Debt Collection in the Information Age: New Technologies and the Fair Debt Collection Practices Act

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Debt collectors are increasingly using internet and mobile technologies as part of the debt collection process. While these technologies may provide conveniences for collectors and consumers alike, they also create the potential for new forms of deception and raise novel privacy concerns. Much of the problem lies in the failure to update the Fair Debt Collection Practices Act (FDCPA). Despite the dramatic transformation of the debt collection industry over the last thirty years, the statute has remained largely backward looking, even in the face of calls to modernize the act from regulators, industry representatives, and consumer advocates.

Recently, this landscape has undergone a fundamental change. Congress vested the newly created Consumer Financial Protection Bureau (CFPB) with rulemaking authority over the FDCPA. This marks an opportunity to address the pressing problems raised by debt collectors' use of new and emerging technologies, and to provide guidance regarding what protections are necessary in order to preserve consumer privacy and prevent harassment. In some cases, the challenges raised by new technology can be sufficiently resolved through the current FDCPA framework, while in other areas, reform is sorely needed.

This Comment outlines the challenges new technologies pose, analyzes the areas of tension that cannot be resolved under the current FDCPA framework, and recommends three areas of reform. First, the term "communication" should be redefined in order to

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ensure that the FDCPA's disclosure requirement is adequately applied to new communication platforms that pose a threat to consumer privacy. Second, the CFPB should reform the FDCPA to ensure that new communication technologies do not become a one-way street, by requiring that communications made through new technologies include necessary disclosures, an opt-out mechanism, and a dispute process that consumers can use through the same technology that the debt collector used to contact the consumer. And third, the CFPB should consider imposing an express written consent requirement on the use of technologies that may cause consumers financial harm.

INTRODUCTION

On July 20, 2010, a friend of Melanie Beacham, Florida resident Devilin Wilson, received an unexpected message through his Facebook account from a man who identified himself as "Jeff Happenstance."[1] The message was straightforward, and asked Wilson to "[p]lease [h]ave Melanie D. Beacham call" a specified phone number.[2] Wilson responded later that day, suggesting that he

1. Motion to Enjoin at 2, Beacham v. MarkOne Financial, LLC, No. 10-12883CI-15 (Fla. Pinellas Cnty. Ct. Sept. 2, 2010) [hereinafter *Beacham* Motion to Enjoin].

2. *Id.*, Ex. A at 1.

would relay Happenstance's request, but noted that since Beacham had her own Facebook account, it would be simpler for Happenstance to contact her directly.[3] Happenstance thanked him for the reply, and did not message Wilson again.[4]

One month later, Beacham received a Facebook message from a person identifying himself as "Loxley Duffus."[5] In contrast to the message sent by Happenstance, Duffus's message was much more pressing. The message stated that there was an "[u]rgent" matter, provided a phone number to call, and asked Beacham to contact "Supervisor Duffus at MarkOne" by 6 p.m. that day.[6]

Both of these messages were from a debt collector, and were aimed at inducing Beacham to repay a $362 car loan.[7] But instead of prompting a quick repayment, the unwanted online contacts led Beacham to file a civil suit in state court, alleging violations of state debt collection laws and intentional infliction of emotional distress.[8] Beacham's suit, filed on August 26, 2010, marked the first time a debt collector had been sued based on a series of Facebook messages.[9]

While Beacham's suit may be the first, it almost certainly will not be the last. A growing number of similar lawsuits and media stories reveal that debt collectors are increasingly turning to emerging technologies as a way to collect payments on defaulted debts.[10] In one case, a debt collector attempted to intimidate a putative debtor by saying that she had seen a picture of the consumer's "beautiful daughter" on the consumer's MySpace webpage.[11] In another example, a Chicago lawyer reported that a young woman in a bikini

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3. *Id.*

4. *Id.*

5. *See* Motion to Amend for Punitive Damages, Ex. A at 1, Beacham v. MarkOne Financial, LLC, No. 10-12883CI-15 (Fla. Pinellas Cnty. Ct. Nov. 18, 2010) [hereinafter *Beacham* Motion to Amend].

6. *Id.*

7. Alexis Madrigal, *Facebook Warns Debt Collectors About Using Its Service*, ATLANTIC MONTHLY, Nov. 19, 2010, *available at* http://www.theatlantic.com/technology/archive/10/11/facebook-warns-debt-collectors-about-using-its-service/66831.

8. Complaint at 3, Beacham v. MarkOne Financial, LLC, No. 10-12883CI-15 (Fla. Pinellas Cnty. Ct. Aug. 26, 2010). The complaint in *Beacham* was filed before the debt collector directly contacted the plaintiff. Thus, the complaint only contained allegations arising from the debt collector's online contacts with the plaintiff's friends. *See id.* at 2–3. Later filings made additional allegations arising out of the debt collector's direct contacts with the plaintiff. *See Beacham* Motion to Amend, *supra* note 5, at Ex. B, 3–5.

9. *See* Alexia Tsotsis, *Facebook Debt Collection Case Is Definitely a First*, TECHCRUNCH (Nov. 19, 2010), http://techcrunch.com/2010/11/19/debtbook.

10. *See, e.g.*, Madrigal, *supra* note 7; Renee C. Lee, *Got Debt? Better Watch What You Post on Facebook*, HOUSTON CHRON. (July 21, 2010), http://www.chron.com/disp/story.mpl/facebook/7118943.html; Vanessa Romo, *Elusive Debtors Foiled by Their Social Media Sites* (July 12, 2010), *available at* http://www.npr.org/templates/story/story.php?storyId=128464415.

11. Sohns v. Bramacint LLC, No. 09-1225, 2010 WL 3926264, at * 2 (D. Minn. Oct. 1, 2010). At trial, there was conflicting testimony concerning whether the debt collector additionally asked the consumer "wouldn't it be terrible if something happened to your kids" in the event that the sheriff's department arrested the consumer. *Id.*

had "friended" his client on Facebook.[12] The account turned out to be a debt collector, who posted a message on the client's wall: "Pay your debts, you deadbeat."[13] In yet another instance, a consumer alleged that a debt collector placed a message on his daughter's MySpace webpage, demanding that the daughter contact the debt collector and warning her that "[f]ailure to comply with this notice of surrender is a class 5 felony and carries a maximum penalty of imprisonment for two years plus all applicable surcharges."[14]

Debt collectors' use of new communication mediums is not limited to the use of social networking websites. For example, debt collectors have also been experimenting with ways to integrate e-mail and mobile phone text messaging services into their overall collection strategy.[15] One company that offers debt collectors a system to contact putative debtors claims that when one top-ten sub-prime mortgage lender "added text messaging to their existing communications efforts," the lender "saw increased payment rates by nearly 100% within five days of contact . . . ."[16] Despite the potential effectiveness of new technologies, industry insiders have advised collectors to use caution in employing new technologies in order to avoid lawsuits like the one brought by Melanie Beacham.[17]

Applying the main federal law concerning debt collection practices—the Fair Debt Collection Practices Act (FDCPA)—to debt collectors' use of new technologies is a challenging endeavor. Congress passed the FDCPA in 1977, well before the advent of e-mail, internet, mobile, and voicemail technologies.[18] In enacting the FDCPA, Congress gave no agency the power to promulgate rules to clarify and update the law.[19] Thus, the provisions of the FDCPA have remained largely unchanged over the last thirty years.[20]

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12. *Debt Collector Accused of Facebook Harassment*, ARIZ. REPUBLIC, Nov. 19, 2010, http://www.azcentral.com/offbeat/articles/2010/11/18/20101118facebook-debt-collector-harrassment.html.

13. *Id.*

14. Complaint at 2, Ricobene v. JP Morgan Chase Bank, No. 09-cv-2903 (N.D. Ill. May 12, 2009).

15. *See* William Howard, consumer protection attorney, Draft Transcript, *Debt Collection 2.0: Protecting Consumers as Technologies Change*, at 245 (Apr. 28, 2011) [hereinafter Draft Transcript, Debt Collection 2.0], *available at* http://www.ftc.gov/bcp/workshops/debtcollectiontech/docs/transcript.pdf ("People used to be shocked when they were getting text messages, and now that's just a way that, you know, debt collectors collect debts . . . .").

16. *Billing & Collection*, XTXTEXT, http://xtxtext.com/SMS_Industries.html#billingCollection_title (last visited Aug. 18, 2011); *see also* Jeff Sovern, *Debt Collection via Text Messages?*, CONSUMER LAW & PROTECTION BLOG (Feb. 3, 2010, 2:02 PM), http://pubcit.typepad.com/clpblog/2010/02/debt-collection-via-text-messages.html (discussing the FDCPA and text messaging debt collection services).

17. *See, e.g.*, Jon Browning, *Putting Facebook in Your Playbook*, COLLECTOR, Apr. 2010, at 35–36.

18. Fair Debt Collection Practices Act of 1977, Pub. L. No. 95-109 (codified at 15 U.S.C. § 1692a–p (2006)).

19. 15 U.S.C. § 1692l(d) (2006).

20. Stephen J. Maggio & Michael A. Maggio, *Civil Liability Under the FDCPA for*

This regulatory landscape has dramatically changed with the recent creation of the Consumer Financial Protection Bureau (CFPB). By vesting the CFPB with the power to clarify and modify the FDCPA, Congress established a workable way to modernize the federal law that governs debt collection practices. In light of this new rulemaking power, the CFPB should consider reforming the FDCPA in order to address the concerns related to the growing use of new technologies as part of the debt collection process.

This Comment explores how the CFPB can reform the FDCPA to address the concerns that debt collectors' use of new technologies raise. Specifically, the use of these technologies presents two major areas of concern. First, new technologies allow for new types of deceptive debt collection activities. For example, modern technologies offer new ways for debt collectors to disguise or mask their identities while collecting information. Second, since consumers have different expectations of privacy regarding mobile and internet technologies, debt collectors' use of new communication mediums raises unique privacy concerns. In some cases, such as the use of new technologies to surreptitiously collect information about a putative debtor, the current FDCPA framework is flexible enough to address many of the problems that new technologies pose. However, in other contexts, such as the use of internet and mobile technologies to directly contact consumers, new technologies raise privacy concerns that are not easily resolved under the FDCPA.

The CFPB should reform the FDCPA in three ways in order to ensure that consumers are adequately protected against the abusive practices Congress sought to alleviate. First, the CFPB should revise the FDCPA's definition of "communication" to reflect the privacy concerns that debt collectors' use of new technologies raise. Second, the CFPB should ensure that new technologies do not become a "one-way street," by requiring that contacts through new technologies contain a disclosure, a mechanism that allows consumers to dispute the alleged debt, and a simple way to opt-out of future communications. Finally, the CFPB should consider requiring that debt collectors receive prior written consent before using certain technologies to contact consumers.

This Comment proceeds in four parts. Part I provides a basic background of the FDCPA and the current state of debt collection. Part II analyzes case law that applied the FDCPA to technologies that Congress did not contemplate when passing the FDCPA. Part III presents some of the challenges new technologies pose, and identifies areas that courts cannot resolve easily under the current FDCPA framework. Part IV analyzes the obstacles in crafting a

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Unauthorized Practice of Law, 22 U. ARK. LITTLE ROCK L. REV. 91, 92 (1999); *see also* Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 718 (2006) (concluding that in passing the FDCPA, "Congress created a law intended only to remedy previous abusive behavior and not to prospectively adapt to a changing industry").

regulatory response to debt collectors' use of new technologies and discusses three potential changes to the FDCPA.

I.
A BRIEF BACKGROUND ON THE FDCPA & THE DEBT COLLECTION INDUSTRY

Examining the statutory and legal background of the FDCPA provides an important backdrop to the regulatory challenges new technologies present. This Part begins by discussing the goals that Congress sought to further through enacting the FDCPA in 1977. Next, it examines the approach courts have taken in interpreting the provisions of the FDCPA. It then outlines the recent explosive growth of the debt collection industry before ending with a discussion of the current regulatory landscape regarding new technologies and debt collection.

A. Legislative Background

The FDCPA was passed in 1977 in order to prohibit abusive, harassing, and deceptive debt collection methods. In enacting the FDCPA, Congress sought to further two main policy goals. First, Congress intended to protect consumers from a host of egregious debt collection practices.[21] Second, Congress sought to remove the incentive to engage in certain debt collection practices so that ethical debt collectors would not suffer a competitive disadvantage.[22]

Congress viewed furthering these twin goals through federal legislation as an appropriate and necessary response to the patchwork of state laws regulating debt collection practices. When Congress enacted the FDCPA, thirteen states had no debt collection laws, and an additional eleven states had wholly ineffective laws regulating third-party debt collections.[23] Reacting to this regulatory landscape, the FDCPA made it unlawful for debt collectors in every state and the District of Columbia to engage in certain practices, including: contacting consumers at inconvenient times and places;[24] failing to cease communication upon written request;[25] making spurious threats of legal action;[26] using abusive or profane language;[27] and communicating with putative debtors without meaningful disclosure.[28]

These prohibitions were primarily aimed at ensuring adequate protection for consumers.[29] Consistent with this remedial purpose, the FDCPA provides

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21. *See* S. REP. NO. 95-382, at 1–2 (1977).
22. *Id.*
23. *Id.*
24. 15 U.S.C. § 1692c(a)(1) (2006).
25. § 1692c(c).
26. § 1692e(4).
27. § 1692d(2).
28. § 1692d(6); § 1692e(11).
29. § 1692d.

consumers with a private right of action against debt collectors who engage in unlawful collection tactics.[30] In addition, the FDCPA is generally a strict liability statute, which allows a consumer to hold a debt collector liable without showing that the collector intended to violate the FDCPA.[31] Taken together, these elements of the FDCPA created a powerful remedy that consumers could assert against aggressive collectors.

The protections afforded by the FDCPA were also intended to remove the economic incentive debt collectors had to engage in abusive practices. At the time Congress enacted the FDCPA, it recognized that the commission-based model of debt collection "too often created the incentive to collect by any means."[32] By prohibiting certain practices, Congress wanted to ensure that "debt collectors who refrain from abusive debt collection practices are not competitively disadvantaged . . . ."[33] Thus, Congress sought to guarantee that unscrupulous debt collection practices would not adversely affect either consumers or ethical debt collectors.

B. General Principles Guiding Judicial Interpretation of the FDCPA

In line with the consumer protection goal of the FDCPA, courts interpret the provisions of the FDCPA liberally, in favor of the consumer.[34] Accordingly, to determine whether a collector has violated a specific provision of the FDCPA, courts generally apply a "least sophisticated" consumer test, as opposed to a "reasonable" consumer standard.[35] The "least sophisticated" consumer test is based on the notion that "consumers of below-average sophistication or intelligence are especially vulnerable to fraudulent schemes."[36] Hence, this standard "ensures the protection of all consumers, even the naïve and the trusting, against deceptive debt collection practices."[37]

Under this test, the question is whether a debt collector's activity would mislead or deceive the "least sophisticated" consumer.[38] To make this

30. *See* § 1692k.

31. Russell v. Equifax A.R.S., 74 F.3d 30, 33 (2d Cir. 1996); *see also* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S. Ct. 1605, 1611–25 (2010) (holding that errors of law do not qualify as good faith mistakes for the purpose of the FDCPA's bona fide error defense).

32. *See* S. REP. 95-382, *supra* note 21, at 2.

33. 15 U.S.C. § 1692(e).

34. *See, e.g.*, Brown v. Card Serv. Ctr., 464 F.3d 450, 453 (3d Cir. 2006) ("Because the FDCPA is a remedial statute, . . . we construe its language broadly, so as to effect its purpose . . . . "); Johnson v. Riddle, 305 F.3d 1107, 1117 (10th Cir. 2002) ("Because the FDCPA . . . is a remedial statute, it should be construed liberally in favor of the consumer."); Blair v. Sherman Acquisitions, No. 04-Civ-4718, 2004 WL 2870080, at *2 (N.D. Ill. Dec. 13, 2004) ("Because it is designed to protect consumers, the FDCPA is, in general, liberally construed in favor of consumers to effect its purpose.").

35. *See* Swanson v. So. Or. Credit Serv., Inc., 869 F.2d 1222, 1227 (9th Cir. 1998) (finding that "the standard is lower than simply examining whether particular language would deceive or mislead a reasonable debtor").

36. Clomon v. Jackson, 988 F.2d 1314, 1319 (2d Cir. 1993).

37. *Id.* at 1320.

38. *See, e.g.*, Leblanc v. Unifund CCR Partners, 601 F.3d 1185, 1193–94 (11th Cir. 2010)

determination, courts look at the impression that a debt collection activity is likely to leave on a consumer who "lacks the astuteness of a 'Philadelphia lawyer' or even the sophistication of the average, everyday, common consumer . . . ."[39] However, while affording protection to all consumers, the "least sophisticated" standard also provides some assurances to debt collection companies. The "least sophisticated" consumer, while lacking the acumen of an average consumer, is still "presumed to possess a rudimentary amount of information about the world and a willingness to read a collection notice with some care."[40] Thus, while the judiciary's general approach towards FDCPA violations explicitly protects naïve consumers, it also shields debt collectors "against liability for bizarre or idiosyncratic interpretations of collection notices."[41]

C. The Growth of the Debt Collection Market

When Congress enacted the FDCPA, debt collection was already a substantial business enterprise. The legislative history of the FDCPA notes that in 1976, companies turned over five billion dollars in debt to the approximately five thousand collection agencies across the country.[42] With respect to servicing these debts, one trade association that represented approximately half of the independent debt collections operating in the United States estimated that its members contacted eight million consumers in 1976.[43]

In recent years, the debt collection industry has experienced explosive growth, which followed an enormous increase in credit card debt. According to Federal Reserve statistical reports, the amount of revolving consumer credit[44]—almost all of which is from credit cards—rose from $273 billion in September

(applying "least sophisticated" consumer test to false or misleading representations under the FDCPA); *Brown*, 464 F.3d at 454 ("[A]ny lender-debtor communications potentially giving rise to claims under the FDCPA . . . should be analyzed from the perspective of the least sophisticated debtor."). The Seventh Circuit has adopted an "unsophisticated consumer" standard that serves a similar purpose, while not being tied to "the very last rung on the sophistication ladder." Gammon v. G.C. Servs. Ltd. P'ship, 27 F.3d 1254, 1257 (7th Cir. 1994).

39. Russell v. Equifax A.R.S., 74 F.3d 30, 34 (2d Cir. 1996)

40. Clomon v. Jackson, 988 F.2d 1314, 1319 (2d Cir. 1993); *see also, e.g.*, Drossin v. Nat'l Action Fin. Serv., Inc., 641 F. Supp. 2d 1314, 1317 (S.D. Fla. 2009) ("Courts may assume, however, that the least sophisticated consumer will possess a rudimentary amount of information about the world and will not make unreasonable misinterpretations.") (internal quotations omitted).

41. Gionis v. Javitch, Block, Rathbone, LLP, 238 F. App'x 24, 28 (6th Cir. 2007) (quoting *Clomon*, 998 F.2d at 1320) (internal quotation marks omitted); *see also* Grden v. Leikin, Ingbert & Winters, P.C., No. 09-10579, 2010 WL 199947, at *3 (E.D. Mich. Jan. 19, 2010) ("[A]lthough this standard protects naïve consumers, it also prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care.") (quoting Fed. Home Loan Mortg. Corp. v. Lamar, 530 F.3d 504, 509–10 (6th Cir. 2007)).

42. S. REP. NO. 95-382, *supra* note 21, at 2.

43. *Id.*

44. Revolving credit involves an arrangement that "allows the borrower to buy goods or secure loans on a continuing basis as long as the outstanding balance does not exceed a specified limit." BLACK'S LAW DICTIONARY 1193 (9th ed. 2009).

1992 to $973 billion in September 2008.[45] As the amount of unsecured credit card debt has risen, so have the default rates on credit card payments. Although credit card delinquency rates averaged about 4 percent from 1991 to 2007,[46] this rate increased to a peak rate of 6.75 percent in the second quarter of 2009, before returning to between 4 and 5 percent in the last half of 2010.[47]

Increasing consumer debt laid the foundation for the growth of the debt collection industry. In 2006, third-party debt collectors received $10 billion in revenues, and law firms specializing in debt collection received around $1.2 billion.[48] In servicing outstanding debts, industry representatives estimate that third-party debt collectors make more than one billion contacts with consumers each year.[49] Underscoring the prevalence of debt collection as part of the American economy, researchers at Ohio University conducted a recent survey in which nearly half of the respondents reported that they had received a telephone call from a debt collector.[50]

Debt collection contacts have been the source of an enormous number of consumer complaints. The number of complaints that the FTC has received regarding debt collection has increased dramatically over the last decade, growing by 34 percent from 2004 to 2008.[51] Consistent with this trend, in 2009 the FTC received 88,190 complaints concerning debt collection practices, a considerable increase from the 78,925 complaints received in 2008.[52] The 2009 complaints against third-party debt collectors represented 16.8 percent of the total number of complaints the agency received, making debt collection the industry that received the most consumer complaints.[53]

45. Federal Reserve, Consumer Credit Historical Data, http://www.federalreserve.gov/releases/g19/hist/cc_hist_sa.html (last visited Aug. 5, 2011) (seasonally adjusted). Since 2008, the amount of revolving consumer debt in the United States has gradually declined. In July 2011, revolving consumer debt was estimated at $792 billion. *Id.*

46. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-748, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 4 (2009) [hereinafter GAO FDCPA REPORT].

47. Federal Reserve, Charge-Off and Delinquency Rates for All Banks, http://www.federalreserve.gov/releases/chargeoff/delallsa.htm (last visited Aug. 5, 2011) (seasonally adjusted).

48. GAO FDCPA REPORT, *supra* note 46, at 6.

49. *Id.* at 35.

50. NAT'L CONSUMER LAW CTR., INC., THE DEBT MACHINE: HOW THE COLLECTION INDUSTRY HOUNDS CONSUMERS AND OVERWHELMS COURTS 5–6 (2010) (citing Scripps Survey Research Center poll of 1,001 respondents completed Sept. 26, 2009 and posted at http://www.newspolls.org/surveys/SHOH42/22510).

51. GAO FDCPA REPORT, *supra* note 46, at 35.

52. FTC, ANNUAL REPORT 2010: FAIR DEBT COLLECTION PRACTICES ACT 3–4 (2010). While already substantial, these numbers almost certainly understate the total number of instances of abuse, as many consumers may never file a complaint, or may only complain to the underlying creditor or to other enforcement agencies. *Id.* at 2–3.

53. *Id.* at 3–4.

D. The Current FDCPA Regulatory Landscape and New Technologies

When Congress passed the FDCPA in 1977, it gave no agency the power to issue additional rules and regulations to govern the practices of third-party debt collectors.[54] Consequently, revising the FDCPA has been a difficult process because the only route to change has been through Congress.[55] Notably, the only recent major amendments to the FDCPA—passed as part of the Financial Service Regulatory Relief Act of 2006—came after considerable lobbying by the collection industry.[56]

As a result of the FDCPA's largely static nature, the law has not kept pace with new technologies, a fact that regulators and industry representatives have strongly criticized. The Federal Trade Commission (FTC), the government agency entrusted with enforcing the FDCPA, recently concluded that "[t]o provide more certainty to the industry and to protect consumers from harm . . . debt collection law needs to be modernized to take account of today's new communication technologies."[57] The Commercial Law League of America, which represents the collection industry, has similarly concluded that "[t]he failure of Congress to modernize the FDCPA presents substantial problems for both debt collectors and consumers."[58] Although consumer advocates have also recognized the tension between the FDCPA and the growth of new technologies, they have voiced the fear that "opening up more technologies just

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54. 15 U.S.C. § 1692l(d) (2006). The legislative history of the Act suggests that the relevant Committee felt that the FDCPA was comprehensive and would fully address debt collection abuses. S. REP. NO. 95-382, *supra* note 21, at 6 (1977).

55. *See* GAO FDCPA REPORT, *supra* note 46, at 49–50 (recommending that Congress provide the FTC with FDCPA rulemaking authority).

56. Jennifer W. Loon, *Congress Passes Three FDCPA Amendments*, COLLECTOR, Nov. 2006, *available at* http://findarticles.com/p/articles/mi_qa5315/is_200611/ai_n21403197. Passed as part of the Financial Service Regulatory Relief Act of 2006, Pub. L. No. 109-251, the three amendments: (i) clarified that a "formal pleading" is not subject to the initial communication disclosure requirements; (ii) clarified that certain notices that do not seek payment of a debt are not subject to the initial communication disclosure requirement; and (iii) clarified that debt collectors are permitted to engage in collection activities during the thirty-day period in which a putative debtor is entitled to obtain verification for a disputed debt. 15 U.S.C. §§ 1692g(b), (d) & (e). In addition, as part of the same act, the FDCPA was amended to exclude certain bad check enforcement firms from the scope of the FDCPA. 15 U.S.C. § 1692p. Some consumer advocacy groups strongly criticized this exclusion. *See, e.g.*, *Public Citizen, NCLC Call on Congress Not to Exempt Abusive Debt Collectors From Consumer Protection Law* (May 2, 2006), PUBLIC CITIZEN, http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=2193.

57. FTC, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE 36 (2009) [hereinafter CHALLENGES OF CHANGE].

58. MANUEL H. NEWBURGER ET AL., WHITE PAPER OF THE COMMERCIAL LAW LEAGUE OF AMERICA ON THE FAIR DEBT COLLECTION PRACTICES ACT 26 (2007), *available at* http://www.clla.org/clla_news/default.cfm?view=item&id=1111&cat=11; *see also* ACA International, Written Comment Submitted to the Federal Trade Commission for Debt Collection 2.0 Public Workshop 4 (Apr. 7, 2011) (arguing that without clear guidance, many debt collectors do not utilize new technologies), *available at* http://www.ftc.gov/os/comments/debtcollecttechworkshop.

gives [debt collectors] more avenues to harass . . . embarrass . . . and cause [consumers] problems at work . . . ."[59]

The recent creation of the Consumer Financial Protection Bureau (CFPB), marks a new opportunity to address the concerns regarding the FDCPA and new technologies. The Consumer Financial Protection Act of 2010, which established the CFPB, vested the new bureau with the power to promulgate rules clarifying and amending the FDCPA.[60] This rulemaking power presents a workable, promising path to reforming the FDCPA so it may better reflect the technological developments that have taken place over the last thirty years. Indeed, in outlining a suggested agenda for the CFPB, the nonprofit advocacy group Consumers Union identified exercising the "new power" of FDCPA rulemaking as a priority.[61]

Taken together, this background provides compelling reasons for considering how the CFPB can reform the FDCPA to better reflect new technologies. Organizations have argued that without clearer guidance, the use of new technology may become a "challenging" process, with "regulatory compliance a guessing game, rather than a predictable endeavor."[62] This has the potential to create a "race to the bottom" by incentivizing aggressive collectors to take advantage of this legal gray area in ways that jeopardize the welfare of consumers—exactly what Congress sought to avoid.[63] Such a result would severely undermine the policy goals of the FDCPA by encouraging unscrupulous debt collectors to utilize new technologies to deceive and harass putative debtors, thereby harming consumers and placing ethical collectors on an uneven playing field.

II.
CASE LAW APPLYING THE FDCPA TO NEW TECHNOLOGIES

Although courts have touched on the use of internet and mobile technologies by debt collection companies, no decision has squarely addressed this issue. Two areas of litigation, however, provide some guidance for applying the FDCPA to new technologies. First, cases applying the FDCPA to

59. Transcript of Challenges of Change Workshop at 163 (Oct. 10, 2007) (remarks of Lauren Saunders, Managing Attorney, National Consumer Law Center), *available at* http://www.ftc.gov/bcp/workshops/debtcollection/FTC_DebtCollect_071010.pdf.

60. *See* Consumer Financial Protection Act of 2010, Pub. L. No. 111-205, §§ 1002(12), 1022.

61. *See Protecting Our Wallets: Consumers Union Recommends Priority Areas for the Consumer Financial Protection Bureau's First Year*, CONSUMERS UNION (Oct. 6, 2010, 9:43 AM), http://www.defendyourdollars.org/2010/10/the_cfpb_can_solve_consumer_pr.html.

62. *See* GAO FDCPA REPORT, *supra* note 46, at 49 (quoting comment letters from ACA International and the National Association of Retail Collection Attorneys).

63. Jerman v. Carlisle, McNellie, Rini, Kramer, & Ulrich LPA, 130 S. Ct. 1605, 1623 (2010) (finding that allowing debt collectors to apply a "bona fide error" defense to mistaken interpretations of the law would give a "competitive advantage to debt collectors who press the boundaries of lawful conduct."); *see also* Romo, *supra* note 10 (characterizing debt collectors' use of social networking websites to contact consumers as a "legal gray area").

voicemails left by debt collectors reveal that courts have not diminished federal protections in order to accommodate new communication technology. In addition, these cases suggest that courts should consider the practical effects of technology in applying the FDCPA to different communication platforms. Second, decisions addressing the use of new technologies by debt collectors to deceive consumers reveal that some provisions of the FDCPA may be flexible enough to extend to these technologies.

A. Voicemails Under the FDCPA

Litigation over debt collection voicemails delivered to answering machines demonstrates some of the potential difficulties in applying the FDCPA to new technologies. Although the underlying technology of answering machines had been developing since the early 1900s, it was not until the 1980s that the device became widely used in residential homes.[64] Consequently, when plaintiffs began alleging FDCPA violations arising out of voicemails placed by debt collectors, the courts had to apply the FDCPA to a technology that was not specifically contemplated at the time of the law's enactment in 1977.

Courts that have applied the FDCPA to voicemails have routinely faced the issue of whether voicemails are "communications" that are subject to the FDCPA's disclosure requirements. The FDCPA defines "communication" as the "conveying of information regarding a debt directly or indirectly to any person through any medium."[65] In turn, the FDCPA requires that in an initial communication with a putative debtor, debt collectors must disclose "that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose."[66] The law also requires debt collectors to disclose in subsequent communications that the communication is from a debt collector.[67] In response to claims that voicemails require these disclosures, debt collectors have argued that voicemails do not constitute "communications" because they do not "convey[] . . . information regarding a debt directly or indirectly to any person . . . ."[68]

The vast majority of courts that have addressed this issue have held that voicemails are communications that are subject to the FDCPA disclosure provisions.[69] These courts, however, have employed different reasoning to reach this conclusion. Although courts have not provided a clear-cut framework for approaching voicemails under the FDCPA, three elements appear to be

64. DAVID MORTON, OFF THE RECORD: THE TECHNOLOGY AND CULTURE OF SOUND RECORDING IN AMERICA 134 (2000).

65. 15 U.S.C. § 1692a(2) (2006).

66. § 1692e(11).

67. *Id.*

68. *See* § 1692a(2).

69. *See, e.g.*, Foti v. NCO Fin. Sys., 424 F. Supp. 2d 643, 654 (S.D.N.Y. 2006) (finding that a voicemail message left by a debt collector was a FDCPA communication and noting the "paucity of authority" to the contrary).

particularly important in determining whether a voicemail is a "communication." First, courts have relied on the content of the voicemail message.[70] Second, courts have looked to the practical consequences of exempting certain voicemails from the ambit of the FDCPA.[71] Finally, courts have looked to the context in which the voicemail was made.[72]

With respect to the content of voicemails, many courts have found that voicemail messages containing even minimal information related to a debt are "communications" under the FDCPA.[73] For instance, in *Hosseinzadeh v. MRS Associates*, the plaintiff brought suit against the defendant debt collector based on a series of voicemails referring to a "very important matter."[74] The messages requested that the consumer call back a specified toll-free number, and warned that failure to call the number would result in "a decision-making process that [the consumer would] not be a part of."[75] The court found that although the messages may not have "technically" mentioned specific information "about a debt or the nature of the call," the indirect references to the debt were sufficient to bring the messages under the FDCPA's definition of "communication."[76]

Other courts have emphasized the pragmatic concern that exempting certain voicemails from the FDCPA would allow debt collectors to circumvent statutory requirements by repeatedly contacting debtors with messages containing minimal content.[77] In *Ramirez v. Apex Financial Management, LLC*, a debt collector had left several messages on a consumer's answering machine after receiving a written "cease and desist" letter.[78] Although the FDCPA generally requires that debt collectors "cease further communication" after receiving such a letter,[79] the defendant argued that the voicemails were not

70. *See infra* notes 74–77 and accompanying text.

71. *See infra* notes 77–82 and accompanying text.

72. *See infra* notes 83–84 and accompanying text.

73. *See, e.g.*, Edwards v. Niagara Credit Solutions, Inc., 586 F. Supp. 2d 1346, 1350–51 (N.D. Ga. 2008) (finding that a voicemail instructing the listener to return the call in order to discuss an "important matter" indirectly conveyed information about the debt), *aff'd on other grounds*, 584 F.3d 1350 (11th Cir. 1009); Costa v. Nat'l Action Fin. Servs., 634 F. Supp. 2d 1069, 1076 (E.D. Cal. 2007) (finding that a voicemail conveying "the fact that there was a matter that she should attend to and instructions on how to do so" was a communication under the FDCPA because it indirectly conveyed information regarding a debt); Berg v. Merchants Ass'n Collection Div., Inc., 586 F. Supp. 2d 1336, 1340–41 (S.D. Fla. 2008) ("Courts generally consider pre-recorded messages and voice mail messages from debt collectors to be 'communications,' even if the messages do not state what the calls are regarding.").

74. 387 F. Supp. 2d 1104 (C.D. Cal. 2005).

75. *Id.* at 1107–08.

76. *Id.* at 1116.

77. *See, e.g.*, Ramirez v. Apex Fin. Mgmt., LLC, 567 F. Supp. 2d 1035, 1042 (N.D. Ill. 2008) (opining that exempting nonspecific voicemails from the FDCPA would allow collectors to "continue calling debtors after having received a 'cease and desist' letter, so long as they avoid mentioning the underlying debt . . . ."); *Edwards*, 586 F. Supp. 2d at 1351 (noting that exempting voicemails would "provide a loophole for debt collectors" to harass putative debtors with non-specific messages).

78. *Ramirez*, 567 F. Supp. 2d at 1036–38.

79. 15 U.S.C. § 1692c(c) (2006).

"communications" because the messages did not clearly convey information regarding a debt.[80] The court rejected this argument, observing that under the defendant's interpretation of the FDCPA, debt collectors would be able to continue to leave messages after receiving a "cease and desist" letter "so long as they avoid mentioning the underlying debt, which would absolve them of liability."[81] Drawing on the legislative purpose of the FDCPA to protect consumers from debt collectors' harassing conduct, the court concluded that exempting messages that lack specific content "would be in grave conflict with the standards that underlie the FDCPA."[82]

A third element that courts have relied on in determining whether voicemails are "communications" is the context and purpose of the message.[83] Courts have found that a voicemail's function as part of the overall debt collection process militates in favor of finding that the message is a "communication" under the FDCPA. For instance, in *Hutton v. C.B. Accounts, Inc.*, the court found that a series of voicemails left by a debt collector were "communications" in part because "the purpose of the messages was to induce Plaintiff to call Defendant to discuss her outstanding debt."[84]

The precise standard employed in these decisions is often unclear, and courts commonly provide multiple reasons for concluding that a particular voicemail is actionable under the FDCPA. For example, in *Foti v. NCO Financial Systems*, which has become the most prominent of the FDCPA voicemail cases, the court drew on several different lines of reasoning in finding that the voicemail at issue was an FDCPA "communication."[85] These included: (i) the content of the voicemail, including the suggestion that there was a matter requiring immediate attention and the provision of a call-back number; (ii) the "obvious purpose" of the message to entice a return call; (iii) the broad purpose of the FDCPA to protect consumers; and (iv) the concern that exempting voicemails would provide debt collectors with a loophole to circumvent protections afforded by the FDCPA.[86] Although these different factors provide a variety of justifications for concluding that such a contact is a "communication" under the FDCPA, they do not set forth a clear framework that courts can easily apply to other contexts.

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80. *Ramirez*, 567 F. Supp. 2d at 1040–41.

81. *Id.* at 1042.

82. *Id.*

83. *See, e.g.*, Hutton v. C.B. Accounts, Inc., No. 10-3052, 2010 WL 3021904, at *2 (N.D. Ill. Aug. 3, 2010) ("Determining whether something is a 'communication' under the FDCPA involves looking at the would-be communication's purpose, and the context in which it was made.") (citing Gburek v. Litton Loan Servicing LP, No. 08-3776, 2010 WL 2899110, at *4–5 (7th Cir. July 27, 2010)); Belin v. Litton Loan Servicing, LP, No. 8:06-cv-760-T-24 EAJ, 2006 WL 1992410, at *4 (M.D. Fla. July 14, 2006).

84. *Hutton*, 2010 WL 3021904 at *2.

85. Foti v. NCO Fin. Sys., 424 F. Supp. 2d 643, 654–59 (S.D.N.Y. 2006).

86. *Id.*

Conversely, at least two courts have reached a contrary result, agreeing with the defendant debt collectors and finding that challenged voicemails were not "communications" under the FDCPA because they did not convey any "information regarding a debt."[87] These cases focused primarily on the content of the voicemail and involved voicemails that contained only a name and a request for a return call.[88] In concluding that such voicemails were not actionable under the FDCPA, these cases did not address the other elements upon which other courts that treated voicemails as "communications" relied. As a result, other courts have widely criticized these cases.[89] Despite this criticism, these decisions highlight the confusion over determining how to apply the FDCPA to new technologies.

While the voicemail cases do not establish an unassailable framework for applying provisions of the FDCPA to new technologies, they do provide two helpful guidelines for approaching new technologies. First, the voicemail cases demonstrate that the protections afforded by the FDCPA should not be diminished because the law makes it difficult or impossible for collectors to use a particular technology. The three main elements considered in the FDCPA voicemail cases—the content of the voicemail, the concern that exempting voicemails would create a "loophole" in the FDCPA's protections, and the context of the voicemail—all focus on whether applying the FDCPA to a voicemail will ensure an adequate level of consumer protection.

Notably, none of these cases look to balance the interest of debt collectors in using new technologies against the consumer protections the FDCPA endows. Indeed, a common argument debt collectors have made in these cases has been that requiring collectors to disclose their identity in voicemail messages places the collectors in an untenable dilemma.[90] Collectors have

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87. *See* Biggs v. Credit Collections, Inc., No. CIV-07-0053-F, 2007 WL 4034997, at *4 (W.D. Okla. Nov. 15, 2007) (finding that a voicemail that identified the name of the caller and asked the putative debtor to call a provided number was not a communication under the FDCPA); Koby v. ARS Nat'l Servs., Inc., No. 09-cv-0780, 2010 WL 1438763, at *4 (S.D. Cal. Mar. 29, 2010) (finding that a voicemail that identified the caller's name and requested a return call was not a communication, in contrast to two other messages that were more detailed and did fall under the FDCPA).

88. *See* Pl.'s Mot. Summ. J., Ex. 5 at 2, *Biggs*, No. CIV-07-0053-F (transcript of messages showing that voicemails contained only the name of the caller, request for a return call, and return number); *Koby*, 2010 WL 1438763, at *4 (describing the message as only including the caller's name and a request for a return call).

89. *See, e.g.*, Mark v. J.C. Christensen & Assocs., No. 09-100, 2009 WL 2407700, at *2 (D. Minn. Aug. 4, 2009) (noting that the great weight of authority is inconsistent with the *Biggs* holding); Wideman v. Monterey Fin. Servs., No. 08-1331, 2009 U.S. Dist. LEXIS 38824, at *7–8 (W.D. Pa. May 7, 2009) (same); Edwards v. Niagara Credit Solutions, Inc., 586 F. Supp. 2d 1346, 1359 (N.D. Ga. 2008) (same); *see also Hutton*, 2010 WL 3021904, at *3 (observing that the *Koby* decision "cannot be reconciled with the Seventh Circuit's clear statement that the purpose and context of the communications are key factors in determining whether something is an FDCPA 'communication.'"); Krug v. Focus Receivables Mgmt., LLC, No. 09-4310, 2010 U.S. Dist. LEXIS 45850, at *7 n.3 (D.N.J. May 11, 2010) (criticizing the *Biggs* decision for "fail[ing] to address prior cases holding otherwise even though the opinion suggests that the parties cited those cases").

90. *See generally* Carolyn A. Taylor, *Voice-Mail Messages: A Hobson's Choice*,

alleged that either a voicemail will not disclose that the message is from a debt collector and run afoul of the FDCPA's disclosure requirement, or a voicemail will have a disclosure and could run afoul of the FDCPA's separate prohibition against communicating information to third-parties, should a third-party come across the voicemail.[91] Thus, collectors have alleged that the application of the FDCPA's provisions to voicemail messages forces them to either not use voicemails as a form of communication or pay inevitable litigation costs.

Courts have roundly rejected this argument, finding instead that debt collectors are not entitled to use inherently risky methods of communicating with consumers. As the Southern District of New York observed,

> just because a debt collector is permitted to continue to attempt to collect the debt does not entitle the collector to use any means. . . . The court has no authority to carve an exception out of the statute just so [a debt collector] may use the technology they have deemed most efficient . . . .[92]

Reinforcing this principle, several courts have noted that even in the absence of a particular communication platform, debt collectors have an array of other methods with which to contact putative debtors.[93] Hence, in applying the FDCPA to new technologies, the protections that federal law supplies do not need to accommodate a particular mode of communication. Instead, these protections are paramount and should not be displaced because debt collectors wish to use a potentially risky method to contact consumers.

Second, the voicemail cases demonstrate that applying the FDCPA to a particular communication platform requires a consideration of the practical effects that the technology may have. Several of the voicemail cases noted the concern that exempting certain voicemails from the FDCPA would create a "loophole" that would allow debt collectors to circumvent various protections

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MORTGAGEORB (Apr. 30, 2010), http://www.mortgageorb.com/e107_plugins/content/content.php?content.5804.

91. *See* 15 U.S.C. §§ 1692c(b) & 1692e(11) (2006). An exception to the general rule against disclosing information to third parties is that a debt collector can contact a third-party to acquire location information about a putative debtor. *Id.* § 1692b.

92. Leyse v. Corp. Collection Servs. No. 03-Civ-8491(DAB), 2006 WL 2708451, at *5 (S.D.N.Y. Sept. 18, 2006); *see* Berg v. Merchants Assoc. Collection Division, Inc., 586 F. Supp. 2d 1336, 1343 (S.D. Fla. 2008) ("[C]ourts have no obligation to harmonize different provisions of the FDCPA so that debt collectors may use an inherently risky method of communication); *see also Mark*, 2009 WL 2407700, at *5 (dismissing the defendant's argument that they were entitled to use voicemail and noting that such a position had been "argued by debt collectors in other cases and rejected").

93. *See, e.g.*, Grybowski v. I.C. Sys., Inc., 691 F. Supp. 2d 618, 623 (M.D. Pa. 2010) (noting the availability of "postal mail, in-person contact, and speaking directly by telephone"); *Berg*, 586 F. Supp. 2d at 1345 ("Debt collectors have several alternative channels of communication available to them, including live conversation via telephone, in person communication, and postal mail."); Foti v. NCO Fin. Sys., 424 F. Supp. 2d 643, 659 (S.D.N.Y. 2006) ("Debt collectors . . . could continue to use other means to collect, including calling and directly speaking with the consumer or sending appropriate letters.").

of the FDCPA.[94] Thus, in applying the FDCPA to new technologies, it is important to consider the practical consequences of imposing a particular rule of law in light of the FDCPA taken as a whole.

These insights provide a foundation for approaching new technologies. When the use of a technology runs afoul of the provisions of the FDCPA, that use may properly be prohibited under the FDCPA. Moreover, where a technology has the potential to undermine the FDCPA's protections, there may be practical considerations that militate in favor of allowing the use of particular technologies. And both of these insights, having arisen from the controversy over the FDCPA's definition of "communication," demonstrate that this definition is one of the most important sources of tension between new technologies and the FDCPA.

B. Deceptive Uses of Technology Under the FDCPA

A second line of cases that provides guidance regarding the application of the FDCPA to new technologies involves the use of technology to deceive consumers. Although far less litigated than the use of voicemail, cases applying the FDCPA to potentially deceptive uses of technology have focused on two specific technologies. First, courts have considered debt collectors' use of caller-ID devices to disguise the identity of the person or entity placing telephone calls.[95] Second, courts have considered debt collectors' use of verification systems to collect information about putative debtors.[96]

The handful of cases that have applied the FDCPA to caller-ID devices demonstrate how courts have flexibly applied the law's general prohibition on deceptive practices to new technologies. Unlike the voicemail cases, which have been concerned primarily with the FDCPA's disclosure requirements, the caller-ID cases have centered on the FDCPA's prohibition against the use of false pretenses. The FDCPA prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer."[97] In addition, the FDCPA specifically prohibits debt collectors from using a false business name.[98]

The caller-ID cases have largely turned on whether the debtor used the challenged device to actively mislead the putative debtor as to the source of the call. In *Knoll v. Allied Interstate, Inc.*, a consumer alleged that a debt collector employed a caller-ID device that made the collector's calls appear as if they

94. *See, e.g.*, *Edwards*, 586 F. Supp. 2d at 1351; Ramirez v. Apex Fin. Mgmt., LLC, 567 F. Supp. 2d 1035, 1040–42 (N.D. Ill. 2008); *Foti*, 424 F. Supp. 2d at 657.

95. *See infra* notes 99–104 and accompanying text.

96. *See infra* notes 105–113 and accompanying text.

97. 15 U.S.C. § 1692e(10) (2006); *see also* S. REP. NO. 95-382, *supra* note 21, at 4 (noting that the FDCPA prohibits debt collectors from "obtaining information under false pretenses").

98. 15 U.S.C. § 1692e(14).

were from "Jennifer Smith."[99] The *Allied Interstate* court found that the caller-ID device misled the consumer with respect to the source of the phone call, by masking the fact that a debt collector was calling.[100] Thus, the court concluded that the plaintiff's allegations were sufficient to survive a motion to dismiss.[101]

By contrast, in *Glover v. Client Services, Inc.*, the United States District Court for the Western District of Michigan concluded that a debt collector's caller-ID device that made the collector's phone number appear as "unavailable" did not violate the FDCPA.[102] The *Glover* court noted that unlike the "Jennifer Smith" ID in *Allied Interstate*, the "unavailable" message was "entirely accurate as it conveyed that the identity of the caller was not available."[103] Thus, the court concluded that the caller-ID device did not constitute "false representation or deceptive means."[104]

Courts have used a similar approach in cases applying the FDCPA to the use of verification systems that collect information about putative debtors. In *Romine v. Diversified Collection Services, Inc.*, the Ninth Circuit concluded that Western Union's telegram verification system may have been sufficient to make the company a "debt collector" subject to the FDCPA.[105] The challenged activity involved Western Union's use of an Automated Voice Telegram (AVT) service to collect putative debtors' unlisted phone numbers.[106]

Through the AVT service, a consumer would receive a notification that he had a telegram marked for voice delivery, and was instructed to call a toll-free number to have an operator read the telegram aloud.[107] Unlike Western Union's standard telegram delivery service, the AVT service required the recipient of the telegram to "confirm" his or her identity by providing a personal telephone number before the telegram could be conveyed.[108] The AVT process was specifically advertised to debt collectors as a way of gathering the phone numbers of putative debtors.[109] For instance, after the consumer in *Romine* provided his confirmation information, the operator read aloud a debt collection message prepared by a collector.[110]

Although the case only involved the preliminary question of whether Western Union was a "debt collector" subject to the FDCPA, the reasoning of the *Romine* court underscores the need for a pragmatic approach that looks at the way that technology functions as part of the debt collection process. In

99. 502 F. Supp. 2d 943, 945 (D. Minn. 2007).
100. *Id.* at 948.
101. *Id.* at 949.
102. No. 1:07-CV-81, 2007 WL 2902209 (W.D. Mich. Oct. 2, 2007).
103. *Id.* at *4.
104. *Id.* at *3–4.
105. 155 F.3d 1142 (9th Cir. 1998).
106. *Id.* at 1143–44.
107. *Id.* at 1144.
108. *Id.*
109. *Id.* at 1147–48.
110. *Id.* at 1144.

determining whether Western Union's activities should be subject to the provisions of the FDCPA, the court looked at the role of the AVT system in collecting debt-related information. The court noted Western Union's aggressive marketing of the AVT system to debt collectors, the fact that the AVT system differed significantly from Western Union's ordinary process of telegram delivery, and the advertised use of the system to "convey[] a sense of urgency through the use of Western Union telegrams."[111] In light of these observations, the court found that the manner in which the AVT service obtained consumers' phone numbers went "beyond mere information gathering or message delivery."[112] Accordingly, the court concluded that the AVT service was "of the type that the FDCPA was designed to deter."[113]

These cases suggest that in some instances, the difficulties of applying an older statute to new, unforeseen technologies can be resolved through a flexible principle that focuses on the function and nature of the technology. There is, of course, nothing in the FDCPA that directly addresses the use of caller-ID devices or telegram verification systems. But unlike the voicemail cases, these cases did not involve any threshold issue concerning the mode of contact, such as the "conveying information" requirement for provisions that apply to "communications."[114] Instead, the question in *Allied Interstate* and *Glover* was whether the use of a particular technology constitutes a false representation or deceptive means.[115] This question turns on the effect that a particular contact has on the "least sophisticated" consumer.[116] As in *Romine*, this inquiry looks at how technology is used, without being bogged down with the antecedent question of whether a particular technology falls under the FDCPA.[117] Because this determination is inherently context-specific, the flexible approach under the deceptive technology cases appears to be equally applicable to any number of debt collection technologies.

Along with the voicemail cases, the cases addressing deceptive uses of technologies by debt collectors provide guidance regarding how the current FDCPA framework could be extended to mobile phones, e-mail, social networking, and other modern communication platforms. In both the voicemail and deception cases, courts relied on the specific language of the FDCPA in

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111. *Id.* at 1147–49.

112. *Id.* at 1149; *see also* Udis v. Universal Commc'ns. Co., 56 P.3d 1177, 1180 (Colo. App. 2002) (reaching a similar conclusion with respect to a nearly identical telegram system).

113. *Romine*, 155 F.3d at 1149 (finding debt collector violated the FDCPA by making collection calls using a caller-ID device to misleadingly display a number with the same area code as the consumers' phone number).

114. *See* 15 U.S.C. § 1692a(3) (2006).

115. *See* Glover v. Client Services, Inc., No. 1:07-CV-81, 2007 WL 2902209, at *2–3 (W.D. Mich. Oct. 2, 2007); Knoll v. IntelliRisk Mgmt. Corp., 2006 WL 2974190, at *3 (Oct. 16, 2006).

116. *See Glover*, 2007 WL 2902209, at *3; *IntelliRisk*, 2006 WL 2974190, at *3.

117. *See Romine*, 155 F.3d at 1149 (noting that the determination of whether a use of technology renders a party a debt collector "depend[s] on the nature of the activities in the individual case.").

determining whether a particular act ran afoul of the law. Where this language is based on a particular characteristic of a contact, as in the voicemail cases, the FDCPA has not given rise to a clear framework for approaching new technologies. In contrast, where the FDCPA provides a general principle that looks to the effect that an action has on a consumer, as in the deceptive technology cases, courts may have enough flexibility to apply the language of the FDCPA to new technologies in a sufficiently predictable manner. Thus, before analyzing what changes should be made to the FDCPA, it is necessary to separate out those areas that may be resolved under a general principle found in the current FDCPA framework from those areas that would benefit from reform.

III.
APPLYING THE FDCPA FRAMEWORK TO NEW TECHNOLOGIES: IDENTIFYING AREAS OF REFORM

Although Congress enacted the FDCPA before the advent of mobile and internet technologies, existing cases concerning voicemail, caller-ID devices, and verification systems provide guidance regarding some of the more pressing issues emerging technologies raise. While advances in communication technology have the potential to create conveniences for both collectors and consumers, they also pose new possibilities for deception and raise serious privacy concerns. In some cases, these challenges may be resolved adequately through the current FDCPA framework. However, in other areas the FDCPA should be reformed to ensure that debt collectors do not use new technologies to undermine the provisions and purpose of the FDCPA. This Part addresses the use of new technologies to communicate with consumers and gather information, identifies issues that the statutory language and existing interpretations of the FDCPA may resolve, and suggests areas for future reform.

A. Communications with Putative Debtors

When debt collectors use new technologies to communicate with consumers in a way that is closely analogous to voicemails, courts can apply the FDCPA framework to these new technologies in a similar manner. Although the mode of communication may change, the content of the message and the purpose of inducing a consumer into discussing a putative debt remains the same. For example, the messages discussed in the introduction, in which collectors left messages for putative debtors or third-parties through Facebook or MySpace, function in a similar manner as voicemails in that debt collectors leave a message to which the recipient later responds. Accordingly, where collectors use new technologies to prompt consumers into discussing a putative debt with them, courts likely would consider these messages a "communication" under the current FDCPA framework.

As a communication, these contacts would be subject to the FDCPA's disclosure requirement and the prohibition against revealing information about a debt to third parties.[118] Since many of the most egregious uses of these contacts would not comply with these existing requirements, they would be prohibited by the FDCPA. For example, at a recent FTC conference concerning debt collection and new technologies, both plaintiff-side lawyers and industry representatives appeared to agree that publicly posting information that would "shame" consumers into paying debts, like some of the examples in the introduction, would run afoul of the FDCPA.[119] Hence, where collectors use communications made possible by new technologies in a way akin to voicemails, the current FDCPA framework would suffice to ensure that the technologies do not mislead consumers by failing to disclose that the sender is a debt collector or reveal sensitive information to third-parties.

In addition, new technologies may make it much easier to enforce the FDCPA's disclosure and third-party requirements by creating a record of the communication. With telephone calls, recording a call is inconvenient for many consumers, and some state laws prohibit recording an incoming call.[120] As a result, many FDCPA violations go unaddressed. In contrast, newer technologies like text messages, e-mail, and social networks generally create a record of the communication between the consumer and the collector. Thus, in addition to the FDCPA framework attaching to voicemail-like communications based on newer technology, these technologies may increase the likelihood of enforcement.

The fact that certain FDCPA provisions would attach to communications made through mobile and internet platforms, however, does not necessarily mean that these protections are adequate. In passing the FDCPA, Congress sought to ensure a reasonable level of consumer privacy.[121] Although the current FDCPA framework will likely be sufficient to resolve many of the disclosure problems new forms of communication pose based on the analogy between voicemails and newer forms of communication, this analogy may not hold up in the privacy context. Because new communication platforms make it much easier to disseminate information in a public manner, consumers likely have different expectations regarding their use of these technologies. Hence, reform may be necessary to address the privacy concerns that the unique characteristics of new technologies pose.[122]

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118. *See* 15 U.S.C. §§ 1692c(b) & 1692e(11) (2006).

119. *See* Draft Transcript, Debt Collection 2.0, *supra* note 15, at 28–33.

120. Donald H. Yarbrough, consumer protection attorney specializing in FDCPA suits, *id.* at 88 (noting that in many states it is generally illegal to record a telephonic conversation); *see also* Cary L. Flitter, consumer protection lawyer specializing in FDCPA suits, *id.* at 89 (advocating for allowing consumers to record telephone calls from debt collectors).

121. *See* 15 U.S.C. § 1692(a1) (2006) (noting that abusive, deceptive, and unfair debt collection practices contribute "to invasions of individual privacy"); S. REP. NO. 95-382, *supra* note 21, at 43 ("[T]his legislation strongly protects' [sic] the consumer's right to privacy by prohibiting a debt collector from communicating the consumer's personal affairs to third persons . . . .").

122. *See* CHALLENGES OF CHANGE, *supra* note 57, at 30 (observing that the FDCPA specifies how debt collectors must protect a consumer's privacy in making a contact, but noting that

In analyzing the privacy concerns that new technologies raise, Professor Helen Nissenbaum's model of privacy as "contextual integrity" is insightful.[123] Under Nissenbaum's theory, the rules governing the flow of information should be tied to the norms that exist in a specific context.[124] For example, a disclosure that may be appropriate in the context of an employer-employee relationship may be far different from one made in the context of a personal friendship.[125] Likewise, the venue in which a particular information flow exists—for example a street, park, market, school, or hospital—may also affect the norms related to privacy.[126]

In the context of debt collection and new technologies, Professor Nissenbaum's theory raises the question of whether the same norms that were developed to address letters and residential phone calls should also be applied to social networking websites, mobile communication platforms, and e-mail. Notably, the FDCPA's disclosure requirements do not depend on the medium of communication.[127] The same disclosure that is adequate for a phone call will, under existing FDCPA standards, presumably be sufficient for other communication platforms as well.

Two distinctions between new and old technologies underscore the need for further consideration of the terms of the FDCPA in order to adequately account for privacy concerns. First, unlike residential phone lines and home addresses, many new technologies are mobile. The mobile characteristic of technology means that people will receive communications in a different context than the FDCPA contemplated. For example, a person may receive a telephone call placed to his mobile number at home, at the store, at work, or in any other number of locations.[128] Although the FDCPA prohibits communications to be placed "at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer," mobile technologies make the application of this provision much more difficult.[129] In order to ensure adequate consumer privacy, clarification or reform may be appropriate.

Second, partly as a result of the mobility of new technologies, mobile and internet communication platforms have become an increasingly present part of peoples' everyday life. As the Supreme Court recently observed in *City of Ontario v. Quon*, "[r]apid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in

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"[n]evertheless, the use of new communication technologies raises issues not necessarily contemplated when the statute was enacted").

123. Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119 (2004).

124. *Id.* at 137–40.

125. *Id.* at 138–39.

126. *Id.*

127. *See* 15 U.S.C. § 1692e(11) (2006). Other provisions in the FDCPA single out certain technologies. *See, e.g.*, 15 U.S.C. § 1692b(4) (prohibiting communication by post card).

128. *See* CHALLENGES OF CHANGE, *supra* note 57, at 30.

129. 15 U.S.C. § 1692c(a)(1).

what society accepts as proper behavior."[130] The Court went on to note that "[c]ell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification."[131] As a result of the pervasive and intimate nature of modern technologies, users may expect the ability to exercise control over the dissemination of information, in order to maintain borders between social, work, and family groups.[132] The potential for debt collectors to exploit the intimate nature of these technologies by using new technologies raises concerns over whether existing FDCPA protections are adequate.[133]

These distinctions provide a strong justification for clarifying the section of the FDCPA that covers direct contacts between debt collectors and consumers. Although the current FDCPA framework will likely ensure that the new forms of communication disclose that the contact is from a debt collector and prevent information from being revealed to third-parties, it does not satisfactorily address the privacy concerns raised by new technologies. FDCPA provisions that were seen as adequate to protect consumer privacy in 1977 may not be sufficient to govern the use of technologies that involve a different set of expectations. Without clearer guidance, courts, consumers, and debt collectors will be left in the unenviable position of drawing imperfect analogies between voicemails and newer communication platforms. This will encourage firms to push the boundaries of the law, disadvantage ethical debt collectors, and jeopardize the FDCPA's overarching goal to safeguard consumers from abuse and harassment.

B. Information Gathering

As with communicating with putative debtors, courts could likely treat many uses of new technologies to collect information in a predictable manner under the current FDCPA framework. Where collectors use new technologies to gather information under false pretenses, courts can consider these technologies as closely analogous to the caller-ID system in *Allied Interstate Knoll* and the verification system in *Romine*.[134] As suggested by those cases, the FDCPA's prohibition against false pretenses may be flexible enough to cover new technologies.

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130. 130 S. Ct. 2619, 2629 (2010) (discussing privacy in the context of text messages sent by an employee through an employer-provided mobile phone).

131. *Id.* at 2630.

132. Avner Levin & Patricia Sánchez Abril, *Two Notions of Privacy Online*, 11 VAND. J. ENT. & TECH. L. 1001, 1045 (2008) (reporting survey results that indicate that young adult social network users conceptualize privacy partly as a way to control the flow of personal information).

133. *See* David C. Vladeck, Director, Bureau of Consumer Protection, Federal Trade Commission, Draft Transcript, Debt Collection 2.0, *supra* note 15, at 3.

134. The specific use of caller-ID at issue in *Allied Interstate*, which is sometimes referred to as "caller-ID spoofing," has also been specifically prohibited by Congress. *See* Truth in Caller ID Act of 2009 § 2, 47 U.S.C. § 227(e) (2010).

Hence, the standards for collecting information under the FDCPA may not need to be modernized in order to address new technologies. In contrast to the definition of "communication" and the specific disclosures required by the FDCPA, the prohibition against deceptive information gathering is written in broad language. Indeed, the terms "deceptive" and "misleading" are inherently dependent on the context in which an activity is carried out.[135] In order to determine whether a particular practice will tend to mislead or deceive a consumer, regulators and courts must take into account the circumstances surrounding the practice.[136]

Debt collectors should find sufficient guidance in the flexible approach applied in the deceptive use of technology cases. Under this approach, the question is whether collectors use technology to deceive the consumer, and thus obtain information that the debt collector would otherwise not be able to obtain. So, while using Google to search out publicly available information about a putative debtor would likely be legal because there is no deception involved, using a misleading alias to contact a putative debtor through a social networking website or mobile phone would likely be misleading and thus illegal.

The use of new technologies to gather information does, however, raise separate issues that courts cannot easily resolve by the flexible prohibition against deceptive and misleading practices. For example, users of social networking websites often share certain information only with certain people who have been allowed access, or added as a friend. Debt collectors may seek out that information and request that consumers add them as social networking "friends."[137] Gary D. Nitzkin, an attorney specializing in debt collection, has claimed that "[m]y collectors and skip tracers will put their name in to be a friend to the debtor[.]"[138] Once friends, the agents for the collector "can get into their inner circle and talk to [the consumer's] other friends."[139] This, the attorney suggests, allows the agents to find assets that might otherwise remain uncovered.[140]

A court, in line with a liberal interpretation of the FDCPA's provisions, might very well find this behavior to be deceptive. Given that a "friend request" that lacks a disclosure would likely deceive a significant number of consumers with respect to the purpose of the request, a court may find that this activity runs afoul of the FDCPA. Indeed, the FTC recently concluded an investigation of Mr. Nitzkin's activities and issued a public letter detailing some of the

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135. For example, the general standard of deception applied by the FTC includes a consideration of whether a representation is misleading "under the circumstances" presented. *See FTC Policy Statement on Deception*, *appended to In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984).

136. *See id.* (discussing the "reasonable consumer" standard).

137. Draft Transcript, Debt Collection 2.0, *supra* note 15, at 23–24 (discussing friend requests and the FDCPA).

138. Romo, *supra* note 10.

139. *Id.*

140. *Id.*

possible ways that social networking contacts could run afoul of the FDCPA.[141] Although the FTC declined to recommend enforcement against Mr. Nitzkin because it did not appear that Mr. Nitzkin actually contacted a consumer debtor through Facebook, the letter indicates that a "friend request" would have to disclose that the message is from a collector in order to adhere to the FDCPA.[142] Following this logic, a court might find that in light of the request's role as part of an ongoing debt collection process, and given the potential for harassment, the request should be considered a communication under the FDCPA.[143]

This conclusion, however, is not completely clear from the text of the FDCPA or case law. If a court found that a "friend request" did not convey sufficient content to be considered a "communication" under the FDCPA, it could follow *Glover* and find that the request constitutes lawful information collection.[144] As in *Glover*, a court could find that a collector does not need to make an affirmative disclosure before conveying additional content to a consumer.[145] Moreover, it is questionable whether this type of "information collection" friend request would be subject to the disclosure requirement of the FDCPA, because the request does not clearly convey information regarding a debt. Indeed, a debt collector may only want to gather more information about a putative debtor without making further contact after the initial friend request. The potential for conflicting court decisions in this area warrants additional consideration concerning reform.

IV.
RECOMMENDED CHANGES AND THE CHALLENGES OF REFORM

The primary challenge in applying the FDCPA to new technologies is in modernizing the guidelines regarding direct debt collection contacts with consumers. With new technologies, debt collection contacts with putative debtors may take the form of an e-mail, text message, or "friend request," all of which create the potential for new forms of deception and pose unique privacy concerns.

Drawing on the above analysis, this Part presents three areas where reform through the CFPB's new rulemaking powers may be appropriate, and highlights some of the challenges in implementing these solutions. First, the CFPB should clarify the term "communication" to encompass all contacts with putative debtors that relate to the collection of a debt. Second, with respect to mobile and internet technologies, the CFPB should impose additional

141. Letter from Joel Winston, Associate Director, Division of Financial Practices, Federal Trade Commission, to Gary D. Nitzkin, P.C. and Gary D. Nitzkin (Mar. 10, 2011), *available at* www.ftc.gov/os/closings/110310nitzkincletter.pdf.

142. *Id.* at 2.

143. *See supra* notes 77–84 and accompanying text.

144. *See* Glover v. Client Services, Inc., No. 1:07-CV-81, 2007 WL 2902209, at *4 (W.D. Mich. Oct. 2, 2007).

145. *See id.*

requirements to ensure that consumers receive adequate protections. Finally, the CFPB should give further consideration to whether it should impose an express written consent requirement on the use of technologies that may cause consumers financial harm.

A. Textual Clarification of the Term "Communication"

A starting point for reforming the FDCPA is the term "communication." The standard of whether a debt collector's contact with a putative debtor conveys information regarding a debt has given rise to considerable confusion. Some contacts made over new communication platforms, such as the Facebook messages sent to Melanie Beacham described at the beginning of this Comment, clearly convey information, and would thus presumably be subject to the FDCPA's disclosure requirement. However, as the voicemail cases demonstrate, in other contexts courts have grappled with what level of information is necessary to bring a contact under the ambit of "communication." Thus, while the current FDCPA framework will be sufficient in many cases to ensure that new technologies are subject to the FDCPA provisions that are specific to "communications," additional clarity is warranted to prevent confusion over contacts with minimal content.

The primary challenge is that new technologies make it more difficult to consider a communication in isolation, apart from other contacts that collectors make as part of the debt collection process. The current definition of "communication," which requires the conveyance of information regarding a debt, focuses on the content of the individual debt collection contact. However, an anonymous debt collection contact intrudes on a consumer's privacy because of its status as a debt collection message, not because it conveys a certain level of content. Professor Nissenbaum's theory underscores that the expectation of privacy flows at least in part from context.[146] Consumers likely have a reasonable expectation to be free from anonymous debt collection contacts that intrude into areas they regard as intimate, regardless of whether the contact conveys content regarding a debt.[147]

With new technologies, certain contacts that pose harm may be inadvertently exempted from the FDCPA's current disclosure requirement which focuses on content. As discussed above, in contacting a consumer through a social networking website, a debt collector must first "friend" the consumer, which may not transmit any content beyond the social networking

146. *See* Nissenbaum, *supra* note 123, at 138–39 (discussing norms of appropriateness).

147. Although "privacy" is a famously elusive concept, it can be characterized in various ways. *See generally* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006). With respect to the categories outlined by Professor Solove, many of the concerns at issue with debt collection contacts most closely fall under the "intrusion" category of privacy. *See id*. at 549. An action that intrudes "disturbs the victim's daily activities, alters her routines, destroys her solitude, and often makes her feel uncomfortable and uneasy." *Id*. at 552–57.

name or alias of the collector. Likewise, as the voicemail cases suggest, there may be inconsistent judicial treatment of text-based messages that leave only a name, phone number, and request for a return call. In order to ensure that these contacts reflect the underlying impetus behind the FDCPA's basic protections, the definition of "communication" needs to reflect the privacy concern raised by the context in which a debt collection contact is made.

A solution to this problem would be to shift the definition of "communication" from its current focus on content toward the role that the contact plays as part of the overall debt collection process. This approach would encompass voicemails, "friend requests," and some text messages that have minimal substance relating to the debt, but are intended primarily to *induce* the recipient into future action. While these contacts may not directly convey information about a debt, because they are part of the debt collection strategy, the general prohibition against anonymous communications should apply.[148] Requiring such a disclosure would impose only a minimal cost on debt collectors and would prevent unscrupulous collectors from exploiting this regulatory gap to harass debtors, as many courts have observed in the voicemail context.[149]

Redefining "communication" as "any contact with a debt collector that relates to the *collection of the debt or seeks to induce future action*" would better ensure consumer protection in a manner that does not unduly burden debt collectors. Tethering the definition of "communication" to the debt collection process, which is the source of the privacy concern, will better protect consumer privacy. At the same time, certain behaviors that do not raise consumer protection concerns are excluded. For example, sending account balance updates and privacy notices would fall outside of the definition of "communication" because they do not relate to the process of collecting a debt. Likewise, collectors would be able to search publicly available material because this type of searching does not involve any "contact" with a consumer. Thus, a shift towards a definition of "communication" that depends on the role of the contact would better ensure consumer privacy while bringing a level of clarity to this murky area of the FDCPA.

A similar clarification may also be helpful in the context of the FDCPA's prohibition against "false representation or deceptive means" to collect information.[150] Although this language is flexible enough to encompass forms of deception that rely on new technologies, the CFPB should make it clear that the deception, like privacy, depends on context.[151] With a social networking website, for example, a consumer would probably not expect a "friend request"

148. *See* S. REP. NO. 95-382, *supra* note 21, at 4 (describing the prohibition on "harassing *or* anonymous telephone calls") (emphasis added).

149. *See supra* note 94 and accompanying text.

150. 15 U.S.C. § 1692e(10) (2006).

151. *See* § 1692e(10).

from a debt collector. Hence, even if a debt collector used his or her real name, if that name did not adequately represent that the request is from a collector, it should be considered deception.[152] The deception in this case would result from omitting information about the collector in a way that "contributes to an overall incorrect impression" because of the consumer's assumptions about the form of communication.[153] This change would ensure that consumers are protected from a range of deceptive practices, while providing collectors with some basic guidelines that follow from the plain text of the FDCPA. Thus, with respect to the use of technology to both contact consumers and gather information, clarifying the FDCPA to reflect the context-specific nature of privacy and deception would benefit both consumers and collectors.

B. Additional Requirements for the Use of Internet and Mobile Technologies

A second major area of potential reform concerns the ability of consumers to use the very same communication platform through which they receive debt collection contacts. A prominent argument for the use of new technologies in the debt collection process is that these technologies provide a more convenient means of communication.[154] Just as new communication platforms permit debt collectors to more efficiently contact consumers, these platforms may also make it easier for consumers to send important messages to debt collectors. Notably, although debt collectors are permitted to call consumers in order to request repayment of an outstanding debt, in order to dispute the validity of the debt and receive verification that the debt is valid, consumers must send debt collectors a written notice.[155] New technologies could make it easier for a consumer to dispute a debt, request verification, workout a payment solution, or demand that collectors cease contact.

Without additional guidance, however, new communication platforms may become a one-way street, allowing debt collectors to more efficiently further the collection process without providing similar conveniences to consumers. For example, it is easy to envision debt collectors using technologies to send text messages and e-mails, without providing a valid return address or opt-out mechanism. A similar concern was a major motivating factor behind the CAN-SPAM Act, which made it a criminal offense to send unsolicited commercial e-mail without providing the recipient an opt-out mechanism.[156] The use of new technologies by debt collectors could create similar problems.

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152. *See* Draft Transcript, Debt Collection 2.0, *supra* note 15, at 264–66.

153. ABA SECTION ANTITRUST LAW, CONSUMER PROTECTION LAW DEVELOPMENTS 14 (2009) (discussing how deception can result from material that is omitted).

154. *See, e.g.*, ACA Int'l, Public Comment Submitted for Debt Collection 2.0, at 16 (Apr. 7, 2011) (arguing that text messaging, instant messaging, and e-mail have the potential to replace traditional means of contacting consumers in a cost-effective and frequently consumer-preferred format), *available at* http://www.ftc.gov/os/comments/debtcollecttechworkshop/00010-58352.pdf.

155. *See* 15 U.S.C. § 1692g(b) (2006).

156. *See* 15 U.S.C. § 7704(a)(3). Commentators have criticized this aspect of the CAN-SPAM

In order to address this concern, the FDCPA should be modified to impose additional requirements on the use of modern technologies. First, the FDCPA could require that mobile and internet communications from collectors contain a disclosure, a dispute process that obligates a collector to provide verification, and an opt-out mechanism. Second, in order to allow consumers to take advantage of these technologies, the dispute and opt-out mechanisms would need to allow the consumer to respond through the same technology that the debt collector used to send the communication. For example, a collector's message through a social networking website could not require that consumers opt out of future messages by sending a letter to the debt collector's physical office. Instead, the consumer should be able to dispute the debt, request verification, and opt out of future messages by responding through the social networking website. In addition, these options should be presented in a "clear and conspicuous" manner in order to be reasonably usable.[157]

Taken together, these changes would provide a number of benefits for both consumers and collectors. By ensuring that consumers and collectors alike can take advantage of new technologies, these updates would deter collectors from abusing new communication platforms. By giving consumers both the notice and opportunity necessary to exercise their statutory rights through new technologies, unethical collectors would be prevented from using one-way messages in an abusive manner. Moreover, by requiring a verification and dispute mechanism, both consumers and collectors would be able to gain genuinely from the conveniences of mobile and internet technologies. And finally, by establishing an electronic paper trial for many debt-related communications, these requirements would deter unethical behavior.

The CFPB could model these changes off of the Federal Trade Commission's previous amendments to the Telemarketing Sales Rule (TSR), which impose requirements on telemarketing calls. Under the TSR amendments, a prerecorded call must disclose at the outset of the call that the recipient can ask to be placed on the company's do-not-call list at any time during the message.[158] In addition, the amendments require that in cases where a person answers the call, the call include an interactive voice and/or keypress-activated opt-out mechanism that adds the consumer's phone number to the company's do-not-call list and then immediately ends the call.[159] If the call is answered by an answering machine or voicemail program, the message must

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Act, on the grounds that an opt-in system would provide greater protection for consumers. Jeffrey D. Sullivan & Michael B. de Leeuw, *Spam After CAN-SPAM: How Inconsistent Thinking Has Made a Hash Out of Unsolicited Commercial E-Mail Policy*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 887, 895–96 (2004).

157. *See, e.g.*, FTC, DOT COM DISCLOSURES (2000) (providing guidance on the "clear and conspicuous" standard in the context of media disclosures).

158. Telemarketing Sales Rule, Final Rule Amendments, 73 Fed. Reg. 51164, 51185 (2008) (codified at 16 C.F.R. § 310.4).

159. 16 C.F.R. § 310.4(b)(1)(v).

provide a number that allows the consumer to access an interactive voice and/or keypress-activated opt-out mechanism.[160]

The amendments to the TSR demonstrate that a more detailed approach may be advantageous in order to balance the interests of consumers and debt collectors. Applying a similar approach to debt collectors' use of new technologies to contact debtors, in addition to the current protections under the FDCPA, would be a reasonable way to ensure that both collectors and consumers benefit from new technologies. Thus, in line with the FDCPA's twin goals of protecting consumers and ensuring that ethical debt collectors are able to practice, the CFPB should strongly consider imposing these requirements on debt collection communications that utilize new technologies.

C. Express Written Consent Requirement for New Technologies That May Cause Consumers Financial Harm

A third area of potential reform involves the form of consent that should be required to contact consumers through new technologies that may cause consumers financial harm. The most prominent example of this issue is mobile communications, such as calls and texts to mobile phones. Because mobile phone plans often charge users to receive calls and text messages, debt collectors' use of these technologies may impose unauthorized financial costs on individual consumers.[161]

Although the FDCPA contains a prohibition against "[c]ausing charges to be made to any person for communications by concealment of the true purpose of the communication,"[162] the Federal Communications Commission (FCC) has recently proposed a rule that would have a potentially broader impact on collection efforts that rely on mobile technology. Introduced in 2010, the FCC rule would clarify that the Telephone Consumer Protection Act (TCPA) prohibits *any* calls made from an autodialer or predictive dialer to a mobile telephone—including calls made by debt collectors—without written consent from the consumer.[163] The 2010 amendments are consistent with previous FCC statements that the TCPA's prohibition against calls made from automated dialers extends to "both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls."[164]

Some commentators have argued that such a change will impose unjustified burdens on ethical debt collectors. One commentator has argued, for

160. *Id.*

161. *See* CHALLENGES OF CHANGE, *supra* note 57, at 31.

162. 15 U.S.C. § 1692f(5) (2006).

163. Rules and Regulations Implementing the Telephone Consumer Protection Act; Proposed Rule, 75 Fed. Reg. 13471, 13474–76 (2010).

164. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, 14115 (July 3, 2003). The FCC has reaffirmed this statement in other reports. *See* Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 952 (9th Cir. 2009) (discussing the history of the FCC's interpretation of the prohibition to include text messages).

example, that "[t]here is virtually no way of knowing whether the number provided by the debtor is a cell phone number."[165] Available software that identifies whether a given phone number is mobile or landline, however, contradicts this argument.[166] Although some industry representatives have argued that "scrubbing" mobile phone call lists impose substantial costs,[167] other collectors have claimed that they use the technology on a regular basis.[168]

Utilizing this type of software, even if a collector erroneously called a mobile telephone number, the collector could raise a bona fide error defense. The FDCPA does not hold collectors liable who can show, "by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."[169] Thus, collectors who scrub cell phone numbers from lists of consumer phone numbers should not face an unduly high litigation risk.

A stronger argument against the FCC's rule is that a written express consent requirement would render many consumers practically unreachable by phone.[170] Indeed, it is difficult to imagine a substantial number of consumers giving written consent to be contacted by debt collectors through any medium. As David Jones, president of the Association of Independent Consumer Credit Counseling Agencies has observed, "more and more consumers are moving away from land lines and depending only on their cell phones . . . the collectors have a point."[171] In addition, the transaction costs in receiving written consent from putative debtors, or alternatively in manually calling consumers, may outweigh the potential benefit to the debt collector in contacting consumers' mobile phones.[172] Thus, on a practical level an express written consent

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165. William P. Hoffman, Comment, *Recapturing the Congressional Intent Behind the Fair Debt Collection Practices Act*, 29 ST. LOUIS U. PUB. L. REV. 549, 565 (2010).

166. *See, e.g.*, INTELIUS, http://www.intelius.com (last visited Aug. 18, 2010).

167. *See, e.g.*, Cross-Industry Reply Comment on Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 at 4–5 (June 21, 2010), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7020916024.

168. *See* John Watson, Chief Operating Officer of ARS National Services, Inc., Draft Transcript, Debt Collection 2.0, *supra* note 15, at 111 (noting that because of the TCPA's prohibition on calling cell phone numbers, "I think most agencies, including ours, have multiple scrubs that happen before a dialer gets placed . . . ."); *see also* Brian Cutler, Senior Director of Product and Program Management, Ontario Systems, *id.* ("[W]e've got a software program built into our system that we use with our dialer where we scrub for cell phone numbers.").

169. 15 U.S.C. § 1692k(c) (2006).

170. *See* Cross-Industry Reply Comment, *supra* note 167.

171. Martin Merzer, *Debt Collectors Seek Right to 'Robocall' Cell Phones*, FOX BUSINESS, (Feb. 22, 2011), http://www.foxbusiness.com/personal-finance/2011/02/22/debt-collectors-seek-right-robocall-cell-phones.

172. Letter from Lisa S. McGreevy, President & CEO of Online Lenders Alliance, to the Federal Communications Commission (May 21, 2010), *available at* http://www.onlinelendersalliance.org/Resources/Documents/FCC final comment letter.doc (arguing that the rule "will cost our members millions of dollars in revenue each year in lost collections and higher compliance costs").

requirement may result in debt collectors being precluded from being able to telephonically contact many consumers.

This makes the cell phone issue difficult to resolve. In light of the FDCPA voicemail cases, rendering a new technology unusable may be an acceptable—and necessary—consequence. These cases demonstrate that debt collectors are not entitled to use technologies that present unacceptable harms to consumers.[173] So, if these technologies cannot be utilized without threatening the protections afforded by the FDCPA, they can rightfully be excluded.

In addition to financial harms, there may be privacy concerns that warrant a heightened consent requirement. As discussed above, collectors' use of mobile telephones raises an enormous risk of running afoul of the FDCPA's prohibition on "unusual time or place" contacts.[174] Mobile phones move around with their owner, and the area code of a mobile telephone number may not reflect the owner's current location, or time zone. In a 2009 report on debt collection, the FTC concluded that given this characteristic, debt collectors should only be able to call mobile telephones if they have prior express consent from a consumer.[175] Much like the FCC's proposed rule, the FTC's recommended changes would require that consumers be "adequately informed that they may receive collection calls on their mobile phones" and that the consumers "have taken some affirmative step to indicate their agreement to receive such calls."[176]

While it is important to ensure the privacy of consumers, a practical wholesale bar on the use of new technologies may have unwanted consequences for consumers and collectors alike. If a substantial proportion of consumers begin to rely solely on cell phones as a form of communication, the written consent requirement may leave collectors with few ways to contact putative debtors. Moreover, although an express written consent requirement appears to be consistent with both the purpose of the FDCPA and case law, it is not necessarily the best response to collectors' use of mobile technologies. The opportunity for consumers to dispute a debt over the phone, and to opt out of further communications, could provide benefits that militate against a written consent requirement.

At this stage, whether the FCC's proposed rule will ultimately create the burden that collectors have predicted is unclear.[177] Against this uncertainty, the CFPB should continue monitoring the use of mobile technologies by debt collection companies to determine whether further action is necessary. In

173. *See supra* notes 92–93 and accompanying text.

174. *See* 15 U.S.C. § 1692c(a)(1) (2006).

175. CHALLENGES OF CHANGE, *supra* note 57, at 6.

176. *Id.* at 27.

177. *See* Cynthia Wilson, *Proposed FCC Change to TCPA Would Negatively Impact ARM Industry*, INSIDEARM.COM (Feb. 4, 2010), http://www.insidearm.com/daily/debt-collection-news/debt-collection/proposed-fcc-change-to-tcpa-would-negatively-impact-arm-industry (quoting several industry representatives claiming that the TCPA rule would severely disrupt the debt collection sector).

particular, it should gather information regarding what percentage of consumer debt collection complaints received by the FTC and other consumer protection agencies involve mobile technology. The CFPB can employ its rulemaking powers to solicit comments from industry representatives and consumer advocacy groups to further study the issue. While there may not be sufficient evidence to impose a blanket ban on mobile technologies, the CFPB should closely monitor this area as a potential target for future reform.

CONCLUSION

There are compelling reasons to modernize the FDCPA so that it reflects new and emerging technologies. With the debt collection industry rapidly expanding and collectors pushing the boundaries of lawful behavior, both consumers and ethical debt collectors may be harmed in the absence of sensible reform.

To address the potential for deception and novel privacy concerns that new technologies present, the newly created CFPB should consider revising the FDCPA in three ways. First, the CFPB should clarify the definition of "communication" in order to provide necessary guidance regarding the need for disclosures. Second, the CFPB should require that debt collectors' communications that rely on new technologies clearly and conspicuously present consumers with a workable disclosure, dispute process, and opt-out mechanism. Third, the CFPB should closely monitor the use of mobile technologies by debt collectors, in order to assess whether an express written consent requirement is warranted. These changes would strike a better balance between the need to ensure adequate consumer protection and the interest that the debt collection industry has in utilizing new technologies.