

Your Digital Collections Questions Answered

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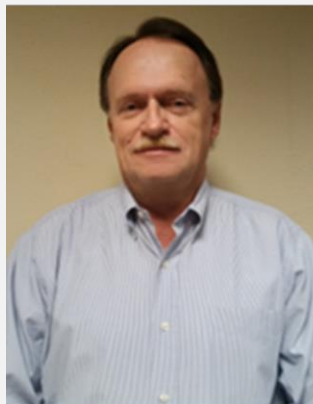
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For additional information on our ACA program, contact: Catherine Torrey at 212.805.9831 or catherine.torrey@us.qbe.com or Kristina Warmka at 952.259.4225 or warmka@acainternational.org.

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Disclaimer

This information is not intended to be legal advice and may not be used as legal advice. Legal advice must be tailored to the specific circumstances of each case.

Every effort has been made to assure this information is up-to-date. It is not intended to be a full and exhaustive explanation of the law in any area, nor should it be used to replace the advice of your own legal counsel.

Any opinions expressed are the opinions of the speaker and not their organization or RMAI.

Polling Questions:

1. How much are you using email and text to communicate with consumers?
2. What is your biggest email and text obstacle/worry?

Topics:

1. Consent for digital communications
2. E-Sign Act
3. How to leverage live-agents
4. Lawsuits involving digital communications

Consent for Digital Communications

A consent requirement does not exist in any federal law* (*New York may have an email consent requirement)

- CAN-SPAM does not apply to debt collection. It applies to **commercial messages**.
- E-Sign does not apply to the **initial communication** delivered by email ([Greene v. TrueAccord](#))
- Reg F provides a safe harbor to be used when defending against an FDCPA third party disclosure claim (sending email to the wrong person). Those practices do not and cannot change the law relating to consent.

“Nothing in the [safe harbor] section **prohibits** a debt collector from **sending an email to an email address provided by the consumer to the creditor**. Depending on the facts, a debt collector may be able to do so without violating FDCPA section 805(b).”

-Regulation F -part I- page 173

Consent for Digital Communications

Regulation F Safe Harbors – Worth it?

Protects against Third-Party Disclosure Claims... but

Regulation F Safe Harbor is hard to get and provides protection for claims that present a low risk and low likelihood of occurring.

Consent for Digital Communications

No consent is needed to send **the initial communication containing the validation notice by email**. Consent is required before sending certain disclosures electronically 12 CFR § 1006.42(b):

1. Any time an initial communication does not contain the validation notice.

1006.42(b) - must obtain consent when sending the validation notice in writing within 5 days of the initial communication (see 1692g).

2. Any time a consumer disputes their debt.

1006.42(b) - part I page 585 - must obtain consent to email the validation documents as explained in 1006.38(d)(2)(i).

3. Any time a consumer requests the name and address of the original creditor.

1006.42(b) - must obtain consent to email the name and address of the original creditor as explained in 1006.38(c).

Consent for Digital Communications: Check State Laws!

New York Department of Financial Services Rules Requires:

- Direct consent to email consumer in debt collection prior to discussing the account electronically
- Can send generic emails in an attempt to capture consent
- Provided [written FAQs](#) to a number of industry questions

New York DFS Debt Collection Rules are being updated.

The original proposed changes included:

- Editing the initial communication language to **require the validation notice to be provided by mail** (not electronically) unless requested directly by the consumer;
- Limiting calls to 3 per week;
- **Requiring direct consent not only to email but also to send SMS messages**

Industry associations filed comments, NYDFS decided to reconsider the rulemaking, waiting to hear revised proposal.

Consent for Digital Communications: TCPA

Under the TCPA consent is only required if using an ATDS to call or text a cell phone or if leaving a prerecorded message regardless of the system used. April 2021 SCOTUS **unanimously** ruled Facebook did **not violate** the TCPA when it **sent unsolicited text messages to people without their consent.**

Unlawful to (1) make **a call or text using an automated telephone dialing system (ATDS) without consent to any cell phone** number and to (2) make **a call using an artificial or prerecorded voice without consent.**

Consent passes from the creditor automatically to the debt collector.

Revocation of consent passes from the debt collector automatically to the creditor.

Digital Communications: Other Considerations

- **Email occurs when the debt collector sends it.**
For the purposes of inconvenient time calculations, an electronic communication (email or text message) occurs when the debt collector sends it **not when the consumer receives it or views it.** See 12 CFR § 1006.6(b)(1)(i).
- **Unsubscribe notice must be clear and conspicuous.**
See 12 CFR § 1006.6(e).
- To send required disclosures electronically must do so in a manner that is **reasonably expected to provide actual notice** in a form the consumer may **keep and access** later. See 12 CFR § 1006.42.
 1. **Monitor deliverability**
 2. **Identify Collector as the sender** of the email
 3. **Two pieces of account information** in **the subject line** (not the debt amount).
- **Hours of operation, address, phone number contained in the footer of all emails.**

Digital Communications: Other Considerations

- **Email/text occurs when the debt collector sends it not when it is received/viewed.**
(Inconvenient time calculations) See 12 CFR § 1006.6(b)(1)(i).
- **Unsubscribe/Opt-Out notice must be clear and conspicuous.**
See 12 CFR § 1006.6(e).
- Must be delivered in a manner that is **reasonably expected to provide actual notice** in a form the consumer may **keep and access** later. See 12 CFR § 1006.42.
 1. **Monitor deliverability**
 2. **Identify Collector as the sender** of the email
 3. **Two pieces of account information** in **the subject line** (not the debt amount).
- Don't forget, mini-Miranda, contact information, and other required disclosures
- Check the reassigned number database ever 30 days!
- Communication frequency, time/place/manner and other restrictions still apply.

E-Sign Consent

- 1. To email the validation notice when the validation notice is not the initial communication**
 - consent captured over the phone via a script with the agent
- 2. To email verification documents in response to a dispute**
 - consent captured via online flow
 - consent captured over the phone via a script with the agent
- 3. To email payment reminders**
 - consent captured via online flow

Leveraging Agents

How can we best leverage our agents and collectors when utilizing digital communications?

Lawsuits & Trends

What lawsuits are being attempted? How to build a defense?
What are the courts saying?

Some cases of note:
Greene v. TrueAccord
Branham v. TrueAccord

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