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OF THE
UNITED STATES OF AMERICA

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March 27, 2014

VIA ELECTRONIC FILING

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

Re: *Written Ex Parte Communication In the Matter of Application of Rules and Regulations Implementing the Telephone Consumer Protection Act: ACA International Petition for Rulemaking, CG Docket No. 02-278*

Dear Ms. Dortch:

The U.S. Chamber of Commerce (“Chamber”)¹ strongly supports Federal Communications Commission (“Commission”) action on the issues raised in the Petition for Rulemaking filed by ACA International (“ACA Petition”)² filed in the above-referenced proceedings to “remove the confusion and uncertainty that has facilitated the explosion in frivolous TCPA class action litigation.”³

The ACA Petition urges the Commission to address significant issues related to the application of the Telephone Consumer Protection Act (“TCPA”) and the Commission’s rules,⁴ 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.⁵

¹ The U.S. Chamber of Commerce is the world’s largest business federation, representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America’s free enterprise system.

² *In the Matter of Application of Rules and Regulations Implementing the Telephone Consumer Protection Act: ACA International Petition for Rulemaking*, CG Docket No. 02-278 (filed Jan. 31, 2014) (“ACA Petition”).

³ *Id.* at 18.

⁴ 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.*

⁵ ACA Petition at 1-2.

I. Regulatory Clarity on a Variety of TCPA Issues is Desperately Needed

The Chamber⁶ and many others from numerous industry sectors have previously and frequently highlighted TCPA litigation abuses that could be ameliorated by Commission action. There is, unfortunately, a tsunami of class action TCPA lawsuits driven not by aggrieved consumers, but by opportunist plaintiffs' firms taking advantage of uncertainty in the law to rake in attorney fees. TCPA lawsuits against businesses are skyrocketing. There were 222 TCPA lawsuits filed in February 2014 compared to 159 in February 2013, an increase of 40%.⁷ There were 1,862 TCPA lawsuits filed in 2013 compared to 1,101 in 2012 and 825 in 2011, an increase of 69% and 126%, respectively.⁸

Confusion among plaintiffs' attorneys and courts over the Commission's prior TCPA decisions has resulted in conflicting court decisions and erroneous interpretations of the statute. Based on comments received on many of the pending TCPA-related Petitions for Declaratory Ruling, the Commission has the requisite record necessary to support agency action on the issues raised in the ACA Petition. Therefore, if the Commission determines that it can provide clarification through a Declaratory Ruling on one or more of the issues raised in the ACA Petition, then the Chamber urges the Commission to expeditiously provide this clarity. However, if the Commission determines that a rulemaking is necessary, then the Chamber urges the Commission to promptly commence a rulemaking that seeks comment broadly on potential changes to its TCPA regulations.

II. The Commission Should Confirm that Predictive Dialers are not Necessarily "Automatic Telephone Dialing Systems"

The Commission should confirm that not all predictive dialers are categorically Automatic Telephone Dialing Systems (ATDSs). Under the TCPA, an ATDS is defined 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."⁹ A predictive dialer might be an ATDS for purposes of the TCPA. However, not 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. Therefore, the Chamber supports ACA's request for a simple, explicit clarification from the Commission that the agency has not (nor could it) modify the statutory definition of an ATDS. Such a statement would alleviate TCPA

⁶ See U.S. Chamber Comments on Communication Innovators' Petition for Declaratory Ruling (filed Nov. 15, 2012), U.S. Chamber Comments on GroupMe's Petition for Declaratory Ruling (filed Aug. 30, 2012), and U.S. Chamber Comments on PACE's Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking (filed Dec. 19, 2013), U.S. Chamber Comments on United Healthcare Services, Inc.'s Petition for Expedited Declaratory Ruling (filed Mar. 10, 2014), and U.S. Chamber Reply Comments on United Healthcare Services, Inc.'s Petition for Expedited Declaratory Ruling (filed Mar. 24, 2014).

⁷ Jack Gordon, *Debt Collection Litigation & CFPB Complaint Statistics, February 2014*, Interactivecredit.com, Mar. 21, 2014, available at <http://interactivecredit.com/?p=2114>.

⁸ Jack Gordon, *Debt Collection Litigation & CFPB Complaint Statistics, December 2013 & Year in Review*, Interactivecredit.com, Jan. 22, 2013, available at <http://interactivecredit.com/?p=2101>.

⁹ 47 U.S.C. § 227(a)(1).

litigation risk for businesses while still preserving the Commission's ability to guard against the use of evolving technology merely to circumvent its rules.

A. Wireless Usage is Vastly Different Than When the TCPA Was Enacted

When Congress enacted the TCPA in 1991, wireless phones were a luxury item and the landline was the dominant consumer telecommunications device. Thus, certain restrictions in the TCPA are only applicable to calls made to cell phones. However, as the Commission itself has acknowledged, "wireless use has expanded tremendously since passage of the TCPA in 1991."¹⁰ The number of "wireless-only" households increased to 39.4% during the first half of 2013 from 38.2% during the second half of 2012.¹¹ An additional 15.7% of U.S. households were "wireless-mostly" (i.e., the household has a landline but receives all or most calls on a wireless phone).¹² No matter where they are at the moment, consumers want to be connected. Thus, smartphones in the United States are now used by 64% of all mobile phone owners and account for 80% of recently purchased mobile phones.¹³ Consumers use their smartphones to communicate in the manner (e.g., voice calls, text messaging, e-mail, video chat, social media, gaming, etc.) that best meets their needs at the time.

B. Regulatory Uncertainty Around the Commission's Prior TCPA Decisions has Resulted in a Surge of Class Action Lawsuits as well as Conflicting Court Decisions and Erroneous Interpretations of the Statute

As wireless devices have become dominant, clarification by the Commission of what type of equipment does not constitute an ATDS—a discussion that would have been unnecessary in 1991, is now needed to bring regulatory certainty to the business community and to stem the tide of class action TCPA lawsuits. As another petitioner in this docket elegantly stated, "Without some guidance, the evolution of the definition of the term ATDS is limited only by class counsel's imagination, or worse yet, will come to encompass every type of telephonic device in existence, thereby preventing anyone from calling a cellular phone number without express consent or except in an emergency."¹⁴

¹⁰ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* ("2012 TCPA Order"), 55 Communications Reg. (P&F) 356, ¶ 29 (2012).

¹¹ Stephen J. Blumberg & Julian V. Luke, Div. of Health Interview Statistics, Nat'l Ctr. for Health Statistics, Centers for Disease Control and Prevention, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2013*, at 1 (Dec. 2013), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201312.pdf>.

¹² *Id.*

¹³ *Smartphone Switch: Three-Fourths of Recent Acquirers Chose Smartphones*, The Nielsen Company (Sept. 17, 2013), available at <http://www.nielsen.com/us/en/newswire/2013/smartphone-switch--three-fourths-of-recent-acquirers-chose-smart.html>.

¹⁴ *YouMail, Inc., Petition for Expedited Declaratory Ruling That YouMail's Service Does Not Violate the TCPA*, CG Docket No. 02-278, at 11 (filed Apr. 19, 2013), available at <http://apps.fcc.gov/ecfs/document/view?id=7022288462>.

Conflicting court decisions heighten litigation risk in this area. Some courts have interpreted the prior decisions to mean that any predictive dialing solution is an autodialer, regardless of whether it has the statutorily required “capacity to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers.”¹⁵ Other courts have held that the Commission altered the statutory definition of autodialer such that now any equipment that has “the capacity to dial numbers without human intervention” is an autodialer.¹⁶ Some plaintiffs are now even claiming that under the Commission’s prior decisions, manually dialing wireless telephone numbers is a violation of the autodialer restriction if the calls are made using equipment that “has the capacity to autodial.”¹⁷

The “random or sequential number generator” prong of the ATDS statutory definition shows that Congress did not intend to restrict the use of innovative technologies that do not have that functionality. In particular, predictive dialers are used to deliver non-marketing, important, time-sensitive information (e.g., alerts concerning data breaches, fraud, prescription refills, flight delays, power outages, package delivery, billing issues, and appointments). Additionally, predictive dialers promote consumer privacy by protecting against manual dialing errors and by facilitating compliance with federal and state calling laws.

III. The Commission Should Clarify that “Capacity” Under the TCPA Means Present Capacity

The Chamber strongly supports Commission action that would 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.”¹⁸ “Capacity” is not defined in the statute or the Commission’s rules. At least three federal courts have concluded that TCPA “capacity” must be read as “present ability.”¹⁹ Thus, the Chamber urges the Commission to use this commonsense 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.²⁰

Businesses use ATDSs to access their own databases of contacts to inform consumers about products, services, and accounts; these phone numbers are not randomly or sequentially

¹⁵ See, e.g., *Griffith v. Consumer Portfolio Services, Inc.*, 838 F. Supp. 2d 723 (2011); see also 47 U.S.C. § 227(a)(1).

¹⁶ See, e.g., *Gragg v. Orange Cab Co., Inc.*, ---F.Supp.2d---, 2013 WL 1788479 at *2 (W.D. Wash. April 26, 2013); *Buslepp v. Improv Miami*, 2012 WL 4932692 at *2 (S.D. Fla. Oct. 16, 2012).

¹⁷ See, e.g., *Mudgett v. Navy Fed. Credit Union*, 2012 WL 870758 at *2 (E.D. Wis. 2012); *Dobbin v. Wells Fargo Auto Finance, Inc.*, 2011 WL 2446566 at *4 (N.D. Ill. 2011).

¹⁸ 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.

¹⁹ 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 *Dominguez v. Yahoo!, Inc.*, No. 13-1887, slip op. at 11 (E.D. Pa. March 20, 2014); see also, ACA Petition at 11.

²⁰ See ACA Petition at 9, n.29, 30.

stored or produced. However, conceivably any telephone equipment could be modified to dial randomly or sequentially stored or produced numbers. Therefore, logically, capacity should be limited to what the equipment is capable of doing, without further modification, at the time the call is placed; otherwise, the TCPA would be applicable to a much broader array of equipment, including cell phones, than Congress intended.

IV. The Commission should Confirm that “Prior Express Consent” Attaches to the Person Providing the Telephone Number Rather than the Specific Number Provided

The Chamber supports Commission action that would clarify that “prior express consent” for informational, non-telemarketing calls attaches not to a specific number but rather to the person who provides the telephone number at the time of consent. For 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;²¹ the requested rule change would not impact any of these existing protections.

V. The Commission Should Confirm that Parties are not Liable for Autodialed “Wrong Number” Calls to Wireless Numbers, Including Calls Placed in Error to Numbers no Longer Assigned to the Person who Gave Consent

Finally, the Commission should implement a safe harbor for autodialed “wrong number” 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. Even Companies acting in good faith can potentially be held liable under the TCPA for calls made to a wireless number for which the caller has obtained valid consent to call but has been reassigned, unbeknownst to the caller, to a new consumer.²²

Additionally, human error—by either the person providing the number or the company representative inputting the information—can result in wireless phone numbers being entered incorrectly into a company’s databases or systems. There should be a good faith exemption from TCPA liability when this type of error leads to a call being mistakenly placed to a wrong number and the caller updates its systems or databases upon realization of this error.

VI. Conclusion

The Chamber supports Commission action to resolve the issues raised in the ACA Petition. Specifically, the Chamber urges the Commission to: (1) confirm that not all predictive dialers are categorically ATDSs; (2) clarify that “capacity” under the TCPA means present

²¹ See ACA Petition at 14.

²² See U.S. Chamber Comments on United Healthcare Services, Inc.’s Petition for Expedited Declaratory Ruling (filed Mar. 10, 2014), and U.S. Chamber Reply Comments on United Healthcare Services, Inc.’s Petition for Expedited Declaratory Ruling (filed Mar. 24, 2014).

Ms. Marlene H. Dortch
March 27, 2014
Page 6 of 6

ability; (3) declare that valid consent attaches to the person who provided the consent, and not to the specific telephone number provided; and (4) clarify that is no liability for autodialed “wrong number” calls. By providing this type of relief, the Commission can help curtail abusive lawsuits, provide American businesses with desperately needed certainty, and ensure that businesses maintain the ability to communicate in the manner that best meets the demands of their customers.

Sincerely,

A handwritten signature in black ink, appearing to read "William L. Kovacs". The signature is written in a cursive style with a prominent initial "W".

William L. Kovacs