

**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 ACA INTERNATIONAL

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Dated: March 24, 2014

EXECUTIVE SUMMARY

The Telephone Consumer Protection Act (“TCPA”), a statute meant to shield consumers from harassing telephone calls has, in the last several years, become a sword for harassing lawsuits. In January 2014 alone, approximately 208 new federal TCPA cases were filed. In 2013, a staggering 1,862 such lawsuits were filed. The barriers to filing even the most frivolous of lawsuits are low, and because there are no limits on damages, the risk to even diligent companies is extreme. Companies that are targeted in lawsuits are being forced to choose between settling quickly or betting the future of the company in court, even when the underlying communication does not undermine the purpose of the TCPA, and even when the cost to the consumer is trivial (or zero).

ACA International (“ACA”) files these comments in support of its Petition and respectfully reiterates its request that the Commission address these issues by updating its TCPA rules. Covered communications must be governed by a clear, fair and consistent regulatory framework that protects the purposes of the TCPA without impeding legitimate business operations. Specifically, ACA asks the Commission to: (1) confirm that not all predictive dialers are categorically automatic telephone dialing systems (“ATDS” or “autodialers”); (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 provided at the time of consent; and (4) create a safe harbor for certain autodialed, non-telemarketing “wrong number” calls.

ACA members contact consumers exclusively for *non-telemarketing* reasons to facilitate the recovery of payment for services that have already been rendered, goods that have already been received, or loans that have already been provided. Debt collection companies play an important

role in the U.S. economy by returning funds owed to both businesses and public sector entities as well, including federal, state, and local governments. The use of modern technology is critical for facilitating compliance with the myriad federal, state and local laws that govern all aspects of communications between ACA member companies and consumers. By adopting these needed clarifications and updates to its TCPA rules, the Commission will help ensure that legitimate, non-telemarketing debt collection calls (and their resulting positive economic impact on the public and private sectors) are not unfairly impeded.

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ACA International (“ACA”), an international trade organization of nearly 5,000 credit and collection companies, respectfully submits these comments in support of its Petition for Rulemaking in the above captioned proceeding.¹ 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.² Specifically, ACA asked the Commission to: (1) confirm that not all predictive dialers are categorically automatic telephone dialing systems (“ATDS” or “autodialers”); (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 only the specific telephone number the debtor provides at the

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 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.*

time of consent; and (4) create a safe harbor for autodialed “wrong number” non-telemarketing calls to wireless numbers.

I. BACKGROUND ON ACA INTERNATIONAL

ACA members provide a wide variety of accounts receivable management services. With offices in Minneapolis, Minnesota and Washington, D.C., ACA represents collection agencies, attorneys, credit grantors and vendor affiliates located in every part of the United States. ACA members are governed by myriad federal, state and local laws and regulations regarding debt collection.³ Indeed, the accounts receivable management industry is unique if only because it is one of the few industries in which Congress enacted a specific statute, the Fair Debt Collection Practices Act (“FDCPA”), governing all manner of communications with consumers when recovering payments.⁴

³ For example, the collection activity of ACA members is governed by the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*; the Fair Debt Collection Practices Act (“FDCPA”), *codified at* 15 U.S.C. § 1692 *et seq.*; the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (as amended by the Fair and Accurate Credit Transactions Act); the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*; the Fair Credit and Charge Card Disclosure Act, 15 U.S.C. § 1637(c), Pub. L. No. 100-583, 102 Stat. 2960; the Federal Bankruptcy Code, Title 11 of the U.S.C., Pub. L. No. 95-598, 92 Stat. 2549; and numerous other federal, state, and local laws. *See, e.g.*, Illinois Collection Agency Act, 225 ILCS 425 *et seq.*; California Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code § 1788 *et seq.*; Florida Fair Consumer Credit Practices Act, Fla. Stat. Ann. § 559.55 *et seq.*; West Virginia Collection Agency Act of 1973, W. Va. Code Ann. § 47-16-1 *et seq.*

⁴ The FDCPA defines “communications” subject to the statute broadly to include “the conveying of information regarding a debt directly or indirectly to any person through any medium.” 15 U.S.C. §1692a(2).

Debt collection companies are responsible for creating 302,000 jobs.⁵ ACA members include the smallest of businesses that operate within a limited geographic range of a single state, and the largest of publicly held, multinational corporations that operate in every state. The majority of debt collection companies, however, are small businesses, with over 59% maintaining nine or fewer employees, and over 74% maintaining fewer than 20 employees.⁶ Many of the companies are wholly or partially owned or operated by minorities or women.⁷

ACA members contact consumers exclusively for *non-telemarketing purposes*. The calls do not involve advertising or soliciting the sale of products or services. The purpose of these telephone communications is strictly to facilitate the recovery of payment for services rendered, goods that have been received or loans that have been given, and to explain to the consumer the options available for repayment. The calls made by collection professionals are informational – these are not telemarketing calls.⁸ Furthermore, these calls are not random or sequential. Indeed, random or sequential calls would obviously be a waste of time for ACA members. Such calls are quite the opposite – these are specific and targeted contacts made for a very particular purpose. A telephone number is generally required to be provided by the consumer for purposes of receiving calls, for

⁵ See The Impact of Third-Party Debt Collection on the National and State Economies, at 2, February 2012 (available at <http://www.acainternational.org/files.aspx?p=/images/21594/2011acaeconomicimpactreport.pdf>) (last visited Mar. 18, 2014) (“Impact of Third Party Debt Collection”).

⁶ *Id.* at 9.

⁷ See ACA International, *2012 Agency Benchmarking Survey*, at 10 (illustrating that 16 percent of survey respondents work for a women or minority-owned company, or both, as those terms are defined by the federal government).

⁸ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8770-71, ¶ 34 (1992).

example, as part of a credit application. Collection professionals are not telemarketing – their calls are for the explicit purpose of completing a transaction in which a customer has received a product, service, loan or other thing of value, and payment has not yet been received. *This single fact distinguishes the communications of ACA members from those of telemarketers subject to the TCPA.*

By itself, outstanding consumer non-revolving debt has increased in the past decade by nearly \$1 trillion and now approaches \$2.235 trillion.⁹ According to the Consumer Financial Protection Bureau, student loan debt now tops \$1.2 trillion.¹⁰ Total consumer debt, including home mortgages, exceeds \$11.28 trillion.¹¹ But, the \$44.6 billion in net debt returned by debt collection agencies in 2010 alone has provided a real benefit to the economy, representing \$396 in savings on average per household.¹²

As part of the process of attempting to recover outstanding payments, ACA members are an extension of the community.¹³ They represent, for example, the retailer and doctor down the

⁹ U.S. Federal Reserve Board of Governors, Consumer Credit – G.19, Historical Data for Non-Revolving Consumer Credit (available at http://www.federalreserve.gov/releases/g19/HIST/cc_hist_nr_levels.html) (last visited Mar. 18, 2014).

¹⁰ See Student Debt Swells, Federal Loans Now Top a Trillion, July 17, 2013 (available at <http://www.consumerfinance.gov/newsroom/student-debt-swells-federal-loans-now-top-a-trillion/>) (last visited Mar. 18, 2014).

¹¹ See Steven C. Johnson, U.S. Consumer Debt Rises in Third Quarter by Most Since Early 2008, Reuters, November 14, 2013 (available at <http://www.reuters.com/article/2013/11/14/us-usa-fed-consumerdebt-idUSBRE9AD0W920131114>) (last visited Mar. 18, 2014).

¹² Impact of Third Party Debt Collection, at 6.

¹³ Sense of community is extremely important to ACA members. In 2010, industry employees spent approximately 652,000 hours participating in company-sponsored charitable activities. ACA members and the U.S. debt collection industry as a whole also made charitable contributions of roughly \$85.2 billion. See Impact of Third Party Debt Collection, at 9.

street, and the local university. The activities of private debt collectors are important to the federal government,¹⁴ and play an especially impactful and expanding role in recovering funds due to state and local governments.¹⁵

The President's FY2015 Budget recently highlighted the importance of debt collection operations at the federal level and proposed that Treasury debt collections be improved by extending the use of debt collections resources and "clarify[ing] that the use of automatic dialing system and prerecorded voice messages is allowed when contacting wireless phones in the collection of debt owed to or granted by the United States."¹⁶ The White House emphasized that a balance must be struck between protections, such as those under the TCPA, and the need to support debt collection operations: "[w]hile protections against abuse and harassment are appropriate, changing technology should not absolve these citizens from paying back the debt they

¹⁴ A statutory framework governs U.S. debt collection procedures. *See* Debt Collection Improvement Act of 1996 (DCIA), Pub. L. No. 104-134, 110 Stat. 1321, 1358 (1996). The FCC rules implementing the DCIA are codified at 47 C.F.R. Part, Subpart O.

¹⁵ *See, e.g.,* Michael Neibauer, *Report details Fairfax County's many tax collection efforts*, Washington Business Journal, Sept. 7, 2012, available at <http://www.bizjournals.com/washington/blog/2012/09/report-details-fairfax-countys-many.html> (last visited Mar. 18, 2014) (discussing the Fairfax County Executive's annual report to the Board of Supervisors highlighting the county's highly successful tax collection rates, driven in great measure by collections services.); MyGovWatch.com, *The Public Eye*, Feb. 20, 2014, available at http://www.mygovwatch.com/public-eye.aspx?utm_source=PE+1QTR+2014&utm_campaign=1QTR+20134&utm_medium=email (last visited Mar. 18, 2014) (describing an increase in the public sector entities seeking to outsource collections for revenue recovery, including at least 51 such activities totaling over \$2 billion in 4Q2013 alone).

¹⁶ Office of Management and Budget, *Fiscal Year 2015, Analytical Perspectives, Budget of the United States*, at 123, available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/spec.pdf> (last visited Mar. 18, 2014).

owe.”¹⁷ In another example of the important impact that debt collectors have at the federal level, in its FY2012 Report to Congress, the Department of the Treasury described “private collection agencies,” or “PCAs,” as one of the tools it uses to collect delinquent Federal non-tax debt, describing over \$3 billion in collections made on behalf of the Departments of Health and Human Services, Treasury, and Education in FY2012 alone, as part of an increasing trend since FY2008.¹⁸

ACA members work with these entities, large and small, to obtain payment for the goods and services received by consumers. In years past, the combined effort of ACA members has resulted in the recovery of \$55 billion that was returned to businesses.¹⁹ This amounts to 2.5 percent of U.S. corporate profits before taxes and 4.7 percent of before-tax profits for U.S. domestic non-financial corporations.²⁰ Without an effective collection process, the economic viability of businesses and organizations that depend on getting paid for goods and services that have been rendered is threatened.

One commonality in the diverse membership of ACA is the use of technology to facilitate efficient, accurate and compliant communications. Technology confers unique benefits to both consumers and creditors. Technology allows precision and prevents dialing errors – which is particularly important when calls involve sensitive credit matters. Technology facilitates compliance with the numerous laws that govern debt collection. Technology allows programming

¹⁷ *Id.*

¹⁸ Department of the Treasury, *Fiscal Year 2012 Report to the Congress, U.S. Government Receivables and Debt Collection Activities of Federal Agencies*, March 2013, at 16, available at <http://www.fms.treas.gov/news/reports/debt12.pdf> (last visited Mar. 18, 2014).

¹⁹ Impact of Third Party Debt Collection, at 6

²⁰ *Id.* at 6.

to restrict calls to designated area codes within the calling times prescribed by federal and state laws. Technology allows for a reliable way for credit professionals to see and analyze the full payment and other history related to a customer before making a contact, which allows the professional to provide better advice. Being able to efficiently utilize technology is crucial to the operations of ACA members.

Given the backdrop of unchecked and often frivolous TCPA litigation, clarification by the FCC of the issues raised by ACA is critical. Others requesting Commission relief estimate that TCPA class action lawsuits have risen by a “staggering 592% in the last few years alone” and that predictive dialer cases have increased by at least 800%.²¹ Recent reports also indicate that TCPA lawsuits continue to skyrocket, with 1,862 TCPA lawsuits filed in 2013, and 208 suits filed in January 2014 alone.²² And, as some have demonstrated, even nuisance lawsuits are expensive.²³

²¹ See Communication Innovators Petition at p. 15; Comments of the U.S. Chamber of Commerce, *Communication Innovators Petition for Declaratory Ruling*, CG Docket No. 02-278, at p. 5 (filed Nov. 15, 2012); Comments of DIRECTV, LLC, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at p. 10 (filed Dec. 19, 2013); Comments of the U.S. Chamber of Commerce, *Professional Association for Customer Engagement (PACE) Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking*, CG Docket No. 02-278, at p. 3 (filed Dec. 19, 2013); Comments of Twilio Inc in Support of Petitions for Expedited Declaratory Ruling, *Professional Association for Customer Engagement and Glide Talk, Ltd. Petitions for Expedited Declaratory Ruling*, CG Docket No. 02-278, at pp. 5-6 (filed Dec. 19, 2013).

²² Darren Waggoner, *FDCPA Lawsuits Slip in 2013; TCPA Lawsuits Soar*, Collections&CreditRisk, Jan. 22, 2014, available at <http://www.collectionscreditrisk.com/news/fdcpa-lawsuits-slip-tcpa-lawsuits-soar-3016758-1.html> (free registration required)(last accessed Mar. 18, 2014); See also Darren Waggoner, *TCPA Lawsuits Projected to Grow 70 Percent in 2013*, Collections&CreditRisk, Dec. 26, 2013, available at <http://www.collectionscreditrisk.com/news/tcpa-lawsuits-projected-to-grow-3016431-1.html> (free registration required)(last accessed Mar. 18, 2014); Patrick Lunsford, *TCPA Lawsuits Really are Growing Compared to FDCPA Claims*, insideARM.com (Accounts Receivable Management), available at <http://www.insidearm.com/daily/debt-buying-topics/debt-buying/tcpa-lawsuits-really-are-growing-compared-to-fdcpa-claims/> (last accessed Mar. 18, 2014); ACA Int'l, *FDCPA lawsuits decline, While FCRA and TCPA Filings Increase*, available at <http://www.acainternational.org/news->

Often it is only the lawyers representing the class that “win” with large attorneys’ fee awards, while only a few dollars are provided to individual consumers.²⁴ For example, in mid-2013, a case against Papa John’s settled for over \$16.5 million with almost \$2.5 million in attorney’s fees and costs – while individuals just received a free pizza coupon and could submit a claim for another \$50.²⁵ Another action against Federal Home Loan Mortgage settled for \$17.1 million with a whopping \$4.275 million in attorney’s fees, with the court noting that individuals would receive only “approximately \$2 each,” if each of the potential class members made claims.²⁶ Similarly, in a September 2012 settlement for \$9 million, some \$2.7 million (30% of the settlement fund) was allocated for attorney’s fees against Alliance One, with 63,573 valid claims filed to split the

[fdcpa-lawsuits-decline-while-fcra-and-tcpa-filings-increase-31303.aspx](#) (last visited Mar. 18, 2014) (citing statistics collected by Webrecon).

²³ Comments of the American Financial Services Association, to the *Petition for Declaratory Ruling* filed by a Coalition of Mobile Engagement Providers, in CG Docket No. 02-278, at 3 (dated Dec. 2, 2013) (“[e]ven when companies prevail in lawsuits, the cost to pursue the lawsuit (often through an appellate court) is over \$100,000”); *see also, e.g., David M. Emanuel v. The Los Angeles Lakers Inc.*, case number 13-55678, U.S. Court of Appeals, Ninth Circuit, Appellee’s Answering Brief (Nov. 14, 2013); *David M. Emanuel v. The Los Angeles Lakers Inc.*, case number 13-55678, U.S. Court of Appeals, Ninth Circuit, Amicus Brief of Twitter, Inc. and Path, Inc., at 1 (Nov. 21, 2013)).

²⁴ *See, e.g., Aaron Van Oort, Eileen Hunter, Erin Hoffman, Recent Developments in TCPA Litigation*, Faegre Baker Daniels, April 5, 2013, at 4, available at http://www.minncle.org/attendeemats/30313/10_VAN%20OORT.pdf (last visited Mar. 18, 2014) (citing to four settlements in which the attorneys fees amounted to \$4.8 million, \$3 million, \$3 million and \$4.3 million, and in which the payment per class member amounted to \$3.00, \$5.30, \$1.63 and \$2.88 respectively).

²⁵ Unopposed Motion for Preliminary Approval of Class Action Settlement, *Agne et al. v. Papa John's International Inc. et al.*, No. 2:10-cv-01139-JCC at 6 (W.D. Wa. May 17, 2013).

²⁶ Order Granting Unopposed Motion for Preliminary Approval of Class Action Settlement and Certification of Settlement Class, *Malta v. Federal Home Loan Mortgage Corp.*, No. 10-CV-1290 BEN (NLS) at 10 (S.D. Cal. Feb. 5, 2013).

remainder, after costs.²⁷ Finally, a late 2011 settlement with Sprint of \$5.5 million, included over \$1.5M in attorney's fees and costs.²⁸

More importantly, the current “cottage industry” of exponentially growing TCPA litigation, with class action plaintiff attorneys incentivized to file lawsuits that inure primarily to their own benefit and not to the benefit of consumers, runs counter to Congressional intent of the TCPA. This is reflected by the statement of the TCPA's sponsoring senator – Senator Ernest “Fritz” Hollings – who noted that consumers would be able to bring TCPA actions in small claims court with damages set at a fair level for *both* the consumer and the calling entity:

[I]t is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court. . . . 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.**²⁹

Academics have described the current situation involving class actions that benefit primarily the lawyers, as opposed to the actual class members, as “faux” or “bounty hunter” class actions – noting that they “effectively represent the transformation of the substantive law.”³⁰ ACA

²⁷ Order Granting Joint Motion for Final Approval of Class Action Settlement and Granting Class Counsel's Motion for Attorney's Fees, Costs, and Service Awards, *Adams v. Alliance One, Inc.*, No. 3:08-cv-0248-JAH-WVG at 5-6 (S.D. Cal. Sept. 28, 2012).

²⁸ Judgment and Order of Final Approval, *Palmer v. Sprint*, No. 2:09-cv-01211-JLR at 6 (Oct. 6, 2011); Unopposed Motion for Final Approval of Class Action Settlement and Response to Objections, *Palmer v. Sprint*, No. 2:09-cv-01211-JLR at 5 (Oct. 6, 2011).

²⁹ 137 Cong. Rec. 30821 (1991)(emphasis added).

³⁰ Douglas G. Smith, *The Intersection of Constitutional Law and Civil Procedure: Review of Wholesale Justice--Constitutional Democracy and the Problem of the Class Action Lawsuit*, Northwestern University Law Review Colloquy, 104 Nw. U. L. Rev. Colloquy 319, 326 (March 2010)(quoting Martin Redish's *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit*, Stanford Law Books, 2009).

urges the Commission to move forward in addressing this through the requested clarifications and rulings.

II. THE COMMISSION MUST CLARIFY THAT JUST BECAUSE A PREDICTIVE DIALER *CAN BE* AN ATDS, NOT EVERY PREDICTIVE DIALER *MUST BE* AN ATDS UNDER THE TCPA.

ACA emphasized in its Petition that 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.”³¹ ACA agrees with the Commission that predictive dialers can fall within the statutory meaning of autodialers, and that the TCPA may not be circumvented by simply labeling a technology a “predictive dialer.”³² However, it is critical for the Commission to explicitly confirm that simply because a predictive dialer *can be* an ATDS for purposes of the TCPA, does not mean that every predictive dialer *must be* an ATDS under the TCPA.³³ Indeed, the Commission must clarify that if a technology does not meet the explicit statutory definition of an ATDS under the TCPA, then it is not an ATDS under the TCPA.

³¹ 47 U.S.C. § 227(a)(1).

³² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 FCC Rcd 14014 ¶ 133 (2003) (“2003 TCPA Order”) (“We believe the purpose of the requirement that equipment have the ‘capacity to store or produce telephone numbers to be called’ is to ensure that the prohibition on autodialed calls not be circumvented. Therefore, the Commission finds that a predictive dialer falls within the meaning and statutory definition of ‘[ATDS]’ and the intent of Congress.”).

³³ Amy M. Gallegos, *Confusion Over FCC’s Autodialer Definition Continues*, Law360, Mar. 14, 2014, available at <http://www.law360.com/articles/518599> (last visited Mar. 18, 2014)(subscription required)(highlighting the confusion caused by the Commission’s language in the 2003 TCPA Order and the need for clarification).

In 2008, the FCC stated “that a predictive dialer constitutes an [ATDS] and is subject to the TCPA’s restrictions on the use of autodialers.”³⁴ Unfortunately, this language has been twisted in litigation to support the theory that a predictive dialer does not even have to meet the statutory definition of an ATDS to be an ATDS under the statute – and some courts are pointing to the Commission’s language in the 2008 Declaratory Ruling to support this theory.³⁵ Obviously, such cases must be wrong – a predictive dialer that does not contain the statutory elements of an ATDS simply cannot be an ATDS under the statute.³⁶ Several other petitioners have also requested that the Commission issue such a clarification.³⁷

Consistent with ACA’s request, at least one, very recent court decision has emphasized that the statutory definition of an autodialer must be met in order for a system to be an ATDS under

³⁴ *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 at ¶ 12 (2008) (“2008 Declaratory Ruling”).

³⁵ *See, e.g., Griffith v. Consumer Portfolio Serv., Inc.*, 838 F. Supp. 2d 723, 727 (N.D. Ill. 2011) (“The FCC concluded that predictive dialers are governed by the TCPA because, like earlier autodialers, they have the capacity to dial numbers ‘without human intervention.’ In doing so, it interpreted ‘automatic telephone dialing system’ to include equipment that utilizes lists or databases of known, nonrandom telephone numbers.”)(internal footnotes omitted).

³⁶ TCPA at § 227(a)(1). ACA has previously raised this issue with the Commission. *See, e.g., ACA Int’l, Notice of Ex Parte Presentation*, CG Docket No. 02-278 (filed April 22, 2012); *ACA International’s Reply Comment to Proposed Amendments to the Telephone Consumer Protection Act Regulations*, CG Docket No. 02-278, at pp. 6-9 (filed June 21, 2010); *ACA International’s Comment to Proposed Amendments to the Telephone Consumer Protection Act Regulations*, CG Docket No. 02-278, at pp. 45-46 (filed May 21, 2010).

³⁷ *See, e.g., Communication Innovators, Petition for Declaratory Ruling*, CG Docket No. 02-278 (filed June 7, 2012) (“Communication Innovators Petition”); *Communication Innovators, Notice of Ex Parte Presentation*, CG Docket No. 02-278 (filed Sept. 13, 2013 and filed Dec. 19, 2013); *YouMail, Inc., Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, at p. 11 (filed April 19, 2013); *Professional Association for Customer Engagement, Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking*, CG Docket No. 02-278 (filed Oct. 18, 2013); *Petition of Glide Talk, Ltd. for Expedited Declaratory Ruling*, CG Docket No. 02-278, at pp. 9-13 (filed Oct. 28, 2013).

the statute.³⁸ However, to address the growing number of lawsuits on this point, it is critical that the Commission clarify its treatment of predictive dialers. The best reading of both the Commission’s 2003 TCPA Order and its 2008 Declaratory Ruling – and the only reading consistent with the TCPA – is that the FCC held that a telemarketer cannot circumvent the statutory definition of an ATDS by using a predictive dialer. The Commission’s 2003 TCPA Order stated, and its 2008 Declaratory Ruling affirmed, that a dialing system is not shielded from TCPA liability just because it relies on predictive dialing software, where it otherwise meets the statutory criteria for an autodialer.³⁹ Nowhere does the FCC state that predictive dialers do not need to meet the statutory definition of an ATDS to be considered an ATDS under the statute.

An explicit clarification that the FCC did not (and could not) alter the statutory definition of an ATDS under the TCPA would address the Commission’s concerns that the ATDS restrictions not be avoided by simply feeding numbers into a predictive dialer, while still comporting with the express statutory requirements defining an ATDS. And, this reading is also consistent with the Commission’s expectation that it may need to consider changes as these technologies evolve.⁴⁰

³⁸ *Dominguez v. Yahoo!, Inc.*, 2014 U.S. Dist. LEXIS 36542 at *18 (E.D. Pa. Mar. 20, 2014) (“As discussed above, Plaintiff has not offered any evidence to show that Yahoo’s system had the capacity to randomly or sequentially generate telephone numbers (as opposed to simply storing telephone numbers) as required by the statutory definition of ATDS.”).

³⁹ 2003 TCPA Order, at ¶¶ 131-33.

⁴⁰ 2008 Declaratory Ruling, at ¶ 13.

III. THE COMMISSION MUST CONFIRM THAT “CAPACITY” FOR TCPA PURPOSES MEANS THE “PRESENT ABILITY” OF A DIALING SYSTEM.

As stated above, 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.”⁴¹ Critically, “capacity” is not defined in either the statute or the regulations. As detailed in ACA’s Petition, while “capacity” is a key term in evaluating whether a particular dialing system is an ATDS, the term is not defined in either the statute or the Commission’s regulations.⁴² ACA and a diverse range of other organizations have urged the Commission to explicitly confirm 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.⁴³

Clarifying that “capacity” must mean “present ability” is consistent with the TCPA’s plain language, the Commission’s prior TCPA rulemakings, the everyday meaning of the term and the legislative history of the statute. It is a longstanding principle of statutory construction that when

⁴¹ 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).

⁴² ACA Petition at 9.

⁴³ ACA Petition at 9-10, n.29, 30. *See also* Professional Association for Customer Engagement, *Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking*, CG Docket No. 02-278 (filed Oct. 18, 2013) (“PACE Petition”) at pp. 7-12; *GroupMe, Inc.’s Petition for Expedited Declaratory Ruling and Clarification*, CG Docket No. 02-278, at p. 14 (filed March 1, 2012); YouMail, Inc., *Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, at p. 11 (filed April 19, 2013); *Petition of Glide Talk, Ltd. for Expedited Declaratory Ruling*, CG Docket No. 02-278, at pp. 9-13 (filed Oct. 28, 2013); *TextMe, Inc.’s Petition for Expedited Declaratory Ruling and Clarification*, CG Docket No. 02-278, at pp. 7-12 (filed Mar. 18, 2014). ACA has made filings in support of the PACE Petition. *See* Comments of ACA International to PACE Petition (filed Dec. 19, 2013) and Reply Comments of ACA International to PACE Petition (filed Jan. 6, 2013).

Congress chooses not to define a term, its ordinary meaning typically applies.⁴⁴ First, the definition in the statute begins with the present tense – “*has* the capacity” – reflecting that the statute is intended to apply only to equipment with current or present capacity.⁴⁵ Second, dictionary definitions support the ordinary meaning of “capacity” as a dialing system’s “present ability” or current capabilities.⁴⁶ Of particular relevance, the Merriam-Webster Dictionary defines “capacity” as “the facility or power to produce, perform, or deploy.”⁴⁷ A dialing system that otherwise meets the criteria for an ATDS does not carry such a “facility” or “power” if it cannot perform such functions in its current form without significant modification.

At least three federal courts recently grappling with this same issue have concluded that “capacity” must mean current ability:

“[T]o meet the TCPA definition of an ‘automatic telephone dialing system,’ a **system must have a present capacity, at the time the calls were being made, to store or produce and call numbers from a number generator.** While a defendant can be liable under § 227(b)(1)(A) whenever it has such a system, even if it does not make use of the automatic dialing capability, **it**

⁴⁴ See, e.g., *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1182 (U.S. 2011) (citing *Johnson v. United States*, 559 U.S. 133, 138 (2010)).

⁴⁵ 47 U.S.C. § 227(a)(1) (emphasis added). By contrast, in a different portion of the TCPA describing protection of subscriber privacy rights, Congress uses the future tense in describing the Commission’s requirement to initiate a rulemaking involving, in part, an evaluation of the capacity for certain entities to establish certain processes. See 47 U.S.C. § 227(c)(1)(B) (“The proceeding shall...evaluate the categories of public and private entities that *would have the capacity* to establish and administer such methods and procedures”)(emphasis added).

⁴⁶ See PACE Petition at pp. 10-11.

⁴⁷ *Id.*; see also, Merriam-Webster Dictionary, available at <http://www.merriam-webster.com/dictionary/capacity> (last accessed Mar. 18, 2014).

cannot be held liable if substantial modification or alteration of the system would be required to achieve that capability.”⁴⁸

In holding that a particular dialing system was not an ATDS, the *Hunt* court found it to be critical that the dialing system at issue was incapable of automatic dialing “in its present state.”⁴⁹ The court specifically rejected plaintiff’s argument that the equipment had the requisite TCPA capacity simply because it may be possible at some unknown future point in time for “certain software” to be installed to make automatic dialing possible. The court also pointed to the creation of such software as an iPhone app and questioned whether “roughly 20 million American iPhone users” would be subject to the TCPA’s mandates.⁵⁰

Similarly, in *Orange Cab*, and other recent cases, courts have emphasized the importance of taking a “common sense” approach in evaluating TCPA issues.⁵¹ In following such a “common sense” approach to analyzing TCPA claims, the *Orange Cab* court assessed the system at issue based on its “present, not potential, capacity to store, produce, or call randomly or sequentially generated

⁴⁸ *Hunt v. 21st Mortgage Corp.*, 2013 U.S. Dist. LEXIS 132574, at *11 (D. Ala. Sept. 17, 2013)(emphasis added); *See also Gragg v. Orange Cab Co.*, 2014 U.S. Dist. LEXIS 16648 at *8-9(W.D. Wa. Feb. 7, 2014); *Dominguez v. Yahoo!, Inc.*, 2014 U.S. Dist. LEXIS 36542 at *16-18 (E.D. Pa. Mar. 20, 2014) (citing *Hunt* and *Orange Cab*).

⁴⁹ *Hunt* at *10.

⁵⁰ *Id.* at *10-11.

⁵¹ *See, e.g., Gragg v. Orange Cab Co.*, 2014 U.S. Dist. LEXIS 16648 at *3-4 (W.D. Wa. Feb. 7, 2014)(adopting the 9th Circuit’s “common sense” approach to reviewing TCPA claims, and citing *Chesbro v. Best Buy Stores, L.P.*, 11-35784, 705 F.3d 913 (9th Cir. Dec. 27, 2012)). *See also, Ryabyshchuck v. Citibank (S.Dakota) N.A.*, 2012 U.S. Dist. LEXIS 156176 at *8-9 (S.D. Cal. 2012)(“context is indisputably relevant to determining whether a particular call is actionable under the TCPA”); *Aderbold v. Car2Go N.A., LLC*, 2014 U.S. Dist. LEXIS 26320 at *12-13 (W.D. Wa. Feb. 27, 2014)(citing the Ninth Circuit’s “common sense” approach).

telephone numbers,”⁵² and stated that any other interpretation of capacity “would lead to an absurd result.”⁵³

Common sense dictates that these cases are correct, and that “capacity” under the TCPA cannot mean hypothetical future ability. However, without specific FCC guidance regarding the definition of “capacity,” nuisance lawsuits will continue to be filed on the basis that the TCPA’s scope extends to any device that could theoretically perform the statutorily required functions, even if the device completely lacks any current ability to do so without significant modification.⁵⁴

ACA joins the broad call for the Commission to act expeditiously by explicitly clarifying that “capacity” for TCPA purposes means the present ability, at the time the call is made, of equipment to (A) store or produce telephone numbers to be called, using a random or sequential number generator; and (B) dial such numbers.

IV. PRIOR EXPRESS CONSENT SHOULD ATTACH TO THE PERSON WHO INCURS A DEBT, NOT THE SPECIFIC WIRELESS TELEPHONE NUMBER THE DEBTOR PROVIDES AT THE TIME OF CONSENT.

In its Petition, ACA explained that prior express consent to receive non-telemarketing, debt collection calls should attach to the person who provides a wireless telephone number as part of the application process to obtain credit for goods or services, and not only to the specific wireless telephone number that the debtor provides.⁵⁵ ACA appreciates that the FCC has recognized that

⁵² *Gragg v. Orange Cab Co.* at *9 (emphasis added).

⁵³ *Id.*

⁵⁴ See, e.g., *Griffith v. Consumer Portfolio Serv., Inc.*, 838 F. Supp. 2d 723, 727 (N.D. Ill. 2011) (equipment could be treated as an ATDS if it could be programmed in the future to perform ATDS functions).

⁵⁵ ACA Petition at 12-14.

“the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.”⁵⁶ Unfortunately for creditors who depend on such information in order to contact a debtor in connection with a debt, debtors sometimes change their telephone numbers before clearing their debt.

It is critical for creditors to be able to contact debtors on a wireless number if the debtor has provided a wireless number in connection with an application for credit, or to otherwise receive goods or services with an agreement to pay at a later date. Recent studies show that today almost two in every five American homes have only wireless telephones, and some 38% of U.S. adults now live in wireless-only households (over 60% of adults aged 25-29), making alternative means to live contact with debtors increasingly difficult, even when they have expressly consented to be called on a wireless phone number regarding the debt.⁵⁷

⁵⁶ 2008 Declaratory Ruling at ¶ 9.

⁵⁷ Centers for Disease Control and Prevention (CDC), *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January-June 2013*, Stephen J. Blumberg, Ph.D. and Julian V. Luke, Division of Health Interview Statistics, National Center for Health Statistics, released Dec. 2013, at pp. 1-2, available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201312.pdf> (last accessed Mar. 18, 2014); *see also*, Steven Shepard, National Journal, *Americans Continue to Drop Their Landline Phones*, Dec. 18, 2013, available at <http://www.nationaljournal.com/hodine-on-call/americans-continue-to-drop-their-landline-phones-20131218#undefined> (last accessed Mar. 18, 2014); *Remarks of Sean Lev, Technology Transitions Policy Task Force, Acting Director, at TIA Network Transition Event*, June 21, 2013 (noting that "more than a third of U.S. households are now wireless-only and the percent of adults between the ages of 25 and 29 living in wireless-only homes is 60%. Yes 6-0.") (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-321781A1.pdf) (last accessed Mar. 18, 2014). In addition, the Commission has relied on earlier versions of the same CDC study to highlight the increasing trend of wireless-only households in its reports. See, e.g., *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket N. 11-186, Sixteenth Report (Mar. 21, 2013) at p. 25 (citing the

The Commission should rule that by providing a wireless telephone number during the transaction or relationship that underlies the debt, or during the collection of a debt, an individual consents to be contacted regarding the debt on any wireless number affiliated with that person or the underlying debt. This clarification would narrowly apply only to these uniquely situated debt collection calls – based on the individual’s original consent to be contacted on a wireless phone number.

Such a rule change will not impact or lessen any of the rules and statutes protecting debtors from unfair, misleading, and abusive debt collection practices, as provided under the FDCPA and numerous other federal, state, and local laws.⁵⁸ For example, a debt collector may not communicate with the consumer in connection with the collection of any debt at any unusual time or place known or which should be known to be inconvenient to the consumer.⁵⁹ Also, a debt collector is prohibited from debt collection communications at the consumer’s place of employment if the debt collector knows or has reason to know that the consumer’s employer prohibits such communications.⁶⁰

July-December 2011 version of the *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey* to report that "[t]he number of adults who rely exclusively on mobile wireless for voice service has increased significantly in recent years approximately 32.3 percent of all adults in the U.S.lived in wireless-only households during the second half of 2011. This compares to 27.8 percent of all adults in the second half of 2010 and 22.9 percent in the second half of 2009.”) (internal citations omitted).

⁵⁸ ACA Petition at 14.

⁵⁹ 15 USC 1692c(a)(1).

⁶⁰ 15 USC 1692c(a)(3).

Moreover, a consumer has the ability to opt-out of receiving collections communications from the debt collector altogether.⁶¹

Thus, to ensure that communications from legitimate debt collectors are not impeded, the FCC should rule that in the case of non-telemarketing, debt collection calls, prior express consent attaches to the person who incurs the debt, and not just to the specific wireless telephone number that the debtor provides when receiving goods, services, or credit.

V. A SAFE HARBOR SHOULD BE CREATED FOR “WRONG NUMBER” NON-TELEMARKETING CALLS.

The Commission should establish a safe harbor for “wrong number” non-telemarketing calls where the caller previously obtained appropriate consent, in good faith dialed the telephone number provided by the consumer, and had no intent to call any person other than the individual who had provided such consent to be called, or had no reason to know that the called party would be charged for the incoming call.⁶² As ACA described in its Petition, under current TCPA rules, even careful debt collectors, who take substantial precautions and engage in careful due diligence,

⁶¹ See 15 USC 1692c(c).

⁶² As described in its Petition (at 15, n.46), ACA strongly supports the *Petition for Expedited Declaratory Ruling of United Healthcare Services, Inc. (United)*, CG Docket No. 02-278 (filed Jan. 16, 2014), requesting clarification that TCPA liability does not apply to informational, non-telemarketing autodialed and prerecorded calls to wireless numbers for which prior express consent has been obtained but which, unknown to the calling party, have been reassigned from one wireless subscriber to another. See Comments of ACA International, *Petition for Expedited Declaratory Ruling of United Healthcare Services, Inc. (United)*, CG Docket No. 02-278 (filed Mar. 10, 2014). Many other commenters support United’s petition, for similar pragmatic reasons. See, e.g., Comments by America’s Health Insurance Plans in Support of United Healthcare Services, Inc. Petition for Declaratory Relief, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of the Coalition of Higher Education Assistance Organizations, *Re: United Healthcare Services, Inc. Petition For Expedited Declaratory Ruling Regarding Reassigned Wireless Telephone Numbers*, CG Docket No. 02-278 (filed Mar. 10, 2014).

can face enormous liability by dialing a “wrong number” (such as in those cases where the consumer no longer maintains the original telephone number provided), or unknowingly calling a number for which a recipient is charged (for example, via a call to a residential number where the called party is using a Voice Over IP (“VOIP”) service that assesses charges per call without the caller’s knowledge).⁶³

This type of safe harbor is not unprecedented. In 2004, the Commission established a safe harbor from the prohibition on placing calls using an ATDS or prerecorded messages to wireless numbers for numbers that have been recently ported from wireline service to wireless service.⁶⁴ Under this safe harbor, a caller is not be liable when making ATDS or prerecorded message calls to a wireless number ported from wireline service within the previous 15 days, provided the number is not already on the national do-not-call registry or the caller’s company-specific do-not-call list.⁶⁵ The Commission found this safe harbor to be appropriate and necessary to ensure that callers would have a reasonable opportunity to comply with the rules while at the same time protecting consumer privacy interests, and found compelling that it is impossible for telemarketers to identify immediately those numbers that have been ported from a wireline service to a wireless service provider.⁶⁶ The safe harbor did not nullify the need for telemarketers to abide by any of the Commission’s other telemarketing rules; nor did the safe harbor excuse any willful violation of the

⁶³ ACA Petition at 15-17.

⁶⁴ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 19215 (2004) (“2004 TCPA Order”); *see also*, ACA Petition at 15-16.

⁶⁵ *See* 47 C.F.R. § 64.1200(a)(1)(iv).

⁶⁶ *See* 2004 TCPA Order, ¶ 1.

ban on using autodialers or prerecorded messages to call wireless numbers. Thus, the wireless number portability safe harbor reflected operational realities to ensure that application of the TCPA would not “demand the impossible” from callers.

Similarly, a limited safe harbor for “wrong number” calls is necessary to ensure that callers do not face liability under the TCPA for placing non-telemarketing, non-solicitation ATDS calls to lawfully obtained numbers (such as wireless numbers obtained with prior express consent) when such numbers are subsequently no longer maintained by the intended called party without the knowledge of the caller, or when the debt collector has no way of knowing that the called party would be charged for the call.

In its Petition, ACA proposed new rule language to rectify this situation, as underlined below:⁶⁷

§ 64.1200 Delivery restrictions.

(a) No person or entity may:

(1) Except as provided in paragraph (a)(2) of this section, initiate any telephone call (other than a call made for emergency purposes or is made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;

...

(iv) A person will not be liable for violating the prohibition in paragraph (a)(1)(iii) of this section when the call is placed to a wireless number that has been ported from wireline service and such call is a voice call; not knowingly made to a wireless number; and made within 15 days of the porting of the number from wireline to wireless service, provided the number is not already on the national do-not-call registry or caller’s company-specific do-not-call list.

⁶⁷ ACA Petition at 17.

(v) A person will not be liable for violating the prohibition in paragraph (a)(1)(iii) of this section when, despite the calling party's good faith efforts, a non-telemarketing call is unknowingly placed to (a) a wireless number which the party providing consent no longer maintains, or (b) to a number for which the called party is charged, such as, for example, a call to a residential line that incurs a separate charge.

VI. CONCLUSION

As described herein and further detailed in its Petition, ACA respectfully requests that the Commission initiate a rulemaking as appropriate and adopt much-needed clarifications to its TCPA rules. The suggested clarifications and changes will help ensure that covered communications are governed by a more clear, fair, and consistent regulatory framework. Specifically, ACA urges the Commission to: (1) confirm that not all predictive dialers are categorically automatic telephone dialing systems; (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) create a safe harbor for autodialed "wrong number" non-telemarketing calls to wireless numbers. Addressing these issues is critical to removing the current confusion and uncertainty that has brought on an explosion in frivolous TCPA class action litigation. Such changes to the FCC's rules will help ensure that legitimate, non-telemarketing debt collection calls (and their resulting positive economic impact on the public and private sectors) are not unfairly impeded.

Respectfully submitted,



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March 24, 2014