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May 21, 2010

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
FCC Headquarters
445 12th Street, SW
Room TW-A325
Washington, D.C. 20554

Re: Rules and Regulations Implementing the TCPA of 1991
Notice of Proposed Rulemaking
Telephone Consumer Protection
CG Docket No. 02-278; FCC Number 10-18

Dear Ms. Dortch:

Wells Fargo & Co. appreciates this opportunity to file comments in response to the Federal Communication Commission's ("FCC" or the "Commission") request for comments on the notice of proposed rulemaking ("*NPRM*" or "Proposed Rule") to amend its regulations implementing the Telephone Consumer Protection Act ("TCPA"). Wells Fargo is a diversified financial services company with $1.2 trillion in assets, providing banking, insurance, investments, mortgage and consumer finance to nearly 70 million customers through more than 10,000 stores, 12,000 ATMs, and the internet across North America and internationally. Our corporate vision is to satisfy all of our customers' financial needs and help them succeed financially. Our customer-centric culture drives us to constantly examine how to make financial transactions feel simple and easy and improve our customers' overall experience. Wells Fargo supports financial innovation and customer choice, and we offer a variety of financial products, features, and services to help our customers meet their financial goals.

Introduction

Wells Fargo relies on efficient, effective communications to serve our customers and comply with our regulatory obligations. Fraud alerts, communications regarding loan modification and loss mitigation, reminders to activate credit or debit cards, and other time-critical, non-telemarketing messages must reach tens of thousands of our customers promptly each day. Manual dialing by live agents cannot meet these service-level requirements -- only automated calling can. As landline telephones increasingly yield to mobile service as customers' preferred mode of telecommunication, a growing segment of these automated calls must be placed to wireless devices at a reasonable cost. The Proposed Rule would dramatically increase communication costs for financial institutions, which would likely result in increased prices to consumers for products and services.

Regulation should keep pace with evolving technology and customer preferences to promote economic growth and the competitiveness of American businesses. We urge the Commission to work to reduce rather than increase regulatory burdens on automated business-to-customer communications. In particular, we urge the Commission to not impose a written consent requirement for automated non-marketing calls to mobile numbers that our customers have voluntarily provided to us. The Proposed Rule does not serve the goal of harmonizing the FCC's rules with those of the Federal Trade Commission ("FTC"), complicates customer relations, and runs counter to long-standing FCC guidance concerning acceptable means for obtaining customer consent to receive automated calls.

We believe the Commission should instead reaffirm its long-standing guidance that customer consent to receive autodialed calls on a wireless number may be obtained either in writing or orally. We also believe that, rather than prescribe new restrictions on automated calling, the Commission should use this opportunity to revisit its interpretation of automatic telephone dialing systems to acknowledge current technologies.

Discussion

1. The Proposed Rule Fails to Achieve the Statutory Requirement of Maximizing the Consistency of the Commission's 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 provide a clearer pathway to compliance for regulated entities. The Do-Not-Call Implementation Act[1] specifically requires the Commission to adopt complementary rules that "maximize consistency with the rule promulgated by the Federal Trade Commission."

Specifically, the Commission's rules must be consistent with the FTC's rules codified at 16 C.F.R. § 310.4(b). Under those rules, it is an abusive telemarketing practice and a violation of the Telemarketing Sales Rule ("TSR") for a telemarketer to engage in a pattern of calls that causes "any telephone" (wireless or wireline) to ring repeatedly 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 without express written consent of the called party.[2] The FTC's rule specifically exempts from the TSR calls initiated to recover debts.[3] This exemption includes calls to both wireless and wireline numbers. According to the FTC, "debt collection and market research activities are not covered by the Rule because they are not 'telemarketing', i.e., they are not calls made 'to induce the purchase of goods or services.'" Consequently, it is the FTC's position that debt communication calls are exempt from the Telemarketing Act.

The Commission initiated this rulemaking with the intent of fulfilling its statutory

[1] 15 U.S.C. §6101 et seq.
[2] 16 C.F.R. § 310.4(b).
[3] *Telemarketing Sales Rule,* 68 Fed. Reg. 4,664 n. 1020 (Jan. 29, 2003).

obligation to maximize the consistency of its rules with those promulgated by the FTC in 16 C.F.R. § 310.4(b). Under 16 C.F.R. § 310.4(b), customer service calls not involving the sale of goods or services made with an autodialer are exempt from the FTC's rule. The Commission, in contrast, is asserting authority over these calls and is attempting to regulate them under the TCPA even though the FTC has declined to do so. We believe that, in compliance with the statutory requirement, the Commission should focus the present rulemaking on harmonizing its rules with those of the FTC, which exclude the types of calls Wells Fargo makes to its customers in connection with servicing their accounts and simply do not apply to other non-telemarketing calls.[4]

2. The FCC Should Not Adopt Further Restrictions on Autodialed Non-Marketing Calls To Wireless Telephone Numbers

Through the *NPRM*, the Commission proposes to harmonize its regulations with the FTC's amended TSR, which imposes obligations on telemarketers that differ from those the Commission has imposed under the TCPA. Notably, under the FCC's current rules and orders, a telemarketer may make a commercial call to a residential telephone number using an artificial or prerecorded voice if the calling party and receiving party have an established business relationship ("EBR"), or if the caller has obtained the receiving party's prior express consent (which may be obtained orally if the receiving party's number is not listed on the national do-not-call registry). Under the amended TSR, a telemarketer is permitted to make such a commercial call only if the receiving party has given prior express consent in writing, whether or not the telemarketer and the receiving party have an EBR.[5] The *NPRM* tentatively concludes that resolution of this regulatory inconsistency may reduce the potential for industry and consumer confusion concerning which telemarketers may qualify for the EBR exception.

[4] See, e.g., *Id.* n.1020.
[5] 47 C.F.R. § 64.1200(a)(2)(iv).

Because the TSR applies only to telemarketing, however, the goal of harmonizing the rules would be adequately served by the Commission's adoption of the proposed express written consent and related requirements only for prerecorded voice *telemarketing* calls. No change need be made to the FCC's current treatment of autodialed *customer service* calls that are not subject to the TSR. In fact, changes to the FCC's rules governing non-telemarketing calls are likely to heighten, rather than minimize, regulatory inconsistency and confusion.

Specifically, regulatory consistency is not served by the Commission deciding, as it proposes in paragraph 20 of the *NPRM,* that the more burdensome prior written consent obligations it would impose on prerecorded *telemarketing* calls should also extend to autodialed or prerecorded message calls made to consumers' mobile devices for *non-marketing* purposes. Adoption of this proposal would complicate rather than reduce the current distinctions in regulatory treatment of calls to wireline and mobile numbers, which distinctions have outlived their usefulness in the midst of the wireless revolution. Wells Fargo urges the Commission not to adopt this proposal. Instead, we ask the Commission to use this opportunity to lessen the burdens on non-marketing wireless communications between businesses and their customers.

Wells Fargo cannot serve its customers effectively while also complying with the myriad of legal and regulatory requirements unless we can reach customers promptly and efficiently. Wireless devices are continuing to displace wireline telephones as our customers' primary, if not sole, communications tools. Critical, time-sensitive service messages must increasingly be sent to mobile devices in real time if they are to have any value to the customer.

The communications that Wells Fargo must send to customers serve a wide range of purposes, including completing transactions, default servicing and loss mitigation, fee assessments, avoiding foreclosures, and fraud prevention. The rigid consent requirements proposed in the *NPRM* would severely curtail, or even eliminate, Wells Fargo's ability to use an automatic telephone dialing system ("autodialer") to conduct the following activities:

- **Fraud Prevention.** Wells Fargo uses autodialers to place calls to customers' wireless devices in order to quickly notify them of unusual or out-of-pattern transactions that could result in fraudulent activity on their deposit and credit card accounts. Wells Fargo believes it is important to deliver these notices in real time and without delay in order to prevent fraud and rule out false positives (where a transaction raises concerns but is actually legitimate). For example, if Wells Fargo detects an unusual transaction on a customer's credit card account, then we must be able to contact the customer on his or her cell phone in order to immediately determine whether it is the customer who initiated the transaction or a third party using the customer's credit card information to make a fraudulent purchase. If we are unable to immediately contact the customer to verify the transaction, we are often left with no alternative other than to assume the transaction is fraudulent and freeze the account until we can contact the customer. In the case of false positives, this creates unnecessary inconvenience for the customer, which easily could have been avoided had Wells Fargo been permitted to contact the customer on their wireless device.

- **Customer Service.** Wells Fargo uses autodialers to place calls and send text messages to customers' wireless devices to provide customers with the following types of valuable services:

    - "Welcome Calls" designed to introduce new customers to Wells Fargo;
    - Verification calls to confirm that customers received merchandise purchased from merchants using a Wells Fargo credit card;
    - "Account Alerts" designed to notify customers of low account balances, overdrafts, over-limit transactions, and delinquent accounts. These alerts allow customers to act in a timely manner and avoid the imposition of late payment fees, the accrual of additional interest, and negative credit bureau reports;
    - Contact to verify information provided in loan applications or to finalize incomplete loan applications so that applications can be processed quickly and avoid being declined;
    - Contact customers who have student loans nearing repayment status to discuss their status in school, as well as repayment terms and options;
    - Deliver "Rapid Alerts" to customers who hold a Wells Fargo Visa credit card. Rapid Alerts allow customers to better manage their spending by offering them the opportunity to establish real time alerts for certain types of account activities (e.g., transactions above a certain dollar limit or transactions at a certain type of merchant);
    - Calls to remind customers to activate debit or credit cards they have requested in order to verify that the cards were not stolen out of the mail;
    - Calls to notify customers of more favorable account terms or interest rates;
    - Resolution of information discrepancies or questionable transactions as required by the Red Flags Rule adopted under the Fair and Accurate Credit Transactions (FACT) Act; and

- **Loss Mitigation and Default Servicing.** Wells Fargo relies heavily on the efficiencies provided by autodialers for contacting customers in connection with loss mitigation and default servicing efforts. Chief among these efforts is our commitment to contacting customers who may be in danger of losing their homes to discuss possible loan modification options, which are a key part of the Obama Administration's *Home Affordable Modification Program* ("HAMP"). In these areas, an autodialer is a critical piece of technology that is used to deliver calls, text messages, and prerecorded calls to customers' mobile devices and residential lines for a variety of purposes, including the following:

    - To inform customers in major metropolitan areas of upcoming community outreach programs where they can meet with a Wells Fargo mortgage loan counselor to discuss their financial situation and learn about available workout options designed to help them maintain home ownership;
    - To provide other helpful information to mortgage customers at risk of foreclosure, including notice of modification options and reminders to complete and return documentation needed to qualify for modifications intended to keep customers in their homes;
    - To comply with the directives established by the federal government related to HAMP, which require Wells Fargo to make four (4) attempts to contact eligible customers to inform them of their available options under the program;
    - To maintain its federal insurance on federally guaranteed student loans, the Department of Education ("DOE") requires Wells Fargo to perform certain due diligence measures when collecting on delinquent accounts. In today's environment, Wells Fargo uses autodialer technology to go beyond the defined measures of the DOE to help protect the assets of the federal government so that increased losses in this loan portfolio do not have to be passed on to American taxpayers;
    - To conduct proactive loss mitigation campaigns using intelligent message delivery ("IMD"). IMD allows Wells Fargo to assist delinquent customers, as well as customers that have a high likelihood of becoming delinquent, by using technology to authenticate a customer's identity prior to connecting them with a live agent, to deliver friendly reminder calls during early stages of delinquency, as well as delivering a variety of collection-related messages in later stages of delinquency; and
    - To launch interactive outbound dialing campaigns where customers can update their delinquent accounts and provide Wells Fargo with information without the need of interacting with a Wells Fargo representative.

- **Other Aspects of Legal Compliance and Support of Public Policies.** Wells Fargo uses autodialers to more efficiently and effectively perform the services listed above. Autodialers do more than simply ensure efficiency and effective outreach to customers, however. They help Wells Fargo to ensure regulatory compliance in the direct ways mentioned above and also indirectly by: (1) eliminating dialing errors that may result in the inadvertent disclosure of information to a third-party; (2) using "pop-up" screens which mandate the reading of required disclosures before an agent can proceed with a customer call; and (3) limiting the time of day that collection calls may be placed so that Wells Fargo's practices will be consistent with the federal Fair Debt Collection Practices Act, as well as state debt collection laws. More broadly, all efforts – including debt recovery calls – to avoid delinquencies and foreclosures promote the stability and soundness that financial institutions are required by law to maintain.

The Proposed Rule also fails to reflect technological changes that impact business communication with customers. A growing percentage of customer service calls must be placed to wireless devices. The number of Wells Fargo customers who use mobile devices as their primary means of personal and business communication has grown dramatically in recent years. On average, 25% to 30% of our customers provide only cell phone numbers as a means of contact. As a result, outdated regulatory obstacles to the normal use of wireless technologies for business-to-consumer communications stand in the way of an important technological advance across the nation.

Existing restrictions on automated and prerecorded calls to wireless numbers already disrupt the efficiency of customer communications. Over the years since the TCPA was enacted, Wells Fargo has reduced the negative impact of the autodialer restriction by integrating compliance into our day-to-day business practices. For example, to comply with the existing prior express consent requirement, we have been guided by the FCC's consistent findings that: (1) prior express consent to receive an autodialed or prerecorded voice call at a cell number may be given either orally or in writing; and (2) a business may contact a customer at a cell number provided to that business by the customer. Accordingly, we have developed and use application forms that expressly include the customer's consent to be contacted using autodialers or other available technology at any numbers they have provided. Wells Fargo also uses calling scripts during our telephone conversations with prospective and existing customers that request the customers' consent to be called at contact numbers, including mobile numbers that the customers provide. This compliance effort has resulted in Wells Fargo obtaining the consent of many of its customers in accordance with the FCC's guidance over the past several years.

If the Commission replaces its long-established guidance with the elaborate prior written express consent obligations detailed in the Proposed Rule, Wells Fargo will face an unreasonable and costly compliance burden. This burden will provide no offsetting benefit to our customers and may, in fact, lead to confusion that could damage our customer relationships. If the regulations are applied **retroactively** -- that is, invalidating consents previously obtained -- they will force a massive and costly project to recontact existing customers and replace valid consents already in place with more complex consents that meet the new requirements. Even if applied only **prospectively**, the new rules would complicate, and therefore increase the cost of, the methods by which customer relationships are maintained.

3. Calls Made By Wells Fargo to Our Customers' Cell Phones Are Consistent with Customer Expectations and Not Contrary to Congressional Intent

Wells Fargo applauds the Commission's goal of protecting consumers from receiving too many telemarketing "robocalls." Requiring financial institutions, like Wells Fargo, to obtain the prior express consent of its customers to receive prerecorded or autodialed telephone calls or text messages delivered in connection with account servicing activities does not further the Commission's goal, however. Rather, such limitations only create unnecessary barriers between Wells Fargo and its customers that run counter to an established relationship of trust.

Moreover, the Proposed Rule does not prohibit financial institutions from calling its customers on their cell phones. Rather, the Proposed Rule merely makes it more difficult for a financial institution to place these sometimes critical calls promptly and in an efficient, cost-effective manner. If the Commission implements the Proposed Rule as written, Wells Fargo would undoubtedly be forced to make more manual calls to customers' cell phones in order to maintain the same level of customer service and account servicing that is accomplished through the use of autodialers. This increase in the level of manual dialing will increase Wells Fargo's servicing costs and will likely force Wells Fargo to pass on some or all of these increased costs to consumers.

Congress enacted the TCPA in 1991. At the time of enactment, Congress prohibited a person from using an autodialer to call, among other things, any telephone number assigned to a cellular telephone service, or any service for which the called party is charged for the call, without the prior express consent of the called party. This prohibition was based upon the high cost of wireless telephone service at the time the TCPA was enacted, which made cost-shifting to wireless customers especially burdensome and justified Congress's decision to limit the volume of such calls by requiring that they be made manually.

The cost of wireless services has dropped dramatically since 1991, however. According to the Cellular Telecommunications & Internet Association ("CTIA"), in 1991, the number of wireless telephone subscribers in the United States was 7,557,148 and the cost of a monthly bill averaged $72.74. By December 2005, there were 207,896,198 wireless telephone subscribers and the average monthly bill was $49.98. The CTIA also reports that the average monthly bill has declined 1.3% per year since 1987 at the same time that average customer usage has *increased* by 24.2%.[6]

As wireless service has grown more widespread and affordable, consumers have demonstrated that cell phones can be a complete and cost-effective substitute for residential wireline service. Indeed, according to a December 2009 National Health Interview Survey (NHIS) by the Department of Health and Human Services, more than one in five American households (22.7%) subscribe only to wireless telephone service. As of December 2009,

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[6] CTIA Semi-Annual Wireless Industry Survey (Apr. 6, 2006) (background and summary of the survey results can be found at http://files.ctia.org/pdf/CTIAEndYear2005Survey.pdf).

approximately 21.1% of all adults – more than 48 million adults – live in households with wireless service only. Moreover, the percentage of wireless-only households continues its steady increase. According to the 2009 data, the percentage of households that are wireless-only increased by approximately five percentage points in just twelve months, from 17.5% in the first six months of 2008 to 22.7% in the first six months of 2009. Not surprisingly, the number and percentage of wireless-only households has increased fastest among younger Americans. Indeed, nearly half of all adults aged 25-29 (45.8%) live in households with only wireless telephones, and approximately one-third of adults aged 30-34 (33.5%) live in households with only wireless telephones.[7]

Like the general public, Wells Fargo's customers have also demonstrated that their cell phones are a preferred channel of communication that can be completely and cost-effectively substituted for wireline service. As stated earlier, an average of 25% to 30% of our customers provide only cell phone numbers as a means of contact. These customers have provided Wells Fargo with a variety of reasons as to why they have chosen to conduct their business with Wells Fargo using their cell phones including:

- A cell phone number is the only reliable way to reach the customer;
- The customers incur few, if any, transaction costs for inbound or outbound calls made to their cell phones; and
- While calls may decrease the total number of available minutes under a customer's cell phone plan, this impact is lessened by the fact that the average talk time for calls made by Wells Fargo to its customers is less than six minutes and some of the

[7] Blumberg SJ, Luke JV, Wireless substitution: Early release of estimates from the National Health Interview Survey, July-December 2009, National Center for Health Statistics, May 2009, *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200912.htm#telephone_status.

services provided by Wells Fargo to its customers via text message are actually free to the customers.

Wells Fargo believes that these factors demonstrate that Congress's assumptions concerning the interests and expectations of wireless telephone subscribers, however legitimate they may have been in 1991, have little application to today's world. Wells Fargo urges the Commission to interpret the autodialer restrictions in any final Rule in a manner that is not only consistent with the public interest, but also consistent with the expectation of Wells Fargo's customers.

4. Implementing the Proposed Rule Would Be Challenging and Provide Customers with a Negative Experience

As written, the Proposed Rule imposes a significantly higher burden for obtaining the prior express consent of a consumer than the standard established by the Commission in its 2008 declaratory ruling.[8] Obtaining express consent is not an easy task and Wells Fargo believes that the Proposed Rule would make that task more challenging.

Even with the implementation of E-SIGN, Wells Fargo believes it is highly unlikely that its customers will respond to requests for express written consent in any appreciable number -- and certainly not at the levels currently obtained using the processes permitted by the Declaratory Ruling (e.g., verbal consent). The process for obtaining E-SIGN consents online can be static and impersonal. Verbal consent, by contrast, offers customers a more personal experience, and provides an opportunity for them to ask questions and for us to explain the benefits of consenting to contacts via autodialer.

If Wells Fargo's prediction proves to be true, then its customers will unfortunately lose out on technological advancements and industry innovation that could help them manage their

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[8] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 and Request of ACA International for Clarification and Declaratory Ruling*, 23 FCC Rcd 559 (2008) ("Declaratory Ruling").

financial affairs more efficiently and effectively. It is also unfortunate because Wells Fargo believes that, in a weakened economy, financial services companies should be looking for ways to further reach out to their customers and help them with their financial challenges instead of burdening customers with a new level of written consent for service-related interactions that will be costly, time-consuming, and deliver no incremental value to those customers.

In addition, there are a number of scenarios in which the Proposed Rule has the potential to increase the burden on customers, as well as diminish customers' overall experience with Wells Fargo. These scenarios can be described as follows:

- Current regulations require Wells Fargo to charge-off customer overdrawn checking and savings accounts within sixty days. Without the use of autodialers, it is less likely that we will be able to contact customers and potentially resolve the overdraft issue in this short period of time. Once Wells Fargo charges off an overdraft, the balance is reported to Chex Systems where a derogatory comment could have a direct impact on their overall relationship with Wells Fargo, as well as the customer's ability to establish other banking relationships;
- When asked to provide consent to be called on their cell phone using an autodialer, over 90% of Wells Fargo's customers have provided such consent. Clearly, the vast majority of Wells Fargo's customers are not averse to engaging in communications about their personal financial affairs over their cell phones. An increase in the level of manual dialing would increase Wells Fargo's servicing costs and likely force us to pass on some or all of these increased costs to consumers by increasing the costs of obtaining credit and other financial services. An example of this type of cost shifting could be a proposed change related to "proportional fees" under the Credit Card Accountability, Responsibility and Disclosure (CARD) Act. Under this proposal, the costs associated

with recovering on delinquent accounts could potentially be passed to consumers through higher late fees.

- If Wells Fargo is unable to contact customers in an efficient and cost-effective manner, there is an increased risk that customers' accounts will become more delinquent, thereby impacting their FICO™ and other credit scores. This could be especially significant for customers who pay late every month since Wells Fargo may not be able to use an autodialer to send such customers payment reminder messages at early stages of delinquency; and
- Due to the complexity of complying with the Proposed Rule as written, it may be much more difficult for financial institutions to continue sending their customers prompt and effective account alerts.

5. Like Exempted Healthcare-Related Communications, Calls Made by Financial Institutions as Part of Ongoing Default Servicing Are Subject to Existing Laws that Substantially Reduce the Risk of Abusive Practices and Promote Privacy and Consumer Protection

The Commission has authority under the TCPA to create exemptions from the statute's ban on leaving artificial and prerecorded messages on residential lines where the calls are non-commercial or do not adversely affect privacy rights and do not transmit unsolicited advertisements. Invoking this authority, the Commission proposes to exempt healthcare calls from the prohibition against delivering artificial or prerecorded messages to residential telephones without the prior express consent of the called party.

One of the reasons the Commission proposes to make this change is because 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 would be little risk that the creation of an exemption ... would lead to abusive practices...."[9]

As with healthcare-related calls, there is already a set of both federal and state consumer protection laws that govern the manner, method, and content of the communications that financial institutions have with their customers in connection with default servicing. These laws minimize the risk of abusive practices related to the use of prerecorded messages or autodialed calls.

An example of this type of law is the Fair Debt Collection Practices Act ("FDCPA"),[10] which, in many situations, governs communications between financial institutions and their customers regarding the collection of consumer debts. The FDCPA imposes strict liability on violators and subjects them to administrative enforcement and civil liability, including class action exposure. Thirty years ago, Congress enacted the FDCPA to promote the fair treatment of consumers when debt collectors engage in conduct essential to the availability of consumer credit (and thus the fundamental health of our economy), namely, the recovery of debts. One essential purpose of the FDCPA, as stated 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."[11]

In addition to the FDCPA, all of the states have enacted consumer debt collection laws which supplement or mirror the FDCPA. Many of these state laws also apply to the default servicing activities of financial institutions like Wells Fargo. Such laws further minimize the risk of financial institutions engaging in abusive practices with their customers in connection with default servicing.

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[9] NPRM, FCC 10-18, ¶34 (Jan. 22, 2010).
[10] 15 U.S.C. §§ 1692 et seq.
[11] 15 U.S.C. § 1692(e).

Beyond laws dealing with debt collection, financial services companies may also be required to comply with some or all of the following federal laws:

- Equal Credit Opportunity Act, 15 U.S.C. §1691 *et seq.*;
- Fair Credit Billing Act, 15 U.S.C. §§ 1666 *et seq.*;
- Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*;
- United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*;
- Graham-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*;
- Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.*;
- Regulation E, 12 C.F.R. § 205.1 *et seq.*; and
- Regulation Z, 12 C.F.R. §226.1 *et seq.*

Working together, these laws offer robust consumer protection for communications made by financial services companies in connection with servicing their customers' accounts. These laws make highly remote the risk of abusive practices in the use of prerecorded messages or autodialed calls used in connection with such communications. Further regulation by the Commission is not necessary.

6. The Proposed Rule is Inconsistent with the Plain Language of the TCPA

We urge the Commission to adopt a construction that is consistent with the TCPA's legislative history. The Commission seeks comment on its proposal to construe the statute as requiring prior express *written* consent to make autodialed calls. Wells Fargo opposes this proposal for the following reasons.

a. The TCPA and Its Legislative History Clearly Anticipate Oral Consent

Nothing in the TCPA or the legislative history suggests Congress intended to limit the type of consent permitted under the statute to written consent. Instead, the legislative history clearly and repeatedly demonstrates that Congress left open the option that prior express consent be oral.[12] In addition, Congress did not grant the Commission specific discretion to restrict consent to only written form. Specific discretion given to the Commission was limited to lessening statutory requirements and exempting certain conduct from compliance, e.g., where there is no adverse impact on privacy interests.

b. Applying Written Consent to All Calls Would Exceed the Scope of the FTC's Rule

In furtherance of its mandate to harmonize its rules with the FTC's Telemarketing Sales Rule, the Commission should not adopt a construction that is far more expansive than the FTC's recent amendments.[13] The FTC's rule requiring prior express written consent when leaving prerecorded messages applies only to telemarketers and sellers. Calls for account servicing, including debt recovery, are not telemarketing calls, as they do not contain unsolicited advertisements or solicitations. Despite this, the Commission proposes to require callers to obtain prior express written consent from the called party for all autodialed calls to wireless numbers -- even those that do not fall under the definition of telemarketing. Rather than achieving maximum consistency with the FTC's TSR, this proposal would vastly exceed the reach of the 2008 TSR amendments.

c. The Proposed Rule Would Reverse the Commission's 2008 Declaratory Ruling

Wells Fargo urges the Commission not to adopt a new approach that would undercut its 2008 Declaratory Ruling. In that ruling, the Commission held that prior express consent need not be limited to written form. On the contrary, oral consent is equally acceptable provided that a

[12] NPRM at note 55.

[13] *Telemarketing Sales Rule, Final Rule*, Federal Trade Commission, 73 Fed. Reg. 51164-01 (2008).

wireless number was provided by a consumer to a creditor during the transaction that resulted in the debt owed and then effectively memorialized by the creditor. We are surprised that this Declaratory Ruling, which the Commission specifically issued in part to construe the meaning of prior express consent, is not mentioned in the *NPRM.*

Relying on the clear guidance of the Declaratory Ruling, Wells Fargo (like many other financial institutions) developed and implemented policies and procedures nationwide to ensure that prior express consent would be appropriately captured both orally and in writing. The Proposed Rule would potentially nullify all existing consents that have been obtained over the past two years. Significant numbers of our customers would need to be re-contacted so that new consents could be captured. We anticipate an expensive and time-consuming implementation process that could confuse and irritate customers. In the absence of consents meeting the newly-mandated requirements, we would be unable to reach out to many of these customers with important servicing and fraud-alert messages.

7. Implementing the Proposed Rule Would Take Longer Than Twelve Months

The Commission notes that the FTC, in enacting the Telemarketing Sales Rule, deferred the express written agreement requirement for twelve months. In the event the Commission adopts an express written consent requirement, the Commission has asked for comment on whether it should also adopt a similar implementation period to ensure that companies have adequate time to prepare to comply.

Wells Fargo appreciates the Commission's willingness to provide for an implementation period to ensure that companies have adequate time to prepare to comply with any new written express consent requirement. We believe, however, that a twelve month implementation period may not be sufficient for two reasons.

First, there is a large volume of financial services legislation and regulation now pending in Congress and before the agencies. Indeed, financial services companies are already trying to prepare for, implement, and cope with a myriad of new laws and regulations. Second, financial services companies would be required to invest a significant amount of time, money, and resources into developing new written and electronic forms, as well as an infrastructure that supported multiple E-SIGN channels. Given the number of technology changes that are necessitated by the financial services legislation, financial services companies may not have the resources to accomplish these changes, as well as prepare for the Commission's new written consent requirement, in a twelve month time period.

For these reasons, Wells Fargo submits that an eighteen month implementation period would be a more realistic period of time to allow companies to prepare and comply with this new requirement.

8. The Commission Should Clarify Its Classification of Systems as Autodialers

This rulemaking process gives the Commission an opportunity to revisit certain issues that perennially complicate efforts to comply with the TCPA. From Wells Fargo's perspective, one of the most critical of these issues is the confusion surrounding the types of systems and equipment that constitute automatic telephone dialing systems ("autodialers") under the TCPA. We urge the Commission to revise its interpretation, which now is both vague and overbroad, to reflect technological and business realities.

The TCPA defines an automatic telephone dialing system as "equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[14] The statute's autodialer restriction employs

[14] 47 U.S.C. § 227(a)(1).

that definition when it prohibits certain calls "using any automatic telephone dialing system . . . ."[15]

The autodialer definition is clearly intended to govern the use of technologies that generate numbers at random or in sequence, not to restrict the use of devices that merely support the dialing of numbers stored in databases compiled for a specific purpose – for example, lists of numbers of existing customers whose accounts are at risk of fraud.

Unfortunately, the Commission has ignored the "random or sequential number generator" qualifier of the definition by expanding it to cover devices that merely automate the dialing of numbers contained in databases that were not generated by a random or sequential algorithm, but may, in fact, have been specifically selected for calling based on certain criteria arising from existing customer relationships.[16] ("[I]n order to be considered an 'automatic telephone dialing system,' the equipment need only have the 'capacity to store or produce telephone numbers.'")

The Commission's interpretation leads to the unacceptable result that the definition of "automated telephone dialing system" expands without limits as technology advances. The "capacity to store or produce telephone numbers," once a rare functionality, has become commonplace among numerous consumer electronics products, including the ubiquitous smartphone. Likewise, businesses use devices that feature a broad range of storage and dialing capacities, not all of which might be used in calling campaigns. If the autodialer restriction is activated by any use of a system with this dormant "capacity," then businesses and ordinary consumers are unwittingly violating this law every day.

We ask the Commission to provide guidance that will simplify compliance in this area and enable us to optimize our use of technology in ways that are consistent with the plain

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[15] *Id.* § 227(b)(1)(A).

[16] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 18 FCC Rcd 14014 (Report and Order 2003) ¶ 133.

language of the TCPA. Specifically, we ask that the final order issued under the *NPRM* confirm that: the autodialer restriction does not apply to equipment with the capacity to merely store or produce telephone numbers; and, the autodialer restriction is invoked, not just when that dormant capacity is present in a device, but when it is actually used to make calls.

Conclusion

We urge the Commission to reaffirm its long-standing guidance that customer consent to receive autodialed calls on a wireless number may be obtained either in writing or orally. In addition, we ask the Commission to limit the scope of any new rulemaking to telemarketing calls to ensure harmonization with the FTC's TSR. Finally, rather than prescribe new restrictions on automated calling, the Commission should use this opportunity to revisit its interpretation of automatic telephone dialing systems to acknowledge current technologies.

Respectfully submitted,

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