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CFPB Debt Collection Rulemaking: Bringing Social Media Into the Mix

By Christopher J. Willis and Stefanie H. Jackman

Social media, along with other newer communication technologies that post-date the Fair Debt Collection Practices Act's enactment, such as e-mail and text messaging, can provide for easy and reliable methods for consumers and collectors to communicate. Indeed, social media appears to be one of the preferred communication methods today, particularly among younger consumers. The ways in which we utilize social media tools such as Twitter, Facebook, LinkedIn, Instagram and YouTube continue to evolve every year. Therefore, it makes sense that the debt collection industry might begin thinking about ways to use social media as a tool to facilitate the resolution of consumer debts.

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On Feb. 28, 2014, the comment period officially closed on the Advance Notice of Proposed Rulemaking (ANPR) published by the Consumer Financial Protection Bureau (CFPB) with regard to debt collection.[1] One of the specific areas in which the CFPB solicited comments concerned the use of social media in connection with debt collection efforts. The ANPR reflects that the CFPB expects that social media will be (or already is) being used by the collection industry, as there are a number of questions in the ANPR aimed specifically at gathering information about how social media is used in connection with collection efforts.

Interestingly, despite increasing consumer use of social media, as well as the CFPB's belief that social media is already being used in connection with collection efforts, we do not yet see widespread use of social media by the collection industry. Telephone calls and letters still seem to be the predominant methods by which collectors communicate with consumers, with some e-mail and text messaging starting to emerge. However, to the extent that social media becomes an even more widely utilized and accepted method of communication in the future, particularly by younger consumers, social media may become the preferred communication method by enough of the consumer population such that creditors and collectors will have no choice other than to utilize social media in order to accommodate consumer preferences. Therefore, it is important for the collection industry to have clear guidelines about how social media can be used to assist consumers in resolving their debts in a manner that both respects the consumers' wishes with regard to how they will communicate with collectors, as well as the law.

Based on our experience representing creditors and collectors in connection with CFPB enforcement investigations and private litigation, and the industry's comments to the ANPR, the collection industry as a whole welcomes the opportunity to collaborate with the CFPB and supports implementing certain safeguards for consumers with regard to social media. This article focuses in particular on the comments submitted in response to the ANPR that relate to social media, and not text messages and e-mail. And while consumer groups did not widely comment on the social media issue, members of

[1] Debt Collection (Regulation F), 78 Fed. Reg. 67,848 (proposed Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-11-12/pdf/2013-26875.pdf.

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the collection industry submitted a number of comments with regard to the social media-related questions posed by the CFPB, many of which show a congruence with consumer interests. In short, the industry as a whole seeks to accommodate the growth of social media and related consumer preferences in the future in connection with its collection efforts.

■ **Summary of the CFPB's Social Media-Related Requests**

The CFPB included the following requests for comments relating to the use of various social media technologies that now exist in the marketplace:

- Whether the CFPB should clarify the extent to which the FDCPA applies to social media (Question 54 in the ANPR);
- The types of compliance issues/complications that social media present for consumers and collectors, including privacy concerns (Question 56);
- The costs and benefits of collectors including the mini-Miranda disclosure when they send communications to consumers via social media (Questions 57, 88, and 107);[2]
- Whether there should be limits on the number of times collectors can contact consumers via social media and should consent be required to use such methods of communication (Questions 66, 89, and 97);
- Should the CFPB update the FDCPA's prohibition on publishing lists of known debtors to cover social media (Question 94)?

Each of these questions, including the industry's position in response, is explored in more detail below. But in general, it is essential that the CFPB enact narrowly tailored rules and regulations that give due consideration to the choices of consumers with regard to their preferred methods of communication, as well as enable collectors to respect the same in a compliant and cost-efficient manner. Moreover, it should be the CFPB's goal to facilitate consumer communications with collectors, because this increases the opportunities for consumers to resolve their debts amicably and without further collection activity. Creditors and collectors should be encouraged to utilize the consumer's preferred communication method in order to make the debt resolution process work in the easiest and most efficient way possible for each individual consumer.

– ***Whether to amend the FDCPA to clarify its application to social media.***

The CFPB should absolutely clarify the extent to which the FDCPA applies to the use of newer technologies, such as social media.[3] In general, responsible collectors have to tread cautiously into this emerging communication arena because of the uncertainty of how the FDCPA might be applied to technologies not envisioned when the FDCPA originally was passed.[4] While the industry expects that the FDCPA does apply to consumer communications made via social media, guidance is needed from the CFPB on exactly how the industry can utilize social media in a compliant manner that will allow it to accommodate consumer requests to be contacted through such channels.[5] The industry is unlikely to venture into this area without some assurance of how it can do so without exposing itself to the potential for litigation.[6] Until the industry has some sense of the CFPB's position on the use of social media in the collection process, the industry will likely continue to avoid social media and instead contact consumers using more traditional communication methods, such as letters and telephone calls, despite potential contrary consumer preferences. At the same time, the CFPB must be sensitive to appropriately tailor any new rules or regulations to the specific circumstances of any perceived problem areas to ensure those changes do not make it too difficult or costly for the industry to comply. Imposing unnecessary or costly burdens on the industry in connection with using social media will cause the same result and leave consumers unable to take advantage of social media in connection with resolving their debts when it would be preferable for the consumer to do so.[7]

– ***Whether to require consumer consent to social media communications.***

The impetus for any interest by the collection industry in using social media will be consumer preference. If a consumer prefers to be contacted through Facebook or LinkedIn because that is the best way to reach the consumer, then a creditor or collector should be able to honor that request from the consumer. Accordingly, as reflected in many industry comments in response to the ANPR, consent should be obtained from the consumer for the collector to contact the consumer through social media channels.[8] This will ensure that the use of social media is per the consumer's preference, not pursuant to some other motivation or purpose.

Further, once consumer consent is obtained, creditors and collectors can take appropriate steps to ensure that any communications with consumers via social media are conducted privately.[9] Or, the consumer can elect to waive certain or all privacy protections, should the consumer so choose.[10] Consumer consent to social me-

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[2] In the context of debt collection, the mini-Miranda disclosure is a statement that the debt collectors are required by the Fair Debt Collection Practices Act to include on communications with debtors informing those individuals that the communication is from a debt collector and that any information will be used to assist in collecting the debt.

[3] ACA International, ANPR Response 24, 39 (Feb. 27, 2014), *available at* http://www.acainternational.org/files.aspx?p=/images/31323/aca-anpr-comments.pdf (ACA Response); American Bankers Association, Consumer Bankers Association and Financial Services Roundtable, ANPR Response 28 (Feb. 28, 2014), *available at* http://www.aba.com/Advocacy/commentletters/Documents/clDebtCollection2014Feb.pdf (ABA/CBA Response); AARP, ANPR Response 3 (Feb. 25, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=CFPB-2013-0033-0228.

[4] *See* Consumer Relations Consortium, ANPR Response 39 (Feb. 26, 2014), available at http://www.regulations.gov/#!documentDetail;D=CFPB-2013-0033-0241 (CRC Response).

[5] *See, e..g.*, ACA Response, at 24; ABA/CBA Response, at 25; CRC Response, at 39.

[6] *See* ACA Response, at 24 (stating that debt collectors would welcome using new technologies for communication with consumers, including social media, but need to be authorized by regulation to do so); CRC Response, at 39 (same).

[7] *See* ABA/CBA Response, at 24.

[8] *See, e.g.*, CRC Response, at 39, 67; ABA/CBA Response, at 25.

[9] *See* CRC Response, at 40; CRC Response, at 75.

[10] *See* CRC Response, at 40.

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dia communications may also help to alleviate some of the other compliance risks relating to the FDCPA's identification and mini-Miranda requirements and prohibitions on third-party disclosures.

With regard to what constitutes ''consent,'' if a consumer provides an e-mail address linked to a social media account to the creditor or collector in the consumer's initial credit application on the account, or in some subsequent written communication, that should constitute sufficient consent for the creditor or collector to contact the consumer at that address.[11] Similarly, if a consumer initiates contact with a debt collector via social media, the debt collector should be permitted to respond using the same form of communication.[12] By promulgating unnecessary or overbroad rules governing collections-related contacts, the CFPB risks inhibiting the ability of collectors to communicate with consumers, which may result in *more* customer accounts in collections for longer periods of time.[13]

– Limits on the number/types of communication attempts via social media.

As a general matter, it does not appear that the CFPB needs to enact any specific limits on the number of times a collector can attempt to contact a consumer via social media. Social media is more akin to a communication via postal mail (for which there are no such limits) in that both are visual modes of communication that can be read at the consumer's convenience (or not at all).[14] Both also are far less disruptive than phone calls, because consumers control when—and whether—to open them.[15] It also is doubtful that any legitimate collector would send repetitive, harassing messages to consumers using social media.[16]

An arbitrary rule that unduly restricts contact through consumers' preferred communication channel, such as social media, will not only frustrate those consumers' desires, but also likely prevent contact with many of them altogether.[17] In turn, that may reduce consumers' ability to communicate with collectors in order to resolve their debts and impose further negative consequences, such as credit reporting or litigation.[18] However, if the CFPB is concerned about the potential for abuse by a small segment of the collection community by the use of repeated text, social media or e-mail messages, perhaps a modest limitation on such messages of two messages per week, per method of communication, would be appropriate.[19]

With regard to the CFPB's questions about whether to impose particular time or frequency limits to social media specifically, it should be noted that the FDCPA does not provide a framework for a consumer to opt out of specific communication methods or to limit some more than others.[20] Rather, the FDCPA only provides consumers with the ability to opt out of all collection communications altogether.[21] The CFPB should not modify the FDCPA to allow consumers to opt out of, or otherwise limit, only certain methods of communication over others, because this would likely prove impractical and extremely expensive to comply with.[22] For example, the operating systems used by most debt collectors do not have functionality that would allow consumers to restrict the specific times or methods of contact based on the type of contact being attempted by the collector, whether through social media or otherwise.[23] To accommodate such requests, creditors and collectors would have to invest in expensive system modifications, or attempt to manually note and follow such limitations, which would be impossible to do on a consistent basis. This reality likely explains the resistance observed in the industry's comments to the ANPR with regard to this topic.[24] The collection industry as a whole is investing a great deal of time and resources in updating its compliance systems. Oversight–imposing additional costs through broad regulations that are not supported by the text of the FDCPA risk ripple effects that ultimately may restrict consumer credit because the collection-related costs have to be recouped somewhere in the process in order for the credit and collection industry to remain in business.

– How to protect against third-party disclosures.

At first glance, the risk of improper third-party disclosures through the use of social media seems self-evident (e.g. posting a debt collection communication on a consumer's wall, timeline, etc.).[25] In reality, protecting against third-party disclosures in connection with social media does not pose any more of a challenge than doing so in the context of postal mail. Accordingly, consumer communications via social media should be treated like postal mail communications as contemplated by the FDCPA (e.g., posting on a consumer's wall is akin to sending a postcard, which is prohibited by the FDCPA).[26] This also is another reason why requiring consumer consent to social media communications makes sense, because once such consent is obtained, steps can be taken to ensure that any communications with consumers via social media are conducted privately, or a consumer can elect to waive certain or all privacy protections.[27] Similarly, the CFPB could allow collectors to send secure links or use other methods of leading a consumer to information that only the consumer could view—again, the third party disclosure risk would be no greater than with ordinary mail.[28] However, ultimately, if a consumer requests that a collector communicate via social media, the CFPB should take care to avoid imposing the risks of third-party disclosure on the collectors, so long as the collector takes rea-

[11] *See* ABA/CBA Response, at 25.
[12] *See* ACA Response, at 24, 28.
[13] *See* ABA/CBA Response, at 24.
[14] *See* ACA Response, at 28, 40; ABA/CBA Response, at 30; American Financial Services Association, ANPR Response 19 (Feb. 28, 2014), available at http://www.regulations.gov/#!documentDetail;D=CFPB-2013-0033-0298 (AFSA Response).
[15] *See* ACA Response, at 40; ABA/CBA Response, at 30.
[16] CRC Response, at 71; *see also* ABA/CBA Response, at 30.
[17] *See* CRC Response, at 71.
[18] *See* ABA/CBA Response, at 30.
[19] *See* CRC Response, at 71.
[20] *See* ACA Response, at 37.
[21] *Id*.
[22] ACA Response, at 37; AFSA Response, at 23; CRC Response, at 62.
[23] *See, e.g.*, CRC Response, at 62.
[24] *See generally supra* notes 12-23.
[25] *See* ACA Response, at 25, 37; *see also* CRC Response, at 57.
[26] *See* ACA Response, at 25, 37; *see also* CRC Response, at 57.
[27] *See* CRC Response, at 40; CRC Response, at 75.
[28] *See* CRC Response, at 75.

sonable precautions to prevent any disclosure prior to sending the communication.

– ***Disclosure challenges and how to provide the mini-Miranda.***

Assuming collectors are permitted to send confidential social media communications to consumers with the consumers' consent, there also does not appear to be any challenge with regard to including the mini-Miranda disclosure in such communications. Unlike a text message, there generally are not any character limitations with respect to social media and e-mail communications.[29] So, other than protecting against third-party disclosures, there do not appear to be any other unique challenges.[30]

Nevertheless, the CFPB should consider allowing consumers to opt-out of receiving the mini-Miranda disclosure.[31] This actually could be useful in the context of social media because omitting the mini-Miranda disclosure from subsequent social media communications provides one additional protection against third-party disclosures of the debt. In this day and age, most consumers are familiar with and understand the concept of the mini-Miranda. Accordingly, consumers should be permitted to ask a collector to stop including that statement in future communications, if they so choose.

– ***Updating the debtor list publication prohibition.***

Finally, there is no need for the CFPB to update the FDCPA's prohibition against publishing lists of known debtors in connection with social media communications.[32] It is self evident, even without any rulemaking by the CFPB, that a public message (e.g., posting a message on a consumer's Facebook timeline) would be a third-party disclosure of a debt, and therefore prohibited by the FDCPA.[33] The industry's comments in response to the ANPR recognize this, which is why they propose approaches aimed at ensuring this would not happen (i.e., obtaining consumer consent and sending only private messages to consumers relating to their debts).[34]

■ **Where should the CFPB go from here?**

There is no doubt that the debt collection rules need to be modernized to allow for the use of newer technologies in the same way the FDCPA anticipated debt collection communications via telephone and postal mail. In doing so, the CFPB must strike an appropriate balance between regulatory reform, respecting consumer choice and maintaining a competitive collection market that will ensure the availability of credit for consumers. It is essential that the CFPB avoid implementing unnecessary regulations and rules that will unduly burden legitimate and compliant members of the collection industry. Legitimate debt collection businesses should not have to endure the burden of unnecessary or overly restrictive regulations in this area. Further, the CFPB should be mindful that many consumers, particularly younger consumers, prefer to communicate via e-mail, social media messaging, text messaging or through websites, so care must be taken not to limit unnecessarily this communication channel. The cornerstone of any guidance from the CFPB should focus on the concept of respecting the consumer's choice of communication channel and focusing on how to integrate, rather than discourage, the use of such media as another touch point between consumers and collectors that can be used to assist consumers in resolving their debts.

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[29] *See* ACA Response, at 44.
[30] *See id.*, at 25, 37; *see also* CRC Response, at 57.
[31] *See* CRC Response, at 75.
[32] *See* ACA Response, at 39; CRC Response, at 67.
[33] CRC Response, at 67.
[34] *See, e.g.*, CRC Response, at 57, 67, 71; ACA Response, at 24; ABA/CBA Response, at 25.

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