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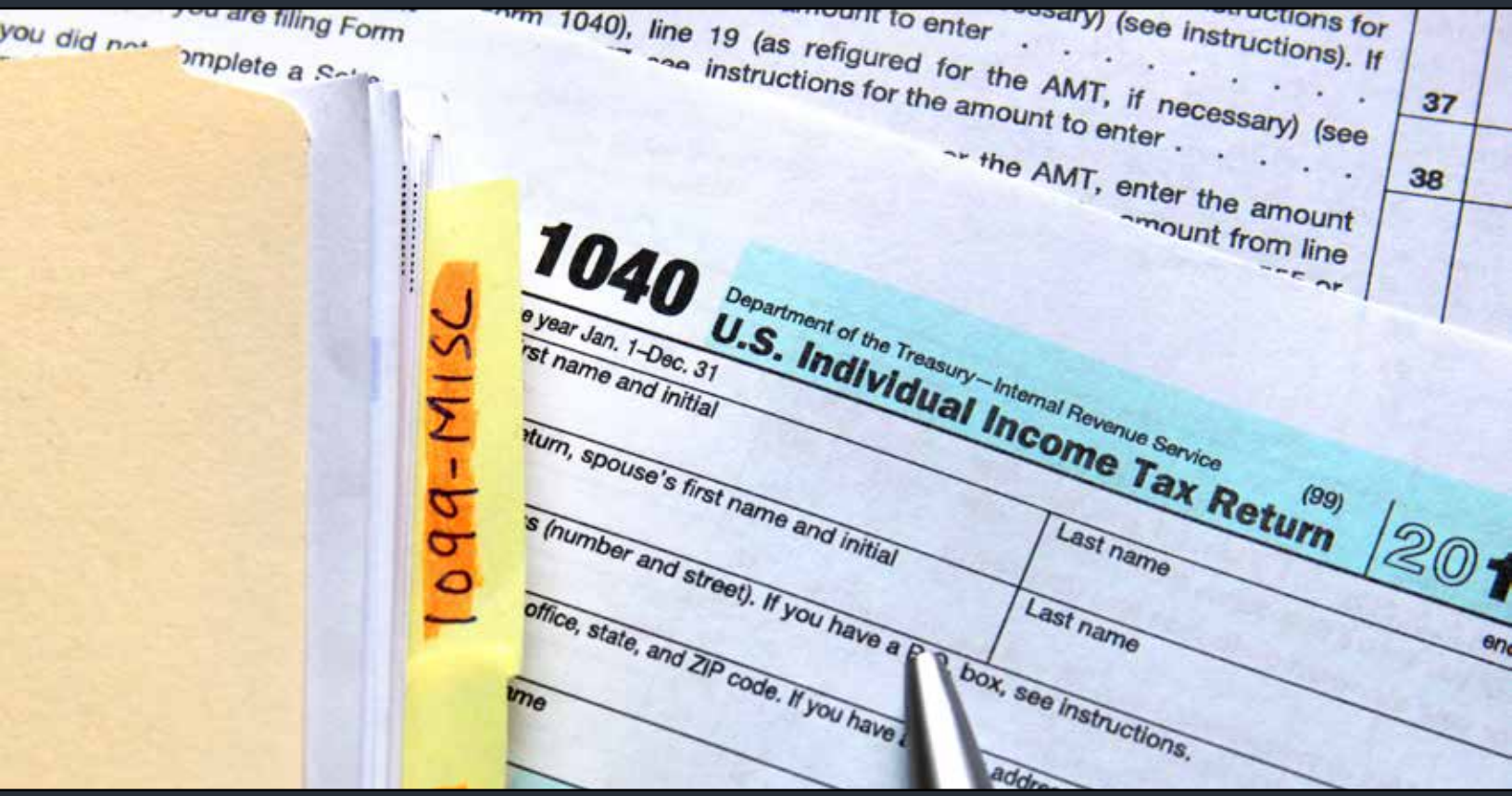
RMA Insights



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President's Message

Looking back upon a very hot summer, concluding with the annual RMA Executive Summit in Lake Tahoe, I take this time to contemplate upon the continued positive direction the industry is heading, by reflecting upon a quote from one of my favorite authors, Isaac Asimov: ***"It is change, continuing change, inevitable change, that is the dominant factor in society today. No sensible decision can be made any longer without taking into account not only the world as it is, but the world as it will be."*** An innovator in his own right, Asimov could imagine inventions and improvement within a world of his own creation, speaking about things that would only become reality decades after he spoke about them in theory. In many ways, the second half of 2017 leaves many companies contemplating these future changes, not just from a regulatory and legal perspective, but also from an internal process improvement standpoint. As artificial intelligence and a younger borrow pool begin to develop, companies must become 'Asimovian' in their own rights, to stay ahead of the inevitable change that the future heralds.

Returning from Lake Tahoe, I reflected on the status of the industry since my last message. No better time to understand the interconnectedness of all aspects of the receivables industry than after three days at the Executive Summit. The Summit was, as always, filled with excellent content, and even more importantly, the opportunity for decision makers, business owners, and regulators to meet in a secluded location for uniquely meaningful interaction.

As with all preceding Summits, the presence of Originating Creditors willing to discuss the market trending and forecasting for the upcoming year, while simultaneously providing a glimpse into a relatively newer financial vertical, is critical within the context of future planning. The FinTech panel gave insight to an emerging marketplace to both experienced buyers of this product type, as well as potential opportunity to those not as familiar with the FinTech space.

Attorney Generals from Colorado and Massachusetts, and the former Iowa AG, presented to our association, focusing on the ongoing initiatives and consumer-based improvements in each of their states for the upcoming year. While our industry is faced with many challenges daily, the ability for members to interact with AGs outside of the normal channels allows for a unique insight not available in general business operations. This opportunity left many RMA members with additional insight into both state-specific concerns, as well as prospective directional improvements for utilization within their own businesses.

Princeton's Julia Duarte Fonseca presented her analysis written in conjunction with individuals from the Federal Reserve Bank of New York, highlighting the many ways in which increased state and federal regulation led to reduced access to credit, as well as significant deterioration in financial health indicators. Ms. Fonseca's presentation was well timed, and allowed many in the audience to finally see statistical information around an often suggested, yet not substantiated, unintended consequence of increased regulation.

As always, the CFPB gave us an update on the upcoming potential rule-making prior to the end of the year. Focus on right-party contact, proper communication channels, and frequency of communication were eluded to as the focus of the long-awaited revisions to

the FDCPA. The presenters did acknowledge the importance of the First Party SBREFA in conjunction with, and in some ways driven by, the feedback from the previously responded to Third Party comments.

Certification has reached version 5.0 and with the successful inclusion of brokers as a certified company category, we again look to the future for additional member classes seeking qualified standards under the RMA Certification Program. Fewer than six years ago, the number of International Members was in the low single digits. That number has grown, and as more prospective international companies continue to join RMA, we have started to examine a new Certification classification specifically for international debt buying and collections operations. Finally, Originating Creditor membership has now reached 40 total members. In comparison to 2011 and 2012, this is more than an eight-fold increase.

As we reach the conclusion of 2017, while the challenges have changed, the determination and focus of the association remains consistent with member expectations. The association continues to advocate for fair and balanced legislation and regulation across the country. In many states, RMA is the only national association advocating on behalf of the receivables management industry. While the new administration provides confidence in a business-friendly federal government, several states are preemptively pushing back. Now more than ever, the industry needs to come together to stand up for our mutual interests. Contributing to the Legislative Fund is a necessity for all businesses who depend on the continued success of our industry.

With an increasingly diverse membership, new technologies at every turn, and ongoing regulation to stay on top of, staying in the know at the Annual Conference has risen from "the extra mile" to "critical". For me personally, the Annual Conference provides something unique every February. Whether it's an important business connection or a better understanding of emerging markets, the investment of one's time and effort is well worthwhile. Earlier this year, the Board of Directors came together to consider the best ways to improve your experience at the Annual Conference. The results of that meeting are sure to make 2018 better than ever.

I urge new and long-time members alike to consider how to play your best hand in 2018. There is a plethora of ways to get involved in your association—volunteer on a committee, run for the Board of Directors, donate to the Legislative Fund, sponsor an event. By contributing your unique talents and perspective, you can help the association, and the industry as a whole, prepare to embrace whatever changes and challenges come before us. I invite you to become your own version of Asimov, and introduce improvements that will one day be the standard of the industry.

Mark Naiman, *President*

Receivables Management Association International

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Financial Regulatory Reform: All Eyes on the Senate

By Daniel Crowley

K&L GATES

As Congress enters the year-end push, financial regulatory reform continues to be a significant component of the legislative agenda. Following House passage of H.R. 10, the "Financial CHOICE Act" (the "FCA") by a party-line vote in June 2017, all eyes are now on the bipartisan efforts currently underway in the Senate to craft reform legislation that can garner the eight Democratic votes that will likely be necessary to overcome a potential filibuster in that chamber. In contrast to the FCA, which House Financial Services Committee Chairman Jeb Hensarling (R-TX) introduced to comprehensively reform the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), the much-anticipated Senate bill can be expected to focus in large part on the promotion of economic growth. Notably, there also seems to be bicameral, bipartisan consensus emerging on the need to provide targeted regulatory relief to small- to medium-sized financial institutions. This article highlights the current policy dynamics on financial regulatory reform.

U.S. House of Representatives

Although the FCA is not expected to pass the Senate in its current form, the bill represents a marker for reform efforts that House Republicans could seek to achieve through such legislative vehicles as appropriations measures. For example, the House Appropriations Committee recently approved its Financial Services and General Government ("FSGG") Appropriations Bill, which includes FCA provisions that would subject the Consumer Financial Protection Bureau (among other agencies) to the Congressional appropriations process, repeal the Volcker rule, and create certain regulatory exemptions for startup investors.

Just as significantly, the FSGG Bill includes Section 511 of the FCA. Section 511 would require federal banking regulators to have a material reason (not based solely on "reputation risk") for ordering a depository institution to terminate a customer's account. Proponents of the provision argue that the measure is necessary to provide relief to both community financial institutions and individuals. They also contend that the provision would furnish institutions and individuals greater due-process protections and would not allow regulators to target businesses based solely on reputational risk. Further, proponents maintain that Section 511 would foster additional transparency, as well as opportunity for the appeal of regulatory decisions to an independent arbiter. The full House has not yet acted on the FSGG bill, and it is not yet clear if the FCA provisions will remain intact.

U.S. Senate

Earlier this year, Senate Banking Committee ("SBC") Chairman Mike Crapo (R-ID) and Ranking Member Sherrod Brown (D-OH) solicited input from the public on legislative proposals to promote economic growth. The SBC requested that the proposals focus on "help[ing] consumers, market participants, and financial companies [to] responsibly participate in the economy in a more effective and efficient manner." Senate Republicans argue that burdensome regulations have led to a lack of readily available credit, which in turn has stifled economic growth and job creation. Additionally, Democratic Senators who are up for reelection in states where President Trump won in the 2016 Presidential Election will likely face strong political incentives to support reasonable reform efforts. At this juncture, there has been a heightened emphasis on both sides of the political aisle on furnishing regulatory relief to financial institutions that provide services to small businesses, but don't represent the same kind

of risks to the financial system as "too-big-to-fail" institutions. Among other issues, RMA has provided input on legislative solutions to ensure that consumer debt can be sold and resold, and that documentation and itemization requirements truly benefit consumers, and that state limitations laws are not preempted by federal law, and to update and modernize the Fair Debt Collection Practices Act.

Trump Administration

Reform efforts in the Senate will likely be influenced by the Trump Administration's financial regulatory reform principles, which are set forth in the series of reports that the U.S. Department of the Treasury is required to issue by Executive Order. One Treasury report ("A Financial System That Creates Economic Opportunities") has already been issued, and three others are expected to be released in the near future. We expect that the second report about capital formation could be released as early as September 2017. Other federal financial regulatory agencies are exploring ways to achieve reform administratively in the absence of legislation. For example, the Office of the Comptroller of the Currency recently requested comments from the public about possible reforms to the Volcker Rule, and the Securities and Exchange Commission has expanded the availability of draft registration statements for initial public offerings in order to spur capital formation. Efforts are also being undertaken to coordinate regulatory oversight among the various agencies in an attempt to try to reconcile any inconsistencies and redundancies that may have been created by Dodd-Frank.

Conclusion

In the near term, the SBC can be expected to continue putting together its reform proposal, while convening hearings that will inform the thinking of SBC members. As with the FSGG Bill, it also remains possible that certain aspects of the Treasury reports and/or the FCA could advance as stand-alone measures or be included in legislative vehicles that "must-pass" before the end of the year. RMA will continue to provide input as part of both the legislative and regulatory processes to ensure that industry interests are advanced as reform efforts continue. Ultimately, Dodd-Frank reform can be expected to be an incremental, multi-year process, which will likely be further complicated by the political environment surrounding the 2018 mid-term elections.

Daniel Crowley
Dan Crowley is a partner in the firm's Washington, D.C. office. His practice is focused on public policy issues relating to financial services and capital markets. Mr. Crowley represents category-leading financial services clients across a broad range of policy issues including accounting & financial reporting, and more.

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Cognical, Inc. dba Zibby, New York
Foundation Finance Company, Wisconsin
Line5, LLC, Florida
Tracir Financial Services, Inc., Ohio
Wilco Finance, Inc., North Carolina

Debt Collectors Pay for Circuit Mistakes

By Donald S. Maurice

The federal Fair Debt Collection Practices Act is largely a "strict liability" statute. Essentially, you violate the act if you engage in conduct prohibited by the act, regardless of whether the conduct was not intended.

To steer clear of violations, many look to decisional law interpreting the FDCPA. Two recent circuit court decisions cast serious doubt on the practice.

In its July 2017 decision in *Oliva v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, the Seventh Circuit Court of Appeals ruled that a debt collector who relies upon circuit precedent that is later reversed is not only liable for the FDCPA violation, but also cannot escape damages under the FDCPA's bona fide error exception.

Seventh Circuit Reverses FDCPA Interpretation

Section 1692i of the FDCPA requires that a debt collector who sues to collect a consumer debt must sue in the "judicial district or similar legal entity" where the debtor lives or signed the contract in question. In its 1996 decision *Newsom v. Friedman*, the Seventh Circuit Court of Appeals interpreted "judicial district" to mean that if a debtor resided in or signed a contract in Cook County, Illinois, a debt collector could file suit in any of the county's six municipal districts.

As you might imagine, debt collectors relied on *Newsom* when instituting lawsuits in Cook County. Fourteen years later, the Seventh Circuit decided *Newsom* was wrongly decided and held that "judicial district or similar legal entity" in section 1692i means "the smallest geographic area that is relevant for determining venue in the court system in which the suit is filed." That decision, *Suesz v. Med-1 Solutions, LLC*, determined that for the purposes of suing in Cook County, the FDCPA would now be interpreted as requiring a lawsuit to be brought not in any court in Cook County, but in that divisional court within Cook County where either the debtor resides or signed the contract.

Chicago is no small city and when the *Suesz* decision came down there were plenty of lawsuits pending that, although filed in Cook County as *Newsom* condoned, had not been filed in a Cook County divisional court in which the debtor resided or signed the contract.

One such lawsuit was filed against Ronald Oliva in the First Municipal District of Cook County in downtown Chicago. Although the collection lawsuit was dismissed only eight days after the *Suesz* decision came down, Oliva sued claiming the debt collector had violated the Seventh Circuit's latest interpretation of the FDCPA's venue provision. The District Court disagreed finding that although the law firm may have violated the FDCPA under *Suesz* it did so because of its good-faith reli-

ance on the Seventh Circuit's prior precedent in *Newsom*. Oliva appealed and the Seventh Circuit affirmed.

But Oliva was not done. He petitioned for review by the entire Seventh Circuit which, in turn, reversed itself and found that the law firm's reliance on *Newsom* did not shield it from violating the FDCPA.

Circuit Precedent No Protection from FDCPA Liability

A change in decisional law typically will not shield the losing party from liability. A court's decision imposing liability, after all, does so in considering past conduct. But that's not what makes the *Oliva* decision so troublesome.

The FDCPA allows a debt collector to avoid liability if "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." Here there was no question the collection lawsuit was filed in reliance on *Newsom*. And it would seem plausible that under these circumstances, where the very practice complained of had been lawful for 14 years, that reliance on *Newsom* would be enough to invoke the protection of the bona fide error defense. Not so here.

The Seventh Circuit's Oliva decision found that any mistake of law interpreting the FDCPA, even if it is a mistake arising from strict adherence to the controlling circuit's decisional law, does not qualify as a bona fide error.

Third Circuit Reaches Similar Conclusion

A few days before the Oliva decision, the Third Circuit Court of Appeals also refused to excuse a debt collector from FDCPA liability when its conduct was in reliance on prior decisional law from within the circuit.

In *Daubert v. NRA Group, LLC*, the debt collector had made operational changes to use Quick Response codes in its mail communications to consumers. It did so relying on two trial court decisions that found that the use of QR codes visible on the face of envelopes did not violate the FDCPA. When the debt collector was later sued for using such QR codes, the trial court found that it did violate the FDCPA, but the debt collector was excused from liability under the FDCPA's bona fide error exception because it relied on the earlier trial court decisions.

The Third Circuit reversed, finding that a bona fide error cannot be premised on a mistaken legal interpretation of the FDCPA, even when it is premised on trial court decisions from within the same circuit.

Decisional Law's Role in Compliance

These recent decisions do not change the key role of decisional law in interpreting the FDCPA. Case law has provided significant guidance on the timing of initial disclosures, the timing of telephone contacts and the verification of debt.

But Oliva and Daubert create unnecessary risk when debt collectors, in a good faith effort to comply with the FDCPA, rely on case law. This is particularly disconcerting when controlling circuit law "instructs" that certain conduct is FDCPA compliant. One example comes from the Seventh Circuit's decision in *Miller v. McCalla*. There, Judge Posner wrote:

We hold that the following statement satisfies the debt collector's duty to state the amount of the debt in cases like this where the amount varies from day to day . . .

After *Oliva*, pronouncements like Judge Posner's famous safe harbor clause may not have the effect once accorded them, at least in the Third and Seventh Circuits.

And so, as the *Oliva* court put it, "[o]ne judge or a panel of judges may or may not understand that text correctly, but the statute remains the law even if judges err." In other words, when a circuit court mistakenly interprets the FDCPA, debt collectors will pay for it.

Don Maurice
Don Maurice is a partner at Maurice Wutscher, LLP a nationwide law firm representing the financial services industry in both defense and compliance matters. He has represented financial services companies in trials and appeals including matters before several U.S. Courts of Appeals and as amicus counsel before the U.S. Supreme Court. Mr. Maurice is a fellow of the American College of Consumer Financial Services Lawyers and serves on the Governing Committee of the Conference on Consumer Finance Law. He chairs the Debt Collection Practices and Bankruptcy Subcommittee of the American Bar Association and serves as outside counsel to RMA. He is admitted to the Bars of Massachusetts, New York, New Jersey, and the District of Columbia.

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Credit Reporting: Adopting to Regulatory Expectations

By Kim Phan

This fall, any RMA members and other industry participants that furnish trade line information about consumer debts to consumer reporting agencies (CRAs) must implement changes to how that data is reported. The Consumer Data Industry Association (CDIA), the trade association for the consumer reporting industry, has announced modifications to the industry's standard electronic data reporting format called the Metro 2. These modifications arise from a self-regulatory National Consumer Assistance Plan (NCAP) that was first announced in March 2016 in response to a multi-state enforcement action against Equifax, Experian, and TransUnion. The NCAP is designed to enhance the ability of CRAs to collect complete and accurate consumer information and provide consumers more transparency about their credit reports.

The NCAP updates the mandatory data that furnishers will now be required to report about collections trade lines. Beginning in September 2017, RMA members must now be prepared to furnish the following:

- A full file on a monthly basis for accounts that are open, that are paid in the last 90 days, or that require deletion or correction;
- No medical debt collection accounts (Creditor Classification Code 02) that are less than 180 days past the date of first delinquency;
- A delete for accounts that are being paid or were paid in full by insurance (not by the consumer); and
- Newly established minimum consumer personally identifiable information;

  >> For new collection trade lines, this must include the full name (first, middle, last, and generation code/suffix), address, full Social Security number, and date of birth (mmddyyyy); and

  >> For new authorized users on pre-existing accounts, this must include the full date of birth (mmddyyyy).

Under the NCAP, furnishers are strongly encouraged to monitor data being reported on an ongoing basis to ensure these requirements are being met.

With regard to monitoring, the NCAP reflects the regulatory expectations expressed by the Consumer Financial Protection Bureau (CFPB) in its Supervisory Highlights Consumer Reporting Special Edition released earlier this year. In this document, the CFPB summarized its supervisory actions against furnishers for credit reporting issues.

The CFPB made clear that it expects companies to structure their compliance management systems in a manner sufficient to comply with the furnisher obligations required under the Fair Credit Reporting Act (FCRA). This should include oversight of furnishing practices by senior management or a company's Board of Directors; maintaining a formal data governance program; updating FCRA policies and procedures, as appropriate; training employees who are responsible for furnishing data and/or handling consumer disputes; monitoring for issues with data being furnished and taking appropriate corrective action(s); and conducting follow-up testing on the

accuracy of consumer account files submitted to and rejected by one or more CRAs.

Specifically with regard to debt sales, the CFPB stated that a furnisher's policies and procedures should address furnishing information about consumers following transfers of accounts in a manner that prevents re-aging of accounts and other problems that may affect the accuracy or integrity of the information furnished when being transferred between selling and buying entities, especially with regard to dates of first delinquency.

The CFPB emphasized the importance of the date of first delinquency as it determines when information on a consumer report becomes obsolete and may no longer be reported by the CRAs. The CFPB noted that at least some furnishers examined by the CFPB had failed to report accurate dates of first delinquency on accounts when consumers who had been delinquent filed for bankruptcy. The CFPB directed at least one furnisher to re-evaluate consumer accounts with bankruptcy, charge-off, and other applicable post-delinquency statuses to confirm the date of first delinquency was being reported accurately and to promptly correct and update any dates of first delinquency with the CRAs, as necessary.

The CFPB also noted that furnishers should carefully consider any data quality feedback received from the CRAs to identify internal compliance gaps or persistent violations that furnishers should address. This should include a process to formally review exception reports provided by the CRAs so that the furnisher can identify, correct, and resubmit invalid data identified by the exception reports.

The CFPB also expects that furnishers should establish and implement other internal controls, such as data quality testing for accuracy issues by verifying random samples of information provided to the CRAs. Testing should occur on data before and after it is furnished to the CRAs. Furthermore, the CFPB expects furnishers to conduct ongoing periodic evaluations or audits of furnishing practices to identify and correct root causes of any inaccurate information that is generating a high number of consumer disputes.

The accuracy and integrity of consumer reports is critical to an efficient consumer reporting industry, which ultimately benefits both consumers as well as credit markets. However, even though the FCRA is nearly 50 years old, the who, what, when, why, and how of credit reporting continues to pose challenges for RMA members and other industry participants, who must stay vigilant for and responsive to changing regulatory expectations by both the CDIA and CFPB.

Kim Phan

Kim Phan provides regulatory guidance on compliance matters, including interactions with the Consumer Financial Protection Bureau and the Federal Trade Commission relating to both supervisory and enforcement activity involving UDAAP, FCRA, FDCPA, GLBA, TCPA, and other consumer protection statutes. Ms. Phan's practice also focuses on privacy and data security laws and regulations. Her work in this area encompasses strategic planning and guidance for companies to incorporate privacy and data security considerations throughout product development, marketing, and implementation, as well as data breach prevention and response.

New State Laws: Business as Usual for RMA Certified Businesses

By David Reid, CRCP

The states of Colorado, Maine, and Oregon, have adopted comprehensive statutory changes in 2017 that will impact the operations of all debt buying companies that collect accounts in these states, not to mention the agencies and law firms that service them and the originators that sell to them. Combined, these new laws represent some of the most noteworthy changes to impact the industry in a single year at the state level.

While these laws are significant, it is also important to place them in context and not overreact. The new statutory requirements are highly consistent with the standards contained in the Receivables Management Certification Program that RMA certified companies have already been complying with for a number of years. Therefore, any operational changes necessitated by these enactments will likely be much more manageable for RMA members compared to those faced by non-members who have not adopted the industry's robust consumer protection standards.

However, regardless if you are certified or not, RMA would strongly recommend that any businesses operating in these states spend time reading these new laws and ensuring that those internally responsible for compliance, purchase/sale, and legal operations are fully aware of their requirements.

While the bills share similarities, the one constant is that they have a January 1, 2018 effective date and a number of their statutory provisions (but not all) only apply to debt that is purchased or sold after the effective date.

Here is a high level summary of the new laws:

COLORADO
[Chapter 285 of the Laws of 2017]

When bringing a legal action on a debt owned by a debt buying company, a copy of each assignment demonstrating chain of title and one of the following must be attached to the complaint:

- A copy of the contract, account-holder agreement, or other writing from the original creditor or the consumer evidencing the consumer's agreement to the debt
- For medical debt, a copy of a redacted itemization of charges
- f a signed writing evidencing the debt does not exist, a copy of a document provided to the consumer while the account was active must be attached; for credit cards this can be the most recent monthly statement showing a purchase, payment, or balance transfer
- If a claim is based on an electronic transaction, where a signed (signature presumably can be wet or electronic) writing never existed, a copy of the records created during the transaction evidencing the consumer's agreement, the date and terms of the transaction, and information provided by the consumer during the transaction

Prior to entry of a default judgment, the following evidence must be submitted to the court to establish the "amount and nature" of the debt:

- Charge-off account number
- Name of charge-off creditor
- Amount due at charge-off or if not charged-off, an itemization of the pre-charge-off balance
- Itemization of the post-charge-off balance
- Date of consumer's last payment or date of consumer's last transaction
- If not a revolving credit account, the date the debt was incurred

As part of the negotiating process, RMA through its lobbyist was also able to insert an exemption from existing state bonding requirements for debt buying companies as long as they do not also operate as a third-party collection agency.

MAINE
[Public Law 216 of 2017]

The new law makes it a "prohibited practice" for a debt buying company to collect or attempt to collect a debt or sell or otherwise transfer ownership of a debt unless the debt buying company possesses the following:

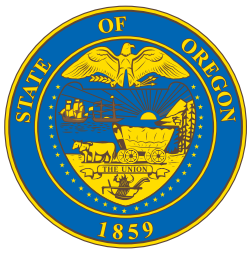
- The original creditor's name at the time of charge-off
- The original creditor's account number used to identify the debt at the time of charge-off
- The principal amount due at charge-off
- An itemization of interest and fees, if any, incurred after charge-off that is claimed to be owed and whether those were imposed by the original creditor or any subsequent owners of the debt
- If the debt is not from a revolving credit account, the date that the debt was incurred or the date of the last charge billed to the consumer's account for goods or services received. In the case of debt from a revolving credit account, the debt buying company must possess the date of the last extension of credit for the purchase of goods or services, for the lease of goods or as a loan of money
- The date and amount of the last payment, if applicable
- The names of all persons or entities that owned the debt after the time of charge-off, if applicable, and the date of each sale or transfer
- Documentation establishing that the debt buying company is the owner of the specific debt at issue. If the debt was assigned more than once, the debt buyer must possess each assignment or other writing evidencing the transfer of ownership to establish an unbroken chain of ownership, beginning with the original creditor to the first debt buyer and each subsequent debt buyer
- A copy of the contract, application or other documents evidencing the consumer's liability for the debt. If a signed writing evidencing the original debt does not exist, the debt buyer must possess a copy of a document provided to the consumer before charge-off demonstrating that the debt was incurred by the consumer or, for a revolving credit account, the most recent monthly statement recording the extension of credit for the purchase of goods or services, for the lease of goods or as a loan of money

The information and documents described above must also be alleged and/or attached to the complaint and are subject to the Maine Rules of Evidence. The complaint must also include:

- The basis for any interest and fees
- The basis for the request of attorney's fees, if applicable
- A statement that the cause of action is filed within the applicable statute of limitations period

Debt buying companies who submit applications to be licensed as a debt collector must demonstrate that the company has conducted a criminal background check on officers and employees, prior to employment, if the person engages in the active collection of debt or has access to consumer credit information. This requirement is virtually identical to that contained in the RMA Certification Program.

OREGON
[Chapter 625 of the Laws of 2017]



A debt buyer, or a debt collector working on the debt buyer's behalf, must include the following in the initial pleadings when seeking court action on a debt:

- The original creditor's name, written as the original creditor used the name in dealings with the debtor
- The name, address, and telephone number of the person that owns the debt and a statement as to whether the person is a debt buyer

- The last four digits of the original creditor's account number for the debt

- The date on which the debt buyer purchased the debt

- A detailed and itemized statement that shows:

  - The amount and date of the debtor's last payment on the debt before the debtor defaulted or before the debt became charged-off debt, if the debtor made a payment

  - The amount and rate of interest, any fees and any charges that the original creditor imposed, if the debt buyer or debt collector knows the amount, rate, fee or charge

  - The attorney fees the debt buyer or debt collector seeks, if the debt buyer or debt collector expects to recover attorney fees

  - Any other fee, cost or charge the debt buyer seeks to recover

A debt buyer, or debt collector acting on behalf of a debt buyer, engages in an unlawful collection practice if the debt buyer or debt collector:

- Collects or attempts to collect a debt before providing, in response to a debtor's request, the following documents that establishes the nature and the amount of the debt:

  - The information provided in the initial pleadings (see above)

  - The name and address of the debtor

  - Evidence that the debt buyer and only the debt buyer owns the debt

  - The date on which the debt buyer purchased the debt

  - A copy of the agreement between the original creditor and the debtor that is either: (i) the contract or other writing the debtor signed that created and is evi dence of the original debt; or (ii) a copy of the most recent monthly statement that shows a purchase transaction, balance transfer, or the debtor's last payment provided the debt is a credit card debt or other debt for which a contract or other writing that is evidence of the debt does not exist

    [NOTE: A debt buyer, or debt collector acting on behalf of a debt buyer, must provide to a debtor all of these documents within 30 days after receiving a request for information about the debt from the debtor. While this provision appears in the pleadings section of the law, it is not clear whether its applicability only relates to pleadings.]

- Fails to provide to a debtor, after the debt buyer or debt collector receives payment in cash or the debtor requests the receipt, a receipt that contains specific content

- Files legal action against a debtor or files legal action to attempt to collect a debt if the debt buyer or debt collector knows or after exercising reasonable diligence would know that an applicable statute of limitations "bars the legal action to collect or the legal action to attempt to collect the debt"

- Brings a legal action against a debtor to collect a debt without possessing records that satisfy the business records exemption to the rules of evidence (or that are a record of a foreign judgment) that establishes the nature and the amount of the debt (see above)

The following are new unlawful collection practices which apply only to debt collectors:

- Collects or attempts to collect interest or other charges or fees that exceed the actual debt unless the agreement, contract or instrument that creates the debt expressly authorizes, or a law expressly allows, the interest or other charges or fees

- Collects or attempts to collect any debt that the debt collector knows, or after exercising reasonable diligence would know, arises from medical expenses that qualify for reimbursement under the Oregon Health Plan or under Medicaid

- Files a legal action to collect or files a legal action to attempt to collect a debt if the debt collector knows, or after exercising reasonable diligence would know, that an applicable statute of limitations bars the collection or the collection attempt

- Knowingly collects any amount, including any interest fee, charge or expense incidental to the principal obligation, unless the amount is expressly authorized by the agreement creating the debt or permitted by law

- Collects or attempts to collect a debt before providing to a debtor specific documents within 30 days after the date of the debtor's request

This bill also introduces the first stand-alone licensure requirement for debt buyers in the nation. In most states that license debt collection activity, debt buyers are generally considered "debt collectors" or "collection agencies" for the purpose of licensing. Debt buyers are not considered debt collectors or collection agencies under existing Oregon law and as clarified in this bill.

CONCLUDING OBSERVATIONS

The increased activity witnessed at the state level this past year perhaps should not too surprising when considering the results of the 2016 national elections. It was anticipated that a Trump victory would stoke the flames of legislative initiatives at the state level, especially in democratic leaning states. However, what is clear is that if it were not for RMA's extensive lobbying on the three new laws, the results would have been crippling for the industry rather than the achieved outcome that largely reflects RMA's certification standards and allows RMA members, for the most part, to conduct business as usual.

David Reid, CRCP
David Reid serves as Director of Government Affairs & Policy for RMA. In this capacity, Mr. Reid manages the state legislative, regulatory, and advocacy activities of the association. Mr. Reid also serves as staff liaison to the RMA Certification Council and its Audit and Standards Committees. Mr. Reid is a graduate of Canisius College and Albany Law School. He is admitted to the New York and New Jersey bars.

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The Value of RMA Radiated at the Executive Summit

RMA hosted a successful Executive Summit in Lake Tahoe, California, boasting 125 attendees from a wide range of ARM-industry companies. The intimate nature of the Resort at Squaw Creek proved to be an ideal venue for networking, as participants naturally encountered one another among the restaurants, corridors, and decks. While many golfers were humbled by the challenging course on Tuesday, all were impressed by the scenic views surrounding them. RMA's affiliate members were eager to show their support of the membership by sponsoring events, giveaways, and meals. These companies demonstrated admirable commitment to the education, legislative support, and business health of the entire receivables management industry.

"The Summit had a great concentration of top players and decision-makers in the industry, including the regulators and those that know them. Great networking and relationship building was done at this Summit." - Craig Antico

"One of my takeaways from the Summit was the value of RMA. I am going to meet with my team to discuss joining a committee, pursuing Certification, and generally becoming a more active member of RMA." - Isaac Goldman.

CYBER INSURANCE

What Is Cyber Liability Insurance and What Does It Cover?

By Anthony D'Elia

I am convinced that there are only two types of companies: those that have been hacked and those that will be. And even they are converging into one category: companies that have been hacked and will be hacked again.
- Robert Mueller, Director of the FBI (2001-2013)

Data breach. Cyber risk. Security and privacy. Cyber liability. All of these terms refer to the same type of insurance policy designed to address the cyber security exposures for companies across all industries; however, not all cyber liability insurance policies are created equal. There are two primary portions of a cyber liability insurance policy: third party and first party.

The third-party portion of a policy was created to address lawsuits (defense and damages) and the increasing state and federal regulatory oversight across the country as they relate to an individual's right to privacy. There are currently 48 states with their own unique regulations in addition to various industry specific regulations such as HIPAA/HITECH for healthcare, Gramm-Leach Bliley for financial services, the NYDFS Cybersecurity (23 NUCRR 500) requirements, and the TCPA. Each of these regulations and laws outlines different definitions, compliance, and protocols that need to be followed before and after a breach with conflicting wording in many cases. The regulatory environment has evolved over the years but the ultimate goal of protecting the individual's private information remains the same.

As with most things, the only constant is change. While the initial exposure was seen to be a response to the regulations, it became increasingly clear that the business risks related to cyber security were just as important. Where these insurance policies in the past were designed to respond strictly to the requirements in the event of a data breach, the first-party coverage was created to address the business risks and responsibilities of the insured after a breach. These first-party expenses include several elements necessary to handle and survive a breach:

- The costs to notify and monitor the credit of individuals affected by the breach;
- Forensics and public relations expenses to determine what happened and how to notify the public;
- Cyber-crime and extortion demands tied to the theft of money by cyber criminals, including social engineering, or malicious software (i.e. ransomware); and
- Business interruption coverage to get your systems back up and running as well as the reimbursement of lost revenues due to the breach.

The impact that an event could have on the bottom line increases with every breach that hits the news. The combination of these first- and third-party coverages exists to provide comprehensive coverage when your company goes through a data breach or cyber event. It is extremely important to note that not all cyber liability insurance policies will contain the entirety of the first-party coverages mentioned. In particular, endorsements and add-ons to existing policies are generally not designed to provide the full suite of coverages found on a comprehensive stand-alone cyber liability insurance policy.

To put things into perspective there are several breaches specific to the collection agents in recent years for various reasons that come to mind:

Los Angeles Healthcare Provider – 2014

A break-in at a Southern California medical building and collections agency resulted in eight stolen computers and a total of 341,997 patients affected by the breach. The illegally obtained information included Social Security numbers, birth dates, first and last names, and medical diagnoses stored in the company's database. The Los Angeles based company issued a $25,000 reward for the devices without success. The subsequent HIPAA fines and penalties for the breach can be up to $1,500,000 as a holder of healthcare information in addition to the expenses to notify all of the individuals. The total estimated costs: $1,000,000 inclusive of forensics, notification, and related fines.

United States Wireless Provider – 2015

Hackers breached a collections network server that contained the personal information of approximately 15,000,000 customers of a U.S. wireless provider. Private records including addresses, names, social security numbers, birth dates, driver's licenses, military IDs, and passport numbers of current and former customers were accessed. The related forensics investigation discovered that the event happened during a limited period of time, however the damage was done. A report of the event determined that no inappropriate use of customer records occurred. The company's response consisted of strengthening IT security and notification to customers offering 12 months of credit monitoring as well. The total estimated costs: $1,750,000 inclusive of forensics, notification, improvement to IT systems, credit monitoring, and public relations.

Why Do You Need It?

Think about it this way: the odds of being struck by lightning are 1 in 960,000; the odds of finding a pearl in an oyster are 1 in 12,000; the odds of experiencing a data breach/event are 1 in 4 according to the Ponemon Institute's "2017 Cost of Data Breach Study: Global Overview". The stories we see in the news typically involve large and well-known organizations costing hundreds of millions of dollars. In reality, the vast majority of these events involve private companies (62 percent of small and mid-size businesses) and typical event costing around $200,000 or about $76 per record. When you factor in damage to your brand, lost revenues, and lost customers the estimated cost per record is as high as $225. In 2017, the average for total estimated costs in the case of a cyber breach for companies with fewer than 1,000 employees came to $362,550. Overall, 60 percent of businesses go out of business within 6 months of a cyber attack. The financial services industry is responsible for 40 percent of reported cyber attacks. This includes collections agencies and debt collectors. When you analyze the reasons that the debt collection industry has such a high exposure to potential security breaches, it makes sense. Accounts receivables management companies all have the following common characteristics, which make them vulnerable to cyber attacks:

- Databases with a large number of personal records including name, addresses, and contact information to identify one individual;
- Access to personal financial information that can be used to open lines of credit should they be stolen;
- Industry requirements to store records for an extended period of time leading to aggregation of data; and
- A consistent flow of funds through the organization that can be redirected or transferred as a part of an attack or phishing scheme.

The expenses incurred after an attack or breach definitely add up quickly when you see them on paper. The exposures beyond the data breach can be just as impactful as well.

Over the last 18-24 months, there has been a 400 percent increase in the number of ransomware claims by businesses purchasing cyber liability insurance.

Ransomware – *A type of malicious software that infects your computer with the goal of encrypting your files thereby preventing you from accessing data or operating your systems entirely. The ransomware demands a modest ransom usually in Bitcoin or alternative cryptocurrency to be paid to an anonymous attacker.*

Companies do not have a responsibility to report a ransomware event under most regulations so they go unreported, making it difficult to track; however, the advent of newsworthy ransomware such as WannaCry and Petya have brought ransomware to the forefront. While the ransom demands are generally low, averaging approximately $500 in ransom "demands", these attacks can make it difficult for a company to operate during and after the breach. If the ransom is not paid, a company typically needs to take their systems offline to restore data, software, and hardware from back-ups with no guarantee of working all the while being unable to generate revenue. If the ransom is paid, there is still a 50 percent chance that the criminals will not unencrypt your system requiring you to restore from back-ups or rebuild the network. The insurance company can help in the determination as to whether or not the payment should be made as well as making the payment on your behalf in whatever form requested by the criminals.

The most recent addition to the cyber criminal's arsenal has been increased usage of social engineering and phishing attacks. Phishing emails have become incredibly realistic in appear-

ance and skill resulting in an increased frequency of fraudulent transactions that appeared to have been authorized only to find out later that the request was made by an imposter. This is not something that is generally covered under a crime policy because the funds were voluntarily released and the transaction was authorized. Sadly, once the money leaves the account it is very rarely recovered leaving companies without recourse in recovering funds. A cyber liability insurance policy can provide coverage for all of these circumstances and expenses to keep your business running.

What Is the Value?

Insurance is essentially the business of worst -ase scenarios. Typically, an insurance policy is supposed to be there when the worst happens to you or your business. Data breaches and cyber attacks are becoming the worst-case scenario for many businesses that rely on computer systems and technology vendors to function on a daily basis. Your cyber liability insurance policy can serve as an invaluable part of your business continuity plan in that the policy is designed to handle a breach from start to finish and get your business back up and running. The true value of a cyber liability insurance policy is not in the coverage provided post-breach, but in the services provided pre-breach as a part of the policy.

A comprehensive cyber liability insurance policy should incorporate pro-active risk management measures as a part of the policy giving the insured access to a full suite of services including sample privacy policies, incident response plans, and educational material on how to create a culture of privacy. Some additional features can include access to a hotline to discuss potential events, consulting with breach vendors, penetration testing, and table top exercises all with the goal of creating a more secure environment. It is important to add that many of these services will not be included in endorsements or add-on coverage found on your other policies (e.g. GL, BOP, Package) because they are not intended to be an all-encompassing policy.

There is no "best company" or "best policy" in the marketplace because every risk is unique with different needs and concerns making it important to find the best policy for your company. The first step is to work with your insurance agent or broker in identifying the right insurance company and policy for your company. An educated agent or broker can work to assess your needs and provide quotes that can address your exposure through a comprehensive and competitive policy.

In order to protect your company for the exposures mentioned specific to the accounts reeivables management industry, it is important to keep some key coverages and issues in mind when looking for an insurance policy including the following:

- What type of risk management is provided by a policy?
- Will this policy reimburse you for lost revenues if you are unable to operate after an event?
- Does this policy include cyber crime and social engineering coverage?
- Dependent or Contingency Business Income coverage is important in keeping your company functioning if a vendor (e.g. cloud provider) suffers a cyber event.
- Does the carrier handle breaches in-house? Do they provide a breach coach?
- What is the carrier's experience in this coverage? How long have they been writing this policy?
- Ask for Full Prior Acts coverage to ensure coverage exists for those events that may have already occurred but you do not know about yet
- Does the carrier see Cyber Liability as a Service (CaaS) or just another insurance policy to be sold?

Given the nature of the environment and the higher risks at hand for the accounts receivables management industry it is important to keep risk management in mind at all times. A comprehensive cyber liability policy should be seen as a service to be used with the benefit of insurance rather than a standard policy. As the criminals get smarter we must respond in kind through risk management and enterprise-wide solutions that include education, training, and monitoring. Cyber security risks are not a problem that can be solved so they must be managed through a comprehensive risk management platform which includes an insurance policy.

Anthony D'Elia

Anthony D'Elia has proven track record with over 15 years of insurance experience, including having created one of the East Coast's most successful personal and commercial insurance agencies. He has been providing insurance to the ARM industry for over 10 years and formed Acumen in 2011. Mr. D'Elia has been responsible for Acumen's growth as a true, full-service ARM support company offering E&O insurance, licensing, bonds, auditing, and compliance services. Recently, Mr. D'Elia successfully launched CollectionGuard to meet the E&O needs of debt collectors, debt buyers, and collection attorneys. CollectionGuard is an exclusive Acumen insurance program with polices written specifically for the collection industry.

Who to TRUST?

By Matt Pridemore

Understanding licensing requirements for debt buyers has been a challenging task, and we are yet to see the light at the end of the tunnel. The list of potential licenses that might apply to debt buyers is expanding, and the plaintiff's bar continues to pursue licensing-related cases against debt buyers. In addition, courts have in some cases ignored authoritative guidance provided by state licensing authorities which debt buyers rely on to help interpret whether the underlying licensing statutes should apply.

State Statutes

Up until the recent Oregon bill (HB 2356) which created a specific debt buyer license, states typically regulated and licensed debt buyers indirectly through their debt-collection statutes and related rules. The primary question was whether the activities performed by the debt buyer were consistent with the activities of a collection agency as defined in the underlying state statute. Since debt buyers are not collection agencies, the answer to that question was not always clear. Recognizing this fact, regulators, career bureaucrats, and industry advocates have consistently pushed for clarification at the legislative level. In some states, they have been successful in doing so. In North Carolina, for instance, the North Carolina General Statutes were amended to clearly include both active and passive debt buyers in their definition of a collection agency. In many cases, however, even the final legislative language did little to provide clarity. In Maryland, statutes were amended to include in the definition of a collection agency persons who engage directly or indirectly in the business of collecting a consumer claim the person owns if the claim was in default when the person acquired it. Unfortunately, while this amendment was helpful in providing some clarity around whether an active debt buyer was a collection agency in the state, it did little to clearly provide guidance for passive debt buyers.

Authoritative Guidance and Existing Case Law

If the underlying statutes are not clear, debt buyers look for published authoritative guidance from the licensing authority or existing case law to help determine whether a license is required. Unfortunately, courts are not bound by authoritative guidance or existing case law. In fact, courts have recently made some astonishing rulings against debt buyers. In June 2006, the Massachusetts Division of Banks issued an opinion that stated that "it is the Division's position that entities purchasing debt in default at the time of purchase . . . must be licensed as debt collectors." Following the issuance of that published Industry Letter, the Division received several inquiries as to whether a passive debt buyer also must be licensed as a debt collector. In October 2006, the Division published a response stating that:

> *"It is the position of the Division that a debt buyer who pur chases debt in default but is not directly engaged in the collection of these purchased debts is not required to obtain a debt collector license provided that all collection activity performed on behalf of such debt buyer is performed by a properly licensed debt collector in the Commonwealth or an attorney-at-law licensed to practice law in the Commonwealth."*

Earlier this year, a large passive debt buyer received a stunning threefold loss in the Massachusetts Appellate Division after failing to be licensed based on the above opinion. The court held that they violated the Massachusetts Debt Collection Practices Act (MDCPA), the Fair Debt Collection Practices Act (FDCPA), and the Massachusetts Consumer Protection Act (Chapter 93A) by failing to be licensed.

Anything Else?

As if this is not confusing enough, most states also have statutes that require licensing or registration related to consumer lending. It is common for a large consumer lender to maintain multiple licenses or registrations within a specific jurisdiction in order to offer all their desired products to the consumer marketplace. Unfortunately, a significant number of the underlying statutes include someone who "takes assignment of" the related

consumer loan in the definition of "lender." As such, debt buyers (both active and passive) in many instances are required to not only license as a collection agency but also to hold the same licenses or registrations as the originating creditor. For example, Title 28 of the Idaho Code on Commercial Transactions states that unless a person has first obtained a license from the administrator authorizing him to make regulated consumer loans, he shall not engage in the business of making regulated consumer loans or **taking assignment of and undertaking direct payments from or enforcements of rights against debtors arising from regulated consumer loans.**

Where This Is Headed?

More Lawsuits

There is much more confusion around what licenses a debt buyer is required to hold than what a traditional third-party agency is required to hold. As such, there is a lack of consistency and no apparent industry standard. Because the plaintiff's bar recognizes this, they will continue to find more holes in regulations, and the number of licensing related lawsuits against debt buyers will only increase.

More Licenses

Oregon is the first to release the new debt buyer specific license, but other states may not be far behind. Additionally, additional licenses such as lender and mortgage licenses are only going to become more prevalent. Because of this, it is more necessary now than ever that debt buyers evaluate licensing requirements prior to purchasing a portfolio in a new asset class.

What Should I Do?

If you are a debt buyer, it is imperative that you understand what licensing or registration requirements are needed for each consumer debt portfolio you are looking at prior to purchase and subsequent collection efforts. Be conservative in your approach and get a legal opinion. Have that opinion updated as your portfolio changes—different asset classes require different licensing. Amidst all the confusion, remember that there are experts in the industry who are able to take care of all your licensing problems.

Matt Pridemore

Matt Pridemore has led Cornerstone Support for the past fifteen years. In that time he has worked on thousands of licensing projects for debt buyers, collection agencies, and collection law firms. He is frequently asked to assist both debt buyers and originators in developing and implementing programs designed to minimize the risk of unknowingly outsourcing collections to an agency that is not appropriately licensed. He is the co-founder of Integrity First Insurance, Inc., a commercial insurance agency built to provide a full suite of insurance products designed specifically for the ARM industry.

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Help Banks "Know Their Customer" to Avoid De-Risking Consumer Protection

By Jim Mastriani

In response to potentially overbroad de-risking by payment processors, in May 2017, the Federal Legislative Committee met with the American Bankers Association ("ABA"), and in July 2017, met with the Office of the Comptroller of the Currency ("OCC"). RMA expressed concern that banks were indiscriminately terminating accounts of RMA members, or refusing to open new accounts without detailed explanations. We discussed potential reasons for an upsurge in closure activity, and compiled our findings and recommendations to pass along to our members concerning best practices for working with your financial institution.

As background, the OCC conducts regular examinations of national banks, federal savings associations, and federal branches in the U.S. to determine compliance with the Bank Secrecy Act ("BSA") by establishing risk assessment programs, recordkeeping, and reporting requirements for these financial institutions. The BSA was amended to incorporate provisions of the USA Patriot Act that require every bank to adopt a customer identification program ("Know Your Customer") as part of its compliance program. However, under OCC Bulletin 2014-58, the OCC does not direct banks to open, close, or maintain individual accounts, nor encourage the termination of entire categories of accounts. It is up to the bank's own assessment of the risks of customer accounts.

The Financial Crimes Enforcement Network ("FinCEN") is the federal agency primarily responsible for administering the BSA. In 2005, FinCEN put out guidance to banks on providing banking services to money service businesses ("MSBs") while meeting their obligations under the BSA. FinCEN defines MSBs as one of the following types: (1) currency dealers or exchangers; (2) check cashers; (3) issuers of traveler's checks, money orders, or stored value; (4) sellers or redeemers of traveler's checks, money orders, or stored value; and (5) money transmitters.

While debt buyers and collection agencies should not fit into any of the enumerated categories of MSBs, the OCC believes that miscommunication between banks and our members is potentially causing misidentification of our members as MSBs under the BSA risk assessment and customer identification requirements. Specific examples are that "high risk indicator(s)" for MSBs under the BSA include businesses that accept a large amount of out-of-state checks and third-party checks, or act as an intermediary to transfer large amounts of funds to other commercial enterprises.

A banks risk assessment needs to consider the products and services it offers RMA members as a customer and the individual circumstances of each business. To help banks meet their supervisory obligations under the BSA, RMA members can help their bank understand the business model and customer base. Once a bank understands your business, it can establish and maintain an appropriate risk-based program suited to your company that can help avoid the consequences of an unintended closure notice. If you receive an account closure notice from your bank despite this increased communication and responsiveness, please consider the below steps.

1. Immediately try to obtain from your relationship manager why the account was closed. Typically, a bank should send out a written notice that the account is going to be closed

but they may or may not spell out the exact reasons for doing so. If this occurs, you may choose to follow up with them to get a specific answer as to why they closed your account and whether there's anything you can do to avoid closure. To the extent that additional information is desired with the regional manager or other senior executive(s) as appropriate.

2. Contact RMA so that our staff can monitor patterns of closure and continue to address your concerns at the federal level.

3. Contact your Congressional Representative and your state banker's association.

It is critical for RMA members to be responsive to the Know Your Customer ("KYC") questionnaires that are received from financial institutions, regardless of the length of your relationship. Establish a connection with an officer at your local branch, and have contact information for his or her regional manager. Be proactive and make sure that your bank understands your business and its cashflows, including any seasonality.

If there is a change in personnel at your financial institution, ask for an introduction to your new contact. If your company establishes new business relationships (new lending relationships, new clients, increased portfolio purchases, etc.) or changes in its business model (increased outsourcing, ramp up in internal collections, etc.) that changes the amount or nature of outgoing cashflows or incoming deposits, proactively communicate these changes to your bank.

Proactive and increased communication between RMA members and financial institutions help develop the business relationship and minimize risk-assessment inaccuracies about your company that could result in in termination of banking services.

Jim Mastriani
James J. Mastriani is President of Velocity Portfolio Group, Inc. Mr. Mastriani earned a Bachelor of Arts degree from Georgetown University and graduated from the Seton Hall University School of Law. From 1998 until joining Velocity in 2004, he practiced at the New York office of international law firm Skadden, Arps, Slate, Meagher and Flom LLP, where he was responsible for providing legal and regulatory advice to clients in the financial services and consumer finance industries. In addition, Mr. Mastriani was in-house counsel for SBC Warburg Dillon Read Inc., providing legal advice and transaction support to the broker-dealer subsidiary of Swiss Bank Corporation.

Using Texting to Engage Consumers

Over the past few years, texting has become the preferred means of communication for individuals of almost all ages. With an average read rate of 98 percent within three minutes or less, text messages have become the most impactful and cost-effective means of communicating today, both for individuals and companies. Even so, many companies in the collections industry are wary of incorporating texting into their strategies, relying instead on traditional efforts such as letters and phone calls. But could they be missing out on a tool that could significantly increase their revenue without also increasing risk?

RMA Insights recently spoke about this new frontier in collections with Danny Cantrell, CEO and founder of Solutions by Text. Mr. Cantrell's company was one of the earliest to specialize in helping businesses streamline client communication, reduce costs, and increase revenue by leveraging the power of SMS (text messaging). As a member of RMA, Mr. Cantrell has enjoyed educating members of the receivables management industry on the ways that new technology can be incorporated into their companies' strategies to grow business while reducing compliance concerns.

What are some of the developments in texting technology that have emerged over the past few years that ARM companies could use to increase their collection potential?

Texting has become an ideal way to communicate all kinds of information to consumers and to allow them to easily communicate back. Our research has shown that consumers prefer text alerts over phone calls or letters for things like payment reminders and past-due notifications. Texting can even be a way for consumers to make payments!

Texting can also be used for more than just one-way communication with consumers. We've seen many collection agencies successfully incorporate technology into their call centers to support the use of two-way texting with consumers. This feature allows customers to reply by text to payment reminders, accelerate resolution to concerns or disputes, and generate a phone call to a live agent if needed. So in my opinion, texting has complemented dialing and mailing efforts, not necessarily replaced them completely.

The great thing is that all of the communication that occurs over texting can be stored and analyzed, not only for compliance review, but also to determine what texts have the most success at getting responses from consumers and generating payments.

What has the general consumer response been to these new approaches? Would you say that these new strategies are more consumer friendly than traditional options?

The response from consumers has been overwhelmingly positive. Soft text messages and friendly payment reminders have become the secret sauce to engage customers. When accounts become past due, texting is a non-invasive way to let consumers know they can learn their options for bringing their accounts current just by replying to the text.

Even though many people now will not take phone calls from numbers they don't recognize, they are likely to read a text. With a 90 percent smart phone penetration rate in the United States, we have become a society that is very mobile dependent. Early on, my company saw customers trying to text our clients back to explain why they would be late on a payment. We knew then that two-way texting capabilities had the potential to change the landscape of collections industry.

In your experience, what are companies' biggest reservations in making the transition from traditional options (like lettering and calling) to texting?

Obviously the biggest concerns are around compliance with laws and regulations, so understanding the laws will help companies address any reservations about texting customers—we would encourage any company that's considering texting to consult legal counsel themselves. We've seen receivables management companies using texting for consumer communication for over three years now, and so I think it's safe to say that we're through the early adoption stage of this technology.

Companies may also be concerned that any investment in new technology is expensive. But when texting allows customers to opt in to receiving billing statements or to make payments, the potential for postage savings is astronomical. Personnel costs for call center staff can also be controlled because an agent can manage multiple two-way texting sessions at one time.

Obviously, there are risks inherent in any collection strategy. On average, are the risks higher or lower with texting than with traditional collection efforts? What measures could companies who decide to employ new technology put in place to mitigate these risks?

In the thirteen years that our company has been helping businesses text customers, not one of our clients has ever been listed in any legal matter for texting their customers. This is primarily because the technology is built so that customers must give explicit consent to receive text messaging, and if they want to remove consent, they can simply reply STOP to any message received. To reduce risk, it's important to work with a company that has extensive experience with texting and that provides additional software features like the STOP safety net, logic to remove deactivated or changed phone numbers, etc. Adding layers of protection with these features are a must to mitigate risk.

What do you anticipate the collections industry will look like five years from now? Will texting be fully integrated into most companies' collection strategies?

My guess is that in five years, most companies will be texting their customers, because companies that have failed to adjust to consumer communication preferences are probably not still in business! Texting is on the way to being fully integrated with many of the core platforms being used by readers of this magazine, so I expect that this technology will be used extensively in collections.

As far as new technology, we are just now seeing capabilities for customers to send in photos of things like income verification, driver's licenses, insurance cards, and more. The potential for taking advantage of features like this will take collections-by-text to another level.

DANNY CANTRELL

In 1995, Danny Cantrell became the CEO and founder of Marketing Response Solutions. Mr. Cantrell created the first "Automated Loan by Phone" service and quickly gained traction with clients like Citibank and Brink's Home Security. Thirteen years ago, Mr. Cantrell and his brother Mike founded Solutions by Text, which currently provides services to more than 660 lenders, utility providers, and insurance companies in five countries. Solutions by Text has offices in Dallas, Texas and Bangalore, India.

5 Steps to Make Your RMA Certification Audit a Less Scary Experience

By Richard Brown

While RMA's requirements for its certification program may seem daunting at first glance, many items are easily assembled by debt purchasers, collection agencies, and law firms who already have an eye toward compliance with federal and state and local statutes and regulations. While very few tend to think of "easy" and "audit" in the same thought, RMA has provided excellent guidance and resources that can at least separate the term "audit" from "scary." The key, of course, is preparation. Any audit becomes manageable when your company knows what is expected of it, and has those elements ready for the auditor to verify. Here are 5 steps that can get your company down the road to a scare-free certification audit:

STEP 1

Understand the RMA Governance Documents

The starting point in understanding how to prepare for your audit is to determine which standards the auditor will examine and which elements of the organization need to provide documentation to the auditor.

Once your company has been certified as an RMA Certified Professional Receivables Company, the date of the application governs which standards your company must be in compliance with for your certification audit. Depending on your company's primary function, you may be certified under only three of the five classes of certification standards helping focus areas you must prepare for.

Subsidiaries may be certified under a parent company as "families." For example, if you are a debt collecting law firm that purchases portfolios under an LLC but collects those debts exclusively through the law firm LLP, these companies may be certified as a family. It is important to note that if your debt purchasing entity is certified, but law firm is not because it is not associated with your receivables, you may need to show the requisite separation between the operating structures and lines of business.

These standards are spelled out in detail in RMA's governance documents in a section called "Certification Standards and Testing Manual." Make sure you match the governance document up with the date associated with your initial application. These dates and governance documents are available here: rmassociation.org/certification

STEP 2

Review Your Policies and Procedures

Many of the requirements in RMA certification involve ensuring your company has written policies and procedures that are compliant with state and federal statutes and regulations. If you are unsure whether your existing policies and procedures meet these standards, or if you don't know where to start to create a set of policies within your organization, there is hope! RMA has provided model policy documents to provide CPRC firms with a baseline for required policy documentation. Whether you decide to use the templates provided by RMA or have created your own, you will want to ensure that each policy accurately reflects your company's day to day business practices.

STEP 3

Review Your Documentation and Training Manuals

Policies and procedures are merely words on paper unless they have been approved by your senior management, implemented as processes, and successfully communicated to your staff through training. It is crucial that you document each of these steps as you complete them; if you cannot demonstrate a documented event where something was completed, it cannot be verified by the auditor. For

example, recently approved policies should be reflected in updated training manuals with corresponding training logs reflecting staff attendance, dates of completion, and any other supporting documentation necessary to demonstrate implementation.

STEP 4

Find Your Data

Policies and procedures, training logs and manuals, and education transcripts are only one level of the audit. It is likely that your auditor will conducts transactional testing in, several key areas, including, but not limited to:

- Employee background checks
- Complaints and disputes
- Required notices to consumers
- Payment processing
- Credit reporting
- Litigation against consumers
- Statutes of limitations
- Affidavits

Whatever method your company uses to track evidence or statistics for these topics, be prepared to provide details during your certification period related to that information. This may involve discussing or providing existing reports from IT or operations staff who are familiar with these areas. For third-party debt collection agencies, it may also involve discussions with clients to inform them that data related to accounts serviced on their behalf may be requested by the auditor.

STEP 5

Give Yourself Time

One of the best things to do is to simply start the preparation process early enough. If your certification expires in six months, start looking for an RMA approved auditor now, so that your organization can begin gathering the documentation to ensure your audit goes smoothly.

Richard Brown

Richard Brown is a staff attorney and Compliance Associate with Ontario Systems, LLC. With Ontario's Compliance Consulting Group, Mr. Brown works throughout the U.S. to prepare financial services companies for regulatory examinations with policies, procedures, and training programs focused on consumer financial laws. Ontario Systems, LLC is an approved auditor for the RMA Certified Professional Receivables Company Program (CPRC).

2017 Legislative Fund Contributors

Titanium ($15,000)
Certified Debt Buyers
Cavalry Investments, LLC
Resurgent Holdings

Platinum ($10,000)
Associate Collection Agency
Financial Recovery Services, Inc.

Gold ($7,500)
Certified Debt Buyer
Unifund CCR LLC

Silver ($5,000)
Associate Debt Buyer
U.S. Equities Corp.

Associate Collection Agency
Credit Control, LLC

Affiliates
Digital Recognition Network
National Loan Exchange NLEX

Bronze ($2,500)
Affiliate
EZ Messenger

Brass ($1,000)
Certified Debt Buyers
Capital Alliance Financial, LLC
First Financial Asset Management, Inc.
FFAM360
Mjollnir Group
The Bureaus, Inc.

Associate Debt Buyer
International Debt Buying Consultants, LLC dba Portfolio Management Group

Associate Law Firm
Maurice Wutscher LLP

Affiliates
Full Circle Financial Services, LLC
VeriFacts, Inc.

Individual
Dara Tarkowski

Other
Certified Debt Buyers
Atlantic Credit & Finance, Inc.
Cascade Capital, LLC
Collins Asset Group
Jefferson Capital Systems
National Recovery Solutions, LLC
USI Solutions, Inc.
Unifund CCR LLC
Velocity Portfolio Group

Certified Collection Agencies
Frontline Asset Strategies, LLC
Stoneleigh Recovery Associates

Associate Debt Buyers
Alliance Credit Services, Inc.
Convergence Acquisitions LLC
National Check Resolution, Inc.
US Asset Management

Associate Collection Agencies
A-1 Collection Service
Capital Collection Management, LLC
Midwest Recovery Systems, LLC
Nationwide Credit & Collection, Inc.
Superlative RM
TCF & Associates

Associate Law Firm
Faloni & Associates, LLC

Affiliates
Acumen Solutions Group
MicroBilt Corporation
Vertican Technologies, Inc.
Y2Payment Systems, Inc.

Individuals
Jan Stieger
Mike Colby

Contribute today at rmassociation.org/contribute or call Barbara Souza at (916) 779-2493.

Join RMA's Board of Directors

Declare Your Candidacy for the Board of Directors

RMA's Board of Directors is comprised of 10 members—five officers and five directors—who are responsible for managing the affairs of the association. RMA holds elections annually to elect officers, fill open seats on the Board, and to approve changes to the bylaws (if necessary). The number of open seats varies each year. Candidates elected to serve on the Board of Directors serve two-year terms.

Qualifications

Individuals interested in running for a Director position must have the following qualifications pursuant to RMA Bylaws:

- Be a Professional Certified, Professional, or Standard member in Good Standing. Good Standing is defined as those members who have paid any required dues, fees, and assessment in accordance with the Bylaws, who are not suspended or expelled, and are in compliance with RMA's Code of Ethics and Principles and Guidelines.
- The individual must be an officer, director, or an owner of five (5) percent of an active Professional Certified, Professional, or Standard member.
- Must be able to show proof that the member company has purchased a receivables portfolio in the previous twelve (12) months.
- Must have a minimum of four (4) years of experience in the distressed debt acquisition industry.
- Must have attended the annual conference in the calendar year preceding their election.
- Must currently be serving on an RMA committee, special committee, or task force designated by the President, or on the Certification Council or one of its committees.
- No Professional Certified, Professional, or Standard members may have more than one individual currently serving on the Board of Directors.

Election Timeline

Members interested in running for a position on the Board must submit the following materials by mail, fax, or email by the deadline (which varies from year to year):

- A letter of intent declaring your desire to be a candidate
- A professional photo
- A resume and/or bio
- A candidate statement of not more than 400 words which will be distributed to members with the official ballot
- A copy of a redacted bill of sale or a reference letter on a seller's letterhead verifying that the member company has purchased a debt portfolio in the previous 12 months

Ballots are sent to eligible voting members at the beginning of January, at which time voting begins. They may be returned via email or regular mail, or may be cast in person at RMA's annual conference in February. Eligible member organizations may cast:

- One vote to approve or not approve the slate of officers
- One vote to approve or not approve proposed changes to the bylaws
- One vote for each open Director position

Questions

Contact RMA Executive Director Jan Stieger at (916) 482-2462 or jstieger@rmassociation.org.

Final Debt Discharge Regulations Remove 36-month Nonpayment Rule

By David Blum and Dara Tarkowski

As many members may now be aware, there have been recent amendments to the Income Tax Regulations relating to the 36-month non-payment testing period. These amendments take effect in the 2017 tax year.

Under former regulations (specifically the 1996 final regulations), creditors were required to issue Form 1099-C (Cancellation of Debt) if they hadn't received debt payments for 36 months (the "36-month rule"). This was the case even if the debt had not been discharged. The 36-month rule essentially created a rebuttable presumption that an identifiable event had occurred if a creditor had not received a payment on an account within a 36-month testing period. Creditors had the ability to rebut that presumption, but the mechanics of that are now (mostly) irrelevant as new rules have removed the 36-month rule in its entirety as described below.

On November 10, 2016, the IRS issued final regulations (TD 9793) that remove the 36-month rule. The final regulations apply to information returns required to be filed, and payee statements required to be furnished after 12/31/16. As such, the expiration of the 36-month period during 2016 will not create a filing requirement. See Reg. 1.6050P-1.

Essentially, the Treasury Department and the IRS were concerned that the 36-month rule created confusion for taxpayers. In addition, the IRS found that the rule did not increase tax compliance by debtors or otherwise provide the IRS with valuable third-party information that may have been used to ensure taxpayer compliance. This rule was removed as one of the identifiable events effective after 12/31/16. This rule is still applicable for information returns required to be filed, and payee statements required to be furnished on or before December 31, 2016.

Questions regarding the mechanics of the 36-month rule or whether your organization is still under certain filing obligations should be directed to your own tax and legal professionals.

David Blum

David Blum is a partner in Akerman's national Tax Practice Group focused on a broad range of transactional, tax planning, and tax litigation matters involving federal, state and local, and international taxation. He routinely advises clients on all aspects of multistate taxation. Mr. Blum is a former state tax auditor with years of experience representing domestic and multinational companies before the Internal Revenue Service and state and local taxing agencies.

Dara Tarkowski

Dara Tarkowski concentrates her practice on the defense of creditors in litigation and regulatory matters, including matters involving the FDCPA, FCRA, TCPA, state consumer protection laws, licensing, and regulatory advocacy. Ms. Tarkowski acts as outside general counsel to debt buyers and collection agencies and counsels her debt collection and debt buying clients with respect to policies and procedures, preparation for regulatory audits and CFPB exams, and responding to consumer complaints.

The following companies have earned their Certified Professional Receivables Company (CPRC) designation by complying with uniform certification standards. The standards address core principles including account documentation, chain of title, consumer complaint and dispute resolution, statute of limitation compliance, vendor management, credit bureau reporting, resale, as well as other relevant operational procedures.

A & A North American Financial LLC
Absolute Resolutions Corp.
Accounts Receivable, Inc.
Acctcorp International Inc
Admin Recovery, LLC
ALCO Capital Group LLC
Ashley Funding Services, LLC
Atlantic Credit & Finance, Inc.
Autovest, LLC
Bankrupt Debt Acquisitions
Barnes Financial Services LLC
BCG Equities, LLC
B-LO, LLC
Bloomfield Financial Group, LLC
Brightwater Capital, LLC
C & E Acquisition Group, LLC
Capio Partners
Capital Alliance Financial LLC
Capital Enterprise Services
Cascade Capital, LLC
Cavalry Investments, LLC
Cavalry Portfolio Services, LLC
Cavalry SPVI, LLC
Cavalry SPVII, LLC
CKS Financial
Collins Asset Group LLC
Converging Capital LLC
Credit Corp Collections Agency
Credit Corp Solutions Inc
Credit Management Corporation
Crown Asset Management LLC
Dalty Acquisitions Inc
Debt Recovery Solutions
Deville Asset Management Ltd
Diaz & Associates, Inc.
Diverse Funding Associates LLC
DNF Associates
Dobberstein Law Firm, LLC
Duke Capital, LLC
Dyck-O'neal Inc
eCast Settlement Corporation
Encore Capital Group, Inc
Federal Pacific Credit Company
First Financial Asset Management, Inc
First Financial Investment Fund Holding LLC
First Financial Portfolio Service LLC
Frontline Asset Strategies, LLC
G. Reynolds Sims & Associates
Galaxy Asset Management, LLC
Galaxy Asset Purchasing, LLC
Galaxy Capital Acquisitions LLC
Galaxy Capital Recoveries, LLC
Galaxy International Purchasing, LLC
Galaxy Portfolios, LLC
Gaskell and Giovannini, LLC
Gemini Capital Group LLC
Gurstel Law Firm P.C. (Formerly Gurstel Chargo PA)
H & S Financial, Inc
Halsted Financial Services LLC
Hameroff Law Group, P.C.
Heritage Funding, LLC
Hilco Receivables LLC
HS Financial Group, LLC
Icon Equities LLC
Indiana Receivables, Inc
Integras Capital Recovery LLC
Interim Capital Group, Inc.
Investment Retrievers
Jefferson Capital Systems LLC
JH Capital Group
Jormandy, LLC
JTM Capital Management
Law Offices of Steven Cohen, LLC
Lawgix Lawyers, LLC
LCS Capital LLC
LCS Financial Services
Livingston Financial LLC
LVNV Funding, LLC
Maryland Portfolios, Inc
Michael Andrews & Associates, LLC
Michael Haynes & Associates, LLC
Mid Atlantic Portfolios, LLC
Midland Credit Management, Inc
Midland Funding LLC
Millennium Financial Group, LLC
Mjollnir Group Inc
National Judgement Recovery Center
National Recovery Solutions, LLC
NCB Management Services, Inc.
NDS LLC
New Century Financial Services Inc
NMRC (National Management Recovery Corp)
Ophrys, LLC
Orion Portfolio Services, LLC
PCA Acquisitions V, LLC
Peroutka, Miller, Klima & Peters, PA
Pilot Receivables Management, LLC
Pinnacle Credit Services LLC
Plaza Services, LLC
Portfolio Group Investors LLC
Portfolio Recovery Associates
Poser Investments, Inc.
PYOD, LLC
Quantum 3 Group
RAzOR Capital LLC
Real Time Resolutions, Inc.
Resurgence Capital LLC
Resurgent Capital Services LP (Sherman Financial Group, LLC)
Resurgent Holdings, LLC
Reynolds & Co., LLC
RSK Financial Group
Salander Enterprises, LLC
Sandia Resolution Company LLC
Second Round Limited Partnership
Security Credit Services LLC
Sherman Acquisition, LLC
Sherman Originator III, LLC
Sherman Originator, LLC
Stawiarski & Associates
Steel Tower Holdings LLC dba Atlantic Recovery Solutions, LLC
Stoneleigh Recovery Associates, LLC
Strategic Alliances Inc
Superior Capital LLC
Superior Debt Recovery LLC
T & I Enterprises, LLC
TEM Capital, LLC
The Bureaus, Incorporated
The Cadle Company
Troy Capital, LLC
Unifund CCR Partners
Unifund CCR, LLC (Credit Card Receivables)
Unifund Corporation
United Debt Holding LLC
US Mortgage Resolution LLC
USI Solutions
Velocity Investments
Velocity Portfolio Group, Inc.
Warner Law Firm (Robert W Warner & Associates)
West Bay Recovery, Inc.
Windy City Management LLC
World Credit Fund III LLC
World Credit Recovery LLC
Worldwide Asset Purchasing II, LLC

The following company has earned their Certified Receivables Broker (CRB) designation:

Market View, LLC dba DebtTrader
NorAm Debt Management Group

Meeting the Challenges of RMA Certification for Debt Buyers

By Rance Willey

Throughout the industry, the future of the debt purchasing marketplace has been discussed almost ad nauseam. For those of us who have been in the collections industry long enough to remember what happened when the FDCPA first went into effect, the uncertainty and speculation that is taking place now comes as no surprise in the wake of the creation of the CFPB and more recently the published OCC debt-sale guidelines. In the nearly four decades since the FDCPA became law, there has been an almost uninterrupted stream of increased regulatory requirements that have been applied to an ever-broadening portion of the collections industry.

Regulatory challenges have and will continue to touch creditors, debt buyers, collection agencies, and collection attorneys—the major segments of the debt collections world. Individually and collectively each segment has demonstrated exceptional resiliency by being able to make creative, compliant, and ethical adjustments to a multitude of regulatory changes. The end results have been that markets recover and every segment of the industry has remained a vital part of the life cycle of delinquent debt resolution. It therefore seems that the decision to seek certification comes down to whether a given debt buyer believes that markets will recover and/or emerge in such a way and to an extent that makes the investment in certification a viable opportunity cost that will pay future dividends.

The following is a summary of how one debt buyer, Troy Capital, LLC, worked through the certification decision and then the certification process. There are no closely guarded secrets revealed because there aren't any that exist. Troy Capital's certification initiative is presented as and intended to be an example of much of what many debt buyers might go through to achieve RMA certification.

For the purposes of context understanding, a brief overview of Troy Capital is appropriate.

Background – Troy Capital's Profile Highlights

The company is a passive debt buyer, founded in 2007. Purchases are national and regional, with acquisition sources including direct buys from major and mid-level creditors, indirect broker purchasing, partial portfolio "flips" from other buyers, and re-sells from buyers looking to move remnants of previous purchases. Troy Capital buys several different product types and selectively seeks further diversification opportunities.

All accounts go through a proprietary evaluation process and then are either outsourced to an attorney, a collection agency, or warehoused; the company does not engage in internal direct collections activity. The vendor network is comprised primarily of individually selected and compliance focused law firms and collection agencies.

Troy Capital operates on off-the-shelf software, relies heavily on Excel, and uses a well-established industry service provider for system-to-system interfacing with the vendor network. Internally the focus is on compliance and support in the areas of acquisitions processing, vendor management, inventory reconciliation, and ensuring its vendors' level of meaningful involvement with the accounts.

The company's business plan positioned it to expand in 2014-2015 through investment capital acquisition. From 2007 to date the business has been deliberately grown within its self-funding capacity. As part of the long-term plan for expansion positioning, no significant long term financial obligations have been incurred.

The Certification Decision- Key Considerations

From the outset Troy Capital viewed the entire certification decision on the premise that there have been "ups and downs" in the marketplace before, i.e. the current market situation was not apocalyptic. In fact, it was quickly decided the company's long-term marketplace viability could be at risk without certification.

When reviewing the standards, it was determined that, functionally, certification made sense because things like up-to-date data security measures and formal vendor-management policies are just good business practices.

It also became evident that "standing still" could hurt diversification and expansion plans because the company would be more attractive to new markets and investors if it was keeping up with industry best practices. No one at the company saw the regula-

tory environment getting easier to function in. On the contrary, it seemed being able to prove ongoing full compliance for the entire inventory was quickly becoming mandatory, even for a traditionally "passive" buyer.

Of course, the considerable investment that had to be made was thought through and discussed at length. As an outcome of those discussions, it became apparent that, as part of the certification process, some fundamental changes would have to take place concerning how acquisitions were processed, how vendors were managed, how data security was handled, and how the company ran its internal operations.

Finally, it was recognized that the regulators and the major creditors, in conjunction with the RMA itself, had decided which direction the industry was going to go. Accordingly, it became clear that if Troy Capital intended to remain a player and keep expanding, it had to look at the certification investment as an "opportunity cost" and the best way for the company to maintain control over its own future in the marketplace.

Knowing it was about to commit to a sizeable six-figure investment, the company opted for certification, which meant significant effort over an extended period lay ahead.

Going Through the Certification Process

Long before Six Sigma became the popular reference point for process improvements that led to lower costs and "zero defects", there was a method known as the "Results Process" that essentially accomplished the same thing. Simply put, the Results Process is a four step/question project management method: Where are we? Where do we want to be? How do we get there? Did we get there? This was the basic method the company used to work through the certification efforts.

The original 19 standards were studied and then individually categorized as a subset of one of four major categories: acquisitions processing, data security, vendor control, or internal procedures. While many of the standards touched more than one of the categories, each was assigned to the most significant area of needed effort. That categorization effort made it easier to consider what the company was up against on a standard by standard basis.

For the most part, the processes of making the changes and enhancements needed to achieve certification proved to be costlier and more time consuming than they were difficult. The key to reducing the difficulty level of a given project was directly tied to the initial, sstandard self-assessment the company went through. Also, as the self-assessment was completed, it was determined where the company would need the assistance of outside consultants, which proved to be the case with the data security related projects.

Another critical part of the first step was to go through each standard and gain as much clarity as possible based on the auditor instructions and from discussions with the RMA staff.

Upon completion of the self-assessment, a detailed plan was developed for how each standard would be achieved and how the ongoing management of that standard would be accomplished. This was the most time-consuming portion of the certification initiative, primarily because it involved changes to practices and policies Troy Capital and its vendors had gotten comfortable with.

In the areas of data and physical security, there are low-cost tools available on the Internet that, with some customizing, could lessen the time needed to complete much of the documentation while simultaneously providing a thorough set of guidelines to follow.

Another key strategy used was to engage Troy Capital's vendors early in the process. They were told what was being planned and what that ultimately could mean for them. Also, vendors were asked to provide details of the most stringent data security requirements a client of theirs put on them, which proved valuable in determining what level of material change vendors would have to make to meet the audit requirements.

Finally, other than for data and physical security policies and procedures, which were thoroughly documented, the company opted to create more broad-based policies and procedures that are accompanied by a form that combines detailed task completion and audit sign-offs.

Troy Capital was one of the first 10-12 companies that achieved the initial RMA certification.

Looking back, Troy Capital is satisfied it made the right decision to become certified. The cost was a burden the company would rather have not had. However, the company knows it is more functionally safe and sound than it was before. It also knows that no matter what the future holds for the industry, Troy Capital is doing everything it can to be as prepared as possible to remain as competitive as it can be going forward.

Rance Willey
Rance Willey is the CEO of Troy Capital and currently serves on the RMA Standards Committee and is the Chairman of the Legislative Committee for Nevada. He is a 38-year industry veteran. He spent six years at Ford Motor Credit managing in field offices and has held VP-level positions at Credit One Bank (Sherman Financial), Cavalry Portfolio Services, GE Capital, and Citibank. He also ran his own consulting business for a number of years, specializing in operational, financial, and strategic analyses and enhancements for agencies and attorneys.

How The Courts and Regulators Have Made the Issue Of Statute Of Limitations More Complicated

By Dara Tarkowski

The issue of statute of limitations has had a dramatic impact on the debt-collection industry. Regulators have dismissed and ignored decades and centuries of jurisprudence which holds that the statute of limitations is not only an affirmative defense, asserted by a defendant in a civil action, but that right to payment still exists even if a statute of limitations expires. Our legal system has not fared much better in their understanding of how statute of limitations and the disclosure of a time-barred debt works in tandem with the collection of that debt. As a result, our colleagues have been forced to make legal determinations, in many instances by non-lawyers, and to adopt significant operational policies not required in any other industry.

This article first explores the policy adopted by the Federal Trade Commission (FTC) and then followed by the Consumer Financial Protection Bureau (CFPB) and state regulators. The article then looks at several Court decisions which highlight the difficulty the issue of statute of limitations can be when debt collectors are required to inform the least sophisticated consumers about its legal significance.

Regulatory History

The FTC jumped into the fray first when they issued their report in July 2010, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration*. Ironically, in that report the FTC acknowledged that the right to payment is not extinguished by the running of the statute of limitations and that debt collectors were permitted to collect time-barred debts by non-litigation means. However, the FTC took a bold step by concluding that consumers do not "know or understand their legal rights with respect to the collection of time-barred debt" and therefore by collecting on time-barred debt, debt collectors were creating a misleading impression in violation of Section 5 of the FTC Act (Unfair or Deceptive Act or Practices) and [§1692e] of the FDCPA. To cure this "misleading impression," the FTC recommended that debt collectors, before seeking payment on a time-barred debt, provide a disclosure advising consumers that because of the passage of time, the debt could not be sued upon or otherwise compel payment.

The FTC utilized their recommendation when it entered into a Consent Order with Asset Acceptance, LLC (Asset), who was collecting on time-barred accounts. In its press release the FTC explained the settlement as follows:

The proposed settlement requires that when Asset Acceptance knows or should know debt may not be legally enforceable under state law—often referred to as "time-barred" debt—it must disclose to the consumer that it will not sue on the debt and, if true, that it may report nonpayment to the credit reporting agencies. Once it has made that disclosure, it may not sue the consumer, even if the consumer makes a partial payment that otherwise would make the debt no longer time-barred.

What is significant about the Asset Consent Order is that for the first time a federal regulator deemed that a disclosure by a debt collector that a debt is subject to a statute of limitations defense creates a "legal right" which prevents a creditor from filing a lawsuit.

It did not take long for the CFPB and many states to follow the FTC's "guidance." In last year's Outline of Proposal for Debt Collection, the CFPB proposed time-barred debt disclosures upon debt collectors including obsolescence disclosures relating to credit reporting as well as disclosures regarding the revival of the statute of limitations due to payment. Much of the CFPB's proposals were not novel as some states including New York, California, and Massachusetts had been moving toward the use of disclosures for some time, enacting statutes and regulations that mandated specific disclosures when collecting on time-barred debt.

Judicial Analysis and Case Law

What Is a Threat of Suit?

Although the regulators saw disclosures as an "easy" fix to their perceived problem of consumer misperception about time-barred debt, the Courts have otherwise struggled to find consistent and workable solutions in light of prior case law. For instance, there had been a line of cases which held that the collection of time-barred debt, in and of itself, did not violate the FDCPA as long as there was no threat of suit. However, in the cases of *McMahon v. LVNV* and *Buchanan v. Northland Group*, what constitutes "threatening suit" on time-barred debt took on new definition. In both cases, the Circuit Courts held that the use of the term "settlement" in a collection letter was an implied threat of suit and thus a violation of the FDCPA. The CFPB weighed in on both cases through amicus briefs, pushing their agenda that all time-barred collections posed a risk upon consumers and thus a disclosure was the only remedy short of banning the collection of time-barred outright.

What Is the Proper Disclosure?

Following the heightened scrutiny upon the collection of time-barred debt, debt collectors in states where no specific disclosure was mandated struggled to implement the proper disclosure. Of course, "experimenting" with best practices in areas of compliance with the FDCPA always results in a plethora of lawsuits.

There is no better example of this than what occurred in the federal Court of Kansas this past January. Two cases, S*mothers v. Midland Credit Mgmt* and *Boedicker v. Midland Credit Mgmt*, were decided within 24 hours of the other pursuant to Motions for Summary Judgment. Both matters involved the identical disclosure:

> *"The law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it. If you do not pay the debt, we may continue to report it to the credit reporting agencies as unpaid.*
>
> **If you pay your full balance, we will report your account as Paid in Full. If you pay less than your full balance, we will report your account as Paid in Full for less than the full balance."*

The Smothers court held that the failure to provide a disclosure that payment would revive the debt was confusing to the consumer and thus violated the FDCPA. The Boedicker court found the exact opposite, concluding that a debt collector had no such duty to make a disclosure about revival.

The confusion and inconsistency in holdings has continued throughout the year. In the case of *Pittman v. Jefferson Capital Systems*, a settlement letter contained a time-barred debt disclosure as well as information regarding revival of the debt by payment. However, the debt collector also made the following statement in the settlement letter: "In order to aid your financial situation, as may be necessary, we could set up your account on a monthly payment plan." The Court found that statement to be misleading taken together with the revival disclosure and thus Plaintiff stated a plausible claim under the FDCPA.

Several weeks later in the same federal district Court in Indiana, the Court in *Shields v. J. C. Christensen & Assoc & LVNV Funding, LLC* found that a disclosure which stated that the debt buyer would not sue the consumer, but made no reference to collection agency, was a material omission that could confuse or mislead the consumer. Furthermore, the disclosure made no mention of whether payment could revive the debt. The Court held that "although a revival disclosure is not required in all circumstances, it does not mean that a letter, without such a disclosure necessarily complies with the FDCPA."

In *Pantoja v. Portfolio Recovery Associates (PRA)*, the 7th Circuit, following McMahon, found that a debt collector letter that did not include revival language violates the FDCPA. Further, the Court found PRA's statement that "it will not sue" the consumer to be deceptive and misleading, as it gave the impression that PRA had only chosen not to sue, not whether it is legally barred from doing so.

Another particularly disturbing case came out of Oregon in May of this year. In the case of Kaiser v. Cascade Capital, the issue was whether the four-year statute of limitations under U.C.C. Article 2 or the six-year statute of limitations under U.C.C. Article 9 applied for a retail-installment contract was an open question of law in Oregon. The Court in Kaiser held that the filing of a lawsuit where there were two possible statutes of limitations, without informing the consumer of such conflict, constituted a violation of the FDCPA.

Despite the negative holdings, a positive case came out of New Jersey. In the case of *Judah v. Total Card et al.*, the District Court found no FDCPA liability on a collection letter that offered settlement options on a time-barred debt but did not otherwise disclose that payment could revive the statute of limitation. The Court found that the omission of the revival disclosure did

not run afoul of the FDCPA because pursuant to New Jersey state law, a debt cannot be revived unless a consumer makes a written unconditional promise to pay the debt in full. So even if the consumer made a small payment, the limitations period would not necessarily be revived.

Finally, last month a District Court in Louisiana in the case of *Baye v. Midland Credit Management, Inc.* followed the holding in Boedicker and found no duty upon the debt collection to provide a disclosure that a partial payment could revive the debt.

So What Is a Debt Collector to Do?

When clients ask me to assess operations in light of regulatory policy and current case law, my advice is always "less is more". In states that have specific statutes and regulations regarding the disclosure of time-barred, I usually say, "Stick to the script." Just like the disclosures in § 1692g of the FDCPA and the Mini-Miranda warnings, you are playing with fire if you stray from what is explicitly stated in the statute. In the case analysis noted above, you will notice there are no negative decisions from states like California which already have specific disclosure requirements; that is not to say a case could never be brought. Much like the overshadowing analysis in cases brought under § 1692g, a statute of limitations disclosure must not contradict the contents of the communication as a whole. Unfortunately, while Courts are split as to a debt collector's duty to disclose that a partial payment may revive a debt, the conservative approach would be to consider a disclosure, regardless of whether the state has specific requirements to otherwise revive the debt.

Unfortunately, the Courts and state and federal regulators continue to send mixed messages when it comes to debt collection. Collection letters now are so diluted with disclosures and mandated language that the underlying intent and purpose—helping consumers resolve their debts—has now been lost. All jurisdictions recognize that legal remedies are extinguished after a statute of limitations expires, but the right to be paid and to make good on your promise to pay always exists except in a few jurisdictions. At some point, those charged with consumer protection should endeavor to simplify processes and provide clarity to both the industry and consumers.

Dara Tarkowski
Dara Tarkowski concentrates her practice on the defense of creditors in litigation and regulatory matters, including matters involving the FDCPA, FCRA, TCPA, state consumer protection laws, licensing, and regulatory advocacy. Ms. Tarkowski acts as outside general counsel to debt buyers and collection agencies and counsels her debt collection and debt buying clients with respect to policies and procedures, preparation for regulatory audits and CFPB exams, and responding to consumer complaints.

Inside Tips for Demonstrating Compliance and Navigating CFPB Examinations

By Jonathan L. Pompan, Alexandra Megaris, and Katherine M. Lamberth

Navigating a government examination requires more foresight and vigilance than ever. Between the inception of the Consumer Financial Protection Bureau (CFPB) and heightened scrutiny from state and local regulators, it is no secret that regulatory expectations have increased exponentially over the past several years. Furthermore, even companies that are RMA certified and accustomed to government oversight can find supervisory interactions with federal and state regulators, particularly with CFPB, to be opaque and confusing. As a result, members of the receivables management industry must be careful when navigating an examination. To shed some light on the CFPB's processes for examinations and investigations, as well as the intersection of supervision and enforcement, we obtained several documents from the CFPB through a Freedom of Information Act (FOIA) request, including a copy of the CFPB's internal Supervision, Enforcement, and Fair Lending (SEFL) Examination Playbook (Examination Playbook), SEFL Integration Memorandum (Memorandum), and the Enforcement Policies and Procedures Manual Version 2.0 (Enforcement Manual). In addition to illuminating the key decisions and inputs of various stakeholders that are made throughout the examination and investigation processes, these documents provide details on what a company facing an examination or investigation can expect at each stage.

The Examination Process

The Examination Playbook identifies and describes the key decisions that arise at each stage of the examination process, as well as who within the CFPB is responsible for making and implementing each key decision. The purpose of the Examination Playbook is to provide guidance to CFPB decision makers on their roles and responsibilities, referred to as "decision rights," throughout the examination or target review.

As outlined by the Examination Playbook, the examination process is composed of four stages: scoping, on-site analysis, off-site analysis, and report review.

Scoping

Scoping involves setting examination priorities and schedules across markets and individual institutions. It also includes conducting pre-examination activities such as preliminary information requests and determining the scope of the examination.

- Examination Priorities. The Assistant Directors (ADs) for the Office of Supervision Policy (OSP) are responsible for determining examination priorities. Resources are allocated using a

risk-based assessment that evaluates the potential for consumer harm based on the institution's market share and risks inherent to the institution's operations. Inherent risk factors may include, but are not limited to, previous examinations, regulatory actions, and consumer complaints. Because of the CFPB's risk-based approach for selecting entities to examine, an institution that has a robust compliance management system (CMS) is less likely to be a priority for CFPB examination.

- Specific Scope and Schedule. The Examiner-in-Charge (EIC) is responsible for making decisions regarding the scope of the examination, the preparation of the Information Request, and the examination schedule. These decisions involve determining which activities will be conducted during the examination and relevant modules, and which items of information are pertinent to the examination of the particular institution.

On-Site Analysis

On-site analysis involves conducting interviews, observations, transaction testing, and other examination processes that assess the institution's compliance with federal consumer financial laws and potential violations. After the on-site examination is complete, additional time may be granted for the off-site analysis of relevant factual findings and other information.

- Modifications to Scope. The Field Manager/Senior Examination Manager (FM/SEM) is responsible for making decisions regarding modifications to the scope of the examination once it has commenced.

- Examination Findings. The EIC is responsible for conducting the closing meeting and making related decisions, including any preliminary examination findings, expected corrective actions, recommended rating, and next steps. The EIC is also responsible for preliminary decisions regarding whether an examination is "clean"—i.e., does not involve any potential violations of federal consumer financial laws—and eligible for review on an expedited track. The Assistant Regional Director (ARD), the OSP AD, and the Office of Enforcement (ENF) are responsible for approving review of an examination on an expedited review track.

Off-Site Analysis

Off-site analysis involves escalating potential violations of federal consumer financial laws discovered during the examination and determining whether an enforcement or supervisory action should be pursued. It is at this stage that collected information and findings can lead to an enforcement action.

- Interpretations of Non-Routine Questions of Law. The Legal Division is responsible for determining whether a violation has occurred with respect to non-routine questions of law, except where the question of law involves a regulation – then the Office of Regulations is responsible for the determination.

- PARR Letter. A Potential Action and Request for Response (PARR) Letter notifies the institution that the CFPB is considering whether to propose a supervisory or enforcement action, based on preliminary findings of potential legal violations. The FM/SEM is responsible for determining whether a PARR letter should be sent. The PARR Letter is drafted by the OSP Program Manager and approved by the Regional Director.

- ARC. Decisions on whether potential legal violations should be escalated to the Action Review Committee (ARC) are also made by the FM/SEM. The ARC evaluates over thirteen factors spread among four categories: violation, institution, policy, and justice. The ARC then recommends to the Director whether the matter should be handled through the supervisory process or public enforcement action.

Report Review

Once an examination report is prepared, the review process depends on whether it is scheduled for expedited or full review.

- Expedited Review. Under the expedited track, the examination report is reviewed by the FM/ SEM and the OSP Program Manager and Deputy AD and approved by the RD.

- Full Review. Under the full-review track, the examination report is reviewed by the FM/ SEM, the OSP Program Manager and Deputy AD, the Legal Division, and staff of the Office of Enforcement, and reviewed and ratified by the OSE AD, OSP AD, RD, and SEFL Associate Director.

Key Tips for Navigating and Examination

Knowing the CFPB's internal examination policies and processes, and understanding who is responsible for making policy decisions and factual findings is important for developing a strategy for responding to examination information requests. Here are a few important considerations when planning for a CFPB examination:

- Plan with All Stakeholders, but Be Prepared to Defend with Counsel. A culture of compliance starts at the top and is exemplified by an active compliance committee involved in examination preparedness; but when there is a potential that allegations regarding consumer financial law violations or a deficient compliance management system could be raised during an examination, in-house and outside counsel should be included to ensure that rights are protected and legal obligations are interpreted correctly.

- Demonstrate Compliance through a Tailored CMS. Companies that have completed examinations with few or no findings are those that not only comply with legal requirements, but can also effectively demonstrate such compliance through a tailored CMS. Further, institutions that demonstrate a strong CMS are deemed to present a lower risk to consumers and are generally examined less frequently. The RMA certification is a great tool for establishing and maintaining a strong CMS foundation.

- Leverage Participation in Industry Self-Regulation. The RMA certification program promotes rigorous industry standards. The standards are designed to meet federal and state statutory requirements, and many of the RMA standards exceed these requirements and establish best practices for the receivables industry.

- Designate a Leader and Ambassador. A CFPB examination is demanding and requires internal leadership and an "ambassador" who can interface the EIC and other staff. Designate an employee (preferably within the legal or compliance department) to serve as the point of contact for the CFPB examination team and to lead the process for document collection and production.

- Watch Your Flank. Develop a process of working with legal counsel to review all submissions to the CFPB for responsiveness, privilege, and consistency. The overall facts presented during the course of a review will be analyzed and findings of an examination may lead to a recommended course of action (e.g., supervisory or enforcement action).

- Develop Advocates. It is important to prepare employees who likely will interface with CFPB examiners to explain how compliance is addressed among complex operations. Employees can be instrumental in reflecting a compliance culture, and the impression that the EIC and other examiners have about a company's dedication to compliance can affect how information is presented in formal work papers and preliminary examination findings.

- Know the Law. Specific facts and law should be assessed with an eye to differences between the company and the CFPB on legal positions and analysis. This will help inform how alleged violations of federal consumer financial law are addressed.

The key to successfully navigating a CFPB examination is preparation. The companies in the best position to manage regulatory scrutiny are those that understand and follow applicable laws, invested significant time and resources to build their compliance management programs, and have the capacity to proactively identify issues and make corrections when needed.

Jonathan L. Pompan

Jonathan L. Pompan, a partner in the Washington, D.C. office of Venable LLP, co-chairs the firm's Consumer Financial Protection Bureau (CFPB) Task Force. His practice focuses on providing comprehensive legal advice and regulatory advocacy to a broad spectrum of consumer financial services clients, including debt collectors, debt buyers, and their service providers, before the CFPB, the FTC, state Attorneys General, and regulatory agencies. His experience includes defending governmental consumer protection investigations and enforcement actions and examinations, including some of the earliest actions pursued by the CFPB, and providing consumer protection related compliance advice.

Alexandra Megaris

Alexandra Megaris advises companies on regulatory investigations and government enforcement matters, with a focus on consumer protection, consumer finance, and advertising issues. Ms. Megaris has extensive experience across a broad array of regulatory matters, including managing large-scale investigations before the Consumer Financial Protection Bureau, the Federal Trade Commission, state Attorneys General offices, the U.S. Postal Service, and the U.S. Congress.

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Katherine Lamberth is an associate in the Financial Services Regulatory Group of Venable LLP, where she advises banks and other financial institutions on issues that arise under federal and state banking and consumer financial laws. In particular, she represents financial institutions in connection with supervisory examinations and enforcement matters and counsels clients on regulatory compliance and transactional issues arising under the Consumer Financial Protection Act. Ms. Lamberth also has experience advising trade associations on regulatory advocacy efforts before the CFPB.

THE SPEECH ANALYTICS DILEMMA

Is your platform acting as Big Brother, collecting dust, or offering something more robust?

By Josh Seuberling and Kyle Carter

In today's compliance-centric credit and collection world, more and more companies are turning to speech analytics platforms to help solve their compliance needs. These robust software tools help companies find and track issues much more quickly than any internally staffed quality-assurance team. Many agencies are deploying the software to act as the proverbial Big Brother, setting it to constantly mine for compliance infractions. Unfortunately, in many cases, this is the extent in which the system is utilized. In many instances after initial set-up, companies follow a "set it and forget it" model. In this case, the investment is merely collecting dust. Speech analytics users should consider the possible pitfalls and best practices of speech analytics so that they can maximize their current platform and customize it to offer something much more robust than just quality assurance.

First and foremost, it is imperative for users of speech analytics tools to understand the potential pitfalls of the system that has been purchased. An off-the-shelf system—complete with canned searches, reports, and scorecards—can provide immediate lift to an overtaxed quality-assurance department. However, these systems have a fair number of inherent inaccuracies and false positives when it comes to the mined calls and subsequent agent scorecards. These quality issues stem from poor audio quality, systemic difficulties of identifying tone and sarcasm, and recalibrations due to accents or rate of speech. Kyle Carter, VP of Creative Solutions for Zenylitics, suggests that while these pitfalls are very real, it is possible for users of the software to gain an understanding of these system nuances and determine the best way for their organization to adapt. Some solutions can be as simple as ensuring dual audio recording ability. Determining false positives and tonality issues, he warns, can be much more difficult. Random audits and constant recalibrations are a must when managing these platforms. Mr. Carter also cautions that "because of the power of speech analytics, it is very easy for speech analytics teams to get in the weeds," and that "scope creep is very real and dangerous to the success of speech analytics initiatives."

In addition to understanding the possible pitfalls of a speech platform, it is also imperative that users reach out to other users of speech analytics software to learn best practices in the industry and to maximize their investment in the platform. It is quite simple to use the speech analytics software straight out of the box to monitor calls for compliance concerns. But fully grasping the potential of the software can lead not only to enhanced quality assurance and compliance deliverables, but also increased revenue in a collection shop. For example, companies could see an immediate and obvious lift from a decrease in expenses related to compliance violations. If the priorities of end users, operators, and management are aligned and collector scorecards are structured to reward compliant behavior, the time and financial resources invested in resolving violations would obviously drop. But imagine the additional possibilities of scorecards or mined data that can replicate the top agents' best practices. Consider, for example, the ability to look for specific language that is universally successful in driving performance. A few years back, an agency was struggling with expected production during tax season. Speech analytics software was used to create a scorecard to see how many agents were utilizing tax-time verbiage in their demands and how often they did so. The results were surprising: less than 40 percent of the agents were using tax-return language when demanding money. With this knowledge, management produced a revised script for agents to use, and collections drastically increased. If speech analytics platforms are used for compliance purposes only, agents and end users won't be engaged. But if the system is used to decrease training time and increase revenue, correct behaviors will be consistently reinforced and best practices will become more universal across the business.

With the amount of data the industry now has available, the "gut feeling" companies managed by in the past can now be quantified, and subsequent decisions can be made with measurable and exact results. A speech analytics platform increases the data available to management tenfold, so it can take formerly anecdotal incidents, quantify them, and allow company leaders to identify action steps necessary. A typical user may consider purchasing the software so that complaint reporting can be achieved for compliance needs. Now, instead of using all of their time to identify the scope of a potential problem, management can focus on the possible causes of

the behavior and ultimately perform a root-cause analysis at scale on all calls. By identifying the root cause of complaints and consumer dissatisfaction drivers, an organization can build models to look for behaviors of either agents or callers that can eventually help eliminate the complaints and not just report on them. Couple that information with a strong marketing or mail campaign, and a company could proactively engage the consumers that are likely to complain before they actually do so. With today's platforms, data is virtually unlimited and with that amount of information, companies are bound only by their creativity.

"Speech analytics can be transformative to an organization if deployed appropriately," Kyle Carter states. "Understanding the interactions between customer and agent can provide unparalleled insight into process inefficiencies and consumer pain points, and can also provide the roadmap for solutions to those problems. Today's consumer is searching for a frictionless experience, and analyzing our interactions can help companies understand how to create that for them." It is imperative that owners of speech analytics software avoid pitfalls that can cause the system to be a waste of time and money, determine best practices that can reduce costs and drive revenue, and use data to enhance the customer experience while increasing the effectiveness of the company.

Josh Seuberling

Josh Seuberling, Chief Operating Officer, has over 25 years of experience in the credit and collection industry while working for both Fortune 500 banking and other large institutions, as well as smaller start-up organizations. Mr. Seuberling has held multiple executive positions over his career and most recently served as the President of TEMPOE, a leading provider of no-credit required leasing. Over his career, he has helped multiple organizations drive results by finding operational efficiencies, developing strategies, and establishing key accountability metrics. He has been responsible for leading, growing, and building large operation centers both stateside as well as outsourced. Outside of operations, Mr. Seuberling has been a key member of executive teams relative to capital funding needs, client development, sales strategy, and organizational growth requirements.

Kyle Carter

Kyle Carter is the Vice President of Creative Solutions for Zenylitics, a company founded to solve the most significant challenges with quality assurance programs by using a combination of AI-powered speech analytics with professional quality-assurance agents.

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