



July 19, 2013

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

***Re: Petition for Declaratory Ruling filed by YouMail, Inc.  
(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 YouMail, Inc. (“YouMail”) seeking clarification of three issues arising under the Telephone Consumer Protection Act (“TCPA”). AFSA’s comment focuses on the first issue, which is when a system or service has the requisite “capacity” to “store or produce numbers to be called using a random or sequential number generator.”<sup>1</sup> We agree with YouMail that, “Litigants’ focus on whether a system could, under any conceivable circumstance, be modified to be ‘capable’ of randomly or sequentially dialing a telephone number needlessly embroils innovators in crippling class action litigation and retards their ability to provide consumers with the beneficial products made possible by the types of technological advances for which the Commission and Congress have set the stage.”<sup>2</sup>

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.

**I. The FCC Should Eliminate Confusion Regarding Predictive Dialers**

The Petition focuses on YouMail’s specific software, but AFSA believes that the FCC should grant the Petition, and in granting the Petition, use this opportunity to eliminate significant confusion regarding the applicability of the TCPA rules to predictive dialers used to provide informational, non-telemarketing calls to consumers.

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 FCC confirmed that the TCPA should not “impede” or “unnecessarily restrict” purely informational

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<sup>1</sup> TCPA 47 U.S.C. § 227(a)(1)

<sup>2</sup> YouMail, Inc., Petition for Declaratory Ruling, CG Docket No. 02-278 (filed April 19, 2013).

calls in its recent Robocall Report and Order.<sup>3</sup> 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 FCC's interpretation of "autodialer" 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 to non-customers who are manually dialed by accident. As the FCC knows, 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 can already 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. 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.<sup>4</sup> The number of wireless-only households increases daily.

## **II. Predictive Dialers That Are Not Used for Telemarketing Purposes and Do Not Generate And Dial Random or Sequential Numbers Should Not Be Defined As Autodialers**

AFSA joins YouMail in asking the FCC to "affirmatively state that only equipment that has a current capacity to store and produce telephone number to be called using a random or sequential number generator – and is currently being used for that purpose – should be considered an ATDS [Automatic Telephone Dialing System]."<sup>5</sup>

The FCC should use the authority granted by the TCPA to regulate actions taken by businesses, not the ability or capacity of the employed equipment either as it currently is or as it could conceivably be modified. We understand that the TCPA defines automatic telephone dialing system as "equipment which has the capacity – (A) to store or produce telephone numbers to be

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<sup>3</sup> *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)

<sup>4</sup> 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>

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

called, using a random or sequential number generator; and (B) to dial such numbers.”<sup>6</sup> However, the TCPA also states:

“The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

...

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement.”<sup>7</sup>

This exemptive authority granted to the FCC must apply to calls made on equipment that meets the definition of “autodialer” or else it has no meaning because no exemption is needed for calls made on non-autodialer equipment. Clearly this grant of the power to exempt must inform the FCC that the intent of Congress was for it to regulate calls based on the content and purpose of the call, not on the technical characteristics of the equipment used.

The FCC should use its exemptive authority under 47 U.S.C. § 227(b)(2)(B)(ii)(I) to specify that predictive dialers that are not used for telemarketing purposes or that are not used to generate and dial random or sequential numbers are not autodialers.

AFSA members use phone systems that, either as designed or with the addition of hardware or software, have the capacity, and may or may not then have the current ability, to generate, store and dial random or sequential numbers. AFSA members, however, do not avail themselves of either that capacity or availability. 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.

Nonetheless, 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. The Petition explains, “Much like any ordinary computer could (with a complete overhaul) be transformed into a device to launch nuclear missiles, any desktop

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<sup>6</sup> TCPA 47 U.S.C. § 227(a)(1)

<sup>7</sup> TCPA 47 U.S.C. § 227(b)(2)(B)

computer or smart phone could be modified to store telephone numbers to be called by a sequential number generator and dial those numbers.”<sup>8</sup>

### **III. Automatic Text Notifications**

YouMail provides a software-based service that allows smartphone users to replace default voicemail options with customizable telephone answering functions, including automated text message replies to calls. In other words, the customer is requesting that YouMail send a text (considered by the FCC to be a prerecorded call) to a third party who has no relationship with YouMail. This is a situation that can arise for some AFSA members as well. For example, an AFSA member offers a product where customers can “send money” from their credit cards to third parties. The third party is notified via text that the money has been sent and is now available. While this is a useful product for customers, it is problematic under the TCPA, as the financial services company does not have express consent from the third party to send the message to the third party’s cell phone. Nevertheless, it is a transaction message sent at the *customer’s* request.

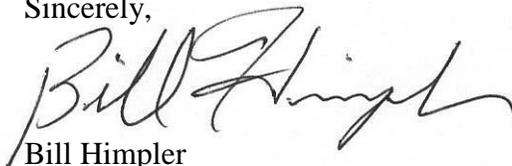
We ask that the FCC confirm that automatic text messages sent at the customer’s request do not violate the TCPA.

### **IV. Conclusion**

Although the purpose of the TCPA is to protect consumers from unrestricted telemarketing, aggressive class action attorneys are subverting that purpose and attempting to prevent consumers from receiving important messages in an efficient way. AFSA joins YouMail in asking the FCC to “affirmatively state that only equipment that has a current capacity to store and produce telephone number to be called using a random or sequential number generator – and is currently being used for that purpose – should be considered an ATDS.”

We look forward to continuing to work with the FCC on this important issue. Please contact me by phone, 202-466-8616, or e-mail, [bhimpler@afsamail.org](mailto:bhimpler@afsamail.org), with any questions.

Sincerely,



Bill Himpler  
Executive Vice President  
American Financial Services Association

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<sup>8</sup> YouMail, Inc., Petition for Declaratory Ruling, CG Docket No. 02-278 (filed April 19, 2013).