

May 20, 2013

VIA ELECTRONIC DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TWA325
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentation
CG Docket No. 02-278**

Dear Ms. Dortch:

On Thursday, May 16, 2013, Michele C. Farquhar and Mark W. Brennan, counsel to Communication Innovators (“CI”), met with Nick Degani and Josh Cox from Commissioner Pai’s office to discuss CI’s pending Petition for Declaratory Ruling (“Petition”) regarding the non-telemarketing use of predictive dialer solutions under the Telephone Consumer Protection Act (“TCPA”).

As discussed in the attached slides that were distributed at the meeting, the CI representatives encouraged the Commission to grant the CI Petition and confirm that predictive dialer solutions that do not have capacity to generate, store, and dial random or sequential numbers are not automatic telephone dialing systems (“autodialers”) under the Telephone Consumer Protection Act. Today’s predictive dialer solutions promote consumer-friendly calling practices and allow businesses with a legitimate need to contact large numbers of specific customers for specific non-telemarketing purposes to do so accurately, efficiently, and cost-effectively while complying with federal and state consumer protection laws. They connect live representatives with consumers as quickly as possible to provide timely, useful information.

The representatives explained that a grant of the CI Petition is urgently needed because of significant confusion by courts over the Commission’s prior TCPA decisions regarding the applicability of the TCPA to predictive dialers. Specifically, some courts are now interpreting the Commission’s prior TCPA rulings to mean that all predictive dialers are “autodialers” even if they do not meet the statutory definition of an “autodialer.” As a result, companies are being sued in TCPA class actions and are facing potentially devastating penalties just for using predictive dialers or other new technologies. Approximately 500 TCPA cases have already been filed in court this year (nearly double the number of cases filed during the same period a year ago), with many involving allegations of predictive dialer use. The Commission can resolve much of this litigation by clarifying that a predictive dialer solution that does not meet the statutory requirements of an “autodialer” is not an “autodialer.” To provide meaningful relief, however, the Commission must specifically clarify the

scope of the term “autodialer” under the TCPA. For example, clarifying the meaning of “prior express consent” instead of clarifying the term “autodialer” will provide no protection against opportunistic TCPA plaintiffs and will instead encourage further unnecessary litigation and increase costs to consumers, undermining the TCPA’s consumer protection goals.

Pursuant to Section 1.1206(b) of the Commission’s rules, I am filing this notice electronically in the above-referenced docket. Please contact me directly with any questions.

Respectfully submitted,

/s/ Mark W. Brennan

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Clarifying the Applicability of the TCPA to Today's Predictive Dialer Solutions

Communication Innovators

FCC Meeting
May 16, 2013



There is an urgent need for the FCC to confirm that predictive dialer solutions that do not have capacity to generate, store, and dial random or sequential numbers are not “automatic telephone dialing systems” under the Telephone Consumer Protection Act.

Overview

- Background on the TCPA
- The Statutory Definition of an Automatic Telephone Dialing System (“ATDS”)
- Predictive Dialer Solutions
- Courts Are Confused by the FCC’s TCPA Decisions
- The Consumer Benefits of Today’s Predictive Dialer Solutions
- The Circumstances Regarding Predictive Dialer Solutions Have Changed
- Solution

Background on the TCPA

- Congress enacted the TCPA specifically to curb aggressive telemarketing practices.
 - Using automatic dialing equipment to make hundreds of thousands of unsolicited calls to random or sequential telephone numbers.
 - Calling sequential telephone numbers in a way that ties up a block of telephone numbers and creates public safety risks.
- The TCPA was not intended to restrict businesses from placing informational and other non-telemarketing calls to their customers and accountholders, including on their wireless telephones.

The Statutory Definition of an Automatic Telephone Dialing System (“ATDS”)

- The TCPA defines an “automatic telephone dialing system” (“ATDS”) 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.”
- The TCPA restricts calls to wireless telephone numbers when made using an ATDS.

Predictive Dialer Solutions

- Predictive dialer solutions connect live representatives with consumers.
- They enable businesses with a legitimate need to contact large numbers of specific customers for specific non-telemarketing purposes to do so accurately, efficiently, and cost-effectively.
- Many of today's predictive dialer solutions are software- or cloud-based application platforms.
- They are exponentially more efficient than manual dialing and enable companies to implement pro-consumer controls that enhance privacy and compliance with state and federal laws.

Background on Predictive Dialer Solutions (cont'd)

- **The TCPA does not mention predictive dialer solutions.**
- Today's leading predictive dialer solutions do not meet the statutory requirements for an ATDS.
- They do not have the capacity to generate, store, or dial random or sequential numbers.
- Many predictive dialer solutions require callers to create detailed "profiles" for each consumer, and multiple fields (sometimes dozens) must be completed to create a profile.
- Callers cannot simply load telephone numbers into a predictive dialer solution and start placing calls.

Courts Are Confused by the FCC's TCPA Decisions

- The FCC has previously distinguished between autodialed telemarketing calls and the use of predictive dialers for non-telemarketing calls, consistent with the intent of Congress.
- In the 2003 TCPA Order and 2008 ACA Declaratory Ruling, however, the FCC determined that some predictive dialers qualify as an ATDS, creating widespread confusion and devastating class action litigation.
 - Approximately 500 TCPA cases have already been filed in court this year (nearly double the number of cases filed during the same period a year ago), with many involving allegations of predictive dialer use.
- Some courts are now interpreting the FCC's decisions to mean that *every* predictive dialer solution is an ATDS, regardless of whether it meets the statutory requirements.
- **These courts are essentially rewriting the TCPA and undermining the FCC's consumer protection goals.**

The Consumer Benefits of Today's Predictive Dialer Solutions

- Predictive dialers are used to place a variety of critical, time-sensitive non-telemarketing calls. Examples include:
 - Appointment reminders
 - Lab result discussions
 - Fraudulent activity / potential identity theft checks
 - Payment confirmations
 - Data security breach notifications
 - Flight delay updates
 - School closing notifications
 - Pending insurance lapse courtesy calls
 - Product recalls
 - Warnings about utility outages.
- The FCC recognized the value of these informational calls in the Robocall Report and Order.

The Consumer Benefits of Today's Predictive Dialer Solutions (cont'd)

- Predictive dialer solutions also:
 - Promote consumer privacy by protecting against improper calls and manual dialing errors.
 - Increase productivity.
 - Lower costs for consumers.
 - Facilitate regulatory compliance with Federal and State laws regarding consumer calls.

The Circumstances Regarding Predictive Dialer Solutions Have Changed

- Companies that use predictive dialers for non-telemarketing purposes have absolutely no need to generate, store, or dial random or sequential numbers (nor can they benefit from using such numbers)
- There has also been a dramatic shift in the use of wireless telephones over the last decade (recognized by the FCC in its Robocall decision).
 - Today, wireless service is so inexpensive and accessible that it has replaced landline service for more than one-third of the U.S. population.
 - Consumers can easily “port” their wireline number to their wireless device.

The Solution

The Commission should confirm that predictive dialer solutions must meet the statutory requirements of an ATDS to be subject to the TCPA's ATDS restriction.

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