

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)	CG Docket No. 05-338
)	CG Docket No. 02-278
Junk Fax Prevention Act)	FCC 05-206
Request for Comments)	
)	

TO: The Commission

**ACA INTERNATIONAL'S COMMENT REGARDING THE
JUNK FAX PREVENTION ACT OF 2005 PROPOSED RULE**

Rozanne M. Andersen, Esq.
ACA International
4040 W. 70th Street
Minneapolis, MN 55435

Andrew M. Beato, Esq.
Stein, Mitchell & Mezines, LLP
1100 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036

*ACA General Counsel
Senior Vice President of Legal and
Governmental Affairs*

ACA Federal Regulatory Counsel

January 18, 2006

ACA International (“ACA”) files this comment in response to the Commission’s proposed rules implementing the Junk Fax Prevention Act of 2005 (“JFPA”), which amended the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* Enacted on July 9, 2005, the JFPA rejected a previous Commission finding that a commercial facsimile is “unsolicited” even where an established business relationship (“EBR”) exists with the recipient. To this end, Congress mandated in the JFPA that unsolicited facsimile advertisements are subject to an EBR exception. Moreover, the JFPA clarified that a recipient’s prior express or invitation to receive a facsimile advertisement need not be in writing, thereby reversing the Commission’s previous determination that a written, signed document was required.

Part I of this comment provides background information on ACA, its members, and the important role they play in the domestic economy. Part II sets forth ACA’s comment on several topics requested by the Commission, that is, the recognition of the applicability of the EBR, the definition of the EBR, the notice of opt-out opportunity, requests to opt-out of future advertisements, and the definition of unsolicited advertisement.

I. Statement on ACA

ACA International is an international trade organization of credit and collection companies that provide a wide variety of accounts receivable management services. Headquartered in Minneapolis, Minnesota, ACA represents approximately 5,800 company members ranging from credit grantors, collection agencies, attorneys, and vendor affiliates.

ACA International
CG Docket No. 05-338

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 activity of ACA members is regulated primarily by the Federal Trade Commission 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 payments, including facsimiles.¹ In so doing, Congress committed the regulation of the recovery of debts to the jurisdiction of the Federal Trade Commission. 15 U.S.C. § 1692i.

ACA members range in size from small businesses with several employees to large, publicly held corporations. Together, ACA members employ in excess of 100,000 workers. These members include the very smallest of businesses that operate within a limited geographic range of a single state, and the very largest of multinational corporations that operate in every state. The majority of ACA members, however, are small businesses.

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).

**ACA International
CG Docket No. 05-338**

Approximately 2,000 of the company members maintain fewer than 10 employees, and more than 2,500 of the members employ fewer than 20 persons. Many of the companies are wholly or partially owned or operated by minorities or women.

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 hardware store, the retailer down the street, and your family doctor. 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 \$30 billion in 1999 alone, a massive infusion of money into the national economy. 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.

Facsimiles are a commonplace method today to communicate information between businesses and with consumers. ACA members rely on facsimiles to communicate with consumers and clients as a critical link in the process of recovering outstanding payments. Such communications are not unsolicited advertisements. Instead, they are an outgrowth of customers' business relationships with credit grantors and an extension of the process whereby creditors seek recovery payments for goods and services received by customers.

ACA itself uses facsimiles to communicate with its membership about meetings, upcoming online and telephonic seminars and other educational opportunities, membership information, product information, conferences and conventions, and other legitimate business matters. Consistent with the requirements of the JFPA, ACA has developed and implemented a detailed written policy to ensure that the provisions of the JFPA are followed when communicating by facsimile with the thousands of individuals constituting ACA's membership. The policy applies to all advertisement messages sent to ACA members. It addresses disclosure and opt out requirements, creates a do-not-fax list, and expressly prohibits unsolicited fax advertisements sent to non-ACA members.

II. ACA's Comment on the Proposed JFPA Rules.

A. Recognition of the Applicability of the EBR.

The Commission proposes to amend §64.1200(a)(3) to expressly recognize the applicability of the EBR exemption. The proposed change clarifies that the prior express permission to receive a commercial facsimile advertisement may be formed by means other than a signed written document by the recipient.

ACA believes that the proposed regulatory amendment is consistent with the requirements of the JFPA. It also addresses a previous failing of the Commission when it adopted an unsupportable regulatory construction in § 64.1200(a)(3)(i) which established an artificially high threshold to receive commercial facsimiles. Under that threshold, a sender of

commercial facsimiles would virtually never benefit from an EBR because the Commission had restricted it to only situations in which there was a prior express invitation or permission defined as a signed, written statement by the recipient. As noted, the JFPA correctly rejected the Commission's overly restrictive construction, and it is appropriate for the proposed rule to recognize as such.

The Commission requests comment as to whether it should establish parameters in the proposed rule to define what it means for a person to provide a facsimile number within the context of an EBR. ACA believes that the proposed rule should not define the parameters. The history in this proceeding reflects a tendency by the Commission to adopt restrictive interpretations that narrowly define the circumstances when sending a facsimile is permissible. ACA therefore is concerned that any attempt to define the parameters in the rule will be excessively restrictive and will, in all likelihood, fail to account for the variety of circumstances that a recipient of a facsimile may manifest his or her assent to receive the communication in the context of an existing EBR.

This concern particularly motivates ACA members that utilize facsimiles to contact debtors about existing payment obligations to credit grantors. Debtors sometimes provide facsimile numbers to a credit grantor within the context of an EBR, for example, on a credit application. This fact should be sufficient for the credit grantor, or a third-party debt collector acting on its behalf, to subsequently send a facsimile to the debtor for collection purposes. In

effect, the debtor has given prior express consent to receive the facsimile from the credit grantor or collector.

This outcome is consistent with the Commission's handling of wireless telephone communications by or on behalf of creditors in the context of the TCPA. The term "prior express consent" is not defined by the TCPA or the corresponding regulations. However, the Commission has stated that "[c]ommenters concur that debt collection calls are exempt as calls to parties with whom the caller has a prior or existing business relationship, and further argue that debtors have given prior express consent to such calls by incurring a debt."² In commenting specifically on prior express consent, the Commission concluded that "[i]f a call is otherwise subject to the prohibitions of § 64.1200, persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."³ Thus, the administrative record supports the conclusion that a debtor that releases his or her wireless number to a creditor or debt collector logically consents to be called at the number for purposes of attempting to recover an outstanding payment obligation. The same conclusion should result if the debtor provides a facsimile number.

² Report and Order, 7 FCC Rcd 8752, para. 37 (footnotes omitted, emphasis added).

³ Report and Order, 7 FCC Rcd 8752, para. 31 (footnotes omitted).

ACA International
CG Docket No. 05-338

The Commission also seeks comment to define what circumstances it should recognize that a facsimile number has been made available for public distribution. ACA believes there are some common sense criteria the Commission should consider, for example, whether the information was received directly or indirectly. There exists today a variety of location information services that mine public databases for information about consumers. Typically the information in the databases originates with the consumer. To the extent that a facsimile number is part of such a database, ACA believes that the proposed rule should recognize that the consumer has consented to the distribution of the number.

Mining public databases and the use of that information leads to the next area of comment requested by the Commission, specifically, should a sender of a facsimile that obtains the number from a public database or directory be required to make reasonable efforts to confirm with that entity that the information was intended by the recipient to be publicly available? Phrased in other words, if the facsimile number is public, should the sender confirm that the recipient intended for it to be public? ACA believes that the Commission should establish some safeharbors in this regard. Obviously if the information is gathered from a telephone book, there is a reasonable basis to believe it was intended to be public. Similarly, if the facsimile number is garnered from a public database or directory, it is reasonable to assume that it was intended to be public and need not be independently verified by the sender as such. These conclusions, ACA submits, are supported by the fact that

consumers today have been empowered to control the use and distribution of public and non-public personal information in numerous Federal and State laws such as the Gramm-Leach-Bliley Act (“GLB Act”).⁴

Next, the Commission asks how it can verify that a sender had an EBR created before July 9, 2005. This is because, under the JFPA, if an EBR was created prior to the July 9 enactment date *and* the sender obtained the facsimile number prior to that date, then the sender is not required to demonstrate how it obtained the facsimile number. ACA respectfully submits that the Commission should not endeavor to establish by rule the criteria that the Commission’s enforcement officers should follow to verify receipt of the number before the operative date. Resolving this verification issue is best addressed on a case-by-case basis as part of the well-established procedures used by the Commission to investigate potential violations of Commission rules.

⁴ 15 U.S.C. § 6801 *et seq.* The GLB Act, and implementing regulations by the Federal Trade Commission, prohibit the disclosure of nonpublic personal information about consumers to nonaffiliated third parties unless they satisfy privacy disclosure and opt out requirements. This objective is accomplished by: (1) creating and disseminating policies and practices regarding disclosure of private financial information; (2) prohibiting the disclosure of private financial information to nonaffiliated third parties, unless consumers are provided the right to “opt out” of such disclosure; and (3) requiring the establishment of safeguards to protect the security and integrity of private financial information. *See* 16 C.F.R. § 313.1(a)(1)-(3), 15 U.S.C. § 6801(b).

B. Definition of the EBR.

The Commission proposes to limit the definition of EBR in the proposed rules. The JFPA authorized the Commission to enact rules defining the EBR as coextensive with the definition in §64.1200, and to impose a time limitation on the length of the EBR. As a precursor to imposing a time limitation, Congress instructed the Commission to engage in a detailed, multi-step fact finding process “before establishing such limits.” The Commission now proposes to incorporate language into the rules to define the EBR as “a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without the exchange of consideration, on the basis of an inquiry, application, purchase or transaction, which relationship has not been previously terminated by either party.”

ACA believes that the Commission has not satisfied the various requirements imposed by Congress in order to establish limitations on the EBR, for example, examination of the complaint data regarding facsimile advertisements. At a minimum, this data should have been reviewed by the Commission and the results disclosed in the proposed notice in order for commenters to meaningfully respond to the proposed rule. As such, ACA believes that the proposed rule has not created the record envisioned by Congress in order to limit the EBR.

In the absence of any disclosure of the complaint data trends, ACA simply comments that the proposed definition is too limited because it is premised on a voluntary two-way

communication formed between a person and a business that has not been previously terminated by either party. Although debtor-creditor relationships are initiated voluntarily, in some instances, debtors may seek to cut off that relationship and cease communications either credit grantors or debt collectors acting by or on behalf of the credit grantors. Consequently, the proposed definition would give debtors the unilateral right to terminate the EBR even before the credit grantors have received payment for the goods and services delivered to the debtors. This would result in the Commission's rule acting to obfuscate efforts to recover payments from debtors.

ACA believes there is a simple resolution that heads off this unintended result. In the TCPA, the Commission clarified that, in the debt collection context, the EBR extends to debt collectors and cannot be unilaterally terminated by a debtor. The TCPA regulations extended the EBR to affiliated entities where the "subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate."⁵ In addition, the Commission's 1992 TCPA Order stated that "[w]hether placed by or on behalf of the creditor, prerecorded debt collection calls would be exempt from the calls to residences as: (1) calls from a party with whom the consumer has an established business relationship, and (2) commercial calls which do not adversely affect privacy rights

⁵ 47 C.F.R. § 64.1200(f)(3)(ii).

and which do not transmit and unsolicited advertisement.”⁶ More recently, the Commission stated in the 2003 TCPA Order that the act of terminating an EBR will extinguish the EBR for purposes of subsequent collection activity.⁷ Consequently, the Commission should confirm in this rulemaking that the EBR statements from the TCPA apply with equal force when engaging in facsimile communications to recovery debts.

C. Notice of Opt-Out Opportunity.

The JFPA amended the Commission’s rules to include a first-page notice on the facsimile to inform the recipient of the means to opt-out of future communications. In this regard, the Commission seeks comment on the shortest reasonable time within which a sender must comply with an opt-out request. ACA agrees with the Commission that the facsimile rules should adopt the thirty-day time limit now in effect for telephone solicitations under the

⁶ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 7 FCC Rcd 8752, para. 39 (footnotes omitted) (“1992 TCPA Order”). See also Notice of Proposed Rulemaking in the Matter of the Telephone Consumer Protection Act of 1991, 7 FCC Rcd. 2736, para. 16 (rel. April 17, 1992) (“In addition, where a company contracts with another company for debt collection services, the collection company acts on behalf of the company holding the debt. Under such circumstances the collection company becomes a party to the relationship between the company holding the debt and the called party and the ‘business relationship’ exemption would apply to allow an auto dialer call to former or current clientele”).

⁷ See e.g., 2003 TCPA Order, n.358 (“We also note 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”); *id.* n.421 (“Unlike debt collection calls, a consumer may ‘terminate’ an established business relationship with a company offering debt consolidation

TCPA. This time frame balances the abilities of large organizations with sophisticated operations to scrub facsimile lists in shorter periods of time as compared to the many small business members of ACA with less computer sophistication.

D. Requests to Opt-Out of Future Advertisements.

Comment is sought by the Commission on the proposed termination of the EBR exemption based on the sender's receipt of a do-not-fax request, even if the recipient continues to do business with the sender. In this regard, the Commission also asks for comment on whether the EBR termination would extend to any third-party agent of the sender.

ACA refers the Commission to its comment, *supra*, in Part II.C. ACA believes that the Commission must clearly state in the proposed rule or accompanying statement of basis and purpose that opt-out requests do not, in the specific context of debt collections, extinguish the EBR between the debtor and the credit grantor or a third-party debt collector acting on its behalf. In other words, an opt-out from facsimile communications should not be construed by the Commission as empowering debtors with the ability to terminate all other modes of communications (for example, written and oral communications). Unless the Commission acts to clarify this, there is a risk that debtors will have the false impression that effectuating an opt-out will terminate the relationship with the credit grantor and prevent future collection activity on his or her account.

services by requesting placement on a company-specific do-not-call list”).

The Commission also seeks input on whether do-not-fax requests that fail to follow the clear and conspicuous procedures in the notice should nonetheless be honored. ACA strongly believes that opt-out requests must follow the procedures in the notice. To conclude otherwise is to invite ambiguity and confusion. It would place significant – if not impossible – burdens on small and large businesses to track all communications with recipients and to integrate their communication systems to ensure, for example, that a consumer that chooses to communicate his or her opt-out orally as opposed to in writing will be honored.

In the context of collection activities which frequently rely on oral communications with debtors, a requirement that opt-outs be effectuated regardless of whether the recipient follows instructions would result in many opt-outs for debtors that may not want to opt-out. This is because it is not always clear during a collection call whether the debtor wants to opt-out or exercise some other right, such as the right to dispute a debt. If, for example, a debtor states that he or she does not want to talk about the debt now, is that an opt-out? What if the debtor informs the credit grantor during a collection call not to call anymore? Is that an opt-out? To avoid these ambiguities, the rule should require both senders and recipients to follow the procedures for opt-out as set forth in the notice.

E. Definition of Unsolicited Advertisement.

Finally, the Commission requests comment on the proposed amendment of “unsolicited advertisement” in §64.1200(f)(10). ACA does not object to the proposed change. However,

ACA believes that the Commission's final rule or accompanying order should clarify that debt collection facsimiles are not unsolicited advertisements, much the same as the Commission previously has concluded that debt collection telephone calls are not unsolicited advertisements. In the TCPA 1995 Reconsideration Order, the Commission stated that calls to recover payment are not "telephone solicitations" or "unsolicited advertisements" as those terms are defined in the TCPA.⁸ More recently, the Commission again stated that "debt collection calls constitute neither telephone solicitations nor include unsolicited advertisements."⁹

CONCLUSION

ACA appreciates the opportunity comment on the proposed amendments and implementation of the JFPA requirements.

⁸ See e.g., *1995 TCPA Reconsideration Order*, para. 17 ("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'").

⁹ *2003 TCPA Order*, para. 113 n. 358.

**ACA International
CG Docket No. 05-338**

If you have any questions, please contact Andrew M. Beato at (202) 737-7777 or
abeato@steinmitchell.com.

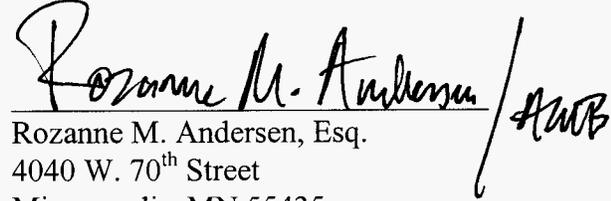
Respectfully submitted,

STEIN, MITCHELL & MEZINES, LLP



Andrew M. Beato, Esq.
1100 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036

ACA INTERNATIONAL



Rozanne M. Andersen, Esq.
4040 W. 70th Street
Minneapolis, MN 55435