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600 PENNSYLVANIA AVENUE, N.W.
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ACA INTERNATIONAL'S COMMENT REGARDING ADVANCED NOTICE OF PROPOSED RULEMAKING CONCERING CALLER IDENTIFICATION, MATTER P104405

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Valerie Hayes, Esq.
ACA International
4040 W. 70th Street
Minneapolis, MN 55435
General Counsel

Andrew M. Beato, Esq.
Stein, Mitchell & Muse L.L.P.
Federal Regulatory Counsel

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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 amendments to the Telemarketing Sales Rule ("TSR"), 68 Fed. Reg. 4,580, 4,672 (2003) (codified at 16 C.F.R. § 310.4(a)(7), to address the current use and capabilities of Caller ID technologies. The TSR regulates specific deceptive and abusive practices as defined by the Telemarketing Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108 ("Telemarketing Act"). In the Advance Notice of Proposed Rulemaking ("ANPRM"), the Commission cites to Caller ID regulations in the context of debt collection. ANPRM at 11-12.

The Commission has repeatedly stated in the TSR rulemakings that telephone calls initiated for debt collection purposes are outside of the scope of the definition of "telemarketing" under the Telemarketing Act and the TSR. Although the Commission has not indicated that it intends to reverse its prior findings that debt collection services are not covered by the TSR, ACA strongly encourages the Commission to clarify in the proposed and final rule that the legitimate services of debt collectors are not regulated under the proposed amendments to the TSR. This is consistent with the definition of "telemarketing" under the statute and regulation, which requires marketing to consumers to induce the purchase of goods or services as the trigger to coverage. Moreover, expanding the TSR to regulate debt

collection calls would create contradictory and duplicative regulation of the financial services industry. As set forth below, credit grantors and third party debt collectors that service accounts on behalf of credit grantors do not engage in telemarketing and should not be brought within the scope of the TSR.

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

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[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).

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 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.

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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.

III. Response to Request for Comment.

A. The Telemarketing Sales Rule Does Not Apply To Communications To Consumers About An Existing Debt.

The Commission requests comments on whether the TSR should be amended to reflect the current use and capabilities of Caller ID technologies, particularly regarding whether the TSR should be amended to better achieve the objective of the Caller ID provisions;[4] regulate services that misrepresent, conceal, or obscure the identity of telemarketer or sellers; or require oral disclosure of the identity of the telemarketer on whose behalf a call is being made to require additional or more specific disclosures.[5] ACA respectfully submits that any amendment to the TSR explicitly exclude the routine business communications among consumers and credit grantors and/or debt collectors that do not involve marketing to induce the purchase of goods or services. Without such clarification, the amendment may be wrongly

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[4] 16 C.F.R. § 310.4(a)(7) ("Failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call; *provided* that it shall not be a violation to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller or charitable organization on behalf of which a telemarketing call is placed, and the seller's or charitable customer or donor services telephone number, which is answered during regular business hours.").

[5] 16 C.F.R. § 310.4(d) (making it unlawful for telemarketers to "induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call . . . (1) [t]he identity of the seller; (2) [t]hat the purpose of the call is to sell goods or services; (3) [t]he nature of the goods or services; and (4) [t]hat no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning").

construed to apply to communications with consumers about an existing debt.

Congress and the Commission have interpreted the term "telemarketing" to exclude telephone communications with consumers about account information, including such basic functions as status of payments, the recovery of debts, and the detection of identity theft/fraud deterrence. First, the Telemarketing Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108 ("Telemarketing Act"), enacted in 1994, was an effort by Congress to address fraudulent telemarketing conduct harmful to consumers by regulating deceptive and abusive telemarketing acts and practices intended to induce the purchase of good or services, that is, commercial conduct. 15 U.S.C. § 6102(a)(3)(C). The Telemarketing Act defined "telemarketing" under the as "a plan, program, or campaign which is conducted to induce purchases of goods or services by use of one or more telephones and which involves more than one interstate telephone call." 15 U.S.C. § 6106(4).

Second, the Commission repeatedly has stated in the TSR rulemakings that routine business communications among consumers, credit grantors, and third-party debt collectors do not constitute "telemarketing" under the Telemarketing Act and implementing regulations. The Commission previously has found that telephone calls initiated for debt collection purposes are outside the scope of the definition of "telemarketing" in the TSR.

> *The Commission also intends that this Section not cover debt collection practices, since debt collection is not "conducted to induce the purchase of goods or services," – a prerequisite for Rule coverage as dictated by the definition of "telemarketing" in § 310.2(u).* Furthermore, this section is applicable only to recovery services that promise the return of money or other items of value paid for or promised to the consumer in a previous telemarketing transaction. Thus, this Section will not apply to attempts to recover money or items lost outside of telemarketing.

See Statement of Basis and Purpose and Final Rule, 60 Fed. Reg. 43843, 43854 (Aug. 16, 1995) (emphasis added).

Third, consistent with the Commission's intention as expressed in the 1995 final TSR rule, the 2003 amendments to the TSR led the Commission to again reiterate that the TSR does not apply to debt collection activities "because they are not 'telemarketing' – i.e., they are not calls made 'to induce the purchase of goods or services.'" 68 Fed. Reg. 4580, 4664 n.1020 (Jan. 29, 2003). This regulatory construction represents the proper application of Congressional intent to abusive practices by telemarketers. It also avoids adversely impacting the normal business communications with consumers or subjecting those communications to the full scope of the TSR requirements.

The Commission should clarify that, consistent with the above definitions and interpretations, the amendments to the TSR concerning the Caller ID and required disclosure provisions do not apply to non-telemarketing communications with consumers about the status

of their accounts.

B. Expanding the TSR to Apply to Telephone Calls Initiated to for Debt Collection Purposes Would Lead to Contradictory and Duplicative Regulation of the Financial Services Industry.

Before wrongly applying the Proposed Rule to the financial services industry and directly impeding communications with consumers about the status of accounts (including, for example, detection of identity theft, debt validation and verification, payment histories, settlement plans, and credit reporting information), the Commission should recognize that countless Federal and State consumer protection statutes exist to protect consumers when communicating with debt collectors. Regulation under the TSR would be contradictory and duplicative. First, the Federal Communications Commission has concluded that the implementing regulations under the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227)—the regulatory analog to the TSR—exempts all calls to consumers to communicate information about debts because such calls are not "telemarketing" and do not induce the purchase of a good or service.[6] Second,

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[6] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 7 FCC Rcd 8752, ¶ 39 ("[W]e emphasize that ***the identification requirements will not apply to debt collection calls*** because such calls are not autodialer calls (i.e., dialed using a random or sequential number generator) and hence are not subject to the identification requirements for prerecorded messages in 64.1200(e)(4) of our rules.") (emphasis added); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Reconsideration Order, 10 FCC Rcd 12391, ¶ 19 (1995) ("*Household correctly points out that* ***debt collection calls are not directed to randomly or sequentially generated telephone numbers, but instead are directed to the specifically programmed contact numbers for***

there are already an extensive number of federal and state consumer protection laws that govern the manner, method, and content of communications with debtors. These laws, some of which are summarized below, make the risk of abusive practices with the use of prerecorded messages highly remote, and further empower the FTC, state agencies, and consumers to enforce law violations.

Primary among these laws is the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA"), which the Commission cites in its ANPRM. The FDCPA governs all communications regarding the collection of consumer debts, and already requires the meaningful disclosure of the debt collector's identity in the collection of a debt.[7] 15 U.S.C. § 1692d(6). It is a strict liability statute that subjects violators to administrative enforcement and civil liability, including class action exposure. 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

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debtors. As we stated in our Report and Order, ***such debt collection calls do not require an identification message.*** We thus clarify that ***the rules do not require that debt collection employees give the names of their employers in a prerecorded message, which disclosure might otherwise reveal the purpose of the call to persons other than the debtor.***") (emphasis added).

[7] The FDCPA broadly defines communication as "the conveying of information regarding a debt directly or indirectly through any medium" to encompass every possible means of communication regarding a debt. 15 U.S.C. § 1692a(2).

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." 15 U.S.C. § 1692(e).

The statute contains provisions that prescribe and prohibit specific conduct when communicating with consumers. As required conduct, a debt collector must provide a consumer with notice of certain rights afforded to the consumer under the FDCPA. The FTC has construed this requirement such that if the debt collector's first communication with the consumer is oral (e.g., a telephone conversation), the debt collector may make the required disclosure at that time and the debt collector need not send a written notice. If such disclosure is made orally, the collector must be able to document that such disclosure was provided if the collector is ever asked to prove that the disclosure was, in fact, made. If the notice is not included in the initial communication with the consumer, it must be provided in writing within five days after the initial communication with the consumer. This written notice must identify (a) the amount of the debt; (b) the name of the creditor to whom the debt is owed; (c) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector; (d) 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 the judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and (e) 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.

Other FDCPA provisions prohibit the use of any false, deceptive, or misleading representation or means in connection with the collection of any debt, which necessarily includes all communications by telephone. 15 U.S.C. § 1692e. The sixteen specifically enumerated false representations include the affirmative requirement that a debt collection "disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral [by telephone], 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." 15 U.S.C. § 1692e(11). With respect to the use of telephones to communicate with consumers, the FDCPA requires the meaningful disclosure of the debt collector's identity, the failure of which is considered harassment or abuse in connection with the collection of a debt. 15 U.S.C. § 1692d(6).

The FDCPA additionally authorizes consumers can require a collector to cease communications. Under § 805 of the FDCPA, consumers may send a debt collector a notice to

cease communications in connection with the collection of a debt, or the consumer may send a notice that he or she refuses to pay a debt. In both cases, the debt collector may not communicate further with the consumer with respect to the debt in question, other than to: (1) advise the consumer that the debt collector's further efforts are being terminated; (2) notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or (3) where applicable, notify the consumer that the debt collector or creditor intends to invoke a specified remedy. This includes telephone communications.

The FDCPA also restricts the communication of information concerning a debt to anyone, other than the consumer, without the consumer's consent. Under the FDCPA, the term "consumer" includes the actual consumer, the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator. Section 805(b) of the FDCPA states that communications with a third party concerning a consumer's debt is prohibited.

Taken together, these and other provisions under the FDCPA offer robust consumer protections embedded in the statute that apply to all communications in furtherance of debt collection, including the use of telephones. The restrictions govern the content, timing, and audience of the communications, and authorize consumers to invoke their rights to stop all future communications by telephone or otherwise. Significantly, consumers, in addition FTC,

have authority to enforce alleged violations, including statutory and actual damages and class actions.

Depending on the type of accounts subject to collection, debt collectors and/or the credit grantors also may have compliance obligations under the following illustrative list of Federal laws in addition to the FDCPA:

- The Higher Education Act of 1971, Pub. L. No. 89-329;
- 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.*; and
- Regulation Z, 12 C.F.R. § 226 *et seq.*

Each state has enacted laws and regulations supplementing the FDCPA, including licensing and registrations requirements.[8] 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

[8] The FDCPA pre-empts state laws to the extent that those laws are inconsistent with any Federal provision, and then only to the extent of the inconsistency. A state law is not inconsistent if it gives consumers greater protection than the FDCPA.

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).[9]

As the preceding demonstrates, the FDCPA and an extensive number of other federal and state consumer protection laws that govern the manner, method, and content of communications with debtors. These laws make the risk of abusive practices with the use of prerecorded messages highly remote in the context of debt communication calls. Further regulation by the Commission is duplicative and unnecessary. For these reasons, the Commission should clarify that the proposed amendments to the TSR do not apply to debt collection calls.

IV. CONCLUSION.

For the foregoing reasons, ACA respectfully requests that the Commission clarify in this rulemaking that the Proposed Rule does not apply to or exempts the accounts receivable companies, such as those who are members of ACA, for the reasons stated herein. If you have any questions, please contact Andrew Beato at (202) 737-7777.

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[9] ACA International, *Guide to State Collection Laws & Practices, available at* http://www.acainternational.org/default.aspx?cid=866&ref=http://products.acainternational.org/eSeries2005/source/Orders/index.cfm^task=3*category=COMPLIANCE*product_type=sales*sku=21170*findspec=Compliance*continue=1*search_type=find.

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Respectfully submitted,

Valerie Hayes, Esq.
ACA International
4040 W. 70th Street
Minneapolis, MN 55435
General Counsel

Andrew M. Beato, Esq.
Stein, Mitchell & Muse L.L.P.
Federal Regulatory Counsel