

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

In the Matter of)
)
) CG Docket No. CG 02-278
Rules and Regulations Implementing the)
Telephone Consumer Protection Act of 1991)
)
Petition for Declaratory Ruling or)
Clarification of Citizens Bank, N.A.)

TO: The Commission

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

Citizens Bank, N.A. (“Citizens”), through counsel, respectfully submits these Reply Comments in support of its Petition for Declaratory Ruling or Clarification (“Petition”) asking that the Commission clarify the scope of prior express consent under the Telephone Consumer Protection Act (“TCPA”).¹ As the comments on its Petition demonstrate, there is overwhelming support for the common-sense approach urged by Citizens to clarify that, where a called party has taken purposeful and affirmative steps to advertise her cell phone number and invite calls to that number for regular use in normal business communications, the party has provided prior express consent to receive non-telemarketing calls at that number.²

¹ 47 U.S.C. § 227; *see* Petition for Declaratory Ruling or Clarification of Citizens Bank, N.A., *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Jan. 16, 2015) (“Citizens Petition”); *see also* Comments of Citizens Bank, N.A., CG Docket No. 02-278 (Mar. 12, 2015) (“Citizens Comments”).

² *See* Comments of The Professional Association for Customer Engagement, CG Docket No. 02-278 (Mar. 16, 2015) (“PACE Comments”); Comments of the Student Loan Servicing Alliance, CG Docket No. 02-278 (Mar. 16, 2015) (“SLSA Comments”); Comments of the American

As Citizens detailed in its Petition and Comments, it is currently defending a putative class action lawsuit in which the named plaintiff – Linda Sanders – has brought suit alleging TCPA violations for calls she received on her cell phone, a number that she publicly advertised as the contact number for her online retail business (the “3848 Number”).³ The alleged violations occurred when, after Sanders defaulted on a loan agreement with Citizens and then stopped responding to calls at the numbers she provided on the loan agreement, Citizens’ third party collection vendors attempted to contact her on the 3848 Number. At the time the calls were made, Sanders had broadly advertised her name and the 3848 Number in connection with an online retail business that she owned and operated.⁴

I. Commenters Overwhelmingly Agree that the Requested Clarification is a Natural and Logical Reading of Congress’s Intent and the Commission’s Implementation of the Statute

Critically, Sanders had no reasonable expectation of privacy once she invited the general public to call her on the 3848 Number by plastering it throughout her business’ website and

Financial Services Association, CG Docket No. 02-278 (Mar. 16, 2015) (“AFSA Comments”); Comments of the Consumer Bankers Association, CG Docket No. 02-278 (Mar. 16, 2015); Comments of the Independent Bankers Association of Texas, CG Docket No. 02-278 (Mar. 16, 2015) (“IBAT Comments”).

³ See *Sanders et al v. RBS Citizens, N.A.*, No. 13-cv-03136-BAS-RBB (S.D. Cal., Oct. 16, 2014). 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 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.” See 47 U.S.C. § 227(b)(1) (emphasis added).

⁴ See Citizens Petition at 3-6; Citizens Comments at 4-5 (detailing the numerous and various ways in which Sanders actively distributed the 3848 Number for broad public use).

distributing it broadly through various advertising channels. This is a common sense proposition with which commenters overwhelmingly agree.⁵

The TCPA's legislative history, as reflected in the 1991 House Report that recommended passing the TCPA, found that the statute's restriction on calls does not apply when the phone number has been provided "*for use in normal business communications.*"⁶ Federal courts have also recognized that Congress properly intended for the TCPA to "balance individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade."⁷ A recent federal court decision, applying "common sense," also recognized that the expectation of privacy 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.*"⁸

⁵ See CBA Comments at 2-3 (Noting that in other contexts, a reasonable expectation of privacy hinges on whether the individual has a "subjective expectation of privacy that is deemed reasonable in public norms." CBA states that Sanders' public advertisement of her telephone number "[u]nquestionably" indicates that she had no subjective expectation of privacy and, even if she did, it would not meet "reasonable privacy norms."); SLSA Comments at 4 ("It seems disingenuous at best for the consumer in the Citizens lawsuit to publicly distribute her cell phone number, and then to object when she is called at that number."); AFSA Comments at 1 (Highlighting that "[Sanders] actively invited calls to her cell phone number."); IBAT Comments at 2 (Emphasizing that Sanders had "little to no reasonable expectation of privacy for a telephone number . . . repeatedly advertised to the public.").

⁶ House Report, 102-317 at 13, 17, 1st Sess., 102nd Cong. (1991) (emphasis added).

⁷ *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1121 (11th Cir. 2014).

⁸ See *Bank v. Independence Energy Group LLC and Independent Energy Alliance LLC*, 2014 U.S. Dist. LEXIS 141141 at * 9 (Oct. 2, 2014) (emphasis added). 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 with determining whether 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

The National Consumer Law Center (“NCLC”) wrongly suggests that Citizens’ proposed clarification will “delete the word ‘express’” from the TCPA.⁹ This ignores the fact that when the Commission addressed “prior express” consent and permission in 1992, it stated that, in the context of facsimiles, “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.*”¹⁰ There, the touchstone of the Commission’s analysis is the purposeful and affirmative release of the number to the public through, for example, advertisements or other conduct actively inviting normal business communications.¹¹ An advertisement specifically inviting (and, in fact, soliciting) the general public to call a cell phone number for business communications is subject to the same analysis.

NCLC also falsely states that Citizens is requesting an exemption from the TCPA to call “*about anything*” based on *limited public release of one’s phone number*.¹² What Citizens is actually requesting is a narrow clarification that in the specific context where a party *actively*

as a business line,” is appropriate – as that approach “better comports with Congress’s intent in enacting the TCPA and with common sense.” *Id.* at *7.

⁹ Comments of the National Consumer Law Center, *et al.*, CG Docket No. 02-278, 2 (Mar. 16, 2015) (“NCLC Comments”).

¹⁰ Federal Communications Commission, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8769, para. 31 (1992) (“1992 TCPA Order”).

¹¹ 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”).

¹² NCLC Comments at 4. NCLC incorrectly characterizes Citizens’ petition as suggesting that an individual who posts to a website a resume containing her cellular telephone number for prospective employers has consented to receive robocalls on her cell phone. But NCLC is attempting to analogize to a situation that dramatically understates the level of active advertisement of the 3848 Number by Sanders, which went beyond posting the number to a website and included affirmative distribution through a magazine ad and business cards. *See* NCLC Comments at 2.

solicits and invites calls to her cell phone through public advertisements and other affirmative and purposeful steps, the party has provided prior express consent to receive *non-telemarketing calls* on that number. The Commission has historically distinguished between telemarketing and non-telemarketing calls when evaluating privacy implications.¹³ Obviously 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 concerns animating the TCPA are not implicated.

II. Commenters Overwhelmingly Agree that Important Policy Considerations 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.

First, commenters agree that providing the requested clarification in the *narrow* context where the called party specifically advertised her name and cell phone number and invited calls to that number for business communications will help to prevent frivolous TCPA claims like the

¹³ 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 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). Additionally, in the U.S. Senate report recommending the TCPA’s passage, the Senate recognized a “substantial government interest in protecting telephone subscribers’ privacy rights from *unsolicited telephone solicitations*.” Senate Report 102-177 at 7, 102d Cong., 1st Sess. (emphasis added).

claims asserted against Citizens.¹⁴ The status quo is unsustainable – between 2010 and 2014, TCPA litigation increased by 560%.¹⁵

Second, the ample consumer protections afforded by myriad federal, state, and local laws will ensure that Citizens’ requested clarification would only help the caller to defend against frivolous litigation without compromising legitimate privacy rights of consumers.¹⁶

Third, commenters agree that the use of autodialers benefits both the calling party and the party being called by facilitating efficient, uniform communications to consumers.¹⁷ For example, student loan servicers rely on the use of automated calling to help borrowers manage their student loan debt and to collect payments that are critical federal government revenue.¹⁸ Moreover, 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.¹⁹

¹⁴ See CBA Comments at 4-5 (The “unnecessary influx [of TCPA litigation] further supports the need for FCC guidance as the expert agency tasked with interpreting the TCPA.”); SLSA Comments at 5 (Noting “the problems caused by the over-zealous plaintiffs’ bar.”); PACE Comments at 1.

¹⁵ *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/>.

¹⁶ 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 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. See 15 U.S.C. §§ 1692c(a)(1), (a)(3); see also IBAT Comments at 5.

¹⁷ See AFSA Comments at 2; IBAT Comments at 4 (Noting that automated dialing reduces collection costs, which in turn “reduces costs for other borrowers [and] makes additional credit available for individuals in need.”); SLSA Comments at 3-4.

¹⁸ SLSA Comments at 3-4.

¹⁹ 47 U.S.C. § 227(b)(1).

Fourth, making manual calls – even in the limited circumstances where this is possible – is burdensome and will impose additional costs that will be passed on to consumers.²⁰ That result would be inconsistent with the TCPA’s stated desire to preserve “the continued viability of beneficial and useful business services.”²¹ As noted, manual calling does 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.²²

Finally, the clarification requested will help to curb the growing use of the TCPA as a “device for the solicitation of litigation.”²³ It is a clever scheme indeed to “solicit litigation” by advertising a cell phone number to the general public for the purpose of business communications and then suing under the TCPA when called on that cell phone number. Without clarification, aggressive plaintiffs will be free to entrap not only debt collectors but other corporate or civic institutions.

III. Conclusion

For the foregoing reasons, the Commission should clarify that a called party has provided prior express consent to receive non-telemarketing, auto-dialed calls on a cell phone number in the narrow context where the called party has taken purposeful and affirmative steps to advertise her cell phone number to the general public, and has invited and solicited the general public to call her on that number for normal business communications.

²⁰ See SLSA Comments at 3-4; AFSA Comments at 2.

²¹ 1992 TCPA Order, 7 FCC Rcd at 8754, para. 5.

²² See *Hunt v. 21st 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).

²³ See *West Concord 5-10-1.00 Store, Inc. v. Interstate Met Corp.*, 2013 WL 988621 at *6, *8, 31 Mass. L. Rep. 58 (Mass. Super. Ct. Mar. 5, 2013).

Respectfully submitted,

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March 27, 2015