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WASHINGTON DC, 20580**

PRERECORDED MESSAGE EBR TELEMARKETING

PROJECT NO. R411001

COMMENTS OF ACA INTERNATIONAL

FILED JANUARY 10, 2005

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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 the notice of proposed rulemaking to amend the Telemarketing Sales Rule, 16 C.F.R. § 310 *et seq.* (“TSR”). *See* Notice of Proposed Rulemaking, 69 Fed. Reg. 67287 (Nov. 17, 2004) (“NPRM”).¹

The NPRM announces three changes to the TSR. First, the FTC seeks to bring the TSR in line with the Federal Communication Commission’s (“FCC”) regulations by adopting a call abandonment safe harbor to allow telemarketing calls that deliver a prerecorded message to consumers with whom the seller on whose behalf the calls are made has an established business relationship. Second, the FTC announces an enforcement forbearance for such calls. Finally, the FTC requests comment on a proposal to modify the call abandonment safe harbor provision in order to require an abandonment rate of no more than three (3) percent of all calls answered by a person when measured over a 30-day period.

ACA supports the proposed changes as measures which advance the directive of Congress that the telemarketing rules of the FTC and the Federal Communication Commission

¹ These comments supplement the comments filed with the Commission by ACA on April 15, 2002, in response to the Commission’s Notice of Proposed Rulemaking to promulgate amendments to the TSR. *See Comments of ACA International in Response to the Federal Trade Commission’s Proposed Amendments to the Telemarketing Sales Rule*, <http://www.ftc.gov/os/comments/dncpapercomments/04/aca.pdf>.

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(“FCC”) achieve “maximum consistency.” See Section 3, Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (Mar. 11, 2003) (“DNC Act”). However, ACA respectfully requests that the FTC utilize this rulemaking to address a significant remaining conflict in the federal regulatory scheme whereby debt collectors are forced to choose between complying with the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 *et seq.*, or the FCC’s telemarketing rules. Specifically, the FCC’s regulations, 47 C.F.R. § 64.1200(b), require debt collectors to identify their state-registered names in artificial and prerecorded telephone messages, but Section 805(b) of the FDCPA, 15 U.S.C. § 1692c(b), prohibits the disclosure of the existence of a debt to persons other than the debtor.² As noted below, the conflicting interpretations not only presents an impossibility for debt collectors to comply simultaneously with the FDCPA and the FCC regulations, but the FCC’s rule undermines the FTC’s previous conclusion – as the primary Federal agency regulating the credit and collection industry – that debt collection calls generally are not “telemarketing” and are not regulated by the TSR. See *Telemarketing Sales Rule*, 68 Fed. Reg. 4580, 4664 n.1020 (Jan. 29, 2003) (final amended rule).

² As explained, *infra*, many ACA members have state registered names including words that identify their business, for example, “ABC Collections, Inc.” or “ABC Recovery, Inc.” Under the FCC’s rules, a collection agency is required to disclose this information at the beginning of a prerecorded message. Doing so, however, may violate Section 805(b) of the FDCPA because the collection agency has no way of knowing whether the prerecorded message will be received by a person other than the debtor.

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The choice for many debt collectors is between Scylla and Charybdis: (1) disclose their state-registered name to comply with the FCC regulations, but violate the FDCPA; or (2) comply with the FDCPA by not disclosing information in a prerecorded message that might reveal the existence of a debt, but violate the FCC's regulations. Either violation subjects debt collectors to federal enforcement and private rights of action, including statutory penalties and actual damages. In light of this intractable conflict, ACA requests that the FTC utilize this proceeding to reconcile the clear inconsistency between the two Agencies' rules and, at a minimum, state that the FTC will forbear from enforcement of alleged FDCPA violations stemming from debt collectors' compliance with the state-registered name disclosure requirements under the FCC's telemarketing regulations.

I. Statement on ACA

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 debt collectors, 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 FDCPA, 15 U.S.C. § 1692 *et seq.*, and the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, and other state and federal laws.

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There is no question that uncollected consumer debt does great harm to the vitality of America's economy. According to the Federal Reserve Board and United States Census Bureau, total consumer bad debt costs every adult in the United States \$683 every year. This translates into a cost for the average non-supervisory worker of nearly 54 hours (before taxes) in annual salary that pays for the bad debt of other consumers. Outstanding credit card debt has doubled in the past decade and now approaches three quarters of a trillion dollars. Eileen Alt Powell, *Consumer Debt More Than Doubles in a Decade*, Associated Press, Jan. 6, 2004. Total consumer debt, including home mortgages, exceeds \$9 trillion. William Branigan, *U.S. Consumer Debt Grows at an Alarming Rate*. Wash. Post, Jan. 12, 2004. Moreover, the greatest increases in consumer debt are traced to consumers with the least amount of disposable income to repay their obligations. For example, between 1989 and 2001, American families with annual incomes of less than \$10,000 experienced a 184% increase in their average debt.

Uncollected debt also harms consumers. This fact is reflected in the continued increase in consumer bankruptcies. In 2003, there were more than 1.63 million personal bankruptcies filed, representing a 5.6% increase from 2002 levels. Even further, the harmful consequences of uncollected debt are not limited to consumers. It also impacts the smallest of businesses in addition to the largest of the multi-national credit grantors.

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ACA members are an extension of practically every community's business. We represent the local hardware store, the retailer down the street, and the local hospital. The collection industry works with these businesses, large and small, to obtain payment for the goods and services received by consumers. Without collection, the economic viability of these businesses, and by extension, the American economy in general, faces a grave threat. At the very least, Americans are forced to pay higher prices to compensate for uncollected debt.

II. The Amendments Proposed by the FTC Effectuate the Maximum Consistency in Federal Telemarketing Rules as Required by Congress.

ACA approves of the proposed amendment to the call abandonment safe harbor provision in order to permit calls to consumers with whom a seller has an established business relationship to deliver a prerecorded message. As the FTC is aware, the FCC's telemarketing regulations for more than a decade have permitted prerecorded messages to consumers with whom there exists an established business relationship. *See* 47 C.F.R. § 64.1200(a)(2)(iv). In effect, the proposed amendments are calculated to bring the FTC's telemarketing regulations in line with those of the FCC, thereby reducing inconsistencies in the overall federal regulatory scheme and assuring a more direct pathway to compliance for those entities regulated by the FTC and FCC rules.

Consistency in the federal scheme is not aspirational. It is required by Congress pursuant to section 3 of the DNC Act. *See* Section 3, DNC Act, Pub. L. No. 108-10, 117 Stat. 557 ("the Federal Communication Commission shall consult and coordinate with the Federal

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Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission”). To the extent that the proposed amendments further advance this Congressionally-mandated standard of maximum consistency, ACA supports the changes.

III. The FTC Should Exercise its Authority to Resolve the Disparate Treatment of Debt Collectors Under the Federal Telemarketing Rules.

ACA respectfully requests that the FTC clarify in this rulemaking the significant conflict in the federal telemarketing regulatory scheme as it relates to debt collectors. As noted, the FTC previously concluded that debt collection calls generally are not “telemarketing” and are not regulated by the TSR because they are not calls to induce the purchase of a good or service. *See Telemarketing Sales Rule*, 68 Fed. Reg. 4580, 4664 n.1020 (Jan. 29, 2003) (final amended rule). In contrast, in July 2003, the FCC issued final regulations implementing amendments to the TCPA. *See* 68 Fed. Reg. 44144 (July 25, 2003).

Section 64.1200(b) requires that all artificial or prerecorded telephone messages *must* “at the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call.” This requirement applies to *all* artificial or prerecorded telephone messages, and the FCC determined that the message must disclose the state-registered name of the company making the call.

Notwithstanding a long history of exempting collection calls from the FCC’s rule,³ the

³ The FCC repeatedly has clarified that debt collection calls are not “telephone solicitations” or “unsolicited advertisements” as those terms are defined in the TCPA, thereby not subjecting

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July 2003 FCC rulemaking did not re-affirm the exemption of such calls from the FCC's rule and, thereby, implicitly included calls made for the purpose of collection of a debt. Consequently, as a result of the two Agencies' decisions, collectors generally have no compliance obligation under the FTC's telemarketing rules, but must disclose their state-registered business name in prerecorded calls in order to comply with the FCC's requirements.

The FCC regulation not only is inconsistent with the FTC's final rule, but it conflicts with the requirements of the FDCPA.⁴ Section 805(b) of the FDCPA prohibits debt collectors from disclosing the existence of a debt to third parties. The FDCPA expressly prohibits debt collectors from communicating any information to third parties, even inadvertently, with respect to the existence of a debt without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction. *See* 15

the calls to the statutory and regulatory restrictions on prerecorded messages. *See, e.g.*, 1995 TCPA Reconsideration Order, 10 FCC Rcd 12,391, ¶ 17 (“We have specifically noted that ‘prerecorded debt collection calls [are] exempt from the prohibitions on [[prerecorded] calls to residences as . . . commercial calls . . . which do not transmit an unsolicited advertisement’”); *id.* ¶ 19 (“We thus clarify that the rules do not require that debt collection employees give the names of their employers in a prerecorded message, which disclosure might otherwise reveal the purpose of the call to persons other than the debtor”). More recently, the FCC again stated that “debt collection calls constitute neither telephone solicitations nor include unsolicited advertisements.” Final Rule, 68 Fed. Reg. 44144, at 44158, para. 81 (July 25, 2003).

⁴ ACA filed a petition for reconsideration with the FCC in August 2003 in which it asked the FCC to address the conflict. *See* Petition for Reconsideration and Clarification of Final Rule Implementing Amendments to the Telephone Consumer Protection Act, *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514784334. The FCC has had the petition before it for 18 months and has failed to act.

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U.S.C. § 1692c(b).⁵

When applied to the collection industry, requiring a debt collector to transmit its registered name at the beginning of a prerecorded message may create liability under the third party disclosure prohibition of the FDCPA for many collectors. This is because many ACA members have state registered names including words that relate to their business, for example, “ABC Collections, Inc.” or “ABC Recovery, Inc.” By disclosing this information, the debt collector may violate Section 805(b) of the FDCPA because the collector has no way of knowing whether the prerecorded message will be received by a person other than the debtor. In effect, the federal telemarketing scheme regulated by the FTC and FCC subjects debt collectors to a compliance impossibility of liability under the TCPA if they comply with the FDCPA, or liability under the FDCPA if they comply with the TCPA.

⁵ The term “communication” is defined broadly under the FDCPA, and includes “the conveying of information regarding a debt directly or indirectly to any person through any medium,” including over the telephone. 15 U.S.C. § 1692a(2). Federal courts have interpreted the third party disclosure prohibition liberally such that a third party need not be told expressly that the communication is about a debt. *See, e.g., West v. Nationwide Credit, Inc.*, 998 F. Supp. 642 (W.D.N.C. 1998); *Arslan v. Florida First Fed. Group*, 1995 WL 73115 (M.D. Fla. 1995) (violation of the FDCPA for a third party to merely construe the communication as referring to a debt); *Committee v. Dennis Reimer, Co., L.P.A.*, 150 F.R.D. 495 (D. Vt. 1993) (telephone message admissible as evidence of third party communication).

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ACA's concern is substantial. As the FTC knows, the FDCPA subjects collectors to statutory and actual damages for violations, as well as the risk of regulatory enforcement. Conversely, alleged violations of the TCPA carry similar regulatory and civil litigation risks. Moreover, ACA has verified that the FCC's Enforcement Bureau is actively investigating and issuing citations of debt collectors for alleged failure to comply with the FCC's regulations when, in fact, collectors cannot comply with said regulations and also uphold the requirements of the FDCPA.

The FTC can and should use the present rulemaking to harmonize its own rules with those of the FCC. One way for the FTC to accomplish this is to acknowledge that it will not enforce violations of the FDCPA when a debt collector discloses its state-registered name in a prerecorded message as required under the FCC's rules. Such an enforcement directive would not eliminate future civil liability, but it would remove the risk of FTC administrative enforcement for alleged FDCPA violations compelled by the FCC's rule.

CONCLUSION

ACA appreciates the opportunity to comment on the proposed amendments and encourages the FTC, in the spirit of engendering maximum consistency in the federal telemarketing scheme, to forbear from enforcing at least until such time as the FCC rules on ACA's petition for reconsideration. If you any questions, please contact Rozanne Andersen, ACA International General Counsel and Senior Vice President of Legal and Governmental

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Sincerely,

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