

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	
ACA International Petition for an)	
Expedited Clarification and Declaratory Ruling)	

REPLY COMMENTS OF THE DIRECT MARKETING ASSOCIATION

The Direct Marketing Association, Inc. ("DMA"), submits these reply comments in connection with ACA International's ("ACA") Petition for an Expedited Clarification and Declaratory Ruling, to address an issue that the American Financial Services Association ("AFSA") raised in its comments on ACA's petition. AFSA generally contends that the Federal Communications Commission ("FCC" or "Commission"), should reaffirm that businesses are not prohibited from using an autodialer to contact an individual at a number that individual provides as a contact point, even if the call is made to a wireless number. DMA agrees that the Commission should reaffirm that an individual effectively consents to be contacted at a number – including a wireless number¹ – that he or she identifies as a contact point. AFSA, however, suggests that there is ambiguity about whether such consent extends only to what AFSA describes as "account- servicing" calls, or more broadly to other types of calls, too. DMA does not believe any such ambiguity exists. When someone provides their telephone number, then

¹ For ease of reference for purposes of these comments, we use the term "wireless number" to refer to any of the services subject to the limits of 47 U.S.C. § 227(b)(1)(A)(iii).

absent contrary instructions,² it is reasonable to infer that they consented to receive calls at that number.

AFSA refers to one paragraph, and in turn a single footnote, in the Commission's 2003 Report and Order amending its rules implementing the Telephone Consumer Protection Act of 1991 ("TCPA). The Commission stated that it was declining to adopt a categorical exemption from the limits on autodialers for "inadvertent autodialed or prerecorded calls to wireless numbers and proposals to *create* implied consent."³ AFSA suggests that since some of the parties requesting such action engaged in solicitation calls, the Commission's statements may be interpreted as limited to calls regarding servicing an individual's account.

We disagree. To the extent that these statements in the *2003 Order* relate to the consent to be inferred from the knowingly release of a telephone number, the Commission did not "decline" to take action; it had *already* taken a position on the issue 1992. Indeed, the Commission could not, consistent with the Constitution or the Administrative Procedure Act, alter the substantive legal standards established in the *1992 Order*⁴ by way of a terse footnote, rather than a reasoned explanation for such a material change in the applicable legal standards.

The TCPA's legislative history indicates that Congress intended a decision to release a telephone number to constitute consent to contact that number. As explained in the Committee report to accompany H.R. 1304:

² This could include a company-specific do-not-call request or an instruction provided when the number is supplied.

³ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, FCC 03-153, ¶ 172 and fn. 623 (2003) ("*2003 Order*") (emphasis added).

⁴ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, 7 FCC Rcd. 8752, ¶ 31 ("*1992 Order*").

The restriction on calls to emergency lines, pagers, and the like does not apply when 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.⁵

Consistent with that guidance, the FCC was unmistakably clear when it explained, in the context of discussing the autodialer restrictions, 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. Hence, telemarketers will not violate [FCC] rules by calling a number which was provided as one at which the called party wishes to be reached."⁶ The Commission recently restated this principle when it adopted regulations to implement the Junk Fax Prevention Act of 2005 ("JFPA"). The FCC determined that when otherwise lawful, it is permissible for a sender to transmit a fax "to a recipient that had provided a facsimile number to the sender, for example, on an application, information request, contact information form, or membership renewal form."⁷ The Commission further concluded that "a business card containing a fax number that is provided by the recipient to the sender would permit the sending of a facsimile advertisement."⁸

It was not necessary for the FCC, in the *2003 Order*, to re-state the operative legal standard that had governed calls for the prior decade – knowingly releasing a number is consent to call that number. The range of views and interpretations that interested parties have expressed about the scope of the autodialer limits *since* the *2003 Order* has perhaps

⁵ H.R. Rep. No. 102-317 at 17 (1991).

⁶ *1992 Order* at ¶ 31.

⁷ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, *Report and Order and Third Order on Reconsideration*, FCC 06-42, ¶14 (rel. April 6, 2006) ("*JFPA Order*").

⁸ *Id.* at fn 49.

led to confusion, and at a minimum suggests that confusion exists. DMA, therefore, agrees that the FCC should clarify this issue, and we urge the Commission to reaffirm the views it expressed in the *1992 Order*. We also believe that debt collection calls are unique, and at times warrant a more flexible approach. Yet, there is nothing in the TCPA or in prior Commission orders to suggest that the consent conveyed by releasing a telephone number is or should be limited only to calls made for debt collection. Just as "[t]he provision of a telephone facsimile number to a business or other entity reflects a willingness to receive faxes from that entity,"⁹ so too does the release of a wireless number communicate consent to receive calls on that number.

Accordingly, DMA respectfully asks that the Commission reaffirm that when consumers release a wireless number, they have given permission to call that number, whether the number is dialed manually or using an autodialer, and that the same standard applies equally to all calls, whether or not made for purposes of debt collection.

Respectfully submitted,

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⁹ *JFPA Order* at ¶14.