

Comments of the Privacy Rights Clearinghouse

Federal Trade Commission Debt Collection 2.0

Project No. P114802

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The Privacy Rights Clearinghouse (PRC)¹ appreciates the opportunity to comment on debt collection practices and ways to protect consumer privacy as technologies change. These comments are submitted in response to the Federal Trade Commission's (FTC or Commission) Federal Register notice published March 15, 2011, and the subsequent workshop held on April 28, 2011.²

We direct our comments as follows:

1. Introduction
2. Information Technology -- Finding the Right Person
3. Communications Technology – Contacting the Right Person
4. Debt Verification and the Resale Market
5. FDCPA Enforcement
6. Conclusions and Recommendations

1. Introduction

The Fair Debt Collection Practices Act (FDCPA), enacted in 1977, not only sets standards of conduct for debt collectors but also incorporates measures to assure that consumers are treated with fairness and respect. In recognizing that a consumer's debt is a personal matter, something that could cause embarrassment, ridicule, even the loss of a job, the FDCPA was ahead of its time in protecting personal privacy.

The FDCPA principles of privacy and fair play are as valid today as in 1977. However, the revolution in technology, the explosion of the resale debt market, and the Commission's lack of rulemaking authority have all contributed to the alarming and steady increase in abusive debt collection practices. The FDCPA, with all of its good

¹ The Privacy Rights Clearinghouse is a nonprofit consumer education and advocacy organization based in San Diego, CA, and established in 1992. The PRC advises consumers on a variety of informational privacy issues, including financial privacy, medical privacy and online privacy, through a series of fact sheets as well as individual counseling available via telephone and e-mail. It represents consumers' interests in legislative and regulatory proceedings on the state and federal levels. Privacy Rights Clearinghouse, www.privacyrights.org (last visited May 26, 2011).

² Public Workshop: Debt Collection 2.0: Protection Consumers as Technologies Change, 76 Fed. Reg. 14010, Mar. 15, 2011, *available at* <http://www.ftc.gov/os/fedreg/2011/03/110310debtcollectiontechnologies.pdf>

intentions, has not kept pace with changes in the debt collection industry. An overhaul is long overdue.

In July 2011, the Consumer Financial Protection Bureau (CFPB) will assume concurrent responsibility along with the FTC for enforcing the FDCPA.³ To address the many issues, Congress should amend the FDCPA to recognize the current state of communications and tracking systems. At a minimum, Congress should give the FTC concurrent rulemaking authority so the Commission can interpret the 1977 law in the context of today's technology. If Congress fails to act, the Commission and the CFPB should provide guidance for debt collectors and consumers about how the agency relates current technology to the existing law.

2. Information Technology-- Finding the Right Person

Key to protecting consumer privacy is that debt collectors contact the person claimed to owe the debt. It's not easy to hide these days. A keyboard and Internet access is all it takes for the average person to find their high school sweetheart, an old friend, or a long-lost relative. Even a simple Internet search can reveal an individual's age, address, former address, telephone number, relatives, spouse, home value, email address, employer, and much more.

Debt collectors today have access to technologies that go far beyond what is available to the average person. As workshop participants discussed, collectors accumulate and compile information from a variety of sources, including public records, skip-tracers, and private databases. In addition, collectors may compile extensive dossiers on a consumer from commercial data brokers that include information such as buying habits and magazine subscriptions that seem unrelated to debt collection.

Along with information available from the Internet, public records, and private data bases, debt collectors have available the consumer's Social Security number, the key to tracking any individual. The Fair Credit Reporting Act (FCRA) also gives collectors the right to access a consumer's credit report. In addition, the credit bureaus now offer new products for sale to debt collectors. Account monitoring products alert the debt collector to certain "trigger" events such as a change of address or telephone number, application for new credit, or a new mortgage. Credit bureaus also sell collectors "recovery scores" indicating the likelihood of collecting from specific accounts by combining consumer data with analysis.⁴ The credit bureaus sell this personal data to debt collectors, all without consumer transparency.

³ See FTC, ANN. REP. 2011: FAIR DEBT COLLECTION PRACTICES ACT, at 19, *available at* <http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf> [hereinafter *2011 Report to Congress*].

⁴ See e.g., TransUnion, Collections homepage: http://www.transunion.com/corporate/business/collections/collections_landing_page?portal=y&ref=c (last visited May 26, 2011).

A common complaint against debt collectors concerns persistent contact with a person who does not owe the debt. Recent lawsuits filed by the FTC against debt collectors have involved such allegations.⁵ Similarly, complaints of debt collectors contacting the wrong person are consistently among the top ten reasons consumers contact the PRC.

With all of the tracking tools available to collectors, why the wrong consumer is persistently contacted is beyond explanation. Workshop participants discussed reasons why consumers might be contacted after denying the debt and failing to receive verification. One reason given is that a consumer wrongly targeted may have his or her name removed from the tracking database. However, the information is not permanently scrubbed and contacts are resumed when a new collector takes over. This is, at best, a meager excuse for repeatedly contacting, without account verification, consumers who claim not to owe the debt. At worst, it suggests a strategy by some collectors to bully consumers into paying a debt, whether it is legitimate or not.

Several workshop participants made it a point to say that collectors only want to contact the right person. Even so, the reality is that thousands of consumers have complained about unwarranted contact, and the likelihood of such unwarranted contact will increase as collectors use social media as a tool to locate alleged debtors. Whether such contacts stem from failure to scrub inaccurate information or a blatant disregard for the FDCPA, the collection industry must take steps to stop this unacceptable harassment of innocent consumers. If the industry fails to weed out its own bad actors, government agencies must become more aggressive in stopping these abusive practices.

3. Information Technology – Contacting the Right Person

Advances in technology have given debt collectors an array of contact methods that were beyond contemplation when the FDCPA was passed in 1977. A most striking example of new technologies involves the telephone. Today, most consumers have a mobile phone as well as some means to record incoming messages, whether on a mobile phone or a land line. Collectors often use autodialing technology to leave a recorded message. Or, as frequently happens with auto dialers, the consumer's telephone number rings and no one is on the other end to proceed with the call. Email, text messaging, and social networking websites are also means of contact collectors may now use to reach consumers.

⁵ In March 2011, the FTC filed a lawsuit against West Asset Management after receiving thousands of consumer complaints about multiple calls, often involving accounts that did not belong to them. *See* News Release, FTC, Leading Debt Collector Agrees to Pay Record \$2.8 Million to Settle FTC Charges (Mar. 16, 2011), available at <http://www.ftc.gov/opa/2011/03/wam.shtm>.

In October 2010, the FTC charged Allied Interstate, Inc., “one of the nation’s largest debt collectors,” with, among other things, repeated telephone calls to the wrong person. *See* News Release, FTC, Debt Collector Will Pay \$1.74 million to Settle FTC Charges (Oct. 21, 2010), available at <http://www.ftc.gov/opa/2010/10/alliedinterstate.shtm>.

In March 2010, the FTC charged Credit Bureau Collection Services with “pressing consumers to pay debts they often did not owe.” *See* News Release, FTC, Debt Collectors Will Pay more than \$1 Million to Settle FTC Charges (Mar. 3, 2010), available at <http://www.ftc.gov/opa/2010/03/creditcollect.shtm>.

No matter what technology the collector chooses as the means of contact, all have the potential to cause unwarranted privacy invasions unless the consumer specifically chooses the means of contact. For example, a collector may leave a voice mail message or contact an email address. However, without the consumer's express consent, the collector has no way of knowing whether the message may reach a roommate or some other member of the household.

Communicating with consumers via social networking websites can be particularly risky as far as consumer privacy is concerned. It is possible, depending on a consumer's privacy settings and how the collector proceeds, that a collector may contact him or her in a manner that may be seen by relatives, close friends, casual acquaintances, co-workers, or even the general public. Collectors may even be tempted to contact members of an alleged debtor's network.⁶ The FTC should consider how or whether the FDCPA adequately applies to debt collectors' use of social media in locating and communicating with alleged debtors.

According to the FTC's latest report to Congress on the FDCPA, consumer complaints about repeated calls to third parties and improper calls to the consumer's place of employment have increased dramatically in the last year alone.⁷ Family members, friends, neighbors or others, the FDCPA says, should be contacted only once and then only to learn where the "debtor" can be found. That the person is claimed to owe the debt or even that the contact is from a debt collector should never be discussed with third parties.⁸ Nor, says the FDCPA, should a debt collector contact a person at work unless notified that it is alright to do so.⁹

Third-party contacts and improper calls to a place of employment should be the last resort and only used when all other location efforts have failed. Few consumers, we believe, would choose to have their private business aired through public forums, overheard messages, or calls to friends, family members and employers. If given the choice of contact and assuming the debt was legitimate, it makes sense that most consumers would communicate more openly with debt collectors.

⁶ At least one court has held that a debt collector's attempt to contact a consumer on a social networking website violates the FDCPA. *See e.g.* Sarah Lundy, *Debt Collectors must tread lightly on social media*, ORLANDO SENTINEL, Apr. 17, 2011, http://articles.orlandosentinel.com/2011-04-17/news/os-law-and-you-facebook-20110417_1_debt-collectors-mark-schiffman-jeff-happenstance (last visited May 26, 2011).

⁷ Repeated calls to third parties accounted for 21.8% of complaints received by the FTC in 2010 as compared to 19.2% in 2009. Improper calls to employment sites accounted for 15.6% of consumer complaints in 2010 and 13.6% in 2009. 2011 Report to Congress, *supra* note 3, at 21.

⁸ Fair Debt Collection Practices Act, 15 U.S.C. § 1692(b)(2)-(3).

⁹ *Id.* at 1692(c)(3).

4. Verification of Debt and the Resale Market

A significant change in the collection industry in recent years is the market for purchasing and reselling old debt.¹⁰ Collectors who buy old debt attempt to collect debts up to 14-years-old.¹¹ As the debt ages, the margin for profit decreases which, in turn, may escalate aggressive efforts to collect the debt.

Consumers faced with a collector attempting to collect an old debt are at a particular disadvantage. For example, the debt may have been long paid but the consumer did not retain the necessary documents. As is often the case, collectors ignore requests for verification of the debt. Furthermore, the collector may not even have the information necessary to verify the debt. Creditors, without a required retention period, may have no incentive to retain information necessary to verify the debt.

Consumers who are claimed to owe an old debt are disadvantaged in other ways as well. Collectors, even without the means to verify a debt, may still access a consumer's credit report. Although an old debt disappears from the credit report after seven years, collectors may still access the reports to gain personal information about the consumer. Credit bureaus, too, play a part in unfair treatment of consumers by monitoring credit reports and reporting to collectors about the consumer's active accounts, changes in status, or life events. The debt's age or whether the debt can be shown to be legitimate is apparently not a consideration when credit bureaus market their byproducts to collectors.

Because consumers experience unique problems when faced with collection of an old debt, regulators should adopt rules and guidelines specific to this segment of the industry. For example, rules should be adopted to require that the original creditor and subsequent collectors possess information necessary to verify the debt before the debt can be sold or resold.

Agency rules and guidelines should give consumers the fundamental right to request a breakdown of fees, charges and the original debt. It is only fair that consumers receive such an accounting because when old debt passes from one collector to another arbitrary charges and fees may be added that far exceed the original debt. In short, when consumers are asked to pay a debt, they should be entitled to know what they are being asked paying for.

Consumers deserve the right to notice each time their debt is sold and the right to dispute that debt each time it lands in the hands of a new collector. In all fairness, they should also receive specific notice regarding the age of the claimed debt and whether the account is too old to appear on the consumer's credit report. Additionally, consumers should be entitled to know when their state's statute of limitations has passed and the collector

¹⁰ See FTC, *Collecting Consumer Debt: The Challenges of Change*, Workshop Report, Feb. 2009, at 13 [hereinafter *2009 Workshop Report*], available at <http://ftc.gov/bcp/workshops/debtcollection/dcwr.pdf>.

¹¹ See e.g., Lucy Lazarony, *Dealing With Old Debt*, Bankrate.com, (quoting GERRI DETWEILER, *THE ULTIMATE CREDIT HANDBOOK*, 1993)

cannot file a lawsuit, and also be made aware that payment of any portion of the debt may reactivate an account so that the account may reappear on the credit report.

5. FDCPA Enforcement

As the Commission has stated, “In enacting the FDCPA, Congress made clear that the FDCPA was intended to be a “primarily self-enforcing” statute, with private individual and class actions providing collectors with a powerful incentive to comply with the statute.”¹² In reality, the consumer’s right to sue a debt collector is often not as valuable as it seems on paper.

First, the potential recovery of “actual damages” plus \$1,000, while perhaps adequate in 1977, is not nearly enough in today’s dollars to justify the stress, time lost, cost, and risk of further intimidation associated with litigation. In addition, mandatory arbitration has left the consumer without the right to have his day in court. The current sentiment against class action lawsuits also works against consumers seeking redress against abusive debt collectors.

Second, the amount of debt claimed may also hinder a consumer’s ability to seek relief in the courts. Even a small debt can be reported to the credit bureaus, causing the credit score to plummet. But, no matter how damaging to the credit rating, a small debt or several small delinquent debts to different creditors may not justify the cost of an attorney. For attorneys, even the most egregious case, might have to be turned down if the costs involved exceed the potential recovery.

Consumers faced with the realistic obstacles to litigation may become easy targets for unscrupulous debt collectors. The consumer may very well decide to pay the debt, even if the debt was previously paid or is not even his to pay.

Certainly, the FTC cannot file lawsuits against any but the most blatant collection abuses. However, authority for state Attorneys General to bring an action under both state collection laws and the FDCPA would increase the potential for enforcement through the courts. Revisions to the FDCPA to increase potential damages would also encourage more consumers as well as attorneys to file actions against egregious violations of the law.

6. Conclusion and Recommendations

The CFPB and the FTC should coordinate efforts and, as appropriate, seek additional authority from Congress to regulate and enforce the debt collection industry. In addition, the agencies should adopt rules and produce guidance to address today’s technology.

The agencies should seek revisions to the FDCPA to:

- Give state AGs the authority to bring an action under both state and federal collection laws.

¹² See 2009 Workshop Report, *supra* note 10, at 66.

- Promote private litigation as an increased enforcement tool.
- Increase penalties for private litigants.
- Give the U.S. Department of Justice and state justice officials the authority to file criminal charges in an appropriate case. Actions should be allowed against both the debt collection company and the company's employees.
- Regulate and oversee the debt resale market.

Debt resale market:

- No debt should be sold without adequate information to contact the right consumer
- Require that creditors passing debt to a collection agency retain information necessary to verify the debt indefinitely.
- Require a breakdown of fees, charges and original debt.
- Require notice to the consumer each time the debt is sold.
- Give consumers the right to dispute debt and require additional information at the time debt is sold.
- Require debt collectors to notify consumers when the statute of limitations to sue has passed.
- Right to notice that even partial payment may "reactivate" the debt and that an old debt may reappear on the consumer's credit report as an active account.

Respectfully Submitted,

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