

**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
) RM-11712
Petition for Rulemaking of ACA)
International)

To: The Commission

REPLY COMMENTS OF ACA INTERNATIONAL

ACA International (“ACA”), through counsel, submits these reply comments in support of its Petition for Rulemaking in the above captioned proceeding.¹ In its Petition and Comments, ACA respectfully requested that the Commission initiate a rulemaking as appropriate and adopt much-needed clarifications to its rules under the Telephone Consumer Protection Act (“TCPA”).² These clarifications will help ensure that covered communications are governed by a more clear, fair, and consistent regulatory framework. Specifically, ACA asked the Commission to: (1) confirm that not all predictive dialers are categorically automatic telephone dialing systems (“ATDS”) under the TCPA; (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 time of consent; and (4) create a safe harbor for autodialed “wrong

¹ ACA International, *Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (filed Jan. 31, 2014) (“Petition”); see also *Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemaking Filed*, Report No. 2999, Feb. 21, 2014; *Comments of ACA International*, CG Docket No. 02-278 (filed Mar. 24, 2014) (“Comments”).

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.*

number” non-telemarketing calls to wireless numbers. Consistent with recent Commission orders, these communications are “normal business communications” that do not run afoul of the TCPA.³

The overwhelming majority of comments support the ACA Petition. These commenters, which represent thousands of entities in a wide range of different types of organizations, include trade organizations,⁴ a government agency;⁵ individual companies,⁶ and individual professionals.⁷ In

³ See Cargo Airline Association Petition for Expedited Declaratory Ruling, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Order, CG Docket No. 02-278, FCC 14-32, 2014 FCC LEXIS 1072, at *21-22 ¶ 19 & n.49 (rel. Mar. 27, 2014); see also GroupMe, Inc./Skype Communications S.A.R.L Petition for Expedited Declaratory Ruling, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling, CG Docket No. 02-278, FCC 14-33, 2014 FCC LEXIS 1073, at *8-9 ¶ 8 & n.21 (rel. Mar. 27, 2014).

⁴ See, e.g., Comments filed in Support of Petition in CG Docket No. 02-278, by: American Bankers Association (“represents banks of all sizes and charters and is the voice for the nation’s \$14 trillion banking industry and its two million employees”) (March 24, 2014); American Financial Services Association (over 350 members including consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers) (Mar. 24, 2014); Coalition of Higher Education Assistance Organizations (“a partnership of colleges, universities, and organizations promoting Federal Campus Based loan programs, student institutional and private loans, campus receivables, financial literacy, and other student financial services”) (Mar. 24, 2014); National Association of Industrial Bankers (members range from banks serving under-served segments of society such as taxi drivers and public service organizations, to large credit card and commercial finance companies) (Mar. 24, 2014); National Association of Retail Collection Attorneys (“more than 700 debt collection law firms and in-house legal counsel of creditors”) (Mar. 21, 2014); Professional Association for Customer Engagement (a non-profit trade organization dedicated to the advancement of customer engagement) (Mar. 24, 2014); Student Loan Servicing Alliance (SLSA) and SLSA Private Loan Committee (non-profit trade association of student loan servicers and organizations involved in financing, lending, servicing, and collecting private education loans) (Mar. 24, 2014).

⁵ See, e.g., Comments filed in Support of Petition in CG Docket No. 02-278, by County of San Diego, Office of Revenue and Recovery (Mar. 20, 2014).

⁶ See, e.g., Comments filed in Support of Petition in CG Docket No. 02-278, by: Comcast Corporation (Mar. 24, 2014); Hilton Worldwide (Mar. 24, 2014); Portfolio Recovery Associates LLC (Mar. 24, 2014); Santander Consumer USA, Inc. (Mar. 24, 2014); Wells Fargo (Mar. 24, 2014).

⁷ See, e.g., Comments filed in Support of Petition in CG Docket No. 02-278, by: Brian Melendez (Mar. 24, 2014); Christopher Publow (Mar. 24, 2014).

fact, of the thirty-five (35) comments filed, only three commenters opposed the ACA Petition.⁸

Supporting commenters agree that by adopting the much needed clarifications and updates to the Commission's TCPA rules urged by ACA, the Commission will help ensure that legitimate, non-telemarketing debt collection calls are not unfairly impeded, while still protecting consumers.

I. JUST BECAUSE A PREDICTIVE DIALER *CAN BE* AN ATDS, NOT EVERY PREDICTIVE DIALER *MUST BE* AN ATDS UNDER THE TCPA.

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.”⁹ 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” - but the fact that a predictive dialer *can be* an autodialer does not mean that it *must be* an ATDS under the TCPA.¹⁰ Opposing commenters would like the Commission to disregard the very clear and precise statutory definition of an ATDS.¹¹

⁸ See Comments filed in opposition to Petition in CG Docket No. 02-278 (Mar. 24, 2014), by: Gerald Roylance (“Roylance Comments”), Robert Biggerstaff (“Biggerstaff Comments”), and Joe Shields (“Shields Comments”).

⁹ 47 U.S.C. § 227(a)(1).

¹⁰ *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.”). This language has been manipulated in lawsuits. See Amy M. Gallegos, *Confusion Over FCC’s Autodialer Definition Continues*, Law360, Mar. 14, 2014, available at <http://www.law360.com/articles/518599> (last visited Apr. 8, 2014) (highlighting the confusion caused by the Commission’s language in the 2003 TCPA Order and the need for clarification).

¹¹ See Roylance Comments at 1 (“... I have maintained that the proper reading of the ATDS merely requires the storage of telephone numbers to be dialed; when numbers are stored, then a number

Numerous petitioners have also requested that the Commission issue such a clarification,¹² as do numerous supporting commenters.¹³ A recent court decision also confirms this approach.¹⁴ 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 prior actions – 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 FCC has never stated, and could not have found, that predictive dialers need not need bother to meet the statutory definition of an ATDS to be considered an ATDS under the statute.

generator is not required.”); Shields Comments at 4 (“Any piece of equipment that can automatically dial a telephone number falls under the definition of automatic dialer.”)

¹² ACA Comments at 11; *see, e.g.*, Communication Innovators, *Petition for Declaratory Ruling*, CG Docket No. 02-278 (filed June 7, 2012); 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).

¹³ *See, e.g.*, American Association of Healthcare Administrative Management Comments at 2 (“Moreover, confusion about whether certain predictive dialers are autodialers will dissuade organizations, including unions and other non-profits[,] from placing consumer-friendly, non-telemarketing calls. Many of these notifications, such as payment confirmations and healthcare reminders provide great benefits to the patient but may not be worth the risk if the caller believes class action liability could result.”); American Bankers Association Comments at 4-7; Hilton Worldwide at 1 (“... we particularly agree that there is a critical need to distinguish that not all predictive dialers are categorically automatic telephone dialing systems.”); PACE Comments at 3 (“just because a predictive dialer can be an ATDS does not mean that every predictive dialer must be an ATDS. The dialer must still meet the statutory definition of an ATDS. Furthermore, PACE agrees that clarification of this issue is necessary to thwart ongoing litigation costs and damages incurred by businesses”); Time Warner Cable Comments at 6.

¹⁴ *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.”).

II. “CAPACITY” FOR TCPA PURPOSES MEANS “PRESENT ABILITY

Pursuant to the TCPA, 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.”¹⁵ As ACA has demonstrated, 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.¹⁶ Moreover, at least three federal courts recently grappling with this same issue have concluded that “capacity” must mean current ability.¹⁷

Even opposing commenters acknowledge that under an interpretation that disregards actual, present ability, and that is expanded to encompass hypothetical abilities, any device could be swept within the scope of the TCPA.¹⁸ Accordingly, and based on the only logical reading of the statute, a diverse range of organizations have also requested that the Commission clarify that “capacity” must mean “present ability.”¹⁹ The overwhelming number of commenters support this interpretation.²⁰

¹⁵ 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).

¹⁶ ACA Comments at 13-16.

¹⁷ ACA Comments at 14-16; *see also, 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); *Dominguez*, U.S. Dist. LEXIS 36542 at *16-18 (citing *Hunt* and *Orange Cab*).

¹⁸ *See, Roylance Comments* at 1 (“Computers have the capacity to do almost anything”); *Shields Comments* at 7 (“My cell phone automatically dials telephone numbers either by selecting the number from my contacts or speed dials the number if so assigned. Manually dialing a telephone number on my cell phone doesn’t change the capability of my cell phone. Adding “current” or “present” before capability doesn’t change what my cell phone is capable of doing.”).

¹⁹ ACA Petition at 9-10, n.29, 30; ACA Comments at 13-16, n. 43. *See also* PACE Petition at 7-12; *GroupMe, Inc.’s Petition for Expedited Declaratory Ruling and Clarification*, CG Docket No. 02-278, at 14

III. 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.

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.²¹ Creditors must be able to contact debtors on a wireless number if the debtor has provided a wireless number for contact in connection with a debt, especially given the trend towards wireless-only communications.²² As ACA has detailed, and as has been echoed by other commenters, “[e]xisting regulatory restrictions on debt collection activities—including a consumer’s right to expressly opt out of all collections communications from the debt collector—would not be affected by this ruling and would continue to fully protect consumers’ interests.”²³

ACA has requested this narrow clarification 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 numerous rules and statutes

(filed March 1, 2012); YouMail Petition at p. 11; Glide Talk Petition at 9-13; *TextMe, Inc.’s Petition for Expedited Declaratory Ruling and Clarification*, CG Docket No. 02-278, at 7-12 (filed Mar. 18, 2014).

²⁰ See, e.g., American Bankers Association Comments at 7; Hilton Worldwide Comments at 1 (“there is a critical need to ... confirm that ‘capacity’ under the TCPA means ‘present’ ability.”); PACE Comments at 3-4 (“the term ‘capacity,’ as used in the definition of ATDS, necessarily refers to a system’s present ability”); Time Warner Cable Comments at 5.

²¹ ACA Petition at 12-14; ACA Comments at 16-19.

²² ACA Comments at 17.

²³ Portfolio Recovery Associates Comments at 10; see also Student Loan Servicing Alliance and the SLSA Private Loan Committee Comments at 8.

protecting debtors from unfair, misleading, and abusive debt collection practices.²⁴ A consumer's subsequent change in wireless telephone number "should not be presumed to extinguish the consumer's consent to be contacted by cell phone about the debt;"²⁵ nor should it extinguish the understanding that some consumers may want to be contacted at their new numbers by creditors, as these calls may provide debtors with critical information. For example, the Student Loan Servicing Alliance (SLSA) and the SLSA Private Loan Committee explain that calls may be made for notification of returned mail, notification of an expiring grace period related to loan repayment, or to provide urgent tax information.²⁶ SLSA notes further that agencies provide notification regarding eligibility to rehabilitate defaulted loans, or consolidation, cancellation and forbearance options.²⁷ Contact may also concern the successful management of debt, including repayment plans or eligibility for deferment.²⁸

The opposing commenters misleadingly state that ACA's request on this point would be "an expansive exemption" that would "sweep automatically dialed calls to family members, neighbors, friends, employers and colleagues under this overbroad prior express consent exemption simply because a cell number may be affiliated with a debtor."²⁹ This not correct. ACA narrowly requests that the exemption apply only in the context of debt collection calls, and only with respect to the

²⁴ ACA Comments at 18-19.

²⁵ Portfolio Recovery Associates Comments at 9-10.

²⁶ Student Loan Servicing Alliance and the SLSA Private Loan Committee Comments at 4.

²⁷ *Id.* at 5.

²⁸ *Ibid.*

²⁹ Shields Comments at 8. *See also* Roylance Comments at 2 (stating, without explanation, that the request amounts to some sort of "data mining carte blanche").

person providing consent to be contacted at a cell phone number regarding a particular debt.³⁰ One opposition comment also places great emphasis on caselaw regarding the definition of “called party” under the TCPA,³¹ while ignoring caselaw to the contrary. Indeed, one federal court noted just a few weeks ago that “[a] number of courts have issued conflicting decisions (none of which are binding on this Court) as to the meaning of the phrase ‘called party,’” and in granting a motion to stay, emphasized that the Commission is the appropriate authority to decide this issue.³²

To prevent impeding legitimate debt collection communications, 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 the debtor provides when receiving goods, services, or credit.

IV. SAFE HARBOR FOR “WRONG NUMBER” NON-TELEMARKETING CALLS.

The Commission should clarify that TCPA liability does not attach to “wrong number” calls, and should establish a safe harbor for “wrong number” non-telemarketing calls in the narrow circumstances 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

³⁰ ACA is agnostic as to whether the Commission believes it is in the public interest to expand the exemption beyond the narrow category of debt collection. ACA’s request is specific to debt collection calls. *See, e.g.*, Wells Fargo Comments at 5.

³¹ Shields Comments at 10.

³² *Matlock v. United Healthcare Services, Inc.*, 2014 U.S. Dist. LEXIS 37612 (E.D. Cal. Mar. 20, 2014).

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.³³

CTIA, the leading representative of the wireless industry, noted in its comments supporting the United petition, “there is no reasonable means for companies that make informational and other non-telemarketing calls to wireless numbers for which they have obtained prior express consent, to know if such numbers are actually assigned to someone other than the consenting party or if they have been reassigned.”³⁴ In another scenario, a customer may mistakenly supplies the wrong number—i.e., “transpose[s] digits or accidentally press[es] the wrong computer button when completing an application, registration form, quote request, consent form or other documentation”—to the caller.³⁵ Under such circumstances, TCPA liability should not attach.

³³ See ACA Comments at 19-22; see also, *Petition for Expedited Declaratory Ruling of United Healthcare Services, Inc. (United)*, CG Docket No. 02-278 (filed Jan. 16, 2014); Comments of ACA International, *Petition for Expedited Declaratory Ruling of United Healthcare Services, Inc. (United)*, CG Docket No. 02-278 (filed Mar. 10, 2014).

³⁴ *Comments of CTIA – The Wireless Association®*, *Petition for Expedited Declaratory Ruling of United Healthcare Services, Inc.*, CG Docket No. 02-278 (filed Mar. 10, 2014), at 4. See also Professional Association for Customer Engagement Comments at 6 (because it is impossible to know whether a number is reassigned, “the Commission should provide similar relief to ensure businesses are not held liable for calls made with the good faith belief that the number is still assigned to the subscriber whom the businesses is permitted to call.”); Portfolio Recovery Associates Comments at 10; Global Connect Comments at 3; Time Warner Cable Inc. Comments at 10 (“Such relief would be analogous to the safe harbor established by the Commission in 2004 exempting calls made to wireless numbers that had recently been ported from wireline service.”); Santander Consumer USA, Inc. Comments at 5 (“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.”).

³⁵ Professional Association for Customer Engagement Comments at 8.

The handful of commenters opposing this proposal attempt to mislead the Commission either by mischaracterizing this straightforward request as “data mining,” or by stating that “debt collectors will not identify who they are” without informing the Commission that the FDCPA *prohibits* debt collectors from communicating, even inadvertently, any information to third parties concerning the existence of a debt without the prior consent of the consumer.³⁶

V. CONCLUSION

ACA respectfully requests that the Commission initiate a rulemaking as appropriate and adopt much-needed clarifications and updates to its TCPA rules, consistent with its Petition, Comments, and Reply Comments herein. Commission action will help to ensure that covered communications are governed by a more clear, fair, and consistent regulatory framework.

Respectfully submitted,



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April 8, 2014

³⁶ Roylance Comments at 2; Biggerstaff Comments at 5-6. *See also*, 15 U.S.C. § 1692c(b).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Comments was served via first class mail, postage pre-paid, on this 8th day of April, 2014 to the parties listed below.

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