Consumer Financial Services Year in Review and A Look Ahead Webinar Series: Litigating Consumer Claims in a Post-Regulation F World

Stefanie Jackman
James Trefil
Jonathan P. Floyd

Troutman Pepper
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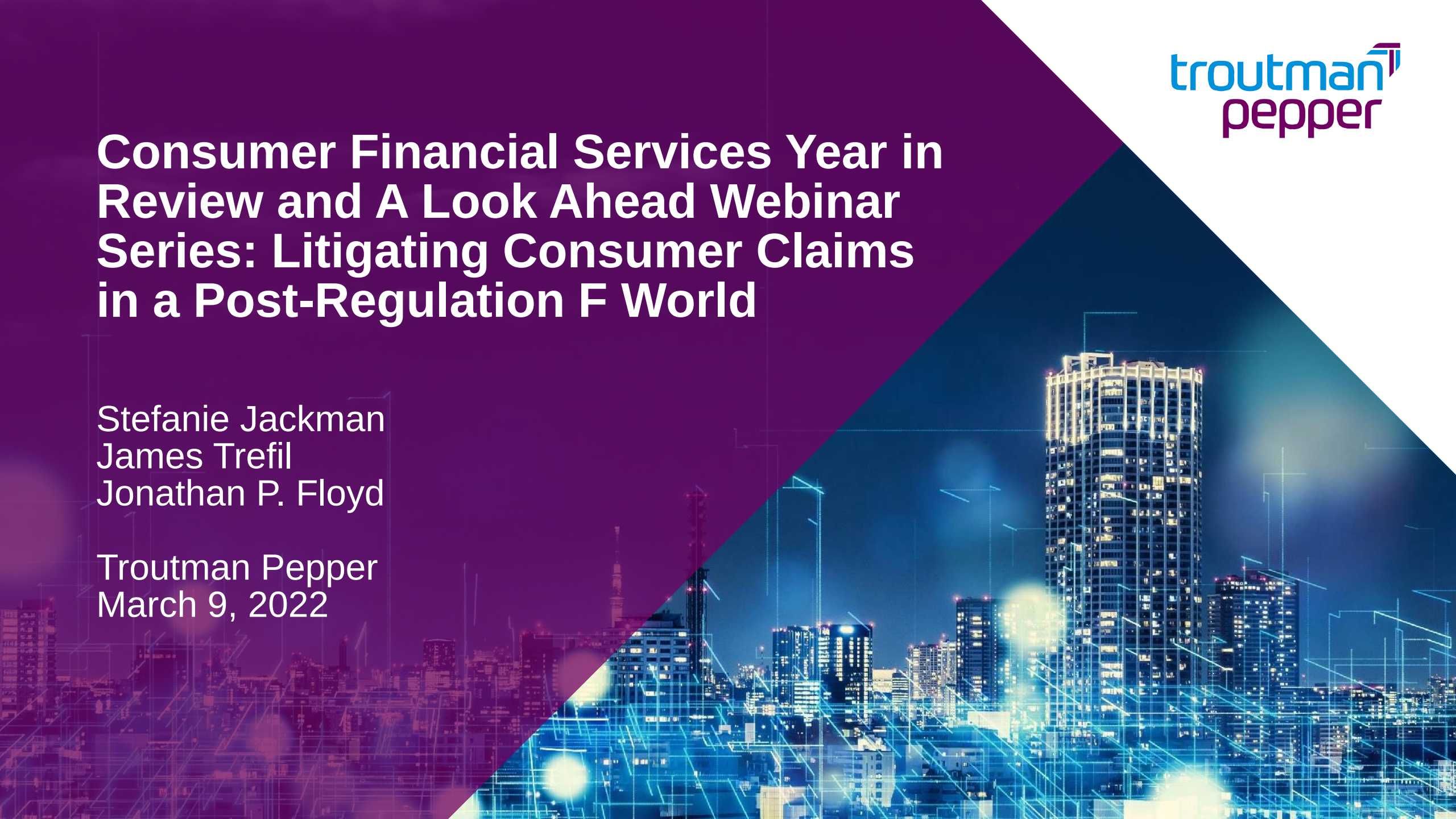
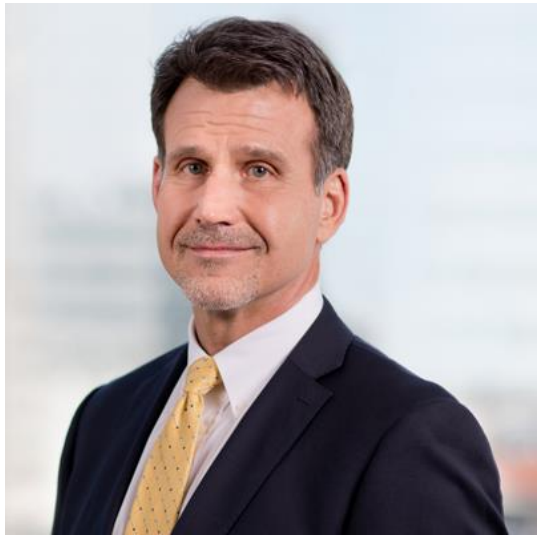


Speakers

Stefanie Jackman
Partner
Troutman Pepper



James Trefil
Counsel
Troutman Pepper

Jonathan Floyd
Associate
Troutman Pepper

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Part I: Safe Harbors Provisions

a. Voicemail Compliance

The Rule creates a safe harbor for voicemail messages in the sense that it may not consider such messages to be "communications," so long as certain procedures are followed. The Rule accomplishes this by including a new term, "attempt to communicate," which are acts to initiate communications regarding a debt. In this sense, a voicemail left for a consumer by a debt collector can be an "attempt to communicate" and, thus, may qualify as a "limited content message."

To be considered a "limited content message," a voicemail should not include superfluous categories of information. In other words, a voicemail may contain some things, but not others, lest it be considered a "communication" and not a "limited content message."

The CFPB provided specific instructions on the types of information that a voicemail should contain. Specifically, a voicemail may be a "limited content message" when it includes:

- A business name for the debt collector that does not indicate 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
- A telephone number or numbers that the consumer can use to reply to the debt collector.

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In addition to the four enumerated categories above, a voicemail also may include, at most, any (or all) of the following:

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

Including any information in addition to the preceding eight categories runs the risk of converting a voicemail into a "communication." In its guidance, the CFPB provided this example of a "limited content" voicemail: "This is Robin Smith calling from ABC Inc. Please contact me or Jim Johnson at 1-800-555-1212."

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b. Time and Place Restrictions

The FDCPA restricts the times and places at which a debt collector may communicate or attempt to communicate with a consumer. Under section 805(a)(1) of the FDCPA, a debt collector may not communicate with a consumer "at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer."

In practice, the CFPB has interpreted this language and directed that debt collectors should assume that the convenient time for communicating with a consumer is after 8:00 a.m. and before 9:00 p.m. local time at the consumer's location, unless the debt collector has knowledge of circumstances to the contrary. In reality, the predominance of cell phones (and their ability to cross time zones unlike a land line) has created problems in comply with this limitation.

The Rule has met this challenge by providing a safe harbor that applies in circumstances in which the debt collector does not have knowledge of the consumer's actual location. Under those circumstances, the debt collector complies with the FDCPA if it communicates or attempts to communicate with the consumer at a time that would be convenient in all of the locations at which the debt collector's information indicates the consumer might be located.

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c. Electronic Communications

The FDCPA generally prohibits with whom a debt collector may communicate regarding the collection of a debt. Generally, debt collectors may not communicate with any person other than the consumer in connection with the collection of any debt.

The Rule provides a safe harbor for unintentional third-party disclosures through email or text messaging. Notably, the Rule does not address communications through social media.

Under the Rule, a debt collector may avoid civil liability for unintentional disclosures to a third-party if, when communicating with a consumer, the debt collector's procedures included steps to reasonably confirm and document that the debt collector complied with the following guidelines.

First CLE Code

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c. Electronic Communications

To fall under the safe harbor for communications by email, a debt collector must demonstrate that it followed one of the three methods listed below to show that it did not communicate with a consumer by email to an email address that the debt collector knew had led to a prohibited third-party disclosure:

1. Direct communication with the consumer: The email address is one that the consumer used to communicate with the debt collector about the debt and the consumer has not since opted out of communications to that email address, or the email address is one for which the debt collector previously received the consumer's consent to use and the consumer has not since then withdrawn consent.
2. Creditor communication with the consumer: This method requires five sequential steps to be satisfied, which are: (1) the creditor obtained the email address from the consumer; (2) the creditor used that email address to communicate with the consumer concerning the account and the consumer did request the email address to no longer be used; (3) before the creditor used the email address for these purposes, the creditor sent the consumer a written or electronic notice that clearly and conspicuously disclosed the information required under the Rule; (4) the opt-out period expired and the consumer did not opt out; and (5) the email address used a domain name available for use by the public, unless it is known that the consumer's employer provided the email address.
3. Prior debt collector communication with the consumer: This method requires three sequential steps to be satisfied, which are: (1) any prior debt collector obtained the email address from the consumer in accordance with either of the two procedures described above; (2) the immediately prior debt collector used the email address to communicate with the consumer about the debt; and (3) the consumer did not opt out of such communications.

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Likewise, to fall under the safe harbor for communications by text message, a debt collector must show that it followed two steps:

1. It did not communicate with the consumer by sending a text message to a phone number that the debt collector knew had led to a prohibited third-party disclosure; and

2. It communicated with the consumer by text message using a phone number that either:

   - The consumer used to communicate about the debt with the debt collector by text message, so long as the consumer did not opt out, and, in the past 60 days, the consumer used to send a text message to the debt collector or the debt collector confirmed had not been reassigned from the consumer to another user; or

   - The consumer gave consent to use, as long as the consumer has not since withdrawn that consent; and in the past 60 days, the consumer provided or renewed their consent to use or the debt collector confirmed had not been reassigned from the consumer to another user.

If followed, this process may provide debt collectors with a safe harbor. It is worth noting, however, that following this process does not affect a debt collector's potential liability under the Telephone Consumer Protection Act.

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d. Model Validation Notice

The CFPB expects a validation notice to contain all such required information—this is a communication from a debt collector; information about the debt; amount owed and itemization; where consumers can go for information about protections; and a way to respond—in the required format. Debt collectors who use the Bureau's model validation notice have a "safe harbor" for compliance with the content and format requirements.

The CFPB explicitly states that the final rule "does not require a debt collector to use the model validation notice" and that use of the model notice "is one way to comply to comply [with the content and format requirements in Regulation F.]" It states further that debt collectors who choose "not to use the model validation notice" or who make "changes that are not specified in the Rule," resulting in a notice that is not substantially similar to the model validation notice, do not necessarily violate the final rule. They will not, however, be able to avail themselves of the safe harbor protection in a lawsuit or a supervisory context.

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e. Rejected Safe Harbor Provisions

The FDCPA generally prohibits debt collectors from using false, deceptive, or misleading representation or means in connection with the collection of debt.

One method that has commonly emerged is falsely representing or otherwise implying that any individual is an attorney or that a communication comes "from" an attorney. Historically, there have been mixed opinions on when a communication is "from" an attorney. Generally, a communication could be "from" an attorney even when the attorney is not the author of that communication. Instead, a communication may be directly "from" an attorney when an attorney controlled the process through which the communication was sent and also formed a professional judgment on the validity of the underlying debt. Under this interpretation, creditor attorneys have been sued and, in some cases, forced to pay substantial damages unless they can prove "meaningful attorney involvement" in the preparation of the demand letter or the actual lawsuit.

The CFPB declined to adopt a safe harbor for creditor attorneys that fell within that category. Under the proposed safe harbor, a creditor attorney may have been shielded from liability if he could have proven that he followed certain due diligence procedures.

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e. Rejected Safe Harbor Provisions (cont'd)

The Bureau also rejected proposed safe harbors to the new time-barred debt rule. That rule prohibits a debt collector from bringing or threatening to bring a legal action against a consumer to collect a time-barred debt.

Industry commentators suggested several safe harbors for this provision, including safe harbors for certain types of debts and for debt collectors who rely on information provided by the creditor. The Bureau declined to adopt these proposed safe harbors.

The Bureau also removed the "knows-or-should-know" language from this provision, making it a strict liability standard.

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II. Rebuttable Presumptions

a. What is a rebuttable presumption?

Per the Cornell Law School's Legal Information Institute, a rebuttable presumption is "[a] particular rule of law that may be inferred from the existence of a given set of facts and that is conclusive absent contrary evidence."

Rebuttable presumptions are used in other consumer financial services statutes, including the Truth in Lending Act. In the context of TILA, courts have held that a party rebutting a presumption must present "sufficient evidence" to the contrary. Contradictory, self-serving statements by the party that are usually found to be insufficient to rebut the presumption.

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b. Rebuttable Presmptions in Regulation F - New Telephone Frequency Limits

i. Debt collectors are provided with a rebuttable presumption of non-compliance if they exceed frequency limits on telephone calls;

ii. If a debt collector places more than seven calls within seven consecutive days or calls a consumer more than once within a seven-day period after communicating with a consumer, a debt collector is presumed to have violated the FDPCA. The burden would then be on the debt collector to rebut that presumption.

Call Frequency Limits – Section 1006.14

- **CFPB discarded bright-line frequency limit of proposed rule in favor of a rebuttable presumption standard.**
- **The frequency limits from the proposed rule remain the same:**
  - **Seven unanswered calls within a seven-day period; OR**
  - **No further telephone calls to a consumer for a period of seven days following a telephone conversation with the person in connection with the collection of the debt.**
- **Applies to telephone calls made to a "particular person in connection with the collection of a particular debt."**
- **Includes "ringless voicemails" but not other electronic messages (*e.g.*, text messages or emails).**

Call Frequency Limits – Section 1006.14

- Does not apply to telephone calls:
  - Made with the call recipient's prior consent;
  - That do not connect to the dialed number; or
  - That are placed to individuals mentioned in Section 1006.6(d)(1)(ii)-(vi) (*e.g.*, the consumer's attorney).
- Violation of this section does not constitute a violation of Section 1031 of the Dodd Frank Act as contemplated in proposed rule.

Does it count?

Call causes telephone to ring, but no one answers, and the call is not connected to voicemail / recorded message.

Does it count?

Call connected to voicemail / recorded message (with or without telephone ringing) and the collector leaves a message.

Does it count?

Call connected to voicemail/ recorded message (with or without telephone ringing); collector does not, or is unable to, leave a message.

Does it count?

Telephone call is answered, but subsequently drops.

Does it count?

Telephone call is answered by a person other than the person who the collector has intended to call, and collector does not leave a message.

Does it count?

Dialed number does not cause telephone to ring and it does not connect to voicemail / recorded message.

Does it count?

Dialed telephone number results in busy signal.

Does it count?

Dialed telephone number transfers the call to another number that rings which then either goes to voicemail or is answered.

Does it count?

Collector attempts to communicate with a particular person by placing telephone calls to a particular telephone number, but the collector then learns that the telephone number is not that person's number or has recently been changed.

Does it count?

Telephone calls to a person who gave prior consent directly to the collector within the last seven consecutive days

Does it count?

Collector sends text messages or emails that may be received by a mobile telephone.

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c. Rebuttable Presmptions in Regulation F - Communications with Debtors Prior to Credit Reporting

i. The Rule requires a debt collector to either 1) speak to the debtor in person or by telephone, or 2) place a letter in the mail or send an electronic message to the consumer about the debt before furnishing information about the debt to any consumer reporting agency.

ii. While not a rebutable presumption per se, the Rule provides that a debtor must wait a reasonable period of time to receive a notice of undeliverability if communicating with the debtor by mail as outlined above.

iii. In theory, a debt collector creates a rebuttable presumption (in conjunction with the "mailbox rule" rebuttable presumption) that it has complied with the Rule by waiting a "reasonable period of time" to receive a notice of undeliverability. The comments to the rule clarify that a reasonable period of time is 14 consecutive days after the letter is mailed or the electronic communication sent.

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c. Motion to Dismiss vs. the Rebuttable Presumption

A Motion to Dismiss, in the context of Fed. R. Civ. P. 12(b)(6), challenges the sufficiency of the allegations in the Complaint to support a given claim.

Usually, a court's review of a Complaint on a Motion to Dismiss is limited to the allegations in the Complaint and any attachments thereto.

However, a rebuttable presumption typically requires weighing of evidence and is therefore inappropriate at the motion to dismiss stage.

Second CLE Code

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III. Conclusions

The new safe harbor and rebuttable presumption provisions in Regulation F provide valuable clarity for entities operating under the FDCPA.

These entities should consult with their legal and compliance departments to determine how best to take advantage of the safe harbor and rebuttable presumption provisions in Regulation F.

However, the usefulness of these provisions in the context of active litigation remains to be seen.

While conduct that falls within one of the safe harbor provisions may aid in the early resolution of a case, conduct that falls within the ambit of a rebuttable presumption is unlikely to be useful in a case until the dispositive motion stage.

Questions?

Consumer Financial Services Resources

- We will continue to offer webinars related to legal issues and recent decisions affecting the consumer financial services industry. If you have any questions about this series, please contact us (events@troutman.com).
- The Consumer Financial Services Law Monitor blog offers timely updates regarding the financial services industry to inform you of recent changes in the law, upcoming regulatory deadlines and significant judicial opinions that may impact your business. We report on several sectors within the consumer financial services industry, including payment processing and prepaid cards, debt buying and debt collection, credit reporting and data brokers, background screening, cybersecurity, mortgage lending and servicing, auto finance, and state AG, CFPB and FTC developments. To subscribe to our blog, please visit www.consumerfinancialserviceslawmonitor.com/subscribe/
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Contact Information

Stefanie Jackman
Partner, Troutman Pepper
404.885.3153
stefanie.jackman@troutman.com

Jonathan P. Floyd
Associate, Troutman Pepper
804.697.1435
jonathan.floyd@troutman.com

James Trefil
Counsel, Troutman Pepper
804.697.1864
james.trefil@troutman.com

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