

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	
ACA International's Petition for an)	
Expedited Clarification and Declaratory Ruling)	

**ACA INTERNATIONAL'S SUPPLEMENTAL SUBMISSION TO
PETITION FOR AN EXPEDITED CLARIFICATION AND
DECLARATORY RULING**

FILED APRIL 26, 2006

Rozanne M. Andersen, Esq.
ACA International
4040 W. 70th Street
Minneapolis, MN 55435

*ACA General Counsel
Senior Vice President of Legal and
Governmental Affairs*

Andrew M. Beato, Esq.
Stein, Mitchell & Mezines, LLP
1100 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036

ACA Federal Regulatory Counsel

TABLE OF CONTENTS

I.	Introduction	3
II.	The Commission’s New Interpretation Of The Autodialer Restriction Conflicts with The Plain Language Of The TCPA And Violates The APA	4
	1. Only Random Or Sequential Number Generation Is Regulated	10
	2. Predictive Dialers Do Not Store Or Produce Random Or Sequentially Generated Numbers	14
	3. It Is A Condition Precedent That A Random Or Sequentially Generated Number Is Stored Or Produced And Dialed	14
III.	The Record Does Not Support The Commission’s Construction Of The TCPA Definition Of “Automatic Telephone Dialing System”	18
IV.	The Commission’s New Interpretation Will Severely Harm Public Debt Recovery Programs	21
V.	Congress Did Not Intend The Autodialer Restriction To Apply To Non-Telemarketing Calls To Recover Payments	24
VI.	Manual Dialing Or Using Commercial Databases Of Wireless Numbers Are Not Viable Solutions	28
VII.	Thousands Of Small Businesses Will Be Significantly Harmed	29
VIII.	The Commission’s Interpretation Violates The First Amendment	31
IX.	The Commission’s Construction Results In An Unconstitutional Usurpation Of Powers Congress Reserved To Itself	35
X.	Conclusion	36

I. Introduction

Pursuant to 47 C.F.R. § 1.2 and section 554(e) of the Administrative Procedures Act, 5 U.S.C. § 554(e), ACA International (“ACA”) files this supplemental submission to its Petition for an Expedited Clarification and Declaratory Ruling filed with the Commission on or about October 5, 2005 (“*Petition*”).¹ The *Petition* asks the Commission to clarify that amendments to the Telephone Consumer Protection Act (“TCPA”)² regulations did not alter prior rulings that the TCPA’s automatic telephone dialing system (“autodialer”) restrictions³ do not apply to telephone calls to recover payments for goods and services from customers when initiated by predictive dialers. On April 5, 2006, the Commission issued a public notice requesting comments on the *Petition*.⁴ This supplemental submission provides additional support for the relief requested by ACA.

¹ ACA incorporates the *Petition* by reference herein.

² Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227.

³ The TCPA regulation states that no person or entity may initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system to any telephone number assigned to a cellular telephone service. 47 C.F.R. § 64.12000(a)(1)(iii). Automatic telephone dialing system includes equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such randomly or sequentially generated numbers. 47 C.F.R. § 64.1200(f)(1).

⁴ See DA 06-808.

**II. The Commission's New Interpretation Of The Autodialer Restriction
Conflicts With The Plain Language Of The TCPA And Violates The APA.**

The new meaning of “automatic telephone dialing system” adopted by the Commission in 2003 is inconsistent with the plain language of the statute, let alone more than a decade of rulings pre-dating the amendments.⁵ The Commission espouses a boundless interpretation that abandons the statute’s express limitation to storing or producing *randomly or sequentially generated* numbers. Under the Commission’s rationale, the autodialer ban applies even to telephone numbers that are neither randomly nor sequentially generated – including calls to specific numbers provided by established customers. The statute offers no support for this interpretation.

⁵ *Petition* at 14-20 (summarizing administrative findings between 1991-2003 establishing the inapplicability of the autodialer restrictions to calls made by or on behalf of creditors to recover payments). As the Commission has long stated, “[t]he overall intent of Section 227 is to protect consumers from unrestricted telemarketing, which can be an intrusive invasion of privacy. . . . We tentatively conclude that a debt collection call, that otherwise complies with all applicable collection statutes, is a commercial call that does not adversely affect the privacy concerns the TCPA seeks to protect.” Notice of Proposed Rulemaking in the Matter of the Telephone Consumer Protection Act of 1991, 7 FCC Rcd 2736, at ¶¶ 9, 16 (rel. April 17, 1992) (“TCPA NPRM”). That “tentative” conclusion was adopted in the final report and order. *See generally* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 7 FCC Rcd 8752, at ¶ 39 (“Whether the call is placed by or on behalf of the creditor, prerecorded debt collection calls would be exempt from the prohibitions on such calls to residences as: (1) calls from a party with whom the consumer has an established business relationship, and (2) commercial calls which do not adversely affect privacy rights and which do not transmit an unsolicited advertisement”) (“1992 TCPA Order”).

The cornerstone of the new interpretation is the unsubstantiated assertion that a predictive dialer has a dormant or latent “capacity” for random or sequential number generation if it is upgraded with separate software.⁶ If modified, the Commission opines, the dialer might gain the “capacity” to store or produce randomly or sequentially generated numbers and, therefore, it would be subject to the ban.⁷ Assuming, *arguendo*, the accuracy of this interpretation, the Commission did not stop at limiting the ban to software-enhanced predictive dialers. Instead, the Commission concluded that predictive dialers that have not been modified or enhanced with software nonetheless are covered. Again, this is because of the alleged dormant “capacity” that could be unlocked by adding the upgraded software, regardless whether the dialer actually is modified or upgraded.

This interpretation is excessively broad and it is legally and factually inaccurate. It is a false premise that predictive dialers are subject to the statute if they do not store or produce randomly or sequentially generated numbers. Indeed, as the Commission has acknowledged, modification of predictive dialers with separate software to generate random or sequential

⁶ The Commission’s view is that predictive dialers are subject to the restriction because they might be modified by separate software imparting the “capacity” to dial randomly or sequentially. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, at ¶ 131 (2003) (“2003 TCPA Order”).

⁷ *Id.*

numbers is a practice long since abandoned.⁸ As a result, the new interpretation is hinged on a distinction without any modern practical application. Yet, doing so cleared the pathway to conclude that predictive dialers are covered by the statute even if they do not generate random or sequential telephone numbers, that is, situations where a dialer is used solely to call specific customers' of creditors.

This misreading of the statute fails to comply with the Administrative Procedures Act ("APA"). It does not carry out express congressional intent. It also is limitless. Every computer, modem,⁹ and telephone in America would be subject to the TCPA as "automatic telephone dialing systems" with the "capacity" to store, produce and dial random and sequentially generated numbers when modified or upgraded with software.

The statutory language demonstrates the Commission's departure from the plain language of the TCPA. The statute is clear. It states:

The term "automatic telephone dialing system" means equipment which has the capacity—

(A)to store or produce telephone numbers to be called, *using a random or sequential number generator*; and

⁸ 2003 TCPA Order, at ¶ 132. As the Commission has stated, telemarketers have adapted their practices by using purchased lists of telephone numbers, whereas in the past they contacted consumers by randomly or sequentially creating and dialing numbers.

⁹ See, e.g. 2003 TCPA Order, at ¶ 130 (urging clarification that modems used for non-telemarketing purposes are not autodialers).

(B) to dial such numbers.¹⁰

The definition applies to one or both types of automated calls: (1) the equipment must have the capacity to randomly or sequentially generate a telephone number, which must be “produce[d]” *and* dialed; or (2) the equipment must have the capacity to randomly or sequentially generate a telephone number, which must be “store[d]” *and* dialed. In either case, the threshold is the capacity of the equipment to randomly or sequentially *generate* telephone numbers, not random or sequential dialing. “Random or sequential number generator” is not defined. Yet, it is obvious that random or sequential telephone number generation does not include dialing lists of customers with whom creditors have established business relationships.¹¹

Beginning with the notice of proposed rulemaking in 1992 and continuing through the amendments in 2003, the administrative record is clear: predictive dialers, when used to

¹⁰ 47 U.S.C. § 227(a)(1) (emphasis added). *Accord* Federal Communications Commission Public Notice, *Telephone Consumer Protection Act: Telephone Solicitations, Autodialed and Artificial or Prerecorded Voice Message Telephone Calls, and The Use of Facsimile Machines*, DA 92-1716, at 2 (Jan. 11, 1993) (“**HOW IS THE TERM ‘AUTODIALER’ DEFINED?** An “**autodialer**” is defined as equipment which has the capacity to store or produce telephone numbers to be called **using a random or sequential number generator**”) (emphasis in original).

¹¹ *See* Notice of Proposed Rulemaking in the Matter of the Telephone Consumer Protection Act of 1991, 7 FCC Rcd. 2736, at ¶ 37 (rel. April 17, 1992) (“1992 TCPA Order”) (stating that “[c]ommenters concur that debt collection calls are exempt as calls to parties with whom the caller has a prior existing business relationship, and further argue that debtors have given prior express consent to such calls by incurring a debt”) (footnotes omitted).

recover payments from established customers, were not subject to the autodialer prohibition; and, in fact, the Commission concluded that the dialer in this limited context has beneficial consumer value.¹²

It appears that some businesses are using auto dialers to improve the efficiency of their debt collection practices. In such applications the auto dialer either delivers a payment reminder to the customer or, frequently, the auto dialer dials up customers and immediately delivers answered calls to a live collection representative. The latter use is generally termed a predictive dialer: predictive dialers sometimes deliver a recorded message to a small percentage of called parties when all live operators are busy. The use of auto dialers in debt collection increases the efficiency of the collector who no longer has to deal with unanswered calls, and is beneficial to the called party by making them aware of the company's inquiry. *To the extent such practices comply with all other state or federal debt collection laws, it appears that this is a non-telemarketing use of auto dialers not intended to be prohibited by the TCPA.*¹³

The Commission also stated that calls to recover payments are not subject to the regulation because privacy rights are not adversely affected, the calls do not convey unsolicited advertisements, and there is an established business relationship with the recipient of the call.¹⁴ This outcome was consistent with the authority given to the Commission by Congress

¹² The implementing regulation's definition of "automatic telephone dialing system" is substantively identical to the statute. In addition, as noted in the *Petition*, the regulation has remained the same even after the new interpretation adopted by the Commission in 2003.

¹³ 1992 TCPA Order, at ¶ 15 (emphasis added); see *Petition*, at 14-20.

¹⁴ 1992 TCPA Order, at ¶ 39 ("Whether the call is placed by or on behalf of the creditor, prerecorded debt collection calls would be exempt from the prohibitions on such calls to residences as: (1) calls from a party with whom the consumer has an established business

to “have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy. . . .”¹⁵

In 2003, the Commission adopted a much broader interpretation. It stated that “a predictive dialer is equipment that dials numbers and, *when certain computer software is attached*, also assists telemarketers in predicting when a sales agent will be available to take calls. The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers.”¹⁶ According to the Commission,

The statutory definition contemplates autodialing equipment that either stores or produces numbers. It also provides that, in order to be considered an “automatic telephone dialing system,” the equipment need only have the “*capacity to store or produce telephone numbers. . . .*” Therefore, the Commission finds that a predictive dialer falls within the meaning and

relationship, and (2) commercial calls which *do not adversely affect privacy rights* and which do not transmit an unsolicited advertisement”) (emphasis added).

¹⁵ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991). Section 2(13) of Pub. L. 102-243 provided that:

The Congress finds that . . . [w]hile the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

¹⁶ 2003 TCPA Order, at ¶ 131 (emphasis in original).

statutory definition of “automated telephone dialing equipment” and the intent of Congress.¹⁷

ACA respectfully submits that there are at least three reasons why the Commission’s new interpretation is not correct:

1. Only Random Or Sequential Number Generation Is Regulated.

The definition applies to “telephone numbers to be called[] using a random or sequential number generator. . . .”. The statute expressly limited the delegation of congressional authority to random or sequentially generated telephone numbers. Congress did not intend all telephone numbers to be regulated. If that was the intent, then Congress would not have qualified its delegation of authority by referring only to “telephone numbers to be called[] using a random or sequential number generator. . . .”.

Notwithstanding the language in the statute, the Commission failed to adhere to this limitation in 2003. It disregarded the important qualifier that the telephone numbers stored or produced must be random or sequentially generated. The record demonstrates as much. The Commission’s characterizations of the definition of “automatic telephone dialing system” repeatedly fail to acknowledge the qualification that only randomly or sequentially generated numbers are impacted:

The statutory definition contemplates autodialing equipment that either stores or produces numbers.¹⁸

¹⁷ 2003 TCPA Order, at ¶ 132-133.

¹⁸ 2003 TCPA Order, at 132.

It also provides that, in order to be considered an “automatic telephone dialing system,” the equipment need only have the “*capacity* to store or produce telephone numbers. . . .”¹⁹

The basic function of such equipment, however, has not changed – the *capacity* to dial numbers without human intervention.²⁰

We believe that the purpose of the requirement that equipment have the “capacity to store or produce telephone numbers to be called” is to ensure that the prohibition on autodialed calls not be circumvented.²¹

These statements ignore the fact that the “capacity” to which Congress delegated authority was a capacity to store or produce *random or sequentially generated* telephone numbers. Indeed, the Commission’s selective reading of the statute conveys the wrong impression that “the equipment need only have the “*capacity* to store or produce telephone numbers” in order to be covered by the TCPA.²² The assertion is not accurate.

The TCPA does not define “random or sequential number generator”, but its meaning is ascertained from the common meaning of the words used by in the statute. “Generate” means

¹⁹ 2003 TCPA Order, at 132.

²⁰ 2003 TCPA Order, at 132.

²¹ 2003 TCPA Order, at 133.

²² 2003 TCPA Order, at 132.

“to bring into existence.”²³ In this context, “random or sequential number generator” means to “bring into existence” or create random or sequential telephone numbers (for example, 111-111-1111, 111-111-1112). This contextual meaning is consistent with, and reinforced by, the telemarketing practices in use when the TCPA was enacted. At the time, telemarketers hijacked telephones by arbitrarily creating and dialing telephone numbers, including hospitals and emergency rooms.²⁴ The Commission acknowledged as much in the record. These type of practices prompted Congress to act. By any measure, the meaning of “automatic telephone dialing system” cannot be construed to apply to customer telephone lists that are not created using a “random or sequential number generator.”

In the rush to regulate *all* telemarketing calls by concluding that telephone lists are part of the statutory scheme, the Commission adopted an unsupportable interpretation that turned a

²³ Webster’s Ninth New Collegiate Dictionary (1985). *See id.* (defining “generator” as “a mathematical entity that when subjected to one or more operations yields another mathematical entity or its elements”). *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (words appearing in a statute are to be giving their ordinary, plain meaning unless Congress defined the words otherwise).

²⁴ *See* S. Rep. 102-178, 1991 U.S.C.C.A.N. 1968, at 1969 (“The use of automated equipment to engage in telemarketing is generating an increasing number of complaints. . . . In particular, they cite the following problems: some automatic dialers will dial numbers in sequence, thereby typing up all the lines of a business and preventing outgoing calls”); H.R. Rep. 102-317, at 10 (Nov. 15, 1991) (“In recent years a growing number of telemarketers have begun using automatic dialing systems to increase their number of customer contacts. . . . Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers”).

blind eye to the “random or sequential generator” qualification.²⁵ Doing so failed to uphold congressional intent. If Congress had intended the ban to apply to telephone lists of customers that are not randomly or sequentially generated, it would have stated so. It did not. The absence of any reference in the statute to the application to non-random or non-sequentially generated telephone lists controls the outcome here.²⁶

²⁵ Recognizing that telemarketers no longer randomly or sequentially generate telephone numbers as they did when the TCPA was enacted, the 2003 TCPA Order incorrectly asserted authority from Congress to adapt the scope of “automatic telephone dialing system” to “consider changes in technologies.” 2003 TCPA Order, ¶ 132 (“It is clear from the statutory language and legislative history that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies”). The Commission’s assertion misstates the flexibility conferred by Congress, which the statute limited to calls “not considered a nuisance or invasion of privacy.” See Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, § 2(13) (“The Congress finds that . . . the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution”). In other words, Congress gave the Commission authority to exclude calls that are not an invasion of privacy, such as those subject to the *Petition*.

²⁶ A basic canon of statutory construction is “*expressio unius est exclusio alterius*”, or the expression of one thing is the exclusion of another. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978). As the Supreme Court has explained: “[I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992). Applied here, by expressly limiting the statute to randomly or sequentially generated telephone numbers, Congress did not intend the statute to equally apply to non-random or non-sequentially generated calls.

2. *Predictive Dialers Do Not Store Or Produce Random Or Sequentially Generated Numbers.*

Predictive dialers have no inherent capacity to store or produce randomly or sequentially generated telephone numbers. By focusing on the “capacity” of predictive dialers to be upgraded with separate software imparting a random or sequential number generation potential, the Commission failed to adhere to the statutory language which requires that the “equipment” *itself* have the capacity to store or produce telephone numbers using a random or sequential number generator. The statute defines autodialers as “equipment which has the capacity” to store or produce randomly or sequential numbers, not “equipment which has the capacity *when combined with other equipment*” such as separate software.

3. *It Is A Condition Precedent That A Random Or Sequentially Generated Number Is Stored Or Produced And Dialed.*

Under the TCPA, it is not the “capacity to store or produce telephone numbers” alone that triggers the autodialer prohibition as the Commission suggests, but instead, it is the capacity to store or produce *and* dial the random or sequentially generated numbers. Storage or production of the random or sequentially generated numbers is a necessary, but not sufficient, condition. Instead, the statute is not applicable unless the randomly or sequentially generated numbers are dialed. As noted here, the 2003 TCPA Order failed to give proper deference to this aspect of the statute when the Commission concluded that even non-random or non-sequentially generated telephone numbers dialed by predictive dialers nonetheless are

subject to the statutory definition.

As a consequence of these failings, the Commission's new interpretation violates the Administrative Procedures Act, 5 U.S.C. § 706.²⁷ An administrative agency's authority is limited to only those powers entrusted to it by Congress.²⁸ "The FCC, like other federal agencies, 'literally has no power to act . . . unless and until Congress confers power upon it.'"²⁹ The TCPA definition of "automatic telephone dialing system" granted authority to regulate randomly or sequentially generated numbers. It is arbitrary and capricious, an abuse of discretion, and not in accordance with the law to construe the statute as extending to non-delegated areas such as non-random or non-sequentially generated telephone numbers.

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, the Supreme Court outlined the analysis to be employed when reviewing an agency's construction of its statute.³⁰ If Congress directly spoke on the question at issue, and the intent of Congress is

²⁷ See Stein, Mitchell & Mezines, Administrative Law § 51.01[1].

²⁸ *Lyng v. Payne*, 476 U.S. 926, 937 (1986); *American Library Ass'n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005); *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002).

²⁹ *American Library Ass'n*, 406 F.3d at 698 (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

³⁰ 467 U.S. 837 (1984).

clear, that is the end of the inquiry.³¹ If the statute is silent or ambiguous with respect to the specific issue, the question is whether the agency's answer is based on a permissible construction of the statute, and whether it is reasonable.³² Moreover, an "agency's interpretation of [a] statute is not entitled to deference absent a delegation of authority from Congress to regulate in the areas at issue."³³ Nor is deference available if the administrative interpretation conflicts with the plain language of the statute.³⁴

Whether a given regulation promulgated pursuant to delegated authority properly carries out congressional intent was summarized by the Supreme Court in the following terms:

In determining whether a particular regulation carries out the congressional

³¹ *Id.* at 842-45. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("the preeminent canon of statute interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there'") (quoting *Connecticut Nat'l Ban v. Germain*, 503 U.S. 249, 253-54 (1992)).

³² *Id.*

³³ *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002); *see United States v. Mead Corp.*, 533 U.S. 218, 226 (1984). For purposes of this section alone, we accept the proposition that Congress delegated authority to the Commission in the TCPA to regulate even non-random or non-sequentially generated telephone numbers. However, as discussed in Part IX, ACA contends that Congress did not delegate such authority, and that the Commission's assertion of the jurisdiction over non-random or non-sequentially generated numbers is unconstitutional.

³⁴ *See, e.g., American Bankers Ins. Group v. United States*, 408 F.3d 1328, 1335 (11th Cir. 2005) (refusing *Chevron* deference to an IRS ruling conflicting with the plain language of the statute and which was adopted by the IRS to account for changes in the manner in which toll charges were accumulated since Congress enacted the provision); *OfficeMax, Inc. v. United States*, 428 F.3d 583 (6th Cir. 2006).

mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulations has been in effect, the reliance placed upon it, the consistency of the [agency's] interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.³⁵

An administrative agency's long-standing, reasonable interpretation of a statute is given weight in determining the meaning of a statutory provision.³⁶

Applied here, for more than a decade, the Commission correctly construed the statute and regulation as not applying to calls made by or on behalf of creditors to recover payments. This is because, among other reasons, the Commission concluded that the calls were not random or sequentially generated.³⁷ The relevant statutory and regulatory provisions have not changed. This long-standing interpretation was consistent with the text of the TCPA which applies to equipment that stores or produces and dials randomly or sequentially generated numbers. Predictive dialers do not perform this function. Adopting a new regulatory interpretation that subjects predictive dialers to the TCPA when used to recover payments

³⁵ *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979).

³⁶ *International Bhd. Of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Daniel*, 439 U.S. 551, 556 n.20 (1970).

³⁷ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Reconsideration Order, 10 FCC Rcd 12391, at ¶ 19 (1995).

violates the APA and usurps power not delegated by Congress.

III. The Record Does Not Support The Commission's Construction Of The TCPA Definition Of "Automatic Telephone Dialing System".

There was insufficient evidence in the administrative record warranting the Commission's conclusion that predictive dialers are subject to the definition of "automatic telephone dialing system". Paragraph 130 of the 2003 TCPA Order discussed the record evidence. In it, the Commission acknowledged approximately 10 comments which, in one way or another, urged the Commission to continue to construe the use of predictive dialers as beyond the scope of the TCPA because the dialers do not generate random or sequential telephone numbers.³⁸

Only five comments were cited as support for concluding that "distinguishing technologies on the basis of whether they dial randomly or use a database of numbers would create a distinction without a difference."³⁹ Three of these were by individuals. A careful

³⁸ 2003 TCPA Order, at ¶ 130. Although the Commission only referenced 10 comments, there were more comments that supported the continued inapplicability of predictive dialers.

³⁹ 2003 TCPA Order, at ¶ 130. The issue is not whether the statute creates a distinction without a difference due to the change in technologies. The fact is, when enacted, the statutory distinction was intentional, express, and reflective of then existing technologies and telemarketing practices. It is not reasonable for the Commission to assert that changed circumstances permit it to re-write the meaning of "automatic telephone dialing equipment" by ignoring the clause "using a random or sequential number generator". If modern telemarketing practices hamper the ability of the Commission to effectively enforce the statute, the proper course for the Commission was to seek legislative relief instead of adopting a regulatory interpretation that asserts a delegation of authority not given by Congress.

examination of these comments finds little support for the Commission's conclusion. For example, the Commission relied on a comment which stated that "[t]here is a legitimate business interest in predictive dialers" and that "[t]he FCC should allow telemarketers to use predictive dialers", while expressing concerns primarily about abandoned calls.⁴⁰ Another comment relied on by the Commission appears to acknowledge that the Agency has no authority to regulate non-random or non-sequentially generated telephone numbers under the TCPA: "First, the *definition of 'automatic telephone dialing system' is too limited in [section] 227.*"⁴¹ The commenter suggested that "the answer must be 'yes'" to the "query whether the existing definition of 'automatic telephone dialing systems' includes the equipment that can *dial* from a database of existing numbers."⁴² However, for the reasons discussed above, whether the equipment can dial sequentially is irrelevant under the statute.

Indeed, most of the comments cited in the 2003 TCPA Order as supportive of the change are premised on a misreading of the definition of "automatic telephone dialing system." These comments incorrectly construe the statute as applying to randomly or sequentially *dialing* telephone numbers, as opposed to the actual statutory language of

⁴⁰ Stewart Abramson Comment, at 1-2 (Dec. 9, 2002); *see also* 2003 TCPA Order, at ¶ 130 & n.427.

⁴¹ Thomas M. Pechnik Comment, at 4 (Nov. 29, 2002) (emphasis added); *see also* 2003 TCPA Order, at ¶ 130 & n.428.

⁴² Thomas M. Pechnik Comment, at 4 (Nov. 29, 2002).

randomly or sequentially *generating* telephone numbers. In no instance did a commenter identify authority delegated by Congress to regulate non-random or non-sequentially generated telephone numbers. To be sure, the Commission has not identified any authority in the statute entitling it to ignore a key component of the congressional definition.

Further, the comments cited in support of the new interpretation fail to mention the basis relied upon by the Commission for changing its construction of the statute, namely, the “capacity” of predictive dialers if enhanced with separate software. That rationale is purely a construct of the Commission, yet it finds no basis in the record. In reality, predictive dialers have no capacity to randomly or sequentially generate telephone numbers. The dialer is a computer. It is only hardware. The software commonly used today does not give predictive dialers the capacity to generate random or sequential telephone numbers. The software simply dials a list of customers with whom creditors have established business relationships. In performing this function, it does not “store or produce telephone numbers to be dialed, using a random or sequential number generator.”⁴³

Based on the record, it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law for the Commission to conclude that the record supported finding that even non-random or non-sequentially generated telephone numbers were regulated. The Supreme Court has stated that:

⁴³ See 47 U.S.C. § 227(a)(1).

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁴⁴

Agency action taken as a result of formal rulemaking is reviewed under the substantial evidence standard of review. There must be sufficient evidence to support the agency's decision. The evidence must be "more than a mere scintilla . . . it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁴⁵ In this instance, the Commission's explanation for the need to include predictive dialers in the definition of "automatic telephone dialing systems" runs counter to the weight of the evidence and fails to satisfy the substantial evidence standard.

IV. The Commission's New Interpretation Will Severely Harm Public Debt Recovery Programs.

The *Petition* describes the important contributions ACA members make to the health of the economy.⁴⁶ The significant harm of the Commission's new interpretation is not limited to private industry. In fact, the Federal government, as the largest domestic creditor, will be substantially harmed, as will State governments.

⁴⁴ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 44 (1983); *AT&T Corp. v. FCC*, 113 F.3d 225, 229 (D.C. Cir. 1997).

⁴⁵ *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).

⁴⁶ *Petition*, at 4-8.

Each year, Federal agencies, including the Commission, refer billions of non-tax debts to the Department of Treasury's Financial Management Service ("FMS") pursuant to the Debt Collection Improvement Act of 1996.⁴⁷ FMS is responsible for "improv[ing] the quality of the federal government's financial management by increasing the collection of delinquent debt owed to the government, by providing debt management services to all federal agencies, and by protecting the financial interests of the American taxpayer."⁴⁸ According to FMS, "the FMS debt collection program is a central tool for sound financial management at the federal level. Since 1996, FMS has collected more than \$24.4 billion in delinquent debt. In fiscal year 2005, collections of federal delinquent debt remained at a constant \$3 billion."⁴⁹

FMS contracts with trained, professional businesses to assist in the recovery of the Federal government's obligations. The Budget of the United States Government for 2004

⁴⁷ FMS generally only collects non-tax debts. Tax-based debts owed the Federal government are handled by the Internal Revenue Service and private collection agencies. As of 2003, more than \$13 billion in individual income tax debt had been designated as uncollectible due to IRS collection and resource priorities. The recovery of this tax-based debt also stands to be significantly impacted by the outcome of this *Petition*.

⁴⁸ See <http://www.fms.treas.gov/debt/index.html>. The debts include (1) loans made, insured or guaranteed by the government, including deficiency amounts due after foreclosure or sale of collateral; (2) expenditures of non-appropriated funds; (3) overpayments, including payments disallowed by Inspector General audits; (4) any amount the U.S. Government is authorized by statute to collect for the benefit of any person, e.g., consumer redress; (5) the unpaid share of any non-Federal partner in a program involving a federal payment and a matching or cost-sharing payment by the non-Federal partner; and (6) fines or penalties assessed by an agency. See <http://fms.treas.gov/debt/questions.html#Debts%20Included>.

⁴⁹ See http://fms.treas.gov/news/factsheets/delinquent_debtcollection_2005.html.

specifically recognized the benefits conferred on the treasury as a consequence of these businesses: “Many states and other federal agencies already use private collectors, with encouraging results.”⁵⁰ Either directly or indirectly through the services of private businesses, FMS uses predictive dialers to initiate the recovery of payments owed to the government. To be sure, recovering billions annually owed to the government would be far more difficult without the use of this basic technology.

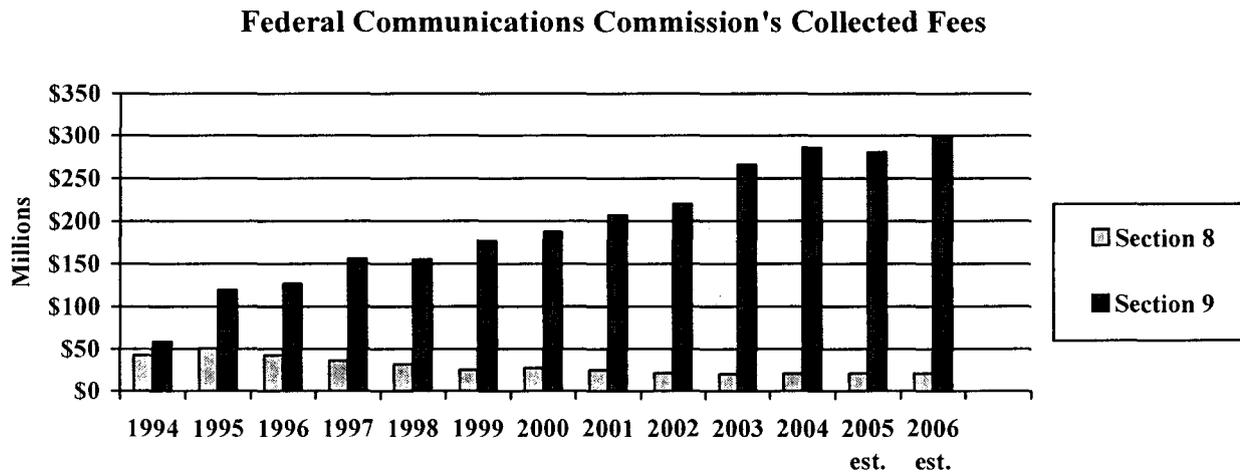
The Commission itself has relied upon and benefited from a cross-servicing agreement with FMS to recover billions claimed by the Commission under the DCIA.⁵¹ The Commission collects funds from regulated entities which then are applied to its expenses. These funds include application processing fees (“Section 8 fees”) which are deposited directly into the United States Treasury, regulatory fees (“Section 9 fees”), and spectrum auction fees. The fees collected are used to offset the Commission’s appropriations. The Commission has generated

⁵⁰ The Budget for FY 2004, at 239 (<http://w3.access.gpo.gov/usbudget/fy2004/pdf/>).

⁵¹ See http://www.fcc.gov/debt_collection. The Commission has explained:

[t]he DCIA rules require that entities or individuals doing business with the FCC pay their debts in a timely manner. The rules also explain how entities or individuals are notified of debts owed to the FCC, and how the FCC will collect those debts. The rules provide that if you fail to pay debts owed to the FCC, the debts will be referred to the Department of Treasury for collection. Your failure to pay will be reported to credit reporting agencies, and you will be unable to obtain any licenses or other benefits from the FCC.

billions of dollars for the United States Treasury by assessing and recovering these fees and the spectrum auctions. For example, in excess of \$14.4 billion in spectrum auction fees were recovered during the period 1994-2004. In addition to the auctions, the following graph summarizes the Commission's Section 8 and Section 9 fee collections during the period 1994-2006 (projected):



A portion of the Commission's recovery of these fees has been premised on the use of predictive dialers based on cross-servicing by FMS.

V. Congress Did Not Intend The Autodialer Restriction To Apply To Non-Telemarketing Calls To Recover Payments.

The *Petition* demonstrates that Congress did not intend to prohibit the use of autodialers by or on behalf of creditors when recovering payments for goods and services

received by consumers.⁵² The TCPA legislative history provides repeated examples of Members of Congress expressing the view that the statute does not apply to calls notifying consumers of overdue bills or seeking to recover payments. The legislative history does not express a congressional intention to subject such calls to autodialer restrictions. To the contrary, Congress intended to restrict automated telemarketing “telephone calls to the *home*” based on findings that, at the time, the “[t]echnologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.”⁵³ In fact, the sponsor of the legislation specifically commented on the need for the Commission to be able to apply different rules or exempt from the definition of “automatic telephone dialing equipment” the “use of machines to place calls for debt-collection purposes.”⁵⁴

⁵² *Petition* at 12-14.

⁵³ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 §§ 2(11) & 2(12) (1991) (emphasis added). Congress was motivated by the belief restrictions less drastic than an absolute ban were unavailable or not effective based on the technologies available in 1991. It therefore gave the Commission the authority to adopt “reasonable restrictions” on the use of autodialers “consistent with the constitutional protections of free speech.” As noted, *infra* Part VII, the do-not-call regulations adopted in 2003 demonstrates the availability technologies with less drastic consequences than banning all commercial speech, thereby rendering unconstitutional a total ban on ACA members’ commercial speech.

⁵⁴ 137 Cong. Rec. S16204-01, at S10206 (Nov. 7, 1991) (Sen. Hollings) (“Finally, the substitute recognizes that the FCC has the authority to craft different rules, including an exemption, for certain types of calls. This provision responds to the concerns expressed by some telephone companies about new services, and some companies that use machines to place calls for debt collection purposes”).

In light of the intent of Congress not to subject non-telemarketing calls to recover payments to the autodialer restriction, a decision by the Commission to do so is *ultra vires* and invades an area of non-delegated congressional authority. This failure is particularly egregious in light of the findings of the Commission that calls to recover payments (1) are not random or sequential, (2) do not convey unsolicited advertisements, (3) do not convey telephone solicitations, (4) do not adversely affect consumers' privacy rights, and (5) are made pursuant to an established business relationship and with the prior express consent of the called party.⁵⁵

Even today, more than a decade after the TCPA first was enacted, Members of Congress continue to inform the Commission that calls to recover payments are not telemarketing solicitations and should be evaluated differently under the autodialer regulations. In February 2005, Senators Mike Enzi, Tim Johnson, and Wayne Allard contacted then Chairman Michael Powell about the issue.⁵⁶ They stated that “[t]he issue was properly addressed by the Commission in previous rules through a narrow exemption tailored to

⁵⁵ *Petition* at 14-15 & n. 22-23. The Commission itself consistently characterizes the TCPA as a telemarketing statute. *See, e.g.*, TCPA NPRM, at ¶ 9 (“the overall intent of Section 227 is to protect consumers from unrestricted telemarketing, which can be an intrusive invasion of privacy”); FCC-FTC Memorandum of Understanding Regarding Telemarketing Enforcement (“Whereas the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, directs the Federal Communications Commission (FCC) to address invasive, costly, and potentially dangerous interstate and intrastate *telemarketing* practices;”) (emphasis added).

⁵⁶ February 9, 2005 Letter to the Honorable Michael Powell from Sen. Mike Enzi, Sen. Tim Johnson, and Sen. Wayne Allard.

provide relief to collectors without allowing telemarketing abuses, but was overlooked in the revisions published in July of 2003.”⁵⁷ They encouraged “[t]he Commission [to] recognize[] the inherent difference between autodialed calls from telemarketers and debt collectors in a July 1995 Report and Order, which accepted that debt collection calls are not random, but instead are directed to specific contact numbers for specific debtors.”⁵⁸

In addition, a bipartisan group of Members notified the Commission of their belief that the Commission should continue to construe the autodialer restriction as not applying to calls to recover payments.⁵⁹ The Members stated:

Autodialers, as used by the credit and collection industry, are not a telemarketing tool, but instead efficiently utilized a collection agent’s time in closing outstanding accounts. Telephone calls by [a] collection agency are not randomly placed to consumers, like autodialed calls by telemarketers. Instead, autodialers are used by collectors in concert with other technology to contact customers who have an existing business relationship with creditors.⁶⁰

In summary, Members of Congress continue to advocate that calls to recover payments not be subject to the autodialer restriction.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ January 24, 2005 Letter to the Honorable Michael Powell from Rep. Barbara Cubin, Rep. Lee Terry, Rep. Heather Wilson, Rep. Scott Garrett, Rep. Mike Rogers (MI), Rep. Mark Kennedy, Rep. Jim Ramstad, Rep. Joe Wilson, Rep. Patrick Tiberi, and Rep. Donald Manzullo).

⁶⁰ *Id.*

VI. Manual Dialing Or Using Commercial Databases Of Wireless Numbers Are Not Viable Solutions.

In the event that the Commission proposes that ACA members bypass the autodialer restriction by dialing manually, ACA wishes to clarify that such a proposal not only is unrealistic, but also would subject consumers to unintentional third-party disclosures and privacy infringements.

As noted in the *Petition*, the primary benefit of predictive dialers is not increased efficiency, although that is a byproduct of the technology. Predictive dialers confer unique benefits to consumers and creditors in the context of the non-telemarketing calls placed by ACA members. Manual dialing of telephone numbers is subject to unintentional dialing errors. Predictive dialers eliminate those errors. They maximize customers' privacy about sensitive financial information by protecting against inadvertent contacts with third parties not responsible for the underlying accounts. The Fair Debt Collection Practices Act, and analogous state laws, prohibit third party disclosures of the existence of a debt.⁶¹

Predictive dialers also are programmed to restrict calls to designated area codes within the calling times prescribed by federal and state laws. Furthermore, as the Commission previously stated, the technology allows for a reliable way for consumers to learn about their

⁶¹ The Fair Debt Collection Practices Act and analogous state laws prohibit communications with third parties regarding the existence of a debt.

accounts and arrange for payment.⁶² Consequently, autodialers are an important tool to control the cost of credit for all consumers, and to keep consumers informed and avoid unnecessary delinquencies and defaulted accounts.⁶³

In addition, the use of databases of cellular telephone numbers to limit autodialer calls to wireline telephones is inherently deficient. The Commission itself has stated that it “is not persuaded that any such databases would include all numbers covered by the [autodialer prohibition], or that such databases are sufficiently accurate.”⁶⁴ Based on the administrative record, it clearly is not a solution for ACA members to rely on any commercially available database purporting to identify wireless telephone numbers.

VII. Thousands Of Small Businesses Will Be Significantly Harmed.

ACA represents approximately 6,000 company members ranging from credit grantors,

⁶² Notice of Proposed Rulemaking in the Matter of the Telephone Consumer Protection Act of 1991, 7 FCC Rcd 2736, para. 15 (rel. April 17, 1992) (“The use of autodialers in debt collection increases efficiency of the collector who no longer has to deal with unanswered calls, and is beneficial to the called party by making them aware of the company’s inquiry”).

⁶³ As a matter of public policy, there can be no true benefit to customers by encouraging government-imposed barriers making it more difficult to keep them informed of status of their accounts with creditors. However, this is the outcome of the Commission’s new interpretation because it bars the use of any technology to call consumers on the telephone. As more customers abandon wireline telephones altogether, the effect of the Commission’s interpretation is to limit communications to letters or to outsource telephone communications to other workers in countries. The favorable resolution of time sensitive issues, such as suspected identity theft, undoubtedly will suffer.

⁶⁴ 2003 TCPA Order, at n.439.

third party collection agencies, attorneys, and vendor affiliates. The members of ACA predominately are “small entities” or “small businesses” as those terms are defined by the Regulatory Flexibility Act. Approximately 2,000 of the businesses that are ACA members maintain fewer than 10 employees; and more than 2,500 of the members employ fewer than 20 persons. Many of the companies are owned or operated by minorities or women. Together, they create jobs by employing tens of thousands and make significant contributions to the economy.

No regulatory flexibility analysis was conducted by the Commission concerning the impact on small businesses as a consequence of the new interpretation that predictive dialers are included in the statutory definition of “automatic telephone dialing system.” The analysis set forth in Appendix B to the 2003 TCPA Order was primarily directed at small businesses that directly or indirectly engage in telemarketing which, as noted above, has no applicability to ACA members.

ACA filed comments with the Commission in August 2005 with regard to the possible revision or elimination of rules under the Regulatory Flexibility Act in proceeding DA-05-1524.⁶⁵ ACA’s comments outlined the substantial negative economic implications for these entities as a consequence of the Commission’s regulatory reversal that creditors and debt

⁶⁵ See FCC Seeks Comment Regarding Possible Revision or Elimination of Rules Under the Regulatory Flexibility Act, DA-05-1524 (May 31, 2005).

collectors cannot use predictive dialers to call wireless numbers to attempt to recover debtors' payments for goods or services received. The United States Small Business Administration previously notified the Commission of the potential significant impact on small businesses as a consequence of the concerns raised by ACA, and encouraged the Commission to prepare regulatory flexibility analyses that address the issue.⁶⁶ To date, no action has been taken by the Commission.

VIII. The Commission's Interpretation Violates The First Amendment.

Congress enacted the TCPA autodialer prohibition based on the belief that less invasive restrictions, short of an absolute ban, were unavailable or not effective based on the technologies existing in 1991. It therefore gave the Commission the authority to adopt "reasonable restrictions" on the use of autodialers "consistent with the constitutional protections of free speech."⁶⁷ The interpretation of the TCPA's definition of "automatic telephone dialing equipment" espoused by the Commission violates the First Amendment. Under the test established by the Supreme Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, when the government seeks to restrict commercial speech protected by

⁶⁶ October 27, 2005, Letter to The Honorable Kevin J. Martin from Thomas M Sullivan and Eric Menge, United States Small Business Administration.

⁶⁷ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 § 2(15) (1991) ("The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to business as well as to the home, consistent with the constitutional protections of free speech").

the First Amendment, it has the burden of demonstrating that (1) the interests it seeks to serve are substantial, (2) the restrictions it seeks to impose will “directly advance” those interests, and (3) the restrictions are narrowly tailored and “not more extensive than is necessary” to advance those interests.⁶⁸

The Supreme Court has made clear that the government bears a heavy burden in justifying restrictions on commercial speech⁶⁹ by satisfying the four-part test of *Central Hudson*:

[1] For commercial speech to come within [the protection of the First Amendment], it at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.⁷⁰

When applying the test, the Court routinely rejects attempts to justify broad prohibitions on

⁶⁸ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980).

⁶⁹ In addition to the commercial speech implicated by this *Petition*, the Commission’s decision whether predictive dialers are within the statutory definition of “automatic telephone dialing system” has equally significant implications for non-commercial speech such as political and religious discourse and charitable communications.

⁷⁰ *Id.* The required analysis under *Central Hudson* is a form of First Amendment “intermediate scrutiny,” which mandates that a restriction on speech must directly advance a substantial governmental interest in a narrowly tailored manner. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997).

speech.⁷¹ “Broad prophylactic rules in the area of free express are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”⁷²

The Commission’s interpretation fails to satisfy the four prongs of *Central Hudson*. Two justifications are offered in support of the Commission’s conclusion: Congress was concerned that pervasive automated calls “threaten[ed] public safety” and are an “invasion of privacy.”⁷³ For telemarketing intrusions, there may be a substantial government interest in promoting safety and privacy. However, either by recognition of the Commission or by Congress, these justifications have no applicability to non-telemarketing calls to solely recover payments from customers. For example, with respect to privacy, the Commission has stated that “[w]hether the call is placed by or on behalf of the creditor, prerecorded debt collection calls would be exempt from the prohibitions on such calls to residences as . . . commercial calls which *do not adversely affect privacy rights* and which do not transmit an unsolicited

⁷¹ See, e.g., *In re R.M.J.*, 455 U.S. 191 (1992).

⁷² *Edenfield v. Fane*, 507 U.S. 761 (1993) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

⁷³ 2003 TCPA Order, at ¶ 133 (citing S. Rep. No. 102-178, at 5 *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972-73 (1991) (“The Committee believes that Federal legislation is necessary to protect the public from automated telephone calls. These calls can be an invasion of privacy, and impediment to interstate commerce, and a disruption to essential public safety services”).

advertisement.”⁷⁴ Similarly, it is true that Congress in 1991 was troubled by the impact that telemarketing calls might have on public safety facilities, such as hospitals. The legislative history noted that “Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers.”⁷⁵ Yet, there is no assertion that ACA members use predictive dialers to randomly dial sequential blocks of telephone numbers which might connect to hospitals or other public safety organizations. Public safety, consequently, also is not a substantial interest.

Not only has the government failed to identify a substantial interest in concluding predictive dialers are autodialers under the TCPA, but the regulatory restriction clearly is not narrowly tailored to advance any interest other than a total ban on commercial speech. To satisfy intermediate scrutiny, the Commission’s interpretation must not be any more extensive than necessary to effectuate the TCPA definition of “automatic telephone dialing system.” Here, the Commission should have more narrowly tailored its interpretation by concluding that, for example, only predictive dialers with software used to generate random or sequential numbers are covered. That would be in keeping with the statute. It would have avoided the current problem that predictive dialers that do not generate random or sequential numbers are

⁷⁴ 1992 TCPA Order, at ¶ 39 (emphasis added).

⁷⁵ H.R. Rep. 102-317, at 10 (Nov. 15, 1991).

covered equally to those that do.

IX. The Commission's Construction Results In An Unconstitutional Usurpation Of Powers Congress Reserved To Itself.

Congress developed a comprehensive statutory scheme to regulate unsolicited telephone advertisements and solicitations. The Commission was directed to create regulations applicable to equipment having the capacity to store or produce telephone numbers, using a random or sequential number generator, and to dial the numbers. The use of predictive dialers to recovery payments, for more than a decade, was determined by the Commission to be beyond the scope of the statute because the dialers did not generate random or sequential numbers. As noted, that changed with the 2003 TCPA Order when the Commission construed the statute to apply even to non-random or non-sequentially generated numbers.

The Constitution forbids the exercise of “executive authority” beyond the limits established by Congress. Simply stated, the Commission has no authority to change the law enacted by Congress. The Commission’s power to promulgate regulations “must stem either from an act of Congress or from the Constitution itself.”⁷⁶

Until the promulgation of the 2003 TCPA Order, the Commission had repeatedly stated its longstanding conclusion that predictive dialers were not “automatic telephone dialing

⁷⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

systems” when used to recover payments because, among other reasons, they did not generate random or sequential numbers. That conclusion expressed the intention of Congress as reflected in the statute and legislative history. The Commission abandoned that construction in 2003 because telemarketers had stopped arbitrarily dialing consumers and began using customer lists. With telemarketers no longer randomly or sequentially generating telephone numbers, the Commission adopted an excessively broad construction so that the capacity to store or produce a telephone number alone was sufficient to trigger the statute.⁷⁷ However, Congress did not grant authority to the Commission to regulate any equipment with the capacity to store and dial a telephone number. It delegated authority over equipment with the capacity to store telephone numbers created *using a random or sequential number generator*, which are dialed. Consequently, the 2003 TCPA Order is unconstitutional because it usurped authority retained by Congress.

X. CONCLUSION

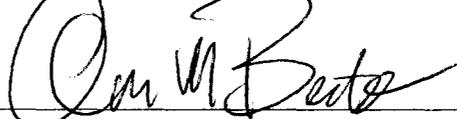
For the foregoing reasons, ACA respectfully requests that the Commission issue a declaratory ruling clarifying that the 2003 TCPA rulemaking did not alter the Commission’s previous findings that calls to recovery debts are not subject to the TCPA’s autodialer restrictions. If you have any questions, please contact Andrew M. Beato at (202) 737-7777.

⁷⁷ 2003 TCPA Order, at 132 (“It also provides that, in order to be considered an ‘automatic telephone dialing system,’ the equipment need only have the ‘*capacity* to store or produce telephone numbers. . . .”).

Dated: April 26, 2006

Respectfully submitted,

STEIN, MITCHELL & MEZINES, LLP

A handwritten signature in black ink, appearing to read "Andrew M. Beato", written over a horizontal line.

Andrew M. Beato, Esq.
1100 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036

ACA INTERNATIONAL

A handwritten signature in black ink, appearing to read "Rozanne M. Andersen", written over a horizontal line. To the right of the signature is a large, stylized initial "RMA".

Rozanne M. Andersen, Esq.
4040 W. 70th Street
Minneapolis, MN 55435