

CFPB- Interim Rule Regarding CDC Disclosures

Tschetter Sulzer's - FAQs

Overview - if you don't have much time or don't care to get into the tall grass on this new COVID-19 related issue, skip directly to #23, #24, and #25. These three contain all you need to know to file your rent cases, be in compliance, and to avoid potential liability.

1. What is the CFPB?

According to its Federal Government website, the Consumer Financial Protection Bureau (CFPB) is a U.S. government agency that makes sure banks, lenders, and other financial companies treat consumers fairly. One of the CFPB's primary functions is to enforce the Fair Debt Collection Practices Act (FDCPA). The CFPB enforces the FDCPA against "debt collectors" in general and specifically against Collection Agencies.

2. Why is the CFPB getting involved with the CDC Eviction Moratorium Order?

- According to the CFPB - "The Bureau understands that a significant number of landlords and residential property owners hire debt collectors for pre-eviction collections."
- We aren't sure where the CFPB gets its information from because this is not common practice in Colorado. In fact, we aren't aware of any landlords that use debt collectors to collect rent pre-eviction. Nationally, it may be done some, but again we aren't aware of this. We believe that CFPB manufactured this rationale (debt collectors are involved with collecting rent pre-eviction) so that rent collection would fall under the FDCPA which the CFPB enforces.
- See the CFPB news release here: [CFPB Rule Clarifies Tenants Can Hold Debt Collectors Accountable for Illegal Evictions | Consumer Financial Protection Bureau](#)

3. How did the CFPB get involved with the CDC Eviction Moratorium?

The CFPB got involved with the CDC Eviction Moratorium by adopting a rule (the Rule) that requires "debt collectors" to provide written notice to tenants of their rights under the CDC Eviction Moratorium. Tenant advocates still advance to this day the myth that a huge percentage of tenants aren't aware of the rights granted by the CDC Order. Apparently they missed the part when every Colorado landlord had to serve the CDC Declaration in both English and Spanish for months.

4. When is this new interim rule effective?

The new interim rule goes into effect on May 3, 2021.

5. What is the new rule exactly?

All 69 pages of the CFPB's new "Interim Final Rule" can be found at: [Interim Final Rule: Debt Collection Practices in Connection with the Global COVID-19 Pandemic \(Regulation F\)](#)
Please note that the actual Rule is set forth in five (5) pages starting at page sixty-four (64).

Key Provisions of the Rule include the following again starting at page 64.

- PART 1006—FAIR DEBT COLLECTION PRACTICES ACT (REGULATION F)
 1. The authority citation for part 1006 is revised to read as follows: Authority: 12 U.S.C. 5512; 15 U.S.C. 1692l(d), 1692o.
 2. Subpart B, consisting of § 1006.9, is added to read as follows: Subpart B—Rules for Debt Collectors Subject to the Fair Debt Collection Practices Act § 1006.9 Debt Collection Practices in Connection with the Global COVID-19 Pandemic.

- **(a) Purpose and coverage.** The purpose of this subpart is to eliminate certain abusive debt collection practices by debt collectors related to the global COVID-19 pandemic, to ensure that debt collectors who refrain from using such abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against such debt collection abuses. This subpart applies to debt collectors, as defined in FDCPA section 803(6), 15 U.S.C. 1692(a)(6), other than a person excluded from coverage by section 1029(a) of the Consumer Financial Protection Act of 2010, title X of the Dodd-Frank Act, 12 U.S.C. 5519(a).

- **(b) Definitions.** For purposes of this subpart, the following definitions apply:
 - (1) The terms consumer, debt, and debt collector have the same meaning given to them in FDCPA section 803, 15 U.S.C. 1692a.
 - (2) The term CDC Order means the order issued by the Centers for Disease Control and Prevention titled Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19 (86 FR 16731 (Mar. 31, 2021)), as extended by the Centers for Disease Control and Prevention.
 - (3) The term eviction notice means the earliest of any written notice that the laws of any State, locality, territory, or tribal area require to be provided to a consumer before an eviction action against the consumer may be filed.

- **(c) Prohibitions.** During the effective period of the CDC Order, a debt collector collecting a debt in any jurisdiction in which the CDC Order applies must not, in connection with the collection of that debt:
 - (1) File an eviction action for non-payment of rent against a consumer to whom the CDC Order reasonably might apply without disclosing to that consumer clearly and conspicuously in writing, on the date that the debt

- collector provides the consumer with an eviction notice or, if no eviction notice is required by applicable law, on the date that the eviction action is filed, that the consumer may be eligible for temporary protection from eviction under the CDC Order; or
- (2) Falsely represent or imply to a consumer that the consumer is ineligible for temporary protection from eviction under the CDC Order. 3.

6. I don't get all this lawyer talk, what is a layman's explanation of the Rule?

Debt collectors (meaning landlords) are prohibited from filing an eviction for nonpayment of rent without first disclosing to a tenant that the CDC Order might apply, and they cannot make false representations to a tenant about whether the CDC Order would apply to them.

The CFPB has put out a Fast Facts Sheet. [Fast Facts: 2021 Debt Collection COVID-19 Interim Final Rule](#)

7. Are landlord debt collectors?

According to the CFPB they are. Otherwise, the CFPB could not adopt this Rule and have it impact evictions. Remember, the CFPB regulates debt collectors and if landlords are not viewed as debt collectors the CFPB would have no right to regulate them or evictions. Thus, in order to assert authority over the eviction process, the CFPB had no choice but to contend that landlords are "debt collectors".

The legally accurate answer is that most landlords are not "debt collectors" and are not subject to the FDCPA because most landlords 1) don't meet the definition of debt collector and 2) are specifically exempt. The following are the general rules based on the law, but you should not rely upon them without specific advice regarding your situation because the legal outcomes are impacted by how landlords operate, meaning protections can be lost based on operating realities.

The term "debt collector" means any 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 another. 15 U.S.C.A. § 1692a(6). Most landlords' principal purpose is not to collect debt *AND* most landlords do not collect debts owed to others. Landlords who manage their own assets cannot be debt collectors based on the definition.

Owners and TPF Managers Are Exempt from FDCPA because the term "debt collector" does not include - "(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor." 15 U.S.C.A. § 1692a(F)

Courts have routinely upheld this exemption.

The Act excludes not only the original creditor but also any person who tries to collect a debt that “was not in default at the time it was obtained by such person.” 15 U.S.C. § 1692a(6)(F)(iii). If a management firm “obtains” a debt, it does so when the lease begins, which necessarily precedes default, or when the agency relation begins (if that happens after a given apartment has been let). The harder question is whether an agent “obtains” the debt at all, or that word instead denotes only ownership. Carter v. AMC, LLC, 645 F.3d 840, 843 (7th Cir. 2011)

8. Are eviction attorneys “debt collectors” if the attorneys are trying to collect money but simply seeking a judgment for possession?

The Courts are split on this issue meaning that there is no determinative answer. Accordingly, arguments support that attorneys are not debt collectors when handling a possession judgment, and arguments that support that they are acting as debt collectors. The CFPB is taking the position in this interim rule that attorneys handling evictions are acting as debt collectors. Even though eviction attorneys’ are necessarily engaging in debt collection in every eviction case, the CFPB’s position dictates that eviction attorneys should proceed cautiously. Thus, Tschetter Sulzer assumes that both Courts and tenant attorneys will attempt to impose or assert liability for non-compliance. Accordingly, TS can’t file any rent evictions for any landlord unless the landlord is in compliance with the CFPB Rule.

9. What is the FDCPA?

The Fair Debt Collection Practices Act, is a Federal law that is meant to protect debtors from bad actions and abuses by third parties acting to collect a debt. The CFPB enforces the FDCPA.

10. Consequences of not complying with the FDCPA or this new requirement from the CFPB?

The FDCPA sets a minimum \$1,000 damage amount per violation plus attorneys fees and costs. The FDCPA also allows for class-action lawsuits.

11. How should Landlords comply?

The CFPB has provided recommendations for compliance. The recommendations reference a website. NOTE - The CFPB does not require that copies of the CDC Order have to be provided with the rent demand. However, currently, there is one jurisdiction, Boulder, that still requires Landlords to provide copies of the CDC Order and Declaration in both Spanish and English prior to filing an eviction. Given the CFPB Rule, Tschetter Sulzer is requesting the Boulder Court to abolish this requirement.

Best practice (and the easiest way to comply) is to use the exact language provided by the CFPB. We recommend incorporating this into your rent demand and TS has already incorporated the language into the Firm's rent demands. ****PLEASE NOTE** - there are specific legal requirements under the FDCPA for how (including typeface requirements) disclosures can be made to a consumer in a written document. The CFPB's Rule doesn't mention or refer to all requirements. However, the Rule does state the required disclosures must be clear and conspicuous. "Clear and conspicuous means readily understandable. The location and type size also must be readily noticeable and legible to consumers, although no minimum type is mandated." TS followed FDCPA rules for making disclosure when we drafted our Rent Demand Template. Thus, we recommend that you use our Form or precisely copy how we have made the disclosures including where in the document they are made and typeface and size.

- [Debt Collection: Sample COVID-19 Tenant Eviction Protection Disclosure Language](#)

Here is the page that the CFPB is directing people to in the disclosures.

- [Help for renters after you receive an eviction notice or an eviction lawsuit | Consumer Financial Protection Bureau](#)

12. When am I supposed to provide my tenants with a copy of the CFPB disclosure?

At the latest, when you serve a tenant who may be covered with a demand for rent or possession. This means you notify the tenant when you serve the demand.

13. I have previously served a demand for payment, do I have to start over?

No, this rule goes into effect on May 3, 2021. If you have previously served a demand that did not provide notice of the CFPB, you can serve a separate notice that includes this information.

<https://www.thslawfirm.com/wp-content/uploads/2021/04/CFPBNotice.pdf>.

14. Have Eviction Notices Changed Again?

Yes, we have provided an updated rent demand.
<https://www.thslawfirm.com/evictions/eviction-forms/>

15. Does the CFPB Rule impact all eviction cases?

No, the Rule only applies to rent cases. Thus, landlords need only comply if they are evicting a tenant for nonpayment of rent.

16. What if I know that my tenant is not covered under the CDC?

The tenant's circumstances may have changed, so the most cautious approach dictates serving the tenant with a rent demand containing the required disclosures. The Rule requires that you provide the information about the CDC Moratorium to tenants that **may** be covered. What about the comments to the Rule that state if there is knowledge that the tenant/consumer is not covered, the disclosure is not necessary. This is true. But the safest approach is to make the disclosure. If you make the disclosure, then what you knew becomes irrelevant.

17. Do I need to serve a copy of the CFPB disclosure every time we serve an eviction notice on a tenant?

No. The Rule only requires the notice to be served once on any given tenant. However, the operational logistics of tracking which tenants served (disclosed to) and which tenants have not been served (have not received the written disclosure) may be difficult or impossible to effectively track and thus could lead to mistakes. To avoid having to track and to prevent any possibility of mistake, use and serve the TS Rent Demand with the required disclosures. However, if you do not want to serve the written disclosures every time, the Rule clearly indicates that you do not have to provide more than once. *"Frequency of Disclosure. Section 1006.9(c)(1) does not require a debt collector to provide the disclosure described in §1006.9(c)(1) more than once."* Rule at Page 68. Arguably, even the previous written disclosure of a tenant's CDC Rights would mean that a landlord has complied. However, because there is no certainty that a court would rule this way, this would be the riskiest course. Accordingly, we advise against taking this position especially when all risk can be eliminated by simply serving a Rent Demand with the required disclosures.

18. Is there a restriction on how many times I can provide the CFPB disclosure?

No. The commentary specifically states that it is not a violation to provide the CFPB disclosure multiple times or every time.

19. Does emailing my tenant put me in legal compliance with the Rule?

No. The safe harbor for compliance is making the disclosures in writing at the time you serve a Rent Demand. Rent demands are served by handing to the tenant or by posting. Thus, to be in compliance with the CFPB Rule - you must serve the disclosures at the time you serve the Rent Demand.

20. Does verbally telling my tenants about their CDC rights and the information referred to in the CFPB Rule count?

NO. The disclosures must be in writing. You are free to verbally inform your tenants, but to be in legal compliance the disclosures must be made in writing.

21. How long will this requirement be in place?

Right now it tracks with the CDC Order, which is currently set to expire on June 30, 2021.

22. Why should I be concerned about this?

Because the potential liability for both small and large landlords are staggering. Small Landlords. "Mark - I only have two single family units. I'm not on anybody's radar. I'm willing to risk it for \$1,000." Remember - it is \$1,000 per violation plus attorneys' fees. Tenant's attorneys would likely seek \$5,000 or more in attorneys' fees. Large Landlords. If you manage a 400+ apartment community and you serve 50 rent demands, that is \$50,000 in potential liability if the disclosures are not made or not made properly.

23. What will Tschetter Sulzer require to file a rent case?

Given the potential liability, TS will not file any rent cases without one of the following

- A Rent Demand on TS's Form with the disclosures
- A Rent Demand with the required disclosures made in a manner to be complying in TS's judgment. Again, remember, the Rule requires that the disclosures be made clearly and conspicuously.
- A written representation that the tenant has previously received written notice of the tenant's CDC rights. Again, we do not recommend this, but would file cases based on your written representation. How this process will be handled and what it looks like are yet to be determined. When the process has been developed and adopted, we will announce it.

24. What are Tschetter Sulzer's Recommendations?

There are only three options:

1. Serve every non-paying tenant with a complying Rent Demand every time
2. Serve every non-paying tenant with a complying Form Once
3. Take the position that you have already provided the tenant with written notice of their CDC rights

We recommend Option #1. It is the simplest (no tracking) and the least riskiest. Option #2 does have the advantage of not having to make the disclosures every time, but has the disadvantage of having to track who you have served with what. Option #3 on the surface may be the most desirable because you are not raising a red flag for the tenant to claim CDC rights when they are not eligible, but there is no guarantee that a Court would hold this complies. Further, given the large potential windfall (\$1,000 for every violation), the chances of a tenant or a tenant attorney taking a run at you to find out how a court would rule is considerable.

25. What do I have to do to ensure compliance and avoid liability?

While there is a lot to think about, the totality of necessary action on your part is quite simple. While the Rule is in effect, simply serve Rent Demands that contain the required disclosure language. Period. That is it!