Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

COMMENTS OF PORTFOLIO RECOVERY ASSOCIATES, LLC

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EXECUTIVE SUMMARY

In its *NPRM*, the Commission proposed to harmonize its regulations concerning prerecorded telemarketing calls with those of the FTC by, among other things, requiring callers to obtain prior written consent for such calls. Portfolio Recovery Associates, LLC, a leader in the debt recovery industry, understands this objective but is concerned that the rule changes the Commission has proposed would inadvertently impose a prior written consent requirement on a broader range of calls than the Commission intended, including on *autodialed* and *prerecorded informational* calls to mobile telephones, which are commonly employed by school boards, non-profit organizations, candidates for political office, and businesses. The Commission's proposed rule also could be misconstrued in a manner contrary to established precedent and, absent clarification, interfere with lawfully-placed calls by debt recovery companies and others.

Fortunately, the Commission can easily correct these oversights. *First*, the Commission should modify the specific language of its proposed rule to clarify that any prior written consent requirement applies only to "telemarketing" or "telephone solicitation" calls made using an artificial or prerecorded voice. *Second*, the Commission should clarify that it does not intend its proposed rule to undermine settled policy in its recent declaratory ruling in *ACA International*. The Commission held in that case that debt collection calls do not include a "telephone solicitation" or "unsolicited advertisement" and that such calls, when placed to mobile telephones, are made with the "prior express consent" of the called party if that called party provided his or her mobile telephone number to the underlying creditor. *Third*, the Commission should provide debt collectors with a modest and appropriate amount of flexibility to convey beneficial repayment option information to consumers in the absence of prior written consent. The Commission can do this by clarifying that debt collection calls that offer flexible repayment

programs to consumers do not contain a “telephone solicitation” or “unsolicited advertisement” because their ultimate purpose is to assist consumers in resolving their debt issues.

These targeted clarifications will allow the Commission to better accomplish its stated objective—the harmonization of its rules with those of the FTC—without undermining that objective.

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Portfolio Recovery Associates, LLC ("PRA"), by counsel, hereby submits these comments in response to the Commission's *Notice of Proposed Rulemaking* in the above-referenced docket.[1] As explained more fully below, the Commission should:

(1) adjust the language and formulation of its proposed rule to avoid unintended interference with the lawful transmission of autodialed and informational (*i.e.*, non-telemarketing) prerecorded voice calls to mobile telephones and certain other locations specified in Section 64.1200(a) of the Commission's rules;

(2) confirm that the core holdings in *ACA International*—that debt collection calls do not include a "telephone solicitation" or "unsolicited advertisement" and that such calls, when placed to mobile telephones, are made with the "prior express consent" of the called party if that called party provided his or her mobile telephone number to the underlying creditor—is unaffected by the proposed rule; and

(3) provide debt collectors with a modest and appropriate amount of flexibility to convey beneficial repayment option information to consumers in the absence of prior written consent.

I. INTRODUCTION & BACKGROUND

In the *NPRM*, the Commission explained that its purpose in initiating this rulemaking is to "harmonize [the FCC's telemarketing] rules with the Federal Trade Commission's (FTC's) recently amended Telemarketing Sales Rule" ("TSR"), which the Commission noted "differs in certain

[1] *Rules & Regs. Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, CG Docket No. 02-278, FCC 10-18 (rel. Jan. 22, 2010) ("*NPRM*").

respects from the Commission's . . . rules regarding prerecorded telemarketing calls."[2] Specifically, as explained in the *NPRM*, the FTC's TSR requires a telemarketer to secure a recipient's written agreement to receive a prerecorded *telemarketing* call before transmitting such a call to that recipient.[3] The Telephone Consumer Protection Act ("TCPA") and related Commission regulations, by contrast, require "prior express consent" to transmit *any* prerecorded voice call to a mobile telephone (and certain other locations) or to a residential telephone line under a number of circumstances; but the Commission's current definition of "prior express consent" does not require that consent to be in writing, although the burden remains on the transmitting entity to demonstrate that prior express consent indeed was provided.[4]

PRA understands the Commission's rationale in seeking to align its own telemarketing regulations for certain prerecorded calls with those of the FTC. And while it is important to ensure that entities that rely on prerecorded calls are not subject to a patchwork of conflicting or inconsistent regulations and that consumers are protected in a uniform manner, it is equally important that any harmonization of existing rules does not overstep its stated purpose and result in unintended consequences for entities that depend on autodialed and prerecorded telephone calls to function.

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[2] *NPRM* ¶ 1. The FTC's TSR defines "telemarketing" as a call made as a part of "a plan, program, or campaign which is conducted *to induce the purchase of goods or services or a charitable contribution*, by use of one or more telephones and which involves more than one interstate telephone call." 16 C.F.R. § 310.2(cc) (emphasis added).

[3] 16 C.F.R. § 310.4(b)(1)(v)(A).

[4] 47 C.F.R. § 64.1200(a)(1) and (2). *See also Rules & Regs. Implementing the Telephone Consumer Protection Act of 1991, Request of ACA Int'l for Clarification and Decl. Ruling*, 23 FCC Rcd 559, 565 (2008) ("*ACA International*").

Issues regarding the Commission's proposed harmonization in the *NPRM* arise because of the structure of Section 64.1200(a), the provision in the Commission's rules that regulates these types of telephone calls. Specifically, Section 64.1200(a) restricts two principal categories of calls:

- **Section 64.1200(a)(1) restricts calls made "using an automatic telephone dialing system *or* an artificial or prerecorded voice" to mobile telephones and certain call locations.**[5] These calls are permitted only if they are made "for emergency purposes" or with the "prior express consent" of the called party.[6]

- **Section 64.1200(a)(2) restricts calls made to residential phone numbers "using an artificial or prerecorded voice."**[7] These calls are permitted only with the "prior express consent of the called party" or where the call falls into one of several exceptions, including calls that are "not made for a commercial purpose," calls that are commercial but do "not include or introduce an unsolicited advertisement or constitute a telephone solicitation," and calls made in the context of an "established business relationship."[8]

Section 64.1200(a)(1) is broader than the comparable provision in the FTC's TSR because it regulates *both* autodialed and prerecorded calls, *and* because it applies to *all* calls, not just to "telemarketing" or sales calls.[9] Likewise, Section 64.1200(a)(2) is broader than the comparable provision in the FTC's TSR because its "prior express consent" requirement is not limited to "telemarketing" calls—that is, calls intended "to induce the purchase of any good or service."[10]

The *NPRM* proposes to harmonize the Commission's prerecorded call rules with the prior written consent requirement of the FTC's TSR by (a) defining "prior express consent" in Section 64.1200(a)(1) to require a signed writing (or its electronic equivalent), and (b) eliminating the "established business relationship" exception in Section 64.1200(a)(2).[11] But because of the

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[5] 47 C.F.R. § 64.1200(a)(1) (emphasis added).

[6] *Id.*

[7] *Id.* § 64.1200(a)(2).

[8] *Id.*

[9] *See* 16 C.F.R. § 310.2(cc).

[10] *See id.* at § 310.4(b)(1)(v)(A).

[11] *NPRM* ¶¶ 16-32.

way in which the Commission has proposed to amend its rules, the proposed modification would go beyond the *NPRM*'s stated purpose and apply unintended limitations to *all* autodialed and prerecorded calls to mobile telephones and other call locations specified in Section 64.1200(a)(1), including purely informational calls.

If the Commission's proposed rule is promulgated in this manner, numerous entities, including school boards, non-profit organizations, political candidates, small businesses, and large established companies would be unnecessarily and adversely affected. Indeed, many of these entities are precisely the types that the *NPRM* states would *not* be affected by the proposed rule. Indeed, the *NPRM* went to some lengths to state that

> the rule revisions proposed herein would make no changes with respect to categories of prerecorded message calls that are not covered by our TCPA rules. Those categories include calls by or on behalf of tax-exempt non-profit organizations; calls for political purposes, including political polling calls and other calls made by politicians or political campaigns; and calls for other noncommercial purposes, including those that deliver purely "informational" messages—for example, prerecorded calls that notify recipients of a workplace or school closing.[12]

Although this may have been the Commission's intent, its proposed rule as drafted would lead to a different outcome. Its proposed rule also would perversely create *more* restrictions on classes of calls that are not even governed by the FTC's TSR rather than harmonize both sets of regulations.

PRA is one entity that would be harmed by this inconsistency. PRA is a leader in the debt collection industry that has operated for well over a decade. Its parent company is publicly traded on the NASDAQ. PRA works with partners in the financial services, retail, and other industries to work out consumer debts, thereby contributing to the proper functioning of the national and global financial system and ensuring consistent revenue to support a wide range of commercial interests.

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[12] *Id.* ¶ 3.

PRA provides highly flexible, customized repayment plans for consumers. In most cases, interest charges are waived or reduced, and payment terms are set so that a consumer suffering a financial setback can afford them. Indeed, PRA often waits months or years for a consumer to establish his or her financial health before asking the consumer to begin repaying delinquent accounts. This flexibility is highly productive and beneficial to the American and global economy because it helps consumers avoid bankruptcy and permits those interested in retiring debt to do so under flexible and forgiving repayment terms. All told, PRA and other debt recovery organizations are responsible for returning *billions* of dollars annually to the industries they serve; this helps keep retail prices down and ensure that the average consumer can have access to credit when, for example, he or she decides to buy a house or a car, apply for a credit card, or order a utility or other service, such as broadband Internet access or wireless telephone service.

PRA employs more than 2,350 employees, including many consumer debt representatives, in offices across multiple states. Integral to PRA's operations is the use by company debt service representatives of automatic telephone dialing equipment ("autodialers") to contact consumers, inform them of their obligations, and work with them to find ways to repay their debts. Although most consumers are contacted at home, it is increasingly common for consumers to abandon traditional wireline telephone service in favor of wireless phones—and this trend shows no sign of abating.[13] Given this continued shift, it is important to PRA and its public service goals to be able

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[13] *See, e.g.*, FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Local Telephone Competition: Status as of December 31, 2007*, at Tables 1, 14 (Sept. 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-285509A1.pdf (showing that mobile wireless telephone numbers now exceed wireline numbers); AT&T Inc., "Comments on the Transition from the Legacy Circuit-Switched Network to Broadband," *In re International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act*, GN Docket No. 09-47, at 2 (Dec. 21, 2009) ("Revenues from POTS are plummeting as customers cut their landlines in favor of the convenience and advanced features of wireless and VoIP services.").

to contact consumers on all types of devices (mobile and wireline), subject, of course, to the appropriate consent and other legal requirements.

PRA's ability to conduct its business depends heavily on the use of autodialers, which allow PRA's staff to contact consumers efficiently and, given the scale of PRA's operations, to recover debts without the extensive lost time associated with manual dialing.[14] PRA has used these systems for years, and it has done so in compliance with the Commission's rules and those of the FTC, as well as with the Fair Debt Collection Practices Act (the FDCPA), which regulates debt collectors specifically.

PRA takes these legal obligations very seriously. PRA also is committed to conducting its business fairly and ethically. PRA sponsors an intensive multi-week training program for its service representatives, including a comprehensive final examination, that addresses legal compliance and methods for ensuring that debt collection calls are made in a way that is productive and respectful to the consumers PRA contacts. In addition, PRA conducts regular in-service monitoring of its personnel to ensure compliance with its high standards, and it has established company-wide training on the PRA Code of Ethics and Code of Business Conduct.[15] These ethical principles emphasize PRA's policy of conducting its business with integrity, and in a way that is fair and honest, with due regard to the company's legal and ethical obligations and commitments regarding internal and external transparency.

Entities such as PRA play a critical role in the national and global economy and do so in a productive and meaningful way. The Commission should ensure that it does not take any action

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[14] PRA also uses prerecorded voice calls, although to a lesser extent than it uses automatic telephone dialing systems. Nevertheless, prerecorded voice calls clearly are an important tool for the debt collection industry.

[15] The PRA Code of Ethics and Code of Business Conduct are available to the public at http://media.corporate-ir.net/media_files/IROL/13/135456/CorpGov/codeofconduct.pdf.

that would unduly or inadvertently interfere with that role while carrying out its objective of harmonizing its prerecorded calls rules with those of the FTC.

With this as background, it is clear that there are at least three things that the Commission must do to correct its proposed rule and ensure that it does not go beyond its stated purpose:

First, the Commission should make two limited changes to Section 64.1200(a)(1) of its proposed rule to ensure that any prior written consent requirement does not apply to autodialed or informational calls to mobile telephones and other call locations specified in Section 64.1200(a)(1).

Second, the Commission should clarify that it did not intend to disturb its declaratory ruling in *ACA International*,[16] which was issued less than three years ago. *ACA International* holds that debt collection calls to mobile telephones are made with the "prior express consent" of the call recipient if the recipient provided his or her mobile telephone number to the underlying creditor (for the purpose of Section 64.1200(a)(1)) and that such calls do not contain a "telephone solicitation" or "unsolicited advertisement" (for the purpose of Section 64.1200(a)(2)).

Third, because debt collection calls are most beneficial to consumers when accompanied by information concerning repayment options and programs, the Commission should clarify that such debt collection calls do not contain a "telephone solicitation" or "unsolicited advertisement" because their ultimate purpose is to assist consumers in resolving their debt issues. In other words, the Commission should clarify that while such calls may be commercial in nature, they are not proscribed by Section 64.1200(a)(2) of the Commission's rules or the proposed revision thereto.

These three clarifications (and possibly others, depending on the record developed in this proceeding) are critical for the Commission to ensure that the proposed revisions to its prerecorded

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[16] 23 FCC Rcd 559 (2008).

call rules do not have unintended or detrimental consequences to a wide range of affected entities both within and outside of the business community.

II. THE PROPOSED RULE WOULD INADVERTENTLY RESTRICT THE TRANSMISSION OF AUTODIALED AND INFORMATIONAL PRERECORDED CALLS TO MOBILE TELEPHONES

In expressing its goal of harmonizing its prerecorded call regulations with those of the FTC, the Commission observed that, like PRA, "the majority of entities that use prerecorded telemarketing calls are subject to both agencies' . . . regulations," so conforming the FCC's rules to the FTC's would establish a uniform enforcement framework.[17] However, the specific changes that the Commission has proposed would unintentionally overstep this stated purpose and, ironically, replace one arguable inconsistency between the Commission's and the FTC's rules with another.

Specifically, the Commission explained its intended change to Section 64.1200 of its rules as an effort to "requir[e] sellers and telemarketers to obtain . . . express written consent . . . to receive prerecorded *telemarketing* calls," even when an established business relationship exists between the caller and the call recipient.[18] Yet, because of the way the Commission's existing telemarketing rules are structured, the revisions the Commission has proposed would (1) impose written consent requirements on *both* prerecorded calls *and* autodialed calls to mobile telephones and other locations specified in Section 64.1200(a)(1); and (2) do so without regard to call content (*i.e.*, the written consent requirement would apply to *all* such autodialed and prerecorded calls, including informational calls, not just to the "telemarketing" calls covered by the comparable FTC rule).

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[17] *NPRM* ¶ 1.

[18] *Id.* ¶ 2 (emphasis added). *See also NPRM* ¶ 13 (discussing written consent obligations under "Prerecorded Message Calls" heading).

These ramifications—which, based on the *NPRM*,[19] were apparently inadvertent—would have profound and unsettling implications for the many entities that rely on the transmission of autodialed and non-telemarketing prerecorded voice messages to mobile telephones and other locations described in Section 64.1200(a)(1). As explained above,[20] for example, the proposed rule would interfere unintentionally with the ability of a school board to transmit an autodialed or prerecorded voice message to a parent's mobile telephone number to, for example, inform the parent of an imminent school closing or of inclement weather without first securing prior written consent in a manner that incorporates the Commission's new disclosure requirements—*even if that parent willingly provided his or her mobile telephone number on a school form for precisely this purpose*. Similarly, a political party or candidate for public office could not transmit a fundraising or "get out the vote" autodialed or prerecorded message to the mobile telephone of a supporter without securing the supporter's formal, written consent. And a business could not transmit any message, regardless of whether it is marketing-related, via autodialed or prerecorded voice to a mobile telephone without first securing prior written consent and including within that consent process the specific disclosures prescribed by the Commission's proposed rule. In short, the Commission's proposed rule would not harmonize the Commission's prerecorded call rules with those of the FTC; rather, it would impose *new and unintended restrictions* on whole categories of calls that are not even regulated by the FTC.[21]

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[19] *Id.* ¶ 3.

[20] *See* § I.B., *supra*.

[21] *See* § I & n.2, *supra* (noting that the FTC's TSR applies only to "telemarketing" calls and citing 16 C.F.R. § 310.2(cc)).

A. Autodialed Calls to Mobile Telephones

In the *NPRM*, the Commission acknowledged that live-voice calls (*i.e.*, non-prerecorded voice calls) made through "the use of automated telephone [dialing] equipment" are covered by "[a] separate section of the TCPA."[22] As to this category of calls, the only change proposed by the *NPRM* is to conform the Commission's standards to those of the FTC to "calculate[] the three percent 'call abandonment rate.'"[23] Likewise, in amending the TSR to address these issues, the FTC distinguished between "telemarketing calls that deliver prerecorded messages" and calls made through the use of "predictive dialers," and it applied the written consent requirement only to the former, not the latter.[24]

Although prerecorded calls are addressed in a section of the TCPA that is distinct from the portion of the statute that restricts the use of automatic dialers, the use of prerecorded calls and automatic dialers are addressed together in at least one the portion of the Commission's rules that is the subject of the new proposed rule: Section 64.1200(a)(1), which regulates calls to mobile and certain other call locations. As a result, the new "prior written consent" language that the Commission has proposed for prerecorded calls would, by its very placement, inadvertently apply to *both* prerecorded calls *and* autodialed calls to mobile telephones and other locations specified in Section 64.1200(a)(1). Specifically, the proposed change to Section 64.1200(a)(1) would prohibit

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[22] *NPRM* ¶ 6.

[23] *Id.* ¶ 11 (citing *Telemarketing Sales Rule, Final Rule*, Fed. Trade Comm'n, 73 Fed. Reg. 51164-01, 51195-51200 (2008)). *See also NPRM* ¶¶ 44-47 (describing limited changes to rules applicable to "Abandoned Calls/Predictive Dialers").

[24] *Compare* 16 C.F.R. § 310.4(b)(1)(v) (regulating "any outbound telephone call that delivers a prerecorded message") *with* 16 C.F.R. § 310.4(b)(1)(iv), *Telemarketing Sales Rule, Final Rule*, Fed. Trade Comm'n, 73 Fed. Reg. 51164-01, 51195-51200 (2008) (restricting calls made through the use of "predictive dialers"). *See also Rules & Regs. Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, ¶ 139 (1992) [hereinafter *1992 TCPA Rule*] (observing that "Congress determined that . . . prerecorded messages cause greater harm to consumers' privacy than telephone solicitations by live telemarketers.").

any "person or entity [from initiating] any telephone call (other than a call made for emergency purposes or made with the prior express written consent of the called party) *using an automatic telephone dialing system* or an artificial or prerecorded voice" to, among other places, a mobile telephone.[25] Under this formulation, the proposed "prior express written consent" requirement would apply not only to calls made using "an artificial or prerecorded voice" but also using "an automatic telephone dialing system."

This outcome, which clearly was not contemplated in the *NPRM*, would have severe and, importantly, *avoidable* ramifications for every entity that relies on an autodialer or non-telemarketing prerecorded voice call to lawfully transmit a message to a mobile telephone on the basis of a call recipient's "prior express consent" that may not have had to be reduced to a signed writing. Absent the appropriate correction in the proposed language of Section 64.1200(a)(1), PRA and other debt recovery companies would be severely hampered by the Commission's adoption of a written consent requirement for autodialed calls to mobile telephones. In the first place, there can be little question that few, if any, consumers would agree in writing to receive collection calls. Therefore, if a written consent requirement were imposed for autodialed calls, PRA effectively would be forced to abandon its autodialed call technology—a technology in which it has invested millions of dollars to ensure maximum productivity across its 1,400 active collection representatives. Indeed, approximately 96 percent of PRA's total dialed calls are autodialed, and the use of these autodialers enables PRA's collection representatives to spend less than 30 seconds of "downtime" between telephone conversations. Autodialers also help minimize the number of misdialed telephone numbers; ensure that legally required disclosures are complete and consistently delivered; and screen out nonproductive calls such as busy signals, unanswered and disconnected

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[25] *NPRM*, Apx. A, § 64.1200(a)(1) (emphasis added).

telephones, and answering machines. In short, autodialers enable PRA to realize efficiencies and keep a full complement of call center personnel gainfully employed and productive, with benefits flowing to the entities that partner with PRA and to consumers. Any action that would require PRA to abandon this productive technology—especially where such action is unnecessary to accomplish the Commission's objectives—would amount to a net loss to consumer and the American and global economy.

Importantly, as described above, the impact of this inadvertent regulation would not be limited to the debt recovery industry. The Commission's proposed rule would limit lawful calls across industries, including the noncommercial entities that the Commission intends to leave outside the scope of its written consent requirement.[26] These entities would be forced to upend their business practices, meaning that the proposed rule would impose a staggering additional cost on the industries that the FCC regulates, increasing regulatory inconsistency without any countervailing benefit to the Commission's stated objective.

B. Informational Prerecorded Calls to Mobile Telephones

The proposed rule, as drafted, also would impose restrictions beyond those prescribed by the FTC because, with respect to transmissions to mobile telephones and certain other locations specified in Section 64.1200(a)(1), the proposed rule would apply a written consent requirement on all prerecorded calls, not just on prerecorded *telemarketing* calls, which is all the FTC rule addresses. This is because, as is the case with autodialed calls to mobile telephones, the Commission has proposed to insert its prior written consent requirement into Section 64.1200(a)(1), which regulates *all* prerecorded calls to mobile telephones and other specified locations regardless of call content. Because the requirements of Section 64.1200(a)(1) do not distinguish between

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[26] *See* §§ I.B. & II.A., *supra*.

prerecorded voice telemarketing calls and prerecorded voice informational calls, the Commission's proposed revision to Section 64.1200(a)(1) reaches beyond its stated intent and, in fact, imposes a prior written consent standard that is broader in scope than its more limited counterpart in the FTC's TSR.

As with the Commission's unintended foray into the realm of autodialed calls to mobile telephones, this outcome clearly was not contemplated in the *NPRM* and would have severe and avoidable ramifications for *every* entity—not just every commercial entity—that relies on prerecorded voice calls to transmit *any* information (including non-telemarketing information) to a consumer's mobile telephone absent a prior written consent process than conforms to the Commission's new disclosure obligations. The *NPRM* demonstrates clearly that this is not what the Commission intended.[27]

* * *

Fortunately, the Commission can address and remedy these unintended oversights easily. The Commission can give full effect to its intended new rule, and conform its prerecorded call rules to those of the FTC, by eliminating the word "written" in proposed Section 64.1200(a)(1) and by imposing the written consent obligation of proposed new Section 64.1200(a)(1)(v) only on prerecorded voice telemarketing calls. This can be accomplished simply by deleting the word "written" as proposed in from Section 64.1200(a)(1) and clarifying in new Section 64.1200(a)(1)(v) that "prior express consent" requires compliance with the proposed written consent requirements of new Section 64.1200(a)(1)(v)(A)-(D) only "for a 'telemarketing' or 'telephone solicitation' call that uses an artificial or prerecorded voice." These simple proposed changes are illustrated for the Commission's convenience in Appendix A to these comments. Under this formulation, the

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[27] *Id.* ¶ 3.

Commission would require prior express consent to be in writing (or its digital equivalent) for only prerecorded telemarketing calls, as the FTC does, but not for live voice autodialed calls or non-telemarketing prerecorded voice calls to mobile phones and other locations specified in Section 64.1200(a)(1) that the FTC's TSR does not address.

III. THE COMMISSION SHOULD CONFIRM THAT ITS HOLDING IN *ACA INTERNATIONAL* IS UNAFFECTED BY THE PROPOSED RULE

Avoiding unintended consequences on debt recovery operations is another important consideration that the *NPRM* does not—but should—address, particularly in light of the Commission's recognition less than three years ago of the essential role that debt recovery businesses play in protecting the American economy. In its declaratory ruling in *ACA International*,[28] the Commission made one important clarification in this regard and reiterated another:

- *First*, the Commission "clarif[ied] that autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with the 'prior express consent' of the called party."[29]

- *Second*, the Commission reiterated that "calls made solely for the purpose of debt collection are not telephone solicitations and do not constitute telemarketing."[30] Implicit in this determination was the Commission's judgment that such calls, while perhaps commercial, do not "include or introduce an unsolicited advertisement or constitute a telephone solicitation" and thus are not subject to the prior express consent requirement of Section 64.1200(a)(2) of the Commission's rules.[31]

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[28] *ACA International*, *supra* n.4.

[29] *Id.* ¶ 1.

[30] *Id.* ¶ 11.

[31] 47 C.F.R. § 64.1200(a)(2).

These two findings make just as much sense today as they did less than three years ago when *ACA International* was decided, and the Commission should clarify that they would remain undisturbed by any action taken in this proceeding.

With respect to the transmission of autodialed or prerecorded message calls to wireless telephone numbers, the Commission determined at the time that "the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt."[32] The Commission went on to note that, as a result, "[c]alls placed by a third party collector . . . are treated as if the creditor itself placed the call."[33] The same logic applies today, and nothing in the *NPRM* suggests that a contrary conclusion is warranted.

There also is no reason to depart from the Commission's logical conclusion that "calls made solely for the purposes of debt collection are not telephone solicitations and do not constitute telemarketing."[34] That conclusion is consistent with the Commission's longstanding view that its rules are designed to protect consumers from calls whose purpose is to advertise or solicit new business.[35] Debt collection calls inform debtors of their existing obligations and provide them with options for satisfying those obligations; they do not aim to market or promote new products or services to consumers, as do the calls that are the focus of the proposed rule.

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[32] *ACA International* ¶ 9. *See also Rules & Regs. Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, ¶ 31 (1992) (holding that "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").

[33] *ACA International* ¶ 10.

[34] *Id.* ¶ 11.

[35] *2003 TCPA Rule* ¶¶ 140-41 & n.478 (amending rule to exempt calls "made for a commercial purpose" as long as they "do[] not include or introduce an unsolicited advertisement or constitute a telephone solicitation"). *See also* 47 C.F.R. § 64.1200(a)(2)(iii).

Of course, as the Commission observed in *ACA International*, "[d]ebt collection calls are regulated . . . by the [FTC] and are subject to the requirements of the [FDCPA], which prohibits abusive, deceptive, and otherwise improper collection practices by third-party collectors."[36] Consumers already are protected by the robust requirements that the FDCPA imposes, so the fact that a clarification specific to debt collection calls is being sought here should not affect the analysis or raise any consumer protection concerns.

To continue to effectuate its approach to debt collection calls, the Commission should reiterate that, with respect to Section 64.1200(a) of the Commission's rules, autodialed and prerecorded voice calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with the "prior express consent" of the called party. This would be wholly consistent with the FTC's existing prerecorded call rule as well as with a Commission determination (described in Section II.B. of these comments) that non-telemarketing prerecorded voice calls to mobile phones are not subject to the proposed new prior written consent requirement. The Commission also should reiterate that, with respect to Section 64.1200(a)(2) of the Commission's rules, prerecorded calls transmitted to residential numbers that are made solely for the purposes of debt collection are, while perhaps commercial, not subject to the prior express consent requirement because they do not include or introduce an "unsolicited advertisement" or constitute a "telephone solicitation."[37] The Commission already made these policy determinations and pronouncements less than three years ago in *ACA International*, and they remain applicable and appropriate today.[38]

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[36] *ACA International* ¶ 1 n.2. *See also* 15 U.S.C. §§ 1692 *et seq.*

[37] *ACA International* ¶ 11.

[38] If the Commission determined that *ACA International* was disturbed by its action here, the proposed addition of the word "written" to Section 64.1200(a)(2) would, like the change to Section (continued…)

These clarifications are especially important because of the devastating effect that a written consent requirement would have on the debt collection business and on the American economy as a whole. As the Commission acknowledged in *ACA International*, consumers generally are willing, as a condition of obtaining credit, to agree to be contacted about their debt. But whether collection efforts are necessary becomes clear only after a debt has been incurred. If PRA (or any other debt collector) were required to return to debtors, after credit already has been issued and used and a debt not repaid, to obtain written permission to contact the debtor to collect the debt in compliance with the formalities proposed in the *NPRM*, or even to transmit mere reminder calls to such debtors, it likely would find itself unable to contact virtually all debtors by telephone.

This inability to reach debtors using the most common and accessible of communications technologies (*i.e.*, the telephone) would discourage lenders from extending credit and lead to a disincentive to write mortgages, issue credit cards, or provide post-paid services such as broadband Internet access and telephone service to all but the most creditworthy consumers. Indeed, this could very well exacerbate the digital divide that the Commission is working to alleviate through a range of other important government policies and programs.[39] One analyst put the magnitude of third-party debt collectors' recovery for the U.S. economy in excess of $40 billion in one recent year and also found that the collection industry directly or indirectly supported between 300,000 and 420,000

64.1200(a)(1), inadvertently create an avoidable inconsistency with the FTC's TSR. This is because debt collection calls are not intended "to induce the purchase of any good or service" and, therefore, are not subject to the TSR's written consent requirement for prerecorded calls. *See* 16 C.F.R. § 310.4(b)(1)(v)(A).

[39] *See, e.g.*, *Connecting America: The National Broadband Plan* § 4.6 (2010) ("The United States should continue to support policies that hasten the rollout and uptake of telecommunications technology that bridges the international digital divide."); FCC, Advisory, "FCC & Knight Foundation Host Digital Inclusion Summit at Newseum on March 9" (rel. Feb. 25, 2010) (announcing the Commission's "summit to highlight solutions to the challenge of providing broadband for everyone").

jobs during that period, with a payroll ranging between $11.5 and $15.9 billion.[40] An annual loss in the billions of dollars—a likely consequence if debt collectors could not contact consumers by telephone without written consent—could have a serious and lasting adverse effect on American businesses.

The Commission has a longstanding policy in favor of "adopt[ing] a regulatory framework that is narrowly tailored to address identifiable harms to competition and consumers in the U.S. market."[41] This narrow tailoring promotes the Commission's policy goals while "prevent[ing] regulatory overreach" and promoting certainty in the marketplace.[42] Clarifying that the changes the Commission has proposed here do not disturb *ACA International* would ensure that the Commission's changes are implemented in a narrowly tailored way and as intended, thereby maintaining consistency with existing policies and promoting the public interest.

IV. THE COMMISSION SHOULD PERMIT DEBT COLLECTORS TO OFFER SENSIBLE REPAYMENT OPTIONS TO DEBTORS IN THE ABSENCE OF WRITTEN CONSENT

Although the primary purpose of any debt collection call is to inform a debtor of his or her obligations, companies like PRA also work to provide debtors with options for repaying their debts. For example, PRA representatives offer programs that include lump sum settlements at less than the

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[40] PriceWaterhouseCoopers LLP, "Value of Third-Party Debt Collection to the U.S. Economy in 2007: Survey and Analysis" (Jun. 12, 2008).

[41] *Rules & Policies on Foreign Participation in the U.S. Telecoms. Market*, 12 FCC Rcd 23891, 23977 (1997). *See also Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, 11 FCC Rcd 1463, 1508 (1996) ("We believe [that our approach] must be narrowly tailored in order to prevent adverse impact on the operations of existing licensees.").

[42] *Cf.* Chmn. Julius Genachowski, FCC, *The Third Way: A Narrowly Tailored Broadband Framework* (May 6, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/ DOC-297944A1.pdf. *See also* Austin Schlick, Gen. Counsel, FCC, *A Third-Way Legal Framework for Addressing the* Comcast *Dilemma* (May 6, 2010), *available at* http://hraunfoss.fcc.gov/ edocs_public/attachmatch/DOC-297945A1.pdf.

face value of accounts or reduced payment amounts made over extended periods. Customized payment plans enable consumers who cannot pay their entire delinquent balance at once to either begin a payment plan or pay a smaller lump sum. These payments are then reflected in a consumer's credit reports and therefore contribute to an important step in the consumer's credit repair process.

These programs are integral to PRA's overall debt collection efforts and benefit creditors because they are able to recover at least partially for unpaid debts. Importantly, these programs also benefit debtors because they offer a structure within which debts can be repaid along with the flexibility to cope with a debtor's particular circumstances. If PRA cannot make debt collection calls that mention these programs without triggering a prior written consent requirement, it would be limited in its ability to help consumers work out their debts. PRA still would be compelled to inform them of their obligations to pay, but with less ability to offer them flexibility in how they may do so.

The Commission should clarify that offering options like these to debtors can be an essential part of a debt collection call and that, consistent with *ACA International*, offering debt repayment and similar program options to debtors does not cause a debt collection call to include a "telephone solicitation" or an "unsolicited advertisement" under Section 64.1200(a)(2)(iii) of the Commission's rules. As described above, it is unlikely that consumers will agree in writing to be contacted about their debts once they default. But contacting debtors and providing them with viable options to work out their debts is nonetheless an essential function of a debt collection service—and an essential part of the credit transaction itself. Clarifying that offering commercial debt repayment programs to consumers as part of a debt collection call does not incorporate a "telephone solicitation" or "unsolicited advertisement" into the call will ensure that creditors and third-party

debt collectors will retain the ability to provide debtors with services allowing them to satisfy their obligations in a meaningful and flexible way.

V. CONCLUSION

PRA understands the Commission's desire to conform its prerecorded voice call regulations with those of the FTC and acknowledges that this step may ease the burdens of compliance for certain entities that are subject to both agencies' regulations while promoting certainty for consumers who receive such calls. It is essential, however, that the Commission modify its rules in a way that is targeted to fulfill its stated regulatory objectives and that does not undermine, rather than promote, regulatory consistency. Accordingly, PRA respectfully requests that the Commission (1) adjust the language and formulation of its proposed rule to avoid unintended interference with the lawful transmission of autodialed and informational prerecorded voice calls to mobile telephones and certain other locations specified in Section 64.1200(a) of the Commission's rules; (2) confirm that the core holdings in *ACA International* are unaffected by the proposed rule; and (3) provide debt collectors with a modest and appropriate amount of flexibility to convey beneficial repayment option information to consumers in the absence of prior written consent.

Respectfully submitted,

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APPENDIX A

Portfolio Recovery Associates, LLC
Suggested Revisions to Proposed Rules

PART 64 - MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

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Subpart L - Restrictions on Telemarketing and Telephone Solicitation

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1. Amend § 64.1200 by revising paragraphs (a)(1), (a)(2)(iv)-(v), (a)(6), (a)(6)(i), (b)(1), and (b)(2), and by adding paragraphs (a)(1)(v), (a)(2)(v), (a)(2)(vi), and (b)(2) to read as follows:

§ 64.1200 Delivery restrictions.

(a) No person or entity may: (1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express ~~**written**~~ consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;

(i) * * *

(ii) * * *

(iii) * * *

(iv) * * *

(v) For purposes of paragraph (a)(1) of this section, a person or entity shall be deemed to have obtained prior express ~~**written**~~ consent **<u>for a 'telemarketing' or 'telephone solicitation' call using an artificial or prerecorded voice</u>** upon obtaining from the recipient of the call an express agreement, in writing, that:

* * *