FEDERAL TRADE COMMISSION
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CAN-SPAM ACT RULEMAKING

NATIONAL DO NOT E-MAIL REGISTRY

PROJECT NO. R411008

COMMENTS OF ACA INTERNATIONAL IN RESPONSE TO THE FEDERAL TRADE COMMISSION'S ADVANCE NOTICE OF PROPOSED RULEMAKING:

DEFINITIONS, IMPLEMENTATION, AND REPORTING REQUIREMENTS UNDER THE CAN-SPAM ACT

NATIONAL DO NOT E-MAIL REGISTRY

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INTRODUCTION

The following comments are submitted on behalf of ACA International ("ACA") in response to the request by the Federal Trade Commission ("FTC" or "Commission") for comments regarding the National Do Not E-Mail Registry portion of the CAN-SPAM Act Rulemaking. *See* FTC Advance Notice of Proposed Rulemaking, 69 Fed. Reg. 11775 (March 11, 2004) ("ANPR"). Although these comments are confined to the National Do Not E-Mail Registry, other aspects of the CAN-SPAM Act and the ANPR will also be addressed. To the extent such other aspects of the ANPR are discussed in these comments, ACA hereby reserves the right to submit further comments on these and other issues raised in the ANPR. According to the ANPR, such additional comments may be submitted on or before April 12, 2004.

I. Statement on ACA

ACA International is an international trade organization 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., and other state and federal laws.

II. Specific Comments on the National Do Not E-Mail Registry

In enacting the CAN-SPAM Act of 2003, Pub. L. 108-187 (Dec. 16, 2003), Congress sought to address the problem of unsolicited e-mail, or "spam," and vested the FTC with rulemaking authority to implement the Act. Among other things, the Act requires the FTC to write a report setting forth a plan and timetable for establishing a nationwide Do Not E-Mail Registry. CAN-SPAM Act § 9. In its ANPR, the Commission seeks comments on "practical, technical, security, privacy, enforceability, and other concerns" related to the creation of such a registry, and how such concerns could be overcome so that the registry would be workable and cost-effective.

In ACA's view, e-mail communications sent to or received by debtors for the purpose of collecting debts ("debt collection e-mails") are clearly not the kind of unsolicited "commercial electronic mail message" Congress intended to regulate under the CAN-SPAM Act. Instead, such e-mails are, at most, "transactional or relationship messages" which Congress explicitly exempted from the Act's coverage. *See* CAN-SPAM Act § 3(2)(B) ("The term 'commercial electronic mail message' does not include a transactional or relationship message."). In its upcoming report on the Do Not E-Mail Registry, the FTC should clarify the fact that debt-collection e-mails are not subject to the CAN-SPAM Act and, therefore, should not be included in the registry.

There are at least three ways the FTC can clarify this point in its report. The report can acknowledge and emphasize that: (1) debt collection e-mails are not covered by the CAN-SPAM Act because they are not "commercial electronic mail message[s]" within the meaning of the Act; (2) debt collection e-mails are instead "transactional or relationship messages" exempted from the Act's coverage; and (3) debt collection e-mails are subject to extensive regulation as "communication" under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692a(2), and all such "communication" under the FDCPA should be exempted from CAN-SPAM regulation, including the do not call registry.

1. Debt Collection E-Mails are Not a Form of "Commercial Electronic Mail Message" Under the CAN-SPAM Act.

The CAN-SPAM Act defines the key jurisdictional term "commercial electronic mail message" as follows: "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose)." CAN-SPAM Act § 3(2)(A). The Act further directs the FTC to issue regulations defining the relevant criteria for determining an e-mail's "primary purpose." CAN-SPAM Act § 3(2)(C).

It should be obvious that an e-mail seeking collection on a debt does not have as its primary purpose the advertisement or promotion of a commercial product or service. Collection agencies send e-mails and other forms of communication to debtors for the purpose

of collecting preexisting debts owed either to the sender or, as is more often the case, a third-party creditor. Such communication does not advertise or promote products or services. It merely seeks to recover money owed for a product, service, or loan that has already been provided but has not been fully paid off by the debtor. Debt collection e-mails simply are not spam, and the FTC should acknowledge this fact in its upcoming report on the proposed do not e-mail registry.

The FTC also should acknowledge that payment services incidental to the collection of debts by e-mail are not subject to the CAN SPAM Act. Payment options are commonly offered as part of an e-mail communication to collect a debt. If a debtor consents, a collection agency will send a collection notice electronically, or "e-collection" notice, to the debtor which includes an electronic payment option. If the debtor elects, the transaction is processed electronically by e-check, debit or credit card and the debt is paid off. Consumers, creditors and collection agencies all benefit by encouraging this type of efficient, elective payment transaction. Regardless of the method of payment, the purpose of e-collection is to communicate with a debtor about his or her debt. An incidental aspect of the communication is to offer an additional option to the debtor to pay off the debt by an electronic process. Including this additional information about the consumer's payment options, however, should not be deemed to be a "commercial advertisement or promotion of a commercial product or service" under the statute. CAN-SPAM Act § 3(2)(A).

2. Debt Collection E-mails, at Most, are Transactional or Relationship Messages Under the CAN-SPAM Act.

Congress explicitly exempted "transactional or relationship messages" from the CAN-SPAM Act's coverage. The Act defines such messages to include e-mails, the primary purposes of which is "to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;" CAN-SPAM Act § 3(17)(A)(i), or "to provide– . . . account balance information or other type of account statement with respect to [an] account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender." CAN-SPAM Act § 3(17)(iii)(III). The Act also authorizes the FTC to modify this definition to "accomplish the purposes of this Act." CAN-SPAM Act § 3(17)(B).

ACA urges the Commission to make clear in its report on the do not e-mail registry that debt collection e-mails would be considered, at most, "transactional or relationship messages" within the meaning of the CAN-SPAM Act, and therefore not subject to inclusion in a do not e-mail registry. The language of section 3(17) would seemingly make this clear, except for the fact that a debt collector, the "sender" of the e-mail, might not be considered the party with whom the recipient entered into a debtor-creditor relationship.

There is nothing in the Act, however, suggesting that Congress intended to create a loophole in the definition of "transactional or relationship messages" through which debtors

could escape collection e-mails. A debt collection agency operates as an agent of the creditor. In the Act's terminology, collection agencies are paid to "complete . . . a commercial transaction that the recipient has previously agreed to enter into . . . ." It would defy common sense, not to mention congressional intent, for a debt collection e-mail to be considered anything other than a "transactional or relationship" message. The Commission should make this point plain in its upcoming report. Otherwise, debtors could abuse the CAN-SPAM Act by seeking to block legitimate and perfectly legal debt collection e-mails simply by having their debt collectors placed on the do not e-mail registry. This is a loophole that Congress showed no signs of wanting to create.

3. The FTC Should Exercise its Rulemaking Authority to Exempt from the CAN-SPAM Act and Do Not E-Mail Registry "Communications" as Defined by the FDCPA.

Debt collection agencies are already subject to numerous regulatory mandates under the FDCPA, a law aimed specifically at the debt collection industry. The FDCPA regulates the practices of debt collectors in locating debtors, 15 U.S.C. § 1692b, in restricting how and how often debtors may be contacted, 15 U.S.C. § 1692c, in preventing harassment or abuse, 15 U.S.C. § 1692d, or false or misleading representations, 15 U.S.C. § 1692(e). The FDCPA imposes stiff penalties, *see* 15 U.S.C. § 1692k, and confers robust administrative enforcement powers on the FTC. *See* 15 U.S.C. § 1692*l*. Indeed, the FDCPA gives consumers the right to cease communications with debt collectors. *See* 15 U.S.C. § 1692c(c). In short, the

FDCPA already establishes a welter of finely-tuned behavioral restrictions on the debt collection industry, and it already protects debtors from abusive communications via the Internet or any other means.

The CAN-SPAM Act, by contrast, contains nothing that would suggest that Congress intended to classify debt collection e-mails as spam. The FTC should emphasize this point in its Do Not E-Mail Registry report. The Commission should also indicate in the report that it intends to exempt debt-collection e-mails from CAN-SPAM regulation (and the do not e-mail registry) by excluding FDCPA "communication" from additional regulation under the CAN-SPAM Act. The statutory definition of "communication" under the FDCPA is quite specific: "The term 'communication' means the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). The regulatory regime established by the FDCPA protects consumers and limits communications by collection agencies. Ultimately, it would be counterproductive and economically wasteful to enable debtors to block necessary, albeit unwanted, e-mail communications seeking collection on valid debts. Allowing debtors to place collection agencies on a do not e-mail registry would do nothing to correct the spam problem and would do much to harm the nation's economic well-being.

CONCLUSION

Debt collection is vital to the national economy. If anything, the advent of e-mail makes a debtor's life less intrusive than it was in the pre-Internet era when written letters or live phone calls were often the only means available to contact debtors. The bottom line for ACA is that the CAN SPAM Act should not be construed by the FTC to hold that debt-collection e-mails are spam. ACA asks the Commission to recognize and reaffirm this simple fact in its report on the Do Not E-Mail Registry.

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.