8 Tips for Outbound Calling Compliance for the Debt Collection Industry

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Latitude Software
7800 Belfort Parkway, Suite 100
Jacksonville, FL 32256
Telephone: 904.680.7100
Toll Free: 866.396.2599
www.Latitude-Software.com

Interactive Intelligence, Inc.
7601 Interactive Way
Indianapolis, IN 46278
Telephone/Fax: 317.872.3000
www.ININ.com

insideARM, LLC
6010 Executive Blvd.
Suite 802
Rockville, MD 20852
Telephone: 240.499.3836
www.insideARM.com

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Introduction

Representatives from the debt collection industry make billions of contacts with consumers on behalf of creditors every year. A significant percentage of these communications are conducted via telephone; thus, outbound calling compliance ranks among the most important issues facing the accounts receivable management (ARM) industry. But calling compliance is not only an operational imperative for collection firms; it is also a moving target. The amalgamation of changes in business and consumer technologies, the protracted effects of the economic crisis of 2008, increased scrutiny by federal regulatory bodies, and a minefield of individual state and local laws, increases collection agencies' reputational risk, drives litigation and overhead expense, and poses very real challenges to the fundamental business model of ARM companies.

Specific examples abound.

- Cellular phones—in actuality, handheld computers that also make telephone calls—are virtually ubiquitous in the United States today. According to the Federal Communication Commission's (FCC) 15th Annual Mobile Wireless Competition Report released at the end of June 2011, 89 percent of Americans are mobile phone subscribers and almost a quarter of the country lives in a cellular-only household. More telling is that 50 percent of all US adults age 25-29 have abandoned landlines entirely, a relatively young demographic now increasingly mobile and more difficult to contact.

- Consumer complaint statistics are quoted (and often misconstrued) in nearly every mainstream news story about the debt collection industry. Even as print newspaper circulation has plummeted, the Internet enables instantaneous transmission of full-length online news in as few as 140 characters or less (via Twitter) to those millions of mobile devices mentioned above. Among those consumers who read complaint information about the ARM industry are policy advocates, consumer rights attorneys, federal and state lawmakers and regulators, and state attorneys general. And among the most common complaints they read about are those related to outbound debt collection calls. In 2009, the Federal Trade Commission (FTC) received 41,028 complaints alleging that collectors had harassed complainants by calling repeatedly or continuously. This category of complaints accounted for almost 47 percent of the total complaints received by the FTC about collection agencies in 2009. In March 2011, the FTC reported an 18 percent increase in debt collection complaints in 2010 over 2009. Complaints against third-party debt collectors were up nearly 25 percent and the top complaint in 2010 remained that "[a]debt collector calls repeatedly or continuously."

- Elected officials—local, state, and federal—are responsible to their constituents. Against the backdrop of economic recession and sustained high unemployment, negative consumer sentiment about an industry that ostensibly seems intent on taking more money out of people's pockets is not surprising. Oversimplified views aside, voices critical of the collection industry are being heard and acted upon by politicians. On July 18, 2011, President Obama appointed former Ohio attorney Richard Cordray to head the Consumer Financial Protection Bureau (CFPB). The CFPB was created last year to oversee financial products marketed to consumers. It will roll up regulatory responsibilities from various existing agencies. For the ARM industry, enforcement previously handled by the FTC will now fall under that of the CFPB. The CFPB will be charged with enforcement of debt collection laws like the Fair Debt Collection Practices Act (FDCPA) and will also be granted rule-making authority.

- Finally, the recovery needs of various creditor industries may unintentionally put ARM industry service providers in a catch-22 between their clients, their costs, and compliance. Consider the hypothetical case of a large contingency agency in the midst of a Telephone Consumer Protection Act (TCPA) dilemma. The agency has millions of unauthorized mobile phone numbers in its database, but is extremely cautious about calling wireless telephone numbers. On the client front, a creditor threatens to pull back accounts if the agency won't call on them. On the business front, the agency cannot afford to call all of these accounts manually and still achieve a positive yield per account. Stuck in the middle, the agency faces reduced placements, diminishing profit margins, or the prospect of an exceptionally ill-advised refusal to comply with accepted standards of ethics and applicable laws.

While these challenges are significant, they are not insurmountable. Collection agencies must communicate openly with and educate their clients. They must keep abreast of changes in laws and regulations at all levels of government and proactively train their employees accordingly. They must protect the brand reputations of their clients and their own companies. They must leverage investments in current technology. And they must balance their own compliance-related costs against the enormous price of noncompliance in the collection call arena.

The next sections of this paper will explore two critical sites of outbound calling compliance and suggest a few tips to address the hurdles that attend them.

Hot Button Issues in Calling Compliance

The Foti Decision and the FDCPA

As most in the ARM industry are aware, the Foti Decision is a landmark case related to calling compliance. In the Foti case, the answering machine message left on Paul S. Foti's answering machine – "Good day, we are calling from NCO Financial Systems regarding a personal business matter that requires your immediate attention" – was deemed to be a violation of FDCPA Section 1692e(11) because the caller's name "Did not adequately disclose that the caller was attempting to collect a debt." But a paradox arises because full disclosure that the communication is an attempt to collect a debt –a requirement of the FDCPA—could also violate prohibitions on third-party disclosure if the person listening to the message is not the alleged debtor.

The following is the currently accepted Foti message required for all outbound debt collection calls:

"This call is for (Mr. Consumer). If we have reached a wrong number for this person, please return our call to (1-800-wrong-number) and we will remove this number from our records. If this is not (Mr. Consumer) please hang up or disconnect now. If this is (Mr. Consumer) please hold, there will now be a 5 second pause to allow you to avoid the disclosure of this message to other individuals. [5 second pause] This call is from (Ms. Collector) from (XYZ Collection Services), a professional debt collector. Please return my call to (1-800-XXX-XXXX) for an important message. Again the tele-phone number is (1-800 XXX-XXXX). Thank you."

In order to comply with Foti under the FDCPA, every collection agency representative is required to recite the (roughly 40-second) Foti message on every outbound collection call he or she makes when leaving a voicemail message. Failure to include the mini-Miranda warning and/or not allowing the recipient of the message the option to end the call prior to delivering the message may expose collection agencies to third-party disclosure liabilities and other litigation risks under the FDCPA. At the same time, the business decision on the part of a collection agency not to leave a message when no live person answers the call (in an attempt to avoid unintentional third-party disclosure) is unfortunately not a perfect solution either. In some instances consumer rights attorneys have argued that the very act of calling (even without leaving a message) is an attempt at communication and, therefore, violates non-disclosure rules.

Unfortunately, the end product of Foti-compliant messages is a general decrease in the consumer response rate to those messages. Fewer returned calls mean that a greater number of calls must be placed. Increased call volume drives telephony expenses and more calls mean more Foti messages. Rinse and repeat.

TCPA Facts and Concerns

- The Telephone Consumer Protection ACT of 1991 (TCPA) was enacted by Congress to "protect the privacy of unsolicited, automated phone calls made by telemarketers who were 'blasting' out advertising by the use of both facsimile machines and automated dialers" (see, for example, Senate Report No. 102-178, October 8 , 1991, 1991 U.S.C.C.A.N 1968).

- The original legislation's notes did not include the debt collection industry in the discussions of the bill because of the established relationship created by the debt itself. FCC Orders in 2002 and 2008, however, reversed the collection industry's exemption from the TCPA in this context.

- The TCPA also prohibits the use of any autodialers and predictive dialers or an artificial or prerecorded voice to place calls to any wireless number except for emergency purposes or with the called party's express consent, according to ACA International.

- IMPORTANT 2011 CASE LAW UPDATE: According to ACA International, "Because a consumer may provide prior express consent to the creditor or debt collector for either party to make autodialed and prerecorded message calls to her wireless number in connection with the collection of a debt, it follows that a consumer has the ability to provide prior express consent at any time during which a debt is created and is ultimately paid off. As a result, a consumer that has provided prior express consent may similarly revoke such consent at any time. Case law has determined such revocation need not be done in writing; oral notification is sufficient to put the caller on notice that the consumer no longer consents to autodialed and prerecorded calls to her wireless phone (see Gutierrez v. Barclays Grp., No. 10cv1012 DMS (BGS), 2011 WL 579238, at *3 (S.D. Cal. Feb. 9, 2011)."

"Further, revocation prohibits both the creditor and debt collector from making autodialed and prerecorded calls to the consumer's wireless number. For example, if a consumer revokes consent when communicating with a debt collector, the debt collector must inform the creditor of such revocation as both parties are prohibited from placing autodialed and prerecorded message calls to the consumer. Policies and procedures addressing calling wireless numbers should reflect the steps which must be taken when a consumer revokes consent."

- Outbound calling restrictions aren't always the exclusive purview of the TCPA, however. A major US financial services company made a recent statement to its collection agency network requiring all unauthorized phone numbers to be dialed manually. In addition, the manually-dialed call must come from a device that does not have the capacity to autodial telephone numbers.

Although major TCPA litigation against the ARM industry has been largely isolated to specific areas of the country (notably California and Florida), the TCPA is a federal law; thus, compliance must be addressed at a national level.

Truth in Caller ID Act Facts and Concerns

- The Truth in Caller ID Act of 2009 (which became law in December 2010) relates to issues of caller ID manipulation covered by the TCPA. The FCC, responsible for additional regulations related to the Act, issued a new set of rules on June 23, 2011. In accordance with those rules, an entity that "deliberately seeks to defraud, cause harm, or wrongfully obtain anything of value" from consumers as a result of caller ID spoofing may be subject to "up to $10,000 for each violation, or three times that amount for each day of continuing violation, to a maximum of $1 million for any continuing violation." The FCC may assess fines against entities it does not traditionally regulate without first issuing a citation and it can impose penalties more readily than it can under other provisions of the Communications Act.

- A concern for the ARM industry related to the FCC's new rules is how the use of apparently legal caller ID masking might be interpreted by the judicial system. A collection agency that altered caller ID information to display a local number (to improve the likelihood that a consumer will answer the phone) on a consumer's caller ID device, for example, would not be in violation of the Truth in Caller ID Act of 2009. However, the courts might interpret that strategy as a "scheme to wrongfully obtain something of value," in which case consumer rights attorneys may argue that it is a violation.

Finally, it is important to remember that individual states may enact legislation that is more restrictive than federal rules. For example, Washington state recently amended a number of its debt collection laws via House Bill 1864, Senate Bill 5574, and Senate Bill 5956. Under these separate bills (effective as of July 22, 2011), entities licensed in the state are prohibited from intentionally blocking their telephone number from displaying on a consumer's caller ID. Thus, while the new FCC rules discussed above only restrict caller ID blocking if the intent is "to defraud, cause harm, or wrongfully obtain anything of value," the Washington statutes ban caller ID blocking entirely.

Outbound Calling Compliance Tips and Suggestions

- Educate your clients. Request additional information on service contracts and push for express permission to contact consumers via any and all means (including mobile phones). If you are a debt buyer or collection agency, determine means for receiving, storing, and accessing prior written approval given to your creditor clients.

- Invest in employee compliance training. Make ongoing compliance training a high priority, specifically as it relates to new state or federal laws, regulations and/or policies and your company's approach to them.

- Implement technologies that help monitor employee compliance; for example, voice analytics tools are now capable of confirming in real-time whether mini-Miranda and other disclosures are being made by collection representatives.

- Explore the use of mobile phone identification and suppression databases—for example, integration with DNC.com—and business partners who can implement them with you.

- Develop a recording system to document mobile phone "express permission" agreements with consumers.

- Look for enhanced, software-based call analysis/answering machine detection to navigate the carrier-specific messages that typically are not preempted with a triple tone. Antiquated, card-based answering machine detection is a thing of the past. Best-in-class software analysis solutions can match tens of thousands of recordings against a database during call analysis to distinguish among music, background noise, carrier messages (without triple tone), and live speakers, etc.

- Be proactive; don't wait until a crisis arrives to address compliance issues in your company. Keep an open line of communication with your corporate counsel regarding your business policies and practices as they relate to compliance.

- Use automated workflow tools and software to help streamline the process for calls that must be dialed manually. Explore how business process automation (coupled with a voice recording solution) will expedite manual dialing as well as other automation steps when available.

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