

TROUTMAN SANDERS

TROUTMAN SANDERS LLP
Attorneys at Law
11682 El Camino Real, Suite 400
San Diego, CA 92130-2092
858-509-6000 telephone
troutmansanders.com

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Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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

Dear Ms. Dortch:

By this letter, Santander Consumer USA Inc. (“Santander”) respectfully submits these comments to the Federal Communications Commission (“FCC”) in support of the Petition for Rulemaking filed by ACA International (the “ACA Petition”) in the above-referenced docket.

Santander is a leading company in the automotive finance sector, originating and servicing retail installment contracts, vehicle leases, and dealer loans, as well as financial products and services related to motorcycles, RVs, and watercraft. Santander is dependent on the lawful use of modern telephone technology to communicate with its customers throughout the duration of its customer relationships. These communications include calls made by Santander to the telephone numbers its customers have provided in connection with their accounts.

Santander is well aware of its compliance responsibilities under the Telephone Consumer Protection Act (“TCPA”) and takes them seriously. The state of the law, however, has made it impossible to design a compliance strategy using modern telephone technology that will not expose Santander to litigation under the TCPA. TCPA litigation has multiplied dramatically; the cost of defending these actions is significant and the potential liability is staggering. The original intent of the TCPA – to protect consumers from unwanted telemarketing calls – has been lost, and the statute is now being used to prevent businesses from communicating with their customers at the numbers that they provided. This new era of TCPA litigation not only punishes business from ordinary and necessary contact with their customers, it also prevents consumers from receiving information they expect, want and need. These are not the unwanted, harassing calls from entities with which the consumer has no relationship. Rather, these are communications from businesses with whom the consumer voluntarily chose to do business.

The TCPA as currently interpreted by the Commission and courts makes compliance impossible in two key respects: (1) once prior express consent is provided, customers may claim it has been revoked verbally without any documentary evidence; and (2) after prior express consent is provided with respect to a particular telephone number, that number may be

reassigned without any notice to the caller. These issues are complicated further by the limitless interpretations of automatic telephone dialing systems. This combination makes it impossible for any business to ensure compliance with the TCPA or to avoid its application. Instead, ordinary businesses placing ordinary calls to their customers in the course of their relationship have no way to escape the punitive remedies provided by the TCPA other than to stop communicating by telephone.

This untenable situation cries out for the Commission to respond to the ACA Petition and the other pending petitions seeking clarification of the TCPA¹ by issuing rulings that provide comprehensive, clear, and common-sense guidance for companies who communicate with their existing customers.

While Santander supports the ACA Petition in its entirety, below are comments on specific issues of special concern to Santander: (1) the definition of automatic telephone dialing systems; and (2) the parameters of prior express consent.

I.

THE COMMISSION SHOULD RETURN THE TCPA TO ITS STATUTORY ROOTS BY AFFIRMING THE STATUTORY DEFINITION OF ATDS.

The statutory definition of an automatic telephone dialing system (“ATDS”) is often quoted, but less often followed. The statute as written defines an ATDS as:

[E]quipment that has the capacity – (A) to store or produce numbers to be called, using a random or sequential number generator, and (B) to dial such numbers.²

The Commission expanded the language of the statute and the meaning of ATDS through three declaratory rulings.

First, in 2003, the Commission concluded “predictive dialers” fall under the definition of ATDS even though they do not dial numbers “randomly or sequentially.” The Commission supported its conclusion by interpreting ATDS as requiring only that the equipment “have the ‘capacity to store or produce telephone numbers’” and reserving to the Commission the ability to

¹ See, e.g., *TextMe, Inc., Petition for Expedited Declaratory Ruling and Clarification*, CG Docket No. 02-278 (filed March 18, 2014); *United Healthcare Services, Inc., Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Jan. 16, 2014); *Retail Industry Leaders Association, Petition for Declaratory Ruling*, CG Docket No. 02-278 (filed Dec. 30, 2013); *Professional Association for Customer Engagement, Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking*, CG Docket No. 02-278 (filed Oct. 18, 2013); *Cargo Airline Association, Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Aug. 17, 2012); *Communication Innovators, Petition for Declaratory Ruling*, CG Docket No. 02-278 (filed June 7, 2012).

² 47 U.S.C. § 227(a)(1) (2011).

apply the definition, and thereby the TCPA, to new technology.³ The Commission created a new litmus test not found within the statute itself – equipment falls within the definition of an ATDS if it has “the *capacity* to dial numbers without human intervention.”⁴ By expanding the scope of ATDS beyond its statutory text, the Commission opened the door to the current flood of litigation, leaving businesses without a means of developing a successful compliance program, thwarting innovation, efficiency and the delivery of necessary information.

Second, in 2008, the Commission reaffirmed its 2003 conclusion that predictive dialers fall within the definition of automatic telephone dialing systems.⁵ This ruling was issued as a result of ACA’s petition seeking clarification as to the meaning of “prior express consent” in the context of a creditor-debtor relationship. The Commission realized the importance of these communications and confirmed that a borrower provides “prior express consent” when he provides his telephone number to his creditor in connection with the credit transaction.⁶ This clarification, while helpful in 2008, does not immunize creditors from TCPA actions claiming that the borrower revoked consent verbally and without documentary evidence at some point thereafter or when the number is reassigned to a new subscriber without any notice to the caller. Under the current state of the law, these claims are unavoidable despite the best efforts of businesses to comply with the TCPA and the Commission’s regulations.

Finally, on November 29, 2012, the Commission again reaffirmed its 2003 position and explained that “...the scope of that definition encompasses ‘hardware [that], when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers...’”⁷

These rulings have created confusion among courts, making compliance with the statute effectively impossible. An example of this confusion as to the meaning and scope of an ATDS is found in two recent court decisions issued within four days of each other, both supposedly applying the FCC’s 2003 Order,⁸ but which came to opposite conclusions on the meaning of the word “capacity.”

On February 7, 2014, the United States District Court for the Western District of Washington issued a decision on whether a computer system that automatically generated a text

³ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14091-14092, para. 132 (2003).

⁴ *Id.*

⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Request of ACA International for Clarification and Declaratory Ruling, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd 559, 566, para. 12 (2008).

⁶ *Id.*

⁷ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Request of SoundBite Communications, Inc. for Clarification and Declaratory Ruling, CG Docket No. 02-278, Declaratory Ruling, 27 FCC Rcd 15391, 15391-15392, para. 2, n. 5 (2012).

⁸ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003).

message confirming dispatch of a taxi at the consumer's request constituted an ATDS.⁹ The plaintiff argued that because the system potentially could be used to store multiple numbers and transmit text messages to those numbers it was an ATDS. The court rejected the argument, holding that the present capacity of the system and how it was actually used, rather than the potential use of the system, determines whether it is an ATDS.

Just four days earlier, however, on February 3, 2014, the United States District Court for the Southern District of California took quite a different view.¹⁰ That Court accepted the plaintiff's argument that if the defendant's system could be configured with software to store multiple numbers and dial them sequentially, then the system could be an ATDS.¹¹

These are just two examples out of many decisions interpreting the meaning of ATDS in the wake of the Commission's rulings. These types of conflicting decisions are common and place businesses in the untenable position of having to *prove* that their telephone equipment does not have the *capacity* to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers, even with the additional software and even if the particular call at issue involved some element of human intervention.

The source of the confusion is not the statutory text, which clearly speaks in the present tense – equipment that “*has* the capacity.” Rather it is the Commission's 2003 order and subsequent reaffirmations of this position that effectively demand the impossible. As courts and the Commission have acknowledged: “It is a flawed and unreasonable construction of any statute to read it in a manner that demands the impossible.”¹²

Santander respectfully requests the Commission provide relief so that the TCPA cannot be read to demand the impossible, grant the ACA petition and definitively declare that an ATDS is equipment that satisfies the statutory definition in its current, as used, configuration.

II.

THE COMMISSION SHOULD ADOPT A SAFE HARBOR TO PROTECT CALLERS FROM LIABILITY WHEN THEY CALL NUMBERS FOR WHICH THEIR CUSTOMER HAS PROVIDED PRIOR EXPRESS CONSENT.

Businesses cannot ensure compliance with the TCPA if calling a number provided by a customer exposes the caller to liability when it has no knowledge that the number has been reassigned.¹³ Under the current state of the law, even if a business obtains its customer's express

⁹ *Gragg v. Orange Cab Co.*, No. C12-0576RSL, 2014 U.S. Dist. LEXIS 16648 (W.D. Wash. Feb. 7, 2014).

¹⁰ *Sherman v. Yahoo! Inc.*, No. 13cv0041-GPC-WVG, 2014 U.S. Dist. LEXIS 13286 (S.D. Cal. Feb. 3, 2014).

¹¹ *Id.*

¹² *McNeil v. Time Ins. Co.*, 205 F.3d 179, 187 (5th Cir. 2000); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 19 FCC Rcd 19215, 19219, para. 9, n. 32 (2004).

¹³ *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637 (7th Cir. 2012). See also ACA Petition, at p. 15 (“[a] debt collector can be held liable for calling a number for which the debt collector had appropriate consent if that

consent to be called using an ATDS or artificial or prerecorded message at a particular number, the next day that number may be reassigned. Once reassigned, calls to that number for which the caller reasonably believes it has prior express consent nonetheless expose the caller to TCPA liability. This exposure exists each day of the relationship, even if the caller verifies its customer's telephone numbers routinely.

The Commission previously provided a safe harbor to prevent this type of impossibility of compliance.¹⁴ Just as in the case of telephone numbers ported from landlines to cell phones, it is "impossible ... to identify immediately those numbers that have been" reassigned to a new subscriber.¹⁵ Accordingly, it is equally appropriate and important to provide relief to businesses that "simply cannot comply with the statute" without this type of safe harbor.¹⁶

This safe harbor does not dilute the TCPA's privacy protections. At the time the call is made, the dialer must actually have its customer's prior express consent to place the call in the first instance. If the caller is informed that the number has been reassigned, the caller proceeds further at its own risk. The proposed safe harbor only protects against liability for the initial call when the caller has no knowledge that the number has been reassigned.

Alternatively, the Commission should clarify that "called party" means, and has always meant, the intended recipient who provided consent to the caller. To find otherwise eviscerates the Commission's prior ruling that "...calls to wireless numbers that are provided by the called party to the creditor in connection with an existing debt are permissible as calls made with the 'prior express consent' of the called party."¹⁷ The Commission provided this common-sense guidance in 2008 to honor the intent of the legislation. Congress did not prohibit all calls using an ATDS or an artificial or prerecorded voice message to wireless numbers. Rather, the legislative history makes clear that Congress crafted the TCPA in an attempt to allow normal business communications, including calls that "advise a customer (at the telephone number provided by the customer) that an ordered product had arrived, a service was scheduled or

consumer no longer maintains the telephone number and the call is received by an unintended recipient - simply because the consumer never updated his or her account with, or otherwise communicated, new telephone number information...").

¹⁴ 47 C.F.R. § 64.1200(a)(1)(iv).

¹⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 19 FCC Rcd 19215, 19218, para. 9 (2004).

¹⁶ Santander also strongly supports the *United Healthcare Services, Inc., Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Jan. 16, 2014).

¹⁷ See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Request of ACA International for Clarification and Declaratory Ruling, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd 559, para. 11 (2008) ("In this ruling, we clarify that autodialed and prerecorded message calls to wireless numbers that are provided by the called party to the creditor in connection with an existing debt are permissible as calls made with the "prior express consent" of the called party"); see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, para. 31, n. 57 (1992) ("[T]he called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications").

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performed, or a bill had not been paid.”¹⁸ The Commission should uphold Congress’s intent by allowing these normal and necessary communications between businesses and their customers.

Addressing the issues raised in the ACA Petition is critical so that businesses are no longer subjected to potentially devastating liability when they call their customers at the numbers the customer provided. In doing so, the Commission should adopt workable, clear rules grounded in the statutory text.

Respectfully submitted,

/s/ Scott J. Hyman

Scott J. Hyman, Esquire
Eric J. Troutman, Esquire
SEVERSON & WERSON
19100 Von Karman Avenue, Suite 700
Irvine, CA 92612
Telephone: (949) 442-7110
Facsimile: (949) 442-7118
sjh@severson.com
ejt@severson.com

Counsel to Santander Consumer USA Inc.

/s/ Burton D. Brillhart

Burton D. Brillhart, Esquire
Lauren E. Campisi, Esquire
McGlinchey Stafford
12th Floor, 601 Poydras Street
New Orleans, LA 70130
Telephone: (214) 445-2409
Facsimile: (214) 247-0855
bbrillhart@mcglinchey.com
lcampisi@mcglinchey.com

Counsel to Santander Consumer USA Inc.

Respectfully submitted,

/s/ Chad R. Fuller

Chad R. Fuller, Esquire
TROUTMAN SANDERS LLP
11682 El Camino Real, Suite 400
San Diego, CA 92130-2092
Telephone: (858) 509-6056
Facsimile: (858) 509-6040
chad.fuller@troutmansanders.com

Alan D. Wingfield, Esquire
Virginia Bell Flynn, Esquire
TROUTMAN SANDERS LLP
Post Office Box 1122
Richmond, VA 23218-1122
Telephone: (804) 697-1200
Facsimile: (804) 697-1339
alan.wingfield@troutmansanders.com
virginia.flynn@troutmansanders.com

Counsel to Santander Consumer USA Inc.

¹⁸ H.R. Rep. No. 317, 102nd Cong. at 17, (1991).