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

PETITION FOR RULEMAKING OF ACA INTERNATIONAL

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Dated: January 31, 2014

EXECUTIVE SUMMARY

Class action litigation related to the Telephone Consumer Protection Act ("TCPA") has spiraled out of control, and the TCPA, a statute meant to shield consumers from harassing telephone calls has, in the last several years, become a sword for harassing lawsuits. Because there are no limits on damages, and very low barriers to filing even the most frivolous of lawsuits, companies are increasingly being forced to choose between settling quickly or betting the future of the company in court, where damages can easily total millions of dollars even when the communication does not undermine any consumer policy, and even when the total cost to the consumer is trivial (or zero).

In filing this Petition, ACA International ("ACA") respectfully requests that the Commission address several significant issues related to its rules promulgated under the TCPA, and in particular modernize and update those rules given that telephone technology has changed dramatically in the over two decades since the TCPA was enacted into law. ACA members contact consumers exclusively for *non-telemarketing* reasons to facilitate the recovery of payment for services rendered, goods that have been received, or loans that have been given, and to explain available options. The use of modern technology is crucial for facilitating compliance with the myriad federal, state and local laws and regulations that govern all aspects of communications between ACA member companies and consumers.

The Commission's adoption of desperately needed updates, clarifications and revisions to its TCPA rules will allow covered communications to be governed by a clear, fair and consistent regulatory framework that protects the interests Congress contemplated in enacting the TCPA without impeding legitimate business operations. Specifically, ACA requests the FCC to: (1) confirm that not all predictive dialers are categorically automatic telephone dialing systems ("ATDS" or "autodialers"); (2) confirm that "capacity" under the TCPA means present ability; (3) clarify that

prior express consent attaches to the person incurring a debt, and not the specific telephone number provided by the debtor at the time a debt was incurred; and (4) establish a safe harbor for autodialed "wrong number" non-telemarketing calls to wireless numbers.

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Pursuant to 47 C.F.R. § 1.401(a), ACA International ("ACA") respectfully requests that the Federal Communication Commission ("Commission") initiate a rulemaking to address significant issues related to the application of the Telephone Consumer Protection Act ("TCPA").[1] Specifically, ACA urges the Commission to: (1) confirm that not all predictive dialers are categorically automatic telephone dialing systems ("ATDS" or "autodialers"); (2) confirm that "capacity" under the TCPA means present ability;[2] (3) clarify that prior express consent attaches to the person incurring a debt,

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[1] 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.*.

[2] The Professional Association for Customer Engagement ("PACE") has filed a pending Petition which requests the Commission to define the term "capacity," as "the current ability to operate or perform an action, when placing a call, without first being modified or technologically altered." *See* Professional Association for Customer Engagement, *Petition for Expedited Declaratory Ruling or, in the Alternative, Petition for Expedited Rulemaking*, CG Docket No. 02-278, at pp. 12-13 (filed October 18, 2013)("PACE Petition"). ACA filed comments and Reply Comments supporting this interpretation. *See* Comments of ACA International to *PACE Petition for Expedited Declaratory Ruling or, in the Alternative, Petition for Expedited Rulemaking*, CG Docket No. 02-278, (filed Dec. 19, 2013) ("ACA Comments to PACE Petition"); Reply Comments of ACA International to PACE Petition for Expedited Declaratory Ruling or, in the Alternative, Petition for Expedited Rulemaking, CG Docket No. 02-278, (filed Jan. 6, 2013) ("ACA Reply Comments to PACE Petition").

and not the specific telephone number provided by the debtor at the time a debt was incurred; and (4) establish a safe harbor for autodialed "wrong number" non-telemarketing calls to wireless numbers.

I. BACKGROUND – ACA INTERNATIONAL

ACA International ("ACA") is an international trade organization of credit and collection companies that provide a wide variety of accounts receivable management services. With offices in Minneapolis, Minnesota and Washington, D.C., ACA represents nearly 5,000 members ranging from collection agencies, attorneys, credit grantors and vendor affiliates.

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]

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[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 example, as part of a credit application. Collection professionals are not telemarketing – their calls

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[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 Jan. 28, 2014) ("Impact of Third Party Debt Collection").

[6] *Id.*

[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).

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 the retailer and doctor down the street, the local university, and even government agencies such as the FCC.[14] ACA members work with these

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[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 Jan. 28, 2014).

[10] *See* Student Debt Swells, Federal Loans New Top a Trillion, July 17, 2013 (available at http://www.consumerfinance.gov/newsroom/student-debt-swells-federal-loans-now-top-a-trillion/) (last visited Jan. 28, 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 Jan. 28, 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.

[14] Debt collection activities are important to the federal government, and a statutory framework governs U.S. debt collection procedures. *See* Debt Collection Improvement Act of 1996 (DCIA),

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.[15] 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.[16] 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 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.

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] Impact of Third Party Debt Collection, at 6

[16] *Id.* at 6.

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.

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."[17] In 2003, the Commission found that predictive dialers fall within the meaning and statutory definition of autodialers: "[w]e 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."[18] In 2008, the FCC reiterated "that a predictive dialer constitutes an [ATDS] and is subject to the TCPA's restrictions on the use of autodialers."[19]

ACA does not disagree with the FCC's rulings on this point. But it is critical that the Commission confirm that simply because a predictive dialer *can be* an ATDS for purposes of the TCPA, this does not mean that a predictive dialer *must be* an ATDS under the TCPA. Pursuant to the statute, to be an ATDS under the TCPA, equipment must have the listed elements. A predictive dialer that does not contain those statutory elements by definition is not an ATDS under the statute.[20]

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[17] 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).

[18] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 FCC Rcd 14014 ¶ 133 (2003) ("2003 TCPA Order").

[19] 2008 Declaratory Ruling, at ¶ 12.

[20] TCPA at § 227(a)(1). Communication Innovators has emphasized this same point with the Commission. *See, e.g.*, Communication Innovators, *Notice of Ex Parte Presentation*, CG Docket No. 02-278 (filed Sept. 13, 2013 and filed Dec. 19, 2013). And, ACA has previously raised this issue with

Yet the Commission's language in the 2003 and 2008 orders 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.[21] As a legal matter, this is wrong.

Other petitioners requesting this same confirmation from the Commission estimate that TCPA class action lawsuits involving autodialers have risen by a "staggering 592% in the last few years alone" and that predictive dialer cases have increased by at least 800%.[22] Recent reports also indicate that TCPA lawsuits continue to skyrocket, with an annualized 70% growth rate in such actions projected for 2013 alone.[23] And, as others have demonstrated, even nuisance lawsuits are expensive.[24]

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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).

[21] *See, e.g., Griffith v. Consumer Portfolio Serv., Inc.,* 838 F. Supp. 2d 723, 727 (N.D. Ill. 2011).

[22] *See* Communication Innovators, *Petition for Declaratory Ruling*, CG Docket No. 02-278, at p. 15 (filed June 7, 2012); 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).

[23] 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 Jan. 28, 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 Jan. 28, 2014).

[24] *See* Reply Comments of A Coalition of Mobile Engagement Providers, to *Petition for Declaratory Ruling* filed by A Coalition of Mobile Engagement Providers, in CG Docket No. 02-278, at 6 (filed Dec. 17, 2014)(citing 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)(stating that, "[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-

To address the growing number of lawsuits on this point, the Commission should 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.[25] 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 the TCPA would address the Commission's concerns that the ATDS restrictions not be avoided by simply feeding numbers into a predictive dialer (as opposed to the dialer generating random or sequential numbers to be called on its own), 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.[26]

Confirming that a predictive dialer must have the statutory elements of an ATDS to be an ATDS under the statute does not run counter to any consumer privacy or public safety interests. Manual calls without the assistance of technology are not practical, and in some cases not even feasible, given the volume of calls made by ACA members, and the numerous federal, state and

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55678, U.S. Court of Appeals, Ninth Circuit, Amicus Brief of Twitter, Inc. and Path, Inc., at 1 (Nov. 21, 2013)).

[25] 2003 TCPA Order, at ¶¶ 131-33.

[26] 2008 Declaratory Ruling, at ¶ 13.

local regulatory obligations they must meet.[27] Moreover, manual processes are more likely to cause errors and create significant inefficiencies, resulting in potential impacts to consumer privacy interests and serious economic harm to companies.

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."[28] Critically, "capacity" is not defined in either the statute or the regulations. As ACA emphasized in its comments supporting the PACE Petition on this point,[29] the Commission must 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. Otherwise, given today's technology, any smart phone, personal computer equipped with a modem or host of other devices with the ability to dial a telephone number could potentially be encompassed under such an expansive interpretation. For reasons similar to those presented in the PACE Petition, a variety of other petitioners support the need to define "capacity" as the "present ability" of a system, including those who develop and support both traditional and highly innovative services that benefit

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[27] *See supra* note 3, at 2.

[28] 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).

[29] *See* 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"); *see also* ACA Comments to PACE Petition, at pp. 3-7. As detailed in its Reply Comments to the PACE Petition, ACA also agrees with PACE and the FCC that if a system requires human intervention, it is not "automatic" and therefore is not an "automatic telephone dialing system" under the TCPA. *See* ACA Reply Comments to PACE Petition at p. 3.

consumers and businesses alike.[30] This diverse community of interests all requesting similar clarification further demonstrates that Commission action on this point is urgently required.

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 Congress chooses not to define a term, its ordinary meaning typically applies.[31] 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.[32] Second, as set forth in detail in the PACE Petition, dictionary definitions support the ordinary meaning of "capacity" as a dialing system's "present ability" or current capabilities.[33] Of particular relevance, the Merriam-Webster Dictionary defines "capacity" as "the facility or power to produce, perform, or deploy."[34] 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.

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[30] *See, e.g.,* 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).

[31] *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)).

[32] 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).

[33] PACE Petition at pp. 10-11.

[34] *Id.*; *see also,* Merriam-Webster Dictionary, available at http://www.merriam-webster.com/dictionary/capacity (last accessed Jan. 28, 2014).

Recently, one federal court grappled with this precise issue and held that "capacity" must mean present 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 cannot be held liable if substantial modification or alteration of the system would be required to achieve that capability.**"[35]

In finding that a particular dialing system was not an ATDS, the court found it to be critical that the dialing system at issue was incapable of automatic dialing "in its present state."[36] The court specifically rejected plaintiff's argument that the equipment had the requisite TCPA capacity simply because it was possible for "certain software" to be installed in the future to make automatic dialing possible. The court 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.[37] Common sense dictates that the *Hunt* court's interpretation is correct, and that "capacity" cannot mean hypothetical future ability. However, despite the helpful outcome of the *Hunt* case, 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.[38]

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[35] *Hunt v. 21st Mortgage Corp.*, 2013 U.S. Dist. LEXIS 132574, at *11 (D. Ala. Sept. 17, 2013) (emphasis added).

[36] *Id.* at *10

[37] *Id.* at *11

[38] *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).

As described herein, ACA members use predictive dialers and other dialing systems to accurately and efficiently contact specific consumers, related to a particular debt, and those systems typically do not have the *present ability* to store or produce and call numbers from a number generator. Further, the use of such systems to contact specific consumers, for debt collection purposes, does not violate the consumer privacy interests or public safety concerns that Congress voiced when it acted to thwart overly aggressive telemarketing practices through the TCPA.[39] And, this reading is also consistent with the Commission's expectation that it may need to consider changes as these technologies evolve.[40]

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 INCURRING A DEBT, AND NOT THE SPECIFIC WIRELESS TELEPHONE NUMBER PROVIDED BY THE DEBTOR AT THE TIME A DEBT WAS INCURRED.

Prior express consent to receive non-telemarketing, debt collection calls should attach to the person who provides a wireless telephone number when obtaining credit for goods or services, and not to the specific wireless telephone number the debtor provides. In its 2008 Declaratory Ruling, the FCC concluded that "the provision of a cell phone number to a creditor, *e.g.*, as part of a credit

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[39] For example, the Commission has agreed that "calls solely for the purpose of debt collection are not telephone solicitations and do not constitute telemarketing." *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 ¶ 11 (2008) ("2008 Declaratory Ruling").

[40] *Id.* at ¶ 13.

application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt."[41] However, consumers sometimes change wireless telephone numbers for the specific purpose of avoiding a debt collection call, or, for example, they may switch carriers without porting their current number. Moreover, 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 wireless-only households (over 60% of adults aged 25-29), making alternative means to live contact increasingly difficult.[42] Crucially, even in such circumstances, the individual has expressly consented to be contacted regarding the debt in consideration for the goods or services received on good faith and credit.

To make this common sense change, the Commission should rule that by providing a wireless telephone number during the transaction or relationship that underlies the debt, or during

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[41] 2008 Declaratory Ruling, ¶ 9.

[42] 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 12/2013, at pp. 1-2, available at http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201312.pdf (last accessed Jan. 28, 2014); *see also*, Steven Shepard, National Journal, *Americans Continue to Drop Their Landline Phones*, Dec. 18, 2013, available at http://www.nationaljournal.com/hotline-on-call/americans-continue-to-drop-their-landline-phones-20131218#undefined (last accessed Jan. 28, 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 Jan. 28, 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 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).

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 by telephone.

The debtor is also already protected from unfair, misleading, and abusive debt collection practices as debt collection communications are regulated under the FDCPA and numerous other federal and state laws. 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.[43] 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.[44] Moreover, a consumer has the ability to opt-out of receiving collections communications from the debt collector altogether.[45]

Thus, as matter of policy, and 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 wireless telephone number that the debtor provides when receiving goods, services, or credit.

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[43] 15 USC 1692c(a)(1).

[44] 15 USC 1692c(a)(3).

[45] *See* 15 USC 1692c(c).

V. THE COMMISSION SHOULD ESTABLISH A SAFE HARBOR FOR "WRONG NUMBER" NON-TELEMARKETING CALLS.

Under current TCPA rules, a debt collector who dials a wrong number – despite taking substantial precautions and engaging in careful due diligence – can face enormous liability. Even more alarming, a debt collector can be held liable for calling a number for which the debt collector had appropriate consent if that consumer no longer maintains the telephone number and the call is received by an unintended recipient – simply because the consumer never updated his or her account with, or otherwise communicated, new telephone number information – or can otherwise be held liable for unknowingly calling a number for which a recipient is charged, even if the debt collector has made good faith efforts to comply with the TCPA. This result is patently unfair – debt collectors cannot be held to the standard of omniscience.[46] To rectify this, the Commission should establish a safe harbor for non-telemarketing calls when the debt collector had previously obtained appropriate consent and had no intent to call any person other than the person who had previously provided consent to be called, or had no reason to otherwise know that the called party would be charged for the incoming call.

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 message calls to wireless numbers when made to numbers that have been recently ported from wireline service to

[46] ACA strongly supports the Petition for Expedited Declaratory Ruling of United Healthcare Services, Inc. (filed Jan. 16, 2014, CG Docket N o. 02-278), requesting clarification that TCPA liability does not apply to informational, non-telemarketing autodialed and prerecorded calls to wireless numbers for which valid prior express consent has been obtained but which, unknown to the calling party, have been subsequently reassigned from one wireless subscriber to another. As stated by United, "It is inconsistent with the letter and purpose of the TCPA to expose to litigation callers that dial numbers for which they have obtained 'prior express consent' to call just because those numbers have been reassigned without the caller's knowledge." United Healthcare Service Petition at 3.

wireless service.[47] Under the 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.[48] According to the Commission, this safe harbor was necessary to ensure that callers would have a reasonable opportunity to comply with rules while at the same time protecting consumer privacy interests.[49] 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 ban on using autodialers or prerecorded messages to call wireless numbers.

In adopting that safe harbor, the Commission explained that because it is impossible for telemarketers to identify immediately those numbers that have been ported from a wireline service to a wireless service provider, telemarketers are unable to strictly comply with the statute. Thus, the wireless number portability safe harbor reflected operational realities to ensure that application of the TCPA would not "demand the impossible" from callers.[50]

Similarly, a limited safe harbor 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

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[47] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 19215 (2004) ("2004 TCPA Order").

[48] *See* 47 C.F.R. § 64.1200(a)(1)(iv).

[49] *See* 2004 TCPA Order, ¶ 1.

[50] *See* 2004 TCPA Order, ¶ 9.

caller, or when the debt collector has no way of knowing that the called party would be charged for the call (such as, for example, a call to a residential number where the called party is using a Voice Over IP ("VOIP") service and the debt collector has no way of knowing that the residential line is a VOIP line through which the customer is charged per call). Without such a limited safe harbor, the TCPA is "demand[ing] the impossible" from callers trying to comply with the statute. Of course, this safe harbor, like the safe harbor found in § 64.1200(a)(1)(iv), should only apply for calls unknowingly placed to a such numbers. Suggested new rule language reflecting this proposed change is underlined below:

§ 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;

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

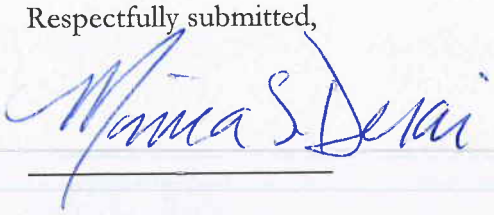
(iv) A person will not be liable for violating the prohibition in paragraph (a)(1)(iii) of this section when the call is placed to a wireless number that has been ported from wireline service and such call is a voice call; not knowingly made to a wireless number; and made within 15 days of the porting 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.

(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

ACA respectfully requests that the Commission initiate a rulemaking to adopt much-needed clarifications to the TCPA to ensure covered communications will be governed by a clear, fair and consistent regulatory framework. Specifically, ACA urges the Commission to: (1) clarify that not all predictive dialers are categorically autodialers; (2) define "capacity" under the TCPA to mean present ability; (3) clarify that prior express consent attaches to the person incurring a debt, and not the specific telephone number provided by the debtor at the time a debt was incurred; and (4) establish a safe harbor for autodialed "wrong number" non-telemarketing calls to wireless numbers. These proposals are critical to remove the confusion and uncertainty that that has facilitated the explosion in frivolous TCPA class action litigation, as well as to ensure that legitimate, non-telemarketing debt collection calls are not unfairly impeded.

Respectfully submitted,



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January 31, 2014