



January 3, 2014

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

***Re: Petition for Declaratory Ruling filed by Glide Talk, Ltd.
(CG Docket No. 02-278)***

To whom it may concern:

The American Financial Services Association (“AFSA”) welcomes the opportunity to comment on the Petition for Declaratory Ruling (“Petition”) filed by Glide Talk, Ltd. (“Glide Talk”) requesting that the Federal Communications Commission (“FCC”) clarify certain aspects of the Telephone Consumer Protection Act (“TCPA”)

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’s comment focuses on Glide Talk’s request that the FCC clarify that “the TCPA’s automatic telephone dialing system restriction applies only to equipment that can, at the time of the call, be used to store or generate sequential or randomized telephone numbers.”¹ AFSA strongly supports the Petition. The FCC should eliminate the widespread confusion regarding the definition of an automatic telephone dialing system (“ATDS”) that has led to costly frivolous class action lawsuits without benefit to consumers and a limitation on technological innovation. The requested clarification concerning the definition of an ATDS will not cause an increase in calls to consumers because it will only address the ambiguity surrounding how to evaluate the capacity of an ATDS, not how often or when calls can be made.

I. FCC should eliminate confusion regarding the definition of an ATDS.

AFSA asks that the FCC clarify its interpretation of the TCPA in a manner that will eliminate uncertainty over what constitutes an ATDS. The TCPA defines an ATDS as “equipment which has the capacity to (A) store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”² The FCC should clarify that the TCPA’s restriction on the use of an ATDS to call wireless numbers applies only to equipment

¹ Petition of Glide Talk, Ltd. for Expedited Declaratory Ruling, CG Docket No. 02-278, filed by Glide Talk, Ltd. on Oct. 28, 2013 (Petition).

² 47 U.S.C. § 227(1)

that could, at the time of the call, store or generate sequential or randomized telephone numbers and dial those numbers. This clarification is implicit in the definition's statement that the equipment "has" – not "could have" – the capacity to do certain things.

II. Clarification is necessary to eliminate the high risk of frivolous class action lawsuits.

When the TCPA was passed in 1991, there were about 7.5 million cell phone subscribers in the United States³ Currently, there are more than 326 million cell phone subscribers in this country. According to a recent report, 54.1 percent of American households rely either exclusively or predominantly on wireless telephone service and 38.2 percent of all adults in the United States live in households with only wireless telephones (i.e. no landline).⁴ As important as our increased reliance on wireless telephone service is, the subscription cost to consumers for cell phones in is significantly lower now than it was in 1991.⁵

If AFSA members are trying to reach their customers to tell them that there is a fraud alert on their account, that a payment is due, that a work-out plan is available, that their 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, as reflected by the study mentioned above.

The TCPA prohibits the use of an ATDS to call cell phones unless the call recipient has provided "prior express consent" to receive such calls. AFSA members have worked hard to comply with the TCPA requirement to obtain prior express consent from their account holders to use an ATDS to contact them on their wireless telephones. But when a company cannot get such consent, the TCPA permits the company to contact that customer on his or her cell phone if the call is placed without using an ATDS (subject to any do-not-call restrictions for telemarketing calls).

The problem is that there is a lack of clarity regarding what type of equipment constitutes an ATDS. As AFSA and other parties have stated, under an extremely broad (albeit erroneous) reading of the TCPA, any modern phone technically could have the requisite capacity to be deemed an ATDS. A standard cell phone or landline that has a redial feature could be viewed as having that capacity. Even a rotary phone has the capacity, in a broad sense of the word, because

³ infoplease. "Cell Phone Subscribers in the U.S., 1985–2010." <http://www.infoplease.com/ipa/A0933563.html>

⁴ Xanthopoulos, Judy. "Modifying the TCPA to improve Services to Student Loan Borrowers and Enhance Performance of Federal Loans Portfolios." *Quantria Strategies, LLC*, July 2013. <http://www.acainternational.org/files.aspx?p=/images/30493/quantriastudyretcpa-july2013.pdf>

⁵ In 1995, the average U.S. consumer paid \$0.44 per minute for a cell phone call (CTIA Resource Library, <http://www.ctia.org/resource-library/facts-and-infographics/archive/average-consumer-voice-price>). In 2004, the average price per minute was down to \$0.09 (CTIA Resource Library, <http://www.ctia.org/resource-library/facts-and-infographics/archive/average-voice-2004>).

a rotary phone plugged into a computer can store or produce random or sequential telephone numbers and dial the numbers.⁶ Instead of adopting this erroneous interpretation of the term “capacity,” the FCC should instead confirm that “capacity” is limited to what a particular piece of calling equipment is capable of doing, without further modification, at the time the call is placed.

The lack of clarity, combined with penalties of up to \$1500 per violation of the TCPA, has provided plaintiffs’ attorneys with fodder for lawsuits that enrich the attorneys rather than compensate their clients. Hundreds of TCPA class actions seeking multi-millions of dollars have been filed in recent years, and their number continues to climb. TCPA lawsuits were up 116 percent in September 2013 compared to September 2012. Echoing that trend, year-to-date TCPA lawsuits have increased 70 percent in 2013.⁷

Plaintiffs’ attorneys see dollar signs with every potential TCPA case. 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.⁸ For example, Bank of America recently entered into a \$32 million settlement with a class of 7.7 million individuals based on alleged violations of the TCPA.⁹ Without conceding any violation of the TCPA, the bank agreed not to oppose any request from plaintiffs’ counsel for attorneys’ fees up to \$8 million. The settlement will provide less than \$5 to each plaintiff if every single person submits a claim (with the exception of seven named class representatives who receive \$2,000 each). Instead of receiving compensation from class action litigation, consumers will experience rising costs as businesses struggle to make up the massive legal fees incurred during TCPA litigation.

The situation for companies striving to comply with the FCC’s new TCPA regulations is only likely to get worse because the current uncertainty concerning ATDS will likely bleed into the new regulatory requirements for telemarketing. “Having staked out jurisdictions favorable to coverage, the TCPA plaintiff’s bar is now in a protection and exploitation mode. This two-pronged strategy is intended to funnel coverage disputes to certain preferred venues and once there, exploit the favorable rulings to the fullest extent possible TCPA plaintiffs now also no longer wait . . . to initiate declaratory actions. With increasing frequency, TCPA plaintiffs file preemptive declaratory judgment actions in their preferred venues. . . . The uncompromising and relentless quest for coverage by a seemingly insatiable TCPA plaintiffs bar will continue and likely increase as application of the act is conformed to technological advancements subjecting a new genre of entities to TCPA liability.”¹⁰

⁶ *Ex Parte* Letter from Communication Innovators, *et al.*, CG Docket No 02-278 (filed July 10, 2013).

⁷ Lunsford, Patrick. “TCPA Lawsuits Really Are Growing Compared to FDCPA Claims.” *insideARM.com*. October 22, 2013. <http://www.insidearm.com/daily/debt-buying-topics/debt-buying/tcpa-lawsuits-really-are-growing-compared-to-fdcpa-claims/>.

⁸ 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

⁹ Dkt. No. 59-1, *Rose v. Bank of Am. Corp.* Case No. 5:11-cv-02390-EJD (N.D. Cal.).

¹⁰ “Get Ready For More Aggressive TCPA Disputes.” *Law360*. June 24, 2013. <http://www.law360.com/articles/451539/get-ready-for-more-aggressive-tcpa-disputes>

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. If the FCC does not clarify the definition of an ATDS, companies must seriously consider shutting down call centers in the United States that provide thousands of Americans with jobs paying over minimum wage, and instead open call centers in other countries, where it is possible to pay workers a smaller amount to manually dial every call using an old-fashioned telephone.

III. Frivolous lawsuits are limiting innovation.

AFSA concurs with Glide Talk that the FCC's and various court's interpretation of an ATDS has 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 TCPA violations and inconvenience non-customers who are manually dialed by accident.

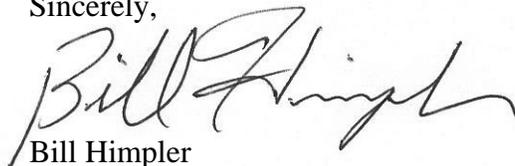
IV. Clarification of the definition of an ATDS will not lead to an increase in calls for consumers.

AFSA emphasizes that clarifying the definition of an ATDS would not lead to an increase in calls to customers. The TCPA permits AFSA members and other businesses to contact customers on their wireless numbers using manual dialing and AFSA's members have no incentive to place unnecessary calls. Thus, it is only *how* some calls are made that would change, not whether or how often the calls are made.

V. Conclusion

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

Sincerely,



Bill Himpler
Executive Vice President
American Financial Services Association