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ALTERNATIVE FORMS OF PRIVACY NOTICE

PROJECT NO. P034815

COMMENTS OF ACA INTERNATIONAL IN RESPONSE TO THE FEDERAL TRADE COMMISSION'S ADVANCE NOTICE OF PROPOSED RULEMAKING:

INTERAGENCY PROPOSAL TO CONSIDER ALTERNATIVE FORMS OF PRIVACY NOTICES UNDER THE GRAMM-LEACH-BLILEYACT

FILED MARCH 29, 2004

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INTRODUCTION

The following comments are submitted on behalf of ACA International ("ACA") in response to the request by the Federal Trade Commission ("FTC" or "Commission") for comments on whether the FTC and the other Agencies that enforce the Gramm-Leach-Bliley Act ("GLB Act") should consider amending their implementing rules to allow or require financial institutions to provide alternative types of privacy notices that would be easier for consumers to understand. *See* Advance Notice of Proposed Rulemaking: Interagency Proposal to Consider Alternative Forms of Privacy Notices Under the Gramm-Leach-Bliley Act, 68 Fed. Reg. 75164 (Dec. 30, 2003) ("ANPR"). In the case of the FTC, the regulations implementing the GLB Act (the "Privacy Rule") are codified at 16 C.F.R. Part 313. *See* Privacy of Consumer Financial Information: Final Rule, 65 Fed. Reg. 33645 (May 24, 2000).

I. Statement on ACA International

ACA International is an international trade organization of credit and collection professionals who provide a wide variety of accounts receivable management services. Headquartered in Minneapolis, Minnesota, ACA represents approximately 5,300 third party collection agencies, attorneys, credit grantors, and vendor affiliates. Members comply with all applicable federal and state laws and regulations regarding debt collection, as well as ethical standards and guidelines established by ACA. Specifically, the

collection activity of ACA members is regulated by the Commission under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, and the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, in addition to analogous state laws.

Some ACA members also participate in ACA's Asset Buyers Program. The Asset Buyers Program assists members that purchase debt from third party creditors. The sale and purchase of accounts receivables is a growing trend within the collection industry, and ACA anticipates that debt purchasing by collection agencies will continue to increase.

II. General Comments on the Application of the GLB Act and Privacy Rule to ACA Members

Before addressing the specific issues raised by the ANPR, it is important to recognize that the GLB Act and Privacy Rule have little, if any, application to ACA members. When Congress enacted the GLB Act, collection agencies were already subject to numerous federal and state regulations that protect the privacy interests of consumers. Additional regulation under the GLB Act and Privacy Rule therefore was unnecessary, and debt collectors were properly exempted from the notification requirements of the Act. Collection agencies that purchase accounts receivables are likewise unaffected by the Act and the Privacy Rule unless and until they consummate a customer relationship by locating a debtor and attempting collection.

A. Congress Drafted the GLB Act Against the Backdrop of Numerous Federal and State Laws Governing Collection Agencies.

When Congress passed the GLB Act in 1999, it recognized that collection agencies were already regulated by many federal and state laws that protect the privacy interests of consumers. Collection agencies are directly regulated by the FDCPA. Among other things, the FDCPA delineates the proper procedures for obtaining debtor location information, communicating with consumers, and disclosing that consumers have the right to dispute the validity of the debt. The FDCPA includes provisions that not only regulate the communication between debt collectors and consumers, but also regulate communication between debt collectors and third parties. Only in very limited situations may a debt collector communicate with anyone other than the consumer, as defined by the statute.

The FDCPA restricts "communications"[1] by "debt collectors"[2] in connection with the collection of a debt. Section 805(b) of the FDCPA states:

> . . . [W]ithout the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate in connection with the collection of any debt,

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[1] The FDCPA broadly defines communication as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2).

[2] A "debt collector" is defined as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6).

> with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

15 U.S.C. 1692c(b). This provision requires collection agencies to obtain the consumer's consent before engaging in any communications about the debt with anyone other than the few persons listed in the subsection. It ensures that consumers decide who can receive information about their debts and the information that may be shared with third parties.

Other aspects of the FDCPA further restrict or prohibit the unauthorized sharing of information about a consumer debt in the interest of protecting the consumer's privacy. For example, the FDCPA requires that:

> [a]ny debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall –
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> 1. identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;
> 2. not state that such consumer owes any debt;
> 3. not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location

information.

15 U.S.C. § 1692b. *See also* 15 U.S.C. § 1692c(a) (controlling a collection agency's communications about a consumer's debt when engaging in direct communication with a consumer).

In addition to the FDCPA, other federal laws governing collection agencies restrict access to nonpublic personal information. For example, collection agencies that "furnish" consumer information to consumer reporting agencies are governed by the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"), as well as amendments to the FCRA recently enacted by Congress. *See* Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, 117 Stat. 1952. The FCRA contains express limitations on the types of consumer information that can be disclosed to third parties.[3] A majority of states have adopted specific debt collection and privacy laws. As a result of these and other laws applicable to the collection industry, the privacy concerns supporting the enactment of the GLB Act and Privacy Rule were already fully reflected in the business operations of ACA members at the time

[3] The FCRA prohibits furnishers of consumer information from providing information to a consumer reporting agency that they know, or consciously avoid knowing, is inaccurate. 15 U.S.C. § 1681s-2(a)(1). When a consumer notifies the furnisher of a perceived inaccuracy which is then verified, the correct information must be forwarded to the consumer reporting agency. 15 U.S.C. § 1681s-2(a). Moreover, if a consumer reporting agency notifies the furnisher of a consumer's dispute of the accuracy of information provided by the furnisher, the furnisher must conduct an investigation of all relevant information provided by the consumer reporting agency, as well as any material given to the agency by the consumer, and report the results of the investigation to the agency. 15 U.S.C. § 1681s-2(b).

Congress passed the GLB Act and the FTC promulgated the Privacy Rule.

B. Collecting a Debt on Behalf of a Creditor is Properly Exempted from the GLB Act and Privacy Rule.

In light of existing regulation of debt collectors, the FTC properly exempted collection agencies from the vast majority of the GLB Act's and Privacy Rule's provisions. As the Commission explained in the preamble to the final Privacy Rule, a consumer does *not* have a customer relationship "with a debt collector that simply attempts to collect amounts owed to the creditor." 65 Fed. Reg. at 33653 n. 18. The services performed by a collection agency are based on delinquent accounts that have been placed by a creditor with the agency. The creditor, however, maintains control and legal ownership over the account. Any recovery obtained by the agency is ultimately returned to the creditor. There is no "financial product or service" exchanged between the collection agency and the consumer. *See* 16 C.F.R. § 313.3(l)(1) (defining "financial product or service" as "any product or service that a financial holding company could offer by engaging in an activity that is financial in nature under section 4(k) of the Bank Holding Company Act of 1956"). An agency collecting on behalf of a third party creditor is thus properly excluded from the GLB Act's and the Privacy Rule's notification and opt out requirements.

C. A Collection Agency that Purchases Debts and Other Forms of Accounts Receivable Does Not Have a "Customer Relationship" with the Debtor Except Under Limited Circumstances.

Some ACA's members purchase debts and other forms of accounts receivable from creditors, a type of transaction that is likely to increase in the future. ACA continues to believe that the Privacy Rule should never apply to such a collection agency because, under the FDCPA and case law interpreting that statute, a collection agency does not become a "creditor" when it purchases accounts in its own name. See 15 U.S.C. §§ 1692a(4), 1692a(6); *Cirkot v. Diversified Fin. Sys., Inc*, 839 F. Supp. 941, 944-45 (D. Conn. 1993); *Holmes v. Telecredit Service Corp.*, 736 F. Supp. 1289, 1293 (D. Del. 1990). As one federal court explained it, such agencies are "merely in the business of collecting . . . debts rather than extending credit," and for that reason, they are "simply independent collectors of past due debts . . . ." *Kimber v. Federal Fin. Corp.*, 668 F. Supp. 1480, 1486 (D. Ala. 1987) (internal quotation and citation omitted).

Nevertheless, it bears emphasis that under the Privacy Rule a collection agency that purchases an account does *not* automatically establish a "customer relationship" with the debtor. Instead, this relationship and the legal obligations that accompany it are triggered only if collection agency (1) locates the debtor *and* (2) attempts collection. The FTC explicitly recognizes these limits. *See* 16 C.F.R. § 313.3(i)(2)(i)(J). According to the Commission, these limits are "clear":

> [A customer relationship] occurs only in those instances where the agency locates the [debtor] and tries to obtain payments on the debt. . . . The applicable example in Sec. 313.3(i)(2)(i)(J) makes it clear that a debt buyer does

not have a customer relationship if it does not attempt to collect payments from, or is unable to locate, the individual named on an account it has purchased.

65 Fed. Reg. at 33654 (preamble to Final Privacy Rule).

III. Specific Comments on the ANPR

A. Goals of a Privacy Notice

The ANPR requests comment on whether there are "special issues for the Agencies to consider in developing a short privacy notice that may arise from potential differences between federal and state law requirements[.]" 68 Fed. Reg. at 75161. While the FTC should certainly consider any differences between state and federal requirements, it is just as important to address potential differences or conflicts between GLB Act requirements and requirements imposed on collection agencies by other *federal* laws.

In particular, section 809 of the FDCPA requires that, within five days of the initial communication with the debtor, a collection agency must send a written notice indicating the amount of the debt and the name of the creditor. 15 U.S.C. §1692g. The FDCPA-mandated notice must state: (1) the debt will be assumed to be valid unless it is disputed within thirty days; (2) if the debtor timely disputes the debt in writing, the collector will obtain verification of the debt or a judgment and mail it to the debtor; and (3) if the debtor submits a timely written dispute, the collector will provide the debtor with the name and address of the original creditor. 15 U.S.C. §1692g. This required validation notice is commonly sent to the consumer with the first collection letter.

A substantial body of law has developed around the FDCPA's validation notice requirement. It is among the most aggressively litigated provisions of the FDCPA. In particular, some plaintiffs allege that the content of the collection letters sent by collection

agencies to debtors during the first thirty days of collection contradict or overshadow the validation notice. *See, e.g., Terran v. Kaplan*, 109 F.3d 1428 (9th Cir. 1997); *Miller v. Payco-General Am. Credits, Inc.*, 943 F.2d 482 (4th Cir. 1991); *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991); *Southern Oregon Credit Serv., Inc.*, 869 F.2d 1222 (9th Cir. 1988).

ACA is concerned that any privacy or opt out notices sent by collection agencies under their GLB Act obligations,[4] if they are sent within the first thirty days of collection, may lead to increased claims by consumer attorneys seeking new avenues to file suit based on the alleged overshadowing or contradiction of the validation notice required by section 809 of the FDCPA. ACA therefore urges the FTC to harmonize the notification requirements imposed by section 809 of the FDCPA with any new requirements imposed by a revised Privacy Rule. In particular, any amended rule should clarify that the privacy and opt out notices sent by collection agencies to consumers in compliance with the GLB Act cannot be a basis for an alleged violation of the FDCPA's validation requirements, as set forth at 15 U.S.C. §1692g, or for that matter, any other requirement imposed by federal or state laws or regulations.[5]

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[4] Once again, ACA emphasizes that the notice and opt out requirements of the GLB Act apply to collection agencies only in very limited circumstances; that is, when the collection agency purchases an account in its own name, locates the debtor, and actually attempts collection.

[5] On a related point, the FDCPA validation provision mandates that the collection agency verify the account information by providing the consumer with the requested documentation before resuming any collection activity on the account. The main way for a collection agency to comply with the verification requirement is to contact the original creditor and obtain information that will help the consumer understand his or her payment obligation. Under the current Privacy Rule, this kind of contact and communication is clearly exempted: "requirements for initial notice . . . [and] for the opt out notice . . . do not apply if you disclose

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nonpublic personal information as necessary to effect, administer, or enforce a transaction that a consumer requests or authorizes." 16 C.F.R. § 313.14(a). There is no doubt that this exemption includes communication and work required in connection with the collection of accounts. *See* 16 C.F.R. § 313.14(b)(2)(vi)(A). ACA believes this exemption is a necessary feature of the Privacy Rule, and should that rule be revised, the exemption should remain unchanged.

B. Elements of a Privacy Notice

The ANPR requests comment on several aspects of the elements of a short privacy notice. *See* 16 C.F.R. at 75167-68. ACA firmly believes that such a shortened notice, if the Agencies opt to pursue one through regulation, would be of little benefit to either consumers or financial institutions if it contains *all* of the elements listed in GLB Act and Privacy Rule. Obviously, the primary purpose of a shortened notice is to provide consumers with a simpler, more understandable message so that they comprehend and exercise their privacy rights. Just as important, such a shorted notice has the potential to save financial institutions – and in turn their consumers – resources that otherwise would be spent on the design, language, and content of a longer privacy notice. As the ANPR acknowledges, experience thus far with the Privacy Rule has tended to undermine these important considerations.

In light of this experience, ACA strongly believes that any short privacy notice must be just that – short – in order to accomplish the goals of the Act. Thus ACA disagrees with the ANPR's suggestion that a short privacy notice contain "all of the relevant elements listed in the GLB Act and the privacy rule[.]" This would do little to advance the interests of either consumers or financial institutions, and would do much to aggravate the problems with consumer confusion that the ANPR highlights.

Instead, such a shortened notice should advise the consumer that the financial institution's complete privacy policy can be found at a particular internet site or by calling a toll-free telephone number. This would minimize customer confusion while at the same time providing those consumers who wish to pursue their GLB Act rights with a simple, inexpensive

way of doing so.

For similar reasons, ACA disagrees with the suggestion raised in Part III.B.6 of the ANPR. There, the ANPR asks whether "statements describing information sharing practices not subject to a consumer's right to opt-out, such as whether a financial institution discloses information to nonaffiliated financial institutions under joint marketing agreements for financial products or services, be highlighted in the short notice[.]" 68 Fed. Reg. at 75168. To reemphasize a basic point: the more information that is included or "highlighted" in a short notice, the more likely it is that consumers will find the notices confusing, frustrating, and in the end useless.

C. Language of a Privacy Notice

The issues raised in Part III.C.2 and III.C.3 of the ANPR are interrelated. The first question is whether financial institutions should "be required to use standardized clauses in a short notice[.]" ACA's answer is emphatically *no*. As the Commission is aware, financial institutions covered by the GLB Act are numerous and engage in many different institution-specific policies. Although these institutions might benefit from a shortened privacy notice, the material differences among them are too numerous to make mandatory standardized clauses a realistic possibility. As suggested in Part III.C., financial institutions must be permitted to develop their own language in a short notice to account for their own unique policies and circumstances. As discussed in greater detail below, *any* mandates as to language, content, and format would ill-serve the needs of consumers and financial institutions alike.

D. Format of a Privacy Notice

ACA applauds the FTC's and the other Agencies' consideration of a shorter, simpler privacy notice. The ultimate format and graphic design of a shortened notice are obviously critical to the success of this interagency initiative. ACA believes, however, that this is not the right time or place to impose mandatory design elements, whatever they might be.

As the Commission knows, innovations in communications science and graphic design have been evolving rapidly and will no doubt continue to evolve in the future. Market forces, as opposed to government mandates, will be more effective in driving these innovations in a positive direction. Even if the Agencies impose format requirements that reflect the best that design and communications specialists can devise, these requirements will be unable to account for the many differences among financial institutions. Even worse, any design or format mandate, once it is promulgated as mandatory law, will stifle the very market-driven energies that have allowed us to make progress to this point. It would be a shame if the Agencies fossilized into law design elements that, within a few years or months, prove less effective than innovations the private section would produce on its own.

Part III.D.6 of ANPR asks whether a financial institution should be allowed to modify its short notice "to include elements that may be required under states laws?" The answer to this questions should obviously be yes, otherwise federal law in some cases would mandate the violation of state law, not an outcome the Agencies would desire. Ultimately, the resolution of this issues rests with Congress rather than the Agencies, as only Congress has the authority to preempt state law.

E. Mandatory or Permissible Aspects of a Privacy Notice

Above all other considerations, a short-form privacy notice should be a permissible, not a mandatory, aspect of a revised Privacy Rule. There are numerous ways the Agencies could promote the goals of a shorter privacy notice without creating a new set of mandatory rules or prescribed designs that might stifle further advances. The issuance of non-binding industry guidelines, for example, would enable financial institutions and their consumers to reap the benefits of the shorter notice without creating the inevitable confusion that would result from a required "form" that could not possibly capture the differences and nuances among financial institutions and the customers they serve.

ACA encourages innovation in implementing the GLB Act, particularly innovation that benefits both the public and industry. But it strongly opposes a new set of regulations that, under the banner of simplification, risk creating more problems than they solve.[6] The differences among financial institutions are simply too numerous for any kind of mandatory rule to encompass. While we encourage the Commission and the other Agencies to continue their research into communications, graphic design, and consumer perception, this research should produce, at most, non-binding guidelines that will assist financial institutions as they work to

[6] The risk that a mandatory notice regime might create additional litigation problems for financial institutions especially is acute for ACA members. Perhaps more so than any industry, federal and state laws extensively regulate the communications of collection agencies with consumers. Some of these laws, such as the FDCPA, go so far as prescribe the inclusion of specific language in communications with consumers, e.g., a validation disclosure or mini-Miranda warnings. At a minimum, great care must be given by the Agencies to consider the interaction of these mandatory disclosures, and to assure that there are no unintended conflicts between the notice requirements under consideration and those imposed by existing federal and state laws.

simplify their privacy notices. In the long run, this will benefit consumers far more than a new set of regulatory mandates.

Assuming, for the sake of argument, that the Commission ultimately decides to create model formats or language for privacy notices, use of these models and language should establish a safe harbor for financial institutions. Thus, ACA supports the position described in Part III.E.4 of the ANPR:

> 4. If use of standardized part(s), such as standardized clauses, is not required, should the Agencies create a safe harbor from administrative enforcement for financial institutions that use the standardized parts in their notices (or a whole, standardized notices)?

III. Conclusion

ACA appreciates the Commission's and the other Agencies' consideration of these comments. It commends the effort to make the privacy notices required by the GLB Act more understandable to consumers and less burdensome to financial institutions. As a general proposition, it supports the idea that consumers would be less confused and financial institutions less burdened if shorter privacy notices were allowed. It strongly believes, however, that mandatory regulation in this area would be premature and could worsen the very problems it seeks to solve. Agency guidelines, additional research, and even the creation of safe harbor language might well be steps in the right direction. But ACA opposes any initiative to make the new short-form notices mandatory.

If you have any questions, please do not hesitate to contact Glenn A. Mitchell

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