BEFORE THE
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)
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Health Breach Notification	)
Rulemaking, Project No. R911002	)
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ACA INTERNATIONAL'S COMMENT REGARDING HEALTH BREACH NOTIFICATION RULEMAKING, PROJECT NO. R911002

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I. Introduction

The following comment is submitted on behalf of ACA International (ACA) in response to the Federal Trade Commission's (FTC) request for comments concerning the breach notification requirements under Section 13407 of Title XIII of the American Recovery and Reinvestment Act of 2009. ACA is commenting to clarify and confirm that members of the accounts receivable management industry are governed by the Department of Heath and Human Services (HHS) proposed rulemaking under Section 13402 of Title XIII of the American Recovery and Reinvestment Act of 2009 rather than the FTC's proposed rulemaking. ACA members operate as business associates of HIPAA covered entities and thus should be regulated by the HHS. ACA would like the FTC to clarify on the record that the debt collection services of a business associate working for a covered entity are exempt from the proposed FTC rulemaking.

II. Background on ACA International.

ACA International is an international trade association 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 5,500 company members, including credit grantors, collection agencies, attorneys, asset buyers and vendor affiliates. Many ACA members function as business associates under the Health Insurance Portability and Accountability Act.

The company-members of ACA comply with applicable federal and state laws and regulations regarding debt collection, as well as ethical standards and guidelines established by ACA. Specifically, the collection activities of ACA members are regulated primarily by the FTC under the Federal Trade Commission Act, 15 U.S.C. § 45

et seq., the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq*.; the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*. (as amended by the Fair and Accurate Credit Transactions Act); 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 debts, including those created in the context of healthcare operations.[1] In so doing, Congress committed the primary regulation of the recovery of debts to the jurisdiction of the Federal Trade Commission. 15 U.S.C. § 16921.

ACA members range in size from small businesses with a few employees to large, publicly held corporations. Together, ACA members employ in excess of 150,000 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 members are a crucial component in safeguarding the health of the economy. Uncollected consumer debt threatens 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

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

the bad debt of other consumers. By itself, outstanding credit card debt has doubled in the past decade and now approaches three quarters of one trillion dollars. Total consumer debt, including home mortgages, exceeds $9 trillion.[2] Moreover, the greatest increases in consumer debt are traced to consumers with the least amount of disposable income to repay their obligations.

As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community's businesses. They represent the local hardware store, the retailer down the street, and the family doctor. ACA members work with these businesses, large and small, to obtain payment for the goods and services received by consumers. In years past, the combined effort of ACA members have resulted in the recovery of billions of dollars annually that are returned to business and reinvested. For example, ACA members recovered and returned over $40 billion in 2007 alone, a massive infusion of money into the national economy.[3] Without an effective collection process, the economic viability of these businesses, and by extension, the American economy in general, is threatened. At the very least, Americans are forced to pay higher prices to compensate for uncollected debt.

III. HIPAA.

On December 28, 2000, HHS published the final Privacy Rule of the Health Insurance Portability and Accountability Act of 1996. The effective date was April 14, 2001. Covered entities (healthcare providers, health plans and healthcare clearinghouses)

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[2] William Branigan, *U.S. Consumer Debt Grows at an Alarming Rate*, Wash. Post, Jan. 12, 2004.

[3] PricewaterhouseCoopers, Value Of Third-Party Debt Collection To The U.S. Economy in 2007: Survey and Analysis, *available at* http://www.acainternational.org /files.aspx?p=/images/12546/pwc2007-final.pdf.

and their business associates (such as third-party collection agencies) were required to comply by April 14, 2003.

The Privacy Rule requires covered entities to establish clear procedures to protect patients' privacy. Covered entities must designate an official to establish and monitor the organization's privacy policies and training. Collection agencies are not defined as covered entities. However, an agency or attorney that collects healthcare debt (and thus has access to PHI) is defined as a "business associate" of a covered entity and must comply with HIPAA standards for associates passed down via the business associate contract. Business associates are not directly subject to the HIPAA; rather, before a covered entity can release PHI to a business associate, it must receive reasonable assurances that the PHI will be properly protected. These assurances are provided by the business associate contract.

Collectors typically access only the minimum amount of PHI necessary to do their jobs.[4] In order to use PHI, the policies and procedures of a covered entity, and by extension the policies and procedures of a business associate under the business associate contract, must identify the persons or classes of persons within the entity who need access to the PHI in order to carry out their job duties, the categories or types of protected health information needed, and the conditions appropriate to such access.[5] A covered entity, and thus a business associate, may only disclose the minimum necessary

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4 *See* 45 C.F.R. §164.502(b), 45 C.F.R. §164.514(d).

5 65 Fed. Reg. 53195 (August 14, 2002).

information to any person or entity as necessary to obtain payment for health care services.[6]

IV. Response to Request for Comment

The Health Information Technology for Economic and Clinical Health (HITECH) Act was enacted on February 17, 2009, as Title XIII of Division A and Title IV of Division B of the American Recovery and Reinvestment Act of 2009. Subtitle D of the HITECH Act requires HHS to issue interim final regulations for breach notification by entities subject to HIPAA and their business associates. In particular, section 13402 of HITECH requires HIPAA covered entities to notify affected individuals, and requires business associates to notify covered entities, following the discovery of a breach of unsecured protected health information (PHI).

Companies that provide debt collection services for the health care industry currently operate as business associates of these HIPAA covered entities. Anyone who collects healthcare debt needs business associate contracts with their covered entity clients and, if they release protected health information to vendors or business partners, with them as well. It is by way of this business associate contract that third party debt collectors, billing companies and outsourcing companies become obligated to comply with the HIPAA. This fits the definition of "business associate" under HIPAA, as defined in 45 CFR 160.103. That regulation, in relevant part, defines a business associate as an entity that (1) provides certain functions or activities on behalf of a HIPAA-covered entity or (2) provides "legal, actuarial, accounting, consulting, data aggregation,

[6] 65 Fed. Reg. 53198 (August 14, 2002).

management, administrative, accreditation, or financial services to or for" a HIPAA covered entity.

The FTC has stated that entities engaged in activities as business associates of HIPAA-covered entities will be subject only to HHS' rule requirements and not the FTC's rule requirements. ACA would like the FTC to clarify in the final rule herein that debt collection service providers operating under a business associate contract for a HIPAA covered entity are included in this category.

V. Conclusion

ACA members in the healthcare accounts receivable management industry operate as business associates of HIPAA covered entities. As such, they are regulated by the HHS rules concerning the breach notification requirements of the American Recovery and Reinvestment Act of 2009. This should exempt them from the FTC regulations of Section 13402. ACA would like the FTC to clarify on the record that debt collection services of a business associate working for a covered entity are exempt.

If you have any questions, please contact Andrew Beato at 202-737-7777.

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