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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1006

Debt Collection Practices (Regulation F); Pay-to-Pay Fees

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Advisory opinion.

SUMMARY: Section 808(1) of the Fair Debt Collection Practices Act (FDCPA or Act) prohibits debt collectors from collecting "any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." The Consumer Financial Protection Bureau (CFPB) issues this advisory opinion to affirm that this provision prohibits debt collectors from collecting pay-to-pay or "convenience" fees, such as fees imposed for making a payment online or by phone, when those fees are not expressly authorized by the agreement creating the debt or expressly authorized by law. This advisory opinion also clarifies that a debt collector may also violate section 808(1) when the debt collector collects pay-to-pay fees through a third-party payment processor.

DATES: This advisory opinion is effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

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SUPPLEMENTARY INFORMATION:

I. Advisory Opinion

A. Background

Congress enacted the FDCPA in 1977 to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."[1] The statute was a response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors," which Congress attributed to the "inadequacy" of "existing laws and procedures," including State laws.[2] To remedy this, the FDCPA imposes various requirements and restrictions on debt collectors' debt collection activity. Relevant here is section 808, which provides that a "debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt."[3] Section 808 then states that "[w]ithout limiting the general application of the foregoing, the following conduct is a violation of this section" and enumerates eight specifically prohibited practices, including the "collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law."[4]

At the time of the FDCPA's enactment, the Federal Trade Commission (FTC) was the agency that administered, and had primary responsibility for enforcing, the FDCPA.[5] Then, in 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which

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[1] Pub. L. No. 95-109, sec. 802(e), 91 Stat. 874, 874 (codified at 15 U.S.C. 1692(e)).
[2] 15 U.S.C. 1692(a), (b). *See also* S. Rep. No. 95-382, at 2 (1977) (stating that "debt collection abuse by third party debt collectors [was] a widespread and serious national problem," which Congress largely attributed to a "lack of meaningful legislation on the State level").
[3] 15 U.S.C. 1692f.
[4] 15 U.S.C. 1692f(1).
[5] *See* 15 U.S.C. 1692*l*(a) (2010).

created the CFPB and granted it authority to administer, implement, and enforce the FDCPA.[6] Congress also provided the CFPB authority to prescribe rules under the FDCPA.[7] Pursuant to that authority, in 2020, the CFPB issued Regulation F, which implements the FDCPA, to prescribe rules governing the activities of debt collectors.[8] The CFPB implemented FDCPA section 808(1) at 12 CFR 1006.22(b) by "generally mirror[ing] the statute, with minor wording and organizational changes for clarity."[9] In particular, the CFPB stated that the "term 'any amount' includes any interest, fee, charge, or expense incidental to the principal obligation."[10]

In 2013, the CFPB launched its supervisory program over certain larger participants in the consumer debt collection market. Through these examinations, the CFPB ascertains compliance with the FDCPA, and now Regulation F, as well as other Federal consumer financial laws. The CFPB also periodically publishes *Supervisory Highlights* with anonymized findings and analysis from these supervisory examinations, as well as compliance bulletins to provide entities with guidance on complying with certain legal requirements.

For example, in 2017, the CFPB issued a compliance bulletin (Bulletin) that "provides guidance to debt collectors about compliance with the [FDCPA] when assessing phone pay fees," a type of pay-to-pay fee.[11] The Bulletin summarizes CFPB staff's conclusion that, under section 808(1), debt collectors may collect such pay-to-pay fees only if the underlying contract or state law expressly authorizes those fees.[12] In particular, the Bulletin states that in at least one supervisory exam, CFPB examiners found that a debt collector "violated [section 808(1)] when

[6] Pub. L. No. 111-203, sec. 1089, 124 Stat. 1376, 2093 (codified at 15 U.S.C. 1692*l*(b)(6)).
[7] 15 U.S.C. 1691*l*(d).
[8] *See* Debt Collection Practices (Regulation F), 85 FR 76734 (Nov. 30, 2020); Debt Collection Practices (Regulation F), 86 FR 5766 (Jan. 19, 2021).
[9] 85 FR 76734, 76833.
[10] *Id*. at 76833, 76892.
[11] CFPB Compliance Bulletin 2017-01, 82 FR 35936, 35936 (Aug. 2, 2017).
[12] *Id*. at 35938.

they charged fees for taking mortgage payments over the phone" where the underlying contracts creating the debt did not expressly authorize collecting such fees and where the relevant State law did not "expressly permit collecting such fees."[13]

B. Coverage

This advisory opinion applies to debt collectors as defined in section 803(6) of the FDCPA and implemented in Regulation F, 12 CFR 1006.2(i). As used in this advisory opinion, pay-to-pay fees—sometimes called convenience fees—refers to fees incurred by consumers to make debt collection payments through a particular channel, such as over the telephone or online.

C. Legal Analysis

1. Any Amount

Section 808(1) of the FDCPA prohibits debt collectors, in relevant part, from "collect[ing] . . . *any* amount (*including* any interest, fee, charge, or expense incidental to the principal obligation)."[14] As the Supreme Court has explained, the "word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"[15] In addition, under its ordinary meaning, the term "including" typically indicates a partial list.[16] The CFPB interprets

[13] *Id.* (explaining that the CFPB examiners had instructed the company to collect pay-by-phone fees only "where expressly authorized by contract or state law"); *see also* CFPB: Fall 2014 Supervisory Highlights, at 7, *available at* https://files.consumerfinance.gov/f/201410_cfpb_supervisory-highlights_fall-2014.pdf (similar); CFPB: Fall 2015 Supervisory Highlights, at 20-21, *available at* https://files.consumerfinance.gov/f/201510_cfpb_supervisory-highlights.pdf (similar).

[14] 15 U.S.C. 1692f(1) (emphasis added). *See also* 12 CFR 1006.22(b).

[15] *Ali v. Fed. Bur. of Prisons*, 552 U.S. 214, 219 (2008) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997), in turn quoting Webster's Third New International Dictionary 97 (1976)).

[16] *Include*, Black's Law Dictionary (11th ed. 2019). Additionally, as the Supreme Court has stated, "including" is "not [a term] of all-embracing definition, but connotes simply an illustrative application of the general principle." *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941); *see also Arizona State Bd. For Charter Schools v. Dep't of Educ.*, 464 F.3d 1003, 1007 (9th Cir. 2006) ("[T]he word 'including' is ordinarily defined as a term of illustration, signifying that what follows is an example of the preceding principle."); *United States v. Hawley*, 919 F.3d 252, 256 (4th Cir. 2019) (explaining that "including" "is an introductory term for an incomplete list of examples").

the words "any" and "including" as used in section 808(1) consistent with their ordinary meanings. Accordingly, the CFPB clarifies that FDCPA section 808(1) and Regulation F, 12 CFR 1006.22(b), apply to any amount collected by a debt collector in connection with the collection of a debt,[17] including, *but not limited to*, any interest, fee, charge, or expense that is incidental to the principal obligation.

Consistent with this interpretation, the CFPB further clarifies that pay-to-pay fees charged to consumers for accepting a consumer's payment on a debt through a particular payment channel are an "amount" within the meaning of FDCPA section 808(1) and Regulation F, 12 CFR 1006.22(b). The CFPB acknowledges that some courts have held otherwise, finding that pay-to-pay fees do not violate FDCPA section 808(1) because such fees are not "incidental to the principal obligation."[18] But, as explained, the CFPB interprets section 808(1) to apply to "any amount," even if such amount is not "incidental to" the principal obligation.[19]

2. Permitted by Law

Section 808(1) of the FDCPA prohibits, in relevant part, the collection of any amount "unless such amount is expressly authorized by the agreement creating the debt or *permitted by*

[17] The CFPB notes that, if a debt collector is engaged in a truly separate transaction and is not collecting or attempting to collect a debt covered by the FDCPA, section 808(1) does not apply.
[18] *See*, *e.g.*, *Flores v. Collection Consultants of Cal.*, No. SA CV 14-0771-DOC, 2015 WL 4254032, at 10 (C.D. Cal. Mar. 20, 2015); *Shula v. Lawent*, 359 F.3d 489, 492-93 (7th Cir. 2004). In *Shula*, it does not appear that that court was presented with the question whether "any amount" included more than "fees . . . incidental to the principal obligation"; nor did that court analyze the issue. For the reasons stated above, the CFPB disagrees with that decision to the extent it suggested that section 808(1) applies only to amounts that are incidental to the principal obligation.
[19] Section 808(1) of the FDCPA and Regulation F, 12 CFR 1006.22(b), also covers pay-to-pay fees for the separate reason that such fees are "incidental to" the principal obligation. While the FDCPA does not define "incidental," it is ordinarily understood as "related to," *see* Collins English Dictionary (12th ed. 2014), or "[s]ubordinate to something of greater importance," *see* Black's Law Dictionary (11th ed. 2019). Pay-to-pay fees meet these definitions: They are "related to" the principal obligation because they are fees charged for paying the principal obligation. Indeed, if the principal obligation did not exist, then neither would the pay-to-pay fee. These fees are also generally minor in comparison to the outstanding debt and are therefore "subordinate to" the principal obligation.

law."[20] The word "permit" is susceptible to multiple meanings, but it tends to refer to "affirmative authorization," and the CFPB reads section 808(1) to use the word in that sense. Dictionaries provide that "permit" can mean either "to consent to expressly or formally," suggesting affirmative authorization, or to "allow" or "to acquiesce, by failure to prevent," suggesting that the lack of a prohibition is sufficient.[21] However, "allow and permit have an important connotative difference. Allow . . . suggests merely the absence of opposition, or refraining from a proscription. In contrast, permit suggests affirmative sanction or approval."[22] Use of the word "permit," rather than "allow," therefore suggests that affirmative authorization, rather than a mere lack of a prohibition, is required. Furthermore, as the Supreme Court has instructed, "words of a statute must be read in their context,"[23] and here, "permit" is used not in isolation but as part of the phrase "permitted by law." While in some contexts one may "permit" something by failing to prevent it, it is far less natural to understand "permitted by law" to mean "permitted by the absence of any law prohibiting it."

The CFPB therefore interprets FDCPA section 808(1) to prohibit a debt collector from collecting any amount unless such amount either is expressly authorized by the agreement creating the debt (and is not prohibited by law) or is expressly permitted by law. That is, the CFPB interprets FDCPA section 808(1) to permit collection of an amount only if: (1) the agreement creating the debt expressly permits the charge and some law does not prohibit it; or (2) some law expressly permits the charge, even if the agreement creating the debt is silent. The

[20] 15 U.S.C. 1692f(1) (emphasis added). *See also* 12 CFR 1006.22(b).
[21] *Permit*, Webster's Third New International Dictionary 1683 (1976); *see also Permit,* Black's Law Dictionary (5th ed. 1979) (defining "permit" as "[t]o suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act").
[22] Garner's Dictionary of Legal Usage 46 (3d ed. 2011); *see also Alexander v. Carrington Mortgage Services*, 23 F.4th 370, 377 (4th Cir. 2022) (holding "permitted by law" requires affirmative authorization).
[23] *King v. Burwell*, 576 U.S. 473, 492 (2015).

CFPB's interpretation of the phrase "permitted by law" applies to any "amount" covered under section 808(1), including pay-to-pay fees.[24]

Under the CFPB's interpretation, an amount is impermissible if both the agreement creating the debt and other law are silent. For example, under the CFPB's interpretation, amounts, including pay-to-pay fees, that are neither expressly authorized by the agreement creating the debt nor expressly authorized by law are impermissible under FDCPA section 808(1) and Regulation F, 12 CFR 1006.22(b), even if such amounts are the subject of a separate, valid agreement under State contract law.[25] Although some courts have adopted this "separate agreement" interpretation to permit debt collectors to collect, for example, certain pay-to-pay fees, the CFPB declines to do so. Such a reading would render the part of section 808(1) that refers to amounts "expressly authorized by the agreement creating the debt" superfluous[26] because a lawful agreement creating the debt is, by definition, an agreement valid under State contract law.[27] In addition, the separate agreement interpretation ignores section 808(1)'s focus on the "amount" being "expressly authorized by the agreement creating the debt" or "permitted

[24] Note that, even if pay-to-pay fees are expressly authorized in the underlying agreement or permitted by State law, debt collectors must still take care to comply with other laws, including other provisions of the FDCPA and the Consumer Financial Protection Act's prohibition on unfair, deceptive, or abusive acts or practices, when assessing pay-to-pay fees.

[25] The CFPB acknowledges that some district courts have held otherwise. *See*, *e.g.*, *Thomas-Lawson v. Carrington Mortg. Servs., LLC*, No. 2:20-cv-07301-ODW, 2021 WL 1253578 (C.D. Cal. Apr. 5, 2021), *appeal pending*, No. 21-55459 (9th Cir.).

[26] *See Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1037 (2019) (refusing to interpret the FDCPA in a way that would render a provision "superfluous").

[27] *Accord Alexander*, 23 F.4th at 379 (rejecting the separate agreement interpretation in part because it would render section 808(1)'s other prong superfluous). The separate agreement interpretation also would conflict with the FDCPA's use of the phrase "expressly authorized," since general principles of State contract law allow parties to agree to express or implied terms as part of any agreement. *See* Restatement (Second) of Contracts § 4 cmt. a (1981). If general principles of contract law counted as a "law" that "permitted" the collection of amounts, debt collectors would be free to collect not only those amounts authorized by separate agreements, but also to collect amounts that are only implicitly authorized by the agreement creating the debt—further rendering section 808(1)'s "express" requirement meaningless.

by law."[28] Under section 808(1), it is not enough for the agreement to be "permitted by law"; rather, the "amount" itself must be. Contract law standing alone does not provide for the collection of any specific amounts—and no principle of contract law says debt collectors may collect pay-to-pay fees.[29] Thus, while it may have been permissible under contract law for a debt collector to enter into separate agreements with consumers, contract law does not permit the "amount" at issue, i.e., the pay-to-pay fees.

The CFPB's interpretation of "permitted by law" in FDCPA section 808(1) is consistent with the previous interpretation in a CFPB compliance bulletin as discussed in part I.A., as well as with the prior interpretation of FTC staff and the holdings of the majority of courts to address the issue.[30] In particular, in 1988, FTC staff issued Commentary that set forth "staff interpretations" of the FDCPA.[31] As relevant here, FTC staff stated that, under section 808(1), a "debt collector may attempt to collect a fee or charge in addition to the debt if . . . the contract [creating the debt] is silent but the charge is otherwise expressly permitted by state law."[32] Conversely, FTC staff stated that "a debt collector may not collect an additional amount if . . . the contract does not provide for collection of the amount and state law is silent."[33]

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[28] *See Johnson v. Riddle*, 305 F.3d 1107, 1118 (10th Cir. 2002) ("The statute does not ask whether [the debt collector's] actions were permitted by law . . ., it asks whether the *amount* he sought to collect was permitted by law." (emphasis in original)).

[29] While a *contract* might, consistent with contract law, permit an amount, section 808(1) only permits collecting amounts authorized *by contract* when the amount is expressly authorized by the contract "creating the debt."

[30] *See, e.g.*, *Alexander*, 23 F.4th at 376-77 (holding, in a case regarding pay-to-pay fees, that "'permitted by law' requires affirmative sanction or approval"); *Seeger v. AFNI, Inc.*, 548 F.3d 1107, 1111, 1112 (7th Cir. 2008) (finding that, to be entitled to collect a fee, debt collectors "must show that the fee is either authorized by the governing contract or that it is permitted by Wisconsin law" and that, in that case, that neither an agreement nor a law expressly permitting a collection fee existed); *Tuttle v. Equifax Check*, 190 F.3d 9, 13 (2d Cir. 1999) (explaining that if "state law neither affirmatively permits nor expressly prohibits service charges, a service charge can be imposed only if the customer expressly agrees to it in the [underlying] contract").

[31] *See* Staff Commentary on the Fair Debt Collection Practices Act, 53 FR 50097, 50101 (Dec. 13, 1988).

[32] *Id*. at 50108.

[33] *Id*.

The CFPB's interpretation is also consistent with the FDCPA's statutory purposes. As noted in part I.A, Congress passed the FDCPA because it found that existing laws and procedures, including at the state level, were inadequate to protect consumers. Given this concern, it would be particularly unnatural to understand "permitted by law" to mean "permitted because no law prohibits it." Accordingly, the CFPB interprets FDCPA section 808(1) and Regulation F, 12 CFR 1006.22(b), to prohibit debt collectors from collecting any amount, including any pay-to-pay fee, not expressly authorized in the agreement creating the debt unless there is some law that affirmatively authorizes the collection of that amount.

3. Payment Processors

Debt collectors may violate FDCPA section 808(1) and Regulation F, 12 CFR 1006.22(b), when using payment processors who charge consumers pay-to-pay fees. For instance, a debt collector collects an amount under section 808(1) at a minimum when a third-party payment processor collects a pay-to-pay fee from a consumer and remits to the debt collector any amount in connection with that fee, whether in installments or in a lump sum.[34]

II. Regulatory Matters

This is an advisory opinion issued under the CFPB's authority to interpret the FDCPA, including under section 1022(b)(1) of the Consumer Financial Protection Act, which authorizes guidance as may be necessary or appropriate to enable the CFPB to administer and carry out the purposes and objectives of Federal consumer financial laws, such as the FDCPA.[35]

An advisory opinion is a type of interpretive rule. As an interpretive rule, this advisory opinion is exempt from the notice-and-comment rulemaking requirements of the Administrative

[34] *See, e.g.,* Ballentine's Law Dictionary (3d ed. 2010) (defining "collect" as "to receive payment"); *cf.* 15 U.S.C. 1692a(6) (defining debt collector to include persons who "directly or indirectly" collect debts).
[35] 12 U.S.C. 5512(b)(1); 5481(14); 5481(12)(H).

Procedure Act.[36] Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[37] The CFPB has also determined that this advisory opinion does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[38]

Pursuant to the Congressional Review Act,[39] the CFPB will submit a report containing this advisory opinion and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the opinion's published effective date. The Office of Information and Regulatory Affairs has designated this advisory opinion as not a "major rule" as defined by 5 U.S.C. 804(2).

/*s*/ Rohit Chopra

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Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[36] 5 U.S.C. 553(b).
[37] 5 U.S.C. 603(a), 604(a).
[38] 44 U.S.C. 3501-3521.
[39] 5 U.S.C. 801 *et seq*.