



March 24, 2014

Commission's Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: Petition for Rulemaking of ACA International (CG Docket No. 02-278)

To whom it may concern:

The American Financial Services Association (“AFSA”) generally supports the Petition for Rulemaking (“Petition”) filed by ACA International (“ACA”).¹ The Petition asks the Federal Communications Commission (“Commission”) to: (1) confirm that not all predictive dialers are categorically automatic telephone dialing systems (“ATDS” or “autodialers”); (2) confirm that “capacity” under the Telephone Consumer Protection Act (“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.

AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its more than 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers.

AFSA members contact their customers to convey important, time-sensitive information. AFSA members contact their customers for a variety of reasons – to tell the customer that there is a fraud alert on an account, that a payment is due, that a work-out plan is available, that a lease is almost up, or with some other account servicing message. The most expedient and effective way to reach these customers is to call or text them on their cell phones, especially if they travel or work out of town and may not receive mail for a period of time. If it is not the only way to reach the customer, it is likely the way that the customer prefers to be contacted.

The Commission should act quickly to resolve the uncertainty surrounding a variety of TCPA issues. Penalties of up to \$1500 per violation of the TCPA have provided plaintiff’s attorneys with fodder for lawsuits that enrich the attorneys rather than compensate their clients. In several TCPA class actions, companies settled for millions of dollars. Each class action member only received a few dollars, while the attorneys walked away with millions.² Instead of receiving compensation from class action litigation, consumers will experience rising costs as businesses

¹ See *ACA International*. Petition for Rulemaking, CG Docket No. 02-278 (filed Jan. 31, 2014).

² Hoffman, Erin, Eileen Hunter, and Aaron Van Oort. “Recent Developments in TCPA Litigation.” *Faegre Baker Daniels*. April 5, 2013. http://www.minncle.org/attendeemats/30313/10_VAN%20OORT.pdf

struggle to make up the massive legal fees incurred during TCPA litigation. Even when companies prevail, the cost of defending a TCPA class action most often exceeds \$100,000, which may be devastating for small and mid-size companies.

I. Not all predictive dialers are ATDS.

The Commission should confirm that predictive dialers are not necessarily ATDS. The TCPA specifically requires that autodialers have 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.”

The legislative history confirms that the TCPA’s autodialer provision was enacted to curtail unwanted *telemarketing calls* – not to curtail important informational calls to existing customers. Congress enacted the TCPA to protect consumers’ privacy interests, not to create unnecessary barriers to account-servicing calls where those privacy interests are not implicated. The Commission confirmed that the TCPA should not “impede” or “unnecessarily restrict” purely informational calls in its recent Robocall Report and Order.³ Calls made to existing customers, for the commercial purpose of servicing a customer’s account that do not include or introduce an unsolicited advertisement or constitute a telephone solicitation, do not adversely affect the privacy rights that the TCPA is intended to protect.

Placing additional and unnecessary communication barriers between financial institutions and their customers at a time when more frequent and open communication is needed to solve and/or mitigate problems, such as repossessions, foreclosures, and potential fraudulent account activity, is counterproductive and could negatively impact not only the customer, but the economy as a whole.

The Commission’s prior TCPA decisions discussing predictive dialers and ATDS have caused significant confusion and an array of unintended consequences that limit innovation. We believe that today’s innovative predictive dialing technology provides significant benefits to customers and businesses. Using a predictive dialer not only saves time, but substantially reduces the likelihood of human error, which can lead to inadvertent privacy violations and inconvenience to non-customers who are manually dialed by accident. The penalties for TCPA violations are considerable, and there has been a surge in purely opportunistic, financially-motivated TCPA claims and class action litigation in recent years.

AFSA emphasizes that clearly and expressly allowing predictive dialers to be used to place non-telemarketing calls without being considered “autodialers” would not lead to an increase in calls to customers. AFSA members and other businesses already can contact customers on their wireless numbers using manual dialing and AFSA’s members have no incentive to place unnecessary calls. (However, we note that companies now face TCPA litigation even when they manually dial numbers using telephones that plaintiffs are asserting have the “capacity to store or produce telephone numbers” and are therefore ATDS.) Thus, it is only how some calls are made

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, FCC 12-21 ¶ 21 (rel. Feb. 15, 2012)

that would change, not whether or how often the calls are made. The ability to use a predictive dialer instead of manually dialing wireless numbers has become more and more crucial as technology continues to advance. Today there are millions of wireless subscribers, and more importantly, almost one-third of all households are wireless-only.⁴ The number of wireless-only households continues to increase.

The Commission should act quickly to remove the unnecessary confusion over predictive dialers. The Commission should issue a declaratory ruling confirming that not all predictive dialers are autodialers. If the Commission issues a declaratory ruling, no rulemaking would be needed to resolve this issue.

II. “Capacity” under the TCPA means present ability.

We urge the Commission to confirm that only equipment that has the current capacity to store and produce telephone numbers to be called using a random or sequential number generator – and is currently being used for that purpose – should be considered an autodialer. Because Congress did not define “capacity,” the Commission should adopt the ordinary meaning of the word, which is “present ability.” Congress’s choice of the present tense “has the capacity,” instead of the future tense, “will have the capacity,” is informative. Under the TCPA, equipment and technologies only qualify as autodialers if, at the time of use, they can (and do) store or produce, and dial, random or sequential numbers without first being technologically altered.

AFSA members use phone systems that may or may not have the current ability, to generate, store and dial random or sequential numbers. AFSA members, however, do not avail themselves of either that ability. The systems are used solely by AFSA members to contact their existing customers with important information such as account information, fraud alerts, or identity theft notifications, thus actually enhancing the customer’s privacy. These systems are not used by AFSA members to harass random consumers with telemarketing solicitations at all hours of the day or night.

In today’s world, it is almost impossible to use telephone systems that do not have, either as originally configured or as could be modified, the capacity to generate, store and dial random or sequential numbers. As a previous petition filed with the Commission explains, “Much like any ordinary computer could (with a complete overhaul) be transformed into a device to launch nuclear missiles, any desktop computer or smart phone could be modified to store telephone numbers to be called by a sequential number generator and dial those numbers.”⁵

As with the first issue above, a rulemaking may not be necessary to resolve this issue. Granting one of the pending petitions for declaratory ruling that raise this issue would be faster and would still provide the “clarification” or “confirmation” that ACA requests.

⁴ CDC Study: Wireless Substitution: Early Release of Estimates From The National Health Interview Survey, July-December 2010, available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201106.htm>

⁵ YouMail, Inc., Petition for Declaratory Ruling, CG Docket No. 02-278 (filed April 19, 2013).

III. Parties should not be liable for autodialed “wrong number” non-telemarketing calls to wireless numbers.

The Commission could satisfy this part of the ACA’s petition by granting the United Healthcare Services Petition⁶ (“UHS Petition”) and confirm that parties are not liable under the TCPA for informational, non-telemarketing autodialed and prerecorded calls to wireless telephone numbers that have been reassigned without the caller’s knowledge – as long as the caller previously obtained “prior express consent” to place calls to that specific telephone number.

AFSA members obtain the required “prior express consent” from their customers before placing calls to wireless telephone numbers using an ATDS or an artificial or prerecorded voice, as specified by the TCPA and the Commission’s TCPA rules.

However, sometimes wireless telephone numbers for which AFSA members have obtained “prior express consent” are reassigned from one subscriber to another. Thus, AFSA members may call a phone number for which they had obtained “prior express consent” to call, but reach a person who was reassigned that number and who had not given the consent. AFSA members cannot completely avoid calling reassigned wireless telephone numbers because there is no public wireless telephone number directory, and individuals may change their phone numbers without notifying callers beforehand.

Companies are now facing expensive class action lawsuits on the grounds that they did not have “prior express consent” to call the reassigned number. As the UHS Petition states, “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.”⁷ Moreover, imposing liability for calls to reassigned numbers could reduce the delivery of important, non-telemarketing, informational calls, such as fraud alerts, to wireless customers, to individuals that have expressly consented to receiving those calls.

AFSA strongly urges the Commission to issue a declaratory ruling confirming that parties are not liable under the TCPA for informational, non-telemarketing calls to telephone numbers that have been reassigned without the caller’s knowledge, as long as the caller previously obtained valid “prior express consent” to place calls to that telephone number.

AFSA also submits that the easiest and most logical way to afford industry the intended protection of the express consent exemption is for the Commission to clarify that the vague term “called party” as used in Section 227(b)(1)(A) and (B) refers to the party the caller was intending to reach rather than the actual recipient or subscriber of the number dialed.⁸ That is “called party” means “intended recipient.” Interpreting “called party” in this manner is consistent with the language of the statute and its purpose. It is also consistent with the application of the former

⁶ See *United Healthcare Services, Inc.* Petition for Expedited Declaratory Ruling, CG Docketed No. 02-278 (filed Jan. 16, 2014).

⁷ *Petition at 3.*

⁸ If the Commission declines to adopt this approach, it could adopt one of the other approaches identified in the UHS Petition.

Established Business Relationship exemption. See e.g. *Meadows v. Franklin Collection Serv., Inc.*, 414 Fed.Appx. 230, 235 (11th Cir. 2011)(“Because Franklin had an existing business relationship with the intended recipient of its prerecorded calls ... we conclude that those calls are exempt from the TCPA’s prohibitions of pre-recorded calls to residences.”)

Importantly, interpreting “called party” in this manner will not dilute the privacy protections that the TCPA assures. Although identity of the “called party” is to be determined from the caller’s frame of reference at the time the call is made, the caller still must actually have its customer’s consent to place the call in order to avoid liability.

Here is how AFSA envisions the matter working in practice:

Customer X provides his number to Creditor and then Bystander inherits the number. Creditor intends to call Customer X but reaches Bystander. Bystander says “do not call me anymore; this is not Customer X’s phone number.” Under AFSA’s interpretation of the TCPA, Creditor has not violated the TCPA so long as it never calls Bystander again: the first call is inactionable because it had the “express consent” of the “called party” – Customer X.

Interpreting the statute in this way provides the balance the TCPA was designed to strike. On the one hand careful dialers are protected from liability for matters completely out of their control. On the other hand individuals that receive multiple calls from a careless dialer has a right of recovery.⁹

IV. Comment deadlines should be extended.

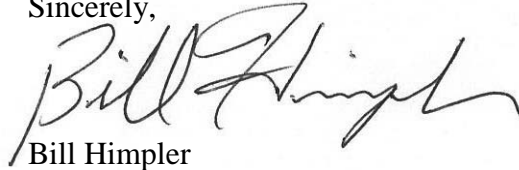
AFSA respectfully asks the Commission to give commenters longer time periods to submit comments on petitions. The Commission currently gives commenters 30 days to respond to petitions. AFSA works hard to provide detailed, well-thought out comments, but it is difficult to do so in such a short time. Member companies need time to review a petition, analyze the petition and gather the data that is necessary for a well-thought-out comment. Time is needed for conference calls between member companies and the association. Time is also needed for multiple drafts of comments to be circulated, reviewed, revised, and approved. It is only with an adequate period of time that AFSA can offer a well-thought-out comment that can assist the Commission.

* * *

⁹ Note that AFSA’s interpretation does not alter the TCPA liability for calls placed without consent. If a creditor does not actually have the consent of the party it is attempting to reach it is liable – even if it thought, in good faith, that consent existed. That is, AFSA’s interpretation merely makes the identity of the “called party” subject to the dialer’s frame of reference but it does not alter the objective nature of the consent inquiry as to that person. Similarly, AFSA’s interpretation does not tinker with the willfulness provision of the TCPA. A dialer may willfully violate the statute by, for instance, attempting to dial Customer X knowing that it lacked Customer X’s consent. Should it inadvertently reach Bystander, creditor will not have the express consent defense available – it never had Customer X’s consent to begin with.

We look forward to working with the Commission on this Petition. Please contact me by phone, 202-466-8616, or e-mail, bhimpler@afsamail.org, with any questions.

Sincerely,

A handwritten signature in black ink that reads "Bill Himpler". The signature is written in a cursive style with a large, prominent "B" and "H".

Bill Himpler
Executive Vice President
American Financial Services Association