party collector....**BUT...**
2. The new rule may be problematic for the first-party collector and will be enforced by the CFPB under UDAAP the same as the current rule
3. Allows calls only between 8AM to 9PM in the consumer time zone and by area code and zip code
4. Allows no more than one collection call ~~attempt~~ every seven days per loan product [and no more than seven call attempts in seven days](#)
5. Applies new restrictions when contacting consumer at work
6. Must comply with electronic communications and TCPA & E-Signature regulations
7. Has a new provision for "Limited content" messages
8. Covers ceasing customer communications
9. Provides for certain provisions if collector is unable to locate consumer
10. Provides for restrictions in third-party communications

REVISED AND UPDATED FDCPA POLICY TO THE BALLARD SPAHR/BORROW SMART CFPB COMPLIANCE POLICY MANUAL

FIRST DRAFT – MARKED & COMMENTED COPY
November 2, 2021

COLLECTIONS POLICY

I. BACKGROUND

The Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 *et seq.*, regulates the practices of a “debt collector,” which the statute defines as “any person [1] who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, [2] who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another [or] ... [3] who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.” 15 U.S.C. § 1692a(6). Regulation F, 12 CFR part 1006, implements the Fair FDCPA to prescribe federal rules governing the activities of debt collectors, as that term is defined in the FDCPA (“Reg. F”). The FDCPA and Reg. F does not apply to a creditor_s, like the Company, when it is collecting its own debts in its own name or to certain affiliates.

Despite the fact that the FDCPA and Reg. F does not generally apply to a creditor collecting its own debt, the practices they# prohibits may be independently problematic under the Dodd-Frank Act’s prohibition against unfair, deceptive and abusive practices regardless of whether they are employed by a creditor or a third-party debt collector. Moreover, the CFPB’s Short-Term, Small-Dollar Lending guidance instructs examiners to consider whether a lender collecting its own debts: (1) discloses to third parties the existence of the customer’s debt; (2) repeatedly calls past due customers in an effort to abuse or harass them; or (3) relies on misrepresentations in collecting debts. Accordingly, even though the Company is not subject to the FDCPA or Reg. F, our policy is to comply with the law’s basic requirements of such laws (other than requirements that make no sense for a creditor collecting its own debts in its own name), which are discussed more fully below.

When, Where, and With Whom Communication is Permitted

Communicating with the Consumer

A debt collector may not communicate with a consumer at any unusual time (generally before 8 a.m. or after 9 p.m. in the consumer’s time zone) or at any place that is inconvenient to the consumer, unless the consumer or a court of competent jurisdiction has already given permission for such contacts or the debt collector has knowledge of

circumstances indicating that a call at another time would be convenient (e.g., that the consumer works the night shift). The consumer's time zone must be calculated using both the consumer's area code and zip code. If the area code and zip code result in the consumer being in more than one time zone, the Company may only communicate during a time that is convenient in both time zones.

Although a debt collector is permitted to contact a consumer at his or her place of employment under certain circumstances, A debt collectorthe Company generally may notwill not do so-contact the consumer at his or her place of employment. _if the collector has reason to believe the employer prohibits such communications. However, if necessary, the Company may contact the consumer at their place of employment only if all of the following conditions are present: -(a) if-athe consumer provides prior express consent to contact the consumer at his or her place of employment and has not revoked such consent, (b) the consumer represents that such communications will be private and will not result in any unauthorized disclosures of the consumer's account to third-parties that are not authorized to see or hear such information; and (c) -and there are also-no other means to contact the consumer. , the Company may contact the consumer at his or her place of employment in such limited circumstances.

If the debt collector knows the consumer has retained an attorney to handle the debt, and can easily-reasonably ascertain the attorney's name and address, all contacts must be with that attorney, unless the attorney is unresponsive after reasonable attempts to reach the attorney are made or agrees to allow direct communication with the consumer.

Call Frequency Limitations

Reg. F limits the number of telephone calls a debt collector may attempt to place to a consumer about a particular debt within a seven-day period, subject to certain exceptions. Under Reg. F, a debt collector is prohibited from attempting to call a consumer about a particular debt more than seven times within a seven-day period. Additionally, once the debt collector engages in a live communication with the consumer about the debt, the debt collector is prohibiting from placing any further telephones calls until at least seven consecutive days after that live contact.

The call frequency limits apply on a per debt account basis, meaning seven call attempts can be placed on each separate debt owed by the consumer in any seven-day period. Calls that do not connect, return calls requested by the consumer, and calls to the consumer's attorney do not count toward the call frequency limits. Additionally, text messages, emails, and other electronic communication do not count toward frequency limitations. However, voicemails left for consumers (including ringless voicemails) count as call attempts.

Even if a debt collector follows the call frequency limitations, the debt collector may still violate Reg. F, if the natural consequence of another aspect of the debt collector's telephone calls, unrelated to frequency, is to harass, oppress, or abuse any person in connection with the collection of a debt.

Electronic Communication

A debt collector may use electronic mediums, such as email and text, to communicate with a consumer about debt. There are no hard-set limits for such electronic communications. However, Reg. F prohibits a debt collector from engaging in conduct, the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Therefore, text messages and emails, either alone or in combination with other communication types, may result in harassment. Reg. F also requires that each of a debt collector's emails and text messages include clear and conspicuous instructions for a reasonable and simple method by which a consumer can opt-out of receiving further emails or text messages. Safe harbor procedures for email can be found at 12 CFR § 1006.6(d)(4), and for text messages at 12 CFR § 1006.6(d)(5). Additionally, Reg. F prohibits a debt collector from communicating or attempting to communicate with a person in connection with the collection of a debt through a social media platform if the communication or attempt to communicate is viewable by the general public or the person's social media contacts. Thus, only private messages may be sent to consumers via social media.

Collectors may provide written notices required or permitted by law electronically; provided, that Company has in place procedures to ensure compliance with the E-Sign Act and TCPA, when applicable, and all applicable state and local laws in connection with such communications, including without limitation ensuring that the consumer has consented to such electronic communication and has not revoked such consent.

Limited Content Messages

Limited-content messages do count towards the call attempt ~~are not counted toward the~~ call-frequency limits detailed above but are not "collection" communications under Reg. F. To qualify as a limited-content message, the message must be left by voicemail and may contain only the following:

- The business name for the debt collector so long as that name does not indicate on its face that the debt collector is in the debt collection business;
- A request that the consumer reply to the message;
- The name or names of one or more natural persons whom the consumer can contact to reply to the debt collector; and
- The telephone number or numbers that the consumer can use to reply to the debt collector.

Each of the above components is mandatory, and a message that does not contain all four components will not qualify as a limited-content message. Reg. F also permits (optional) a limited content message to include:

- A salutation;

- The date and time of the message;
- suggested dates and times for the consumer to reply to the message; and/or
- A statement that if the consumer replies, the consumer may speak to any of the company's representatives or associates.

Limited content messages may not be left with live third parties under any circumstances.

Ceasing Communication with the Consumer

When a consumer refuses, ***in writing*** (which includes by letter, email, text message, and online chat platforms) to pay a debt or requests that the debt collector cease all further communication through all channels about the debt, the collector must cease all further communication, except to advise the consumer that:

- The collection effort is being stopped.
- Certain specified remedies ordinarily invoked may be pursued or, if appropriate, that a specific remedy will be pursued.

Mailed notices from the consumer are official when they are received by the debt collector.

With respect to requests that the collector avoid only certain communication channels or otherwise identifies certain times, days, or locations as inconvenient, Reg. F prohibits a debt collector from continuing to communicate or attempting to communicate with a person through that medium of communication or at the identified inconvenient time, day, or location if the person has requested that the debt collector not use that specific medium to communicate with the person consumer. Such requests can be made in writing or verbally through any communication channel. Thus, a consumer's oral request that the debt collector "stop emailing," for example, would constitute a request that the debt collector not email (e.g.,) to communicate with the consumer, and, the debt collector would thereafter be prohibited from sending emails to the consumer.

Communicating with Third Parties

The only third parties that a debt collector may contact when trying to collect a debt are:

- The consumer.
- The consumer's attorney.
- A consumer reporting agency (if permitted by local law).

- The creditor.

- The creditor's attorney.
- The debt collector's attorney.

The consumer or a court of competent jurisdiction may, however, give the debt collector specific permission to contact other third parties.

In addition, a debt collector who is unable to locate a consumer may ask a third party for the consumer's home address, telephone number and place of employment (location information). Such calls count toward the call frequency limits discussed above when placing calls to such third-parties. The debt collector must give his or her name and state that he or she is confirming or correcting location information about the consumer. Unless specifically asked, the debt collector may not name the collection firm or agency or reveal that the consumer owes any debt.

No third party may be engaged in live communication ~~contacted~~ more than once unless the collector believes that the information from the first contact was wrong or incomplete and that the third party has since received better information, or unless the third party specifically requests additional contact from the debt collector.

Contact with the debtor or any third party by postcard, letter or telegram is allowed only so long as the if the envelope does not reveal the or content of the communication or does not indicate the nature of the collector's business.

Harassing or Abusive Practices

A debt collector in collecting a debt, may not harass, oppress, or abuse any person. Specifically, a debt collector may not:

- Use or threaten to use violence or other criminal means to harm the physical person, reputation, or property of any person.
- Use obscene, profane, or other language that abuses the hearer or reader.
- Publish a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or as otherwise permitted by law.
- Advertise a debt for sale to coerce payment.
- Annoy, abuse, or harass persons by calling repeatedly their telephone number or allowing their telephones to ring continually.
- Make telephone calls without properly identifying oneself, except as allowed to obtain location information.

False or Misleading Representations

In collecting a debt, a debt collector may not use any false, deceptive, or misleading representation. Specifically, a debt collector may not:

- Falsely represent or imply that he or she is vouched for, bonded by, or affiliated with the United States or any state, including the use of any badge, uniform, or similar identification.
- Falsely represent the character, amount, or legal status of the debt, or of any services rendered, or compensation he or she may receive for collecting the debt.
- Falsely represent or imply that he or she is an attorney or that communications are from an attorney.
- Threaten to take any action which is not legal or intended, including a threat of a legal action that is not intended or will not be filed unless and until the debt remains unpaid for a significantly longer period of time.
- Falsely represent or imply that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person, unless such action is lawful and intended by the debt collector or creditor.
- Falsely represent or imply that the sale, referral, or other transfer of the debt will cause the consumer to lose a claim or a defense to payment, or become subject to any practice prohibited by the FDCPA.
- Falsely represent or imply that the consumer committed a crime or other conduct to disgrace the consumer.
- Communicate, or threaten to communicate, false credit information or information which should be known to be false, including not identifying disputed debts as such.
- Use or distribute written communications made to look like or falsely represented to be documents authorized, issued, or approved by any court, official, or agency of the United States or any state if it would give a false impression of its source, authorization, or approval.
- Use any false representation or deceptive means to collect or attempt to collect a debt or to obtain information about a consumer.
- Falsely represent or imply that accounts have been sold to innocent purchasers.
- Falsely represent or imply that documents are legal process.

- Use any name other than the true name of the debt collector's business, company, or organization.
- Falsely represent or imply that documents are not legal process or do not require action by the consumer.
- Falsely represent or imply that he or she operates or is employed by a consumer reporting agency.

Unfair Practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect a debt. Specifically, a debt collector may not:

- Collect any interest, fee, charge, or expense incidental to the principal obligation unless it was authorized by the original debt agreement or is otherwise permitted by law.
- Solicit a post-dated check or other post-dated payment instrument to use as a threat or to institute criminal prosecution.
- Deposit or threaten to deposit a post-dated check or other post-dated payment instrument before the date on the check or instrument.
- Cause communication charges, such as those for collect telephone calls and telegrams, to be made to any person by concealing the true purpose of the communication.

Miscellaneous Requirements

Multiple Debts

If a consumer owes several debts that are being collected by the same debt collector, payments must be applied according to the consumer's instructions. No payment may be applied to a disputed debt.

Legal Actions

Legal actions may be brought only in the judicial district in which the consumer lives or in which the original contract creating the debt was signed.

Deceptive Forms

No one may design, compile and/or furnish any form that creates the false impression that someone other than the creditor (for example, a debt collector or attorney) is participating in the collection of a debt when in fact such person is not participating.

II. THE COMPANY'S COLLECTIONS POLICY

The Company will comply with the provisions of the FDCPA related to communicating with debtors and third parties, abusive behavior, misrepresentations and unfair practices, as described above. ~~However, employees trying to collect debts should identify themselves, using their own name and the Company's name but without stating to any third party (other than the borrower's attorney) that they are calling about an outstanding debt.~~

The Company will ensure that ~~its any telephony used to facilitate calls, texts, or other consumer communications autodialers~~ do not launch collection communications to a customer before 8 a.m. or after 9 p.m. in the customer's time zone unless the customer requests otherwise. The time zone will be calculated by using both the customer's area code and zip code. If the area code and zip code result in the customer being in more than one time zone, the Company will only communicate during a time that is convenient in both time zones. And employees engaged in collection activity, whether store employees or employees specializing in collections (collectively, "Collectors"), likewise should not place calls to customers ~~during outside~~ these times.

Collectors should adhere to the following rules related to communications with customers and third parties:

- If the customer on the account is reached, Collectors ~~trying to collect debts should~~ shall identify themselves to the customer, using their own name and the Company's name. If the Collector reaches the customer's machine, the Collector may leave a limited contact message only.
- In the event a call placed to the customer is answered by a third-party, the Collector will not leave a message, will not disclose the Company name, and will simply state there is no message or that they will try back another time.
- When speaking with a third-party for location information, Collectors should simply state their name and ask the third-party for contact information or to confirm contact information. Collectors should not disclose the Company's name to the third-party in a location call unless the third-party specifically requests this information. Under no circumstances should the third-party be told that the customer is past due on a debt.
- Generally, ~~No communications should be sent to consumers at their A-customer should not be called at his or her~~ place of employment. This prohibition includes emails, texts, and phone calls. However, if necessary, Collectors may contact customers at their places of employment only if all of the following conditions are met: (a) the customer provides prior express consent to contact his or her place of employment and has not revoked such consent, (b) the customer represents that such communications will be private and will not result in any unauthorized disclosures of the consumer's account to third-parties that are not authorized to see or hear such information; and (c) there are no other means to contact the customer. ~~if the Collector has reason to believe the customer's employer prohibits such calls or if the customer has requested, directly or by implication,~~

~~either orally or in writing, that the Collector not call him or her at work. Additionally, the Collector should take steps to ensure that the customer's work number will not be autodialed after such a determination or request. In this regard, it is our policy to be more restrictive than is required by the FDCPA for third-party debt collectors.~~

- ~~If a consumer instructs a Collector in writing not to contact them through any channel or refuses in writing to pay the debt (a "Cease and Desist"), the Collector should take steps to ensure that no further contacts through any communication channel are made to that consumer in the absence of manager approval. Managers should only approve a subsequent written communication to that consumer all to such number if where the purpose of the communication call is to advise the customer that the Company is going to take a particular action (e.g., repossess the customer's vehicle or file suit). Any such call must be manually dialed unless the Collector is sure the number is a home phone and not a cell phone.~~
- ~~Similarly, if a consumer instructs a Collector not to text or email, or otherwise identifies contact during certain time periods, on certain days, or at certain locations stop, such requests also should be honored in all instances. Unlike a Cease and Desist, these more limited requests to cease contact through a certain channel only or during certain times or at certain places must be honored when received either in writing or verbally from the consumer.~~
- If a customer informs a Collector that he or she is represented by an attorney and provides the Collector with the attorney's name and phone number (or sufficient information for the Collector to locate the attorney), the Collector should take steps to ensure that the customer ~~will no longer be contacted directly by the Collector but instead, 's numbers will not be called and that all future calls communications will be and communications are made sent to the customer's to~~ the attorney. However, if the attorney is unresponsive (e.g., the attorney repeatedly fails to return the Collector's calls), ~~or~~ does not in fact represent the customer, or grants permission to the Collector to contact the customer directly, calls to the customer's numbers may resume.
- If a customer informs a Collector that he or she has filed bankruptcy and supplies an attorney's name and phone number (or sufficient information for the Collector to otherwise confirm the bankruptcy through reasonable efforts, such as a PACER locate the attorney search), the Collector should confirm with the attorney that the customer has actually filed bankruptcy. No further calls should be placed to the customer and no further collection activity should take place unless the bankruptcy cannot be confirmed.
- A Collector should not call a customer's references or other third parties (e.g., a relative of the customer whose number the Collector obtains) unless the customer's contact information is bad (e.g., the customer's number is disconnected) or the Collector has reason to believe that the contact information

is bad (because, e.g., the customer has never spoken to any Collector and has repeatedly failed to return messages). A third party who has been reached for updated contact information should not be called a second time except in the unusual situation where the Collector believes that the information provided by the third party was erroneous and the third party has since obtained updated information.

- When speaking with a third party, the Collector should simply state his or her name and ask the third party for contact information or to confirm contact information. The Collector should not tell the third party that the Collector is calling from the Company unless the third party specifically requests this information. Under no circumstances should the third party be told that the customer is past due on a debt.
- All communications with customers and third parties should be documented. Specifically, the Collector should ensure the note date and time of the call communication is recorded, whether a message was left successfully sent or delivered, the identity of any person to whom the Collector spoke and a brief description of any conversation or response by the consumer.
- Absent compelling justification, collection calls-communications should not be made from any non-Company phone, computer, or other device (or any Company phone, computer, or other device that is not intended to be used for such purpose) where the purpose or effect of using such phone, computer, or other device is to shield the Collector's identity or affiliation with the Company or to circumvent Company recording or monitoring of collection communications.
- Collectors should never visit a customer's home or place of employment or confront a customer about a debt in public. If a Collector encounters a customer outside of work (e.g., while running an errand), under no circumstances should the customer's debt be discussed.
- Collectors should never harass or threaten a customer. Collectors should never repeatedly contact ~~all~~ a customer through any means in an effort to annoy the customer or with sufficient frequency to annoy a reasonable customer. A Collector should not seek to contact a customer on the same day as a successful contact, unless the customer has requested or agreed to a follow-up contact. If an arrangement has been reached with respect to payment, a Collector may place a single successful reminder call but may not place a call seeking to modify the arrangement absent a customer breach of the arrangement. If a customer hangs up on a Collector, the Collector should not immediately call the customer back.
- Collectors should never use profanities or be disrespectful to a customer.
- Collectors should never make any misrepresentations to the customer. A Collector should never threaten (directly or by implication) an action that the

Company does not intend to take. For example, a Collector should not tell a customer that his or her account is going to be turned over to an attorney for collection unless the Collector knows that the Company will actually take this step on that account. A Collector should not warn a customer that the Company will bring a lawsuit unless initiation of a lawsuit is reasonably imminent on that account. A Collector should never misrepresent the rights or legal status of the Company or the customer. For example, a Collector should never tell a customer that his or her failure to pay will result in arrest or that the Company can seize the customer's property for failing to pay an unsecured debt. When skip tracing, Collectors should not make misrepresentations in an effort to obtain contact information. In sum, all statements made to a customer or a third party by a Collector should be entirely truthful.

- Collectors should only process payments that have been expressly authorized by the customer. Post-dated payments should never be processed early. Additionally, Collectors may not accept a check or other payment instrument that is post-dated by more than five days unless the customer is notified in writing of the Collector's intent to deposit such check or negotiate such instrument not more than ten nor less than three business days prior to such deposit or negotiation.
- Collectors should never attempt to initiate a collect phone call to a customer (i.e., a call for which the customer instead of the Company will be billed).
- Collectors should not enter into arrangements with a customer for the customer to make three or more payments by electronic fund transfer (either an ACH payment from the customer's bank account or a payment on the customer's debit card) except pursuant to procedures drafted or approved by counsel.

Collectors should receive training regarding the foregoing rules when they join the Company and refresher training thereafter on an as-needed basis. See Training Policy. New Collectors should also be tested to confirm their understanding of these rules. Collectors' compliance with the above rules should be ensured through monitoring and prompt corrective action. See Monitoring & Corrective Action Policy. The Company should ensure that third parties hired by the Company to collect the Company's debts (including collection law firms) fully comply with the FDCPA by performing due diligence on and auditing such third parties. See Compliance Audit Policy.

Any material modifications to the Company's collections letters and collection strategies should be approved by counsel. Counsel should ensure that collection letters do not misrepresent the status of a customer's account or the actions that the Company will take. Counsel should ensure that changes to the Company's collection strategies do not run afoul of the FDCPA's principles.

The Company should ensure that, if and to the extent it reports delinquency and charge off information to credit reporting agencies, the information is accurate. See FCRA Policy.