

Response to Written Question Submitted by Chairman John Thune to Scott Delacourt

*Question.* During the hearing, Ms. Saunders testified that “one big issue is that if auto dialer is not sufficiently defined broadly, it won’t cover texts. There is no independent language in the TCPA that’ll cover texts unless the auto dialer definition is covered.” Do you agree with Ms. Saunder’s assessment? Please explain.

Response. No, I do not agree the above assessment, as it is incorrect and shows a fundamental misunderstanding of the Telephone Consumer Protection Act (“TCPA”) and its implementation. Additionally, Ms. Saunders’s assessment does not account for the robust protections that consumers have to prevent unwanted text messages, nor does the assessment consider the common and best practices of legitimate U.S. companies seeking to build positive relationships with consumers.

First, the statement that “[t]here is no independent language in the TCPA that’ll cover texts unless the auto dialer definition is covered” is simply incorrect. The independent language in the statute that allows the TCPA to cover text messages is “any call.”<sup>1</sup> Specifically, the statute prohibits any person from “mak[ing] any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice” to certain telephone lines and numbers, including wireless numbers.<sup>2</sup> “Call” is not defined in the statute, and has therefore been interpreted by both the Federal Communications Commission (“FCC”) and various courts. It is now well-settled law that the term “any call” encompasses text messages. In 2003, the FCC affirmed that “*any call* . . . encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls.”<sup>3</sup> Courts agree that texts are calls for TCPA purposes, and have held that the FCC’s interpretation of the word “call” is entitled to *Chevron* deference.<sup>4</sup> In sum, text messages are covered under the TCPA based on the statute’s “any call” language, not its “ATDS” language.

Second, there is no direct relationship between the definition of “automatic telephone dialing system” or “ATDS” and the TCPA’s application to text messages. The ATDS definition is key to determining whether the TCPA’s consent restrictions apply to calls to wireless numbers, among other things. It has nothing to do with whether text messages—as a broad category of calls—are covered under the TCPA. As described above, that issue rests on the definition of

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<sup>1</sup> 47 U.S.C. §227(b)(1)(A); *see also* 47 C.F.R. §64.1200(a)(1) (prohibiting “any telephone call” initiated using an ATDS or an artificial or prerecorded voice without consent or an emergency purpose).

<sup>2</sup> *See* 47 U.S.C. §227(b)(1)(A).

<sup>3</sup> *In the Matter of Rule and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd. 14014 (¶ 165) (July 3, 2003) (“2003 TCPA Order”); *see also In the Matter of Rule and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd. 1830 (¶ 4) (Feb. 15, 2012) (“2012 TCPA Order”) (“The Commission has concluded that the prohibition encompasses both voice and text calls, including short message service (SMS) calls, if the prerecorded call is made to a telephone number assigned to such service.”).

<sup>4</sup> *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009).

another term in the statute: “any call.” If the Commission narrows the definition of ATDS in line with the plain meaning of the statute, text messages will still be covered.

Third, in addition to being incorrect and reflecting a misunderstanding of the implementation of the TCPA, Ms. Saunders’s statement ignores a key and robust protection that consumers have against unwanted telemarketing text messages—the Do Not Call rules. The TCPA gives consumers the ability to register numbers on the National Do Not Call Registry to prevent unwanted telemarketing calls. This protection extends to wireless telephone numbers as well as wireline numbers.<sup>5</sup> In addition, consumers may take advantage of the TCPA’s company-specific do-not-call lists to prevent unwanted telemarketing messages.<sup>6</sup> The Do Not Call rules are not triggered by whether a caller uses an ATDS—even manual telemarketing calls must comply with Do Not Call.<sup>7</sup> Accordingly, narrowing the definition of ATDS in line with the plain language of the statute would not affect a consumer’s ability to prevent unwanted telemarketing texts using the Do Not Call rules.

Fourth, consumers are also protected against unwanted text messages by the common and best practices of legitimate U.S. companies. Independent of the TCPA framework, it is a best practice to include an option for consumers to opt-out of text messages and to honor such opt-outs. Not only is this good business—as I testified, U.S. businesses have no interest in engaging in abusive practices and fear the brand and customer relationship damage of being cast as an illegal and abusive robocaller—but it is also enforced by industry itself. For example, CTIA – The Wireless Association administers the Short Code Registry program, a common way of sending marketing text messages. As part of the program, CTIA publishes the Short Code Monitoring Handbook, which describes best practices for short code programs and “requires all short code programs to comply with a basic code of conduct that promotes the best possible user experience.”<sup>8</sup> One key best practice is that, “[f]unctioning opt-out mechanisms are crucial for all short code programs to comply with the CTIA Short Code Compliance Handbook. Programs must always acknowledge and respect customers’ requests to opt out of short code programs. Short code programs must respond to, at a minimum, the universal keywords STOP, END, CANCEL, UNSUBSCRIBE, and QUIT by sending an opt-out message and, if the user is subscribed, by opting the user out of the program.”<sup>9</sup> CTIA audits against this and other best practices, and failure to comply with the Handbook may result in suspension from the short code registry.<sup>10</sup> Accordingly, even if a non-marketing text message is not covered under the TCPA because it is not made using an ATDS, industry common and best practices still value and protect consumer choice.

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<sup>5</sup> 2003 TCPA Order at ¶ 33 (“We conclude that the national database should allow for the registration of wireless telephone numbers, and that such action will better further the objectives of the TCPA and the Do-Not-Call Act.”).

<sup>6</sup> See 47 C.F.R. § 64.1200(e).

<sup>7</sup> See *id.* § 64.1200(c) (restricting “any telephone solicitation[s]”); *id.* § 64.1200(d) (restricting “any call[s] for telemarketing purposes”).

<sup>8</sup> Short Code Monitoring Handbook, CTIA Short Code Monitoring Program, Version 1.7, at 3 (March 27, 2017).

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.* at 14-16.