Consumer Relations Consortium

Thomas Pahl
Policy Associate Director – Research, Markets & Regulations
Bureau of Consumer Financial Protection
1700 G St. NW
Washington, D.C. 20552

Dear Mr. Pahl,

The Consumer Relations Consortium (CRC) - www.crconsortium.org – is a coalition of industry leaders representing credit issuers, agencies and technology firms. The group's primary focus is to strategically drive advancement in compliance and innovation for the collection industry through consumer-centric and common sense solutions. We accomplish our goals through multiple initiatives:

- Designing and managing strategic industry tests, and developing best practice processes that reflect the input of a range of stakeholders
- Partnering with top tech firms to close innovation gaps
- Building a trusted group of peers that is willing to share experiences
- Frequent in-person interaction with regulators and consumer advocates to help challenge and refine our positions

Formed in 2013, the CRC is a membership group run by The iA Institute for those organizations in the industry that have forward-thinking leaders, are willing to engage proactively with regulators and consumer groups and take the position that discussion must be candid to be effective. Membership is selective and the group is intentionally smaller than other industry organizations.

The following is a comprehensive proposal to address the need for debt collectors to initiate communications with consumers through modern communication methods. While this topic was a focus of discussion since the Bureau's 2013 Advance Notice of Proposed Rulemaking, the environment changed materially since that time and continues to evolve rapidly. In addition to consumers' movement away from landline phones, postal mail and fax and toward email, texting and mobile communications, a crisis of trust has emerged which presents unique challenges to the debt collection industry as it seeks to engage in the communications channels demanded by consumers while complying with Fair Debt Collection Practices Act.

We look forward to discussing this proposal with you.

Respectfully,

Stephanie Eidelman, Executive Director
Consumer Relations Consortium

Cc: John McNamara, Kristin McPartland, Gandhi Eswaramoorthy

The Challenges

Consumer Communications is Rapidly Evolving

Congress enacted the Fair Debt Collection Practices Act (FDCPA) in 1977, a time when nearly all debt collection communications were transacted by landline telephone and U.S. Postal Mail. Over the past four decades, alternative communication channels developed, including email, text messaging, web chats and more. These alternative communication channels are the preferred mechanisms of the vast majority[1] of today's consumers, most of whom do not want to be called on the phone and will not open traditional mail[2].

A Crisis of Trust Emerged

In the last several years, a crisis of trust reached a zenith in the United States: Because of the proliferation of scams through the mail, the phone and online, a majority of consumers do not trust anyone unknown who is seeking to contact them[3]. Regulators, consumer groups and the media regularly advise consumers a) not to respond to unknown callers, and/or b) not to provide any sensitive information to someone they don't know[4].

Spurred by the vast explosion of illegal "robocalls," consumers are demanding transparency – they want to know who is calling before they decide to answer a call. The Federal Communications Commission and industry responded with a host of solutions and with each passing day, more calls are being labeled and caller ID information is being enhanced.

See exhibits A-D below. Few consumers today would answer a call from an "unknown" caller, like the one in Exhibit A. Perhaps fewer still would answer a call that looks like Exhibit B. Some calls appear like Exhibit C, but in the case of a debt collector, this is perhaps a violation of the FDCPA. Companies in the mobile ecosystem are also now offering the opportunity to present a call that looks like Exhibit D. While there are limitations to this example being the norm today, it is likely to become the norm over time – especially once the STIR/SHAKEN protocol is deployed, and the ability

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[1] Rimma Kats, "Spoiler Alert: Millenials Prefer Digital for All Communications," eMarketer (Oct. 27, 2017), https://www.emarketer.com/Article/Spoiler-Alert-Millennials-Prefer-Digital-All-Communications/1016677; Larry Alton, "Phone Calls, Texts or Email? Here's How Millenials Prefer to Communicate," Forbes (May 11, 2017), https://www.forbes.com/sites/larryalton/2017/05/11/how-do-millennials-prefer-to-communicate/#6986b8f86d6f; Kenneth Burke, "73 Texting Statistics That Answer All Your Questions," Text Request (May 24, 2016) https://www.textrequest.com/blog/texting-statistics-answer-questions/

[2] Sara Vilkomerson, "You've Got Mail (You Never Open)," Observer (June 17, 2008), https://observer.com/2008/06/youve-got-mail-you-never-open/; David Gewirtz, "Is the U.S. Postal Service obsolete?" ZDNet (April 19, 2010), https://www.zdnet.com/article/is-the-u-s-postal-service-obsolete/

[3] Jonjie Sena, "Consumers Don't Trust Phone Calls From Businesses. Here's How to Restore Their Faith," Forbes (Sept. 7, 2016), https://www.forbes.com/sites/neustar/2016/09/07/consumers-dont-trust-phone-calls-from-businesses-heres-how-to-restore-their-faith/#1861810156a4

[4] Bureau of Consumer Financial Protection (October 2018): https://www.consumerfinance.gov/about-us/blog/how-tell-difference-between-legitimate-debt-collector-and-scammers/; Federal Trade Commission (February 2012): https://www.consumer.ftc.gov/articles/0258-fake-debt-collectors

to spoof a caller identity is minimized -- because consumers will demand it[5]. Enhanced caller ID information like that depicted in Exhibit D apprises consumers of exactly what they want to know – who is calling and why.

It is clearly only a matter of time before an unidentified (or un-labeled) caller will become the exception rather than the norm.

Exhibit A

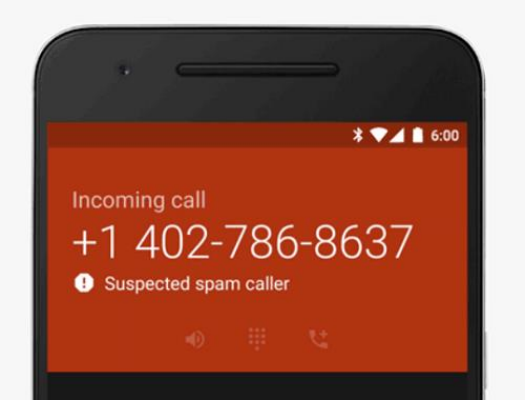

Exhibit B

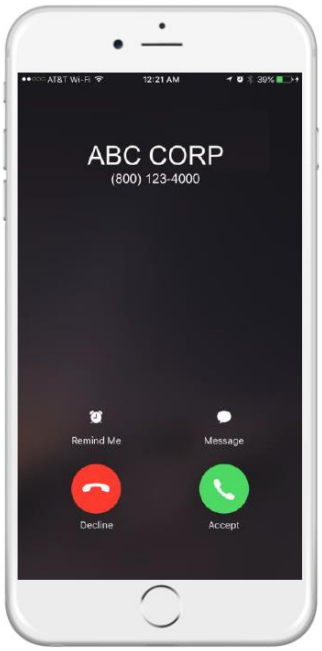

Exhibit C

Exhibit D

[5] TransNexus, "Your Guide to Everything STIR and SHAKEN," https://transnexus.com/whitepapers/stir-and-shaken-overview/

Prolific FDCPA Lawsuits and Inconsistent Regulatory Guidance Force Debt Collectors to Conceal Most Information Regarding Their Communications and Thus Appear "Suspicious"

The requirements of the FDCPA for communicating with consumers directly conflict with this new consumer demand for transparency. The FDCPA defines "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium,"[6] but the statute does not define this key term "information."

Courts established an extremely broad definition of "information" which evolved to include internal collection agency account numbers appearing through the window of a collection letter envelope and even the legal name of the debt collector in some circumstances. Further, a cottage industry of consumer attorneys generates millions of dollars in legal fees every year by suing collection agencies for the most trifling of claims[7], relying on inconsistent interpretations of an outdated statute. These lawsuits do nothing to advance the interests of consumers and typically result in debt collectors paying cash settlements to the Plaintiffs' attorneys with precious little of this bounty trickling down to the consumers.

To avoid being sued for claims such as an unlawful disclosure of a debt to a third party, many debt collectors send mail in envelopes without clearly identifying the name of the sender (thus appearing like junk mail). Some collectors mask their true caller ID name if it is too lengthy. Most debt collectors do not leave voicemails or if they do, the messages that are left sound vague and provide little useful information. The notion of a debt collector sending an email raises further concerns[8] and initiating communication by text – the overwhelmingly preferred communication method for a growing number of consumers – is largely untested due to further compliance concerns including third party disclosures and the difficulty with including all required disclosures in a short message.

The Unclear Definition of "Information" Created an Awkward "Authentication Dance"[9]

To avoid potential litigation when a collector connects with a consumer on an outbound telephone call, debt collectors must confirm they are speaking with the right party before they can disclose information about who they are or why they are calling. The best practice (often dictated by creditor clients and required of credit issuers by Federal banking regulators) is to request personal data the collector can verify, such as a birthdate or the last four digits of a social security number. This is exactly the kind of data consumers are urged not to share with people they don't know.[10]

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[6] 15 U.S.C. §1692a(2).

[7] Reference: https://www.denverpost.com/2011/02/25/consumers-dealing-with-debt-collectors-become-stuck-in-a-vicious-cycle-of-lawsuits/

[8] Lavallee v. Med-1 Solutions, LLC (No. 1-15-cv-1922, U.S.D.C., Southern District of Indiana)

[9] http://insidearm.com/news/00044427-bcfp-fix-authentication-dance-between-con/

[10] http://insidearm.com/news/00044426-debt-collector-requirement-authenticate-c/

An uncomfortable standoff ensues[11], where neither the consumer nor the collector is willing to share information before the other does so first. Further, the consumer feels vulnerable because the caller has more information about the consumer and appears unwilling to share that information until the consumer divulges sensitive information to verify a right party contact.

The Bureau's own advice to the consumer[12] regarding how to tell the difference between a legitimate collector and a scam makes no mention of the requirement for a debt collector to verify the identity of the consumer before providing any information. In fact, among other things, the Bureau offers the following as warning signs of debt collection scams:

> *[If a caller] Withholds information from you*
>
> A debt collector must tell you information such as the name of the creditor, the amount owed, and that if you dispute the debt the debt collector will have to obtain verification of the debt. If the debt collector does not provide this information during the initial contact with you, they are required to send you a written notice within five days of that initial contact.

In reading this guidance, a consumer would assume that the debt collector would initiate a communication by providing the consumer the creditor's name and the amount owed. However, no mention is made of the fact that a debt collector is only allowed to disclose this information about a debt ***after the debt collector confirms a right party contact***.

Indeed, the Bureau's guidance to consumers further provides the following warning signs of a scam:

> *[If a caller] Asks you for sensitive personal financial information*
>
> Such as your bank account, routing numbers, or Social Security numbers. You should never provide anyone with your personal financial information unless you are sure they're legitimate. Scammers can use your information to commit identity theft.

While this is excellent advice in today's world, the information the BCFP recommends consumers withhold from debt collectors is exactly the information creditors (and bank regulators) require collection agencies to verify to confirm a right party contact.

When collectors cannot reach the consumer in any meaningful way, additional adverse consequences may result for the consumer. Many accounts which would otherwise be resolved are

[11] See *Prendergast v. First Choice Assets, LLC*, *Prendergast v. First Choice Assets, LLC*, 317 F. Supp. 3d 1018 (N. D. Ill., 2018)

[12] See https://www.consumerfinance.gov/about-us/blog/how-tell-difference-between-legitimate-debt-collector-and-scammers/

instead escalated, resulting in unnecessary negative credit reporting, debt collection lawsuits, garnishments, repossessions and other litigation against consumers.

This Authentication Dance Could be Eliminated

A rule that clearly authorizes and enables debt collectors to initiate communication through digital channels would make it possible to employ the dozens of more advanced ways to authenticate the consumer's identity.[13] These very same methods are already in wide use by banks and other financial institutions. Enabling use of these newer methods preferred by consumers would greatly benefit the consumer from the very beginning of the collection cycle by making communication far less awkward and frightening, more immediate, more likely to be opened and not ignored – and thus less likely that an account would escalate unnecessarily.

Contact which is initiated digitally rather than via phone call would also give the consumer the opportunity to independently check out the organization that is contacting them before they engage in a live discussion. In fact, it might even remove the direct interpersonal interaction via phone entirely – in the case of a consumer who chooses to pay or dispute online.

Additionally, a rule that clarifies the definition of "information" would provide guardrails for all stakeholders. To be clear, CRC is not recommending the elimination of the US Postal mail. Rather, debt collectors simply seek to be able to use the consumers' communication channel of choice without requiring hurdles which render that channel useless.

Our Recommendations

The CRC offers five recommendations that provide a comprehensive solution to the complex set of challenges outlined above:

1. Declare that for purposes of the FDCPA, email is equivalent to U.S. Postal Mail.
2. Provide an exemption in the E-Sign law for the FDCPA's 1692g notice.
3. Clarify the meaning of "information" as it relates to a communication under the FDCPA.
4. Affirmatively declare that disclosure of the debt collector's true legal identity or a trade name by which it is more commonly known does not constitute an unauthorized conveyance of information about the debt.
5. Affirmatively declare that a limited content message does not constitute a conveyance of information subject to the disclosure requirements of the FDCPA.

[13] Some of these modern methods of authentication may be found at https://www.idology.com/id-verification/id-verification/ ; https://www.twilio.com/verify ; https://www.trulioo.com/ and https://blockscore.com/

CRC's Proposed Solutions

1. Declare that for purposes of the FDCPA, email is equivalent to U.S. Postal Mail.

Collectors must undergo contortions to use email, a decades' old ubiquitous communications technology. Concerns raised about debt collectors communicating with consumers via email include the risk that a neighbor might see the contents of an email or a child might use a shared family email. These concerns are no different than those addressed (and dismissed) by the FTC in its official comments to the FDCPA regarding risks of third party disclosure regarding debt collection telephone calls, postal mail and telegraphs. The official FTC commentary to Section 805(b) of the FDCPA states[14], in relevant part:

> *Section 805(b)--Communication with third parties.* Unless the consumer consents, or a court order or section 804 permits, "or as reasonably necessary to effectuate a postjudgment judicial remedy," a debt collector "may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector."
>
> 3. *Incidental contacts with telephone operator or telegraph clerk.* A debt collector may contact an employee of a telephone or telegraph company in order to contact the consumer, without violating the prohibition on communication to third parties, if the only information given is that necessary to enable the collector to transmit the message to, or make the contact with, the consumer.
>
> 4. *Accessibility by third party.* A debt collector may not send a written message that is easily accessible to third parties. For example, he may not use a computerized billing statement that can be seen on the envelope itself.
>
> A debt collector may use an "in care of" letter only if the consumer lives at, or accepts mail at, the other party's address.
>
> A debt collector does not violate this provision when an eavesdropper overhears a conversation with the consumer, unless the debt collector has reason to anticipate the conversation will be overhead.

Email accounts are private and a consumer must provide credentials to access an email account. Also, email accounts are free. There is nothing that forces a consumer to use a family email to open a bank account, obtain credit, or communicate with a healthcare provider.

[14] https://www.fdic.gov/regulations/laws/rules/6500-1325.html

In spite of email being a well-established, universal and free communication channel, debt collectors are fearful of using it for initial communications with consumers -- not so much because the regulations say debt collectors cannot use email, but because the regulations don't say they CAN use email to communicate with a consumer. Further, the few Court decisions on the issue offer little hope for consumers that prefer email or text of ever using those channels of communication to interact with a debt collector. For instance, in *Lavallee v. Med-1 Solutions, LLC*,[15] the Court determined that consumers are reluctant to click on a link or open an attachment from an unknown source (and are advised by regulators, advocates, and media not to do so) and thus held that a validation notice delivered via link or attachment in an email was ineffective.

However, in *Nelson v. Receivables Outsourcing, LLC*,[16] the Court examined whether a voice-to-text transposition qualifies as third party disclosure if it appears on the face of a consumer's cell phone. According to the decision by the Court, this transposition alone is insufficient for an FDCPA claim to survive a motion to dismiss, writing:

> The case here is even clearer than the cases of the for-your-eyes-only letters: unlike the delivery of letters that could be opened and read by third parties, Plaintiff controls his own cell phone, and has not pleaded that Defendant (or anyone else) controls it instead. Whether overheard or textualized, the voice mails on his phone are within his control. Defendant did not communicate with a third party; it communicated with Plaintiff, whose phone—an instrumentality in his possession, as implicitly acknowledged by the pleadings—was used to convey the message to other people. As such, Plaintiff fails to allege that Defendant communicated with a third party, and his claim under § 1692b(c) is dismissed.

Another example from the archaic nature of the FDCPA regarding emails is found in Section 1692g (b) which provides as follows:

> If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, ***is mailed to the consumer by the debt collector.*** (emphasis added).

[15] 2017 WL 4340342 (S.D. Ind., 2017).
[16] 2018 WL 3854796 (D.N.J., 2018).

Common sense dictates it would be acceptable to email verification to the consumer if this is what the consumer prefers[17]. This would be the most expedient way to respond to the request and the most efficient way to further the communication. If collectors must follow the letter of the statute, however, even if the consumer wishes to receive the information by email, the consumer must wait for the U.S. Postal Service to deliver it by mail.[18]

***Recommended Solution*: For purposes of the FDCPA, clarify that any written notice or communication to be sent, mailed or otherwise delivered by a debt collector to a consumer may be sent by electronic mail. Further, for purposes of the FDCPA, email should be given the same treatment as U.S. Postal Mail in several important ways:**

1. **What's inside the "envelope" is considered private.**
2. **The entire contents of the email (including to/from and subject fields) are considered inside the envelope.**
3. **There is a presumption of delivery (i.e. receipt) unless it is returned as undeliverable.**
4. **Just as a debt collector may rely on a postal address provided by the consumer to the creditor, a collector may also rely on an email address provided by the consumer to the creditor.**

We offer the following as proof that email – including the "to/from" and "subject" fields - is more secure, than U.S. Postal Mail:

- Postal mail requires an envelope because it is shuffled around – it goes into a mailbox, it's handled by a mail carrier and by some number of postal employees, it gets delivered to a mailbox which is likely not secure, and it may sit in a pile in a home that is shared by multiple parties. Email has no similar equivalent.
- Email is more secure than a physical letter due to additional technical controls.[19]
- Typically two passwords are necessary to access an email: one password to unlock the device on which emails are viewed and a second password to log into the email account to access messages.
- Typically, an email "inbox" will contain a list of emails at any given time. This makes it less likely there would be an inadvertent disclosure of any particular email. Even if an automated preview is enabled, one would need to first click on that email in order to display the preview.
- Email addresses are more reliable than physical addresses in today's world, and more likely to be linked to a specific consumer. Consumers move frequently and often do not update their address with their creditors. Regardless of where a consumer lives, the consumer typically retains his email address.

[17] Reference: https://www.forbes.com/sites/larryalton/2017/05/11/how-do-millennials-prefer-to-communicate/#49750016d6fd

[18] Even then, the non-descript mail envelope used by most agencies looks like junk mail and may be overlooked, something that is less likely via email.

[19] See Electronic Communications Privacy Act (in transit) and Stored Communications Act (at rest) protections.

- A disclosure as a result of a person reading someone else's email (including to/from and subject fields) should be compared to the matter of the illegal act of someone opening another person's first class mail or even reading mail that was left out on the kitchen table.
- The provisions of the FDCPA with respect to deceptive practices, threats, etc. would apply to the subject line as well as the body of the email, so those protections already exist.

2. Provide an exemption in the E-Sign law for the FDCPA's 1692g notice[20].

The Electronic Signatures in Global and National Commerce Act ("E-Sign Act") provides,

> Notwithstanding subsection (a), if a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing if [certain conditions are met].[21]

However, the E-Sign Act includes an exemption provision.

> (d) AUTHORITY TO EXEMPT FROM CONSENT PROVISION.—(1) IN GENERAL.—A Federal regulatory agency may, with respect to matter within its jurisdiction, by regulation or order issued after notice and an opportunity for public comment, exempt without condition a specified category or type of record from the requirements relating to consent in section 101(c) if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.[22]

The Federal Reserve Board ("FRB") established multiple exemptions from the E-Sign Act.[23] [24] In 2007, the FRB announced amendments to Regulations B, E, M, Z and DD to clarify requirements for electronic disclosures in which they withdrew portions of the 2001 interim final rules with E-Sign

[20] While this proposal addresses the ability for collectors to *initiate* communication with consumers, it would make sense to also provide an E-Sign exemption for the 1692f notification requirement, if the collector has evidence that the consumer's preferred communication channel is digital.
[21] 15 U.S.C. § 7001(c)(1).
[22] 15 U.S.C. § 7004(d)(1).
[23] Letter from James D. McLaughlin, Director, Regulatory and Trust Affairs to Jennifer J. Johnson, Sec'y, Board of Governors of the Federal Reserve System (Aug. 20, 2001).
[24] https://www.fdic.gov/regulations/laws/federal/01cabaebank.html (last visited Oct. 23, 2018).

provisions that may impose undue burdens on electronic banking and commerce and may be unnecessary for consumer protection.[25] [26]

In the markets covered by Regulations B, E, M, Z and DD there is generally a point of purchase relationship, with a motivated consumer who is present, and wants to complete the transaction she initiated. In the case of debt collection, there is little consumer motivation to complete the E-Sign process. Further, it would require the ability to communicate first, which is exactly the problem we are attempting to solve. It's noteworthy that the FRB excluded the FDCPA from the list of Regulations exempted. This is likely because the enforcement of the FDCPA typically falls outside the scope of the authority of the FRB.

The writing requirement for the 1692g notice only applies when the notice hasn't been provided in the first communication and the FTC recognized that the required 1692g validation notice may be provided orally.[27] Thus, under the FDCPA the writing requirement for the g-notice is not absolute. Absent a mandatory written disclosure requirement, E-Sign should not be mandatory.

Today's young adults are digital first, and want expedience. If the consumer provided her creditor with an email address, the collector should be able to use it to initiate communication without first having to send a letter (which they may not respond to) or call a landline phone (which they may not even have), and complete the authentication dance (which consumers are told not to do).

***Recommended Solution*: Provide an exemption to the E-Sign Law for the FDCPA's 1692g notice and 1692f post-dated check notice. This will help to ensure that collectors can begin an important conversation with consumers so they may make informed decisions about their debt, and will also help to ensure that consumers who prefer to communicate electronically receive their recurring payment notices in the channel of their choice.**

3. Clarify the meaning of "information" as it relates to a communication under the FDCPA.

The FDCPA contains conflicting requirements in that a debt collector must disclose his or her identity to a consumer in every communication and that a collector must refrain from communicating about a consumer's debt to a third party. The FDCPA defines communication as follows:

> The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.[28]

[25] https://www.federalreserve.gov/newsevents/pressreleases/bcreg20071101a.htm (last visited Oct. 23, 2018).
[26] Board of Governors of the Federal Reserve System, *Press Release* (Nov. 1, 2007).
[27] The FTC Official Staff Commentary to Section 809(a) provides, in relevant part: "5. *Oral notice.* If a debt collector's first communication with the consumer is oral, he may make the disclosures orally at that time in which case he need not send a written notice."
[28] 15 U.S.C. §1692a(2).

What constitutes "information" as referenced in the FDCPA has been the subject of heated debate. The Official FTC commentary to Section 803(2) provides, in relevant part:

> 1. *General.* The definition includes oral and written transmission of messages which refer to a debt.
>
> The term does not include situations in which the debt collector does not convey information regarding the debt, such as:
>
> - A request to a third party for a consumer to return a telephone call to the debt collector, if the debt collector does not refer to the debt or the caller's status as (or affiliation with) a debt collector.
> - A request to a third party for information about the consumer's assets, if the debt collector does not reveal the existence of a debt.
> - A request to a third party in connection with litigation (e.g., requesting a third party to complete a military affidavit that must be filed as a prerequisite to enforcing a default judgment, if the debt collector does not reveal the existence of the debt.)[29]

The commentary by the FTC astutely recognizes that there is no communication when a debt collector does not convey certain information about the debt. This position was reinforced by the 2013 FTC consent order with NCO which prohibited the following:

> Leaving recorded messages, such as on the voicemail, answering machine, or messaging service of any person, in which Defendants state both: (1) the first or last name of the debtor, and (2) disclose that they are a debt collector, are attempting to collect a debt, or that the debtor owes a debt. *Provided that,* Defendants may leave such a message if: (1) the recorded greeting on the messaging system discloses the person's first and last name, and only that person's first and last name, and that first and last name is the same as the person who allegedly owes the debt; or (2) Defendants have already spoken with the person on at least one prior occasion using the telephone number associated with the messaging system. *Provided further that,* Defendants may not leave such a message under any circumstances if the person has explicitly prohibited Defendants from leaving recorded messages on that phone number.[30]

However, the Third Circuit Court of Appeals took a much broader approach to the definition of "information" in *Douglass v. Convergent Outsourcing*, somehow ruling that a collection agency

[29] https://www.fdic.gov/regulations/laws/rules/6500-1325.html
[30] https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130709ncoorder.pdf

internal account number visible through the envelope of a collection letter was a disclosure that violated the FDCPA.[31]

Common sense and the FTC guidance make clear that an interaction is not a "communication" for purposes of the FDCPA unless it identifies: 1) a particular consumer, 2) a particular creditor, and 3) some other piece of information establishing that the caller intends to discuss a debt. This approach is consistent with the well-reasoned opinion of the Court in *Zortman v. J.C. Christensen & Associates*[32] in determining whether the following message constituted a communication:

> We have an important message from J.C. Christensen & Associates. This is a call from a debt collector. Please call 866-319-8619.

The *Zortman* Court examined the plain language of the statute, the history of the FDCPA and case law in concluding that the message was not a communication, explaining:

> Here, in order to fit within the "conveying of information regarding a debt" language of § 1692a(2), a third-party listener would need to make two key inferences. JCC's messages were not directed to Zortman by name. Thus, anyone who listened to the messages would not be told that Christine Zortman was being contacted in connection with a debt she owed. A person who heard the message would have to make the assumption that because it was Zortman's telephone that she was the intended recipient. But the number might have been dialed in error. The debt collector might have wrong or outdated information about the owner of the number it dialed. In a world where wrong numbers are a fact of life, the unintended third-party listener would understand that one possible explanation for the message he or she overheard might be a wrong number. Nothing in JCC's message removed that possibility. The unintended listener would then have to make a second assumption—that the only reason a debt collector calls is to collect a debt. Even if that is a common reason for calls, debt collectors also place calls to obtain location information. *See* 15 U.S.C. § 1692b. In this case, Zortman worked for a debt collector. It would not be unreasonable that a call from a debt collector related to her employment. Inferences or assumptions by an unintended listener are not "indirect communications." JCC's message is in contrast to the messages found to be violations in other cases that said the consumer's name and identified a debt. *See Branco*, 2011 WL 3684503, at *1; *Valentine*, 2010 WL 1727681, at *5; *Leahey*, 756 F. Supp. 2d at 1324-25; *Berg*, 586 F. Supp. 2d at 1339. *But see Cordes*, 789 F. Supp. 2d at 1174.

***Recommended Solution*: Affirmatively clarify the meaning of "information" by declaring that it must include all three of the following: 1) the name of the consumer, 2) the name of the original creditor, and 3) one other element conveying that a debt is owed, such as the mini-miranda**

[31] 765 F.3d 299 (3rd Circuit 2014)
[32] 870 F.Supp.2d 694 (D. Minn., 2012).

disclosure, a balance due or other clear indication of indebtedness. However, consistent with Number 4, below, disclosure of the debt collector's true legal identity or a trade name by which it is more commonly known would not, in and of itself, constitute the third element without some other clear indication that the purpose of the communication was to collect a debt.

4. Affirmatively provide that, for purposes of FDCPA compliance, disclosure of the debt collector's true legal identity or a trade name by which it is more commonly known does not constitute an unauthorized conveyance of information.

Congress did not anticipate the challenges created by the wording of the FDCPA in the context of the widespread lack of trust consumers have in today's communication channels. As a result of this lack of trust, the challenge of connecting the right consumer with a legitimate debt collector has become far more complicated than it was in 1977. While consumers demand privacy protection, the consumer demand for transparency in communications is equally as strong. Consumers want to know who is contacting them -- and why -- before making a decision whether to engage. Presently, the manner in which a collector's information appears on caller ID is inconsistent, out of the caller's control and exposes debt collectors to excessive liability.

Since the publication of the SBREFA Outline of Proposals, the proliferation of illegal and unwanted robocalls was the impetus behind a massive effort to insert call identification and blocking tools in between call originators and called parties. Hundreds of smartphone applications (apps) were developed with the goal of notifying a consumer WHO is calling, and WHY, in order to provide them with enough information to determine whether to answer a call.

Yet debt collection is the ONE INDUSTRY faced with a unique challenge in this new scenario. Under the current interpretation of the FDCPA, should one of these apps disclose on a consumer's mobile phone screen that a debt collector is calling (or texting, etc.), it could open up the collector to liability for a third party disclosure.

This potential liability caused the collection industry to propose terminology to application providers that vaguely – but accurately – describes the call. At the moment, "account servicing" has been adopted by at least one major provider. So, what happens when "account servicing" becomes synonymous with debt collection? Another term must be found? How long will it take for a clever consumer attorney to file a lawsuit against the application provider, the carrier, and the debt collector, saying his client was embarrassed because someone saw "account servicing" on her phone? Or that account servicing is somehow misleading or deceptive?

Even more concerning, debt collectors rarely control what Caller ID data or label may display when they call a consumer on a mobile device. CNAM[33] data provided by the call originator is not always displayed – or may not be displayed accurately -- either because the delivering carrier does not subscribe to the latest data, or because the consumer's device is not compatible with it. Further, generic labels may be applied to incoming calls by carriers or software companies that have no relationship with the caller. Apps or displays that provide these labels may be on the consumer's phone by default, or they may have installed them by choice. The opportunity for debt collector liability under the current regime is virtually endless.

Although there is a growing recognition by regulators and consumer advocates that collectors may not be able to be held liable for the actions of a third party – such as one that labels their calls – this does not prevent private lawsuits, and the expense of defending them.

In addition, debt collectors will face an increasingly un-level playing field, where most callers will be able to be transparent about their identity and the reason for the call, while debt collectors will have to remain evasive and shrouded in mystery. This will force legitimate debt collection businesses to appear illegitimate.

Also, contact limits (contemplated by the Bureau's 2016 Outlined of Debt Collection Proposals) will harm consumers. Due to the newly emerging issue of call blocking and labeling, if imposed, contact limits will carry even greater consequences for collectors because call originators do not know when their calls are being blocked or labeled and they may make additional contact attempts, increasing the litigation risk to collectors calling in good faith.

The broad interpretation of the FDCPA's third party disclosure rule inconveniences the vast majority of consumers who desperately seek accurate information about who is contacting them. Further, consumers need the ability to communicate about debts in their preferred channel. The more barriers regulators and the Courts erect to communications with consumers in the form of narrow interpretations of outdated laws and regulations, the more debts will end up on credit reports, turning into lawsuits, or getting re-placed with multiple collection agencies or sold because of an inability to resolve.

***Recommended Solution*: Affirmatively provide that for purposes of the FDCPA, unless otherwise prohibited by section 15 USC §1692b "Acquisition of location information," a communication occurs only if, during the course of the interaction, the fact that *this* consumer owes a debt is disclosed (emphasis added). Mere disclosure of the true legal identity of the collector or a trade name by which it is more commonly known does not constitute a communication.**

[33] CNAM ("Calling NAMe") is an outside telecom service that phone companies use to pair incoming numbers with names. Unlike phone numbers, CNAMs are not centralized databases. There are many different CNAMs a carrier can choose from. Each CNAM maintains its own private database on phone number/name pairs in the United States and abroad.

Examples:

- Displaying a caller's true identity (i.e. a company's legal name) or a trade name by which it is more commonly known on a mobile device does not constitute a communication under the FDCPA.
- An accurate "from" address using the collector's commonly used domain name on an email or a postal letter does not constitute a communication under the FDCPA.
- A limited content message (as described below) left for a consumer does not constitute a communication under the FDCPA.

5. Declare that a limited content message designed in accordance with the definition of "information" above is not a conveyance of information subject to the FDCPA's disclosure requirements.

In its Outline of Proposals released in advance of the Debt Collection SBREFA hearing, the Bureau contemplated a limited content message that can safely be left on a voicemail and not be deemed a "communication" under the FDCPA. The CRC supports such a message, but suggests expanding its use to additional channels, and also recommends that instead of mentioning the consumer's name, the message should refer to the creditor's name. This would be in alignment with the CRC's proposed definition of "information" above, and it would provide a piece of information that would be recognizable to the consumer.

The result of leaving a message with an unknown person's name and phone number is akin to having "unknown" or "potential spam" appear on a mobile phone. In today's world (which is materially different than it was just two-plus years ago in early 2016 when the SBREFA Outline was authored), this is unlikely to build trust or to elicit a response.

Especially if combined with the CRC's proposed "handshake communication,"[34] inclusion of the name of the original creditor would allow the consumer to make a more informed decision about whether to respond.

Recommended Solution: **To make it practical for collectors to initiate contact with consumers through digital channels, declare that a limited content message is not a communication subject to the disclosure requirements of the FDCPA. This message could be used, for instance, in cases where the right party contact information has not yet been confirmed. The following standard message is proposed:**

> **This is <name of person> from <company name> seeking to reach <name of consumer> regarding a matter with <original creditor>. Please contact me at <contact information>.**

[34] The CRC is currently conducting a test to measure whether consumers who receive a "handshake notice" from the creditor just prior to their account being sent to collections -- that references the name of the collector that will have their account -- will increase consumer engagement with the collector.

Note that the proposed communication is approximately 170 characters, which would vary based on the length of the name of the caller, consumer and the creditor. A single text message (SMS) now allows for 180 characters, which should be enough to accommodate most names. Our goal is to avoid the need to create channel-specific rules, as well as to avoid the need to make disclosures within a message that might force the message to exceed the permitted character length allowed.

To Summarize, CRC proposes the following solutions:

Recommended Solution 1: For purposes of the FDCPA, clarify that any written notice or communication to be sent, mailed or otherwise delivered by a debt collector to a consumer may be sent by electronic mail to an address provided by the consumer. Further, for purposes of the FDCPA, email should be given the same treatment as U.S. Postal Mail in several important ways:

5. What's inside the "envelope" is considered private.
6. The entire contents of the email (including to/from and subject fields) are considered inside the envelope.
7. There is a presumption of delivery (i.e. receipt) unless it is returned as undeliverable.
8. Just as a debt collector may rely on a postal address provided by the consumer to the creditor, a collector may also rely on an email address provided by the consumer to the creditor.

Recommended Solution 2: Provide an exemption to the E-Sign Law for the FDCPA's 1692g notice and 1692f post-dated check notice. This will help to ensure that collectors can begin an important conversation with consumers so they may make informed decisions about their debt, and will also help to ensure that consumers who prefer to communicate electronically receive their recurring payment notices in the channel of their choice.

Recommended Solution 3: Affirmatively clarify the meaning of "information" by declaring that it must include 1) the name of the consumer, 2) the name of the original creditor, and 3) one other element conveying that a debt is owed, such as the mini-miranda disclosure, a balance due or other clear indication of indebtedness.

Recommended Solution 4: Affirmatively provide that for purposes of the FDCPA, unless otherwise prohibited by section 15 USC §1692b "Acquisition of location information," a communication occurs if, during the course of the interaction, the fact that *this* consumer owes a debt is disclosed (emphasis added). Mere disclosure of the true legal identity of the collector does not constitute a communication.

Examples:

- Displaying a caller's true identity (i.e. a company's legal name) or a trade name by which it is more commonly known on a mobile device does not constitute a communication under the FDCPA.

- An accurate “from” address using the collector’s commonly used domain name on an email or a postal letter does not constitute a communication under the FDCPA.
- A limited content message (as described below) left for a consumer does not constitute a communication under the FDCPA.

Recommended Solution 5: To make it practical for collectors to initiate contact with consumers through digital channels, declare that a limited content message is not a communication subject to the disclosure requirements of the FDCPA. This message could be used, for instance, in cases where the right party contact information has not yet been confirmed. The following standard message is proposed:

> This is <name of person> from <company name> seeking to reach <name of consumer> regarding a matter with <original creditor>. Please contact me at <contact information>.