February 28, 2014

Ms. Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street, NW, Washington, DC 20552

Docket No. CFPB-2013-0033
Regulatory Identification Number (RIN) ***3170-AA41***
Debt Collection (Regulation F)

Dear Monica:

Auriemma Consulting Group (ACG) is a management consultancy focused on the consumer payments and lending arena that has been advising financial institutions, retailers, capital markets participants, and other interested parties since 1984. We provide advisory services with a specific concentration on debt collection and interact regularly with many of the major US credit card issuers and auto lenders. As such, we feel a particular obligation to provide comments on the Consumer Financial Protection Bureau's (CFPB) proposed rules for debt collection (Regulation F).

ACG seeks to comment on Parts IV and V of the Bureau's Advance Notice of Proposed Rulemaking, which address debt collection communications and unfair, deceptive, and abusive acts and practices (UDAAP), respectively. We also seek to comment on the premise that the CFPB should universalize provisions of the Fair Debt Collection Practices Act (FDCPA) to cover first- and third-party debt collectors.

This document incorporates our own comments and the comments of our clients in the credit card and auto finance industries.

Debt Collection Communications (Part IV)

Debt collection communication via traditional channels is in decline. Creditors are placing fewer calls to delinquent accounts, and a historically low proportion of calls are resulting in a conversation with customers.[1] ACG believes regulations must be updated in order to improve communication between creditors and customers.

Several factors have eroded the efficacy of communications: traditional landline phones are being replaced at an accelerated pace by mobile phones and a growing share of the population lives in wireless-only households;[2] consumer preferences are shifting rapidly from voice and paper contact to digital media (e.g., email, text messages) as those channels have proliferated; the regulatory and legislative environment has effected more conservative contact strategies, either through absolute guidance or conservative interpretation by creditors; and technology has made it easier than ever for customers to avoid collection calls.

Unsuccessful attempts to establish contact with delinquent customers, offer consultation, and pursue remedial measures may result in the creditor taking actions to mitigate losses. These actions are often severe (e.g., vehicle repossession, home foreclosure) and utilized by the creditor as a last resort following a stretch of failed contact attempts throughout the stages of delinquency. Delinquent loans can jeopardize

1 Unique RPC rate on average daily queue (outbound only) declined 10.2% year-over-year in Quarter 3, 2013 according to ACG proprietary data. Unique RPC rate is defined as the total number of outbound right party contacts (RPC) per day divided by the number of unique accounts called in the daily outbound queue.

2 Two in every five US residences (39.4%) had exclusively wireless telephones in the first half of 2013, up from 26.6% three years earlier, and approximately 38% of all adults (about 90 million adults) lived in households with only wireless telephones. Preliminary results from the January – June 2013 National Health Interview Survey (NHIS) conducted by the Centers for Disease Control (CDC).

a customer's employment, make the debt more expensive to repay, and damage the creditor's relationship with the customer.

Consumers are generally responsible and want to repay debts they incur. Unfortunately, in many cases unforeseen circumstances such as loss of employment or medical emergency make it difficult or impossible for customers to do so in the manner agreed. The global recession of 2009 introduced a massive population of individuals to delinquency, many of whom were first-time defaulters. Creditors intensified their calling strategies while consumers, embarrassed and perceiving their financial circumstances as irreparable, avoided those conversations. This breakdown in communication had considerable adverse effects. Customers' credit scores were severely damaged, creditors' losses ballooned, and both sides became more cautious of debt.

The impetus for updating regulations is clear: fostering an open environment of communication between creditors and customers has universal benefits. Communicating with the customer is the most direct way of resolving a delinquent debt. Open communication enables creditors to gather information about the customer's situation, discuss available repayment options, protect account standing, and limit negative impacts to the customer's credit. Customers who communicate openly with creditors are better equipped to resolve their delinquency. Even minor adjustments to payment terms will in many cases enable customers to bring their payments up to date, and it is in creditors' best interests to educate, rehabilitate, and maintain healthy long-term business relationships with customers.

The slow pace of economic recovery, stagnant wage growth, and persistent unemployment and underemployment mean that many consumers are still confronting financial hardship. The need for enhanced communication is stronger than ever, and policy decisions by the CFPB can play a major role in improving conditions.

Advances in Communications Technologies

Technological advances since enactment of the FDCPA have outpaced regulatory updates, obscuring the law's applicability and making it more difficult for creditors and collectors to comply. Legislation governing the industry does not account for modern technologies (e.g., Internet, mobile phones) and has become outmoded as emerging forms of contact have superseded traditional channels. Email usage by consumers has exploded.[3] Widespread use of text messaging, especially among young people, suggests there is an enormous opportunity for growth in that channel.[4] Smartphone penetration is on the rise, and the number of mobile banking users will surpass one billion in 2017, compared with approximately 590 million in 2013.[5]

Uncertainty has stymied the industry's adoption of digital channels and forced a reliance on voice and paper contact. A growing body of research suggests those methods are no longer customers' preferred modes of communication.[6] Lack of clarity has also exposed the industry to significant risk of non-compliance with key provisions of the FDCPA, including prohibitions on communicating with a debtor at an inconvenient time or place, communications with third parties, and harassment or abuse in connection with the collection of a debt. Modernization of the FDCPA is necessary to clarify and promote responsible use of newer technologies, foster productivity and efficiency in the collection process, and improve customer service by aligning communications with customer preferences.

[3] The total number of email accounts worldwide, three-fourths of which are consumer accounts, is expected to increase from nearly 3.9 billion in 2013 to more than 4.9 billion by the end of 2017. The Radicati Group, Inc. Email Statistics Report, 2013-2017. Radicati and Levenstein. April 2013.

[4] 18-29 year olds send or receive an average of 88 text messages per day. "How Americans Use Text Messaging." Pew Research. Smith. September 19, 2011.

[5] Press Release: "Mobile Banking Users to Exceed 1 billion in 2017, Representing 15% of Global Mobile Subscribers." Juniper Research. Bhas. January 2013.

[6] "Mobile Thought Leadership > US." Fair Isaac Corporation. January 2014.

Emerging data suggest that a significant population of consumers prefers to communicate with creditors and bank via digital channels; indications are that this percentage will grow. Email is the preferred channel for most banking communications, and text message alerts are growing in popularity.[7] Digital channels are particularly attractive to delinquent borrowers: they enable customers to self-serve, resolve their delinquency anonymously, and avoid potentially embarrassing interactions with collectors. Supplementing telephone strategies with more robust alternate contact channels will allow creditors to forestall repeated communications and shift more interactions to media customers prefer to use. Digital channels enable creditors to enclose information and resources that empower customers to make informed, educated decisions in resolving their payment issues.

Newer communication methods such as email and text messages allow consumers and creditors to correspond in more convenient, less costly ways than telephone and direct mail. Servicing customers who are active in digital channels is significantly less expensive than servicing non-digital customers and may lead to higher repayment rates. Development of digital channels could materially benefit all customers: efficient, effective methods of debt collection enable creditors to expand access to credit.

The Bureau should consider the industry's need for interactive communication via newer technologies, particularly via email, that is consistent with the intended use of these channels. Customers would benefit from being able to respond to messages in their respective channel and engage in two-way communication with creditors.

We believe it is possible to preserve the spirit of the FDCPA while expanding its applicability to newer technologies. The Bureau should carefully consider issues relating to the use of modern technology and seek to promote an environment of protection for consumers while clarifying application of the law for creditors and collectors.

Unusual or Inconvenient Times

Phones

Creditors have implemented tighter controls to operate within calling times prescribed by the FDCPA and developed processes that honor specific customer requests. Some creditors route these accounts to a separate queue where agents work them manually during those hours.

The proliferation of mobile phones complicates the determination of unusual or inconvenient times. We support the FTC's recommendation in the 2009 Modernization Report that the customer's mailing address on file be considered an accurate indication of time zone in determining appropriate calling hours. Collectors should be permitted to rely on information provided at application, including whether a number is a mobile phone. It should be the customer's responsibility to notify creditors if a number is ported or an address or other information on file is no longer current.

Screening for mobile phones, performed weekly, monthly, or as accounts enter delinquency, has become commonplace.[8] While screening provides an additional safeguard it is unclear whether the technology is sufficiently reliable, especially taking into account that failures in this area produce considerable risk of non-compliance.

Newer Technologies

We believe it is reasonable to apply limitations on usual times (i.e., 8 am to 9 pm local time) to text messages, as audio alerts may be disruptive and less readily disabled. Given the inherent nature of mobile phones and their proximity to customers, it is more likely for a customer to receive notification of a message at an unusual or inconvenient time.

Email is less intrusive than phone calls and text messages and, like direct mail, can be accessed by the customer on demand. Recipients are generally unaware of received messages until they access their account, removing any sense of intrusion, and remain in control of the timing of the correspondence. Further clarification regarding what is considered "disruptive" may be helpful in the context of usual times.

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[7] Ibid.

[8] 59% of creditors perform a mobile phone screen on their delinquent file. ACG proprietary data.

Communications with Third Parties

Recorded Messages

The CFPB should issue guidance on providing meaningful disclosures via a left message that takes into account third-party communication safeguards and corrects the contradiction presented by *Foti* (i.e., mini-Miranda requirement and prohibition of third-party disclosure).[9] A potential solution is to require the disclosure of the customer's name, creditor's name, reference name (name of merchant for co-branded and private label programs), and a callback number. Clarification in this area would be beneficial to creditors, debt collectors, and consumers.

Caller Identification

The purpose of using a local phone number is to improve the opportunity to establish contact with the customer. A creditor should not be prohibited from using a local number provided that creditor has an established collection center corresponding to the geography of such local number. Use of a local number should be permitted even if a particular call does not originate from that facility.

Newer Technologies

While the majority of creditors send email within Collections and coverage continues to expand,[10] treatment (i.e., message content and specificity) varies widely. Privacy and security concerns associated with email, specifically with respect to unlawful third-party disclosure, have prompted creditors to make electronic messages more secure and prevent unintended recipients from accessing them. While many creditors utilize secured messages to alleviate concerns over third-party disclosure, communications requiring further authentication and login on a web portal often have much lower rates of being opened – hindering their effectiveness.

The Bureau raises valid questions regarding email security and the potential for unintended third-party communications in the context of modern technologies. Among these questions is the extent to which an email provider's privacy policy should affect whether collectors send email to an account. Employers generally hold employees accountable for knowing and following email policies. There is no reason to shift that burden onto third parties simply because the third party is a debt collector. It is impossible for collectors to accurately differentiate between personal and business email accounts, and we are not aware of any existing technology to aid in this process. A collector can only assume, using his or her discretion, whether an email account belongs to an employer by looking at the email address; this is an unreliable method, further complicated by businesses that use email services (e.g., Gmail) with non-descript domain names. Additionally, there is no way for a creditor or debt collector to determine the privacy policies associated with an email account. It is impractical to shift the onus onto the creditor/collector in these situations.

It should be remembered that a collector is using email to contact a customer because the customer provided that email address, either to the creditor or collector directly, presumably to be able to communicate via that account.

ACG believes promoting customer education is key, and supports email authorization/opt-in from the customer with the disclosure that there is risk of unintended viewing by another party that has access to such email. We also support disclosure to customers upon providing an email address that account-specific content may be shared through that channel. The efficacy of email is derived from its ability to deliver account-specific content, including past-due status, delinquent balances, and notification of payment programs. Customers should be able to opt out at any time simply by responding to email, provided a link to unsubscribe is included along with the mini-Miranda warning. In order to mitigate identity concerns, customers should be required to confirm their email address at application.

[9] Foti v. NCO Financial Systems, Inc. 424 F.Supp.2d 643 (2006).
[10] Approximately two-thirds of creditors send email to delinquent borrowers. ACG proprietary data.

Unfair, Deceptive, and Abusive Acts and Practices (UDAAP) (Part V)

The FDCPA is intended to protect consumers against harassing debt collection practices and prescribe debt collection tactics. Key provisions of the FDCPA must be clarified to facilitate compliance with the law. Section 806(5), for instance, refers to calling repeatedly "with intent to annoy, abuse, or harass" but does not define what constitutes abusive or harassing conduct. This lack of clarity leads to non-standardized business practices and uncertainty in interpreting existing regulation.

The CFPB has created an excellent forum to accept complaints that has empowered consumers. Creditors are held accountable for their debt collection practices and regulators are made aware of customer dissatisfaction. Creditors have taken meaningful steps to ensure customers are not the recipients of harassment or abuse. The industry has been proactive even without the clarity that it so desperately needs.

Compliance programs have grown exponentially in recent years. Creditors have added layers of redundant quality control and implemented vast internal audit infrastructure. The quality of agent interactions has improved drastically. Creditors have implemented strict controls (e.g., recording and retention of calls, use of speech analytics software) to monitor for harassing and/or abusive conduct, engaged in more prescriptive vendor oversight practices, and tightened penalties for agent violations. Additionally, creditors have put in place robust internal audit programs to monitor for compliance with consumer financial protection laws and taken extreme measures to detect, correct, and prevent potential UDAAP violations.

Abusive Conduct (Section 806 of the FDCPA)

Specific Section 806 Prohibition Questions

There has been an industry-wide migration toward reduced call frequency over the past few years. Contact measures tracked by ACG show that creditors have taken meaningful steps to limit their call attempts.[11]

Creditors must consistently act in a manner that balances effective business practices with consumer sensitivity to calls. While one individual may be apathetic towards additional calls, another may feel harassed. In order to avoid disparate treatment and operate within the law, creditors must be provided clarity and definition around call frequency. Greater specificity around prohibited conduct could facilitate compliance with the law and alleviate many instances of perceived harassing behavior. However, it is important to balance the costs to creditors and ensure restrictions do not lead to unintended consequences while adequately safeguarding customers.

Massachusetts' bright-line prohibitions on repeated communications have deeply impacted the population of delinquent borrowers in that state. The extreme contact limits have led to a higher incidence of chargeoff and an increased reliance on litigation and debt sales.

Creditors have internally tested the impact of implementing similar contact restrictions portfolio-wide. Early results indicate that restricting daily attempts to five or fewer would have deep impacts on the business, including potentially severe degradation of credit losses. Tighter restrictions on communications with consumers may force creditors to file more lawsuits as an alternative method of collecting debts. In an extreme scenario, limitations could affect creditors' ability to extend credit.

It is important to reiterate that abusive and/or harassing conduct is inconsistent with creditors' purpose. The goal of every Collections department is to establish contact, resolve delinquency, and maintain healthy long-term business relationships with customers. Telephone communications are meant to retain and often save the consumer/creditor relationship. Through these telephone conversations, missed payments may be identified, programs may be offered based on need, and customer relationships are maintained.

[11] Number of attempts per account per month decreased 27% from Quarter 3, 2010 to Quarter 3, 2013. ACG proprietary data.

The CFPB should seek to find an intermediate state. If the Bureau does codify bright-line standards, we suggest that it base the bright-line on a number of contacts per period. Call frequency should focus on the duration of time between attempts. For instance, there is a significant difference between calling a customer three times *in an hour* as opposed to three times *in a day*.

"Attempts" should only include calls that are perceptible to the customer and leave a record on a caller identification system. "Contacts" should only include calls that result in a discussion with the customer or a successful voicemail message. Clarifying these terms will make it easier for creditors to determine appropriate contact policies. Additionally, it is important for the CFPB to distinguish between account- and customer-level attempts in any proposed regulation of call frequency. Setting standards at a customer level could complicate the payment hierarchy and lead to conflict among loan product types (e.g., credit card, auto loan, mortgage). Systems limitations are also likely to complicate the servicing of different product types, which may be located on different platforms that do not link together.

Communications via email are generally less intrusive than phone calls and should not be included in maximum daily attempts.

Predictive Dialers

Collectors are responsible for re-establishing contact with delinquent customers and providing services that facilitate repayment of loans, regardless of the technology utilized. In the sphere of debt collection, automated dialing systems effectively increase creditors' ability to contact delinquent customers unwilling to proactively seek assistance. Predictive/automated dialing systems create tremendous operational efficiencies that reduce creditors' cost structure and, ultimately, the cost of credit for consumers. In fact, many industries take advantage of the immense cost savings and operational efficiencies these systems provide.

Automated dialing systems remain the soundest solution for managing call attempts. The technology enables creditors to place limits on how many times a particular number or account is called during the day or month, blocks calls to customers at unusual or inconvenient times, and assists with state-specific compliance management. The vast majority of creditors have already enacted such thresholds proactively to ensure they make a reasonable effort to collect on overdue debt without approaching harassing behavior.[12] While the technology can be adapted to place limits at the customer level, such investment is prohibitively expensive and operationally difficult.

It should be noted that the most effective alternative that protects against numerous attempts is for the customer to pick up the phone on the first call.

The Telephone Consumer Protection Act (TCPA) prohibits creditors from using automated dialing systems to call mobile phone numbers without the customer's prior express consent. The TCPA's original purpose – protecting consumers from incurring charges as a result of automated calls – has been subsumed by the new goal of preventing overly numerous call attempts to a number that, generally, is directly connected to the customer. It does not change the purpose of collection calls; it merely makes the process less efficient.

Regulating which numbers can be called using an automated dialing system is counter to the growing reality of wireless-only households.[13] Even among homes with both wireless and landline service, fewer individuals are receiving calls via landlines.[14] Current regulations serve to restrict a key – and in many cases the most prominent – method of dialogue creditors have with customers. Among certain segments

[12] 89% of creditors have a daily outbound call attempt limit. ACG proprietary data.

[13] Two in every five US residences (39.4%) had exclusively wireless telephones in the first half of 2013, up from 26.6% three years earlier, and approximately 38% of all adults (about 90 million adults) lived in households with only wireless telephones. Preliminary results from the January – June 2013 National Health Interview Survey (NHIS) conducted by the Centers for Disease Control (CDC).

[14] Nearly one of every six American homes (15.7%) received all or almost all calls on wireless telephones in the first half of 2013 despite also having a landline telephone. Preliminary results from the January – June 2013 National Health Interview Survey (NHIS) conducted by the Centers for Disease Control (CDC).

of young people, nearly two-thirds of the population lives in wireless-only households.[15] With an average annualized growth rate of 34%, it is conceivable that sometime before 2020 only a minority of US adults will be living in households with a landline telephone that can be autodialed.

Deceptive Conduct (Section 807 of the FDCPA)

Other Deceptive Acts and Practices

In clarifying how FDCPA section 807(11) applies to newer technologies, the CFPB should seek to adapt disclosure requirements to account for the limits of some newer media. Text messages, which are generally limited to 160 characters, restrict creditors' ability to provide the mini-Miranda warning in the message body.[16] A potential solution is to allow the use of links in the communication that would direct the customer to a site providing the requisite disclosure. ACG advocates for consumers to be able to opt in to collector communications via text message that do not include a mini-Miranda warning or, alternately, use an abbreviated disclosure creditors could place in the message body. Any of these solutions would meet disclosure requirements while allowing the use of newer technologies.

Unfair Conduct (Section 808 of the FDCPA)

Specific Section 808 Prohibition Questions

ACG rejects the FTC's recommendation in the 2009 Modernization Report that "the law should presume that consumers will incur charges for calls and text messages made to their mobile phones, and, therefore, generally prohibit debt collectors from contacting customers via mobile phones."

Fewer customers are being charged based on the number of calls or text messages received or the time spent on mobile phone calls as unlimited voice plans have proliferated. Carriers expect to replace plans that let contract subscribers buy only the number of minutes they need with unlimited-only calling plans.[17] Many carriers now offer voice plans with unlimited minutes to consumers that also purchase data services.[18]

When it comes to text messages, creditors utilize free-to-end-user services to ensure customer do not incur charges when receiving these communications.[19]

For calls to mobile phones lacking the requisite consent, creditors adhere to strict requirements. In accordance with FCC guidance,[20] any law or regulation from the CFPB should permit creditors to accept express verbal consent and/or implied consent when a customer provides a mobile phone number on a credit application. Participants have updated their applications with the appropriate disclosures in accordance with FCC guidance, which maintains that express consent is implied when a mobile phone number has been provided by the customer for use in normal business communications.

ACG believes the CFPB should allow for the autodialing of all telephone numbers provided by the customer without byzantine consent requirements. Regardless of whether it is at application or during the course of normal business, once the number is provided by the customer to the creditor, that number should be considered a viable option for collection. We agree that numbers obtained through skip tracing

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[15] Nearly two-thirds of adults aged 25–29 (65.6%) lived in households with only wireless telephones in the first half of 2013. Preliminary results from the January – June 2013 National Health Interview Survey (NHIS) conducted by the Centers for Disease Control (CDC).

[16] FDCPA section 807(11) requires in the collector's initial communication what is often called a "mini-Miranda" warning, in which the collectors state that they are attempting to collect a debt and any information obtained will be used for that purpose.

[17] Greg Bensinger, Wireless Carriers' Next Move: One Choice for Voice, Wall St. J., Jun. 5, 2012

[18] CTIA Files Comments on State of Mobile Wireless Competition. http://www.ctia.org/docs/default-source/fcc-filings/ctia_final_mobile_competition_report_comments_061713__as_filed_.pdf?sfvrsn=0

[19] 100% of creditors that text delinquent customers use vendors that warrant text messages are free to end user (FTEU). ACG proprietary data.

[20] Under the final rule adopted by the FCC in February 2012, autodialed or prerecorded collection calls and other "informational" non-sales calls to wireless numbers using such methods will not require a signed written agreement from the consumer, as had been proposed. http://www.fcc.gov/document/fcc-strengthens-consumer-protections-against-telemarketing-robocalls-0

efforts or from a third-party supplier (e.g., LexisNexis) should not be autodialed without prior express consent from the customer after right party contact has been established.

First and Third Parties

ACG does not support the premise that the CFPB should universalize first- and third-parties under the FDCPA. First-party creditors have a fundamentally different relationship with customers than third-party debt collectors. It is in first-party creditors' best interests to educate, rehabilitate, and maintain healthy long-term business relationships with customers; abusive and/or harassing conduct is contrary to this purpose. It is also important to highlight the major differences between pre-chargeoff collection activities and post-chargeoff recovery activities and the unique imperatives associated with each.

First-party creditors already comply voluntarily with many provisions of the FDCPA they view as consistent with sound business practices. However, expanding the scope of the FDCPA in certain contexts is likely to lead to unintended consequences including higher cost to service accounts.

It is unnecessary to apply debt validation requirements universally. The original purpose of debt validation by third parties was to reduce the incidence of debt collectors sending collection notices to the wrong person or attempting to collect previously paid debts. Extending debt validation requirements to first-party creditors would have major implications in terms of response time, staffing, infrastructure needs, and other resources that would need to be dedicated to the purpose of verification. Additionally, it could make customers more likely to use debt validation as a delay tactic.

FDCPA section 807(11) declares it to be a false, deceptive, or misleading representation for collectors to fail to disclose that a communication is from a debt collector. Universal application of mini-Miranda warning requirements would also have major implications, perhaps most immediately in terms of call handle times.

The CFPB should take into account the nuances of first- and third-party collectors and develop standards that avoid blanket application of FDCPA provisions.

Conclusion

We recognize the need for the Bureau to clarify the FDCPA's applicability and facilitate compliance with the law in the context of debt collection communications and unfair, deceptive, and abusive acts and practices. We believe it is possible to maintain the spirit of legislation governing the industry while expanding its applicability to emerging modes of communication. Modernization is necessary to promote responsible use, foster efficient, effective methods of debt collection, and improve customer service. The Bureau has the opportunity to advance the industry beyond the status quo. In setting new standards, the Bureau should seek to promote an environment of protection for consumers and maximum clarity for creditors and collectors.