FEDERAL TRADE COMMISSION
OFFICE OF THE SECRETARY
ROOM H-113 (ANNEX F)
600 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, DC 20580

COMMENTS OF ACA INTERNATIONAL
DEBT COLLECTION 2.0

Project No. P114802

FILED ELECTRONICALLY ON APRIL 7, 2011

Valerie Hayes, Esq.
ACA International
4040 W. 70th Street
Minneapolis, MN 55435
(952) 926-6547

General Counsel

Andrew M. Beato, Esq.
Stein, Mitchell & Muse, LLP
1100 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036
(202) 737-7777

ACA Retained Federal Regulatory Counsel

ACA INTERNATIONAL COMMENT
DEBT COLLECTION 2.0
PROJECT NO. P114802

I. Introduction.

The following comments are submitted on behalf of ACA International (ACA) in response to the Federal Trade Commission's request for comments in advance of the April 28, 2011, workshop on Debt Collection 2.0 (Workshop). The Workshop will explore advancements in technology as it relates to information availability, communications with consumer debtors, and payment systems availability. A central theme of the Workshop is the extent to which changes in technology have surpassed the ability of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* (FDCPA) to keep pace, and the effects on consumers and debt collectors created by the use of newer technologies.

Thirty years ago Congress enacted the FDCPA in an effort to legislate the fair treatment of consumers when debt collectors engage in conduct essential to the vitality and health of the economy, namely, the recovery of debts. Among the stated purposes of the FDCPA, as described by Congress, is the elimination of "abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collectors."[1] ACA supported the passage of the FDCPA in 1977. It supported the Commission's effort to study the current functioning of the

[1] 15 U.S.C. § 1692(e).

industry in 2007, and it again embraces the Commission's effort to meaningfully explore the FDCPA's successes and shortcomings with an aim toward improving consumer experiences.

The FDCPA, as all Federal legislation, represents a balance of interests. A primary interest of the statute is to protect consumers' privacy. It does so by prohibiting deceptive, unfair, and abusive practices and guarding against disclosures of sensitive financial information to third parties. Another interest fostered by the FDCPA is the recovery of debts in compliance with the law. As recently observed by the Commission, "[t]he FDCPA permits reasonable collection efforts that promote repayment of legitimate debts, and the FTC tries to ensure compliance without unreasonably impeding the collection process. The FTC recognizes that the timely payment of debts is important to creditors and that the debt collection industry assists creditors in collecting what they are owed."[2]

The delicate balance struck by Congress so reflective of consumer behavior and industry composition in 1977 is increasingly challenged today. The causes are varied. Debts are vastly different. The amount of debt per household is substantially higher. Most significantly, technology has changed the way consumers communicate. Technologies such as E-mail, text messages, and cellular phones are commonplace today but have no mooring in the FDCPA as enacted.

---

[2] Federal Trade Commission, Annual Report 2010: Fair Debt Collection Practices Act, at 2 (Annual Report).

It is easy to overstate the relevancy of these technologies when communicating with consumers. In reality, most of these technologies are used in a comparatively insignificant percentage of debt collectors' overall communications with consumers. For example, based on ACA data, fewer than 2 percent of the hundreds of millions of annual collection communications use E-mail or text messages. This low utilization rate for even basic technology such as email is a result of several factors, including (1) the FDCPA does not expressly address how to utilize the technology in question, (2) the Commission has not updated it's Official Staff Commentary on the FDCPA in decades, and (3) the Commission has declined to issue advisory opinion interpretations and it ceased issuing written informal staff opinion letters interpreting FDCPA compliance obligations years ago.[3] Without clear guidance on the compliance obligations, many collectors simply do not use the technologies even though consumers often prefer these communications to telephone calls or standard letters.

Technology also has impacted the business models of debt collectors in the areas of information collection and payment options. Today even the smallest of debt collectors have a national capacity due to technology, credit grantor demands, and consumers' mobility. The proliferation and complexity of Federal and state statutes and regulations governing the

[3] http://www.ftc.gov/os/statutes/fdcpa/letters/060728staffresponsesofadvisopinion_public.pdf.

conduct of debt collectors has made compliance more complicated and costly. Indeed, there are numerous examples in which Federal and state laws or regulations inadvertently have given rise to compliance conflicts,[4] and the patchwork of state laws have led to unequal legal protections.[5]

These are just a few of the forces in play. What emerges is that the FDCPA was enacted for a different time and different set of circumstances. The adaptive ability of the statute to rise to the dynamic growth and challenges now and in the future should be examined anew and at the most basic of levels, for example, how consumers and business expect to communicate during the next thirty years and beyond. In this way, the FDCPA will not be a static, reactive statute.

This is not to suggest the FDCPA fails to provide the consumer protections envisioned by Congress in 1977. To the contrary, ACA believes the statute is capable of continuing to fulfill the original mandate to protect consumers while encouraging the recovery of debts.

---

[4] For example, in 2002 the Federal Communications Commission implemented a regulation requiring a debt collector to identify its state-registered name in artificial and prerecorded telephone messages even though doing so plainly contradicted with the requirements of section 805(b) of the FDCPA which prohibits the disclosure of the existence of a debt to persons other than the debtor. After an administrative process lasting several years, the FCC finally clarified the conflict.

[5] The state laws enacted to supplement the credit and collection laws afford different protection to consumers. This harms consumers, causes confusion as to their rights on a Federal and state-based level, and greatly complicates compliance.

Nevertheless, ACA welcomes the opportunity to participate in the Workshop and the Commission's fact-finding concerning the nature and extent of changes in the industry and ways to foster better consumer-oriented outcomes.

II. Background on ACA International.

ACA International is an international trade organization originally formed in 1939 and composed of credit and collection companies that provide a wide variety of accounts receivable management services. Headquartered in Minneapolis, Minnesota, ACA represents approximately 5,000 members based in more than 55 countries and ranging from credit grantors, third-party collection agencies, attorneys, and vendor affiliates.[6] ACA has numerous divisions or sections accommodating the specific compliance and regulatory issues of its members' business practices.[7]

The company-members of ACA are subject to 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 primarily by the

---

[6] ACA's membership includes approximately 3100 company members, 600 credit grantor members, 830 attorneys in the Member Attorney Program, 175 affiliate members, and 350 international company members. All stated, ACA represents approximately 95 percent of all debt collectors located in the United States.

[7] *See* www.acainternational.org. ACA's divisions include Creditors International, Asset Buyers Division, Members' Attorney Program, and Affiliate Division. ACA sections include Government Services, Healthcare Services, and Technology.

Commission under the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*, the FDCPA, the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, and the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*, in addition to numerous other Federal and state laws. Indeed, the accounts receivable management industry is unique if only because it is one of the few industries in which Congress enacted a specific statute governing all manner of communications with consumers when recovering payments. In so doing, Congress committed the Federal enforcement of the recovery of debts to the jurisdiction of the Commission.

ACA members range in size from small businesses with a few employees to large, publicly held corporations. Together, ACA members employ in excess of 450,000 workers. These members include the very smallest of businesses that operate within a limited geographic range of a single town, city or state, and the very largest of national corporations doing business in every state. The majority of ACA members, however, are small businesses. Approximately 2,000 of the company members maintain fewer than ten employees, and more than 2,500 of the members employ fewer than twenty persons.

ACA serves members and represents the industry by developing timely information based on sound research and disseminating it through innovative education, training, and communications. The Association also promotes professional and ethical conduct in the global marketplace; acts as the members' voice in critical business, legislative, legal,

regulatory and public arenas; and provides quality products and services to its members.

To help members stay current on regulatory and business developments, as well as industry practices, ACA provides more than 130 educational and training workshops to its members each year, with nearly 1,000 industry professionals completing ACA's collector credentialing program annually. As discussed in detailed herein, ACA is the industry leader in providing compliance information and education to its members.[8] In an effort to promote consumer financial literacy, ACA members created www.AskDoctorDebt.com, a valuable, free consumer website to provide answers to debt related questions. AskDoctorDebt.com is available in both English and Spanish, features straightforward answers, links to resources and helpful tools for consumers.

III. ACA Members Are A Critical Part Of The Economy.

The credit and collections industry in general, and ACA members in specific, play a crucial role in safeguarding the health of the economy. Uncollected consumer debt threatens the economy. According to a 2008 economic impact study of the collections industry conducted by PricewaterhouseCoopers LLP, third party collection agencies returned $40.4

[8] Through ACA's Campus ACA, the Association provides a wide variety of training and educational opportunities such as professional development courses, certification opportunities under ACA's proprietary certification program entitled Professional Practices Management System™ (PPMS), local and in-house seminars, online seminars, teleseminars and Webcourses, as well as regularly scheduled conferences. *See* http://www.acainternational.org/education.

billion to creditors measured on a commission basis in 2007.[9] This represents a savings of $354 per household each year, which equates to 127 gallons of gasoline or 86 days of electricity payments attributed to households.[10]

According to the Federal Reserve, in 2010 the total amount of consumer debt in the United States exceeded $2.45 (with an average credit card debt per household of more than $16,007). In addition, our federal government deficit now tops $13 trillion.

As part of the process of attempting to recover outstanding payments, ACA members are an extension of practically every community's businesses. For example, ACA members represent the local hardware store, the retailer down the street, and the local physician. The collection industry works with these businesses, large and small, to obtain payment for the goods and services received by consumers.

Without an effective collection process, the economic viability of these businesses, as well as public debt recovery programs, is threatened. At the very least, Americans would be forced to pay higher prices to compensate for uncollected debt.

---

9 *See* PricewaterhouseCoopers, LLP, *Value of Third-Party Debt Collection to the U.S. Economy: Survey and Analysis* (June 12, 2008). The $40.4 billion returned to creditors in 2007 amounts to a 20.9 percent reduction in non-public debt. *Id.* It equates to 11.4 percent of the before tax profits of all United States' domestic financial corporations. *Id.*

10 *Id.*

III. Responses to Requests For Comment.

There are many new techniques and technologies which have been developed in recent years that add value to the services provided by third-party debt collectors and provide important safeguards to consumers such as minimizing the risk of third-party disclosures. Before addressing the specific commentary areas requested by the Commission, ACA wishes to provide an overview of some of the costs and benefits of these new technologies.

The industry depends heavily on access to consumer data and location information. One leading provider estimates 35 percent of delinquent consumers move annually, and half of all accounts placed for collection require some kind of skiptracing services. This is one area where there has been significant change in the past ten years. Today there are many companies that specialize in providing location information which is defined in section 803(7) of the FDCPA as "a consumer's place of abode and his telephone number at such place, or his place of employment."[11]

The use of skiptracing services increased from 26 percent in 1995 to 90 percent in 2005 as documented in ACA survey materials previously provided to the Commission. The

[11] Notwithstanding the widespread availability of skiptracing services, there continues to be a lag in the type of information that is aggregated by such services. For example, there is no commercially available database of cellular telephone numbers even though many consumers provide cellular numbers as a primary contact and/or exclusively use cellular phones. According to the U.S. Centers for Disease Control and Prevention, 24.5 percent of all households in the U.S. had only wireless telephones. *See*

availability and use of these databases are essential and beneficial to debt collectors and consumers alike. The benefit is that data aggregation on a consumer-specific level helps protect privacy by ensuring that the correct consumers are contacted and minimizing the risk of third-party disclosures. These services also are of direct benefit to consumers by helping guard against identity theft.

At the same time, there are have been numerous efforts on Federal and state legislative levels to further restrict access to such databases by measures that, for example, bar the transmission of Social Security numbers and drivers' license data as a privacy protection. Frequently these legislative proposals do not intend to apply to the recovery of debts, but the effect on the ability of credit grantors and third-party debt collectors would be extremely harmful to such an effort if basic identifying information such as Social Security numbers are restricted. This is because Social Security numbers and drivers' license information is a critical component in the successful identification of a correct account holder. Other data elements (addresses, telephone numbers) commonly collected by credit grantors are subject to change, but Social Security numbers are a unique identifier that many credit grantors use. Restricting the legitimate use of this information to recover a debt undoubtedly will result in more consumers with similar demographic information (e.g., "John Smith" or "John A. Smith" or "John Andrew Smith") being contacted for a debt of a different individual. This risks

---

http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201005.pdf.

further increases in consumer complaints and higher costs of collections.

ACA believes the availability of consumer contact and location information databases needs to responsive to consumer privacy interests but also reflective of the needs of the industry to locate the correct consumers to effectuate recovery. This is in keeping with the FDCPA, which allows debt collectors to locate and contact consumers.

Another aspect of the industry impacted by technology has been document imaging technology that stores and transfers customer records. The technology allows the user to create an electronically searchable version of a hardcopy document. About 40 percent of ACA members previously reported using this type of technology in some capacity. The electronic availability of this information allows debt collectors to readily access underlying account information, such as contracts or signed documents. Direct access to this information can be helpful when contacting and identifying a consumer. At the same time, the use of imaging technology is an additional cost. The Commission should evaluate the use of imaging technology to record consumer data prior to the sale of a portfolio.

New telephone technologies also are critically important to modern debt collection efforts, and many of the technologies confer consumer benefits. Predictive dialers, for example, have enabled debt collectors to more effectively manage the high volume of calls necessary to establish contact with consumers. Dialers are essential as a tool to communicate with consumers about their payment obligations. The fact is that telephone calls are the most

efficient way to contact consumers, and many consumers today use cell phones as their primary or exclusive point of contact. Calls initiated by predictive dialer software are not random or sequential in the context of collection services. They are limited to customers of credit grantors who have received a service or product without payment. Typically the telephone number is provided by the customer for purposes of receiving calls, for example, as part of a credit application.

Autodialers confer important benefits to consumers. The technology is precise and maximizes consumers' privacy by eliminating dialing errors that risk inadvertent contacts with individuals other than those responsible for the debt. Autodialers are programmed to restrict calls to designated area codes within the calling times prescribed by law. Finally, the technology allows for a cost effective and reliable way for consumers to learn about their accounts and arrange for payment. This helps keep the cost of credit under control by keeping consumers informed and helping them avoid unnecessary defaults or legal action.

The Commission has thoroughly analyzed the use of this technology in the context of pervasive telemarketing when enacting amendments to the Telemarketing Sales Rule. As part of that process, the Commission concluded that debt collection calls do not constitute "telemarketing" and therefore are not subject to the call abandonment and other restrictions

placed on telemarketers which use dialers.[12]

Nevertheless, restrictions on the use of the technology and the issues raised by various privacy issues and telephone communication legislation have limited the level to which these technologies can be employed. For example, although the Commission does not restrict the use of predictive dialers under the TSR when used for collections, the Federal Communications Commission has taken the position that the Telephone Consumer Protection Act and its regulations thereunder apply to calls initiated by a predictive dialer when made solely for a collection purpose which terminate in a cellular phone.

The complexity involved in the use of these new technologies in compliance with Federal and state laws and regulations frequently can be a deterrent to their usage. This is reflected in the intersection of voicemail and pre-recorded messages. Section 807(11) of the FDCPA requires a debt collector to disclose in the initial written communication with the consumer, and if the initial communication is oral, in that oral communication as well, that the debt collector is attempting to collect a debt and any information obtained will be used for that purpose (mini-Miranda). Additionally, all subsequent communications with the consumer must disclose the communication is from a debt collector. In addition, section 806(6) requires

---

[12] Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4664 n.1020. An exception to the non-applicability of the predictive dialer restrictions to debt collectors centers on upselling. That is, a collector who calls a consumer for a collection purpose using a predictive dialer but then engages in a telemarketing solicitation nonetheless is bound by the TSR requirements.

collectors to provide meaningful disclosure of the collector's identity when placing telephone calls. As the same time, section 805(b) of the FDCPA prohibits collectors from disclosing the existence of a consumer's debt to a third party without the prior consent of the consumer.

During the past several years, numerous courts have concluded a voicemail message is a communication under the FDCPA and requires the provision of the mini-Miranda as well as disclosure of the collector's identity.[13]

Paradoxically, a few courts have also ruled disclosing the call is from a debt collector

13 *Gryzbowski v. I.C. Sys., Inc.*, 691 F. Supp. 2d 618, 622 (M.D. Pa. 2010); *Winberry v. United Collection Bureau, Inc.*, 697 F. Supp. 2d 1279, 1291 (M.D. Ala. Mar. 17, 2010); *Nicholas v. CMRE Fin. Servs., Inc.*, No. 08-CV-4857 (DMC), 2010 WL 1049935, at *3 (D.N.J. Mar. 16, 2010); *Krapf v. Collectors Training Inst. of Ill., Inc.*, No. 09-CV-391S, 2010 WL 584020, at *3 (W.D.N.Y. Feb. 16, 2010); *Inman v. NCO Fin. Sys., Inc.*, Civ. A. No. 08-5866, 2009 WL 3415281, at *3 (E.D. Pa. Oct. 21, 2009); *Mark v. J.C. Christensen & Assoc., Inc.*, NO. CIV 09-100 ADM/SRN, 2009 WL 2407700, at *3 (D. Minn. Aug. 4, 2009); *Savage v. NIC, Inc.*, NO. CV08-1780-PHX-JAT, 2009 WL 2259726, at *3 (D. Ariz. Jul. 28, 2009); *Hicks v. Client Serv.*, Inc., NO. 07-61822-CIV-DIMITRO, 2009 WL 2365637, at *3 (S.D. Fla. Jun. 9, 2009); *Ostrander v. Accelerated Receivables*, No. 07-CV-827C, 2009 WL 909646, at *6 (W.D.N.Y. Mar. 31, 2009); *Edwards v. Niagara Credit Solutions, Inc.*, 586 F. Supp. 2d 1346, 1350-51 (N.D. Ga. 2008); *Niven v. Nat'l Action Fin. Servs., Inc.*, No. 8:07-CV-1326-T-27TBM, 2008 WL 4190961, at *2 (M.D. Fla. Sept. 10, 2008); *Ramirez v. Apex Fin. Mgmt., LLC*, 567 F. Supp. 2d 1035, 1041 (N.D. Ill. 2008); *Valencia v. Affiliated Group, Inc*, No. 07-61381-CIV, 2008 WL 4372895, at *3 (S.D. Fla. Sept. 2008); *Anchondo v. Anderson, Crenshaw & Assocs., L.L.C.*, 583 F. Supp. 2d 1278, 1282 (D.N.M. 2008); *Romano v. Williams & Fudge, Inc.*, 644 F. Supp. 2d 653, 657 (W.D. Pa. 2008); *Baker v. Allstate Fin. Servs., Inc.*, 554 F. Supp. 2d 945, 952 (D. Minn. 2008); *Masciarelli v. Richard J. Boudreau & Assocs.*, 529 F. Supp. 2d 183, 186 (D. Mass. 2007); *Costa v. Nat'l Action Fin. Servs.*, 634 F. Supp. 2d 1069, 1076 (E.D. Cal. 2007); *Belin v. Litton Loan Servicing, LP*, No. 8:06-cv-760-T-24 EAJ, 2006 WL 1992410, *4-5 (M.D. Fla. July 14, 2006); *Foti v. NCO Fin. Sys., Inc.*, 424 F. Supp. 2d 643, 655 (S.D.N.Y. 2006).

on a message could cause a third-party disclosure in violation of section 805(b) if someone other than the consumer listens to the message.[14] The inherent contradiction caused by these rulings have left many debt collectors confused about how they can continue to leave messages for consumers while still complying with the disclosure requirements under the FDCPA and simultaneously preventing third-party disclosure of a debt.

Other communication technology, such as Short Message Service (SMS) text messages, instant message and electronic mail (e-mail), have the potential to replace the more traditional means of contacting consumers. However, without guidance on the application of the FDCPA to these new methods of communication, debt collectors and consumers alike are without a reference point to assess the legality of using these technologies to communicate in a cost-effect and frequently consumer-preferred format.

Email is particularly instructive in this regard. The Commission is well-versed in the use of email in commerce, both from unsolicited and solicited points of view. Today, the overwhelming majority of consumers own or have direct access to at least one desktop computer with email capabilities. A Pew Internet & American Life Project survey found that 91 percent of Internet users between the ages of 18 and 64 send or read e-mail, and 88 percent of United States' adults have personal e-mail accounts. Purchasing transactions are commonly

14 *Niven v. Nat'l Action Fin. Servs., Inc.*, No. 8:07-CV-1326-T-27TBM, 2008 WL 4190961, *2 (M.D. Fla. Sept. 10, 2008); *Berg v. Merchs. Ass'n Collection Div., Inc*., 586 F.

initiated and completed online with no direct contact or oral communications between buyer and retailer. There is every reason to believe that the next thirty years of the FDCPA will continue to witness email predominate with standard mail communications relegated to a relic. Still, few today can say with certainty whether the FDCPA actually permits email collection communications, at least from the perspective emails initiated by debt collectors. To be sure, there is a tension between email and the FDCPA's requirements that communications about a debt not be disclosed to third parties. In standard mail letters, the tension is non-existent because sealing of the envelope assures the privacy of its contents. Email requires additional measures of security to ensure privacy, but defining those measures is within the expertise of the Commission.

IV. Conclusion.

ACA appreciates the opportunity to comment on the issues raised by the Commission. Based on the workshop discussion, ACA intends to supplement its comments with more particularized comments responding to points raised during the workshop. If you have any questions, please contact Andrew M. Beato at (202) 737-7777 or abeato@steinmitchell.com.

Supp. 2d 1336, 1340-41 (S.D. Fla. 2008).

Respectfully submitted,

STEIN, MITCHELL & MUSE, LLP

/S/

Andrew M. Beato, Esq.
1100 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036

ACA INTERNATIONAL

/S/

Valerie Hayes, Esq.
4040 W. 70th Street
Minneapolis, MN 55435

Dated: April 7, 2011