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COMMENTS OF ACA INTERNATIONAL REGARDING THE DEBT COLLECTION WORKSHOP

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ACA INTERNATIONAL COMMENT
DEBT COLLECTION WORKSHOP, P074805

TABLE OF CONTENTS

PAGE

I. Introduction.

The following comments are submitted on behalf of ACA International (ACA) in response to the Federal Trade Commission's request for comments following the October 10-11, 2007, Debt Collection Workshop, P074805 (Workshop). These comments also supplement ACA's comments filed with the Commission on June 6 and August 6, 2007. *See* http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00016.pdf and http://www.ftc.gov/os/ comments/debtcollectionworkshop/529233-00031.pdf.

ACA congratulates the Commission and Staff for having achieved in the Workshop the important goal of gathering stakeholders together to discuss the economic and technological trends during the past thirty years and the impact on the recovery of debts. Staff capably elicited a wide-range of views as to whether the FDCPA has kept pace with the complexities of recovering debts today from consumer and business perspectives. In that spirit, ACA welcomes the opportunity to file supplemental comments to respond to several issues raised during the Workshop, amplify other points, and offer specific proposals to continue the constructive dialogue. ACA emphasizes that it seeks to engage all stakeholders in continuing discussions about the important subjects raised in the Workshop in an effort to build a consensus on how to best address these issues from regulatory, industry, and consumer perspectives.

II. Workshop Themes.

During the two days and numerous panel discussions, several "themes" emerged from the Workshop which ACA wishes to address.

Chairman Majoras set the tone for the Workshop in her opening remarks by echoing commentary by ACA concerning the balance between encouraging the recovery of debts and discouraging and penalizing abusive practices. For example, the Chairman noted in her remarks that "[d]ebt collection pays a vitally important role in the system of consumer credit. . . .Obviously debt collection plays a key role in keeping the prices low and ensuring that consumer credit remains widely available across sectors of the economy." She highlighted the abuses giving rise to the enactment of the FDCPA in 1977 and emphasized that the objective of the Workshop was "to consider whether consumer protection laws have kept pace with the changes that have occurred since this Act was passed thirty years ago." Finally, the Chairman emphasized the need to "identify solutions that adequately protect consumers without unduly burdening legitimate debt collectors in performing their important role in the economy."

This important theme of the need to evaluate non-legislative and legislative solutions that do not unnecessarily handicap the recovery of debts too often was deemphasized during the Workshop. ACA's June 6 comment and the study prepared by PricewaterhouseCoopers provides extensive evidence of the important role and contribution of creditors and third-party debt collectors in the health of the domestic economy when interfacing with consumers in

billions of transactions each year. The overwhelming majority of these consumer interactions are positive and do not result in complaints, lawsuits, or the infringement of consumers' rights.

Another theme by panelists was that, in an ill-defined and unquantified percentage of consumer transactions, debt collectors or collection attorneys violate the FDCPA. There is no doubt that that consumers can be harmed by violations of the FDCPA which infringe on consumers' statutory rights. Indeed, no consumer protection statute can prevent rogue actors from violating the rights of consumers, nor for that matter intentional or technical violations by otherwise highly compliant businesses. The complexity of the Federal and State statutory and regulatory schemes applicable to the recovery of debts, as outlined in ACA's June 6 comment, heightens this potentiality. It is for this reason that the Commission is charged with a wide array of enforcement measures to deter violations and, when discovered, penalize the respondent.

However, the evidence developed during the Workshop to quantify and qualify the nature, type, scope and impact of such consumer abuses was consumer-specific and anecdotal. It affords no basis to establish whether the anecdotal evidence is indicative of systemic conduct across the industry or relegated to just a few bad actors. Because comparatively little time was allocated during the panel discussions to the technologies, processes, and procedures that are working well in the industry from consumer and business perspectives, the Workshop did not provide a good frame of reference to assess the overall compliance of the industry.

This is a critical missing evidentiary element, especially because a defined goal of the Workshop was to evaluate legislative amendments to the FDCPA.

Many panelists noted that debt buying has substantially altered the industry and the interactions between creditors, debt buyers, third-party debt collectors, and consumers. Some suggested that third-party debt collectors attempting to recover purchased accounts or even contingent accounts may have a burden higher than prescribed by statute and interpretative case law which clearly entitles them to rely on the information provided by their clients.

ACA respectfully submits that such a proposal would fundamentally alter the statute and the legal relationship between creditors and collectors by, in effect, transferring the obligations of credit grantors to collectors. To be sure, the need to encourage or require credit grantors to provide comprehensive information to collectors is a goal worthy of pursuit. Doing so must recognize that third-party debt collectors are separate from the credit grantors, and each has an independent role in the recovery process.

Numerous panelists emphasized that the problems highlighted by the Workshop, particularly with respect to debt buying, raised issues about credit grantors. ACA notes the absence of credit grantors at the Workshop, and the dearth of comments from the credit granting community is of great concern to the collection and debt purchasing segment of the industry. In light of the very real need for further dialogue with the credit grantors, ACA respectfully reserves the right to file supplemental comments after it convenes a meeting of

creditors. ACA hopes to determine what processes and procedures might be more appropriately assigned to credit issuers and debt sellers.

An overarching theme of the Workshop was that the credit and collections industry has grown extensively following the enactment of the FDCPA, particularly with the maturation of debt buying. The growth raises questions whether the FDCPA, the Commission's enforcement and industry guidance, and the ability of consumers to enforce their rights as private attorneys general all have kept pace with developments in the industry. The Workshop did not fully resolve these questions. There is a wide variety of opinions on the subject. ACA believes that the FDCPA continues to be fully capable of achieving the Congressional mandates articulated thirty years ago. As noted here, ACA welcomes a discussion of whether improvements in the statute might lead to better outcomes for consumers and industry alike.

Finally, a consistent theme of the Workshop was that consumers require more financial education before incurring debts. Increased financial literacy will empower consumers to make good credit decisions and have a better appreciation for the process in which credit grantors and collectors engage to recover debts. ACA considers this to be among the most important themes of the Workshop and certainly worthy of consideration in any discussion of legislative improvements in the FDCPA.

III. Top Priorities for Statutory Improvements.

ACA believes that the FDCPA can be improved to account for changes in industry, technology, and regulatory oversight. Three of the highest priorities for ACA are as follows:

1. Increasing Compliance by Federal Preemption.

The proliferation and complexity of Federal and state statutes and regulations governing the conduct of debt collectors over the past thirty years has made compliance more complicated and costly. As noted in ACA's June 6 comment, depending on the nature of the activity and type of account, third-party debt collectors and/or the credit grantors may have compliance obligations under the following illustrative list of Federal laws in addition to the FDCPA:

- The Bank Holding Company Act, 12 U.S.C. §§ 1841 et seq.,
- The Consumer Leasing Act ,15 U.S.C. §§ 1667 et seq.,
- The Electronic Fund Transfer Act, 12 U.S.C. §§ 222 et seq.,
- The Equal Credit Opportunity Act,15 U.S.C. §§ 1691 et seq.,
- The Fair Credit Billing Act, 15 U.S.C. §§ 1666 et seq.,
- The Fair Credit and Charge Card Disclosure Act, 15 U.S.C. §§ 1601 et seq.,
- The Fair Credit Reporting Act, 15 U.S.C. §§ 1681 et seq.,
- The Federal Bankruptcy Code, 11 U.S.C. §§ 101 et seq.,
- The Graham-Leach-Bliley Act, 15 U.S.C. §§ 6801 et seq.,

- The Health Insurance Portability and Accountability Act, 42 U.S.C. §§ 1320d-2 et seq., including the Security Rule, Privacy Rule, and Transaction and Code Set Standards promulgated by the Department of Health and Human Services;
- The Home Equity Loan Consumer Protection Act, 15 U.S.C. §§ 1637 et seq.,
- The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism , P.L. 107-56, 115 Stat. 272,
- The Right to Financial Privacy Act, 12 U.S.C. §§ 3401 et seq.,
- Telemarketing Sales Rule, 16 C.F.R. §§ 310.1 et seq.,
- Truth in Lending Act, 15 U.S.C. §§ 1601 et seq.,
- Regulation E, 12 C.F.R. §§ 205.1 et seq.,
- Regulation J, 12 C.F.R. §§ 210.1 et seq.,
- Regulation M, 12 C.F.R. §§ 213 et seq.,
- Regulation Z, 12 C.F.R. §§ 226 et seq.

In addition, each state has enacted laws and regulations supplementing the FDCPA, including licensing and registrations requirements. There is little uniformity in these laws. Indeed, ACA publishes a 1,000 page survey of state law requirements entitled Guide to State Collection Laws & Practices covering different topics for each state (state consumer collection requirements, garnishment exemptions, FDCPA compliance, licensing fees, statutes of limitation, "Mini–Miranda" and validation notice information, bond requirements, trust accounts, resident office requirements, exemptions for out-of-state entities, and penalties for collecting without a license, among other topics). The intricate web of Federal and state

requirements results in unintended compliance conflicts, and the patchwork of state laws have led to unequal legal protections.

The discussion of statutory improvements to foster increased compliance must include the need for a uniform Federal law bringing debt collectors under the same legal and compliance framework and creating consistency in collection practices and legal decisions construing the law. Federal preemption is not uncommon in the consumer protection context. It confers benefits to consumers and industry alike. Consumers would be provided with a uniform notice about their rights under the law, streamlined enforcement activity, consistent consumer rights education, and equal rights and remedies under the laws regardless of the consumer's state of residence.

Presently, section 816 of the FDCPA allows states to enact laws governing the debt collection industry as long as the state law provides consumers with more protection than the FDCPA. This approach to credit and collections made sense in 1977 when much of the industry was local or community based. The problem with this provision is that the debt collection industry is an increasingly interstate and international. Technological advances have enabled even the smallest debt collector to operate in multiple states. Creditors are the same. To complicate matters, it is estimated that 35 percent of delinquent consumers move annually resulting in debt collection efforts that must cross state lines.

Independent state laws are preferred by individual states from regulatory and enforcement perspectives in an effort to promote and protect the rights of residents living in-state. However, state law variations are a substantial challenge for compliance purposes. Law-abiding debt collectors are challenged for conducting debt collection activity that is otherwise lawful under the FDCPA. For instance, a debt collector may send a collection letter to a consumer in one state that fully complies with the FDCPA, but if the consumer moves to another state and the letter is automatically forwarded to the new state with a more restrictive notice requirement, the debt collector is in violation of that state's consumer protection law. In addition, the typical collection letters of agencies have numerous state-specific disclosures and notifications which are redundant.

ACA believes that a single federal debt collection law should clearly spell out the rights and obligations of consumers and debtors alike. Doing so will improve compliance by simplifying and streamlining collectors' obligations. As such, the FDCPA should be amended so that its provisions supercede or preempt state laws addressing the same or similar subject matter. An alternate approach to complete preemption might be to identify those provisions of the FDCPA that should specifically preempt state law. This would be in keeping with the approach adopted by Congress when it amended the FCRA pursuant to the Fair and Accurate

Credit Transactions Act of 2003.[1] Preemption is not intended to invade the enforcement authority of state regulators. ACA is not seeking to usurp state licensing laws or in any way remove the enforcement power of state regulators or state attorneys, nor is it seeking preemption of the state rules of civil procedure[2] or other state laws that control litigation.

2. Opting Out of Certain Communications.

Consumer preferences for communicating with credit grantors and collectors have changed during the past thirty years. Today many consumers' preferred methods of communication are e-mail and wireless-based. An increasing percentage of consumers exclusively use wireless phones and no longer have a registered wireline telephone number. Further, telecommunications industry projections indicate that most consumers will altogether forego wireline communications in a mere decade.

The Workshop established that many credit grantors and collectors avoid these newer methods of communication. This is because it is not clear under Federal and state laws, e.g.,

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[1] Under either approach, a sun-setting provision could be added to have the provision expire in five years at which time an analysis could be conducted to determine whether preemption has improved compliance.

[2] On a related matter, ACA believes attorneys who collect consumer debt should be held to the same standards as non-attorney debt collectors under the FDCPA, albeit with one exception. ACA supports the proposition that the FDCPA's impact on debt collection attorneys should stop when the rules of civil procedure and state codes of professional conduct for attorneys govern the conduct of counsel.

third-party disclosure prohibitions, whether communicating by e-mail is permissible. ACA believes that the FDCPA should permit consumers to select the method by which they wish to communicate, e.g., wireline, wireless, regular mail, or electronic mail. Indeed, consumers already make such an election with regard to the time and place of calls from a collector.

When Congress passed the FDCPA it was not contemplated that a debt collector would be required to obtain permission of a consumer prior to calling him or her on their land line or obtain permission to send a letter. The statutory scheme envisioned by Congress empowered consumers with controlling the time and place of telephone calls. ACA believes the FDCPA should be updated to allow consumers to also control the manner or method of communications.[3] To accomplish this, ACA proposes an amendment to section 805 (amendment number 4) concerning the use of these new technologies by adding a new subsequent (e) and inserting the underscored language:

> **§ 805. Communication in connection with debt collection**
>
> (a) Communication with the consumer generally
>
> Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—
>
> (1) at any unusual time or place or a time or place known or which should

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[3] ACA suggests the Commission consider the approach suggested by Laura Udis during the last session of the Workshop as particularly meritorious.

> be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antemeridian and before 9 o'clock postmeridian, local time at the consumer's location;
>
> * * *
>
> (e) A debt collector may communicate with a consumer using those technologies to which the consumer has expressly or impliedly consented.

15 U.S.C. § 1692c (new subpart e). These changes are intended to make the statute more flexibile and adaptable to new and emerging technologies. Although no one can project today precisely what these technologies might entail, the objective is to give consumers a right to select the time, place, and manner or method of how they wish to communicate with collectors.

3. Cure Rights Prior To Litigation.

During the Workshop, panelists asserted that litigation and threats of litigation were becoming more problematic from both the industry and consumer perspective. ACA agrees. ACA believes that litigation between debt collectors and consumers would be reduced substantially if the parties committed to a good-faith process of trying to resolve the dispute before litigation is started. The Workshop developed good evidence of the value of dispute resolution as an alternative to litigation.

To this end, ACA suggests that the statute should include a requirement that any consumer who intends to file a legal action against a debt collector must provide notice of

their intent to sue and a reasonable basis for the consumer's belief that a law violation has occurred. The notice should be communicated 45 days in advance of suit. During this period, the collector should be afforded the right to cure the alleged violation of the law.

This new provision might also provide consumers with an alternative to litigation such as access to a third-party dispute resolution program. Similar dispute resolution programs worked successfully for the auto industry and the advertising industry. They relieve pressure on an overloaded court system, avoid excessive litigation costs, and give consumers direct access to an independent dispute resolution program to resolve their concerns in a streamlined manner.

IV. Adapting to Emerging Technologies.

As Chairman Majoras noted in her opening remarks, the introduction of predictive dialers, advances in hardware and software, and the emergence of the Internet over the past decade "has opened up new possibilities for communications and has facilitated instantaneous processing of debts." To be sure, advancements in communication technologies have not only opened up new methods of communication and organizing data, but these advancements have created interpretation dilemmas that restrict a debt collector's ability to use and a consumer's ability to request and receive communications through modern media.

The conflict that exists between the FDCPA and the use of technology is simple. The statute is predicated on protecting consumers' privacy. One way this is accomplished is by

prohibiting collectors from communicating information about a debt to anyone other than the consumer debtor. The risk of doing so is the statutory and actual damages imposed by the FDCPA. In contrast, the emerging technologies offer reduced assurances of privacy. E-mail, for example, though preferred by many consumers, is not as secure as a posted letter sent via standard mail. An e-mail can be opened by someone other than the debtor, e.g., by a joint user of an e-mail account. Voice-mail messages similarly can be overheard by third parties. Whether it takes the form of a co-worker picking up a fax, a roommate checking the answering machine, a family member checking the family e-mail account, or the name "ACME Collections" being transmitted and viewed on caller identification, the sender of debt collection information often has no control over who will see it.

This conflict plays out in the statutory scheme under the FDCPA. Section 805(b) provides that, without the prior consent of a consumer given directly to the debt collector, a collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor or its attorney, or the attorney of the debt collector.[4] Various legal authorities have defined permissible third-party communications. Courts and the Commission have stated previously that a debt collector can communicate information about a debt to (a) the

[4] 15 U.S.C. § 1692c(b).

consumer's attorney,[5] (b) a consumer reporting agency,[6] (c) the creditor, (d) an attorney representing the creditor,[7] (e) the debtor's spouse,[8] (f) the parent of a minor debtor,[9] and (g) co-debtors.[10] The Commission also has stated that section 805(b) is violated if a communication from a debt collector is overhead by an eavesdropper in situations where the collector has reason to anticipate that the communication may be overheard.[11]

Section 806 was added by Congress to generally identify and prohibit conduct that is unfair, harassing, or deceptive in communications with consumers.[12] In relevant part, the

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5 *See Phillips v. North Am. Cap. Corp.*, 1999 WL 299872 (N.D. Ill. Apr. 30, 1999).

6 *See Ditty v. CheckRite, Ltd.*, 973 F. Supp. 1320 (D. Utah 1997).

7 Bagwell, FTC Informal Staff Letter (Jan. 6, 1987).

8 *West v. Costen*, 558 F. Supp. 564 (W.D. Va. 1983).

9 Atteberry, FTC Informal Staff Letter (July 18, 1978).

10 *Pearce v. Rapid Check Collection*, 738 F. Supp. 334 (D. S.D. 1990).

11 *See* Federal Trade Commission Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 500097, 50104 (Dec. 13, 1998) (section 805(b), cmt. 4) (accessibility by third party). The Commission's comment is significant for the evaluation of this request because there is no guarantee that a debtor is the only person to hear voice mail message. An example is a debtor that resides in a shared apartment with one telephone number used by other residents unrelated to the debtor. A voice mail message to the debtor in such a situation carries the risk that third-parties will listen to the message.

12 The FDPCA broadly defines "communications" subject to the statute as the "conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). The Commission has construed this to include both "oral and written transmissions of messages which refer to a debt." *See* Federal Trade Commission

statute provides:

> A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> * * *
>
> (6) Except as provided in section 804, the placement of telephone calls without meaningful disclosure of the caller's identity.[13]

Section 804 sets forth the procedures for a debt collector to obtain location information about a debtor from a person other than the debtor.[14] It also requires a debt collector to disclose its identity. Section 804, however, forbids a collector from disclosing the identity of his or her employer to a third party unless requested.[15] In the Official Staff Commentary on the FDCPA, section 806(6) is described in the following manner:

> Section 806(6) prohibits, except where section 804 applies, "the placement of telephone calls without meaningful disclosure of the caller's identity."
>
> *1. Aliases.* A debt collector employee's use of an alias that permits identification of the debt collector (i.e., where he uses the alias consistently,

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Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 500097, 50101 (Dec. 13, 1998) (definition of "communication").

13 15 U.S.C. § 1692d(6).

14 15 U.S.C. § 1692b.

15 *Id.*

> and his true identity can be ascertained by the employer) constitutes a "meaningful disclosure of the caller's identity."
>
> *2. Identification of caller.* An individual debt collector must disclose his employer's identity when discussing the debt on the telephone with consumers or third parties permitted by section 805(b).
>
> *3. Relation to other sections.* A debt collector who uses a false business name in a phone call to conceal his identity violates section 807(14), as well as this section.[16]

The final FDCPA provision implicated by this request is the "mini-Miranda" requirement set forth in section 807(11). The provision states:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> * * *
>
> (11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.[17]

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[16] *See* Federal Trade Commission Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 500097, 50105 (Dec. 13, 1998) (cmt. to section 806(6)).

[17] 15 U.S.C. § 1692e(11).

The Commission has construed section 807(11) so as to require debt collectors to "state in the first communication with a third party that he is attempting to collect the debt and that information will be used for that purpose. . . .".[18]

What emerges is that the statute and the Official Staff Commentary to section 806(6) indicate that a debt collector must disclose his or her employer's identity only "when discussing the debt on the telephone with consumers or third parties permitted by section 805(b)."[19] A voice mail message that merely identifies the debt collector as the calling party (e.g., John Smith) and provides a toll-free number to retrieve a message is not a discussion of consumer's debt. Unfortunately, the Commission and court precedent as to what constitutes a meaningful disclosure under 806(6) presents a compliance problem because it is ambiguous and contradictory. The use of the term "meaningful disclosure" in section 806(6) provides no specific guidance as to how the requirement applies in situations involving voice mail messages. The statute does not define "meaningful disclosure." The FTC's Official Staff

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[18] *See* Federal Trade Commission Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 500097, 50107 (Dec. 13, 1998) (cmt. no. 3 to section 807(11)). The Commission's comment pertained to a previous version of section 807(11). In 1996, the statutory provision was amended by Pub. L. No. 104-208, 110 State 3009-[1243], the Omnibus Consolidated Appropriations Act of 1997 § 2305 (Sept. 30, 1996). The point of the 1996 amendment was to clarify that the disclosure is not required in subsequent communications.

[19] *See* Federal Trade Commission Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 500097, 50105 (Dec. 13, 1998) (cmt. to section 806(6)).

Commentary does not address the problem of what constitutes a "meaningful disclosure" of a company in a voice mail in light of the third-party disclosure prohibitions of the FDCPA.[20]

Other FTC authority does provide some guidance in support of the rule that a debt collector is not required to identify its corporate name in order to meaningfully disclose the caller's identity when leaving a voice mail message. In 1977, Staff issued an informal opinion letter under the FDCPA which addressed the question of whether a collector can place a phone call and leave word (if that debtor is not there) to have the debtor call back to an individual without leaving the name of the collection agency.[21] Staff answered the question in the affirmative, adding only the restriction that "when the consumer calls back the individual clearly discloses that he is a debt collector attempting to collect a debt as required by § 807(11)."[22] Staff explained that the meaningful disclosure requirement of section "806(6) is, in our opinion, intended to cover only actual phone conversations."[23]

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20 *See* Official Staff Commentary, *infra* Part IV.

21 Atteberry, FTC Informal Staff Letter, Dec. 30, 1977.

22 *Id.*

23 *Id.* The Atteberry letter does not define the term "actual phone conversations." Written more than 27 years ago, the Atteberry opinion may not have contemplated or addressed the use of voice message technology. Although unclear, to "leave word" at the debtor's phone number likely meant to leave a message with a third party who answered the phone in the debtor's absence. If this conversation with a third party was not considered by Staff to be an "actual phone conversation," then presumably an "actual phone conversation" referred to a conversation with the 'actual' debtor.

The current relevance of this 27-year-old opinion letter is questionable because it is evident that Staff likely was not contemplating the use of technology such as the answering machine, which is commonplace today. Even if the rule in the Atteberry opinion applies to voice mail messages, however, the opinion is not binding in court.[24]

Indeed, at least one federal court appears to conflict with the Atteberry letter by explicitly requiring a debt collector to identify its corporate name when using certain forms of electronic communications with debtors.[25] In *Joseph v. J.J. Mac Intyre Companies, L.L.C.*, the court held that a debt collection company must be identified by name in automated messages and messages on answering machines. The court concluded that the meaningful disclosure requirement in 15 U.S.C. § 1692b applies "equally to automated message calls and live

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[24] *See Swanson v. Southern Oregon Credit Serv.*, Inc., 869 F.2d 1222, 1230 (9th Cir. 1988) ("although courts should give some weight to such opinions, they do not bind courts.") (citation omitted); *Staub v. Harris*, 626 F.2d 275, 279 (3rd Cir. 1980) ("Such unofficial interpretations are 'merely . . . suggestion(s) that the stated interpretation(s are) the 'more likely' meaning of the statute.' Although the FTC informal opinion should be given some weight by this court, it is by no means binding") (internal citations omitted); *see also Hulshizer v. Global Credit Servs., Inc.*, 728 F.2d 1037, 1038 (8th Cir. 1984) (reliance upon a staff letter not a defense where action violated the statute); *Carroll v. Wolpoff & Abramson*, 961 F.2d 459, 461 n.4 (4th Cir. 1992) ("it is well-settled that we 'need not defer to an agency's construction of its governing statute if the construction violates an unambiguous statutory command. . . .") (citation omitted).

[25] *Joseph v. J.J. Mac Intyre Companies, L.L.C.*, 281 F.Supp.2d 1156, 1163 (N.D.Cal. 2003).

calls."[26] The court rejected an analogy between the risks of third-party communications in marks on letters and information provided in automated phone calls, explaining that the possible compromise of privacy is less likely and more remote than where, for example, the debtor indicates the nature of the collection notice on the outside of an envelope sent by mail for the world to see.[27]

The inconsistency between the court's holding and the third-party disclosure prohibitions of the statute is apparent and was recognized by the court.[28] The court was undeterred even though it acknowledged that "disclosure during an automated call could compromise the debtor's privacy if another party such [sic] as a neighbor or relative inside the home picks up the debtor's phone and hears the automated call."[29]

Further complicating the problem is that other federal statutory and regulatory requirements contradicts *J.J. Mac Intyre* by exempting debt collectors from disclosing their corporate name when leaving voice mail messages. For example, until recently, Federal Communication Commission (FCC) regulations promulgated pursuant to the Telephone Consumer Protection Act required debt collectors to disclose their state-registered company

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26 *Id.*

27 *Id.* at 1164.

28 *Id.* at 1163-64.

29 *Id.*

names pursuant to the artificial and prerecorded telephone message identification restrictions in 47 C.F.R. § 64.1200(b). ACA explained in numerous submissions that there is an irreconcilable conflict between the FCC's regulatory requirement that businesses disclose their state-registered names in prerecorded messages, as set forth at 47 C.F.R. § 64.1200(b)(1), and section 805(b) of the FDCPA which forbids ACA members from disclosing their state-registered names in messages if doing so would reveal the existence of a debt. Nearly two years later, the FCC clarified that parties making calls for the purpose of debt collection are not required to identify the caller's state-registered name in prerecorded messages if doing so would conflict with federal or state laws.[30]

In summary, there is no clear direction for debt collectors attempting to recover outstanding payment obligations through the necessary means of modern technologies such as voice mail messages while striving to adhere to the FDCPA's third-party communications limitations to protect privacy and the ill-defined meaningful disclosure standard. Although the privacy of debt information should continue to be sacrosanct, it should not be used as a statutory or litigation barrier to the advancement and improvements in communications between credit grantors, debt collectors and consumers. Instead, measures can be

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[30] *Second Order on Reconsideration: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CD Dkt. No. 02-278, FCC 05-28 (Feb. 18, 2005).

implemented to reasonably guard against the disclosure of the debt.

To resolve the conflict between the requirements of section 805 regarding the prohibition against the unauthorized disclosure of a debt to a third party and the meaningful disclosure requirements of section 806(6), ACA proposes several possible changes to the FDCPA. First, section 805 should be amended to relieve the debt collector from liability for unintended or inadvertent disclosures to third parties. This amendment recognizes both the responsibility of the debt collector to carefully direct communications about the debt to the consumer as defined in section 805 and the consumer's corresponding responsibility to limit access to his personal communications by third parties as underscored by the amending language noted below:

> **§ 805. Communication in connection with debt collection 15 U.S.C. § 1692c(b)**
>
> (b) Communication with third parties
>
> Except as provided in sections 1692b and 1692d (6), of this title, without 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 post judgment judicial remedy, a debt collector may not communicate in connection with the collection of any debt, 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. A communication from a debt collector which is otherwise in compliance with this section and intended only for the consumer but which is received, intercepted, accessed, or viewed by a party other than the consumer is not a violation of this section.

Second, ACA submits that the statute would be improved if it clarified that a debt

collector need not make a full disclosure of the nature of the communication until the collector has determined he or she is actually communicating with the consumer. Colorado law offers a good example of such a change to the FDCPA:

> Except when acquiring location information, it is harassing conduct for a debt collector to place telephone calls without providing meaningful disclosure of the caller's identity in the first sixty seconds after the other party to the call is identified as the debtor.

Colo. Rev. Stat. Ann. § 12-14-106(1)(f).

A third amendment would clarify precisely what information must be disclosed to the consumer once the debt collector determines he or she is actually communicating with the debtor as underscored below:

> **§ 806. Harassment or abuse** **15 U.S.C. § 1692d**
>
> (6) Except as provided in section [804] and [ ] of this title, ~~the placement of telephone calls without meaningful disclosure of the caller's identity~~ the leaving of a message or communication without disclosing the caller's name, company name or professional name.

V. Other Proposals to Strengthen the Statute.

A. Verification.

A recurring theme during the Workshop was the need to improve the verification of debts. To achieve this, ACA proposes that the FDCPA mirror what ACA requires of its members by way of its Code of Ethics and Operations. If an ACA member receives a written request for verification of a debt from a consumer, the member is obligated to suspend

collection activities on the account, and provide verification of the debt. If such member does not or is unable to provide verification of the debt in response to the written request, the member must:

- Cease all collection efforts;
- Direct or request removal of the item from the consumer's credit report or report the item as disputed to the appropriate credit reporting agency, at the member's next available opportunity;
- When closing and returning the account, notify the credit grantor, client or owner of legal title to the debt that collection activity on the account was terminated due to the inability to provide verification of the debt.
- If requested by the consumer in writing, notify the consumer that collection efforts have been terminated by the member.

At the same time, ACA members believe that any changes to the verification requirements of the FDCPA must account for, and perhaps build upon, the established standards reflected in legal decisions interpreting the statutory verification requirements.

B. Consumer Disclosure Requirements.

During the Workshop, Staff asked whether improvements can be made to the written notices provided to consumers during the collection process. ACA submits that improvements can be made to the notices which will alleviate consumer confusion over the content of the notice. For example, the validation notice is a fundamental disclosure mandated by the FDCPA. Unfortunately Federal and state law differ as to the specific content of the validation notice. An optional safe harbor language should be included in debt collection letters in order

to meet the validation notice requirements of section 809. Although this notice would not be a mandatory requirement of the FDCPA, it would serve as a safe harbor notice to those who voluntarily choose to use it when communicating with consumers. The following would be a new subsection (b) immediately following section 809(a).

§ 809. Validation of debts **15 U.S.C. § 1692g**

(b) ALTERNATIVE VERSION OF NOTICE- A notice is described in this subsection for purposes of subsection (a) if the notice contains--

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed; and

(3) a statement containing the following: "Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, in writing, this office will assume this debt is valid. If you notify this office in writing within 30 days from receiving this notice that you dispute the validity of this debt or any portion thereof, this office will obtain verification of the debt or obtain a copy of a judgment and provide you with a copy of such judgment or verification. If, within 30 days after receiving this notice, you request in writing from this office the name and address of the original creditor, this office will provide such information to you if different from the current creditor."

Another improvement would be to clarify that the mailing of an initial validation notice to a consumer who has filed for bankruptcy does not violate the FDCPA or the bankruptcy stay if the debt collector was not provided with notice of the bankruptcy filing by any person. This amendment would eliminate countless lawsuits against debt collectors who had no knowledge of the consumer's bankruptcy filing through no fault of the debt collector.

Finally, the treatment of disputes under the FDCPA must be considered. Some provisions of the FDCPA refer to written disputes, while others refer to disputes generally

without specifying the form or substance of the dispute. Differentiating what constitutes an oral dispute and what rights a consumer has following an oral dispute has created a great deal of uncertainty in court and has undermined industry and consumer confidence in the FDCPA's dispute resolution procedures. It is difficult to determine if a consumer is disputing a debt if he simply hangs up the phone, refuses to pay the debt without stating any reason, or refuses all mail as "return to sender". In order to reduce confusion and introduce consistency, section 809(a) of the FDCPA should be amended as follows to require a valid dispute to be submitted to the debt collector in writing. Also included in this amendment to subsection (a) is the addition of "the written notice described in subsection (b) or" to carry out the safe harbor amendment described above. The following underscored language reflects the proposed changes:

§ 809. Validation of debts **15 U.S.C. § 1692g**

(a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer <u>the written notice described in subsection (b) or</u> a written notice containing-

(1) the amount of the debt;
(2) the name of the creditor to whom the debt is owed;
(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes <u>in writing</u> the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is

disputed, the debt collector will obtain verification of the debt or a copy of a judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

C. Adapting to Consumer Mobility.

As discussed in ACA's June 6 comment, there are unique problems presented by the increased mobility of consumers. This includes consumers who move, those that reside in one state but transact business and/or originate debts in another state, and even those consumers who maintain wireless telephone numbers with area codes different than those allocated to their state of residence. Increased mobility injects uncertainty into the collection process. For example, the FDCPA imposes liability for call-time violations, and collectors rely on area codes to establish the location of a consumer before placing a call. If, in fact, the consumer is outside of the area code or state, a call time violation can occur. Unlike several decades ago when credit and collections were primarily local, the origination of debt today is national. This suggests that the FDCPA should allow a legal action to commence in a venue other than where the contract was signed or where the consumer resides if it is convenient for the parties.

§ 811. Legal actions by debt collectors **15 U.S.C. § 1692i**

(a) Any debt collector who brings any legal action on a debt against any consumer shall -

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or
(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity –
  (A) in which such consumer signed the contract sued upon; or
  (B) in which such consumer resides or is employed at the commencement of the action; or
  (C) to which such consumer has reasonably availed himself.

D. Enforcement Priorities.

ACA has identified several proposals that would strengthen the Commission's overall enforcement of the FDCPA. First, ACA submits that a third-party dispute resolution requirement similar to that which is codified for the resolution of disputes between consumers and the auto manufacturers would be of great benefit to consumers and industry. The National Council of Better Business Bureaus is positioned to expand its dispute resolution program to the collection industry. It has the experience, resources, and capability to perform this function. ACA seeks a dialogue among stakeholders to discuss a new framework for a nationwide consumer dispute resolution program. Any such program must provide consumers with an opportunity to obtain a meaningful resolution to their concern/complaint about a debt collector or debt buyer. Due to privacy laws and the complex legal framework within which debt is collected, this consumer dispute resolution program must uniquely address the needs of all parties to a consumer credit/collection transaction.

Second, in conjunction with the Commission, ACA would like to see the industry develop a self regulating organization (SRO) similar to that which is employed by the securities industry. The SRO would eventually oversee the resolution of consumer complaints, develop standards for entry into the marketplace, and adopt due diligence procedures that detail the responsibilities of sellers and purchasers of consumer debt.

Finally, as noted above, ACA believes that financial literacy education should be a primary concern and goal of all stakeholders. Financial literacy can be substantially increased through the work of a public and private partnership between the Commission and stakeholders. For example, ACA's Financial Literacy Education Foundation would be an ideal way to launch a nationwide, debtor-rights-focused financial literacy education program.

E. Improvements in Private Rights of Action.

A notable difference exists between the attorney's fee provision of the FDCPA, as provided in section 813, and the attorney's fee provisions codified in the Fair Credit Reporting Act (FCRA) in 15 U.S.C. § 1681n and 15 U.S.C. § 1681o. The FCRA recognizes the right of the prevailing party to be reimbursed for the attorney's fee and costs it expended in defending the action. In contrast, the analogous provision in the FDCPA merely provides the court with the discretion to award the defendant agency reimbursement of its fees and costs *if it is proven the action was brought in bad faith and for the purpose of harassment.* There is no reasonable basis for the higher standard imposed by the FDCPA. For this reason, ACA recommends substituting the attorney's fee provision of the FCRA for 15 U.S.C. § 1692k(6). By doing so, the attorney's fees in these two companion statutes would be consistent. The following proposal reflects this change:

§ 813. Civil liability **15 U.S.C. § 1692k**

~~(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.~~ Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

Additionally, ACA seeks an amendment to the FDCPA which would reflect the interpretation of numerous courts that the FDCPA bona fide error defense does indeed apply to mistakes of law as underscored below:

> **§ 813. Civil liability** **15 U.S.C. § 1692k(c)**
>
> (c) A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a mistake of law or from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid any such error.

F. Industry Segments Requiring Regulatory Enhancement.

Numerous panelists emphasized the need for the Commission to engage financial institutions and credit grantors concerning their practices, especially as it relates to record retention and the sale of assets. ACA encourages the FTC to engage in further dialogue with the credit granting community about the role they may be able to play in identifying solutions to many of the issues surrounding debt verification and documentation as original credit issuers, sellers of consumer accounts.

VI. Top Non-Statutory Improvements.

ACA respectfully requests that the collection and reporting of consumer data to Congress concerning the FDPCA be part of the continuing discussion concerning improvements to the enforcement scheme under the FDCPA. The Commission is the industry's chief law enforcement authority, yet the current system of tallying communications

from consumers about the industry [complaints as defined by the FTC] is not a proper, reasonable or accurate reflection of the industry's level of compliance with the FDCPA. For this reason, ACA proposes that the reporting standards recommended by the Office of Management and Budget for all other Federal agencies apply when reporting consumer complaints to Congress, as reflected in the following amendment:

> **§ 815. Reports to Congress by the Commission; views of other Federal Agencies** **15 U.S.C. § 1692m**
>
> …Each [annual] report of the Commission shall include its assessment of the extent to which compliance with this [Act] is being achieved based upon verified information received by the Commission for this purpose…Any such assessment shall address, among others, such factors as the total amount of outstanding third party debt, the number of third party contingent fee collection agencies actively performing collection services on behalf of the original creditor, the number of collection agencies actively performing collection services on purchased debt or on behalf of a debt buyer, the number of the number of third party collection agencies against which complaints alleging law violations were logged, the number of debt buyers against which complaints alleging law violations were logged and the number of unique consumers who logged complaints alleging law violations during the reporting period. Complaints used for the purpose of this Annual Report to Congress shall be verified and subject to the statistical reporting requirements of the Office of Management and Budget.

VII. Next Steps and Conclusion.

ACA appreciates the opportunity to comment on the issues raised during the Workshop, and ACA and its members look forward to the Commission's report. In order to continue the work begun at the Workshop, ACA believes the following action items and goals should be a part of future discussions. First, there should be a bipartisan, cooperative effort among stakeholders to continue the FDCPA discussion and evaluate the potential benefits of amending it. Second, the Commission and other Federal agencies with oversight of credit grantors and financial institutions should be actively engaged in the process. Third, the Commission should undertake a thorough analysis of the methodology of its collection and analysis of consumer complaints and their subsequent use in reporting to Congress as a general assessment of industry's compliance. Finally, ACA believes that a public/private partnership would greatly benefit consumers and industry by such measures as (1) implementing a nationwide third-party dispute resolution program; (b) implementing an ombudsman program similar to those used in other Federal agencies; (c) designing and implementing a financial literacy education program specifically for consumers of all ages and socioeconomic levels which addresses all types of consumer debt and collection remedies; and (d) regularly reviewing consumer rights information on the Internet to deter reporting inaccurate information.

ACA INTERNATIONAL COMMENT
DEBT COLLECTION WORKSHOP, P074805

Respectfully submitted,

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