

**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 )  
 )  
Petition for Declaratory Ruling or )  
Clarification of Citizens Bank, N.A. )  
 )  
TO: The Commission

**COMMENTS OF CITIZENS BANK, N.A. IN SUPPORT OF ITS PETITION FOR A  
DECLARATORY RULING AND/OR CLARIFICATION**

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## **EXECUTIVE SUMMARY**

Citizens Bank, N.A. (“Citizens”) respectfully submits these comments in support of its Petition for Declaratory Ruling and/or Clarification (“Petition”) regarding the scope of “prior express consent” under the Telephone Consumer Protection Act (the “TCPA”). The Commission has long held 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.” Accordingly, Citizens’ Petition asks that the Commission clarify that, where a called party has taken purposeful and affirmative steps to release her cell phone number to the public for regular use in normal business communications – by listing the cell phone number in advertisements and internet sites as the sole contact number for her business – the party has provided prior express consent to receive non-telemarketing calls on that number.

While the requested clarification is a natural and logical reading of Congress’s intent and the Commission’s implementation of the statute, it also has critical implications. Citizens is currently facing potentially significant vicarious liability in a TCPA class action brought by a defaulted debtor who affirmatively and voluntarily invited the general public to contact her on her cell phone number by broadly advertising her name and number in connection with businesses she owned. Persons who repeatedly advertise their name and cell phone number cannot claim to be surprised, or that their privacy has been invaded, when they receive non-telemarketing calls at that number. Moreover, plaintiffs should not be able to set a “TCPA litigation trap” by purposefully advertising that number, and then suing someone who calls the advertised number for informational, non-telemarketing purposes. Citizens respectfully requests that the Commission act swiftly to issue the requested clarification.

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## **I. BACKGROUND**

Citizens is a Rhode Island corporation that provides lending services in select markets nationwide. Citizens is presently defending a putative class action lawsuit in the United States District Court for the Southern District of California, in which the named plaintiff – Linda Sanders (“Sanders”) – has alleged negligent and/or knowing and willful violations of the TCPA.<sup>1</sup>

In late 2007, Sanders entered into two loan agreements with Citizens. On each loan application, Sanders represented that she was a self-employed owner of a restaurant and catering business, and that she had been so employed for 5 years. When Sanders defaulted on the loans, Citizens engaged certain third party vendor(s) to attempt to collect the underlying debts. Sanders stopped responding to attempts to contact her on any of the telephone numbers that she had provided to Citizens in connection with her loans. Certain of the vendor(s) attempted to reach her on a number that Sanders publicly advertised in numerous locations as a contact number for her and her business (the “3848 Number”). The 3848 Number is a cellular telephone number. Sanders’ claims against Citizens arise out of calls allegedly made to the 3848 Number.

Sanders used the 3848 Number as the exclusive business telephone number for IndividualiTEA and Coffee Company (“IndividualiTEA”). At the time that Sanders allegedly received the calls at issue at the 3848 Number, IndividualiTEA’s website – [www.individualiteaandcoffee.com](http://www.individualiteaandcoffee.com) – listed Sanders as owner and operator of the company, and the company was registered to do business with the California Secretary of State. On IndividualiTEA’s website, the 3848 Number was listed as the sole contact number at the bottom of the “Contact Us” section. Furthermore, the number was plastered throughout the website at the “Our Service” page, the “Tea” page, the “Coffee” page, and the “Retail Store” page. The

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<sup>1</sup> See *Sanders et al v. RBS Citizens, N.A.*, No. 13-cv-03136-BAS-RBB (S.D. Cal., Oct. 16, 2014).

3848 Number also appeared as the “Customer Service Phone” on email confirmations received for purchases made from IndividualiTEA.

In addition to advertising the number on her company website, Sanders took affirmative steps to publicly distribute the 3848 Number. In July 2010, an IndividualiTEA magazine advertisement listed Sanders as the contact person for IndividualiTEA and the 3848 number as the only contact phone number.<sup>2</sup> Similarly, business cards for IndividualiTEA identify Sanders as “President” and list the 3848 Number as the only contact phone number. Sanders also registered the 3848 Number with the “Long Beach [California] Business List”<sup>3</sup> and the 3848 Number appeared on a number of other websites as the sole contact number for IndividualiTEA.<sup>4</sup> Furthermore, the 3848 Number was listed with the Data Universal Number System (“DUNS”) as the contact number for IndividualiTEA (DUNS No. 96-203-1758).

Sanders also used the 3848 Number as the “Business Phone Number” for IndividualiTEA on documents filed with the Centers for Medicare and Medicaid Services, an agency of the United States government.<sup>5</sup>

## **II. The TCPA’s Legislative History, Commission Precedent, and Recent Judicial Opinions Support the Requested Clarification**

In the pending putative class action, Citizens is accused of violating the TCPA’s prohibition on any person within the United States making “any call (other than a call made for emergency purposes *or made with the prior express consent of the called party*) using any

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<sup>2</sup> *Product Showcase*, Specialty Coffee Retailer, at 42 (July 2010), available at [http://216.197.100.31/Media/DocumentLibrary/2010\\_Product%20Showcase.pdf](http://216.197.100.31/Media/DocumentLibrary/2010_Product%20Showcase.pdf).

<sup>3</sup> Reverse Lookup of the 3848 Number on Long Beach Business List, [www.longbeachbusinesslist.com](http://www.longbeachbusinesslist.com).

<sup>4</sup> Including at [www.bevnet.com](http://www.bevnet.com) and [queryusa.com](http://queryusa.com).

<sup>5</sup> IndividualiTEA and Coffee Company, *National Provider Identified (NPI) Form*, [www.HIPAASPACE.com](http://www.HIPAASPACE.com) (Sept. 8, 2011), available at [http://www.hipaaspace.com/Medical\\_Billing/Coding/National\\_Provider\\_Identifier/Codes/NPI\\_1558642199.pdf](http://www.hipaaspace.com/Medical_Billing/Coding/National_Provider_Identifier/Codes/NPI_1558642199.pdf).

automatic telephone dialing system or artificial or prerecorded voice . . . to any telephone number assigned to a paging service, *cellular telephone service* . . . or any service for which the called party is charged for the call.”<sup>6</sup> At issue in this case is whether the calls in question were made with prior express consent.

The statute’s legislative history, as reflected in the 1991 House Report that recommended passing the TCPA (“House Report”), demonstrates Congress’s intent that the TCPA must maintain a balance between “barring all calls to those who objected to unsolicited calls [and] a desire to not unduly interfere with ongoing business relationships.”<sup>7</sup> Accordingly, the House Report recognized that statute’s restrictions on calls does not apply when the phone number has been provided by the called party “*for use in normal business communications*.”<sup>8</sup>

The Commission has long confirmed the need to “balance the privacy concerns which the TCPA seeks to protect [and] the continued viability of useful business services.”<sup>9</sup> Federal courts have also recognized the need for balance:

A review of the statutory and regulatory background is critical to understanding the proper resolution of the issues raised by this appeal. In response to evidence that automated or prerecorded calls are a nuisance and an invasion of privacy, Congress passed the Telephone Consumer Protection Act to balance individuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade.<sup>10</sup>

Commission precedent and related policy rationale support the requested clarification. For example, with respect to facsimiles, the Commission has determined that “a number obtained from the recipient’s own directory, advertisement, or internet site was voluntarily made available for public distribution . . . *For instance, if the sender obtains the number from the recipient’s*

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<sup>6</sup> 47 U.S.C. § 227(b)(1) (emphasis added).

<sup>7</sup> House Report, 102-317 at 13, 1<sup>st</sup> Sess., 102<sup>nd</sup> Cong. (1991).

<sup>8</sup> H.R. Rep. 102-317 at 17 (emphasis added).

<sup>9</sup> 1992 TCPA Order, 7 FCC Rcd at 8754, para. 5.

<sup>10</sup> *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1121 (11th Cir. 2014).

*own advertisement, that advertisement would serve as evidence of the recipient's agreement to make the number available for public distribution.*"<sup>11</sup> In that context, the Commission made clear that the touchstone of the analysis is the purposeful and affirmative release of the number to the public through, for example, advertisements or other conduct inviting normal business communications at the number in question.<sup>12</sup> Moreover, when the Commission defined "prior express consent" in 1992, it specifically recognized that "[p]ersons who knowingly release their phone numbers *have in effect given their invitation or permission to be called at that number, absent instructions to the contrary.*"<sup>13</sup>

The same analysis is equally appropriate for calls to cell phones, at least with respect to non-telemarketing calls: where a called party makes her cell phone number available for public distribution through advertisements, or through some other purposeful and affirmative act releases the number to the public for use in normal business communications, the called party has "given their invitation or permission to be called at that number."<sup>14</sup> This is especially true when a party knowingly releases her telephone number to the public expressly for business or commercial purposes, as the House Report<sup>15</sup> and Commission precedent<sup>16</sup> recognize.

A recent federal court decision, applying "common sense," also recognized that the

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<sup>11</sup> Federal Communications Commission, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3795, para. 15 (2006) ("*2006 Junk Fax Order*") (emphasis added).

<sup>12</sup> *2006 Junk Fax Order*, 21 FCC Rcd 3787, 3795, para. 15.

<sup>13</sup> *1992 TCPA Order*, 7 FCC Rcd 8752, 8769, para. 31 (emphasis added).

<sup>14</sup> *1992 TCPA Order*, 7 FCC Rcd 8752, 8769, para. 31.

<sup>15</sup> H.R. Rep. 102-317 at 17 (Recognizing that the TCPA's restriction on calls to mobile devices was not meant to apply where "the called party has provided the telephone number of such a line to the caller for use in normal business communications. The Committee *does not intend for this restriction to be a barrier to the normal, expected, or desired communications between businesses and their customers.*") (emphasis added).

<sup>16</sup> *1992 TCPA Order*, 7 FCC Rcd at 8754, para. 5.

expectation of privacy underlying Congressional intent in enacting the TCPA is negated when a person specifically advertises a number in connection with a business: “a telephone subscriber who registers a line with the telephone company as a residential line but then lists the number in the Yellow Pages and other directories as a business line sacrifices the protections afforded by the TCPA.”<sup>17</sup> In this case, the plaintiff purportedly registered the phone number as a residential line, but advertised it in connection with a business; the court was tasked in determining whether TCPA prohibitions applicable to “residential” lines applied. While “residential” is not defined in the statute, the court concluded that a “nuanced approach” that takes into account factors beyond how the plaintiff registered the number, such as whether the plaintiff “holds out such a telephone number to the general public as a business line,” is appropriate – as that approach “better comports with Congress’s intent in enacting the TCPA and with common sense.”<sup>18</sup>

Congress trusted the FCC to carry out its intent that the TCPA should not inhibit legitimate commercial and business communications, as reflected by the authority Congress gave to the FCC “to design different rules for those types of automated or prerecorded calls that are not considered a nuisance or invasion of privacy.”<sup>19</sup> This makes sense: under the TCPA and its regulatory regime, not all telephone calls are created equal. For example, calls made for purely informational purposes have historically been considered to be substantively less of an invasion of privacy than other calls, and many informational calls are outside the scope of TCPA liability.<sup>20</sup> Conversely, the TCPA legislative history makes clear, for example, that

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<sup>17</sup> See *Bank v. Independence Energy Group LLC and Independent Energy Alliance LLC*, 2014 U.S. Dist. LEXIS 141141 at \* 9 (Oct. 2, 2014).

<sup>18</sup> *Id.* at \*7.

<sup>19</sup> *Mais*, 768 F.3d at 1122.

<sup>20</sup> For example, in 1992, the Commission held that autodialed debt collection calls to residential telephone lines are exempt from liability under the TCPA as “commercial calls which do not

telemarketing calls to the home are particularly invasive of privacy.<sup>21</sup> And unsolicited calls are an actionable invasion of privacy – in the U.S. Senate report recommending the TCPA’s passage (the “Senate Report”), the Senate recognized a “substantial government interest in protecting telephone subscribers’ privacy rights from *unsolicited telephone solicitations*.”<sup>22</sup>

The narrow clarification requested does not conflict with the privacy and cost concerns animating the TCPA. Where, as here, a called party *actively solicits* and invites calls to her cell phone through numerous public advertisements and other affirmative and purposeful steps, the privacy and cost concerns animating the TCPA are not implicated. Indeed, the called party has no expectation of privacy in a telephone number which she releases to the public (and, in this case, quite widely releases the telephone number) for regular use in normal business communications.

### **III. Policy Reasons Support the Requested Clarification**

The clarification requested by Citizens is consistent with the letter and purpose of the TCPA, for the reasons stated above. There are also important policy considerations which support the requested clarification.

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transmit an unsolicited advertisement.” *1992 TCPA Order*, 7 FCC Rcd at 8773-73, para. 40; *see also* 47 C.F.R. 64.1200(a)(2)(v). In 1995, the Commission reiterated that autodialed debt collection calls to residential lines are permitted under the TCPA. Federal Communications Commission, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12400-01, paras. 17, 19 (1995) (“*1995 TCPA Reconsideration Order*”).

<sup>21</sup> H.R. Rep. 102-317 at 2. Stating that “many consumers are outraged [by] the proliferation of intrusive, nuisance calls to their homes from telemarketers . . . [T]herefore, federal law is needed to control residential practices.” Likewise, former Senator Larry Pressler (R-SD) stated that “[p]eople are increasingly upset over this invasion of their privacy by unrestricted telemarketing.” 137 Cong. Rec. 518317 (daily ed. Nov. 26, 1991) (statement of Sen. Pressler).

<sup>22</sup> Senate Report 102-177 at 7, 102d Cong., 1<sup>st</sup> Sess. (emphasis added).

**A. The Narrow Requested Clarification Related to Cellular Telephone Numbers that Are Purposefully Advertised in Connection with a Business Will Not Result in a Flood of Debt Collection Calls to Parties at Work**

All communications related to debt collection are heavily regulated under numerous federal, state, and even local laws.<sup>23</sup> For example, debt collectors are prohibited under federal law from calling at times and places that the collector knows or should know is inconvenient to the consumer,<sup>24</sup> and are specifically prohibited from calling a person at work if the collector knows or has reason to know that the person’s employer prohibits debt collection calls.<sup>25</sup> Accordingly, providing the requested clarification in the *narrow context where the called party specifically advertised her name and cell phone number and invited the public to call that number for business communications* would only protect the caller from defending frivolous TCPA claims like the claims asserted against Citizens. A caller seeking to recover unpaid debt would still be required to comply with the myriad federal, state, and local protections afforded to debtors receiving debt collection communications – meaning that the clarification requested will not lead to an increase in harassing or other unsolicited debt collection calls.

**B. It is Better Public Policy to Support the Making of Debt Collection Calls Through Dialing Technology**

Automatic telephone dialing technology is used in the context of debt collection

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<sup>23</sup> For example, debt collection is governed by the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*; the Fair Debt Collection Practices Act (“FDCPA”), codified at 15 U.S.C. § 1692 *et seq.*; the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (as amended by the Fair and Accurate Credit Transactions Act); the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*; the Fair Credit and Charge Card Disclosure Act, 15 U.S.C. § 1637(c), Pub. L. No. 100-583, 102 Stat. 2960; the Federal Bankruptcy Code, Title 11 of the U.S.C., Pub. L. No. 95-598, 92 Stat. 2549; and numerous other federal, state and local laws. *See, e.g.*, Illinois Collection Agency Act, 225 ILCS 425 *et seq.*; California Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code § 1788 *et seq.*; Florida Fair Consumer Credit Practices Act, Fla. Stat. Ann. § 559.55 *et seq.*; West Virginia Collection Agency Act of 1973, W.Va. Code Ann. § 47-16-1 *et seq.*

<sup>24</sup> 15 U.S.C. § 1692c(a)(1).

<sup>25</sup> 15 U.S.C. § 1692c(a)(3).

communications to benefit both the calling party and the party being called. Such systems facilitate efficient and responsible communications by, for example, making it much easier to (i) verify that the correct number has been dialed, (ii) track the frequency and timing of the calls made, (iii) ensure that the calls to debtors are uniform, and (iv) ensure that the information being relayed to the debtor is permissible and consistent with the federal, state, and local laws applying to such communications. Congress recognizes the benefits of dialing technology by specifically allowing the use of an automatic telephone dialing system (“ATDS”) as long as the calling party had prior express consent to call.<sup>26</sup>

Indeed, just last month President Obama released his FY 2016 Budget Proposal, which proposes to clarify that the use of automatic dialing systems and prerecorded voice messages is allowed when contacting wireless phones in the collection of debt owed to or granted by the United States – to ensure that debt owed is collected as quickly and as efficiently as possible.<sup>27</sup> The White House estimates that this proposal – due to associated efficiencies - will result in \$120 million in savings over 10 years.<sup>28</sup>

Moreover, even if it were feasible to make manual calls (and, in many cases, it is not), manual calls are burdensome and incur extra costs that will almost certainly be passed on to consumers. That result would be inconsistent with the TCPA’s stated desire to preserve “the

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<sup>26</sup> 47 U.S.C. § 227(b)(1).

<sup>27</sup> The Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2016*, Budget.Gov, at 116 (Feb. 2, 2015), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/budget.pdf>; The Office of Management and Budget, *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2016*, at 127-28 (2015), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/spec.pdf>.

<sup>28</sup> *Id.*

continued viability of beneficial and useful business services.”<sup>29</sup> Finally, as explained in more detail below, even manual calls do not safeguard against aggressive plaintiffs pursuing TCPA litigation under the theory that even *manual* dialing systems can be hypothetically modified to become an ATDS in the future.<sup>30</sup>

### **C. Absent the Requested Clarification, Business Advertisements Will Form the Basis for the Next Wave of TCPA “Litigation Traps”**

The clarification requested will also help to curb the growing use of the TCPA “as a device for the solicitation of litigation.”<sup>31</sup> It is a clever scheme indeed to “solicit litigation” by purposefully advertising a cell phone number to the general public for the purposes of business communications and then suing under the TCPA when called on that cell phone number for non-telemarketing business communications. Without clarification, serial plaintiffs and their counsel will be free to entrap not only debt collectors but other corporate or civic institutions by inviting calls to cell phone numbers through public advertisements and distribution, only to then bring claims under the TCPA against these institutions.

Sanders, for example, noted on her website that IndividualiTEA’s past and potential clients include “government officials, universities, colleges [and] schools.” If one of these types of organizations sees the advertisement and contacts Sanders at the advertised number – say, for example, a university placement office seeking to secure internship opportunities for its students, a university booster club seeking to use parking lot space for a car wash fundraiser, a university science lab asking for tea samples to use in a science experiment, or even an alumni organization

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<sup>29</sup> 1992 TCPA Order, 7 FCC Rcd at 8754, para. 5.

<sup>30</sup> See *supra* section III.D of these Comments; see also *Hunt v. 21<sup>st</sup> Mortgage Corp.*, 2013 U.S. Dist. LEXIS 132574, at \* 11 (D. Ala. Sept. 17, 2013); *Gragg v. Orange Cab Co.*, 2014 U.S. Dist. LEXIS 16648 at \*8-9 (W.D. Wa. Feb. 7, 2014); *Glauser v. GroupMe, Inc.*, 2015 U.S. Dist LEXIS 14001 at \* 8-17 (N.D. Cal. Feb. 4, 2015).

<sup>31</sup> *West Concord 5-10-1.00 Store, Inc. v. Interstate Met Corp.*, No. 2010-00356, 31 Mass. L. Rep. 58 (Mass. Super. Ct. Mar. 5, 2013).

seeking to connect with Sanders – those calls would potentially give rise to liability under the TCPA. And, as explained below, whether a call is made from a basic smartphone, a rotary telephone, or a phone connected to a university dialing system, no call is safe from frivolous TCPA litigation, in part because the FCC has not ruled on the meaning of “capacity.” These sorts of litigation traps are plainly inconsistent with the purpose and legislative history of the TCPA, and clarification is needed to prevent further abuse of the statute.

The status quo is unsustainable. Between 2010 and 2014, TCPA litigation increased by 560%.<sup>32</sup> Aggressive plaintiffs, motivated by opportunistic trial lawyers advertising the opportunity of big financial gain, are seizing on the uncertainties of TCPA compliance to strong-arm legitimate businesses into court. Indeed, FCC Commissioner Michael O’Rielly noted that, “for too many American companies seeking to conduct legitimate marketing or collection efforts, or even to communicate with subscribers or employees, the implementation and enforcement of TCPA has turned into a nightmare.”<sup>33</sup>

#### **D. Manual Calls Will Not Protect Against Having to Defend Frivolous Litigation**

As stated above, ATDS is defined as equipment which “has” the “capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”<sup>34</sup> Critically, “capacity” is not defined in either the statute or the regulations. Despite the very clear and explicit definition of an ATDS provided by Congress in

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<sup>32</sup> *Debt Collection Litigation & CFPB Complaint Statistics, December 2014 & Year in Review*, WebRecon LLC (Jan. 22, 2015), available at <http://dev.webrecon.com/debt-collection-litigation-cfpb-complaint-statistics-december-2014-and-year-in-review/>.

<sup>33</sup> Commissioner Michael O’Rielly, *Remarks of FCC Commissioner Michael O’Rielly to The U.S. Chamber of Commerce’s Telecom and E-Commerce Committee Meeting*, at 3 (Nov. 17, 2014), available at <http://www.fcc.gov/document/commissioner-orielly-remarks-us-chamber-commerce>.

<sup>34</sup> 47 U.S.C. § 227(a)(1); see also *2003 TCPA Order*, 18 FCC Rcd at para. 132.

the statute,<sup>35</sup> aggressive plaintiffs are filing lawsuits based on the theory that even if a dialing system does not presently have the statutorily-required elements of an ATDS, it has the requisite “capacity” so long as it can be modified at some hypothetical point in the future to contain those elements at some later date.<sup>36</sup>

There are several petitions before the FCC asking for common sense clarification on the basic notions that (1) “capacity” of an ATDS means present ability, not future hypothetical ability; and (2) in order to be an ATDS under the statute the dialing system must have the statutory elements of an ATDS as set forth by Congress.<sup>37</sup> Those petitions remain pending. While the issue remains unresolved before the FCC, creditors and other callers could *still be forced to defend frivolous TCPA lawsuits, and may ultimately be held liable, even for making manual calls* to a debtor’s advertised number if, for example, the plaintiff asserts that the manual system used by the caller could be connected or upgraded to an ATDS at some future point in time.<sup>38</sup>

As a result, plaintiffs can simply set TCPA “litigation traps” by advertising a name and business, listing a cell phone number in connection with that business, and then racking up potential lawsuits as callers contact the advertised number for any number of non-telemarketing,

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<sup>35</sup> 47 U.S.C. § 227(a)(1) (“The term “automatic telephone dialing system” means equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”).

<sup>36</sup> See *Hunt*, 2013 U.S. Dist. LEXIS 132574, at \* 11; *Gragg*, 2014 U.S. Dist. LEXIS 16648 at \*8-9; *Glauser*, 2015 U.S. Dist LEXIS 14001 at \* 8-17.

<sup>37</sup> See *ACA International, Petition for Rulemaking of ACA International*, CG Docket Nos. 02-278, RM-11712 (Jan. 31, 2014); *Professional Association for Consumer Engagement (PACE), Petition for Declaratory Ruling and/or Expedited Rulemaking of PACE*, CG Docket No. 02-278 (Oct. 18, 2013); *TextMe, Inc., Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (Mar. 18, 2014).

<sup>38</sup> See *Hunt*, 2013 U.S. Dist. LEXIS 132574 at \*11; *Gragg*, 2014 U.S. Dist. LEXIS 16648 at \*8-9; *Glauser*, 2015 U.S. Dist LEXIS 14001 at \* 8-17.

informational communications. Even if the caller makes a manual call (whether a debt collector, a university or a hospital), the manual call will not necessarily protect the caller from TCPA liability.

#### **IV. Clarification From the Commission is Urgently Needed**

Citizens respectfully requests that the Commission expeditiously clarify that where a called party purposefully chooses to make her cell phone number available for public distribution through advertisements or other purposeful and affirmative conduct meant to solicit business communications, the called party has given “her invitation or permission to be called at th[at] number” and has thereby provided prior express consent to receive non-telemarketing, informational calls to the number in question. Imposing liability for these types of invited, non-telemarketing calls is inconsistent with the letter and spirit of the TCPA and with the Commission’s implementation of the statute over the last 20 years.

The clarification requested would also be fundamentally fair and commercially reasonable, and consistent with common sense: a plaintiff should not be able to voluntarily distribute a cell phone inviting the public to call, on the one hand, while on the other hand using the TCPA as a shield against lenders seeking to recover on defaulted debts – or in this case, even attempting to profit from the failure to pay. The TCPA was not enacted to protect such selective indignation or fuel such abusive litigation.

#### **CONCLUSION**

For the foregoing reasons, the Commission should clarify and/or issue a declaratory ruling holding that a called party has provided prior express consent to receive non-telemarketing, auto-dialed calls on a cell phone number where the called party takes purposeful and affirmative steps to advertise her cell phone number to the public for regular use in normal business communications.

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