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ACA INTERNATIONAL'S COMMENT ON THE FTC STAFF PRELIMINARY REPORT ON PROTECTING CONSUMER PRIVACY - FILE NO. P095416

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I. Introduction.

ACA files this comment in response to the Federal Trade Commission's ("FTC" or the "Commission") request for comments concerning the proposed framework in the FTC Preliminary Report on Protecting Consumer Privacy. Concerns about the protection of the privacy of individuals date back to the Fair Credit Reporting Act of 1970 and the Privacy Act of 1974. Since then, a number of additional laws have been passed to protect the privacy of consumers contacted by debt collectors. The debt collection industry currently complies with a multitude of federal and state laws and regulations. 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. ACA therefore opposes the imposition of additional future regulations. For the reasons set forth below, ACA respectfully requests that debt collection companies be excluded from the proposed framework or, in the alternative, that the proposed frame work include a safe harbor provision for debt collection agencies that are already in compliance with other privacy laws.

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. 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. All ACA members must abide by ACA's Code of Ethics and Code of Operations, which are based on five core values: Respect, Leadership, Service, Innovation, and Fiscal Responsibility.

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 the bad debt of other consumers. By

[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).

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 family doctor, hospital, or nursing home. 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. ACA's Response to FTC's Questions for Comment.

According to the Preliminary FTC Staff Report, the proposed framework would apply to "all commercial entities that collect or use consumer data that can be reasonably linked to a specific consumer, computer, or other device." (FTC Rep. at 41-43.) ACA respectfully submits that debt collection companies that gather and use consumer data to contact consumers about an existing debt should be excluded from the proposed framework.

First, gathering and collecting consumer data to locate and contact the consumer about an existing debt is functionally different than collecting and using the information for the value of

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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.

that information. ACA collection agency members regularly gather and use consumer information, which is often critically important for locating consumers and evaluating a consumer's ability to pay a past due account. We appreciate the sensitive nature of personal information, the importance of keeping such information private, and the distressing problems of identity theft which can result when companies in the business of assembling consumer information on a mass scale permit unauthorized or improper access to their databases. But the expectation of privacy for data generated and collected under the proposed framework is different where, as is the case with the debt collection process, a company contacts a consumer regarding a previous transaction in which the customer purchased a good or service. In this instance, creditors and debt collectors should be able to make use of that data – subject to the complex statutory and regulatory scheme outlined below – to effectuate the recovery of the debt. Such use is distinct in contrast to the practices that the FTC seeks to address with the proposed framework; namely, the collection and use of consumer information without the consumer's knowledge for the value of the information itself.

Second, debt collection companies are strictly regulated by a myriad of existing and overlapping federal legislation, much of which has been adopted or amended in the past several years. These laws include the Fair Credit Reporting Act (FCRA), Fair Debt Collection Practices Act (FDCPA), Gramm Leach Bliley Act (GLBA), and the privacy and security rules adopted pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Collection agencies are also subject to many unique state laws and regulations governing collection agencies which limit disclosure of consumer information, and state common laws which permit recovery of damages for a variety of privacy invasions (i.e., intrusion upon seclusion and publication of private facts).

The primary source of regulation of collection agencies is the FDCPA, which was enacted in 1977 with ACA support, to provide uniform standards for the treatment of consumers when collecting past-due accounts. The Act has successfully safeguarded the rights of consumers and provided a regulatory framework for the third-party debt collection industry for over 30 years. One of its chief purposes is to protect the privacy rights of individuals and, as such, includes prohibitions on the disclosure of consumer information to third parties, and provides civil remedies for violations – including a $1,000 penalty (in the case of an individual claim), the lesser of $500,000 or 1% of the collection agency's net worth (in a class action), and the consumer's attorneys' fees and costs, all of which can be recovered regardless of any actual damage to the consumer. Because of the generous civil penalties available under the FDCPA, consumer attorneys often commence lawsuits alleging that any violation of federal and state law or regulation also constitutes a violation of the FDCPA, thereby entitling the consumer to recovery of a civil penalty, fees and costs, regardless of actual damages.

In addition to the FDCPA, the privacy rules under the GLBA require financial institutions, including debt collectors, to give their customers privacy notices that must include: (1) the categories of nonpublic personal information that are collected; (2) the categories of nonpublic personal information that are disclosed; (3) the categories of affiliates and nonaffiliated third parties to whom nonpublic personal information is disclosed; (4) the categories of nonpublic personal information about former customers that are disclosed; (5) the categories of affiliates and nonaffiliated third parties to whom nonpublic personal information about former customers is disclosed; (6) an explanation of the consumer's right to opt out of the disclosure of nonpublic personal information to nonaffiliated third parties, including the methods by which the consumer may exercise that right at that time; and (7) the policies and practices

with respect to protecting the confidentiality and security of nonpublic personal information. 16 C.F.R. § 313.6(a)(1)-(8) (2000). Unlike Section 603(d)(2)(A)(iii), the GLBA and implementing regulations contains express mandates with respect to the form of the opt out notice and the method of delivery. *See* 16 C.F.R. § 313.6(a)(8) (2000).

Likewise, the HIPAA 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, but 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.[4] Debt collectors typically access only the minimum amount of PHI necessary to do their jobs.[5] In order to use PHI, the policies and procedures of covered entities and business associates 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.[6] Covered entities and business associates may only disclose the minimum necessary information to any person or entity as necessary to obtain payment for health care services.[7]

Because of the numerous statutes and regulations already in place to protect the privacy of consumers when being contacted about an existing debt, ACA members are keenly sensitive to further privacy legislation that could be "bootstrapped" into an alleged FDCPA claim, and which might provide standards overlapping and quite possibly be inconsistent with those already imposed by FDCPA, GLBA, HIPAA, and state laws. Accordingly, ACA respectfully requests

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4 Under the HITECH Act § 13101 *et seq.*, most of the provisions of HIPAA's Security and Privacy Rules were extended to business associates such as ACA's members.

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

6 65 Fed. Reg. 53195 (August 14, 2002).

7 65 Fed. Reg. 53198 (August 14, 2002).

that the debt collection companies be excluded from the proposed framework. In the alternative, we suggest that the proposed framework expressly state that third party debt collectors already in compliance with the FDCPA, GLBA, or HIPAA are deemed to be compliant with any new privacy regulations and notification requirements. It is always difficult to draft new legislation and regulations in a manner that does not in some way conflict with existing regulations and legislation – especially as applied to persons who are not the direct target of the new legislation, such as third-party collection agencies. Providing safe harbors to collection agencies would remedy such potential conflicts in the laws.

IV. Conclusion.

For the foregoing reasons, ACA respectfully requests that the Commission exclude debt collection companies from the proposed framework or, in the alternative, provide a safe harbor provision for third party debt collectors that are already in compliance with the FDCPA, GLBA, or HIPPA. If you have any questions, please contact Andrew M. Beato at (202) 737-7777.

Dated: February 18, 2011

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