

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of ) Rules and Regulations ) Implementing the Telephone ) Consumer Protection Act ) of 1991 ) ) ) _____ )	CG Docket No. 02-278
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**COMMENTS OF ROBERT BIGGERSTAFF ON THE  
PETITION OF ACA INTERNATIONAL**

Robert Biggerstaff (“Commenter”) hereby submits these comments as timely filed in opposition to the Petition of ACA International for Expedited Declaratory Ruling Seeking Clarification of the Rules under the Telephone Consumer Protection Act

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## I. INTRODUCTION

ACA has been down this road before.<sup>1</sup> Having filed numerous comments, petitions, and given no less than four *ex parte* presentations to the Commission in just this docket, ACA still hasn’t gotten what it wants – a complete blanket exemption from the TCPA for all debt collection calls.<sup>2</sup> ACA’s repeated requests and petitions demonstrate an unwillingness to accept both the law as Congress wrote it and the regulations duly enacted by the Commission. This maneuvering has kept this matter open far too long and the Commission should take this opportunity to speak clearly, decisively, comprehensively, and unambiguously.

The Commission and others have often referred to the TCPA as a regulation of “telemarketing” practices, which the TCPA certainly is. But it must not be forgotten that the TCPA is broader than that.<sup>3</sup> In *addition* to its proscriptions of certain telemarketing practices, it also

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<sup>1</sup> In 2004, ACA asked the Commission “[i]n 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.” *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*, at 1 (hereinafter “ACA Comments”).

<sup>2</sup> *Id.*

<sup>3</sup> Worth noting is the fact that the TCPA was a combination of several bills that dealt with different telephone privacy topics, which were merged together before passage. *See*, The Telephone Advertising Consumer Rights Act (HR. 1304, 102<sup>nd</sup> Congress, First Session (1991)) the Telephone Privacy Act (HR. 1589, 102<sup>nd</sup> Congress, First Session (1991))

proscribes certain practices using telephones and telephone lines *outside* of the telemarketing context. These provisions were in large part authored by Senator Hollings in 1991 as S. 1462, which became the TCPA, but which was originally introduced as The Automated Telephone Call Protection Act of 1991 (S. 1462, 102nd Congress, First Session (1991)).<sup>4</sup> This bill and the motivation behind it was largely unrelated to telemarketing. This non-telemarketing origin of the TCPA must not be forgotten or overlooked.

**A. Debt collectors' complaints about the effect of the TCPA are grossly overstated.**

ACA grossly overstates its plight and the effect of compliance with the TCPA. "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." *ACA Comments* at 8 (emphasis in original). This is of course sheer hyperbole. The purpose of the TCPA's restriction on prerecorded calls to cell phones was to stop the calls *regardless of the content*:

This bill makes no[] distinction based on the content of the speech. ***It bans automated calls, regardless of whether they are used for commercial, political, or charitable purposes.*** The bill does not ban the message; it bans the means used to deliver that message-the computer voice. . . .

137 Cong. Rec. S9840-02 (Statement of Sen. Hollings) (emphasis added) The fact that prerecorded debt collection calls to cell phones fall within the prohibition merely prohibits those prerecorded calls - not debt collections. To say that the TCPA "prevents" collection of lawful debts is like saying

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The Telephone Advertising Consumer Rights Act (S. 1410, 102<sup>nd</sup> Congress, First Session (1991)); The Telephone Advertising Consumer Rights Act (S. 1442, 102<sup>nd</sup> Congress, First Session (1991)); The Automated Telephone Call Protection Act of 1991 (S. 1462, 102<sup>nd</sup> Congress, First Session (1991)); The Prerecorded Solicitation Consumer Rights Act (S. 1719, 102<sup>nd</sup> Congress, First Session (1991)).

<sup>4</sup> See 137 Cong. Rec. S18317-01 (statement of Sen. Hollings, noting that S. 1462 has been merged with other bills regarding telemarketing); 137 Cong. Rec. S9840-02 (July 11, 1991)(statement of Sen. Hollings, introducing The Automated Telephone Call Protection Act of 1991).

the federal wiretapping laws prevent collection of lawful debts because debt collectors can't conduct wiretaps to find the debtor's assets. If such arguments were legitimate, debt collectors would argue that laws against assault prevent collecting a lawful debt because they can not break the debtor's kneecaps. Nothing blocks the collection of the lawful debt. Lawful debts can still be collected in a myriad of ways -- but not by prerecorded messages to cell phones, not by prerecorded or autodialed calls to hospital emergency rooms and other emergency numbers, and not by anonymous prerecorded message calls.

**B. The notion that debt collectors can not comply with both the TCPA and FDCPA is false.**

ACA claims that “[a]s 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.” *ACA Comments* at 5. This is disingenuous at best. They are not “forced” to violate the FDCPA in order to comply with the TCPA. They can make their non-telemarketing calls with a live person instead of a prerecorded message, and violate neither the TCPA or the FDCPA. They can *easily* comply with both laws. There is absolutely no justification for any exemption from the TCPA for debt collection calls. To the extent debt collection calls are not solicitation, the solicitation laws and the portion of the TCPA dealing with solicitation calls will not apply to them. However, the *other* portions of the TCPA which apply to both solicitation and non-solicitation calls alike, certainly will apply.

When two different statutes apply to an act, the path to compliance is to comply with both statutes if possible, before seeking an exemption. Compliance with both the FDCPA and the TCPA is trivial – *simply call with a live person on the phone.*

Furthermore, providing the name of the caller will not violate the FDCPA unless disclosing

the name of the company will disclose that the call is a debt collection call.<sup>5</sup> Many debt collectors have names that do *not* reveal the nature of the call, and therefore ACA's request for a blanket exemption for all debt collection calls from the TCPA's identification requirements is overly broad, unreasonable, and unnecessary.

As a real world example, I have received prerecorded debt collection calls from two ACA members in the recent past.<sup>6</sup> Both claimed that they could not tell me the name of their company, ostensibly because it would violate the FDCPA. The names of these companies were "NCO Financial" and "West Asset Management." Neither of these names discloses that a call is a debt collection call. Therefore they had no justification for not providing their name in the prerecorded message.<sup>7</sup>

The truth is that debt collectors want to remain anonymous and "trick" people into calling their 800 number. When I called the number, they wanted my "account number" and I told them I don't know who you are so I don't know my account number. Then they wanted my social security number, which of course I am not going to give when it is in response to an anonymous prerecorded call from a company that refuses to give me their name or address. Notably, even if I had given them my name or SSN, it would not have helped as since I was not the debtor, I am not in their database, and I could not stop the calls.

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<sup>5</sup> In other proceedings, the ACA has claimed, without evidence, that "many ACA members have state registered names including words that relate to their business, for example, 'ABC Collections, Inc.' or 'ABC Recovery, Inc.'" *Comments of ACA International*, Filed January 10, 2005 before the Federal Trade Commission. Even if some debt collectors have these types of names, it does not justify an exemption from identification requirements for others without such names.

<sup>6</sup> I was not the debtor. They had a wrong number.

<sup>7</sup> Oddly enough, by simply looking up the 800 number that was provided in the message on the Internet, it was easy to determine that the call was a debt collection call.

### **C. Debt collectors regularly violate the law.**

ACA paints a rosy picture of its industry, stating “company-members of ACA comply with applicable federal and state laws regarding debt collections.” This statement is false. As a first hand example, I have personally received debt collection calls from ACA members (NCO Financial and West Asset Management) in just the past few months which violated federal law.<sup>8</sup> Even if ACA’s statement were accepted as true with respect to ACA members, many, *many debt collectors are not ACA members*. The files of courthouses around the country are legion with lawsuits and judgments against debt collectors for abusive, fraudulent and illegal debt collection practices. Even if ACA members were the pillars of society and had strict compliance with the law, the Commission must remember that any exemption to the TCPA rules for debt collection calls will apply to *all* debt collectors, not just ACA members. Any relaxing of the rules or creation of exemptions will be exploited by the unscrupulous and unprincipled (who as a class are rife in the debt collection industry) and not merely limited to purported “responsible” members of the industry.

## **II. ARGUMENT**

### **A. Different provisions of the TCPA were enacted with different scopes of coverage and for different reasons.**

It is important to remember, that there are four distinct and independent portions of the TCPA that ACA’s Petition addresses. In the Petition, ACA mixes these up with citations to legislative history about live telemarketing calls to support its requested exemption from the restrictions on non-telemarketing prerecorded calls. ACA cites legislative history about prerecorded solicitation calls to residences as its justification for an exemption on non-solicitation prerecorded calls to cell phones

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<sup>8</sup> I was not the debtor, but they were calling me trying to reach someone else. These calls were made repeatedly even after informing them that I was not the person they wanted to reach and that they had a wrong number. They did not stop until I threatened legal action.

where the recipient is charged to receive the call. The Commission must not be deceived by this sleight of hand. 1) Prerecorded telemarketing calls to residences, 2) prerecorded calls of any type to cell phones, 3) autodialed calls of any type to cell phones, and 4) identification requirements in all prerecorded calls to homes, businesses, and cell phones alike, are the four independent portions of the TCPA at issue here, and each must be examined separately and in the context of the correct Congressional intent.

In addition, there are other portions of the TCPA that ACA has not sought exemption from, but their *justification* for the exemptions they do seek, would necessarily give them exemptions from other provisions. The Commission must carefully examine any clarification it makes for “unintended consequences” of that clarification.<sup>9</sup>

**B. Debt collectors use prerecorded calls in ways not disclosed to the Commission.**

***1. Debt collectors knowingly make prerecorded calls to non-debtors.***

ACA claims “[Debt collection] calls are not random or sequential. They are limited to customers of creditors who have received a service or product without payment.” Pet. at 5. This is patently false, as debt collectors – including ACA members – *frequently use prerecorded messages to call people who are not the debtor*. Indeed, ACA admits in its filings in this docket as well as before the FTC, that “debt collectors have no way of knowing whether the prerecorded message will be received by a person other than the debtor.” *ACA Comments* at 6-7.

In addition to reaching non-debtors in error, *many* debt collectors also *intentionally* call non-debtors in these attempts. For example, one tactic debt collectors regularly employ is to use multiple

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<sup>9</sup> There is already such confusion, as ACA constantly claims the Commission intended to exempt debt collection calls “from the autodialer restrictions” without noting that these restrictions also proscribe autodialer calls to 911 lines, hospital rooms, and other emergency numbers. The Commission should not parrot ACA’s careless phraseology.

databases to mine for potential telephone numbers of the debtor or a debtor's family, and then program prerecorded message players to call dozens of numbers looking for one debtor. In some cases, debt collectors will create a list of phone numbers of everyone with the same last name as the debtor in a large area, then program a dialer to call all of these numbers with a prerecorded message as a "shotgun approach" to debtor hunting. Debt collectors also regularly use their dialers and prerecorded messages to call the phone numbers of the homes merely on the same street as the purported address of a debtor.

**2. *Prerecorded calls are made over legally unenforceable debts.***

A disturbing practice is "scavenger" or "zombie" collectors who buy up old, *legally unenforceable* debt, and try to bring it "back from the dead" and bully or harass consumers into making payments they are not legally obligated to make. These unscrupulous collectors use anonymous prerecorded message calls as part of their arsenal. When considering the privacy impact of these calls, the Commission must take into account the privacy rights not just of non-debtors, but of the debtor himself when that debt is no longer legally enforceable.

**C. *Consumers who receive these prerecorded calls but who are not the debtor have no way out.***

Consumers who are not the debtor are stuck in a Kafkaesque world of illegal prerecorded calls (to homes and cell phones) they can't get out of. These prerecords are being made without identifying the caller.... they are told "please call 800-555-5555" for important information." Or sometimes "it is urgent that you call us at 800-555-1212 about an important matter." When the consumer calls, the company will not identify itself. If the company says they are looking for "Mary Smith" and the consumer says "you have a wrong number" the company is under no obligation to

stop calling<sup>10</sup>, and instead will continue calling and harassing the consumer, thinking that the consumer is lying and “covering” for the debtor.

Even if a debt collector says they will stop calling, there is *no way whatsoever* for the consumer to enforce this because the debt collector is never identified. The consumer has no way to identify repeat calls from the same collector since the collector will not identify themselves.

This is bad enough with a live caller, but when these calls are coming from a prerecorded message, particularly to a cell phone, the level of frustration pushes even a calm consumer to the boiling point. Couple this irate response of a non-debtor receiving anonymous, harassing prerecorded messages, with a cell phone while driving, the result could be a fatal accident.

ACA noted that “[f]or 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).” *ACA Comments* at 10 (emphasis added). How can a consumer contact the caller *in writing*, when the consumer is not the debtor and the caller will not identify itself in the calls the consumer wants to stop?

#### **D. The purposes of the TCPA.**

Almost like a mantra, ACA chants over and over “we are not telemarketers.... we are not doing telemarketing” as if this incantation should exempt them for the entirety of the TCPA. Unfortunately for ACA, this fails as the TCPA is not just about “telemarketing.” It is also about use of machines and communication methods that Congress has restricted and/or prohibited *regardless* of whether they are used for “telemarketing,” debt collecting, surveys, or political campaigning:

Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed;

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<sup>10</sup> The FDCPA only provides that the debt collector stop calling if notified *in writing* which a consumer can not do if the company will not identify itself to the consumer who is not the debtor.

they hound us until we want to rip the telephone right out of the wall.

The telephone is a basic necessity of life. You cannot get along in this country if you do not have a telephone in your home. However, owning a telephone does not give the world the right and privilege to assault the consumer with machine-generated telephone calls. These calls are a nuisance and an invasion of our privacy. . . .

This bill makes no[] distinction based on the content of the speech. ***It bans automated calls, regardless of whether they are used for commercial, political, or charitable purposes.*** The bill does not ban the message; it bans the means used to deliver that message-the computer voice. . . .

The bill also contains protections for emergency telephones and cellular and paging systems from these automated calls. These prohibitions are essential to ensuring that the safety of lives and property are not put at risk by these machines. These computers often call and then do not hang up the line. In some cases, the computer will ramble on for a full minute or longer after the person called hangs up. This can prevent the person called from using the telephone at all, which is of special concern in emergency situations.

137 Cong. Rec. S9840-02 (Statement of Sen. Hollings) (emphasis added). ACA argues that their calls “do not involve advertising or soliciting” and that “this single fact distinguishes the communications of ACA members from those of ***telemarketers*** subject to the TCPA.” Pet. at 5-6 (emphasis added). This demonstrates ACA’s fatal lack of understanding of the TCPA. While portions of the TCPA are aimed at “telemarketers” the ***majority***<sup>11</sup> of the TCPA’s restrictions on autodialers and prerecorded messages applies to the use of such devices ***regardless*** of whether they are used for telemarketing, debt collecting, religious, or political purposes.

It is true that different parts of the TCPA can apply to different types of calls. Some portions of the TCPA only apply to prerecorded message calls if they contain certain content. Some parts of the TCPA, however, apply to ***every*** prerecorded call ***regardless*** of content and regardless of how they are dialed. For example, the identification requirement of 227(d)(3)(A) apply to all prerecorded

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<sup>11</sup> Seven provisions of the TCPA apply to autodialers and/or prerecorded messages without regard to whether the call is a solicitation or not, while only three provisions of the TCPA apply to such calls only if they are a “telemarketing” call.

message calls regardless of content, regardless of purpose, regardless of whether they are placed for an emergency purpose, and regardless of whether the calls are placed by an autodialer. The line-seizure requirement of 227(d)(3)(B) applies to all prerecorded message calls – regardless of content, regardless of purpose, regardless of whether they are placed for an emergency purpose, and regardless of whether the calls are placed by an autodialer. Congress gave the FCC room to create limited exemptions from *other* parts of the TCPA, but did not give the Commission that authority with respect to the requirements of 227(d)(3).

Other TCPA requirements apply to all prerecords and autodialed calls, with limited statutory exceptions for “emergency purposes” or calls made with the “prior express consent” of the recipient. This prohibition applies to autodialed *or* prerecorded message calls to any “emergency line” or to “the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment” and this applies to prerecorded calls regardless of how they are dialed. The Commission was not empowered to create *any* exemptions to these provisions.

**E. Whether debt collectors use autodialers or not to make prerecorded calls is irrelevant to the prerecorded call provisions of the TCPA.**

ACA apparently misreads the TCPA because it argues that prerecorded debt collection calls should be exempted from the TCPA because debt collectors dial specific phone numbers with their dialers and not “random” or “sequential” numbers. This is irrelevant to the prerecorded message prohibition because the TCPA imposes the restrictions on calls delivering a prerecorded message *regardless* of whether or not an autodialer is used. *See* 227(b)(1)(A); 227(b)(1)(B); 227(d)(3). The only provision of the automated equipment portion of the TCPA that a debt collector using a prerecorded message would escape if it were allowed an exemption for a debt collector’s use of a predictive dialer would be 227(b)(1)(D) which prohibits using an autodialer “in such a way that two

or more telephone lines of a multi-line business are engaged simultaneously.”

More importantly, however, the Commission has already declared predictive dialers to be “automated telephone dialing equipment.” No further inquiry is needed.

**F. Authority of the Commission to create exemptions was limited by Congress.**

The Commission was empowered with a limited authority to create certain narrow exemptions, but only from two narrow clauses of the TCPA dealing with autodialers and prerecorded message calls. The portions of the TCPA where the Commission has this limited authority are the restrictions in 227(b)(1)(A)(iii) and 227(b)(1)(B). The fact that Congress identified these *and only these* provisions for further exemptions by the Commission shows dispositively that the Commission was precluded by Congress from creating exemptions from other portions of the TCPA.<sup>12</sup>

**I. 227(b)(1)(A)(iii)**

This provision of the TCPA makes it unlawful to make any call (other than emergency purposes or with express consent) using *either* any automatic telephone dialing system *or* an artificial or prerecorded voice “to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.” The Commission was authorized to consider some limited exemptions to this subsection, but Congress placed explicit conditions on the exemptions that the Commission could create. The Commission could exempt from this section “calls to a telephone number assigned to a cellular telephone service *that are not charged to the called party...*” Or stated conversely, there is a statutory prohibition on the Commission in the TCPA itself, that prohibits the Commission from exempting from 227(b)(1)(A)(iii) any calls to a

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<sup>12</sup> “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Rodriguez v. United States*, 480 U.S. 522, 525 (1987).

telephone number assigned to a cellular telephone service that *are* charged to the called party. This is irrespective of the content or purpose of the calls. Exempting debt collection calls from this provision would be a violation of the TCPA itself. If a debt collector makes a debt collection call using an autodialer or prerecorded message “to any service for which the called party is charged for the call” that call violates the TCPA and the Commission has no authority to exempt such a call from the provisions of 227(b)(1)(A)(iii).<sup>13</sup> The gravamen of this portion of the TCPA is the cost shifting – completely and totally irrespective of the content of the calls, be they telemarketing calls, debt collection calls, or calls of a political or religious nature. Were the Commission to make such an illegal exemption, a Hobbs Act challenge would almost certainly follow.

## **2. 227(b)(1)(B)**

This provision makes it unlawful to make any call (other than emergency purposes or with express consent) using an artificial or prerecorded voice “to any residential telephone line using an artificial or prerecorded voice to deliver a message.” Using an autodialer is irrelevant to this provision. The Commission was authorized to consider some limited exemptions to this section, but Congress placed explicit conditions on the exemptions that the Commission could create. The Commission could exempt from this section “calls that are not made for a commercial purpose; and (ii) such classes or categories of calls made for commercial purposes as the Commission determines— (I) will not adversely affect the privacy rights that this section is intended to protect; and (II) do not include the transmission of any unsolicited advertisement.” Or stated conversely, there is a statutory

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<sup>13</sup> To accomplish this outcome, the Commission would have to conclude that a debt collection call fell within one of the existing statutorily permitted exceptions to this subsection. That is, the Commission could declare that all debt collection calls are for “emergency purposes” or are made with “express consent” (such as if the Commission were to conclude, as urged by ACA, that incurring a debt constituted “express permission or invitation” to receive prerecorded and autodialed calls). The consequences of such a declaration would be absurd, as this would also give debt collectors *carte blanche* to call hospital rooms, 911 centers, even operating rooms in hospitals in the middle of an operation.

prohibition on the Commission in the TCPA itself, that prohibits the Commission from exempting from 227(b)(1)(B) any calls “made for a commercial purpose if they either 1) contain an “unsolicited advertisement” or 2) “will adversely affect the privacy rights that this section is intended to protect.”<sup>14</sup>

We can for the moment, assume *arguendo* that debt collection calls are made for a commercial purpose and do not contain an “unsolicited advertisement.”<sup>15</sup> The gravamen of this portion of the TCPA however, is whether such calls “adversely affect the privacy rights that this section is intended to protect.”

ACA argues that a debtor should “expect” calls from a debt collector, in that the debt forms an EBR with the debtor, and thus it does not affect the privacy rights of the debtor to make prerecords to the debtor’s home. Assuming *arguendo*, that this is true, what about rights of non-debtors called by debt collectors with these machines? These are innocent bystanders. Certainly *their* privacy rights to be free of these automated calls are being violated. They never incurred the debt and have no connection with the debtor other than possibly a similar name, similar address, or even just being unlucky enough to have a wrong telephone number.<sup>16</sup>

Furthermore, even the debtor has a privacy right to be free of calls attempting to collect a debt if that debt is legally expired. ACA has a lot of rhetoric about the benefits to society of

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<sup>14</sup> The Commission has exercised this authority, for example by finding that calls from a charity to solicit donations are not “for a commercial purpose” thus the Commission was empowered to create, and did create, an exemption for such calls.

<sup>15</sup> See, 1995 Order at ¶17.

<sup>16</sup> Most certainly ACA will argue that such calls reaching non-debtors are rare. The known practices of some debt collectors using shotgun tactics to locate debtors belie such a contention. But even if it were true, rarity is no excuse to rape the privacy rights of the unfortunate few for the financial expediency of the debt collectors. If there were such a paucity of these calls, then the debt collectors will have very few TCPA cases filed and pay very little for the “privilege” of making prerecords to their stale and incorrect phone numbers. This would be a proper incentive to debt collectors to ensure they are calling correct phone numbers, and to not be sloppy and intruding into the homes of innocent people.

collecting unpaid debts. Well, there are statutes of limitation on such causes of action because at some point in time, finality of things is a benefit to society too. The statute of limitations makes a convenient bright-line test after which the debtor can freely ignore a debt collector, and once again have the same privacy in his home that every other consumer has. A debt collector calling a debtor with a prerecorded machine after the statute of limitations has run on the debt or after the debt is otherwise discharged (i.e. bankruptcy or court order) clearly violates the privacy rights of the debtor.<sup>17</sup>

**3. *Financial effect on debt collectors was excluded from the considerations the Commission was permitted to consider***

In considering exemptions, Congress specified certain criteria, most importantly the provision to protect “interest of the privacy rights [the TCPA] is intended to protect.” This “privacy interest” is cited over a dozen times in the TCPA itself. It is of paramount importance.

If ACA members want the “efficiencies” of making prerecorded calls, then they have to accept the liabilities of making such calls and reaching innocent consumers. If they don’t want the liabilities, they can make the calls using live operators. It is *their* choice.

**G. There can be no EBR exemption when a debtor calls someone who is not the debtor.**

It is self-evident that if a debt collector wishes to invoke an EBR based on the debt, there can be no EBR exemption when a debtor calls someone who is not the debtor.

**H. EBR-based debt collection calls should be limited to the lifetime of the debt.**

The Commission noted that servicing a debt is a form of an EBR, so EBR-based exemptions could apply to debt collection calls. The Commission also noted that a “pure” debt collection call

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<sup>17</sup> If the statute of limitations does not provide such a cutoff, then I ask ACA what would? How long after a debt is *legally unenforceable* should a debt collector be allowed to make prerecorded calls? Until death of the debtor?

was not a “solicitation” so the solicitation-based rules would not apply. Of course, such an EBR can not last forever. There is an important limitation that must be recognized. An EBR (and consequently any EBR-based exemptions) should only exist as long as the debt can legally be enforced.

The appropriateness of this reasonable limitation is easily seen in the light of a disturbing practice of “scavenger” or “zombie” collectors who buy up old, *legally unenforceable* debt, and try to bully and harass consumers into making payments they are not legally obligated to make. An EBR should not apply to a debt collection call that is so old that it is past the statute of limitations and can not legally be enforced. Since the Commission has declared that the EBR is based on the collection of a legal debt and a debtor can not sever an EBR with the creditor, it is only reasonable that if the creditor wants to “impose” an EBR-based on the enforceable debt, that the EBR must end when the debt is no longer legally enforceable against the debtor.

**I. Identification of the caller in all prerecorded calls is necessary.**

In the recent JFPA order, the Commission noted that membership organizations must put opt-out notices on any fax advertisement sent to fax numbers of their members, in no small part because some of these faxes are received by nonmembers who may have no way to identify or contact the organization. The same logic applies to prerecorded calls, regardless of whether they are made by debt collectors or made within the context of an EBR or made with prior express consent. Someone who has an EBR or who has given consent must be told the identity of the entity making the prerecord in order to know that there is an EBR or permission. Likewise, a debtor deserves to know who is making prerecorded calls. But *even more so*, an innocent consumer deserves this information and Congress explicitly said they are legally entitled to it. Indeed, sometimes these machines can malfunction and without supervision, end up making calls over and over to the same number. *See,*

*e.g., Irvine v. Akron Beacon Journal*, 770 N.E.2d 1105, 2002 TCPA Rep. 1045 (Ohio App. 2002) (autodialing system malfunctioned often, lost data, and caused many repeated calls to plaintiff). Without identification of the caller, how is a consumer supposed to know who to contact to stop the calls?

**J. Identification of the caller in all prerecorded calls is legally mandated.**

Congress placed a mandatory requirement in the TCPA that all prerecorded telephone calls must identify the caller. There are no exceptions. This is regardless of the purpose or content of the call. Even emergency calls must meet this requirement. If the Commission were to conclude that debt collectors do not have to comply with this mandatory statutory provision, such a ruling would be voided *abi initio* by a reviewing court, and such a court challenge would be a certainty. The Commission must expressly and unambiguously reject such an improper result. If the FDCPA prohibits a debt collector from identifying themselves so that it can't make prerecords in compliance with the TCPA, then that debt collector can call with a live person and not with a prerecorded robot. The debt collector easily complies with both statutes.

**K. Express consent can not be “implied.” Incurring a debt is not “express” permission for a debt collector to make prerecorded calls.**

The notion that by incurring a debt, a person gives express consent to be called with recorded messages is simply too much of a stretch. Incurring a debt has been recognized as creating an EBR, but it does not rise to “express permission or invitation” which is a different concept and was treated independently by Congress. The Commission has stated many times that merely distributing a phone number in the context of a business relationship is an EBR, but that distribution can not be construed as express permission to make prerecorded calls or to send junk faxes.<sup>18</sup> It would fly in the face of

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<sup>18</sup> *Jemiola v. XYZ Corp.*, 802 N.E.2d 745, 126 Ohio Misc.2d 68, 2003 TCPA Rep 1252 (Ohio C.P. 2003) .

the well settled legal definition of “express:”

Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. *Minneapolis Steel & Machinery Co. v. Federal Surety Co., C.C.A.Minn.*, 34 F.2d 270, 274. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with "implied."

Debts are incurred with documents – the consumer applies for credit and fills out an application. In this process, a creditor can *easily* “set forth in words” that the consumer is giving the creditor and any successors express permission to call the debtor using an autodialer or prerecorded message at the provided telephone number (or any other number). That makes sense and achieves the proper result with full disclosure, in comport to the intent of Congress, and without torturing the English language.

**L. There can not be different definitions of “automatic telephone dialing system” based on the content or purpose of the call as a debt collection call.**

ACA seeks to have its predictive dialers declared not to be “automatic telephone dialing system” yet the Commission has already defined that term to include predictive dialers. Pet. at 20. It is logically impossible for the term “automatic telephone dialing system” to apply to a predictive dialer used for telemarketing calls on Monday and not have that term apply to the exact same device when used on Tuesday for debt collection calls.<sup>19</sup> To do so would be so arbitrary and capricious as to throw the entire Commission interpretation in this area open to question.

### **III. SUGGESTED FINDINGS**

In adjudicating the ACA Petition, the Commission should make the following reasonable and necessary findings to guide the adjudicative process and the public:

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<sup>19</sup> Some call centers do exactly that, shifting their mix of work from outbound telemarketing to outbound debt collection at different times, utilizing the exact same equipment for both duties.

- a. Debt collection calls are made for a commercial purpose.
- b. Debt collection calls are not “unsolicited advertisements” or “telephone solicitations” only if the call is limited to the collection of an existing debt and the call does not introduce other products, goods or services, and the call is not part of an overall marketing campaign.
- c. Debt collection calls using prerecorded messages or artificial voices received by someone other than a debtor do “adversely affect the privacy rights that the TCPA is intended to protect.”
- d. Debt collection calls using prerecorded messages or artificial voices received by the debtor do “adversely affect the privacy rights that the TCPA is intended to protect” if the debt is legally unenforceable (i.e. if the statute of limitations has run or the debt is discharged).
- e. Debt collection calls using prerecorded messages or artificial voices received by the debtor do “adversely affect the privacy rights that the TCPA is intended to protect” if the call is made to a telephone number that was not a telephone number provided to the creditor by the debtor for contact regarding the debt.
- f. Prerecorded and autodialed calls received within the context of an EBR but received on a cell phone or at a phone number not provided to the caller within the context of the EBR, do “adversely affect the privacy rights that the TCPA is intended to protect.”
- g. An Established Business Relationship (“EBR”) exists between the debtor and the creditor and the creditor’s agents, for purposes of the TCPA, only as long as the debt on which the EBR is based is legally enforceable.
- h. Debt collection calls using autodialers that exceed the abandon guidelines do “adversely affect the privacy rights that the TCPA is intended to protect” regardless of whether they are received by the debtor or by a third party.
- i. Congress proscribed all calls (other than a call made for emergency purposes or made with the prior express consent of the called party) using either an autodialer or an artificial or prerecorded voice to emergency numbers, health care facilities, elder care facilities, etc. The Commission was not empowered to create exemptions from this prohibition.
- j. Congress proscribed all calls (other than a call made for emergency purposes or made with the prior express consent of the called party) using an autodialer or an artificial or prerecorded voice to residential telephone lines, and such calls can only be exempted by the Commission if they are 1) not made for a commercial purpose or 2) if they are made for a commercial purpose but do not include an “unsolicited advertisement” and do not “adversely affect the privacy rights that the TCPA is intended to protect.”

- k. Congress prohibited the use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously, and the Commission is without authority to alter that explicit statutory command or create exemptions to that provision.
- l. Congress prohibited all calls using either an autodialer *or* an artificial or prerecorded voice to any service, including cell phones, where the called party was charged for receiving the call and the Commission is without authority to create an exemption to any call using either an autodialer *or* an artificial or prerecorded voice, where the called party was charged for receiving the call, regardless of the content of the call.
- m. Congress required all calls using an artificial or prerecorded voice to have proper identification and to release the line within 5 seconds after hanging up, and the Commission is without authority to alter that explicit statutory command or create exemptions to that provision.
- n. The authority delegated to the Commission under the TCPA and other sections of the 1934 Comminations Act, expressly authorizes the Commission to regulate use of telephone equipment, including automated devices and telephone autodialers so that “predictive dialers” may be regulated by Commission rules with restrictions identical to the restrictions the TCPA’s statutory language places on the use of an “automatic telephone dialing system” and that these Commission rules are promulgated under and consistent with the subject matter and policies of 47 U.S.C. § 227(b).

#### **IV. CONCLUSION**

ACA’s entire Petition is based on two fatal flaws. The first is asking for exemptions from provisions of the TCPA that the Commission has no power to grant. Congress gave the Commission the authority to create limited exemptions to certain provisions of the TCPA, and intentionally withheld that authority from other provisions. The second fatal flaw, using ACA’s own language, is that “debt collectors have no way of knowing whether the prerecorded message will be received by a person other than the debtor.” *ACA Comments* at 6-7. All of ACA’s arguments (e.g. permission, EBR, privacy) are based on a flawed premise of the prerecorded and autodialed calls only reaching the debtor. ACA completely ignores the millions of prerecorded and autodialed calls made by debt collectors that are received by innocent consumers who are not the debtor. Because ACA has failed to address the nuisance and privacy invasions from these prerecorded and autodialed calls ACA

admits debt collectors make to innocent consumers, it has as a matter of law failed to justify the relief it seeks.

ACA has a simple solution in its own hands – it can make these calls with a live human being that can communicate with the called party instead of a robot. Nowhere in the history of the TCPA or any other statute is there a guarantee to the debt collection industry that it shall be allowed the use of any communication medium it wants to use to reach a debtor. While *solicitation* laws may not apply to debt collectors, laws regarding trespass, nuisance, and invasion of privacy do apply. Congress stated explicitly in the TCPA that:

Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, ***regardless of the content or the initiator of the message***, to be a nuisance and an invasion of privacy.

47 U.S.C. 227, statement of findings ¶10 (emphasis added). The portions of the TCPA that are limited to solicitation calls may not apply to debt collection calls, but the portions of the TCPA regarding the use of prerecorded messages and autodialers were enacted to restrict a trespassory nuisance and invasion of privacy caused by the use of those devices, and these provisions of the TCPA apply to all such calls regardless of content.

Respectively Submitted, this the 9<sup>th</sup> day of May, 2006.

*/s/ Robert Biggerstaff*