

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	CG Docket No. 02-278
)	
Petition of Milton H. Fried, Jr. and Richard)	
Evans for Expedited Declaratory Ruling)	
On Autodialer Issue)	
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**COMMENTS OF EXACTTARGET, INC. REGARDING
MILTON H. FRIED, JR. AND RICHARD EVANS'
PETITION FOR EXPEDITED DECLARATORY RULING**

Keith E. Eggleton
keggleton@wsgr.com
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304-1050
Telephone: (650) 493-9300
Facsimile: (650) 493-6811

Tonia Ouellette Klausner
tklausner@wsgr.com
Wilson Sonsini Goodrich & Rosati
1301 Avenue of the Americas
40th Floor
New York, NY 10019-6022
Telephone: (212) 999-5800
Facsimile: (212) 999-5899

Counsel for ExactTarget, Inc.

Dated: August 8, 2014

ExactTarget, Inc. (“ExactTarget”), a global provider of digital marketing and analytics services, respectfully submits these comments in response to the Federal Communications Commission’s Public Notice seeking comment on the Petition of Milton H. Fried, Jr. and Richard Evans for Expedited Declaratory Ruling (“Petition”). The Petition asks the Commission to determine whether the particular equipment used to send text messages that is the subject of a pending federal lawsuit under the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (“TCPA”), qualifies as an “automatic telephone dialing system” (“ATDS”) subject to the TCPA’s prohibitions. However, in doing so, the Petition asserts a definition of what qualifies as an ATDS that has no resemblance to either Congress’ ATDS definition set forth in the statute itself, or the Commission’s ATDS definition set forth in the Code of Federal Regulations. ExactTarget is the defendant in a pending TCPA class action lawsuit that alleges use of an ATDS. *Simms v. Simply Fashion Stores Ltd.*, No. 14-cv-00737 (S.D. Ind. filed Sept. 13, 2013). It therefore has a direct interest in having the Commission clarify the proper definition of an ATDS.

Class action litigation alleging violations of the TCPA have expanded rapidly in recent years due, in part, to attempts by plaintiffs to apply the statute beyond its plain language and related Congressional intent. The TCPA provision asserted in these suits, with certain exceptions, prohibits calls to cellphones made using an “automatic telephone dialing system.” 47 U.S.C. § 227(b)(1)(A). Congress specifically defined “automatic telephone dialing system” in the TCPA as “equipment which has the capacity” both (A) “to store or produce telephone numbers to be called, using a random

or sequential number generator” and (B) “to dial such numbers.” 47 U.S.C. § 227(a); *see also* 47 C.F.R. § 64.1200(f)(2).¹ Given its plain meaning, this definition requires a capacity to generate and dial random or sequential telephone numbers in order to qualify as an ATDS. It was meant to limit the scope of the TCPA by regulating the use of particular types of automatic calling technology that were used by telemarketers to make unsolicited phone calls to unwilling recipients, and that Congress feared would tie up emergency lines and multiple lines of businesses. *See, e.g.*, S. Rep. 102-178, at 2 (“[h]aving an unlisted number does not prevent those telemarketers that call numbers randomly or sequentially”); *id.* (“some automatic dialers will dial numbers in sequence, thereby tying up all the lines of a business and preventing any outgoing calls”).

Contrary to the plain meaning of the TCPA, Congressional intent, and the Commission’s own ATDS definition, class action plaintiffs have cited to language within the Commission’s rulings about predictive dialers, taken it out of context, and argued to courts that an ATDS is any system that can automatically dial telephone numbers from a database. Like Petitioners here, they argue that the Commission changed Congress’ ATDS definition such that “the ability of [the equipment] to produce numbers at random or in sequential order is completely irrelevant under the applicable FCC regulations.” Pet. at 6. Here the Petitions go even farther and submit that

¹ “The terms automatic telephone dialing system and autodialer mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.” 47 C.F.R. § 64.1200(f)(2)

neither a capacity to generate random or sequential telephone numbers, nor a capacity to dial such numbers is required: “[T]he applicable law defines an automatic telephone dialing system as a system comprised of one or more pieces of equipment that together have the capacity to ‘read’ telephone numbers stored in a list (e.g., spreadsheet) or database and to direct messages to those phone numbers without human intervention.” Pet. at 8.

Such an interpretation is inconsistent not only with the plain language of the TCPA, its legislative history, and the Commission’s implementing regulations, but also with the rulings of most courts, which have remained faithful to Congress’ limiting language and correctly concluded that to fall within the definition of an ATDS the equipment must have a capacity to generate random or sequential telephone numbers. *See, e.g., Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009) (an ATDS must have the “capacity” to “store, produce, or call randomly or sequentially generated telephone numbers”); *Dominguez v. Yahoo!, Inc.*, No. 13-1887, 2014 U.S. Dist. LEXIS 36542, at *16-19 & n.6 (E.D. Pa. Mar. 2014) (granting summary judgment to defendant on ATDS issue because system did not have capacity to generate random or sequential numbers); *Gragg v. Orange Cab Co.*, No. C12-0576RSL, 2014 U.S. Dist. LEXIS 16648, at *7-10 (W.D. Wash. Feb. 7, 2014) (same); *Stockwell v. Credit Mgmt.*, No. 30-2012-00596110, slip op. at 2 (Cal. Super. Ct. Oct. 3, 2013) (same).

The few courts to adopt an ATDS interpretation that does not require a capacity to generate random or sequential telephone numbers, as well as Petitioners here, rely on statements by the Commission in TCPA rulings and conclude that the Commission

broadened the TCPA's definition of an ATDS. *See, e.g., Sterk v. Path, Inc.*, No. 13-cv-2330, 2014 U.S. Dist. LEXIS 73507, *10-19 (N.D. Ill. May 30, 2014) (citing *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* ("2003 FCC Order"), 18 FCC Rcd. 14014, 14091-93 (July 3, 2003); *In re Rules & Regulations Implementing the TCPA of 1991* ("2012 FCC Order"), 27 FCC Rcd. 15,391, 15,392 n.5 (Nov. 29, 2012)); *Sherman v. Yahoo! Inc.*, 13-cv-0041, 2014 U.S. Dist. LEXIS 13286, at *15-20 (S.D. Cal. Feb. 3, 2014) (citing *2003 FCC Order* at 14,091-93; *In re Rules & Regulations Implementing the TCPA* ("2008 FCC Order"), 23 FCC Rcd. 559, 566 (2008)); Pet. at 7-8 (citing *2003 FCC Order* at 14,092-93; *2008 FCC Order* at 566). However, a close reading of those rulings reveals that the Commission ruled only that a "predictive dialer" *falls within* the statutory definition of an ATDS; the Commission has never purported to eliminate the number generator requirement or otherwise alter the definition of ATDS. Indeed, because that requirement is part of the statutory text, the Commission has no authority to eliminate it. *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 (1986) ("As we so often admonish, only Congress can rewrite [a] statute."). Although the Commission has amended certain of its TCPA related definitions – providing formal public notice each time – it has never amended its official ATDS definition. And the Commission continues telling consumers that "[a]utodialers can produce, store and dial telephone numbers using a random or sequential number generator." <http://www.fcc.gov/cgb/consumerfacts/tpa.pdf>.

While many courts have properly interpreted the definition of an ATDS as requiring a capacity to generate random or sequential numbers, the fact that some

courts have concluded that the Commission eliminated the need for that capacity to qualify as an ATDS creates uncertainty—uncertainty that fuels TCPA litigations, and causes them to be more prolonged and costly for American businesses. Thus, clarification that the Commission has not altered the TCPA’s definition of an ATDS is needed. The Commission should correct the misinterpretation of its prior rulings and clarify that it has not eliminated Congress’ specific limitations on the definition of “automatic telephone dialing system.”

For these reasons, ExactTarget respectfully requests that the Commission clarify that the TCPA’s ATDS definition only encompasses equipment that has a capacity to generate and dial random or sequential telephone numbers.

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Respectfully submitted,

s/ Tonia Ouellette Klausner

Tonia Ouellette Klausner
tklausner@wsgr.com
WILSON SONSINI GOODRICH & ROSATI
PROFESSIONAL CORPORATION
1301 Avenue of the Americas
40th Floor
New York, NY 10019-6022
Telephone: (212) 999-5800
Facsimile: (212) 999-5899

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