

02-278



Federal Communications Commission
Consumer & Governmental Affairs Bureau
Washington, D.C. 20554

CGB

August 3, 2004

Control No. 0402283-Pol

The Honorable Lamar Smith
U.S. House of Representatives
13333-A Highway 71 West, Room 100
Austin, TX 78738

Dear Congressman Smith:

Thank you for your letter of July 16, 2004, regarding the Commission's recent amendments to the rules implementing the Telephone Consumer Protection Act of 1991 (TCPA). You enclosed a letter from constituent Dwain James, a member of ACA International (ACA), the national association of credit and collection professionals. Mr. James explains that the TCPA rules conflict with the Fair Debt Collection Practices Act (FDCPA), resulting in confusion and workability issues for his business. He seeks your assistance in contacting the FCC regarding a petition filed by ACA to resolve this apparent conflict.

As you know, the TCPA was enacted to address certain telemarketing practices, which Congress found to be an invasion of consumer privacy and even a risk to public safety. The TCPA specifically prohibits calls using an autodialer or prerecorded message to certain numbers, including wireless telephone numbers. In addition, the TCPA directs the Commission to adopt rules requiring all prerecorded messages to identify the business, individual or entity initiating the call and the telephone number or address of such entity.

On July 3, 2003, the Commission released a Report and Order in CG Docket No. 02-278, which adopted rules establishing a national do-not-call registry and other amendments to its telemarketing and facsimile advertising rules. Following the release of the Report and Order, the Commission received over 60 petitions for reconsideration and/or clarification of the amended rules, including ACA's petition. ACA seeks clarification that the Commission's rules do not apply to debt collectors, given the apparent conflict with the FDCPA. These petitions are currently under review and pending before the Commission. Therefore, we have placed a copy of your correspondence in the public record for this proceeding.

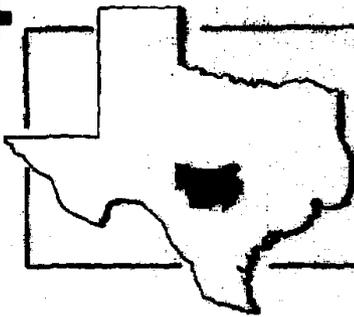
We appreciate your comments and understand the importance of these issues for ACA and its members. Please do not hesitate to contact us if we can be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Dane Snowden".

K. Dane Snowden
Chief

Consumer & Governmental Affairs Bureau



Congressman
Lamar Smith

*CCB
Policy-telemarketing
2283*

Fax Cover Sheet

To: **Congressional Liaison**
(202) 418-1662

Date: **7/15/04**
Pages including
Cover sheet: **5**

From: Sheila Brown
Constituent Services Liaison

Congressman Lamar Smith
Room 100
13333-A Highway 71 West
Austin, Texas 78738

Phone: (512) 402-9743
Fax: (512) 402-9867
E-Mail: Sheila.Brown@mail.house.gov

Congressional Inquiry regarding Dwain James

LAMAR SMITH
21st DISTRICT, TEXAS

JOHN W. LAMPMANN
CHIEF OF STAFF

2231 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-4321
(202) 225-4236
FAX: (202) 225-9628
<http://lamarsmith.house.gov>



Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY
CHAIRMAN, SUBCOMMITTEES ON COURTS,
THE INTERNET AND INTELLECTUAL PROPERTY
SUBCOMMITTEE ON IMMIGRATION AND CLAIMS

COMMITTEE ON SCIENCE
SUBCOMMITTEE ON SPACE AND AERONAUTICS
SUBCOMMITTEE ON RESEARCH

SELECT COMMITTEE ON
HOMELAND SECURITY
SUBCOMMITTEES ON CYBERSECURITY, SCIENCE
AND RESEARCH & DEVELOPMENT
SUBCOMMITTEE ON INFRASTRUCTURE AND
BORDER SECURITY
SUBCOMMITTEE ON INTELLIGENCE AND
COUNTER TERRORISM

July 16, 2004

Federal Communications Commission
445 12th Street SW
Room 8-C453
Washington, DC 20554

Dear Sir/Madam,

Enclosed for your attention is information I received from my constituent, Dwain James.

I would appreciate your reviewing this issue and responding at your earliest convenience.

Please send response to:
The Honorable Lamar Smith
13333-A Highway 71 West, Room 100
Austin, Texas 78738

(512) 402-9743 Commercial
(512) 402-9867 FAX

Sincerely,

Lamar Smith
Member of Congress

LS/sb

enclosures

PLEASE REPLY TO:

1100 N.E. LOOP 410
SUITE 840
SAN ANTONIO, TX 78208
(210) 821-5024
FAX: (210) 821-5847

13333-A HIGHWAY 71 WEST
ROOM 100
AUSTIN, TX 78738
(512) 402-8743
FAX: (512) 402-8867

1006 JUNCTION HIGHWAY
KENNEDYVILLE, TX 78028
(800) 898-1414
FAX: (830) 895-2091

PRINTED ON RECYCLED PAPER

6/18/04

Dwain James
3819 Gaines Court
Austin, TX 78735
June 17, 2004

The Honorable Lamar S. Smith
U.S. House of Representatives
2231 Rayburn House Office Building
Washington, D.C. 20515-4321

Dear Representative Smith:

I am constituent and a professional in the credit and collection industry.

I am a member of ACA International (ACA), the national association of credit and collection professionals. On August 25, 2003, ACA filed a formal petition with the Federal Communications Commission (FCC) regarding the unintended workability issues hampering legitimate debt collection activity caused by the Commission's 2003 modifications to the Telephone Consumer Protection Act (TCPA) regulations. Although the ACA petition is considered non-controversial, the FCC has not acted.

I am writing to request your immediate assistance in contacting the FCC on behalf of my local company and the thousands of other credit and collection industry members in support of the ACA International petition.

Background

On July 25, 2003, the FCC promulgated regulations pursuant to the TCPA which, among other requirements, stipulate that when a company uses a pre-recorded message to communicate with consumers, the pre-recorded message must identify the name of the company as registered with state authorities. Also in the final TCPA regulations, the FCC, in its attempt to regulate telemarketing sales calls, has prohibited the use of an autodialer and/or pre-recorded message to place a call to persons on a wireless phone, without prior express permission.

Both of these regulations pose unintentional, but nevertheless, gravely serious compliance issues for the credit and collection industry. ACA International understands the FCC's intent to curb unwanted telemarketing calls, but the Commission's efforts have negatively impacted the business of lawful and ethical debt collection.

Workability Issues

Issue I: The new TCPA regulatory requirement that a company must transmit its registered name at the beginning of pre-recorded message potentially would trigger liability under the third-party disclosure prohibition of the Fair Debt Collection Practices Act (FDCPA). The FDCPA is the primary federal law governing the credit and collection industry. The FDCPA prohibits collection agencies, when communicating with consumers, from disclosing the existence of a debt to a third-party without proper authorization. Such disclosure would occur if someone, other than the intended recipient, listens to the pre-recorded message.

Debt collection agencies having names that suggest they are in the business of collecting debt, for example, "ABC Collections, Inc." or "ABC Recoveries, Inc.," cannot comply with this TCPA regulation without simultaneously violating the FDCPA. The FCC's requirement that a debt collector convey its registered name at the beginning of a pre-recorded message could easily expose the collector to liability under the disclosure prohibitions of the FDCPA.

Issue II: The new TCPA regulations are intended to restrict the use of autodialers and pre-recorded message technologies by telemarketers. Debt collectors are not telemarketers. The Federal Trade Commission (FTC), the primary federal agency regulating the credit and collection industry, has already determined that debt collection calls do not constitute "telemarketing." However, the FCC rule contradicts what the FTC has already resolved – that debt collectors are not "telemarketers" within the meaning of the TCPA. It was Congress' intent that the FTC and the FCC should promulgate consistent rules. Therefore, by following the FTC's lead, the FCC should similarly determine debt collection calls do not constitute telemarketing and exempt such calls from the TCPA regulations.

As part of the FCC's intent behind the limitation on telemarketers' use of autodialers and pre-recorded messaging is that consumers do not expressly consent to receiving calls to wireless numbers. Collectors, however are not telemarketers and 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. Consumers arguably give their implicit consent to be contacted for legitimate collection purposes when they enter into an agreement for goods or services. Telephone calls to a wireless or wireline number which are initiated for the purpose of collecting a debt should not be subject to the TCPA's autodialer or pre-recorded message restrictions and the doctrine of implied consent should be recognized by the Commission.

The debt collection market generates approximately \$13 billion in revenues for United States companies. Credit and collection companies use

sophisticated technologies such as autodialers and pre-recorded messaging to efficiently collect on this massive amount of outstanding debt. The revised TCPA regulations unfairly restrict market forces by limiting the use of technology for legitimate collection purposes.

The credit and collection industry needs relief from the compliance predicament resulting from the TCPA rule modifications. As it stands today, collection agencies face a conflict that forces them to violate the primary federal law governing the industry (Fair Debt Collection Practices Act - FDCPA) in order to comply with the FCC's TCPA regulations. Clearly, the FCC did not intend to create this workability issue, but has yet to act to resolve its effect. Thousands of credit and collection companies are held hostage by the inconsistent requirements found in the FDCPA and the TCPA regulations.

I am requesting that you contact the FCC on my behalf and ask for a resolution to the workability issues caused by the TCPA modifications. This is a major operations obstacle for my business. Your help would be greatly appreciated.

Thank you and I look forward to working with you!

Sincerely,

Dwain James