



November 15, 2012

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

**Re: *Petition for Declaratory Ruling filed by Communication Innovators  
(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 Communication Innovators (“CI”) that asks the Federal Communications Commission (“FCC” or “Commission”) to clarify that “predictive dialers”<sup>1</sup> that (1) are not used for telemarketing purposes and (2) do not have the current ability to generate and dial random or sequential numbers are not “automatic telephone dialing systems” (“autodialers”) as defined by the Telephone Consumer Protection Act (“TCPA”) and the FCC’s related rules.<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. FCC Should Eliminate Confusion Regarding Predictive Dialers**

AFSA supports the Petition’s attempt to eliminate significant confusion regarding the applicability of the TCPA rules to predictive dialers used to provide informational, non-telemarketing calls to consumers.

We agree with CI that 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

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<sup>1</sup> A predictive dialer, as described by the Petition, is “innovative equipment that dials specifically programmed contact numbers and enables company representatives to provide important, timely informational calls to consumers accurately, efficiently, and cost-effectively. Communication Innovators, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed June 7, 2012).

<sup>2</sup> AFSA notes that its use of the terms “automatic telephone dialing systems,” “autodialers,” and “predictive dialers” are not indicative of its agreement that the terms have been adequately defined by the FCC, including in the FCC’s 2003 Order (Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Rcd 14014 ¶ 133 (2003)) or 2008 Declaratory Ruling (Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling, 23 FCC Rcd 559 (2008)).

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

AFSA also concurs with CI that 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 already can 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, as the Petition notes, and more importantly, almost one-third of all households are wireless-only.<sup>4</sup> The number of wireless-only households continues to increase.

## **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 supports a slightly different exception for predictive dialers than outlined in the Petition.<sup>5</sup> We request that the FCC clarify, consistent with the text of the TCPA and Congressional intent,

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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> AFSA believes that the FCC should regulate based on actions, not the nature of equipment used. AFSA sees three types of predictive dialer equipment that could be deemed to be autodialers under the current definition, to wit: (1) the equipment that cannot generate random or sequential numbers and cannot be made to; (2) the equipment that cannot generate random or sequential numbers but could, with the addition of hardware or software, be made to; and (3) the equipment that can generate random or sequential numbers but the user does not use that feature. AFSA believes that only when the equipment **can** generate random or sequential numbers, and the user **does** use that feature should the equipment be deemed an autodialer.

that predictive dialers that (1) are not used for telemarketing purposes and (2) are not used to generate and dial random or sequential numbers regardless of whether they could be made to, are not autodialers under the TCPA and the FCC’s TCPA rules. The Petition asks that predictive dialers that are not used for telemarketing purposes and do not *have the current ability to* generate and dial random or sequential numbers be exempted from the autodialer definition. The problem with this limited request is that the Commission and some courts have interpreted “current ability” to include predictive dialers that only with significant alterations might have the ability to generate and dial random or sequential numbers. AFSA does not support limiting the exception for predictive dialers to those that neither have nor even with significant alterations could not have the ability to generate and dial random or sequential numbers.

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

This exemptive authority granted to the Commission 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 Commission 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.

AFSA therefore believes that calls of any nature made using predictive dialers that are not autodialers as defined by the requested clarification are not subject to the TCPA and that calls that are not for telemarketing purposes but that are for non-soliciting informational purposes to

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<sup>6</sup> TCPA 47 U.S.C. § 227(b)(2)(B)

the caller's current customers, even if made using autodialer equipment, are not subject to the TCPA.

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 and that are not used to generate and dial random or sequential numbers are not autodialers. AFSA members may use telephone 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. Smart phones, for example, have this capacity.

The Petition asks that the FCC "focus on the meaning of the term 'capacity' in the autodialer definition and declare that, at least for informational calls, capacity refers to a present ability and use of the equipment to generate and dial random or sequential numbers."<sup>7</sup> The Petition goes on to ask that the FCC not interpret capacity as "encompassing any conceivable hardware or software modification to a device that would permit it to generate, store, and dial numbers randomly or in sequence."<sup>8</sup> We do not believe, however, that such interpretation of capacity is sufficient, given the current state of the technology. The Petition states that many of today's predictive dialers do not have the ability to generate and dial random or sequential telephone numbers, but that is not AFSA's experience. AFSA members have telephone systems that they use only to contact their customers for business purposes. These telephone systems, though, may have the capacity and ability to generate and dial random or sequential numbers. AFSA members might be able to disable this ability without rendering the equipment unusable but even then, because whatever was done to disable the equipment could be reversed, the capacity, as currently defined, would still be there. We are concerned that if recent litigation trends continue, courts could define a predictive dialer as an autodialer because the capacity to generate and dial random or sequential numbers exists, even if it is disabled.

We understand that the FCC might be concerned with how a company might prove that a predictive dialer was used when the equipment had the capacity to generate or dial random or sequential numbers. However, it is possible to demonstrate that only customers' numbers that were provided were used. See *Exhibit 1 – Dialer Functionality* for a standard method utilized within the industry.

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<sup>7</sup> Communication Innovators, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed June 7, 2012).

<sup>8</sup> *Ibid.*

### III. 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](mailto:bhimpler@afsamail.org), with any questions.

Sincerely,

A handwritten signature in black ink that reads "Bill Himpler". The signature is written in a cursive, flowing style.

Bill Himpler  
Executive Vice President  
American Financial Services Association

# Exhibit 1

## Dialer Functionality

