

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

In the Matter of)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	CG Docket No. CG 02-278
)	
Petition for Rulemaking of ACA)	
International)	

To: The Commission

**COMMENTS OF THE STUDENT LOAN SERVICING ALLIANCE (SLSA)
AND THE SLSA PRIVATE LOAN COMMITTEE**

The Student Loan Servicing Alliance (SLSA) and the SLSA Private Loan Committee respectfully submit these comments in support of the Petition for Rulemaking filed by ACA International (“ACA”) on January 31, 2014 under CG Docket No. 02-278 (“ACA Petition” or “Petition”). In its petition, ACA urged the Commission to address four significant issues related to the application of the Telephone Consumer Protection Act (“TCPA”) and the Commission’s rules concerning non-telemarketing, informational calls placed to wireless phones,¹ by: (1) confirming that not all predictive dialers are categorically automatic telephone dialing systems (“ATDS” or “autodialers”); (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.

¹ 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.*

We note that almost all of these issues are also the subject of various petitions for a declaratory ruling currently pending before the Commission.² Where the Commission believes that it can provide clarification on one or more of these issues through a declaratory ruling, we would urge it to expeditiously provide the requested clarification. However, if the Commission believes that a rulemaking is necessary in order to grant the relief requested, then we ask that it promptly initiate and complete a rulemaking.

SLSA is a non-profit trade association made up of approximately 25 major student loan servicers whose members service both federal student loans and private education loans. The SLSA PLC is a committee made up of over 55 organizations (some of whom are not SLSA servicers) involved in financing, lending, servicing, and collecting private education loans. Student loan service providers are responsible for a range of services, including the processing of loan applications, communications with consumers, the provision of disclosures and billings, the processing of payments, and the collection of payments. All of the calls that our members make are non-telemarketing, informational calls to our existing customer base.

Many SLSA members service both federal and private student loans. Federal student loans represent by far the largest share of the \$1.2 trillion student loan market, comprising 93% per cent of outstanding student loans, and that share is rapidly increasing each year. Over the past five years, outstanding federal student loans have increased from under \$600 billion in 2008 to more than \$1 trillion today. During the same period, outstanding private loan balances have grown at a much slower pace and have basically leveled off since 2011.

² See, *Petition for Declaratory Ruling*, Communication Innovators, CG Docket No. 02-278 (filed June 7, 2012); *Petition for Expedited Declaratory Ruling*, Cargo Airline Association, CG Docket No. 02-278 (filed Aug. 17, 2012); *Petition for Expedited Declaratory Ruling*, Professional Association for Customer Engagement (PACE), CG Docket 02-278 (filed October 18, 2013); *Petition for Expedited Declaratory Ruling*, Glide Talk, LLC, CG Docket 02-278 (filed October 28, 2013); *Petition for Expedited Declaratory Ruling*, United Healthcare Solutions, Inc., CG Docket No. 02-278 (filed January 16, 2014).

It is important to note that federal loan servicers are stewards of government loans in their care. The primary concern of federal loan servicers is to explore ways to resolve delinquencies in a manner that aids borrowers and preserves government assets. That is difficult to do when regulatory requirements make it difficult and expensive for servicers to perform their obligations. Anyone imposing extra costs on federal loan servicers should recognize the cost to government loan programs funded by taxpayer money. If servicers are to effectively help student borrowers, minimize the costs of loan servicing, and ensure cash flow for federal student loan programs, they must be able to communicate regularly with borrowers about changes in loan status, opportunities to change repayment plans, and new government initiatives to help borrowers. Calls to borrowers using predictive dialers and prerecorded messages are important means of customer communication in our industry.

The current Administration has recognized the importance of these tools in today’s changing technology, and has proposed in recent budgets to expand the use of automatic dialing systems and prerecorded voice messages to contact wireless phones in the collection of debt owed to or guaranteed by the Federal Government.³ The FY 2015 budget also appears to anticipate an FCC rulemaking on this issue.⁴

Cell phones are rapidly becoming the only phone service utilized by many individuals, and that fact is especially true of our borrower population. Preliminary results from the January–June 2013 National Health Interview Survey (NHIS) indicate that the number of American homes with only wireless telephones continues to grow at a rapid rate. Nearly two-thirds of adults aged 25–29 (65.6%) lived in households with only wireless telephones, and 54.3% of those aged 18–24 and 59.9% of those

³ *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2015*, “Budget Concepts and Budget Process,” page 123.

⁴ *Ibid.*

aged 30–34 live in wireless-only households.⁵ Student loan borrowers tend to be young adults who live in the wireless-only households described by the NHIS. Given the continuing increases in the number of borrowers who are wireless-only, it is becoming ever more important to be able to reach them on their cell phones without undue barriers.

Student loan servicers do not make telemarketing calls as part of their servicing activities; all of our telephone contacts are informational and non-telemarketing in nature. Servicers must communicate with their customers by telephone, which means, for most of our borrowers, by cell phone. Where we have “prior express consent,” we use predictive dialers and prerecorded voice messages to reach our customers’ cell phones for many reasons:

- To respond to customer inquiries received by mail, email, or phone;
- To contact borrowers when mail is returned;
- To notify borrowers that their grace period after completing college is ending, and that their student loans are about to go into repayment;
- To notify borrowers that a period of deferment or forbearance on their student loans is ending and that they are about to re-enter repayment status;
- To notify borrowers that their annual period for one of the federal income-driven repayment plans (Income Based Repayment (IBR), Income Contingent Repayment (ICR), or “Pay As You Earn” (PAYE)) is ending and that they must requalify in order to remain eligible;
- To remind borrowers that a payment is due;
- To let borrowers know that a payment is late or has not been received;
- To notify borrowers that their IRS Form 1098-E is available on the servicer’s website;

⁵ Stephen J. Blumberg, Ph.D., and Julian V. Luke, Division of Health Interview Statistics, National Center for Health Statistics, “Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2013”

- To make due diligence telephone contacts to delinquent borrowers as required by the Higher Education Act and its implementing regulations.⁶
- To let borrowers know that their monthly payment amount is changing (for example, borrowers with variable rate loans or graduated repayment plans); and
- To follow up on options paperwork sent to borrowers and not received, or to follow up on missing information to complete options paperwork.

In addition, guaranty agencies and collection agencies notify defaulted federal student loan borrowers that they may be eligible to rehabilitate their defaulted loans or that they may have consolidation, cancellation and forbearance options.

Servicers collect payments, but they also assist borrowers in successfully managing their student loan debt. They provide information on various repayment plans, and help borrowers ascertain whether they are eligible for deferment or forbearance. Federal student loan servicers are required to make repeated attempts to contact delinquent borrowers⁷ to see if there are ways that the servicer can assist the borrower in avoiding delinquency and default – Is the borrower entitled to a deferment? Is there a new repayment plan that would help the borrower meet his/her obligation to repay? Would a temporary forbearance help the borrower through a difficult period?

The ability to use predictive dialers and prerecorded messages to contact specific groups of borrowers who are already our customers and who are on the same payment schedule or covered by similar program changes is critical to student loan servicers in terms of effective outreach. Servicers frequently organize outgoing call campaigns to reach out to particular classes of our borrowers to provide the important types of non-telemarketing consumer information enumerated above. One servicer has estimated that using predictive dialers allows it to reach six times more customers than by

⁶ See, 34 CFR 682.411 which requires lenders in the federal student loan programs to make a certain number of phone calls to delinquent borrowers at various phases of delinquency.

⁷ *Ibid.*

dialing manually. It is important that we be able to speak to as many borrowers as possible in order to help them avoid default by changing their repayment plan, or by applying for a deferment or forbearance. The math is simple: the more borrowers we can reach, the more borrowers we can help. And if we can't reach them, then we can't help them.

The increasing number of lawsuits, including large class actions, being brought under the TCPA is having a chilling effect on the ability and willingness of student loan servicers to communicate with their borrower customers by telephone. The pending disaster posed by the current state of affairs is demonstrated by the numerous TCPA petitions currently pending before the Commission. In the end, it is the customers who will suffer by not being able to receive timely information in the way that is most convenient for them, and in which they have elected to get information.

First, the Commission should confirm that not all predictive dialers are categorically ATDSs. As detailed in the ACA's petition and other pending petitions for declaratory rulings, the Commission's language in prior orders regarding whether predictive dialers can be autodialers under the TCPA has been abused in litigation. An ATDS has a very specific definition under the TCPA --"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."⁸ We acknowledge that some predictive dialers are autodialers under the terms of the statute. But just because a predictive *can be* an ATDS for purposes of the TCPA, does not mean that every predictive dialer *must be* an ATDS under the TCPA. In many circumstances, and as used by student loan servicers, predictive dialers do not meet the statutory requirements. A simple, explicit clarification by the Commission that it did not (and moreover, could not) modify the statutory definition of an ATDS would solve this issue, while still addressing the Commission's concerns regarding evolving technology and potential circumvention of its rules. If the Commission is concerned that providing this clarification will somehow allow telemarketers to avoid

⁸ 47 U.S.C. § 227(a)(1); ACA Petition at 6.

obtaining prior express written consent in accordance with the recent robocall changes to the TCPA regulations,⁹ then we would urge the Commission to limit the effect of the change to non-telemarketing, informational calls. The Commission has already adopted this bifurcated approach to telemarketing and non-telemarketing calls in recent TCPA rulemakings.¹⁰

Second, the Commission should clarify that “capacity” under the TCPA 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.”¹¹ Neither the statute nor the Commission’s rules define the term “capacity.” As ACA explained, clarifying that “capacity” must mean present or current ability is consistent with the TCPA’s plain language, including its use of the present tense “has.” It is also consistent with the Commission’s prior TCPA rulemakings, and the ordinary meaning of the term.¹² At least two federal courts have concluded that TCPA “capacity” must be read as “present ability.”¹³ The predictive dialers used by student loan servicers do not have and do not need the ability to store or produce telephone numbers to be called, using a random or sequential number generator. SLSA and the SLSA PLC join with the ACA and others that have filed declaratory rulings on this issue in urging the Commission to take this common sense approach and explicitly declare that “capacity” for TCPA purposes means the present ability of equipment to (A) store or produce telephone numbers to be called, using a random or sequential

⁹ *Federal Communications Commission’s Report and Order*, FCC 12–21 (February 15, 2012); *Revisions to Rules under the Telephone Consumer Protection Act of 1991*, 77 Fed. Reg. 34233 - 34249 (June 11, 2012) (amending 47 C.F.R. pt. 64.1200).

¹⁰ *Ibid.*

¹¹ 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.

¹² ACA Petition at 10.

¹³ *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.

number generator; and (B) dial such numbers, at the time the call is made.¹⁴ Again, if the Commission is concerned that providing this clarification will somehow allow telemarketers to avoid obtaining prior express written consent in accordance with the recent robocall changes to the TCPA regulations,¹⁵ then we would urge the Commission to limit the effect of the change to non-telemarketing, informational calls.

Third, SLSA and the SLSA PLC request the Commission to declare that prior express consent for purposes of all non-telemarketing, informational calls attaches to the person being called (in our case, our borrower-customer), and not to the specific telephone number provided by the consumer at the time of consent. For calls that are attempting to collect a debt, consumers have additional protections under the Fair Debt Collection Practices Act (“FDCPA”) and a host of other federal and state laws and regulations,¹⁶ and the requested rule change would not impact any of these existing protections. For other types of informational calls, consumers have requested to receive information that is useful to them, and have provided their cell phone number as the means of receiving that information. Student loan servicers make non-telemarketing, informational calls and are trying to call specific customers who provided “prior express consent” to be called on their cell phone. We have no interest in calling a cell phone number that doesn’t connect us to our customer.

Fourth, the Commission should implement a safe harbor for autodialed “wrong number” non-telemarketing calls to wireless numbers or numbers for which the called party is charged, particularly where the caller previously obtained appropriate consent and had no intent to call a different person or any reason to know that the called party would be charged. There are more than 200 million cell phones in the United States, and millions of wireless numbers are reassigned each year. The carriers

¹⁴ See ACA Petition at 9, n.29, 30.

¹⁵ *Federal Communications Commission’s Report and Order*, FCC 12–21 (February 15, 2012); *Revisions to Rules under the Telephone Consumer Protection Act of 1991*, 77 Fed. Reg. 34233 - 34249 (June 11, 2012) (amending 47 C.F.R. pt. 64.1200).

¹⁶ See ACA Petition at 14.

provide no lists of these number changes and there is no central, comprehensive directory of wireless numbers that callers can check against. Nor does the technology exist currently to prevent calls to numbers that have been reassigned without the caller's knowledge. Under the terms of federal promissory notes, borrowers are required to report changes in their contact information,¹⁷ but the simple fact is that they often do not.

Unlike telemarketers, we have no interest in and gain nothing by contacting someone who is not the specific customer that we are trying to reach. It is in our best interest to learn that the number has been reassigned and to be able to change the borrower's contact information accordingly. To impose liability for the innocent lack of knowledge that a number has changed even though the caller had complied with the TCPA's "prior express consent" restriction when obtaining the telephone number seems grossly unfair, and not conduct of the type that the Congress intended the TCPA to prohibit.

As ACA stated, currently, even diligent companies, acting in good faith, can potentially 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.¹⁸ Similarly, student loans servicers and other companies may potentially incur liability if the called party is charged for the call (for instance, if a call is made to a residential number where the called party is using a Voice Over IP ("VOIP") service that charges per call).¹⁹ We agree with ACA that it is patently unfair to hold companies to a "standard of omniscience," and that the Commission should establish a safe harbor in the circumstances outlined by ACA.²⁰

¹⁷ Item 6 of the "William D. Ford Federal Direct Loan Program Direct Subsidized Loan and Direct Unsubsidized Loan Borrower's Rights and Responsibilities Statement" requires a federal student loan borrower to notify the Department of Education and its agents of any changes in the borrower's name, address, phone number.

¹⁸ ACA Petition at 15.

¹⁹ *Id.*

²⁰ *Id.*

In conclusion, SLSA and the SLSA PLC support the ACA Petition and respectfully urge the FCC to (1) confirm that not all predictive dialers are categorically ATDSs; (2) clarify that “capacity” under the TCPA means present ability; and (3) implement a safe harbor for autodialed “wrong number” non-telemarketing calls to wireless numbers or numbers for which the called party is charged, particularly in the circumstances outlined by ACA. We also respectfully urge the FCC to (4) declare that, for all non-telemarketing, informational calls to wireless numbers, prior express consent attaches to the consumer who is called, rather than the specific telephone number the consumer provides at the time of consent. It is vital that the Commission address these issues in an expeditious manner to eliminate today’s uncertainty that has led to an explosion in frivolous and burdensome TCPA class action litigation and to ensure that legitimate non-telemarketing, informational calls (and their positive economic impact on the public and private sectors) are not unfairly impeded.

We therefore respectfully request that the FCC act expeditiously to clarify and provide guidance on these issues, either by granting the petitions for declaratory rulings that are currently pending before the Commission or by promptly granting ACA’s petition for a rulemaking and proceeding swiftly to issue a final rule.

Respectfully submitted,



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