

May 9, 2014

Monica S. Desai
Direct Tel: 202-457-7535
Direct Fax: 202-457-6315
mdesai@pattonboggs.com

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **Notice of *Ex Parte* – ACA International (“ACA”), Petition for Rulemaking, CG Docket Nos. CG 02-278, RM-11712**

Dear Ms. Dortch:

On May 7, 2014, Pat Morris, Chief Executive Officer, and Robert Föehl, Vice President and General Counsel, of ACA International (“ACA”); Monica Desai of Patton Boggs LLP, counsel to ACA; along with Leslie Bender, General Counsel and Vice President of ARS National Services and also President of ACA; Kevin Underwood, Vice President of Legal Affairs, AllianceOne Receivables Management, Inc.; Neal Stern, Chief Operating Officer, Portfolio Recovery Associates (“PRA”); and Lance Black, President, Northland Group, held a series of meetings with individuals at the Federal Communications Commission (“FCC”) to discuss the matters raised in ACA’s Petition for Rulemaking requesting clarifications and updates to the rules implementing the Telephone Consumer Protection Act (“TCPA”).¹ Those meetings were held with: (1) Kris Monteith (Acting Bureau Chief), Mark Stone (Deputy Bureau Chief), John B. Adams (Acting Deputy Division Chief, Consumer Policy Division), Aaron Garza (Front Office Legal Advisor), and Kristi Lemoine (Attorney Advisor, Consumer Policy Division), all in the Consumer and Governmental Affairs Bureau; (2) Commissioner Michael O’Rielly and Amy Bender (Legal Advisor to Commissioner O’Rielly); (3) Maria Kirby (Legal Advisor to Chairman Wheeler); (4) Priscilla Argeris (Legal Advisor to Commissioner Rosenworcel) and Valery Galasso (Special Advisor and Confidential Assistant to Commissioner Rosenworcel); (5) Nicholas Degani (Legal Advisor to Commissioner Pai); and Adonis Hoffman (Chief of Staff and Senior Legal Advisor to Commissioner Clyburn).

¹ Petition for Rulemaking of ACA International, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278, RM-11712 (filed Jan.31, 2014) (“Petition”), and related Comments (filed Mar. 24, 2014) (“ACA Comments”) and Reply Comments (filed Apr. 8, 2014) (“ACA Reply Comments”) of ACA; *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.

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In particular, the ACA group discussed the practical operational and other issues being faced by companies that are diligently acting in good faith to comply with the TCPA, but that are still being faced with a constant stream of frivolous lawsuits for purported violations of the TCPA. The group explained why it was so urgent that the Commission move forward with (1) confirming that for a dialing system to qualify as an “automatic telephone dialing system” (ATDS) under the statute, it must meet the definitional elements of the statute; (2) clarifying that “capacity” under the TCPA must mean “present ability;” (3) declaring that prior express consent attaches to the person who incurs a debt, not only to the specific telephone number the debtor provides at the time of consent; and (4) creating a “safe harbor” for non-telemarketing autodialed “wrong number” calls to wireless numbers.

First, the ACA group emphasized the importance of the FCC clarifying the obvious – that the statutory elements of an ATDS must be met in order for a dialing system to be an ATDS under the TCPA. ACA agrees that a predictive dialer *can be* an ATDS under the TCPA, and that a caller cannot circumvent the TCPA by labeling equipment as a “predictive dialer.” However, it is critical that the FCC clarify that just because equipment is labeled as a “predictive dialer” this does not mean that it *must be* an ATDS – and in fact, *cannot* be an ATDS if it does not meet the statutory elements of an ATDS.² Other petitioners and commenters also have requested that the Commission issue such a clarification,³ and at least one court confirms this approach as well.⁴ An explicit clarification on this point from the Commission would not only preserve the legislative intent behind the TCPA, but would also honor the express language of the TCPA – and accordingly would prevent plaintiffs’ attorneys from pursuing frivolous lawsuits claiming that the FCC has defined an ATDS as something other than what is explicitly in the statute.⁵

Ms. Bender spoke both in her role as President of ACA International, and as a senior executive with ARS National Services. She emphasized that clarification on this point is critical. Ms. Bender further emphasized that the unchecked and growing number of TCPA lawsuits on this issue and others has caused significant operational issues for companies that are trying diligently to comply. She explained that due to the high risk exposure to frivolous litigation and related potentially astronomical damages, insurance premiums have increased by over 30%, there is very little choice for insurance (sometimes none at all), and that where insurance is available, the deductibles are extremely high. She also noted that these lawsuits are often filed for the purposes of

² See Petition at 6-9; see also *Ex Parte Notice – ACA International Petition for Rulemaking*, CG Docket No. 02-278, at 2 (filed Mar. 10, 2014) (“March 10 Ex Parte”).

³ See ACA Reply Comments at 4 (citing numerous other comments and petitions on this point).

⁴ *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.”).

⁵ See March 10 Ex Parte at 2.

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trying to obtain a quick settlement. In many such lawsuits, the complaints do not even provide the phone numbers that were allegedly called, forcing defendants to choose between going through an expensive discovery process or settling to avoid defense costs. Mr. Black echoed these points, emphasizing that Northland Group has sustained very high costs in defending frivolous suits that were ultimately dismissed. Ms. Bender and Mr. Black also noted that some private collection agencies cannot combine with others because of the risk of TCPA liability.

Second, ACA advocated that the Commission take the “common sense” approach espoused by Federal Courts in confirming that “capacity” for TCPA purposes means a dialing system’s “present ability.”⁶ Such an approach is consistent with the plain language of the TCPA, prior FCC rulemakings, and the legislative history of the statute.⁷

To illustrate why such confirmation is so important, Mr. Underwood discussed the substantial amount of money AllianceOne has invested in a manual dialing solution. The company specifically invested in a de-engineered system that *does not even have the latent capacity* to work as an ATDS. Still, the company has been sued, and is being threatened with additional lawsuits, under the frivolous theory that the dialing system “could be modified” to *ultimately* have the requisite capacity to be labeled an ATDS under the TCPA, by, for example, *plugging the manual dialing system into an ATDS*. Mr. Underwood emphasized that under that theory, there is literally no way to comply with the statute or the Commission’s rules using any dialing technology or system – and such theories render the statute and rules meaningless.

Mr. Stern put forth another illustration. PRA has been the subject of multiple TCPA lawsuits combined into a multijurisdictional case in the Ninth Circuit. Mr. Stern himself, as a company executive, has been personally sued and as a result, been denied a basic, personal refinance loan due to TCPA risk exposure. As Mr. Stern explained, PRA has absolutely no interest in dialing random or sequential numbers, and the company’s system lacks the capacity to do so. Under the theory of liability advanced by the plaintiffs’ attorneys, every single smartphone would be an ATDS because you could, theoretically, program a phone or update it in some way to become an ATDS. Defending these lawsuits has a significant impact on the company’s bottom line and has constrained PRA’s ability to hire additional employees, and thus, it is critical for the FCC to clarify that under the TCPA, “capacity” must mean “present ability.” Mr. Stern also highlighted that PRA does business in 15 other countries, and only in the United States does the problem of persistent, frivolous litigation on these types of dialing issues occur. To exacerbate matters, because companies are avoiding calling mobile numbers to the extent possible, there are a disproportionate number of calls being made to landline numbers and as such, older consumers, as younger consumers are increasingly abandoning landline telephones.

⁶ *Id.* (citing *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* Petition at 9-12.

⁷ ACA Reply Comments at 5.

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Mr. Black discussed the importance of using modern technologies in connection with contacting individuals regarding obligations they have incurred – particularly in light of the many federal and state laws and rules beyond the TCPA with which debt collectors must comply, including restrictions on call times and frequency of calls, and also to help keep a record of what information the consumer has requested and what information has been provided to the consumer. For further illustration, Mr. Black discussed a typical situation in which a consumer may request a call back on, for example, Tuesday between 6pm and 8pm. With modern technology, it is simple to assure that the consumer will be contacted on the right date and time, but by not using modern technology and dialing manually such a request is much more difficult to accommodate.

Third, ACA reiterated that prior express consent should attach to the consumer, rather than to the telephone number provided by the consumer at the time of consent.⁸ ACA recognizes that the Commission has clarified that “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.”⁹ Notwithstanding this vital clarification, as ACA has previously explained, consumers change their telephone numbers frequently. It is critical – both to the creditor’s business and to the consumer’s credit status – that creditors are able to contact consumers on wireless telephones when prior express consent has been provided by the consumer.¹⁰ This holds true even when, unbeknownst to the debt collector, the consenting consumer has changed telephone numbers. Such a rule change would allow legitimate debt collection communications to proceed as both the consenting consumer and the creditor originally intended.

Fourth and finally, ACA explained that the Commission should also create a safe harbor for non-telemarketing autodialed “wrong number” calls to wireless numbers.¹¹ ACA proposes a very limited exception, applying only to such calls where the “caller previously obtained appropriate consent, in good faith dialed the telephone number provided by the customer, 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.”¹² As ACA noted in its Comments, such a safe harbor is not unprecedented, as the Commission established one for

⁸ Petition at 12-14. See also March 10 Ex Parte at 2.

⁹ ACA Comments at 16-17.

¹⁰ See ACA Comments at 17. This is especially important where, as ACA noted in the March 10 Ex Parte, “over one-third of Americans now live in wireless-only households.” March 10 Ex Parte at 2 (citing 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>).

¹¹ Petition at 15-17; see March 10 Ex Parte. See also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 19215 ¶ 1 (2004).

¹² ACA Comments at 19.

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telephone numbers recently ported from wireline to wireless service.¹³ Ms. Bender emphasized that there is *absolutely no return on investment for calling the wrong person* – it is a waste of time, money, and effort.¹⁴ She also noted the lack of any workable solutions to scrub for transferred numbers. Mr. Stern further emphasized that there is absolutely no way for anyone in the industry to benefit from random or sequential dialing, or from contacting any person other than the intended recipient.

The ACA group noted that it is important to keep in mind that many federal, state, and local government entities use private debt collection companies to collect monies owed that are needed to provide important services to their communities.¹⁵ The group also noted that such communications are important to prevent much more severe consequences related to failure to pay an obligation, including foreclosure, repossession of a car, or a lawsuit. Mr. Stern added that around 25% of identity theft occurrences are discovered through the debt collection process – identity thefts that may otherwise have gone undiscovered. And, the ACA group reminded staff that companies have extended credit to a particular customer for goods or services that the customer has already received. Debt collection professionals work with hospitals, banks, colleges and universities, retail stores, and others to help such companies in receiving their payment for such goods or services rendered. The group emphasized that all communications related to debt collection are heavily regulated under numerous federal, state, and even local laws, and that modern dialing technologies are important tools for ensuring compliance.¹⁶

¹³ *Id.* at 20.

¹⁴ *See* ACA Comments at 2.

¹⁵ *Ex Parte* Notice – ACA International Petition for Rulemaking, CG Docket No. 02-278, at 1 (filed May 5, 2014) (“[T]hese funds are essential to support important community services, like public safety, a clean environment and quality public schools. Failure to collect all funds owed to the City jeopardizes much needed services and increases the financial burden on compliant taxpayers and residents.”) (citing the City of Philadelphia’s recent Request for Information regarding private collection services).

¹⁶ ACA Petition at 2, 5. 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.*; *see also*, ACA Comments at 3, 6-7.

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In conclusion, ACA reiterated the need for the Commission to act on its petition expeditiously to prevent the proliferation of frivolous TCPA lawsuits, and more generally, to provide desperately needed clarity in this area.

Respectfully submitted,



Monica S. Desai
Patton Boggs, LLP
2550 M Street, NW
Washington, DC 20037
202-457-7535
Counsel to ACA International

cc:

FCC Commissioner Michael O'Rielly
Maria Kirby
Adonis Hoffman
Priscilla Argeris
Nicholas Degani
Amy Bender
Valery Galasso
Kris Monteith
Mark Stone
John B. Adams
Aaron Garza
Kristi Lemoine