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OF THE  
UNITED STATES OF AMERICA

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December 19, 2013

**VIA ELECTRONIC FILING**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: *In the Matter of Application of Rules and Regulations Implementing the Telephone Consumer Protection Act: Professional Association for Customer Engagement (PACE) Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking, CG Docket No. 02-278***

Dear Ms. Dortch:

The U.S. Chamber of Commerce (“Chamber”)<sup>1</sup> respectfully submits these comments to the Federal Communications Commission (“Commission”) in response to its Public Notice<sup>2</sup> requesting comment on the Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking filed by the Professional Association for Customer Engagement (“PACE Petition”) in the above-referenced docket.

The Chamber supports PACE’s request for a Declaratory Ruling to clarify that for purposes of the Telephone Consumer Protection Act (“TCPA”):<sup>3</sup> (1) a system is not an automatic telephone dialing system (“ATDS”) unless it has the capacity to, *inter alia*, dial numbers without human intervention; and (2) a system’s “capacity” is limited to what it is capable of doing, without further modification, at the time the call is placed.<sup>4</sup> If the Commission determines that a Declaratory Ruling is not appropriate, then the Chamber also supports PACE’s request for a Rulemaking to: (1) define the term “capacity,” as used in the TCPA and the Commission’s rules, as “the current ability to operate or perform an action, when placing a call, without first being modified or technologically altered;” and (2) modify the definition of “automatic telephone

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<sup>1</sup> The U.S. Chamber of Commerce is the world’s largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region, dedicated to promoting, protecting, and defending America’s free enterprise system.

<sup>2</sup> Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking from the Professional Association for Customer Engagement*, CG Docket No. 02-278, DA 13-2220 (rel. Nov. 19, 2013).

<sup>3</sup> 47 U.S.C. § 227.

<sup>4</sup> *Id.*

dialing system” in 47 CFR 64.1200(f)(2) by adding the phrase “without human intervention” to the end of the definition.<sup>5</sup>

## **I. The Chamber Agrees with PACE that Businesses Desperately Need Clarification from the Commission Regarding What Type of Equipment Does Not Constitute an ATDS**

Instead of going after abusive marketers as originally intended by Congress, the TCPA has been turned into a “juggernaut: a destructive force that threatens companies with annihilation for technical violations that cause no actual injury or harm to any consumer.”<sup>6</sup> A company facing a TCPA lawsuit is forced to decide whether to reach a settlement with the plaintiff’s counsel or to accept the risk and spend significant resources defending itself against an action where the alleged statutory damages may be in the millions or billions of dollars.<sup>7</sup>

### **A. The TCPA’s Restrictions on ATDS are Only Applicable to Calls Made to Cell Phones**

When Congress enacted the TCPA in 1991, wireless phones were a luxury item and the landline was the dominant consumer telecommunications device. Thus, certain restrictions in the TCPA are only applicable to calls made to cell phones. Specifically, the TCPA prohibits the use of an ATDS to call or send texts to mobile phones without the consent of the recipient. Under the TCPA, an 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.”<sup>8</sup> If this prohibition is violated, the TCPA permits a private right of action and allows statutory damages of \$500 per call or text, which can be trebled if the violation is willful.<sup>9</sup>

### **B. Wireless Usage is Vastly Different Than When the TCPA Was Enacted**

However, as the Commission itself has acknowledged, “wireless use has expanded tremendously since passage of the TCPA in 1991.”<sup>10</sup> The number of “wireless-only” households increased to 39.4% during the first half of 2013 from 38.2% during the second half of 2012.<sup>11</sup> An additional 15.7% of U.S. households were “wireless-mostly” (i.e., the household has a

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<sup>5</sup> *Id.*

<sup>6</sup> Becca J. Wahlquist, *The Juggernaut of TCPA Litigation* (prepared for the U.S. Chamber Institute for Legal Reform) at 1, (Oct. 2013), available at [http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit\\_WEB.PDF](http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF).

<sup>7</sup> *Id.*

<sup>8</sup> 47 U.S.C. § 227(a)(1).

<sup>9</sup> *Id.* at (b)(3).

<sup>10</sup> *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (“2012 TCPA Order”), 55 Communications Reg. (P&F) 356, ¶ 29 (2012).

<sup>11</sup> Stephen J. Blumberg & Julian V. Luke, Div. of Health Interview Statistics, Nat’l Ctr. for Health Statistics, Centers for Disease Control and Prevention, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2013*, at 1 (Dec. 2013), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201312.pdf>.

landline but receives all or most calls on a wireless phone).<sup>12</sup> No matter where they are at the moment, consumers want to be connected. Thus, smartphones in the United States are now used by 64% of all mobile phone owners and account for 80% of recently purchased mobile phones.<sup>13</sup> Consumers use their smartphones to communicate in the manner (e.g., voice calls, text messaging, e-mail, video chat, social media, gaming, etc.) that best meets their needs at the time.

### C. Regulatory Uncertainty Concerning the Definition of ATDS Has Resulted in a Tsunami of TCPA Litigation

As wireless devices have become dominant, clarification by the Commission of what type of equipment does not constitute an ATDS—a discussion that would have been unnecessary in 1991, is now needed to bring regulatory certainty to the business community and to stem the tsunami of class action TCPA lawsuits driven not by aggrieved consumers, but by opportunist plaintiffs’ firms taking advantage of this uncertainty in the law to rake in attorney fees. As another petitioner in this docket elegantly stated, “Without some guidance, the evolution of the definition of the term ATDS is limited only by class counsel’s imagination, or worse yet, will come to encompass every type of telephonic device in existence, thereby preventing anyone from calling a cellular phone number without express consent or except in an emergency.”<sup>14</sup>

TCPA lawsuits against businesses are skyrocketing. There have been 1,332 TCPA lawsuits in the first nine months of 2013 compared to 824 for all of 2011, an increase of 62%.<sup>15</sup> Unfortunately, the growth in TCPA lawsuits shows no indication of slowing down. There were 162 TCPA lawsuits filed in September 2013 compared to 75 in September 2012, an increase of 116%.<sup>16</sup>

These suits create a number of problems. First, businesses face the significant cost of defending against these suits, which are often not resolved until summary judgment after months of expensive discovery. Second, as courts and practitioners have noted, the combination of statutory damages (as in the TCPA) and the class-action device amounts to a “perfect storm.”<sup>17</sup> That “perfect storm” allows for damages demands so high as to force defendants to “stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to

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<sup>12</sup> *Id.*

<sup>13</sup> *Smartphone Switch: Three-Fourths of Recent Acquirers Chose Smartphones*, The Nielsen Company (Sept. 17, 2013), available at <http://www.nielsen.com/us/en/newswire/2013/smartphone-switch--three-fourths-of-recent-acquirers-chose-smart.html>.

<sup>14</sup> YouMail, Inc., *Petition for Expedited Declaratory Ruling That YouMail's Service Does Not Violate the TCPA*, CG Docket No. 02-278, at 11 (filed Apr. 19, 2013), available at <http://apps.fcc.gov/ecfs/document/view?id=7022288462>.

<sup>15</sup> Ben Goad, “Lawsuits surge against robo-callers,” *The Hill*, Nov. 3, 2013, available at <http://thehill.com/blogs/regwatch/pending-reg/189039-new-robo-call-regs-expected-to-cause-flood-of-lawsuits>; and Patrick Lunsford, *TCPA Lawsuits Really Are Growing Compared to FDCPA Claims*, Oct. 22, 2013, available at <http://www.insidearm.com/daily/debt-buying-topics/debt-buying/tcpa-lawsuits-really-are-growing-compared-to-fdcpa-claims/>.

<sup>16</sup> Lunsford, *TCPA Lawsuits Really Are Growing Compared to FDCPA Claims*.

<sup>17</sup> *Sitllmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring).

settle even though they have no legal liability.”<sup>18</sup> The fear of such “annihilating damages” can deter companies from engaging with consumers. Moreover, “[t]he mere threat of a ‘potentially enormous aggregate recovery for plaintiffs’ raises concerns about ‘an *in terrorem* effect on defendants, which may induce unfair settlements.’”<sup>19</sup>

## **II. The Chamber Agrees with PACE that the Commission Should Clarify that a System is not an ATDS Unless it has the Capacity to, *Inter Alia*, Dial Numbers Without Human Intervention**

A recent decision by the Western District of Wisconsin in *Nelson v. Santander Consumer USA, Inc.* held that a dialer used to make calls in “preview mode” was an ATDS because the dialer also had the capacity to dial in predictive mode.<sup>20</sup> Though the decision was ultimately vacated by a joint motion and stipulation by the parties, the case has generated enormous concern within the business community about whether “one-click” preview dialing<sup>21</sup> could constitute a *per se* violation of the TCPA and has caused speculation about whether even manually-dialed calls could eventually be deemed violations if made using a device as simple as a cell phone.

Therefore, the Chamber agrees with PACE that the Commission should clarify that a system is not an ATDS unless it has the capacity to, *inter alia*, dial numbers without human intervention.<sup>22</sup> The Chamber also agrees with PACE that human intervention is the key factor and it should not matter whether calls are commenced by entering all of the digits of the phone number or by using the “one-click” process because in both of these situations there is human intervention that is required before a number is dialed.<sup>23</sup>

If viewed otherwise, “after being prompted by a human” effectively becomes part of the “dial such number” prong of the ATDS definition. Under this interpretation, cell phones would be considered an ATDS because they have the capacity to both store numbers and dial them at the user’s request. The real world consequence of this disastrous interpretation would mean that individuals could not call or text the mobile phones of anyone on their contact list without the recipient’s prior consent. For example, this type of interpretation of the TCPA would force compliance onto small business owners seeking to follow up with their customers, business colleagues seeking to communicate with each other, and many other callers not intended to be regulated by the TCPA. Such a result would be nonsensical and contrary to both Congressional intent and public policy as well as inconsistent with a prior Commission holding that the restrictions of the TCPA “clearly do not apply to functions like ‘speed dialing’ [or] ‘call

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<sup>18</sup> *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

<sup>19</sup> John Nadolenco, Archis A. Parasharmi & Joseph P. Minta, *Too High A Price? The Perilous Combination Of Statutory Damages And Class Certification*, 18 No. 1 Westlaw Journal Class Action 1, 3 (2011) (quoting *Parker v. Time Warner Entm’t Co.*, 331 F.3d 13, 22 (2d Cir. 2003)).

<sup>20</sup> *Nelson v. Santander Consumer USA, Inc.*, 2013 U.S. Dist. LEXIS 40799 (W.D. Wis. Mar. 8, 2013).

<sup>21</sup> “In preview dialing, an employee chooses a telephone number by clicking on a computer screen and the system calls it. Defendant’s employees never called plaintiff by pressing numbers on a keypad.” *Id.* at 8.

<sup>22</sup> Professional Association for Customer Engagement (PACE), Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking, CG Docket No. 02-278 (filed Oct. 18, 2013) at 7-10. (“PACE Petition”).

<sup>23</sup> *Id.* at 9-10.

forwarding' ...because the numbers called are not generated in a random or sequential fashion.”<sup>24</sup>

**III. The Chamber Agrees With PACE that the Commission Should Clarify that a System's “Capacity” is Limited to What it is Capable of Doing, Without Further Modification, at the Time the Call is Placed**

Consistent with the Chamber's previous filings in this docket,<sup>25</sup> the Chamber strongly supports PACE's request that the Commission clarify that “capacity” must be limited to what the system or equipment is capable of doing at the time the call is placed rather than based on a theoretical capacity if modified or altered.<sup>26</sup> Businesses wish to use ATDS that access their own databases of contacts to inform consumers about products, services, and accounts; these phone numbers are not randomly or sequentially stored or produced. However, conceivably any telephone equipment could be modified to dial randomly or sequentially stored or produced numbers. Therefore, logically, capacity should be limited to what the equipment is capable of doing, without further modification, at the time the call is placed; otherwise, the TCPA would be applicable to a much broader array of equipment, including cell phones, than Congress intended.

The Chamber also notes that a recent decision by the U.S. District Court for the Northern District of Alabama in *Hunt v. 21st Mortg. Corp.* expressed the same concern about a broad definition of “capacity,” stating that “it is virtually certain that software could be written, without much trouble, that would allow iPhones ‘to store or produce telephone numbers to be called, using a random or sequential number generator, and to call them.’ Are the roughly 20 million American iPhone users subject to the mandates of...the TCPA?”<sup>27</sup> Therefore, the Court held that to “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.”<sup>28</sup>

**IV. If the Commission Determines that the Relief Sought is Beyond the Agency's Ability to Grant in a Declaratory Ruling, then the Chamber Supports the Commencement of an Expedited Rulemaking to Address These Issues**

If the Commission determines that a Declaratory Ruling is not a workable means of granting the relief sought, then, in the alternative, the Chamber supports PACE's request for an Expedited Rulemaking to: (1) define the term “capacity,” as used in the TCPA and the Commission's rules, as “the current ability to operate or perform an action, when placing a call,

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<sup>24</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8775 ¶ 47 (“1992 TCPA Order”).

<sup>25</sup> See U.S. Chamber Comments on Communication Innovators' Petition for Declaratory Ruling (filed Nov. 15, 2012), available at <http://apps.fcc.gov/ecfs/document/view?id=7022056396>, and U.S. Chamber Comments on GroupMe's Petition for Declaratory Ruling (filed Aug. 30, 2012), available at <http://apps.fcc.gov/ecfs/document/view?id=7022008729>.

<sup>26</sup> PACE Petition at 10-12.

<sup>27</sup> *Hunt v. 21st Mortg. Corp.*, 2013 U.S. Dist. LEXIS 132574 at 11 (N.D. Ala. Sept. 17, 2013).

<sup>28</sup> *Id.*

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without first being modified or technologically altered;" and (2) modify the definition of "automatic telephone dialing system" in 47 CFR 64.1200(f)(2) by adding the phrase "without human intervention" to the end of the definition.<sup>29</sup>

## V. Conclusion

The Chamber supports Commission action that clarifies that: (1) a system is not an ATDS unless it has the capacity to, *inter alia*, dial numbers without human intervention; and (2) a system's "capacity" is limited to what it is capable of doing, without further modification, at the time the call is placed. In the alternative, the Chamber would also support an Expedited Rulemaking to achieve a similar result. By granting the PACE Petition, the Commission can help curtail abusive lawsuits and provide American businesses with desperately needed certainty.

Sincerely,



William L. Kovacs

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<sup>29</sup> PACE Petition at 12-13.