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**COMMENTS OF ACA INTERNATIONAL ON
FCC'S FURTHER NOTICE OF PROPOSED RULEMAKING IN
CG DOCKET NO. 02-278**

**SAFE HARBOR FOR CALLS TO WIRELESS NUMBERS AND
MONTHLY UPDATES TO DO-NOT-CALL REGISTRY**

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INTRODUCTION

The following comments are submitted on behalf of ACA International (“ACA”) in response to the request by the Federal Communications Commission (“FCC” or “Commission”) for comments on the Further Notice of Proposed Rulemaking in CG Docket 02-278. *See* 69 Fed. Reg. 16873 (March 31, 2004) (“FNPR”). The FNPR seeks comment on two proposals: (1) the adoption of a “safe harbor” for telemarketers who call telephone numbers that have recently been ported from a wireline to a wireless telecommunications provider; and (2) a proposal to shorten the time limit from quarterly to monthly for telemarketers to purge from their calling lists numbers appearing on a version of the do-not-call registry.

Although ACA believes it beyond dispute that debt collection professionals are not “telemarketers” under these proposals, it is necessary to comment on the FNPR to reaffirm and clarify this rapidly evolving area of FCC law’s effect on the credit and collection industry. In particular, ACA requests the FCC to confirm that the use of autodialers, pre-recorded messages, and similar technology for the purpose of collecting debts are either outside the scope of FCC regulation under the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”), or administratively exempt from such regulation. *See* 1995 TCPA Reconsideration Order, 10 FCC Rcd at 12397-401, paras. 16-19. ACA also requests that the FCC not construe the TCPA or the FCC’s implementing regulation in a manner that obstructs the lawful collection of debts by telephone. Failure to do so will have a substantial negative effect on the credit industry and, indeed, the domestic economy, by rendering a significant portion of consumer debts uncollectible by reason of the FCC’s regulations.

I. Statement on ACA

ACA International is a trade association of credit and collection professionals who provide a wide variety of accounts receivable management services. Founded in 1939 and headquartered in Minneapolis, ACA represents approximately 5,300 members. ACA's membership spans all fifty states and includes approximately 3,400 third-party collection agencies, 1,200 credit grantors, 750 attorneys, and 140 vendor affiliates. *See* Statement of Rozanne M. Andersen, General Counsel and Senior Vice President for Legal and Government Affairs, ACA International: Testimony Before the Subcommittee on Oversight off the House Committee on Ways and Means (May 13, 2003) ("2003 Andersen Testimony"). ACA members range in size from small businesses with several employees to large, publicly held corporations employing as many as 15,000 workers. *Id.* In short, ACA's membership includes both the very smallest of businesses that operate within a limited geographic range within a single state, and the very largest of multinational corporations that operate in every state.

ACA members comply with all applicable federal and state laws governing debt collection as well as ethical standards and guidelines established by ACA. The collection activities of our members are subject to detailed and stringent regulation under 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.*, and other numerous other federal and state laws.

Each year ACA members engage in hundreds of millions of attempts to contact consumers by telephone. The primary purpose of these telephone communications is to collect debts owed by consumers to creditors. Some of these telephone communications are processed using automatic dialing software to dial a debtor's telephone number in a

predetermined manner and time so that the debtor answers the phone at the same time a collector is free to take the call. The use of autodialer technology to initiate these calls effectively is mandatory either as a consequence of creditors' specific requirements or by reason of the sheer volume of uncollected debt. In addition, ACA members sometimes use pre-recorded messages in their collection efforts.

Whether initiated manually or by an autodialer to a wireless or wireline telephone number, none of these calls are random. Nor are the calls initiated for the purpose of selling products or services. Instead, the calls are made to complete a transaction in which the debtor already has received a product, service, loan or other thing of value without paying for it. This single fact distinguishes the communications of ACA members from those of telemarketers. ACA members are not telemarketers. They do not engage in unsolicited communications. Nonetheless, ACA is concerned that the TCPA and the Commission's implementing regulations will unintentionally stymie legitimate collection efforts.

On August 25, 2003, ACA submitted to the FCC a Petition for Reconsideration and Clarification of the Final Rule Implementing Amendments to the Telephone Consumer Protection Act ("ACA Petition"). The ACA Petition requests the FCC to address a serious conflict between the FCC's TCPA regulations and other, pre-existing legal mandates imposed by the FDCPA. No comments objecting to the ACA Petition were filed. In the comments that follow, ACA reaffirms the points and arguments made in the ACA Petition now pending before the Commission, as well as commenting on specific points raised in the current FNPR with respect to the application of autodialers to calls initiated for a debt collection purpose.

II. ACA Members Play a Vital Role in Safeguarding a Healthy Economy

There is no question that 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. 2003 Andersen Testimony. By itself, outstanding credit card debt has doubled in the past decade and now approaches three quarters of a trillion dollars. Eileen Alt Powell, *Consumer Debt More Than Doubles in a Decade*, Associated Press, Jan. 6, 2004. Total consumer debt, including home mortgages, exceeds \$9 trillion. William Branigan, *U.S. Consumer Debt Grows at an Alarming Rate*. Wash. Post, Jan. 12, 2004. Moreover, the greatest increases in consumer debt are traced to consumers with the least amount of disposable income to repay their obligations. For example, between 1989 and 2001, American families with annual incomes of less than \$10,000 experienced a 184% increase in their average debt.

Uncollected debt harms consumers. This fact is reflected in the continued increase in consumer bankruptcies. In 2003, there were more than 1.63 million personal bankruptcies filed, representing a 5.6% increase from 2002 levels. Even further, the harmful consequences of uncollected debt are not limited to consumers. It also impacts the smallest of businesses in addition to the largest of the multi-national credit grantors.

ACA members are an extension of practically every community's business. We represent the local hardware store, the retailer down the street, and the local hospital. The collection industry works with these businesses, large and small, to obtain payment for the goods and services received by consumers. Without collection, the economic

viability of these businesses, and by extension, the American economy in general, faces a grave threat.¹ At the very least, Americans are forced to pay higher prices to compensate for uncollected debt.

As the above demonstrates, the ability of ACA members to initiate collection using telecommunications technology such as autodialers is critical to the health of our economy. 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 \$30 billion in 1999 alone, a massive infusion of money into the national economy.

ACA urges the FCC to recognize the pivotal role played by the debt collection industry, and to ensure that its regulations implementing the TCPA do not inadvertently block lawful debt collection contacts – a possible result of the current state of manifold, conflicting regulatory mandates.

III. The FCC Should Resolve the Conflicts Between its TCPA Regulations and the FDCPA by Exempting Debt Collection Calls from Regulation Under the TCPA

As it stands today, collection agencies face a conflict that forces them to violate the FDCPA in order to comply with the FCC's TCPA Regulations. In July 2003, the

¹ In a related context, the United States government has emphasized the importance of implementing federal programs designed to encourage the assistance of debt collectors to maximize the recovery of debts, specifically tax obligations owed the government. See Department of the Treasury, Office of Public Affairs, *President's Budget Strengthens IRS Compliance Efforts and Protects Taxpayers Rights* (Feb. 1, 2003) ("Currently, over \$13 billion in delinquent tax liabilities are going uncollected because the IRS cannot continuously pursue every taxpayer with an outstanding liability. This is unfair to every hard-working American who has paid his or her fair share of taxes"). Presumably this proposal from the Bush Administration's Budget is fundamentally altered by the FCC's prohibition on using an autodialer to initiate a call to a wireless number because the President's proposal contemplates private collection agencies communicating by telephone with delinquent taxpayers.

Commission issued final regulations implementing amendments to the TCPA. *See* 68 Fed. Reg. 44144 (July 25, 2003). Section 64.1200(b) requires that all artificial or prerecorded telephone messages *must* “at the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call.” This requirement applies to *all* artificial or prerecorded telephone messages, presumably including those made for the purpose of collection of a debt.

An unintended result of this regulation has been a negative impact on the business of ACA members. Debt collection agencies having names suggesting that they are, in fact, debt collectors cannot comply with the TCPA regulation without simultaneously violating the strict liability provisions of the FDCPA. This is because the FDCPA explicitly prohibits debt collectors from communicating, even inadvertently, any information to third parties concerning the existence of a debt without the prior consent of the consumer. 15 U.S.C. § 1692c(b). The FDCPA defines the term “communication” broadly to include “the conveying of information regarding a debt directly or indirectly to any person through any medium,” including the telephone. 15 U.S.C. § 1692a(2). Federal courts have confirmed the breadth of this prohibition. *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).

The FCC’s requirement that a debt collector convey its registered name at the beginning of a prerecorded message could easily expose the collector to liability under the disclosure prohibitions of the FDCPA. Under the FCC’s rules, a debt collector *must* state its identity and registered name at the beginning of a prerecorded message. Doing so, however, places the collector in peril of violating the FDCPA because debt collectors

have no way of knowing whether the prerecorded message will be received by a person other than the debtor. Thus the conflict: the FCC regulation subjects debt collectors to liability if they comply with the FDCPA, but the FDCPA subjects debt collectors to strict liability and the potential of consumer class actions if they comply with FCC regulation.

To resolve this contradiction between the statutory requirements of the FDCPA and the FCC's regulatory requirements under the TCPA, the FCC should exempt debt collection calls from identification requirements of 47 C.F.R. § 64.1200(b). Indeed, the Commission previously reached a similar conclusion in its 1995 TCPA Reconsideration Order. In the Order, the FCC determined that artificial and prerecorded voice message calls to residences for a debt collection purpose were exempt from the TCPA because the calls are not unsolicited advertisements and are made pursuant to an existing business relationship:

We have specifically noted that “prerecorded debt collection calls [are] exempt from the prohibitions on [[prerecorded] calls to residences as . . . commercial calls . . . which do not transmit an unsolicited advertisement.” Nevertheless, the Report and Order explicitly states that subscribers who sever a business relationship are revoking consent to any future solicitation. Because the termination of an established business relationship is significant only in the context of solicitation calls, that act of terminating such a relationship would not hinder or thwart creditors' attempts to reach debtors by telephone.

1995 TCPA Reconsideration Order, 10 FCC Rcd at 12397-401, para. 17. The Commission also concluded that “debt collection calls do not require an identification message” in a prerecorded message because “the disclosure might otherwise reveal the purpose of the call to persons other than the debtor” in violation of the FDCPA. 1995 TCPA Reconsideration Order, 10 FCC Rcd at 12397-401, para. 19.

Congress could not have intended compliance with one law to force violation of another. The FCC is now in a position to resolve this problem, and ACA respectfully requests the Commission do so in the present rulemaking.

IV. The FCC Should Likewise Exempt Debt Collection Calls from the Autodialer and Prerecorded Message Restrictions of the TCPA

Telephone calls to a wireless or wireline number which are initiated for the purpose of collecting a debt should not be subject to the autodialer or prerecorded message restrictions of the TPCA and the FCC's implementing regulations.² Debt collectors are not telemarketers. Collectors do not telephone consumers to sell or market goods or services. Rather, they contact consumers for the primary purpose of completing a transaction from which consumers already have obtained a benefit, but have not fully paid. Although FCC regulations prohibit the use of telephone technology, including autodialers and prerecorded messages, in making *any* call to a wireless number, the purpose of this prohibition cannot be to block the lawful collection of debts. Rather, the TCPA and its FCC rules are intended to curb the practices of telemarketers – that is, companies who use telephone calls to solicit new business or sell goods.

The Federal Trade Commission (“FTC”) has already determined that debt collection calls do not constitute “telemarketing.” *FTC Telemarketing Sales Rule*, 68 Fed. Reg. 4580, 4664 n. 1020. The FTC is the primary federal agency regulating the credit and collection industry. Yet the FCC rule contradicts what the FTC has already resolved – that debt collectors are not “telemarketers” within the meaning of the TCPA.

² The 2003 TCPA Order issued by the FCC contains a broad prohibition against making “any call using an automatic telephone dialing system or artificial or prerecorded message to any wireless telephone number.” 2003 TCPA Order, 18 FCC rcd at 14115, para. 165.

Both Congress and the FNPR stress the importance of consistency between FCC and FTC regulation under the TCPA. *See* FNPR at 22 (“Congress directed the FCC to consult and coordinate with the FTC to ‘maximize consistency’ with the rules promulgated by the FTC.”) (citing Do-Not-Call Implementation Act).

The FCC can and should use the present rulemaking to harmonize its own rules with those of the FTC. One way for the FCC to accomplish this is to acknowledge that a consumer impliedly consents to receive a telephone call to a wireless number as a consequence of his or her acceptance of the goods or services for which collection subsequently is sought. Although a consumer may not necessarily consent to unsolicited sales calls from merchandisers or telemarketers, the same cannot be said of a consumer who obtains the benefit of goods or services, but has not paid for them. All consumers are aware that the failure to pay for the goods or services will result in a creditor or debt collector attempting to recover payment. By accepting the goods or services, a consumer consents to subsequent collection activity under the auspices of federal and state collection laws. For this reason, the TCPA’s consent or authorization requirements should be revised to clarify that the transaction giving rise to a debt constitutes implied consent and authorization to receive collection calls. ACA requests the FCC resolve this issue in the present rulemaking.

This approach is supported by two additional considerations. The first consideration is ACA’s concern that the TCPA and the FCC’s implementing regulation, as applied to restrict collection calls to wireless numbers initiated with an autodialer, raise serious constitutional questions. At base, the autodialer prohibition discourages collection calls to wireless numbers, while encouraging less efficient manual dialing by

reason of the absence of regulation.³ In effect, a telephone call by a trained, professional debt collector initiated to a wireless number for purposes of collecting a debt is prohibited if made by an autodialer, but a call to the same person at the same wireless number for the same purpose is not restricted if a collector manually dials the number. This result, embodied in the TCPA regulations, reflects a direct restriction on commercial free speech that is not sufficiently narrowly tailored to achieve a substantial government interest.

It is with this disparate treatment in mind that ACA respectfully submits that the regulation does not satisfy the Supreme Court's four-part test to determine the constitutionality of a restriction on commercial speech. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980). Indeed, the government would be hard pressed to articulate any interest, much less a substantial interest, in erecting broad barriers to the collection debts owed by consumers. This especially is true where, as noted in the next paragraph, existing statutory and regulatory provisions fully protect consumers and advance the government's interest through less extensive measures.

The second consideration is the fact that the strict liability provisions of the FDCPA already fully protect consumers from the potential harms that underpin the government's interest in regulating an absolute prohibition against calls to wireless numbers. For more than twenty years, the FDCPA has empowered consumers to unilaterally require debt collectors to cease communications simply by notifying the collector in writing of that request. 15 U.S.C. § 1692c(c). Another FDCPA provision forbids conduct that might be considered harassing, including causing a telephone to ring

³ As noted, *supra*, manual dialing not an option due to substantial increases in consumer debt and/or individual creditor requirements.

repeatedly. 15 U.S.C. § 1692d(5). See *Kuhn v. Account Control Tech., Inc.*, 865 F. Supp. 1443 (D. Nev. 1994); *Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864 (N. N.D. 1981). Still other FDCPA requirements prohibit debt collectors from concealing the purpose of a telephone communication. 15 U.S.C. § 1692f(5). Taken together, these and other FDCPA and state analogs impose strict liability on debt collectors that violate consumers' rights by using telephone communications to harass debtors. It does so without resorting to the more restrictive and constitutionally defective approach of banning all calls to wireless telephone numbers if initiated by an autodialer.

V. The FCC Should Not Construe the TCPA in a Manner that Obstructs the Collection of Debts Owed by Consumers

ACA and its members are concerned that rapid changes in the telephone industry, and in particular the exponential increase in the porting of numbers from wireline to wireless, will encourage debtors to evade legitimate collection efforts simply by making the shift to wireless telephony. Current FCC interpretation of the TCPA may well have this effect. ACA sees a serious, if unintentional, consequence of the current regulatory scheme. The FCC through its enforcement power, and consumers through private rights of action under the TCPA, will use the prohibition against calling a wireless with an autodialer as a shield against the legitimate collection of debts. This has far reaching ramifications. It stands to harm the economy increasing the amount of uncollected debt. It also frustrates the unambiguously expressed intent of Congress to permit debts to be collected in conformity with the FDCPA.

The FNPR restates the Commission's position that "information is currently available to assist *telemarketers* in determining which numbers are assigned to wireless carriers." 69 Fed. Reg. at 16880 col. 2 (emphasis added). This statement reinforces

ACA's basic point, that is, telephone calls to wireless (or wireline) numbers are not "telemarketing" when initiated in order to collect a debt owed by consumers and, therefore, such calls should not be bound by the blanket prohibition on calling a wireless number by use of an autodialer. As the Commission is well aware, consumers have ported to wireless numbers exponentially. Within several years, it is possible that many consumers will forego wireline numbers altogether. This outcome, coupled with the failure of the TCPA regulation to distinguish between "telemarketing" calls and calls to attempt collection of a debt by use of an autodialer, results in a regulatory-endorsed "escape hatch" for consumers to avoid the payment of debts simply by going wireless.

ACA respectfully submits that it is not a viable response for the Commission to assert that technology exists to fix the problem by determining whether a number is assigned to a wireless carrier.⁴ In many instances, the technology is not commercially available widely, or it may be impracticably or financially impossible to make the substantial investment required to gain access to it. This problem particularly is acute for small business members of ACA with finite resources.

The result of the TCPA autodialer restriction has been to compel debt collectors to cease using autodialers in order to comply with the regulation and avoid potential class action claims by consumers based on allegations that a collector violated the TCPA by calling consumers on a wireless number simply to collect debts owed by consumers.⁵

⁴ Nor is it a solution to require collection agencies and creditors to entirely forego the use of autodialers when attempting to collect a debt in order to comply with the TCPA's restrictions on telemarketers. For the reasons set forth herein, cessation of the use of autodialers for collection purposes will have far-reaching negative consequences on the ability to collect debts, thereby increasing the cost of credit for all consumers.

⁵ The counterintuitive results of the TCPA prohibition on the use of autodialers as it applies to the collection of debts is underscored by the fact that many consumers express

ACA therefore requests the FCC to prevent this negative, unintended consequence by exempting debt collection calls from the prohibition against the use of autodialer or prerecorded message technology when initiating a call in order to attempt collection.

VI. In the Alternative, ACA Seeks Confirmation of the FCC’s Conclusion that Debt Collection Calls are Not Solicitations or Advertisements

In the event the Commission does not exempt debt collection calls from the regulations, ACA seeks confirmation of the FCC’s statement in the July 25, 2003, Final Rule implementing the TCPA that debt collection calls are not solicitations or advertisements. In the Final Rule, the Commission “note[d] that the act of ‘terminating’ an established business relationship will not hinder or thwart creditors’ attempts to reach debtors by telephone, to the extent that debt collection calls constitute neither telephone solicitations nor include unsolicited advertisements.” 68 Fed. Reg. 44144, 44158 col.3 (July 25, 2003). In particular, ACA seeks confirmation that it is not a telephone solicitation or unsolicited advertisement for a debt collector to offer a debtor a means of payment during a collection call. The purpose of such a call is the collection of a debt. Although there is an ancillary component of the call to arrange for payment of the debt by options such as cash, electronic check or Western Union, these payment options are not solicitations or advertisements.

VII. Specific Comments on the FNPR

As made clear by the discussion above, ACA members are not “telemarketers” and should therefore not be required to comply with the requirements addressed in the

a preference to receive telephone communications on their wireless numbers. For example, consumers commonly identify a wireless number on credit applications.

FNPR. Nonetheless, we submit the following comment which specifically addresses the questions raised in the FNPR.

- **The FCC Should Adopt the Limited Safe Harbor Proposal for Erroneous Calls to Wireless Numbers**

ACA agrees with the petition submitted jointly by the Direct Marketing Association and The Newspaper Association of America. At the present time, it is commercially and technologically unreasonable to expect industry to recognize immediately when a wireline number has been ported to a wireless device. ACA fully supports the safe harbor proposal that would insulate telemarketers from liability for erroneous calls to wireless numbers within 30 days of porting. We add the caveat, however, that debt collectors are not telemarketers.