

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

In the Matter of )  
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Rules and Regulations Implementing the ) GG Docket No. GG 02-278  
Telephone Consumer Protection Act of 1991 )  
 )  
Petition for Rulemaking of ACA International )  
 )  
Petition for Expedited Declaratory Ruling )  
Of United Healthcare Services, Inc. )

To: The Commission:

**COMMENTS OF THE NATIONAL ASSOCIATION OF INDUSTRIAL BANKERS**

The National Association of Industrial Bankers (NAIB) <sup>1</sup>, through counsel, herein submits these comments in support of the Petition for Rulemaking (hereinafter the “ACA Petition”) filed by ACA International (hereinafter “ACA”). <sup>2</sup>

The ACA urges the Commission to address several significant issues related to the application of the Telephone Consumer Protection Act (hereinafter the “TCPA”) <sup>3</sup> and the Commission’s rules, by:

1. confirming that not all predictive dialers are categorically automatic telephone dialing systems (“ATDS” or “autodialers”);

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<sup>1</sup> First chartered in 1910, industrial banks operate under a number of titles; industrial loan banks, industrial loan corporations, or thrift and loan companies. These banks engage in consumer and commercial lending on both a secured and unsecured basis. They do not offer demand checking accounts but do accept time deposits, savings deposit money market accounts and NOW accounts. Industrial banks provide a broad array of products and services to customers and small businesses nationwide, including some of the most underserved segments of the US economy. Our members are chartered in California, Nevada and Utah.

<sup>2</sup> ACA International, *Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (filed Jan. 31, 2014)

<sup>3</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227 (“TCPA”); 47 C.F.R. § 64.1200 *et seq.*

2. clarifying that “capacity” under the TCPA means present ability;
3. declaring that prior express consent attaches to the person who incurs a debt, and not the specific telephone number the debtor provides at the time of consent; and
4. implementing a safe harbor for autodialed “wrong number” non-telemarketing calls to wireless numbers.

Further, NAIB supports the Petition for Expedited Declaratory Ruling filed by United Healthcare Services Petition (hereinafter the “UHS Petition”).<sup>4</sup> The UHS Petition urges the Commission to find that parties are not liable under the TCPA for informational, non-telemarketing autodialed and prerecorded calls to wireless telephone numbers that have been reassigned without the caller’s knowledge provided the caller has obtained the required prior express consent.

### **I. Statement of Interest**

NAIB is the national association representing industrial banks and our comments focus on those banks, their parent companies and customers. Our member banks share many of the concerns of all banks and have other concerns specific to this type of bank. Unlike other types of bank charters, industrial banks may be owned by non-financial companies. Additionally, industrial banks typically serve unique customer groups and markets nationwide instead of specific geographic areas. Industrial banks rarely have branches and typically do not offer checking and other kinds of transaction accounts.

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<sup>4</sup> *United Healthcare Services, Inc. Petition for Expedited Declaratory Ruling*, CG Docketed No. 02-278 (filed Jan. 16, 2014)

Like other banks and financial services providers, industrial banks contact their customers for a variety of reasons ranging from customer service to fraud prevention to collecting debts and have a keen interest in the Petition.

Like other businesses, the financial services industry finds the TCPA to be less of a vehicle to protect consumers from unwanted calls and more of a stimulus to litigation that often is just short of barratry. When Congress enacted the TCPA, it intended that consumers would recover damages in small claims court without an attorney.<sup>5</sup>

NAIB recognizes that Congress, not the Commission, has the authority to reform the TCPA, nevertheless NAIB urges the Commission to undertake any efforts to reform and ameliorate this, often problematic, statute. Until Congress caps statutory damages or clarifies that class actions cannot be brought under the TCPA, the number of lawsuits will continue to rise because the potential for a monetary windfall is worth the risk for both plaintiffs and their attorneys.

Granting the ACA Petition would be a useful first step.

## **II. The Commission Should Confirm That Predictive Dialers Are Not Categorically Defined As Automatic Telephone Dialing Systems (“ATDS”)**

NAIB urges the Commission to confirm that not all predictive dialers are categorically ATDSs. The ACA Petition correctly notes the Commission’s language in prior orders regarding whether predictive dialers can be autodialers under the TCPA has been abused in litigation.

An ATDS is specifically defined in the TCPA as:

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<sup>5</sup> See Statement of Sen. Fritz Hollings (D-SC): “Small claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purposes of the bill if the attorneys’ costs to consumers of bringing an action were greater than the potential damages.” 137 Cong. Rec. 30821–30822 (1991)

“...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>6</sup>

While NAIB recognizes that some predictive dialers may be be autodialers, the reverse is not the case. Predictive dialers are regularly used by financial institutions to place customer contact calls serving accounts—a use that has nothing to do with telemarketing calls covered by the TCPA. Unfortunately, the lack of clarity has lead to confusion and unwarranted litigation.

NAIB recommends the Commission use its authority to clarify this definition.

### **III. The Commission Should Clarify That “Capacity” Means Present Ability**

The TCPA defines an ATDS 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>7</sup>

Neither the statute nor the Commission’s rules define the term “capacity.”

The ACA Petition cogently explains, clarifying that “capacity” must mean present or current ability is consistent with the TCPA’s plain language (and use of the present tense “has”), the Commission’s prior TCPA rulemakings, and the ordinary meaning of the term.<sup>8</sup>

At least two federal courts have also concluded that TCPA “capacity” must be read as “present ability.”<sup>9</sup>

NAIB urges the Commission to confirm this common sense approach and explicitly declare that “capacity” for TCPA purposes means the present ability of equipment to (A) store or

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<sup>6</sup> 47 U.S.C. § 227(a)(1); ACA Petition at 6

<sup>7</sup> 47 U.S.C. § 227(a)(1); Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Rcd 14014 ¶ 132 (2003); see also, ACA Petition at 9

<sup>8</sup> ACA Petition at 10

<sup>9</sup> See, e.g., *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); see also, ACA Petition at 11.

produce telephone numbers to be called, using a random or sequential number generator; and (B) dial such numbers, at the time the call is made.<sup>10</sup>

### **III. The Commission should declare that prior express consent attaches to the person who incurs a debt, and not the specific telephone number provided at the time of consent**

As the ACA Petition describes, debtors (like all consumers) often change their phone numbers for various reasons, and the trend towards wireless only households is making alternative means to live contact with debtors increasingly difficult, even when they have expressly consented to be called at a wireless number regarding a debt.<sup>11</sup>

The requested clarification would *only* apply to this narrow class of uniquely situated debt collection calls. Debtors have additional protections under the Fair Debt Collection Practices Act (“FDCPA”) and a host of other federal and state laws and regulations and the requested change would not impact any of these existing protections.<sup>12</sup>

### **IV. The Commission Should Implement a Safe Harbor For Autodialed “Wrong Number” Non-telemarketing Calls to Wireless Numbers**

Under current law, a debt collectors, acting in good faith, may be held liable under the TCPA for calling a number for which previous consent was obtained, simply because the original consumer no longer maintains the telephone number. Similarly, debt collectors may potentially incur liability if the called party is charged for the call (for instance, if a call is made to a

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<sup>10</sup> See ACA Petition at 9, n.29, 30

<sup>11</sup> ACA Petition at 12-13

<sup>12</sup> ACA Petition at 14

residential number where the called party is using a Voice Over IP (“VOIP”) service that charges per call).

NAIB supports the ACA’s request that the Commission should establish a safe harbor in the circumstances outlined in the ACA Petition.

## **V. The Commission Should Grant the United Healthcare Petition For Expedited Declaratory Ruling Relating ToReassigned Wireless Telephone Numbers**

Every year, 37 million Americans are assigned new telephone numbers that are recycled from other customers.<sup>13</sup> It is a virtual impossibility for financial institution to avoid making a call to a reassigned telephone number—short the daunting task of verifying the number (or numbers) of every client or customer.

Liability under the TCPA for calls made in good faith to parties who have consented to receive them but whose telephone numbers have subsequently been reassigned may put customers at risk. For example, the UHS Petition outlines critical and time sensitive health care related communications that are inadvertently subject to the TCPA.<sup>14</sup>

Similarly, NAIB members and other financial institutions regularly need to contact customers to convey important, time-sensitive information. For example, call are made to alert customers about possible fraudulent use of their accounts, or that payment is due or, as has

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<sup>13</sup> See:Alyssa Abkowitz, “Wrong Number? Blame Companies' Recycling,” *The Wall Street Journal* (Dec. 1, 2011), available at <http://online.wsj.com/news/articles/SB10001424052970204012004577070122687462582>.

<sup>14</sup> See: UHS Petition at 2: “To facilitate high-quality healthcare and patient services, United contacts individuals to convey important, time-sensitive healthcare-related information, including: Prescription refill notifications; Annual influenza vaccine reminders; Appointment and exam scheduling confirmations and reminders; Pre-operative instruction calls; Lab result discussions; Post-discharge follow-up communications intended to prevent readmission; Home healthcare instructions; Notifications about health-related products or services that are provided by or included in a benefit plan, or that are available only to a health plan enrollee and add value to (but are not part of) plan benefits; and Communications about the entities participating in a healthcare provider network or health plan network, or about replacements of (or enhancements to) a health plan.”

become well publicized in the last few months, that there is a potential breach involving customer information.

NAIB urges the Commission to grant the UHS Petition and confirm that parties are *not* liable under the TCPA for informational, non-telemarketing calls to telephone numbers that have been reassigned without the caller's knowledge, as long as the caller previously obtained valid "prior express consent" to place calls to that telephone number.

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For these reasons, NAIB supports the Petition for Rulemaking filed by ACA International and the Petition for Expedited Declaratory Ruling filed United Healthcare Services, Inc. and urges the Commission to grant prompt approval of both Petitions.

Respectfully Submitted

A handwritten signature in black ink, appearing to read "Frank M. Salinger", written over a horizontal line.

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