

**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
)	FCC Number 10-18
Proposed Rulemaking)	
Telephone Consumer Protection)	

**ACA INTERNATIONAL'S COMMENT TO PROPOSED AMENDMENTS
TO THE TELEPHONE CONSUMER PROTECTION ACT REGULATIONS**

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

Valerie Hayes, Esq.
ACA International
4040 W. 70th Street
Minneapolis, MN 55435
General Counsel

Andrew M. Beato, Esq.
Stein, Mitchell & Muse L.L.P.
Federal Regulatory Counsel

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EXECUTIVE SUMMARY

ACA International (“ACA”) respectfully requests that the Commission clarify that the Proposed Rule does not apply to or otherwise exempts financial service companies when communicating with consumers about the status of their accounts and recovering debts for the following reasons:

1. The Commission’s purpose for the amendments is to harmonize the TCPA rules with telemarketing regulations promulgated by the Federal Trade Commission in 2008 amending the Telemarketing Sales Rule (“TSR”), and to remove differences in the treatment of entities outside the scope of the FTC’s jurisdiction. The Congress, the Commission, and the FTC have interpreted the term “telemarketing” to exclude telephone communications with consumers about account information, including basic data such payment status, the recovery of debts, the detection of identity theft, and fraud deterrence. This purpose is not met if the Commission applies the final rule to companies communicating with consumers about the status of their accounts, and not telemarketing.

2. With specific regard to debt collection calls, the FTC has concluded that the TSR exempts all calls to consumers to communicate information about debts because such calls are not “telemarketing” and do not induce the purchase of a good or service. Harmonization of the FCC’s regulation to the FTC’s regulation requires the FCC to follow

suit.

3. Numerous federal and state consumer protection statutes exist to protect consumers when communicating with debt collectors. Regulation by the Commission is not only duplicative, but contradictory and results in significant bad policy outcomes that will cripple productive, non-privacy infringing communications between consumers and creditors.

4. Applying the TCPA to the non-telemarketing activity of debt collectors when communicating with consumers about the status of their accounts is an *ultra vires* act that conflicts with the plain language of the TCPA because it:

a. Exceeds the Commission's authority under the TCPA and violates the Administrative Procedures Act by advancing a flawed construction of the enabling legislation definition of "automatic telephone dialing system" to include predictive dialers. The Proposed Rule is based on a legally and factually inaccurate finding by the Commission that a predictive dialer has a dormant or unrealized "capacity" for random or sequential number generation if it is upgraded with separate software. Therefore, the equipment is subject to the autodialer ban even where (i) it is not used for telemarketing, advertisements, or solicitations, (ii) it has no present capacity to generate random or sequential numbers, and (iii) it has not been upgraded with separate software to give it the capacity to do so. In fact, predictive dialers in use today *do not* have the capacity to randomly or sequentially generate telephone numbers

using a number generator without fundamentally changing the architecture of the hardware and software. This fact is substantiated by sworn affidavits of the companies that manufacture predictive dialers that ACA will place on the public record.

b. Creates irreconcilable conflicts with the FTC's rules and violates the Do-Not-Call Implementation Act by failing to achieve maximum consistency with the FTC's rules (16 C.F.R. 310.4(b)) which exempts debt collection calls to consumers.

c. Fuels extensive consumer and industry confusion as to whether telephone communications with consumers to recover debts using predictive dialers and prerecorded messages are permissible. The FTC's rules permit these communications, but the Proposed Rule would forbid them.

d. Violates an extensive administrative record in which the Commission has stated that the use of a predictive dialer to collect debts "is a non-telemarketing use of autodialers *not intended to be prohibited by the TCPA.*" The Commission also has record findings that calls to recover debts (1) do not convey unsolicited advertisements, (2) do not convey telephone solicitations, (3) do not adversely affect consumers' privacy rights, (4) are made pursuant to an established business relationship, (5) are not random or sequential when initiated by a predictive dialer, and (6) are made with the prior express consent of the called party.

e. Violates a clear Congressional prohibition against promulgating any regulations “with respect to the collection of debts by debt collectors.” The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* (“FDCPA”), and its legislative history expressly state that Federal agencies exercising jurisdiction over the collection of debts are prohibited from promulgating any rules or regulations pertaining to debt collectors.

I. Introduction.

ACA files this comment in response to the Federal Communication Commission’s (“FCC” or the “Commission”) request for comments on the notice of proposed rulemaking (“NPRM”) to amend its regulations implementing the Telephone Consumer Protection Act (“TCPA”).¹ On its face, the NPRM is directed at telemarketing practices.² The Commission’s

¹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227).

² Notice of Proposed Rulemaking, FCC 10-18, ¶ 16 (Jan. 22, 2010) (“Consistent with Congress’s directive in the DNCA to ‘maximize consistency’ of the Commission’s TCPA rules with the FTC’s Telemarketing Sales Rule, we seek comment on whether we should revise sections 64.1200(a)(1) and 64.1200(a)(2) of our rules to provide that, for all calls, prior express consent to receive prerecorded **telemarketing** messages must be obtained in writing.”) (footnotes omitted, emphasis added) [hereinafter “NPRM”]. *See also id.* at ¶ 27 (“Based on the foregoing, we seek comment on whether the Commission should conform its rule to the FTC’s Telemarketing Sales Rule by eliminating the established business relationship exemption from the general prohibition on prerecorded **telemarketing** calls to residential telephone lines.”) (emphasis added); *id.* at ¶ 53 (“As a practical matter, the proposed written consent requirement, if adopted, would affect only those sellers and telemarketing calls to residential subscribers whose numbers are not listed on the do-not-call registry.”).

stated purpose for the amendments is to harmonize the TCPA rules with telemarketing regulations promulgated by the Federal Trade Commission (“FTC”) in 2008 amending the Telemarketing Sales Rule (“TSR”), as well as to remove differences in the treatment of entities outside the scope of the FTC’s jurisdiction.³

The Congress, the Commission, and the FTC have interpreted the term “telemarketing” to exclude telephonic communications with consumers about account information, including such basic functions as status of payments, the recovery of debts, and the detection of identity theft/fraud deterrence. Congress defined “telemarketing” under the TCPA and Telemarketing Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108 (“Telemarketing Act”). The Telemarketing Act states that telemarketing is “a plan, program, or campaign which is conducted to induce purchases of goods or services by use of one or more telephones and which involves more than one interstate telephone call.” 15 U.S.C. § 6106(4). The Commission has concluded that “the term *telemarketing* means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.”⁴ Building upon that

³ Telephone Consumer Protection, 75 Fed. Reg. 13,471, 13,471 (Mar. 22, 2010) (inviting comment “on proposed revisions to its rules under the Telephone Consumer Protection Act that would harmonize rules with the Federal Trade Commission’s Telemarketing Sales Rule”) [hereinafter “Proposed Rule”].

⁴ NPRM, *supra* note 2 at n.3 (citing 47 C.F.R. § 64.1200(f)(10)).

definition, the Commission has previously made a finding in the TCPA record that calls to recover debts using automatic telephone dialing systems are not telemarketing and, therefore, are not prohibited by the TCPA. Finally, the FTC has concluded that the TSR—the regulatory analog to the TCPA rules—exempts all calls to consumers to communicate information about debts because such calls are not “telemarketing” and do not induce the purchase of a good or service.⁵

Whereas the NPRM was initiated to fulfill the Congressional requirement to harmonize the telemarketing rules of the FTC and the Commission and minimize consumer and industry confusion, the Commission should clarify that, consistent with the above definitions and interpretations, the Proposed Rule does not apply to the financial services industry’s non-telemarketing communications with consumers about the status of their accounts. The NPRM already states that the Commission does not intend to have the Proposed Rule make any changes to prerecorded message calls that do not include solicitations, *e.g.*, debt collection calls.⁶ Although it is clear that the Commission intends to impose no new regulation on

⁵ See *Telemarketing Sales Rule*, 68 Fed. Reg. 4,580, 4,664 n.1020 (Jan. 29, 2003) [hereinafter *Telemarketing Sales Rule*].

⁶ NPRM, *supra* note 2 at n.81 (“To be clear, we propose no changes to, and therefore do not seek comment on, the Commission’s current rules governing . . . (b) prerecorded message calls that do not include a solicitation (*e.g.*, calls notifying customers of product recalls, or of scheduled deliveries.”)).

prerecorded debt collection calls, the use of predictive dialers to communicate with consumers about debts and the viability of an established business relationship exemption relied upon by credit grantors and debt collectors are not resolved and need to be addressed by the Commission. Before wrongly applying the Proposed Rule to the financial services industry and directly impeding communications with consumers about the status of accounts (including, for example, detection of identity theft, debt validation and verification, payment histories, settlement plans, and credit reporting information), the Commission should recognize that countless Federal and State consumer protection statutes exist to protect consumers when communicating with debt collectors. Regulation by the Commission is not only duplicative, but contradictory and results in significant bad policy outcomes crippling of basic communications between consumers and creditors.

Under no circumstances should the Commission adopt an unreasonable and *ultra vires* interpretation of the TCPA to regulate the non-telemarketing activity of debt collectors when communicating with consumers about the status of their accounts. Doing so would lead to confusing and contradictory regulation of the financial services industry. First, it would exceed the Commission's authority under the TCPA and violate the Administrative Procedures Act by advancing a flawed construction of the enabling legislation. Second, it would create irreconcilable conflicts with the FTC's rules and violate the Do-Not-Call Implementation Act.

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Extensive consumer and industry confusion would be sown as to whether telephone communications with consumers to recover debts using predictive dialers and prerecorded messages are permissible. The FTC's rules permit these communications, but the Proposed Rule would forbid them. Third, the Commission will be acting against an extensive administrative record developed during an 18 year period in which the Commission has stated plainly that the use of a predictive dialer to collect debts "is a non-telemarketing use of autodialers *not intended to be prohibited by the TCPA.*"⁷ The Commission also has record findings that calls to recover debts (1) do not convey unsolicited advertisements, (2) do not convey telephone solicitations, (3) do not adversely affect consumers' privacy rights, and (4) are made pursuant to an established business relationship. Applying the TCPA and Proposed Rule to debt communication calls not only would go against these record findings, but it would conflict with the TSR promulgated by the FTC, the primary Federal regulator of the collection of debts in the United States.⁸ Creating this result within a rulemaking initiated to harmonize

⁷ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 7 FCC Rcd 8752, ¶ 15 [hereinafter 1992 TCPA Order].

⁸ 15 U.S.C. § 1692i (stating that compliance with the Fair Debt Collection Practices Act governing the recovery of household debts in the United States is to be enforced by the Federal Trade Commission). As the Commission has stated, "debt collection calls are regulated primarily by the Federal Trade Commission and are subject to the requirements of the Fair Debt Collection Practices Act (FDCPA), which prohibits abusive, deceptive, and otherwise improper collection practices by third-party collectors." Declaratory Ruling, FCC 07-232 at n.

the Commission's rule to that of the FTC based on a Congressional mandate of maximum consistency is entirely unsustainable.

Even more fundamentally concerning is the fact that the Commission's attempted regulation of communications between consumers and debt collectors to recover debts violates a clear Congressional prohibition against promulgating any regulations "with respect to the collection of debts by debt collectors."⁹ The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* ("FDCPA"), and its legislative history expressly state that Federal agencies exercising jurisdiction over the collection of debts are prohibited from promulgating any rules or regulations pertaining to debt collectors.¹⁰ Specifically, the FDCPA occupies the field of "communications" with consumers, including all telephonic communications however initiated, for example, by automatic telephone dialing systems ("autodialers") or predictive dialers.¹¹ Therefore, the Commission is barred from applying the TCPA and the Proposed

2 (rel. Jan 4, 2008).

⁹ 15 U.S.C. § 1692l(d) (stating that "Neither the [Federal Trade] Commission nor any other agency referred to in subsection (b) of this section may promulgated trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this subchapter").

¹⁰ S. REP. NO. 950382, at 814 (Aug. 2, 1977).

¹¹ The FDCPA broadly regulates all communications in connection with debt collection. 15 U.S.C. § 1692c. Communication is defined as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2).

Rule to regulate telephonic communications with debtors for the purpose of collecting debts. Nonetheless, the Proposed Rule portends to regulate the manner and method of collecting debts by restricting communications by telephone.

For the reasons introduced above and explained more fully below, the Commission should clarify that the Proposed Rule does not apply to accounts receivable companies, such as those who are members of ACA, for the reasons stated herein.

II. Background on ACA International.

ACA is an international trade association originally formed in 1939 and composed of credit and collection companies that provide a wide variety of financial services. Headquartered in Minneapolis, Minnesota, ACA represents approximately 5,500 company members, including credit grantors, collection agencies, attorneys, asset buyers and vendor affiliates. ACA members range in size from small businesses with a few employees to large, publicly held corporations. Together, ACA members employ in excess of 150,000 workers. These members include the very smallest of businesses that operate within a limited geographic range of a single town, city, or state, as well as the very largest of national corporations that do business throughout the United States. The majority of ACA members, however, are small businesses. Approximately 2,000 of the company members maintain fewer than ten employees and more than 2,500 of the members employ fewer than twenty employees.

The company-members of ACA comply with applicable federal and state laws and regulations regarding debt collection, as well as ethical standards and guidelines established by ACA. Specifically, the collection activities of ACA members are regulated primarily by the FTC under the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*, the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*; the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (as amended by the Fair and Accurate Credit Transactions Act); the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*; and numerous other federal and state laws. Indeed, the financial services industry is unique if only because it is one of the few industries in which Congress enacted a specific statute governing all manners of communications with consumers when recovering debts. In so doing, Congress explicitly delegated regulatory duties over the debt recovery industry to the Federal Trade Commission. 15 U.S.C. § 1692i.

ACA members are a crucial component in safeguarding the health of the economy. Uncollected consumer debt threatens America's economy. According to the Federal Reserve Board and United States Census Bureau, total consumer bad debt costs every adult in the United States \$683 every year. This translates into a cost for the average non-supervisory worker of nearly 54 hours (before taxes) in annual salary that pays for the bad debt of other consumers. By itself, outstanding credit card debt has doubled in the past decade and now

approaches \$750 billion. Total consumer debt, including home mortgages, exceeds \$9 trillion. Moreover, the greatest increases in consumer debt are traced to consumers with the least amount of disposable income to repay their obligations.

As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community's businesses. They represent the local family doctor, hospital, or nursing home. ACA members work with these businesses, large and small, to obtain payment for the goods and services received by consumers. In years past, the combined effort of ACA members have resulted in the recovery of billions of dollars annually that are returned to business and reinvested. For example, ACA members recovered and returned over \$40 billion in 2007 alone, a massive infusion of money into the national economy.¹² Without an effective collection process, the economic viability of these businesses, and by extension, the American economy in general, is threatened. At the very least, Americans are forced to pay higher prices to compensate for uncollected debt.

Approximately 50 percent of ACA members surveyed in 2005 use an autodialer or "predictive dialer," representing a one-third increase since 1995. These dialers are an essential component of communicating with consumers about their accounts. Dialers enable consumers

¹² PricewaterhouseCoopers, *Value Of Third-Party Debt Collection To The U.S. Economy in 2007: Survey and Analysis*, available at <http://www.acainternational.org/files.aspx?p=/images/12546/pwc2007-final.pdf>.

to obtain current information about their accounts such as verification of the amount of the account, verification of the accuracy of account data, payment histories, upcoming payment dates, notification of overdue payments, credit reporting information, and prevention of identity theft. Dialers effectively manage the high volume of calls necessary to establish communication with consumers. The fact is that telephones are the most efficient way to communicate with consumers today under emergent circumstances, such as identity theft detection and prevention, or in cases of the routine administration of accounts. Indeed, 22.7% of all American households use cell phones as their primary or exclusive point of contact.¹³

Predictive dialers confer important benefits. The technology is precise and maximizes consumers' privacy by eliminating dialing errors that risk inadvertent contacts with individuals other than those responsible for the debt. Autodialers are programmed to restrict calls to designated area codes within the calling times prescribed by law. This technology allows for a cost effective and reliable way for consumers to learn about their accounts and arrange for payment. This helps keep the cost of credit under control by keeping consumers informed and helping them avoid unnecessary defaults or legal action.

III. Summary of The Proposed Rule.

The Proposed Rule allegedly seeks to harmonize the TCPA's requirements regarding

¹³ Jan.-June 2009 Centers for Disease Control and Prevention, National Health Interview Survey.

automatic and prerecorded message calls with the TSR promulgated in 2008 by the FTC. As it relates to the financial services industry, the Proposed Rule amends the FCC's TCPA regulations in the following ways:

First, a person may not initiate any telephone call using an automatic telephone dialing system or an artificial or prerecorded voice to a consumer's wireless number unless the consumer has given the calling party prior express *written* consent. The requirement to obtain prior express written consent is satisfied when the calling party has obtained from the consumer an agreement in writing that (a) the person obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize these particular calls; (b) the person obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service; (c) evidences the willingness of the consumer to receive calls using an automatic telephone dialing system or an artificial or prerecorded voice; and (d) includes the telephone number to which such calls may be placed in addition to the recipient's signature, which can be obtained in writing or electronically. These proposed amendments substantively alter, if not directly overrule, a declaratory ruling issued to ACA by the Commission in 2008. The ruling clarified that autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible calls made with the "prior express

consent” of the called party, including consent obtained orally.¹⁴

Second, the Proposed Rule amends the provision governing prerecorded message or artificial voice calls placed to a consumer’s residential line unless the calling party has obtained prior express written consent from the consumer. However, the proposed rule creates a new exemption for prerecorded healthcare messages made on behalf of a covered entity or its business associate as defined under the Health Insurance Portability and Accountability Act (“HIPAA”). The exemption would apply to the payment and billing functions of business associates within the financial services industry under HIPAA, thereby exempting those calls to recover healthcare debts. Thus, calls made by debt collectors to residential lines to recover healthcare debts would be exempt from the TCPA, as they presently are under the TSR.

Third, the Commission proposes to remove the established business relationship exemption from the prohibition on prerecorded message or artificial voice calls placed to a consumer’s residential line.

Finally, the Proposed Rule provides that an automatic telephone dialing system delivering a recorded message to the called party must release the called party’s telephone line within five seconds of the time notification is transmitted to the system that the called party has hung up.

¹⁴ Declaratory Ruling, FCC 07-232 (rel. Jan 4, 2008).

IV. The Commission is Prohibited By Statute From Promulgating Regulations Concerning the Collection of Debts by Debt Collectors.

Congress has preempted the Commission from applying the Proposed Rule to the collection of debts. As such, the Commission has no jurisdiction to promulgate or enforce its TCPA regulations as it relates to communications between debt collectors and consumers for the purpose of collecting debts.

The Federal enforcement of the collection of debts is committed by Congress to the jurisdiction of the FTC.¹⁵ This includes all manner of communications related to the collection of debts. Indeed, the Commission itself has stated that “debt collection calls are regulated primarily by the Federal Trade Commission and are subject to the requirements of the Fair Debt Collection Practices Act (FDCPA), which prohibits abusive, deceptive, and otherwise improper collection practices by third-party collectors.”¹⁶ The FDCPA also lists several other administrative agencies, which do not include the Commission, with subsidiary jurisdiction to the FTC to enforce the collection of debts in limited contexts, largely to address areas outside the jurisdiction of the FTC.¹⁷

¹⁵ 15 U.S.C. § 1692l(a).

¹⁶ Declaratory Ruling, FCC 07-232 at n.2 (rel. Jan 4, 2008).

¹⁷ 15 U.S.C. § 1692l(b) (listing agencies and statutes).

Congress expressly prohibited the exercise of rulemaking authority by the administrative agencies “with respect to the collection of debts by debt collectors.”¹⁸ This statutory prohibition is broad and it applies to all manner of communications between third-party debt collectors and consumers (a consumer’s spouse, parent, guardian, executor, or administrator) in connection with the collection of any debt.¹⁹ The statute defines the term “communication” to include the “conveying of information regarding a debt directly or indirectly to any person through any medium.”²⁰ “Any medium” obviously includes the use of telephones (wireless and wireline) and related equipment, including predictive dialers, prerecorded messages, as well as communicating information about a debt to any person using a wireless number.

Congress’s prohibition against promulgating regulations “with respect to the collection of debts by debt collectors” in unequivocal. And yet, the Proposed Rule attempts to regulate the communications between consumers and debt collectors. The Commission’s intention to regulate these communications is clear and is evidenced by its Declaratory Ruling issued to ACA in 2008, which sought to regulate autodialed and prerecorded message communications

¹⁸ 15 U.S.C. § 1692l(d).

¹⁹ 15 U.S.C. § 1692l(c).

²⁰ 15 U.S.C. § 1692a(2).

with subscribers to wireless numbers “in connection with an existing debt” under the TCPA.²¹ The Commission has no authority to circumvent this Congressional prohibition by exercising jurisdiction to regulate communications by telephone about debts, including by promulgating and applying rules that restrict or prohibit telephonic communications by debt collectors with debtors. Congress has vested jurisdiction in the FTC with respect to the collection of debts, and the Commission is preempted from promulgating rules on this subject matter.

V. The Proposed Rule Violates the Statutory Mandate Directing the Commission to Maximize the Consistency of its Rule with 16 C.F.R. § 310.4(b).

The Commission and the FTC are required by Congress to remove inconsistencies in the overall Federal regulatory scheme for telemarketing and assure a more direct pathway to compliance for those regulated entities. The Do-Not-Call Implementation Act, 15 U.S.C. § 6101 *et seq.*, specifically requires the Commission to modify its rules to ensure that they are consistent with those promulgated by the FTC. The Do-Not-Call statute states:

Not later than 180 days after the date of enactment of this Act, the Federal Communications Commission shall issue a final rule pursuant to the rulemaking proceeding that in began on September 18, 2002, under the Telephone Consumer Protection Act (47 U.S.C. 227 *et seq.*). In issuing the such rule, **the Federal Communications Commission shall consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission (16 C.F.R. 310.4(b)).**

²¹ Declaratory Ruling, FCC 07-232 at ¶ 1 (rel. Jan 4, 2008).

15 U.S.C. § 6101 (section 3) (emphasis added). *See also* FCC-FTC Memorandum of Understanding: Telemarketing Enforcement (Dec. 2003) (emphasis added) (directing “the FCC to adopt, after consultation and coordination with the FTC, complementary rules that *maximize consistency with the rules promulgated by the FTC*”).

The Commission’s rules must be consistent with the FTC’s rules codified at 16 C.F.R. § 310.4(b). Those rules make it an abusive telemarketing act or practice and a violation of the TSR for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, a pattern of calls that causes “any” (wireless or wireline) to ring repeatedly or continuously with the intent to annoy, abuse, or harass, as well as to initiate any outbound telephone call to a person in violation of the do-not-call registry or without express written consent of the called party. 16 C.F.R. § 310.4(b). In this same section of the TSR, the FTC regulates the use of predictive dialers, to which the NPRM now seeks to harmonize its TCPA regulations.²² As it relates to the financial services industry, the FTC’s rule specifically exempts calls initiated to recover debts from the TSR. This exemption includes calls to wireless devices, wireline calls, and calls initiated with predictive dialers. According to the FTC, “debt collection and market research activities are not covered by the Rule because they are not ‘telemarketing’—i.e., they

²² *Telemarketing Sales Rule*, *supra* note 5 at 4,641 (col. 3) (regulating the use of predictive dialers under the TSR’s prohibition of abusive patterns of calls and implementing call abandonment regulations).

are not calls made ‘to induce the purchase of goods or services.’”²³ Therefore, in the view of the FTC, debt communication calls are exempt from the Telemarketing Act.

The Commission initiated this rulemaking with the purpose of fulfilling its statutory obligation to maximize the consistency of its rules to those promulgated by the FTC in 16 C.F.R. § 310.4(b). Under 16 C.F.R. § 310.4(b), the debt communication calls initiated with a predictive dialer are exempt from the TSR. The Commission, in contrast, continues to assert authority over these calls and fully regulate them under the TCPA even though the FTC has refused to do so. Consistent with the statutory requirement, the Commission should use the present rulemaking to harmonize its rules with those of the FTC, which unequivocally exempt calls initiated with a predictive dialer for the specific purpose of recovering debts.

VI. Similar to the Exemption for Healthcare Related Calls, Debt Collection Calls Are Subject to Extensive Laws that Substantially Reduce the Risk of Abusive Practices and Promote Consumer and Privacy Protections.

Invoking its authority under the TCPA to create exemptions from the TCPA ban on artificial and prerecorded messages to residential lines for non-commercial calls or commercial calls that do not adversely affect privacy rights and do not transmit unsolicited advertisements, the Commission proposes to exempt healthcare calls governed by HIPAA from the prohibition against delivering artificial or prerecorded messages to residential telephones without the prior

²³ See *id.*, *supra* note 5 at 4663 (col. 3)-4664 (col. 1) n.1020.

express consent of the called party. It proposes to make this amendment for two reasons. First, the FTC has exempted healthcare calls from the TSR because the recipients of these calls are unlikely to provide express written consent to receive them. Second, the FTC concluded that communications between healthcare-related entities and their customers “already are subject to extensive federal regulations, some of which directly address the making of telephone solicitations to patients, and therefore there is little risk that an exemption would lead to abusive practices.”

ACA supports this exemption and the rationale behind it. Fundamentally, this proposed exemption seeks to exempt healthcare-related calls for the purpose of recovering healthcare debts. Under HIPAA’s Privacy Rule, the payment functions of a business associate of a covered entity are regulated by HIPAA and include communicating with patients to recover payment for healthcare debts. Many covered entities outsource this function to ACA members who specialize in the practice of recovering healthcare receivables in compliance with the Privacy Rule and other HIPAA requirements. ACA’s *Healthcare Collection, Servicing and Debt Purchasing Practices: Statement of Principles and Guidelines (Healthcare Guidelines)* generally addresses the compliance standards ACA holds its members to in the process of collecting healthcare receivables.²⁴

²⁴ ACA International, *Healthcare Collection, Servicing and Debt Purchasing Practices: Statement of Principles and Guidelines* (Feb. 2007), available at

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- Service all healthcare accounts using a process that is consistent with the expectations of their healthcare provider clients.
- Collect patient accounts in a fair, consistent manner that reflects the public's high expectations of healthcare providers and the collection agencies and debt purchasers who communicate with their patients.
- When responding to a patient's request for information about the bill, account or past due debt, do so in a manner designed to help the patient fully understand his or her payment obligation and in accordance with applicable law or regulation.
- Encourage that due diligence is performed by the healthcare provider, the servicer of the accounts or the debt buyer of the accounts in an effort to promote solid business relationships and a good reputation for all.
- Perform services or payment operations in connection with the collection, servicing or purchase of healthcare debt subject to a written agreement signed by the healthcare provider and the collection agency or debt purchaser.
- Perform services or payment operations upon receipt of information necessary to comply with all applicable laws, regulations, mandates and duties as

<http://www.acainternational.org/images/10281/healthcareguidingprinciples.pdf>.

prescribed by the ACA Code of Ethics and Professional Responsibility and Code of Operations.

- Resell a healthcare receivable only with the express permission of the healthcare provider as provided in the debt sale agreement.
- Communicate regularly with the healthcare provider's designated representative having authority and oversight over the collection or sale of healthcare receivables.
- Establish communication and appropriate information sharing protocols with the healthcare provider during the term of the service agreement and for a reasonable period of time following termination of the service or debt sale agreement.
- Abide by and conduct all services in accordance with the Fair Debt Collection Practices Act, the Health Insurance Portability and Accountability Act, the Fair Credit Reporting Act, charity care program requirements and healthcare and consumer protection laws and mandates, where applicable.
- Adhere to local and state licensing and bond requirements in the jurisdictions where such are required and provide license and bond documentation upon the request of the healthcare provider.

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- Maintain a quality assurance program designed, adopted or developed by the individual member to promote compliance with these Guiding Principles and all collection servicing, debt sale agreements and business associate contract requirements.
- Provide initial and ongoing training and supervision of employees to encourage performance of their duties in a professional and ethical manner.
- Establish a Code of Conduct, signed by all employees that supports these Guiding Principles and the needs of the healthcare community.
- Actively promote and encourage the highest level of integrity within the healthcare receivables management industry.

The Commission should adopt this exemption and include in it calls to communicate with consumers about debts, not solely healthcare-related debts. The reasoning behind this exemption applies to all calls made for the purpose of recovering debts. First, just like with healthcare calls, obtaining such consent from consumers before communicating with them about their debts is highly unlikely. In the experience of the thousands of ACA members, consumers typically do not volunteer prior express written consent to be called by a debt collector. Therefore, as supported by the record of comments filed by consumers in response to ACA's Petition for a Declaratory Ruling on the use of predictive dialers, it is unreasonable

for the Commission to conclude that consumers will offer prior express written consent to receive artificial or prerecorded debt collection messages at their residence.

Second, similar to the healthcare-related calls, there are already an extensive number of federal and state consumer protection laws that govern the manner, method, and content of communications with debtors. These laws, some of which are summarized below, make the risk of abusive practices with the use of prerecorded messages highly remote, and further empower the FTC, state agencies, and consumers to enforce law violations.

Primary among these laws is the FDCPA, 15 U.S.C. § 1692 *et seq.*, which governs all communications regarding the collection of consumer debts.²⁵ It is a strict liability statute that subjects violators to administrative enforcement and civil liability, including class action exposure. Thirty years ago Congress enacted the FDCPA in an effort to legislate the fair treatment of consumers when debt collectors engage in conduct essential to the vitality and health of the economy, namely, the recovery of debts. Among the stated purposes of the FDCPA, as described by Congress, is the elimination of “abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collectors.” 15 U.S.C. § 1692(e).

²⁵ The FDCPA broadly defines communication as “the conveying of information regarding a debt directly or indirectly through any medium” to encompass every possible

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The statute contains provisions that prescribe and prohibit specific conduct when communicating with consumers. As required conduct, a debt collector must provide a consumer with notice of certain rights afforded to the consumer under the FDCPA. The FTC has construed this requirement such that if the debt collector's first communication with the consumer is oral (e.g., a telephone conversation), the debt collector may make the required disclosure at that time and the debt collector need not send a written notice. If such disclosure is made orally, the collector must be able to document that such disclosure was provided if the collector is ever asked to prove that the disclosure was, in fact, made. If the notice is not included in the initial communication with the consumer, it must be provided in writing within five days after the initial communication with the consumer. This written notice must identify (a) the amount of the debt; (b) the name of the creditor to whom the debt is owed; (c) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector; (d) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of the judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and (e) a statement that, upon the consumer's written request within the thirty-day period, the debt

means of communication regarding a debt. 15 U.S.C. § 1692a(2).

collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

Other FDCPA provisions prohibit the use of any false, deceptive, or misleading representation or means in connection with the collection of any debt, which necessarily includes all communications by telephone.²⁶ The sixteen specifically enumerated false representations include the affirmative requirement that a debt collection “disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral [by telephone], in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.”²⁷ With respect to the use of telephones to communicate with consumers, the FDCPA requires the meaningful disclosure of the debt collector’s identity, the failure of which is considered harassment or abuse in connection with the collection of a debt.²⁸

The FDCPA additionally authorizes consumers can require a collector to cease communications. Under § 805 of the FDCPA, consumers may send a debt collector a notice to cease communications in connection with the collection of a debt, or the consumer may send a notice that he or she refuses to pay a debt. In both cases, the debt collector may not

²⁶ 15 U.S.C. § 1692e.

²⁷ 15 U.S.C. § 1692e(11).

communicate further with the consumer with respect to the debt in question, other than to: (1) advise the consumer that the debt collector's further efforts are being terminated; (2) notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or (3) where applicable, notify the consumer that the debt collector or creditor intends to invoke a specified remedy. This includes telephone communications.

The FDCPA also restricts the communication of information concerning a debt to anyone, other than the consumer, without the consumer's consent. Under the FDCPA, the term "consumer" includes the actual consumer, the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator. Section 805(b) of the FDCPA states that communications with a third party concerning a consumer's debt is prohibited.

Taken together, these and other provisions under the FDCPA offer robust consumer protections embedded in the statute that apply to all communications in furtherance of debt collection, including the use of telephones. The restrictions govern the content, timing, and audience of the communications, and authorize consumers to invoke their rights to stop all future communications by telephone or otherwise. Significantly, consumers, in addition FTC, have authority to enforce alleged violations, including statutory and actual damages and class actions.

²⁸ 15 U.S.C. § 1692d(6).

Depending on the type of accounts subject to collection, debt collectors and/or the credit grantors also may have compliance obligations under the following illustrative list of Federal laws in addition to the FDCPA:

- The Higher Education Act of 1971, Pub. L. No. 89-329;
- The Bank Holding Company Act, 12 U.S.C. §§ 1841 *et seq.*;
- The Consumer Leasing Act, 15 U.S.C. §§ 1667 *et seq.*;
- The Electronic Fund Transfer Act, 12 U.S.C. §§ 222 *et seq.*;
- The Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et seq.*;
- The Fair Credit Billing Act, 15 U.S.C. §§ 1666 *et seq.*;
- The Fair Credit and Charge Card Disclosure Act, 15 U.S.C. §§ 1601 *et seq.*;
- The Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*;
- The Federal Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*;
- The Graham-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*;
- The Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320d-2 *et seq.*, including the Security Rule, Privacy Rule, and Transaction and Code Set Standards promulgated by the Department of Health and Human Services;
- The Home Equity Loan Consumer Protection Act, 15 U.S.C. §§ 1637 *et seq.*;
- The Uniting and Strengthening America by Providing Appropriate Tools

Required to Intercept and Obstruct Terrorism , P.L. 107-56, 115 Stat. 272;

- The Right to Financial Privacy Act, 12 U.S.C. §§ 3401 *et seq.*;
- Telemarketing Sales Rule, 16 C.F.R. §§ 310.1 *et seq.*;
- Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.*;
- Regulation E, 12 C.F.R. § 205.1 *et seq.*;
- Regulation J, 12 C.F.R. § 210.1 *et seq.*;
- Regulation M, 12 C.F.R. §§ 213 *et seq.*; and
- Regulation Z, 12 C.F.R. § 226 *et seq.*

Each state has enacted laws and regulations supplementing the FDCPA, including licensing and registrations requirements.²⁹ There is little uniformity in these laws. Indeed, ACA publishes a 1,000 page survey of state law requirements entitled *Guide to State Collection Laws & Practices* covering different topics for each state (state consumer collection requirements, garnishment exemptions, FDCPA compliance, licensing fees, statutes of limitation, “Mini–Miranda” and validation notice information, bond requirements, trust accounts, resident office requirements, exemptions for out-of-state entities, and penalties for

²⁹ The FDCPA pre-empts state laws to the extent that those laws are inconsistent with any Federal provision, and then only to the extent of the inconsistency. A state law is not inconsistent if it gives consumers greater protection than the FDCPA.

collecting without a license, among other topics).³⁰

As the preceding demonstrates, the FDCPA and an extensive number of other federal and state consumer protection laws that govern the manner, method, and content of communications with debtors. These laws make the risk of abusive practices with the use of prerecorded messages highly remote in the context of debt communication calls. Further regulation by the Commission is duplicative and unnecessary. For these reasons, the Commission should expand the prerecorded message exemption to include all collection calls, not just healthcare-related calls (a subset of which includes calls to recover healthcare debts).

VII. Applying the Proposed Rule to Calls to Recover Debts Initiated by Predictive Dialers Conflicts With The Plain Language Of The TCPA.

The Proposed Rule cites subsection 227(b)(1)(A) of the TCPA as authorizing the Commission to prohibit the use of predictive dialers as a category of “automatic telephone dialing equipment” used to initiate a call to cellular phone services without prior express consent. The Commission seeks comment on its proposal to construe the statute as requiring prior express written consent to make such calls, deriving from conclusions it reached in 2003 that predictive dialers are “automatic telephone dialing systems” under the TCPA. ACA

³⁰ ACA International, *Guide to State Collection Laws & Practices*, available at http://www.acainternational.org/default.aspx?cid=866&ref=http://products.acainternational.org/eSeries2005/source/Orders/index.cfm^task=3*category=COMPLIANCE*product_type=sale s*sku=21170*findspec=Compliance*continue=1*search_type=find.

strongly opposes this proposal for the following reasons.

A. The TCPA and Legislative History Clearly Contemplate Oral Consent.

The Commission should adopt a construction that is consistent with the legislative history. Nothing in the TCPA or the legislative history reflects Congress's intent to limit the type of consent accepted under this statute to written consent. To the contrary, the legislative history repeatedly and plainly evidences an intention that prior express consent can be oral.³¹ Further, there is no discretion that was conferred to the Commission to restrict consent to only written situations. The discretion given to the Commission generally was in the nature of reducing the statutory requirements and exempt conduct from compliance, *e.g.*, where there are no privacy issues. Discretion to engage in exemption decisions does not, however, translate to discretion to substantively re-write the Congressional mandate as memorialized in the unambiguous legislative history and, in effect, the type of consent necessary for compliance under this statute to written consent. This type of fundamental change is so patently inconsistent with the clear intent of Congress, that it would not withstand *Chevron* analysis. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

³¹ NPRM, *supra* note 2 at n.55.

B. Applying Written Consent to “All Calls” Would Vastly Exceed the Scope of the FTC’s Rule.

The Commission should not adopt a construction that is far more expansive than the FTC’s amendments promulgated in 2008. The FTC’s prior express written consent requirements when using predictive dialers resulting in prerecorded messages applies to telemarketers and sellers. Calls to recover debts are not telemarketing calls, as they do not contain unsolicited advertisements or solicitations. And yet, the Commission proposes to require all calls using any autodialer or predictive dialer technology under subsection 227(b)(1)(A) to first obtain prior express written consent of the called party—even those that do not fall under the definition of telemarketing. Certainly, this does not achieve maximum consistency with the Commission’s TSR, but actually vastly exceeds the TSR amendments from 2008.

C. The Proposed Rule Would Overwrite ACA’s 2008 Declaratory Ruling.

The Commission should not adopt a construction that would eviscerate the 2008 Declaratory Ruling issued to ACA. That ruling held that prior express consent need not be limited to written consent. Instead, oral consent is acceptable provided that a wireless number was provided by a consumer to a creditor during the transaction that resulted in the debt owed and adequately memorialized by the creditor. This Declaratory Ruling, which was issued by

the Commission to construe the meaning of prior express consent, is not even mentioned in the NPRM.

D. The Proposed Rule is Based Upon a Flawed Construction of the TCPA That Improperly Regulates Predictive Dialer Calls to Communicate with Consumers.

In 2003, the Commission wrongly construed the TCPA definition of “automatic telephone dialing system” to include predictive dialers. This flawed construction is at the foundation of the Proposed Rule, and it is inconsistent with the plain language of the TCPA and more than a decade of Commission rulings pre-dating the 2003 amendments.³² The administrative record contains numerous Commission statements and findings evidencing a decision not to regulate autodialed calls by creditors and collectors to cellular numbers when made for the purpose of attempting to recover payment for goods or services. For more than a decade, the Commission has stated that calls by or on behalf of creditors to recover payments

³² 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 will 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) [hereinafter “TCPA NPRM”]. That “tentative” conclusion was adopted in the final report and order. *See generally* 1992 TCPA Order, *supra* note 7 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.”).

are not subject to the TCPA prohibition on autodialer calls to wireless numbers. According to the Commission, the basis for this conclusion was 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.³³ The Commission also has stated that such calls are made with the prior express consent of the called party.³⁴ Examples of these

³³ The established business relationship between a creditor and a consumer extends to third party collection agencies. The TCPA regulations extended the relationship to affiliated entities where the "subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate." 47 C.F.R. § 64.1200(f)(3)(ii). In addition, the Commission's 1992 TCPA Order stated that "[w]hether placed by or on behalf of the creditor, prerecorded debt collection calls would be exempt from the 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 and unsolicited advertisement." See 1992 TCPA Order, *supra* note 7 at ¶ 39 (footnotes omitted). See also TCPA NPRM, *supra* note 28 at ¶ 16 ("In addition, where a company contracts with another company for debt collection services, the collection company acts on behalf of the company holding the debt. Under such circumstances the collection company becomes a party to the relationship between the company holding the debt and the called party and the 'business relationship' exemption would apply to allow an auto dialer call to former or current clientele.").

³⁴ See 1992 TCPA Order, *supra* note 7 at ¶ 31 ("[i]f a call is otherwise subject to the prohibitions of § 64.1200, persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary"); *id.* at ¶ 37 ("[c]ommenters concur that debt collection calls are exempt as calls to parties with whom the caller has a prior or existing business relationship, and further argue that *debtors have given prior express consent to such calls by incurring a debt.*") (emphasis added).

statements and finding in the administrative record appear below:

1. *The 1992 TCPA Notice of Proposed Rulemaking*

The Commission's 1992 notice of proposed rulemaking ("NPRM") stated that the use of an autodialer to attempt to recover an outstanding payment obligation is not intended to be prohibited by the statute and, in fact, has beneficial consumer value:

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.* Although debt collection calls do not offer products or services, they are indeed commercial in nature and do not fall under the proposed exemption for non-commercial calls.³⁵

2. *The 1992 TCPA Order*

The *1992 TCPA Order* by the Commission adopted the NPRM statements that creditors and collectors non-telemarketing use of autodialers is not subject to the TCPA. Specifically, the Commission stated:

³⁵ TCPA NPRM, *supra* note 28 at ¶ 15 (emphasis added).

Upon consideration of these comments, we conclude that an express exemption from the TCPA's prohibitions for debt collection calls is unnecessary because such calls are adequately covered by exemptions we are adopting here for commercial calls which do not transmit an unsolicited advertisement and for established business relationships. As proposed in the NPRM, these exemptions would also apply where a third party places a debt collection call on behalf of the company holding the debt. 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. With respect to concerns regarding compliance with both the FDCPA and our rules in prerecorded message calls, *we emphasize that the identification requirements will not apply to debt collection calls because such calls are not autodialer calls (i.e., dialed using a random or sequential number generator) and hence are not subject to the identification requirements for prerecorded messages in 64.1200(e)(4) of our rules.*³⁶

3. *The 1995 Reconsideration Order*

Three years later, the FCC issued its Reconsideration Order and again confirmed that calls to wireless numbers seeking to recover payments are not subject to the prohibitions on the use of autodialers. In relevant part, the Commission stated as follows:

The TCPA requires that calls dialed to numbers generated randomly or in sequence (autodialed) and delivered by artificial or prerecorded voice message must identify the caller ("business, individual, or other entity") and give a telephone number or address at which the caller can be reached. *Household correctly points out that debt collection calls are not directed to randomly or sequentially generated telephone numbers, but instead are directed to the specifically programmed contact numbers for debtors.* As we stated in our

³⁶ See 1992 TCPA Order, *supra* note 7 at ¶ 39 (footnotes omitted, emphasis added).

Report and Order, such debt collection calls do not require an identification message. We thus clarify that the rules do not require that debt collection employees give the names of their employers in a prerecorded message, which disclosure might otherwise reveal the purpose of the call to persons other than the debtor.³⁷

Also, in 1995 Reconsideration Order, the Commission clarified that calls to recover payment are not “telephone solicitations” or “unsolicited advertisements” as those terms are defined in the TCPA.³⁸ More recently, the FCC again stated that “debt collection calls constitute neither telephone solicitations nor include unsolicited advertisements.”³⁹

4. The 2003 TCPA Order

In the 2003 TCPA Order, the Commission espoused an unreasonably broad and essentially boundless interpretation of the autodialer restriction, for which there is no statutory support. This interpretation—which is now contained in the Proposed Rule—was adopted by the Commission as a result of telemarketers using predictive dialers, which rely on lists of

³⁷ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Reconsideration Order, 10 FCC Rcd 12391, ¶ 19 (1995) (footnotes omitted, emphasis added) [hereinafter “1995 Reconsideration Order”].

³⁸ *See, e.g., id.* at ¶ 17 (“We have specifically noted that ‘prerecorded debt collection calls [are] exempt from the prohibitions on [prerecorded] calls to residences as . . . commercial calls . . . which do not transmit an unsolicited advertisement.’”).

³⁹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, at ¶ 113 n.358 (2003) [hereinafter 2003 TCPA Order].

numbers that are automatically dialed. Telemarketers used predictive dialers in an attempt to circumvent the autodialer restriction. They argued that predictive dialers were not randomly or sequentially dialing consumers and, therefore, allegedly not bound by the autodialer restriction. As the Commission noted in 2003, predictive dialers are capable of estimating the amount of time it takes the average call to be picked up and the amount of time until a telemarketer will be able to take the call. Although they do not dial randomly or sequentially generated numbers, “when paired with certain software, [they have] the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers.”⁴⁰

To curb telemarketers’ end-run around the autodialer restriction, the Commission in 2003 broadened its construction of what constitutes autodialers by including predictive dialers.

The key statutory language 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

(B) to dial such numbers.⁴¹

⁴⁰ *Id.* at ¶ 131.

⁴¹ 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*

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.⁴²

Significantly, the statutory and regulatory language applicable to autodialers remained identical before and after the 2003 amendments. What changed was the Commission’s interpretation of the scope of the regulation, as follows:

[I]n order to be considered an “automatic telephone dialing system,” the

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).

⁴² See TCPA NPRM, *supra* note 28 at ¶ 37 (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).

equipment need only have the “capacity to store or produce telephone numbers.” It is clear from the legislative history that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies Therefore, the Commission finds that a predictive dialer falls within the meaning and statutory definition of “automated telephone dialing equipment” and the intent of Congress.⁴³

The Commission’s statement in 2003 did not alter the existing regulatory language. Nor did the Commission expressly state that it was reversing the clear findings from 1992 and 1995 that the autodialer restriction does not apply to creditors and collectors seeking to recover payments from consumers.

In 2008, the Commission issued a Declaratory Ruling to ACA in which it again concluded that a predictive dialer falls within the meaning and definition of autodialer such that using the equipment to contact a wireless number violates the TCPA absent the prior express consent of the called party. Consent was determined to be given where the subscriber had previously given his or her number to a creditor, whether written or orally communicated and memorialized by the creditor. In reaching this conclusion, the Commission asserted that section 227(b)(1)(A) prohibits predictive dialing of emergency numbers, healthcare facilities, and wireless devices where the person is charged for the call.⁴⁴ Citing the 2003 TCPA Order,

⁴³ *Id.* at ¶ 133.

⁴⁴ Notwithstanding the Commission’s invocation of calls to health care facilities as prohibited by the TCPA due to the potential for privacy invasion, it nevertheless seeks to exempt all healthcare-related calls in this rulemaking to make its rule more consistent with the

the Commission stated that it would be inconsistent with the TCPA and the intent of Congress to not regulate calls when predictive dialers are paired with a database of debtors with established business relationships credit grantors, but regulate the calls when the dialer is used to randomly and sequentially generate numbers to call (e.g., not from a database of known customers).

The Proposed Rule continues to espouse 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.

The cornerstone of the Commission's 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 at some point in the future.⁴⁵ If modified, the Commission opines, the dialer, which has no present "capacity" might gain the "capacity"

FTC's TSR. Autodialed calls to health care facilities are no more permissible under the TCPA than calls to wireless devices.

⁴⁵ 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. *See* 2003 TCPA Order, *supra* note 35 at ¶ 131.

to store or produce randomly or sequentially generated numbers and, therefore, it would be subject to the ban.⁴⁶ 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 fully regulated 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. Predictive dialers in use today *do not* have the capacity to randomly or sequentially generate telephone numbers using a number generator without fundamentally changing the architecture of the hardware and software. This fact is substantiated by sworn affidavits of the companies that manufacture predictive dialers that ACA will place on the public record. Indeed, as the Commission has acknowledged, modification of predictive dialers with separate software to generate random or sequential numbers is a practice long since abandoned.⁴⁷ As a result, the entire premise of regulating predictive dialers under the Congressionally-defined “automatic telephone dialing system” is hinged on a distinction without any modern application. Yet,

⁴⁶ *Id.*

⁴⁷ *Id.* 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

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.

The Commission's interpretation of the statute and regulation lacks any temporal restriction as to "capacity." The intent of Congress was to address the use of automatic telephone dialing systems that have a present capacity to store or produce telephone numbers using a random or sequential number generator. Absent any present capacity in a predictive dialer, the device is not an automatic telephone dialing system.

However, the Commission has gone much further to construe "capacity" as any past, present, or future functionality of the device, even if modified by other software. The 2003 TCPA Order states:

The record demonstrates 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 . . . The principal feature of predictive dialing software is a timing function, not a number storage or generation.

This construction transforms all electronic devices (including modems, cell phones, smart phones, PDAs, and all wireless devices) into automatic telephone dialing systems because one could possibly modify the hardware or add software in the future to make it store or produce

by randomly or sequentially creating and dialing numbers.

and dial randomly or sequentially generated numbers. The outcome, as we know, is to ban the use of predictive dialers today based on the mere potential that someone might alter the architecture of the device tomorrow to impart the capacity to randomly or sequentially generate telephone numbers.

It is more consistent with the intent of Congress, as well as legal and practical applications of the term “capacity,” to not regulate future conduct, but do so when the capacity is realized. For example, the laws of every State require one to have “capacity” to enter into a binding contract. This means, for example, that the signatory party cannot be a minor nor can he or she lack the mental ability to contract. If a signatory party lacks present capacity at the time of contracting because he or she is underage or mentally impaired, a contract is not enforceable merely because the signatory party will turn the age of majority tomorrow or his or her will have an improved mental state. To conclude otherwise would lead to unacceptable outcomes, such as a minor being permitted to drink at age 17 because one day she or he will be 21 and realize his capacity to comply with the law. In other contexts, capacity is defined as “the potential or suitability for holding, storing, or accommodating <a large seating capacity>.” Merriam-Webster Dictionary. So, for example, a baseball stadium has a stated seating capacity. More seats could be added to the stadium next year, but that does not mean that the capacity this season is the same as it will be next year.

These examples illustrate that “capacity” as accepted in legal and everyday contexts is a measurement of present abilities, and specifically does not allow one to factor into the equation future change circumstances that confer additional or new abilities. And yet, the Commission’s regulatory interpretation of “capacity” for predictive dialers is just the opposite. It asserts that a device lacking a present ability to store or to produce numbers that are randomly or sequentially generated by a number generator nevertheless is regulated because it can be modified in the future, including adding software, to give it the capacity to do so.

This misreading of the statute fails to comply with the Administrative Procedures Act (“APA”) as much today as it did in 2003. This interpretation is limitless and does not carry out express Congressional intent. Every computer, modem,⁴⁸ 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.

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 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

⁴⁸ See, e.g., *id.* at ¶ 130 (urging clarification that modems used for non-telemarketing purposes are not autodialers).

consumer value:⁴⁹

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.***⁵⁰

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.⁵¹ This outcome was consistent with the authority given to the Commission by Congress

⁴⁹ 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.

⁵⁰ 1992 TCPA Order, *supra* note 7 at ¶ 15 (emphasis added); see *Petition*, at 14-20.

⁵¹ *Id.* 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") (emphasis added).

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”⁵²

In 2003, the Commission adopted a much broader and unsupportable 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.”⁵³ 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 statutory definition of “automated telephone dialing equipment” and the intent

⁵² Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(13), 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227) 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.

⁵³ 2003 TCPA Order, *supra* note 35 at ¶ 131 (emphasis in original).

of Congress.⁵⁴

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

i. Only Random Or Sequential Number Generation Is Regulated.

The statute expressly limited the delegation of congressional authority to random or sequentially generated telephone numbers, as the definition applies to “telephone numbers to be called[] using a random or sequential number generator” 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, for example:

- The statutory definition contemplates autodialing equipment that either stores

⁵⁴ *Id.* at ¶ 132-133.

or produces numbers.⁵⁵

- 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. . . .”⁵⁶
- The basic function of such equipment, however, has not changed – the *capacity* to dial numbers without human intervention.⁵⁷
- 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.⁵⁸

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 false impression that “the equipment need only have the “*capacity* to store or produce telephone numbers” in order to be covered by the TCPA.⁵⁹ 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

⁵⁵ *Id.* at 132.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

“to bring into existence.”⁶⁰ 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.⁶¹ 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

⁶⁰ WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (1985) (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) (stating that words appearing in a statute are to be giving their ordinary, plain meaning unless Congress defined the words otherwise).

⁶¹ See S. REP. NO. 102-178, reprinted in 1991 U.S.C.C.A.N. 1968, 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. NO. 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.”).

of the statutory scheme, the Commission adopted an unsupportable interpretation that turned a blind eye to the “random or sequential generator” qualification.⁶² 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.⁶³

⁶² 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, *supra* note 35 at ¶ 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, § 2(13), 105 Stat. 2394 (codified at 47 U.S.C. § 227) (“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*.

⁶³ 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.

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

By focusing on the “capacity” of predictive dialers to be potentially upgraded with separate software imparting a random or sequential number generation capacity, the Commission failed to adhere to the statutory language. The statute requires that the “equipment” itself have the capacity to store or produce telephone numbers using a random or sequential number generator. Predictive dialers, as “equipment” have no inherent capacity to store or produce randomly or sequentially generated telephone numbers. 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. Because predictive dialers have no capacity to perform the functions defined in the TCPA without substantively altering the functionality of the dialers with separate software to confer this capacity, there can be no question that predictive dialers are not properly construed to be an “automatic telephone dialing system” under the statute.

iii. 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 a 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.

VIII. The Proposed Rule Violates the Administrative Procedures Act.

As a consequence of the incorrect interpretation of predictive dialers, which are swept up in the Proposed Rule, the Commission’s interpretation violates the Administrative Procedures Act, 5 U.S.C. § 706.⁶⁴ An administrative agency’s authority is limited to only those powers entrusted to it by Congress.⁶⁵ “The FCC, like other federal agencies, ‘literally has no power to act . . . unless and until Congress confers power upon it.’”⁶⁶ 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

⁶⁴ See STEIN, MITCHELL & MUSE, ADMINISTRATIVE LAW § 51.01[1].

⁶⁵ *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).

⁶⁶ *American Library Ass’n.*, 406 F.3d at 698 (citing *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986)).

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 or equipment has no present capacity to generate and dial such 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.⁶⁷ If Congress speaks directly on the question at issue and its intent is clear, that is the end of the inquiry.⁶⁸ If the statute is silent or ambiguous with respect to the question at issue, the analysis is twofold: whether the agency's answer is based on a permissible construction of the statute and whether it is reasonable.⁶⁹ 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."⁷⁰ Nor is deference available if the administrative interpretation conflicts with the plain

⁶⁷ 467 U.S. 837 (1984).

⁶⁸ *Id.* at 842-45. See *BedRoc Ltd., LLC.*, 541 U.S. at 183 ("the preeminent cannon 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)).

⁶⁹ *Id.*

⁷⁰ *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

language of the statute.⁷¹

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 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.⁷²

An administrative agency's long-standing, reasonable interpretation of a statute is given weight in determining the meaning of a statutory provision.⁷³

Applied here, for more than a decade, the Commission correctly construed the statute

Commission's assertion of the jurisdiction over non-random or non-sequentially generated numbers is unconstitutional.

⁷¹ 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).

⁷² *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979).

⁷³ *International Bhd. Of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Daniel*, 439 U.S. 551, 556 n.20 (1970).

and regulation as not applying to calls made by or on behalf of creditors to communicate information to consumers about their debts. This is because, among other reasons, the Commission concluded that the calls were not random or sequentially generated.⁷⁴ The relevant statutory and regulatory provisions have not changed. This long-standing interpretation was consistent with the text of the TCPA that 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 debt payments violates the APA because it is inconsistent with the plain language of the statute, its origin, or its purpose and it usurps power not delegated to it by Congress.

IX. Congress Did Not Intend The Autodialer Provision To Apply To Non-Telemarketing Calls To Recover Payments.

Congress did not intend to prohibit the use of autodialers and predictive dialers by or on behalf of creditors when recovering payments for goods and services received by consumers.⁷⁵ The intent of Congress was to curb the practices of telemarketers, which by 1990 had grown to such an extent so as to invade the residential privacy of consumers by pervasive telephone solicitations and unsolicited advertisements. However, Congress recognized that

⁷⁴ See 1995 Reconsideration Order, *supra* note 33 at ¶ 19.

⁷⁵ *Petition* at 12-14.

calls to consumers to notify them of overdue bills or to attempt recovery of payments are not telemarketing, do not infringe of privacy rights, and in fact serve beneficial purposes for consumers and creditors alike.

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.”⁷⁶ 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

⁷⁶ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, §§ 2(11) and 2(12), 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227) (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*, 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.

purposes.”⁷⁷

The legislative history of the TCPA contains numerous statements from Members of Congress singling out the non-telemarketing conduct of creditors and collectors as *not a target* of the legislation. For example, former New York Representative Norman Lent stated:

[The TCPA] explicitly recognizes that there are certain classes and categories of calls that consumers do not mind, and in fact would probably like to receive. *Calls informing a consumer that a bill is overdue, or a previously unstocked item is now available at a store are clearly not burdensome, and should not be prohibited.*⁷⁸

Similarly, former Senator Fritz Hollings noted that “[s]ome debt collection agencies use automated or prerecorded messages for outstanding bills. The FCC should consider whether these types of calls should be exempted and under what conditions such an exemption should be granted either as a noncommercial call or as a category of calls that does not invade the privacy rights of consumers.”⁷⁹

⁷⁷ 137 CONG. REC. S16,204-01, S10,206 (daily ed. Nov. 7, 1991) (statement of 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.”).

⁷⁸ 137 CONG. REC. H11,307-01, at H11,312 (daily ed. Nov. 26, 1991) (statement of Rep. Norman Lent) (emphasis added).

⁷⁹ 137 CONG. REC. S18,781-02, S18784 (daily ed. Nov. 27, 1991) (statement of Sen. Fritz Hollings) (emphasis added).

Congress gave the Commission the authority to carve out exceptions for calls that did not invade privacy rights and noted, in particular, that collection calls fall into this category. For example, Massachusetts Representative Edward Markey described the TCPA as allowing the Commission “to exempt, by rule or order, classes or categories of calls made for commercial purposes that do not ‘adversely affect the privacy rights’ that this section of the bill is intended to protect and, that ‘do not include the transmission of any unsolicited advertisement.’ *An example of such a use may be to leave messages with consumers to call a debt collection agency to discuss their student loan or to notify a consumer that a product they have ordered is ready to be picked up at the store.*”⁸⁰

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 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, (5) are made pursuant to an established business relationship and with the prior express consent of the called party, and (6) are not intended to

⁸⁰ 137 CONG. REC. H-11,307-01, H11,310 (daily ed. Nov. 26, 1991) (statement of Rep. Edward Markey) (emphasis added).

be prohibited by the TCPA.⁸¹

X. The Proposed Rule Will Severely Harm Public Debt Recovery Programs.

ACA members make substantial contributions to the health of the economy. The significant harm of the Proposed Rule is not limited to private industry. In fact, the Federal government, as the largest domestic creditor, will be substantially harmed, as will State governments.

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 1996.⁸² 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

⁸¹ The Commission itself consistently characterizes the TCPA as a telemarketing statute. *See, e.g.*, TCPA NPRM, *supra* note 28 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).

⁸² 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*.

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by protecting the financial interests of the American taxpayer.”⁸³ 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.”⁸⁴

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 specifically recognized the benefits conferred on the treasury as a consequence of these businesses: “[m]any states and other federal agencies already use private collectors, with encouraging results.”⁸⁵ 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 of dollars annually owed to the government would be far more difficult without the use of this basic technology.

⁸³ 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>.

⁸⁴ See http://fms.treas.gov/news/factsheets/delinquent_debtcollection_2005.html.

⁸⁵ The Budget for FY 2004 at 239, available at

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.⁸⁶ The Commission collects funds from regulated entities which then are applied to its expenses. These funds include application processing fees, which are deposited directly into the United States Treasury, regulatory fees, and spectrum auction fees. The fees collected are used to offset the Commission's appropriations. The Commission has generated 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. 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.

XI. Regulating Predictive Dialers that Lack Present Capacity is Bad Policy.

Regulating the use of predictive dialers under the TCPA's autodialer definition is bad

<http://w3.access.gpo.gov/usbudget/fy2004/pdf/>.

⁸⁶ 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.

policy where the dialer lacks any present capacity to store or produce and dial telephone numbers using a random or sequential number generator. The absence of any temporal restriction on the meaning of “capacity” renders every device that can dial a cell phone number an automatic telephone dialing system subject to the statutory prohibition. This has profound implications that clearly are not intended by the enabling legislation.

One example is that the Commission’s interpretation places wireline and wireless carriers at substantial risk of liability for violating the TCPA, including the TCPA’s class action exposure. This occurs because, under the Commission’s view, any hardware (that is, a telephone) that has the “capacity” to store or produce and dial randomly or sequentially generated numbers with the addition of software is subject to the rule. Cell phones and residential landlines have this capacity. Thus, any subscriber who calls a cell phone without prior express written consent is using an ATDS in violation of the TCPA.

In a lawsuit asserting a violation, including a class action, the carrier clearly has liability because it issues the equipment to the subscriber, maintains the line, and actually facilitates the violation by processing the offending call when it is on notice that of the TCPA prohibition. A carrier could be joined as a necessary and indispensable party to the litigation that is jointly and severally liable for any violation that is established because, for example, the carrier issued and activated the equipment to the cell phone subscriber, processed the

transaction that allegedly violated the statute, enabled the connectivity with the subscriber, and actually billed the subscriber for the putative violation. Although Congress did not intend individual subscribers to sue other subscribers for calling another cell phone without prior express, the interpretation given to the statute by the Commission yields this result.

There are countless other bad policy outcomes engendered by the Commission's interpretation. For example, the Commission's interpretation does great damage to the timely identification and deterrence of identity theft and fraud prevention. According to the Congressional Research Service, identity theft is the fast growing fraud in the United States with 9.9 million Americans having been victims in 2008 alone (a 22% increase from 2007). 71% of fraud happens within a week of stealing a victim's personal data. Therefore, time is of the essence for detection. Identity theft and possible fraud in a consumer's account frequently is detected by a credit grantor based on purchasing patterns and other transactions before a consumer becomes aware of the problem. Under the Commission's interpretation, a credit grantor or a debt collector cannot use a predictive dialer to call a consumer on a cell phone to inform them of the fraud without a consumer first giving prior express written consent. Given the magnitude of the frequency of the crime (averaging 28,000 events each day), only by a predictive dialer can consumers be timely notified of the crime. The Commission's interpretation results in consumers getting less timely notice of the crime to implement fraud

alerts. This will have serious financial repercussions. The FTC estimates that identity theft costs consumers about \$50 billion annually. This estimate certainly would increase substantially if the Proposed Rule is implemented.

Other examples of the bad policies fostered by the Commission's interpretation can be found in basic transaction information that is communicated routinely with consumers about the status of their accounts. Accounts that are close to entering delinquency with associated penalties, interest rate adjustments, overdraft fees, etc., will not receive this information timely in order to act to head off the event. There is no obligation to notify consumers of these negative account events that are on the horizon. Consumers benefit from this information, and credit grantors perform this service using predictive dialers as a courtesy.

XII. Thousands Of Small Businesses Will Be Significantly Harmed.

ACA represents approximately 5,500 company members ranging from credit grantors, 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.

XIII. The Proposed Rule 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.”⁸⁷ 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

⁸⁷ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(15), 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227) (“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.⁸⁸

The Supreme Court has made clear that the government bears a heavy burden in justifying restrictions on commercial speech⁸⁹ 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.⁹⁰

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

⁸⁸ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980).

⁸⁹ 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.

⁹⁰ *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.⁹¹ “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.”⁹²

The Commission’s interpretation fails to satisfy the four prongs of *Central Hudson*. Historically two justifications are offered in support of the Commission’s conclusion: Congress was concerned that pervasive automated calls are an “invasion of privacy” and “threaten public safety.”⁹³ For telemarketing intrusions, there may be a substantial government interest in promoting safety and privacy. But these justifications have no applicability to non-telemarketing calls to solely recover payments from customers. First, 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

⁹¹ See, e.g., *In re R.M.J.*, 455 U.S. 191 (1992).

⁹² *Edenfield v. Fane*, 507 U.S. 761 (1993) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

⁹³ 2003 TCPA Order, *supra* note 35 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.”).

not transmit an unsolicited advertisement.”⁹⁴ Therefore, privacy in this context is not a substantial interest. Second, 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 “[t]elemarketers 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.”⁹⁵ 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, 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 have been a narrowly tailored response and would have

⁹⁴ 1992 TCPA Order, *supra* note 7 at ¶ 39 (emphasis added).

avoided the current problem that predictive dialers that do not generate random or sequential numbers are covered equally to those that do.

XIV. The Commission Should Clarify that the Proposed Rule Will Not Eliminate the Established Business Relationship Exemption for Non-Telemarketing Prerecorded Calls.

The Proposed Rule seeks to remove the established business relationship exemption as a form of express permission to receive unsolicited prerecorded telemarketing calls to residences. The Commission proposes to do so to make the TCPA regulations consistent with the FTC's 2008 TSR amendments. Those amendments require a customer's prior express written consent to receive prerecorded telemarketing messages even if the customer has a prior established business relationship. The Commission also notes that it does not propose to make any changes to existing requirements for prerecorded message calls that do not include a solicitation.

Based on the above, the Commission apparently does not propose to amend the TCPA rules to require a non-telemarketing prerecorded message to deliver a communication about a debt to be preceded with prior express written consent. This is in keeping with the Commission's 1992 TCPA Order stated that "[w]hether placed by or on behalf of the creditor, prerecorded debt collection calls would be exempt from the calls to residences as: (1) calls from a party with whom the consumer has an established business relationship, and (2)

⁹⁵ H.R. REP. NO. 102-317, at 10 (Nov. 15, 1991).

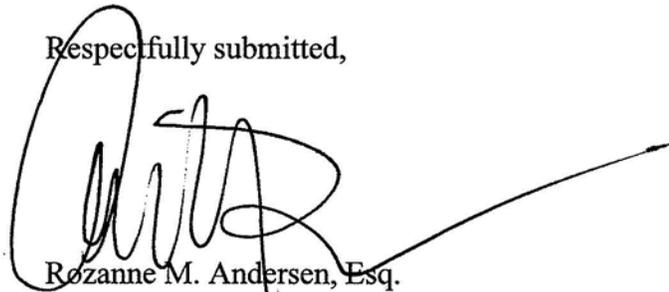
commercial calls which do not adversely affect privacy rights and which do not transmit unsolicited advertisement.”⁹⁶ Nevertheless, the Commission should make clear in the final rule that debt collection calls are unaffected by the Proposed Rule.

XV. CONCLUSION.

For the foregoing reasons, ACA respectfully requests that the Commission clarify in this rulemaking that the Proposed Rule does not apply to or exempts the accounts receivable companies, such as those who are members of ACA, for the reasons stated herein. If you have any questions, please contact Andrew Beato at (202) 737-7777.

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Respectfully submitted,



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

⁹⁶ 1992 TCPA Order, *supra* note 7 at ¶ 39; *see also* TCPA NPRM, *supra* note 28 at ¶ 16 (“In addition, where a company contracts with another company for debt collection services, the collection company acts on behalf of the company holding the debt. Under such circumstances the collection company becomes a party to the relationship between the company holding the debt and the called party and the ‘business relationship’ exemption would apply to allow an auto dialer call to former or current clientele.”).

ACA International
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Valerie Hayes, Esq.
ACA International
4040 W. 70th Street
Minneapolis, MN 55435
General Counsel

Andrew M. Beato, Esq.
Stein, Mitchell & Muse L.L.P.
Federal Regulatory Counsel