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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 AFFILIATED GROUP, INC.

The Affiliated Group, a nationally license receivables management company, respectfully submits these comments in support of the Petition for Rulemaking filed by ACA International (“ACA”) in the above captioned proceeding.¹ The Affiliated Group is in the debt collection business and operates from its headquarters located in Rochester, Minnesota.²

In its petition, ACA urged the Commission to address several significant issues related to the application of the Telephone Consumer Protection Act (“TCPA”) and the Commission’s rules,³ 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

¹ ACA International, *Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (filed Jan. 31, 2014) (“ACA Petition” or “Petition”); see also *Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemaking Filed*, Report No. 2999, Feb. 21, 2014, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0221/DOC-325716A1.pdf.

² For more information regarding The Affiliated Group, please see www.theaffiliatedgroup.com.

³ 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.*

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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.

First, the Commission should confirm that not all predictive dialers are categorically ATDSs. As ACA has detailed, 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.”⁴ Of course there are predictive dialers that can be autodialers. 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 - particularly in circumstances where a particular predictive dialer does not meet the requirements under the statute. A simple, explicit clarification by the Commission that it did not (and moreover, could not) modify the statutory definition of an ATDS would alleviate this issue, while still addressing the Commission’s concerns regarding evolving technology and potential circumvention of its rules.

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.”⁵ 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 (and use of the present tense “has”), the Commission’s prior TCPA rulemakings, and the ordinary meaning of the term.⁶ At least two federal courts have concluded that

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

⁵ 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.

⁶ ACA Petition at 10.

TCPA “capacity” must be read as “present ability.”⁷ The Affiliated Group thus joins the call of ACA and others for 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 number generator; and (B) dial such numbers, at the time the call is made.⁸

Third, The Affiliated Group agrees with ACA that the Commission should declare 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. As ACA described, debtors 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.⁹ 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,¹⁰ and the requested rule change would not impact any of these existing protections.

Finally, 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. As ACA stated, currently, even diligent debt collectors, 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

⁷ 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.

⁸ See ACA Petition at 9, n.29, 30.

⁹ ACA Petition at 12-13.

¹⁰ See ACA Petition at 14.

consumer no longer maintains the telephone number.¹¹ 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 residential number where the called party is using a Voice Over IP (“VOIP”) service that charges per call).¹² The Affiliated Group agrees with ACA that it is patently unfair to hold debt collectors to a “standard of omniscience,” and that the Commission should establish a safe harbor in the circumstances outlined by ACA.¹³

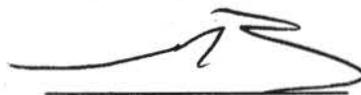
In conclusion, The Affiliated Group supports the ACA Petition and respectfully urges the FCC to (1) confirm that not all predictive dialers are categorically ATDSs; (2) clarify that “capacity” under the TCPA means present ability; (3) declare that prior express consent attaches to the person who incurs a debt, not the specific telephone number the debtor provides at the time of consent; and (4) 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. 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 debt collection calls (and their positive economic impact on the public and private sectors) are not unfairly impeded.

¹¹ ACA Petition at 15.

¹² *Id.*

¹³ *Id.*

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark J. Neeb', written over a horizontal line.

Mark J. Neeb, IFCCE, CPA, MBA
President/CEO
The Affiliated Group

March 17, 2014