

**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 REPLY COMMENT TO PROPOSED AMENDMENTS
TO THE TELEPHONE CONSUMER PROTECTION ACT REGULATIONS**

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ACA International
CG Docket No. 02-278
FCC Number 10-18

ACA International (“ACA”) files this reply to comments filed with the Commission concerning the notice of proposed rulemaking (“NPRM”)¹ to amend its regulations implementing the Telephone Consumer Protection Act (“TCPA”).² ACA reiterates its request that the Commission harmonize its regulation with the FTC and the intent of Congress by excluding non-telemarketing, non-solicitation communications with consumers about account information, including basic functions as status of payments, the recovery of debts, and the detection of identity theft and fraud deterrence. For the reasons stated here, the extensive commentary record fully substantiates action by the Commission in this regard.

More than 1,000 comments were filed in this proceeding. With the exception of the proposed exemption of healthcare-related communications which received strong commentary support, the overwhelming majority of the substantive comments uniformly disagree with the proposed amendments based on statutory grounds, dire financial implications, and a consistent theme that the Commission’s regulation is divorced from consumer and business preferences in the manner and method in which they communicate. Substantive comments opposing the proposed amendments were filed by an unprecedented, diverse group of public and private entities including several Federal agencies, State governments and guaranty agencies, Federal

¹ Notice of Proposed Rulemaking, FCC 10-18, ¶ 16 (Jan. 22, 2010).

² Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394

educational loan companies and guarantors, trade associations, predictive dialer companies, telecommunication companies, credit grantors, and all segments of the credit and collection industry. These entities were uniform in their opposition to the Commission applying the proposed amendments to non-telemarketing communications with consumers to convey account information and recover debts for many of the same reasons identified by ACA in its comment.

ACA has the following responses to the primary arguments raised by commenters who support the Commission's proposed amendments with specific reference to non-telemarketing communications with consumers about their accounts:

I. Commenters Agree That The Autodialer Regulation Should Not Be Interpreted To Bar Non-Telemarketing Calls To Recover Payments.

ACA's original comment extensively addressed the issue that the Commission's TCPA autodialer interpretation would apply even to telephone numbers that are neither randomly nor sequentially generated – including calls to specific numbers provided by established customers. This interpretation does not fulfill the statutory mandate, and it does not reflect harmonization with the FTC's interpretation which exempts calls to recover debts.

Countless commenters agree with ACA. These commenters include, for example, the Department of Treasury's Financial Management Service, who urges the Commission to

(1991) (codified at 47 U.S.C. § 227).

revise the NPRM to create an exception for the use of autodialers when collecting delinquent debts.³ The Board of Governors of the Federal Reserve (“Federal Reserve”) filed staff comments urging the Commission “to consider exercising its rule writing authority to the extent feasible to exempt calls made for non-telemarketing purposes to cellular or wireless telephone numbers from the requirements to obtain a consumer’s prior express written consent.”⁴ The Federal Reserve comment notes, in particular, that the Commission’s applying the autodialer prohibition to non-telemarketing calls may result in a reduced capacity of financial institutions to emergently contact consumers, while leading to significant increased costs that will be passed to consumers without a benefit:

If these requirements are adopted, financial institutions that have not obtained a consumer’s prior express consent in writing would have to use live representatives to manually place calls, which could inhibit an institution’s ability to reach consumers in certain circumstances where a consumer might need the information as soon as possible (for example, in cases of suspected fraud or identity theft). Moreover, this could significantly increase costs for the institution and such costs would likely be passed on to consumers without corresponding consumer benefit.⁵

In addition, the Department of Education filed comments identifying substantial negative

³ Comment of Scott J. Johnson, Assistant Commissioner, Debt Management Service, Department of Treasury, at 1.

⁴ Comment of Sandra F. Braunstein, Board of Governors of the Federal Reserve System, at 5.

⁵ *Id.*

impacts that the Commission's proposed rule will have on the government's ability to collect student loans and the "significant costs to student loan borrowers and the taxpayers that would result from a rule that could significantly restrict the ability to use autodialers to make telephone calls to borrowers."⁶ Further, although the Federal Trade Commission did not file public comments in this proceeding, it previously concluded that the Telemarketing Sales Rule exempts 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.⁷ Clearly the collective regulatory and enforcement expertise of these Federal agencies should be highly probative to the decision of the Commission to reconsider the proposed amendments as against the great weight of commentary from private as well as the public entities.

A few comments asserted that the TCPA's definition of "automatic telephone dialing system" is not limited to equipment with the capacity to randomly or sequentially generate telephone numbers, but instead picks up all calls including predetermined lists. They did not explain how the definition can be construed to apply to sequentially dialing pre-determined numbers that are not random or sequentially generated. Without re-stating ACA's initial comment, we endeavor to address these comments.

⁶ Comment of Vanessa A. Burton, Office of General Counsel, United States Department of Education, at 1.

⁷ See *Telemarketing Sales Rule*, 68 Fed. Reg. 4,580, 4,664 n.1020 (Jan. 29, 2003) [hereinafter *Telemarketing Sales Rule*].

ACA's comments describe in detail the reasons why the autodialer restriction is limited to the random or sequential generation of numbers, not to the use of predictive dialers to call non-random or non-sequentially generated numbers for non-telemarketing purposes. The faulty 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.⁸ If modified, the Commission opines, the dialer, which has no present "capacity," might gain the "capacity" to store or produce randomly or sequentially generated numbers and, therefore, it would be subject to the ban.⁹ 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 simply wrong. Predictive dialers marketed today *do not* have

⁸ 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.

⁹ *Id.*

the capacity to randomly or sequentially generate telephone numbers using a number generator without fundamentally changing the architecture of the hardware and software in violation of licensing and contractual requirements. Attached as Exhibit 1 are declarations from the following leading manufacturers and marketers of predictive dialer equipment, including:

1. Darin R. Bird, Chief Operating Officer and Executive Vice President of Global Connect LLC;
2. Jeffrey Dantzler, President of Comtronic Systems, LLC;
3. Mark LaBoyteaux, Strategic Accounts Manger, Interactive Intelligence, Inc.;
4. Michael Leraris, Chief Financial Officer, LiveVox, Inc.;
5. John Tallarico, Vice President of Product Management, SoundBite Communications;
6. Michael J. Vesper, President and Chief Executive Officer, Vesper Technologies, LLC;
7. Tom Winter, Executive Vice President, Roydan Enterprises Ltd.

The declarations state that the various predictive dialer equipment marketed by the companies, which are used to communicate with consumers about the status of their accounts and seek payments, *do not have the capacity* to store or produce telephone numbers using a random or sequential number generator. Exhibit 1. The declarations further establish that the equipment

cannot function without a predetermined list of telephone numbers, that is, numbers that have not been randomly or sequentially generated using a number generator. Exhibit 1. Further, the declarations establish that the capacity to randomly or sequentially generate a telephone number using a number generator would fundamentally alter the engineering architecture of the equipment and its software platform. 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.¹⁰

The declarations set forth at Exhibit 1 are un rebutted by any evidence in the record. Simply stated, there is not one scintilla of evidence in the record substantiating the Commission's demonstrably incorrect and highly conclusive reasoning that predictive dialers are "automatic telephone dialing systems" because "the equipment need only have the 'capacity to store or produce telephone numbers.'"¹¹ Consequently, the Commission should conclude that a predictive dialer is exempt from the autodialer regulation when used for non-telemarketing purposes to communicate with consumers about the status of their accounts and

¹⁰ *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 by randomly or sequentially creating and dialing numbers.

¹¹ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, at ¶ 133 (2003) [hereinafter 2003 TCPA Order].

seek payments.

II. The Commission Has Authority To Exempt Non-Solicitation Calls.

Several commenters raised questions about the authority of the Commission to exempt healthcare-related communications governed by HIPAA, including payment functions of covered entities and their business associates, from the autodialer regulation. To the contrary, the Commission is authorized to exempt this and other content-specific communications. Congress contemplated that the Commission would exercise discretion in promulgating regulations. For example, Congress limited the applicability of the TCPA to unsolicited advertisements defined as “material advertising the commercial availability or quality of any property, goods, or services.” It also authorized the Commission to exempt, by rule or order, calls to cell phones using an automatic telephone dialing system where there is no charge to the called party.¹² Certainly Congress intended the Commission to have exemption authority.

III. Privacy Rights Are Not Infringed.

Several commenters urged the Commission to move forward with the proposed amendments to avoid privacy infringements associated with the use of cell phones. The commenters assert that consumers have an absolute right to privacy in the use of their cell

¹² 47 U.S.C. § 227(c).

phones, which allegedly may be diminished if calls by or on behalf of creditors were placed to subscribers in the effort to recover payments. These same commenters assert that the mobility of cell phones may result in calls received in settings that consumers may deem inhospitable or unsafe, such as when driving.

The record does not support these assertions. It is true that consumers have privacy expectations in wireless and wireline settings, however, Congress was careful to direct the Commission to balance privacy rights against commercial speech and business considerations and gave the Commission flexibility to use its administrative discretion to create the correct balance.¹³ As these concerns specifically relate to cellular communications about the status of accounts and recovery of payments, the Commission already has exercised its discretion to conclude that, based on the administrative record, calls to recover payments do not diminish privacy rights: “[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 . . .

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

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

commercial calls which *do not adversely affect privacy rights* and which do not transmit an unsolicited advertisement.”¹⁴ Thus, the TCPA record and prior Commission findings do not support the assertion that customer privacy rights in any way are harmed by calls to recover a payment for a good and service received by the customer.

An implicit, if not explicit, premise of the commenters is that predictive dialers are more prone to violate wireless privacy rights than manually dialing subscribers. However, no commenters explained how a call to a specific customer’s cell phone by a creditor seeking to recover a payment creates a greater privacy infringement when initiated with a predictive dialer as compared to a call dialed manually. In truth, it is no more of a privacy infringement to be called by a dialer when recovering payments. In each instance, the outcome is the same – a customer receives a call to inform him or her of the status of an account.

Even if it were not the case that the Commission already resolved the privacy issues, ACA reiterates that predictive dialers lower the risk of individual privacy infringements as compared to a system of manual dialing by creditors. Manual dialing inevitably results in unintentional dialing errors. Predictive dialers eliminate these errors. This maximizes

Constitution.

¹⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 7 FCC Rcd 8752, para. 39 (footnotes omitted) (emphasis added) (“1992 TCPA Order”).

customers' privacy about sensitive financial information by protecting against inadvertent contacts with third parties prohibited by the Fair Debt Collection Practices Act ("FDCPA") and analogous state laws.

It should be noted that the customers already are beneficiaries of important Federal privacy protections. The Gramm-Leach-Bliley Act,¹⁵ the Health Insurance Portability and Accountability Act,¹⁶ and the Fair Credit Reporting Act¹⁷ are but three examples of comprehensive Federal statutes that control the manner and method of communicating customers' personal financial and/or medical information. Added to these is a broad array of

¹⁵ The Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*, part of the Financial Modernization Act of 1999, is a federal statute that imposes comprehensive obligations on financial institutions regarding the disclosure of customers' non-public personal information. As part of the privacy protections enshrined in the GLBA, the Federal Trade Commission in May 2002 issued a separate Safeguards Rule requiring all financial institutions to establish standards that "safeguard" the security and confidentiality of customer records and information, to protect against any anticipated threats or hazards to the security or integrity of such records, and to protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer. 15 U.S.C. § 6801(b).

¹⁶ Enacted in 1996, the Health Insurance Portability and Accountability Act includes three standards applicable to protected health information: privacy, security, and transaction and code set. The HIPAA Privacy Rule enacted by the Department of Health and Human Services alone exceeds 300 pages. The Privacy Rule limits the use and release of protected health information and gives patients the right to access and amend their medical records, among other aspects.

¹⁷ Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*

powerful privacy protections under the FDCPA. For example, the FDCPA bars communications with a customer in connection with the collection of a debt at an unusual time or place or at a time or place known or which should be known to be inconvenient to the customer.¹⁸ A customer that receives a call on his or her cell phone can terminate future calls simply by indicating that the call is inconvenient.¹⁹ In addition, the FDCPA prohibits further communications with a customer, including those directed to a cell phone, after the consumer notifies the caller in writing that he or she wants to stop all further communication.²⁰ It is clear from these and other laws that consumers have the authority to stop receiving calls to their cell phones made by or on behalf of creditors if that in fact is their intention.

As an outgrowth of privacy concerns, some commenters said that they might receive calls in an environment where it is dangerous to answer the phone (for example, while driving a car) or in a setting they would prefer not to speak. The use of a cell phone for personal or business reasons in certain settings may raise safety issues, but the Commission correctly noted

¹⁸ 15 U.S.C. § 1692c(a).

¹⁹ See *Pittmann v. J.J. MacIntyre Co. of Nev., Inc.*, 969 F. Supp. 609, 612 (D. Nev. 1997); *Austin v. Great Lakes Collection Bureau, Inc.*, 834 F. Supp 557, 559 (D. Conn. 1993); see also *Horkey v. J.V.D.B & Assocs., Inc.*, 333 F.3d 769, 772-73 (7th Cir. 2003).

²⁰ 15 U.S.C. § 1692c(c). The statute also bars causing a telephone to ring or from engaging any person in telephone conversations repeatedly or continuously with the intent to annoy, abuse, or harass any person at the called number. 15 U.S.C. § 1692d(5). This applies to wireless and wireline communications.

in the TCPA record that the motivation of Congress in enacting the TCPA primarily was the safety threats posed by unrestricted telemarketing, not non-telemarketing calls with consumers to communicate time-sensitive and potentially critical information such as fraud detection, identity theft, or missed payments affecting their credit rating.²¹ Indeed, the Commission had this in mind when it issued the 1992 TCPA Order (which did not apply the autodialer restriction to calls by and on behalf of creditors to recover payments) and stated:

The regulations implemented satisfy the TCPA's requirements that residential subscribers be provided with a means to avoid unwanted telephone solicitations, and that autodialers and prerecorded or artificial voice messages be used responsibly in ways that do not impede commerce or threaten public health and safety. The record supports our conclusion that the proposed rules strike a reasonable balance between privacy rights, public safety interests, and commercial freedoms of speech and trade, which Congress cited as its paramount concerns in enacting the TCPA.²²

In addition, ACA notes that the safety concerns mentioned by these commenters are

²¹ See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, at ¶ 4 (2003) (“2003 TCPA Order”) (“On December 20, 1991, Congress enacted the TCPA in an effort to address the growing number of telephone marketing calls and certain telemarketing practices thought to be an invasion of consumer privacy and even a risk to public safety”) (footnote omitted); Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Reconsideration Order, 10 FCC Rcd 12391, at ¶ 3 (1995) (“But because unrestricted telemarketing can be an invasion of consumer privacy, and even a risk to public safety, Congress found that a federal law is necessary to control telemarketing practices”).

²² Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 7 FCC Rcd 8752, at ¶ 58 (footnotes omitted) (“1992 TCPA Order”).

accommodated by the existing laws of certain states which restrict or ban the use of cell phones when operating a motor vehicle.²³

IV. Allegations Of Law Violations And Complaints Are Inaccurate.

Several commenters urged the Commission to proceed with the proposed amendments because collectors allegedly violate the law, citing complaints registered with the Federal Trade Commission. The Commission should reject these assertions as inaccurate and irrelevant.

Alleged complaints registered with the FTC are particularly inappropriate as a factor here.²⁴ The FTC has reported to Congress that “collectors contact millions of consumers each year and, thus, the number of consumer complaints the Commission receives about such collectors is but a small percentage of the overall number of consumer contacts.”²⁵ In fact, ACA member companies alone engage in billions of contacts (written and oral) annually.

²³ See Governors Highway Safety Association, *Cell Phone and Texting Laws*, available at http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html (visited June 14, 2010).

²⁴ Even if complaints were relevant, it stands to reason that the Commission would focus on complaints under the TCPA filed by consumers with the Commission as opposed to another administrative agency. The Commission issues quarterly reports identifying and tracking the complaints it receives, including consumer concerns about wireless service. See <http://www.fcc.gov/cgb/quarter/welcome.html>. The reports do not indicate that consumers have complained about receiving calls on their cell phone for the purpose of recovering a debt.

²⁵ *Id.* at 3.

When aggregated with creditor-initiated communications, it is evident that the FTC data represents a small, fractional percentage of overall communications that do not result in complaints.

V. ACA Accurately Portrays The Widespread Economic Harm.

ACA emphasizes the crippling economic consequences that will result from the Commission's proposed rule. Hundreds of comments were filed by a diverse group of entities all attesting to the negative economic impact that will occur if the Commission does not clarify that the TCPA does not bar the use of a predictive dialer to call customers to recover payments.

The United States Department of Treasury's Financial Management Service supports the need for relief. FMS noted that, without the use of autodialers to contact consumers to recover delinquent debts on behalf of taxpayers, the Agency believes that it will see a significant drop in its collection rate.²⁶ The United States Department of Education and the Federal Reserve Board expressed similar concerns about the substantial economic harm that the Commission's proposed rule engenders. These comments express the unified view that the failure to grant relief will have a devastating impact on public debt recovery programs.

In addition, hundreds of private companies, individuals, and advocacy groups filed

²⁶ Comment of Scott J. Johnson, Assistant Commissioner, Debt Management Service, Department of Treasury, at 3.

supporting comments. Scores of small businesses have notified the Commission of the need for relief, as well as large financial institutions.

Whether public or private, large or small, creditor or collector, these commenters are linked in their concern over the harm that will result if the Commission fails to clarify that the autodialer prohibition does not apply to calls to recover payments. Based on these comments, there can be no dispute of the need for relief.

VI. The NPRM Violates The Maximum Consistency Mandate Imposed By Congress On The FCC.

Numerous comments were made that the Commission is overstepping its authority by broadening the scope of the TCPA under the false pretense of harmonization with the FTC's TSR. As discussed in ACA's original comment, 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 it began on September 18, 2002, under the Telephone Consumer Protection Act (47 U.S.C. 227 *et seq.*). In issuing 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)).

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) phone” 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.²⁷ 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

²⁷ *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).

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.’”²⁸ 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.

XII. Conclusion.

ACA respectfully requests that the Commission clarify that the proposed amendments do not apply to or otherwise exempt 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 amending

²⁸ See *id.*, *supra* note 5 at 4663 (col. 3)-4664 (col. 1) n.1020.

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 as 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.

Dated: June 21, 2010

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Respectfully submitted,



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EXHIBIT 1

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DECLARATION OF DARRIN R. BIRD

I, Darin R. Bird, declare as follows:

1. I am the Chief Operating Officer and Executive Vice President of Global Connect LLC ("Global Connect"), which is located at 5218 Atlantic Avenue, Suite 300, Mays Landing, New Jersey 08330, and manage all of the day-to-day operations of the company, including sales efforts.

2. Global Connect has marketed the Global Connect Hosted Dialer Platform for approximately ten years. Once a client obtains a user name and permission, the client can upload files, records messages, designate start and stop times, and utilize other dialer features and functionalities. All hardware is stored in secure data centers, which are not accessed by clients. Software may be accessed by clients via the internet with a secure user name and password. Global Connect has built in compliance rules, such as time zone restrictions, call count scrubs, and other compliance features applicable to the industry.

3. The Global Connect Hosted Dialer Platform (a) is not used for telemarketing, advertisements, or solicitations, (b) it does not have the capacity to store or generate telephone numbers using a random or sequential number generator; (c) it has not been upgraded with separate software to give it the capacity to do so; (d) it cannot function without a list of telephone numbers provided by its customers; and (e) it does 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.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on: June 16, 2010


Darin R. Bird

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DECLARATION OF JEFFREY DANTZLER

I, Jeffrey Dantzler, declare as follows:

1. I am President of Comtronic Systems LLC ("Comtronic Systems"), which is located at 205 N. Harris Avenue, Cle Elum, Washington 98922, and am responsible for administration and development management. I have personal knowledge of the matters contained herein.

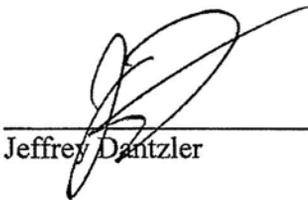
2. Comtronic Systems has marketed the CallThru® dialer since July 2006. The dialer works by pulling debtor phone numbers from a list of debtor accounts to be called that day and dials each number in order to connect a collector/agent to each debtor or leaves a message requesting a return call. CallThru® exclusively works with Debtmaster® and, therefore, can contact debtors from only that database. It is exclusively built for, and used by, the debt collections industry.

3. CallThru® is a PBX server that not only acts as a traditional PBX phone system, but also acts a fully operable dialer, voice broadcaster/messenger, IVR, and Call Recording System. It runs on a Microsoft Server platform and uses T1 or SIP to route in-bound and outbound call traffic.

4. The CallThru® dialer (a) is not used for telemarketing, advertisements, or solicitations, (b) it does not have the capacity to store or generate telephone numbers using a random or sequential number generator; (c) it has not been upgraded with separate software to give it the capacity to do so; (d) it cannot function without a list of telephone numbers provided by its customers; and (e) it does 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.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on: June 8, 2010



Jeffrey Dantzler

**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)	

DECLARATION OF MARK LABOYTEAUX

I, Mark LaBoyteaux, declare as follows:

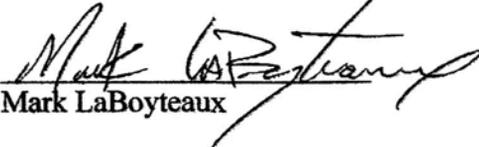
1. I am the Strategic Accounts Manager, Collections Industry Vertical of Interactive Intelligence Inc. ("ININ") located at 7601 Interactive Way, Indianapolis, Indiana 46278. I have personal knowledge of the matters contained herein.

2. Interactive Intelligence markets the Interaction Dialer, which executes outbound dialing campaigns through Workflows based on predetermined contact information. ININ offers one dialer solution. The software consists of ININ developed software in conjunction with third party software applications. The database is open to Microsoft and Oracle, and the hardware is open to standards based platforms suitable for the database.

3. The Interaction Dialer (a) does not have the capacity to store or generate telephone numbers using a random or sequential number generator; (b) it has not been upgraded with separate software to give it the capacity to do so; (c) it cannot function without a list of telephone numbers provided by its customers; and (d) it does 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.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on: June 16, 2010


Mark LaBoyteaux

**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)	

DECLARATION OF MICHAEL LERARIS

I, Michael Leraris, declare as follows:

1. I am the Chief Financial Officer of LiveVox, Inc. located at 450 Sansome Street, 9th Floor, San Francisco, CA 94111. I have personal knowledge of the matters contained herein.

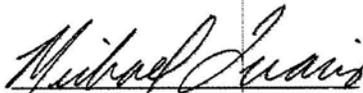
2. LiveVox is a vendor in the ARM space that, in part, provides information systems, including telephone dialing solutions, to its clients.

3. LiveVox uses its own proprietary dialing software, the LiveVox Hosted Dialer, to provide telephone dialing solutions. The LiveVox Hosted Dialer is equipment that can be configured to dial telephone numbers from lists of telephone numbers provided by clients.

4. The LiveVox Hosted Dialer (a) does not have the capacity to store or generate telephone numbers using a random or sequential number generator; (b) has not been upgraded with separate software to give it the capacity to do so; and (c) cannot function without a list of telephone numbers provided by its customers.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on: June 8, 2010


Michael Leraris

**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)	

DECLARATION OF JOHN TALLARICO

I, John Tallarico, declare as follows:

1. I am the Vice President of Product Management at SoundBite Communications located at 22 Crosby Drive, Bedford, Massachusetts 01730. I have personal knowledge of the matters contained herein.

2. SoundBite Communications markets the SoundBite Engage Platform, a hosted outbound communications platform primarily consisting of voice ports connected to the public network (VoIP), application logic, and a database. The three primary components are NMS boards, Weblogic, and Oracle. The platform is housed in three separate data centers in the United States and Canada. The Technology has been in use for over nine years.

3. To operate the SoundBite Engage Platform, clients provide a list of phone numbers to be dialed. SoundBite requires our customers to represent they will run their campaigns in compliance with and according to best business practices, as well as local and federal laws.

4. The SoundBite Engage Platform (a) does not have the capacity to store or generate telephone numbers using a random or sequential number generator; (b) it has not been upgraded with separate software to give it the capacity to do so; (c) it cannot function without a list of telephone numbers provided by its clients; and (d) it does 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.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on: June 11, 2010



John Tallarico

**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)	

DECLARATION OF MICHAEL J. VESPER

I, Michael J. Vesper, declare as follows:

1. I am the President and Chief Executive Officer of Vesper Technologies, LLC d/b/a DialConnection, LLC ("DialConnection"), which is located at 1040 Route 73, Berlin, NJ 08009, and am responsible for the operations of the company. I have personal knowledge of the matters contained herein.

2. DialConnection has marketed the DialIntelligence a/k/a DPTS Enterprise system since 1996. The dialer provides inbound and outbound call management functionality. It dials accounts imported into the system from a host system of record, which is usually a collection system that has been populated with customer account information provided by the entity that owns each debt account. The account number and the selected associated phone number(s) are imported into the system for dialing.

3. The system is built on Dialogic Hardware Telephony Platform. The software was developed by DialConnection using the Microsoft suite of development tools, including VB6, .NET, ASP, ASP.NET, C#, and C++. It utilizes the Microsoft SQL Server 2005/2008 as the database.

4. The DPTS Enterprise system (a) does not have the capacity to store or generate telephone numbers using a random or sequential number generator; (b) it has not been upgraded with separate software to give it the capacity to do so; (c) it cannot function without a list of telephone numbers provided by its customers; and (d) it does 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.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on: June 10, 2010

A handwritten signature in black ink, appearing to read 'M. J. Vesper', with a long horizontal stroke extending to the right.

Michael J. Vesper

**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)	

DECLARATION OF TOM WINTER

I, Tom Winter, declare as follows:

1. I am the Executive Vice President of ROYDAN Enterprises Ltd. ("ROYDAN") located at 602 North 9th Street, Manitowoc, Wisconsin 54220. I am the head of software design and am the lead programmer for the predictive dialer. I have personal knowledge of the matters contained herein.

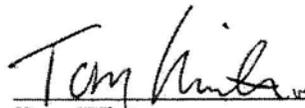
2. ROYDAN has marketed the Bloodhound Predictive Dialer for approximately 15 years. The dialer is designed to work specifically for the debt collection industry and is being used only by collection agencies. It dials phone numbers stored in the collection database, and if the called party answers, the call is connected with an agent or collector. Otherwise, the phone number may be tried again at a later time based on settings that are configured by the management of the collection agency. The dialer can also be configured to accept in-bound calls and route them to an agent or collector.

3. The dialer runs on a PC containing special hardware that allows it to make and answer calls on analog, robbed-bit T1, and PRI phone lines. The dialer PC itself runs on the Microsoft Windows 2000 or Windows XP operating systems. Agents and collectors, however, may use a variety of operating systems. ROYDAN currently sells only one version of the dialer, but have previously sold a version of the dialer that could not be configured to accept in-bound calls.

4. The Bloodhound Predictive Dialer (a) is not used for telemarketing, advertisements, or solicitations, (b) it does not have the capacity to store or generate telephone numbers using a random or sequential number generator; (c) it has not been upgraded with separate software to give it the capacity to do so; (d) it cannot function without a list of telephone numbers provided by its customers; and (e) it does 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.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on: June 09, 2010



Tom Winter