

**BEFORE THE
FEDERAL TRADE COMMISSION
Washington, DC 20580**

TELEMARKETING RULEMAKING – COMMENT

FTC FILE NO. R411001

**COMMENTS OF ACA INTERNATIONAL IN RESPONSE
TO THE FEDERAL TRADE COMMISSION'S PROPOSED
AMENDMENTS TO THE TELEMARKETING SALES RULE**

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INTRODUCTION

The following comments are submitted on behalf of ACA International (“ACA”) in response to the Federal Trade Commission’s (“Commission”) request for comments on the proposed rulemaking to amend the Telemarketing Sales Rule, 16 C.F.R. § 310 *et seq.* (“TSR”). See Notice of Proposed Rulemaking, 67 FED. REG. 4492 (Jan. 30, 2002) (“Notice”). As requested by the Commission, ACA has filed with the Office of the Secretary six copies of these comments and a computer disk containing a copy saved in electronic form.

I. Statement on ACA

ACA International, formerly known as the American Collectors Association, Inc., is a trade association of credit and collection professionals who provide a wide variety of accounts receivable management services. Headquartered in Minneapolis, Minnesota, ACA represents approximately 5,300 third party collection agencies, attorneys, credit grantors and vendor affiliates. Members comply with all 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 by the Commission under the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 *et seq.*, and the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, in addition to analogous state laws.

Whether performing first party billing or third party collection services, ACA members work on behalf of credit grantors in the collection of accounts receivable. Indeed, third party collectors engage in hundreds of millions of telephone collection contacts every year. Some

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of these telephone contacts are commenced through the use of predictive dialers, that is, automatic dialing software that dials a debtor's telephone number in a predetermined manner and time so that the debtor answers the phone at the same time that a collector is free to take the call. Notice, 67 Fed. Reg. at 4522. Whether made personally or through the use of predictive dialers, none of these telephone collection contacts is random. Instead, they are based on information obtained by the collector from the debtor, the underlying creditor, or public records.

II. Specific Comments on the Proposed Amendments to the TSR

ACA believes that the TSR should include an express exemption for telephone calls initiated for a debt collection purpose. These telephone calls when placed by the first party billing company or third party collection agency clearly are outside the scope of the Telemarketing Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101 *et seq.* ("Telemarketing Act"). Further, even though debt collection telephone calls are not regulated by the TSR, ACA believes that the caller identification amendment and the clarification of call abandonment are harmful regulatory policies that conflict with the FDCPA and other provisions of the TSR.

A. The Commission Should Expressly Exempt From the TSR Telephone Calls Initiated for a Debt Collection Purpose

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The TSR regulates specific deceptive and abusive telemarketing practices as defined by the Telemarketing Act. Enacted in 1994, the Telemarketing Act was an effort by Congress to address fraudulent telemarketing conduct harmful to consumers by regulating deceptive and abusive telemarketing acts and practices intended to induce the purchase of goods or services, that is, commercial conduct. *See, e.g.*, 15 U.S.C. § 6102(a)(3)(C).

The Commission previously has stated that telephone calls initiated for debt collection purposes are outside the scope of the definition of “telemarketing”¹ in the TSR.

The Commission also intends that this Section not cover debt collection practices, since debt collection is not “conducted to induce the purchase of goods or services,” – a prerequisite for Rule coverage as dictated by the definition of “telemarketing” in § 310.2(u). Furthermore, this section is applicable only to recovery services that promise the return of money or other items of value paid for or promised to the consumer in a previous telemarketing transaction. Thus, this Section will not apply to attempts to recover money or items lost outside of telemarketing.

See Statement of Basis and Purpose and Final Rule, 60 FED. REG. 43843, 43854 (Aug. 16, 1995) (emphasis added). Although this statement evinces a clear intention to exclude debt collection telephone calls from the scope of the TSR, neither the exemptions in Section 310.6 of the current TSR nor the proposed amendments contain an exception for debt collection telephone calls. 16 C.F.R. § 310.6 (listing acts or practices expressly exempt from the TSR).

¹ The current TSR defines “telemarketer” as “a plan, program, or campaign which is conducted to induce the purchase of goods or services by use of one or more telephones and which involves more than one interstate telephone call.” 16 C.F.R. § 310.2(u).

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Consistent with the Commission’s intention as expressed in the 1995 final TSR rule, ACA believes that an express exemption should be included in Section 310.6 to clarify that telephone calls initiated for debt collection purposes are exempt from the TSR. An express exemption is compatible with the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”), and the regulation promulgated by the Federal Communications Commission, 47 C.F.R. § 64.1200 *et seq.*, which expressly excludes telephone calls and messages not initiated for a commercial purpose. 47 C.F.R. § 64.1200(c) (defining “telephone call” as excluding “a call or message by, or on behalf of, a caller (1) that is not made for a commercial purpose, (2) that is made for a commercial purpose but does not include the transmission of any unsolicited advertisement, (3) to any person with whom the caller has an established business relationship at the time the call is made, or (4) which is a tax-exempt nonprofit organization”). Moreover, many states that regulate telemarketing calls in the form of do-not-call registries exempt debt collection calls. *See, e.g.*, Indiana Code § 24-4.7 (exempting “a telephone call made primarily in connection with an existing debt or contract for which payment or performance has not been completed at the time of the call”). Therefore, ACA proposes that the Commission add an express exemption from the TSR in Section 310.6 stating that telephone calls initiated for a debt collection purpose are not covered.

B. The Caller Identification Blocking Restrictions Conflict with the FDCPA

ACA also is concerned that the Commission’s proposal to prohibit caller identification

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blocking creates a conflict with the FDCPA which, in some instances, requires a collection agency to block this information in order to uphold the FDCPA's prohibition against disclosing the existence of a debt to third parties.² Under the proposed amendments, the Commission proposes to make it an abusive telemarketing act or practice under proposed Section 310.4 of the TSR for a business to block, circumvent, or alter the transmission of, or direct another person to block, circumvent or alter the transmission of, the name and telephone number of the calling party for caller identification service purposes. Notice, 67 FED. REG. at 4514. According to the Commission, this prohibition is necessary to protect consumer privacy, and responds to comments by consumers that businesses systematically fail to transmit this information. Notice, 67 FED. REG. at 4514-15. Indeed, the Commission asserts that there is "no reason that a legitimate" business "would choose to subvert the display of information sent or transmitted to consumers' Caller ID equipment." Notice, 67 FED. REG. at 4515.

Other than the acknowledged technological impediments recognized by the Commission, there are very legitimate reasons that explain why a business would block caller identification information. These reasons especially are relevant in the case of collection

² As discussed previously, ACA members placing telephone calls for debt collection purposes are not covered by the Telemarketing Act and the TSR. However, the Commission's analysis of caller identification blocking issues is relevant and material to how this technology is applied outside of the TSR context, particularly where the Commission proposes to make caller identification blocking an "abusive" practice. Thus, ACA members have a substantial interest in the resolution of this issue even though not regulated by the TSR.

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agencies. The FDCPA expressly prohibits debt collectors from communicating any information to third parties, even inadvertently, with respect to the existence of a debt. 15 U.S.C. § 1692c(b) (“Without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not *communicate*, in connection with the collection of any debt, with any person other than a consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector”) (emphasis added).

The term “communication” is defined broadly under the FDCPA, and includes “the conveying of information regarding a debt directly or indirectly to any person through any medium,” that is, including over the telephone and via caller identification systems. 15 U.S.C. § 1692a(2). In fact, the Commission’s commentary on the FDCPA specifically states that “[a] debt collector may not send a written message that is easily accessible to third parties.” Federal Trade Commission, *Statement of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act*, 53 FED. REG. 50097, 50104 (Dec. 13, 1988). And federal courts have interpreted the third party disclosure prohibitions such that a third party need not be told expressly that the communication is about a debt. *See, e.g., Arslan v. Florida First Fed. Group*, 1995 WL 73115 (M.D. Fla. 1995) (violation of the FDCPA for a third party to merely construe the communication as referring to a debt). Obviously a regulatory requirement that a collection agency transmit its name and telephone number for

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indiscriminate capture by caller identification systems would make that information “easily accessible to third parties” and may trigger liability under the third party disclosure prohibitions of the FDCPA. This approach conflicts with the Commission’s FDCPA commentary, and would subject collection agencies to an impossible alternative of liability under the TSR if they comply with the FDCPA, or liability under the TSR if they comply with the FDCPA. In summary, there are valid reasons why legitimate businesses suppress this information.

Although the Commission agrees that telephone calls initiated for a debt collection purpose are beyond the scope of the TSR and collection agencies, therefore, would not be required to comply with the proposed TSR caller identification blocking restrictions, most debtors do not know that noncommercial debt collection calls are not “telemarketing” under the TSR. These consumers may be confused about the applicability of the TSR, as amended, to debt collection calls especially when the collection agency blocks the originating telephone name and number in order to comply with the FDCPA.

This underscores the need for the Commission to expressly exempt telephone calls initiated for debt collection purposes. It also suggests that it would be bad policy to go forward with the sweeping and indiscriminate prohibitions proposed in the amendments. Indeed, as acknowledged by the Commission, there is substantial record evidence developed during the TSR forums that technological impediments exist that prevent businesses from

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being able to comply with the proposed amendments due to the inability to transmit the type of caller identification information now demanded by the Commission. Notice, 67 FED. REG. at 4515. Nonetheless, the Commission states that “technology advances at a rapid pace in the telecommunications industry,” Notice, 67 FED. REG. at 4515, thereby apparently justifying its intention to subject many businesses to alleged abusive telemarketing acts and practices under the TSR even though these businesses may not possess the infrastructure to comply with the regulation.

C. The Proposed Call Abandonment Clarification is not Supported by the TSR

The Commission also contends that call abandonment or “dead air” by commercial telemarketers using predictive dialers is abusive conduct intended to be regulated by the Telemarketing Act. Notice, 67 FED. REG. at 4524. Thus, the Commission proposes to clarify that call abandonment violates Section 310.4(d) for failing to deliver required disclosures promptly and clearly. Notice, 67 FED. REG. at 4524.

Although not regulated by the Commission’s proposed interpretation of call abandonment issues related to predictive dialers,³ ACA members frequently use predictive dialers. The technology represents a substantial increase in efficiencies and productivity for

³ See *supra* fn.2. Moreover, the disclosures required under Section 310.4(d) are triggered only where an “outbound telephone call” is placed to “induce the purchase of goods or services.”

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ACA members. It has increased competition within the collection industry and made it more cost effective for creditors to collect comparatively smaller balances that, in the past, were simply too costly to justify the expense of collection. Ultimately, less costly and more efficient collection efforts lower the cost and risk of doing business. To be sure, there are many types of predictive dialer systems. Even the most advanced systems may result in situations where a call is connected by the dialer before the operator can complete the call. To avoid delay-related problems, most predictive dialers used by ACA members deliver a recorded message to the answering party which asks the party to hold temporarily. No additional information is conveyed due to the FDCPA prohibition against third party disclosures as discussed above.

The Commission's proposed clarification of call abandonment conflicts with other provisions of the TSR. The proposed amendments define "outbound telephone call" as any telephone call to induce the purchase of goods or services or to solicit a charitable contribution. 16 C.F.R. § 310.2(n) (proposed). The affirmative obligation to make the disclosures in Section 310.4(d) is created only where the "outbound telephone call" is received by the consumer. Notice, 67 FED. REG. at 4524. By implication, a telephone call that is abandoned prior to receipt or results in a short period of "dead air" prior to delivering the message is not an "outbound telephone call" because dialing the telephone number is not an "inducement" for the purchase of goods or services.

Moreover, the Commission's inclusion of call abandonment or dead air as an abusive

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practice under Section 310.4(d) is premised on the unsupported conclusion that there is an “inducement” within the meaning of “outbound telephone call” the moment the consumer receives the call. Notice, 67 FED. REG. at 4524 (“The Commission intends for the phrase ‘receiving the call’ to mean when the consumer answers the telephone. Once the consumer answers the telephone, the consumer has ‘received the call’ for purposes of the Rule; the required disclosures must then be made. Once the consumer has answered the telephone, the telemarketer violates Section 310.4(d) if the telemarketer disconnects the call without providing the required disclosures”). But that reasoning defies common sense. An inducement to purchase a good or service means more than simply receiving a telephone call. BLACK’S LAW DICTIONARY 779 (7th ed. 1999) (defining “inducement” as “[t]he act or process of enticing or persuading another person to take a certain course of action”).

III. Conclusion

For these reasons, ACA International respectfully requests that the Commission expressly exempt from the Telemarketing Act and the Telemarketing Sales Rule telephone calls initiated for a debt collection purpose. If you have any questions, please do not hesitate to contact Glenn A. Mitchell or Andrew M. Beato at (202) 737-7777 or abeato@steinmitchell.com.

Respectfully submitted,

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