

ACA International
CG Docket No. 02-278
CC Docket No. 92-90
August 25, 2003
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

AUG 25 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
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Rules and Regulations Implementing the)
Telephone Consumer Protection Act of 1991)
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CG Docket No. 02-278
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**Petition for Reconsideration and Clarification of Final Rule
Implementing Amendments to the Telephone Consumer Protection Act**

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Dated August 25, 2003

This Petition for Reconsideration and Clarification of the Federal Communications Commission's ("Commission") Report and Order revising its regulations implementing the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), is filed on behalf of ACA International ("ACA") pursuant to Commission Rule of Practice Section 1.429. *See* 47 C.F.R. § 1.429 *et seq.*

I. Summary of Petition

ACA respectfully requests clarification that debt collection calls are exempt from the artificial and prerecorded telephone message identification restrictions in 47 C.F.R. § 64.1200(b). As set forth below, requiring a debt collector to identify its state-registered name in artificial and prerecorded telephone messages:

1. Contradicts with Section 805(b) of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692c(b) ("FDCPA"), which prohibits the disclosure of the existence of a debt to persons other than the debtor.

3. Undermines the Federal Trade Commission's ("FTC") interpretation – as the primary Federal agency regulating the credit and collection industry – that debt collection calls generally are not "telemarketing" and are not regulated by the FTC's Telemarketing Sales Rule which implemented the Telemarketing Consumer Fraud and Abuse Prevention Act. *See Telemarketing Sales Rule*, 68 FED. REG. 4580, 4664 n.1020 (Jan. 29, 2003) (final amended rule).

To resolve these conflicts and permit ACA members to continue to attempt the collection of debts in compliance with the FDCPA, ACA requests that the Commission clarify

that debt collection calls are exempt from the artificial and prerecorded telephone message delivery restrictions. In the alternative, ACA requests clarification that debt collectors are not required to identify their state-registered names in prerecorded messages if the disclosure conflicts with federal or state laws.

II. Statement on ACA

ACA International, formerly known as the American Collectors Association, is a trade association of credit and collection professionals who provide a wide variety of accounts receivable management services. Headquartered in Minneapolis, Minnesota, ACA represents approximately 5,300 third party collection agencies, attorneys, credit grantors and vendor affiliates. Members comply with all 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 FTC pursuant to the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 *et seq.*, and the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, in addition to analogous state laws.

Whether performing first party billing or third party collection services, ACA members work on behalf of credit grantors in the collection of accounts receivable. Indeed, collectors engage in hundreds of millions of telephone collection contacts every year initiated on behalf of creditors. Some of these telephone contacts result in the use of prerecorded messages.

III. Argument

ACA's concern is that Section 64.1200(b) may be interpreted to require a debt collector to transmit its state-registered name at the beginning of prerecorded message but, in doing so, compel the collector to violate the FDCPA's prohibition against disclosing the existence of a debt to party other than the debtor

On July 3, 2003, the Commission released a Report and Order revising its regulations implementing the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"). *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Dkt. No. 02-278, FCC 03-153, Report and Order (rel. July 3, 2003) (*Report and Order*), 68 FED. REG. 44144 (July 25, 2003). Section 64.1200(b), which addresses the use of artificial or prerecorded messages, states:

(b) All artificial or prerecorded telephone messages shall:

- (1) ***At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call.*** If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated, and
- (2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number

provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign.

47 C.F.R. § 64.1200(b) (emphasis added). Thus, the *Report and Order* require the disclosure of the identity of the business or individual initiating the call and, in the case of a business, its state-registered name.

Significant for ACA members, Section 64.1200(b) applies to “*all* artificial or prerecorded telephone messages.” There is no exemption in the regulation for prerecorded messages for a debt collection purpose. Nor did the Commission state in the *Report and Order* that debt collection calls resulting in prerecorded messages are not covered by the regulation.

The plain language of the regulation raises the question whether the Commission intended Section 64.1200(b) to regulate prerecorded messages initiated for debt collection purposes. The purported regulation under Section 64.1200(b) of debt collection calls directly conflicts with the mandate of Congress, expressed in the FDCPA, that debt collection agencies not disclose the existence of a debt to third parties. The FDCPA expressly prohibits debt collectors from communicating any information to third parties, even inadvertently, with

respect to the existence of a debt.

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 postjudgment judicial remedy, a debt collector may not *communicate*, in connection with the collection of any debt, with any person other than a 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

15 U.S.C § 1692c(b) (emphasis added). The term “communication” is defined broadly under the FDCPA, and includes “the conveying of information regarding a debt directly or indirectly to any person through any medium,” including over the telephone. 15 U.S.C. § 1692a(2). Federal courts have interpreted the third party disclosure prohibition liberally such that a third party need not be told expressly that the communication is about a debt. *See, e.g., West v Nationwide Credit, Inc* , 998 F. Supp. 642 (W.D.N.C. 1998); *Arslan v. Florida First Fed Group*, 1995 WL 73115 (M.D. Fla. 1995) (violation of the FDCPA for a third party to merely construe the communication as referring to a debt); *Committee v Dennis Reimer, Co , L.P A.* , 150 F.R.D. 495 (D. Vt. 1993) (telephone message admissible as evidence of third party communication).

The regulatory requirement in Section 64.1200(b) that a debt collector transmit its registered name at the beginning of prerecorded message potentially would trigger liability under the third party disclosure prohibition of the FDCPA. This is because many, if not most,

ACA members have state registered names including words that relate to their business, for example, "ABC Collections, Inc." or "ABC Recovery, Inc." Under the *Report and Order*, a debt collector would be required to disclose this information at the beginning of a prerecorded message. Doing so, however, would violate Section 805(b) of the FDCPA because the debt collector has no way of knowing whether the prerecorded message will be received by a person other than the debtor. In effect, Section 64.1200(b) subjects debt collectors to a compliance impossibility of liability under the TCPA if they comply with the FDCPA, or liability under the FDCPA if they comply with the TCPA.

Finally, ACA notes that the Commission's regulation of prerecorded debt collection messages under the TCPA is inconsistent with the FTC's regulation of those calls under the TSR. The FTC has primary federal enforcement authority over debt collectors pursuant to the FDCPA. In its recent rulemaking under the Telemarketing Act, the FTC concluded that "debt collection . . . activities are not covered by the Rule because they are not 'telemarketing'—i.e., they are not calls made 'to induce the purchase of goods or services.'" See *Telemarketing Sales Rule*, 68 FED. REG. 4580, 4664 n.1020 (Jan. 29, 2003) (final amended rule).

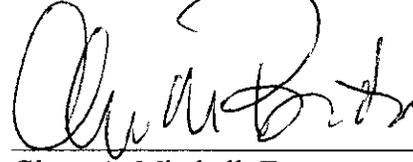
IV. Conclusion

For the foregoing reasons, ACA requests that the Commission exempt debt collection calls from the artificial and prerecorded telephone message identification restrictions set forth

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at 47 C.F.R. § 64.1200(b). In the alternative, ACA requests that the Commission clarify that debt collectors are not required to identify their state registered name in prerecorded messages if such identification conflicts with federal or state laws.

Respectfully submitted,



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