December 2, 2013

Commission's Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: Petition for Declaratory Ruling filed by a Coalition of Mobile Engagement Providers (CG Docket No. 02-278)

To whom it may concern:

The American Financial Services Association ("AFSA")[1] welcomes the opportunity to comment on the Petition for Forbearance ("Petition")[2] filed by the Direct Marketing Association ("DMA"). The Federal Communications Commission ("FCC"), in a February 2012 Report and Order ("Order"), amended its Telephone Consumer Protection Act ("TCPA") rules effective October 16, 2013, to, among other things, require prior express written consent that meets specified standards for certain autodialed or prerecorded telemarketing calls.

I. The FCC Should Grant DMA's Petition

AFSA asks that the FCC grant the Petition, which asks the FCC to forbear from enforcing, in regard to existing written agreements, sections 64.1200(f)(8)(i)(A) and (B) of the Order. These sections require a disclosure informing consumers that sales are not conditioned on consent and that the seller is using an automatic telephone dialing system ("autodialer"). We ask that if the FCC refuses to grant the forbearance, the FCC at least explicitly state that the new standard does not apply retroactively and that written consent that had been previously acquired in compliance with the-current TCPA regulations is valid.

In the Order, the FCC stated that its primary goal in revising the TCPA provisions was to make them consistent with those of the Federal Trade Commission ("FTC").[3] AFSA agrees with that goal, but we note that the FCC Rule, unlike the FTC Rule requires that the marketer affirmatively *disclose* to its customer that it is not acting to condition sale on the written agreement and that the seller is using an autodialer. AFSA agrees that signing the written consent agreement should not be a condition to the sale, but we do not believe the disclosure is necessary. We believe that this disclosure will not help, but would rather confuse, consumers.

[1] AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its more than 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers.

[2] *Direct Marketing Association*, Petition for Forbearance, CG Docket No. 02-278 (filed Oct. 17, 2013).

[3] 16 C.F.R. § 310.4(b)(v)(A)(ii) ("FTC Rule").

For example, most consumers may not even understand what an autodialer is. Instead, all that will be accomplished with this disclosure is that there will be an increased risk of inadvertent violations that would likely result in additional lawsuits.

II. Clarification is Necessary to Eliminate the High Risk of Frivolous Class Action Lawsuits

Hundreds of class action TCPA cases seeking millions of dollars from companies have been filed in recent years, and the number is only climbing. TCPA suits were up 116 percent in September 2013 compared to September 2012. Echoing that trend, year-to-date TCPA suits are up 70 percent in 2013.[4]

Plaintiffs' attorneys see dollar signs with every potential TCPA case. As is evident in the chart[5] below, settlements in the millions of dollars lead to millions of dollars in attorneys' fees:

Jurisdiction	Case	Class Size	Total Settlement	Attorneys' Fees Portion	Payment Per Class Member Before Fees Taken
W.D. Wash.	Arthur v. Sallie Mae	8M customers called	$24.1M	**$4.8M**	$3.00
S.D. Cal.	Connor v. JP Morgan Chase	1.7M customers called	$9M	**$3M**	$5.30
S.D. Cal.	Adams v. Alliance One	5.5.M customers called	$9M	**$3M**	$1.63
S.D. Cal.	Malta v. Freddie Mac / Wells Fargo	5.9M customers called	$17M	**$4.3M**	$2.88

And the situation for companies striving to comply with the new regulations is only likely to get worse. "Having staked out jurisdictions favorable to coverage, the TCPA plaintiff's bar is now in a protection and exploitation mode. This two-pronged strategy is intended to funnel coverage disputes to certain preferred venues and once there, exploit the favorable rulings to the fullest extent possible . . .. TCPA plaintiffs now also no longer wait . . . to initiate declaratory actions. With increasing frequency, TCPA plaintiffs file preemptive declaratory judgment actions in their preferred venues. . . . The uncompromising and relentless quest for coverage by a seemingly

[4] Lunsford, Patrick. "TCPA Lawsuits Really Are Growing Compared to FDCPA Claims." *insideARM.com.* October 22, 2013. http://www.insidearm.com/daily/debt-buying-topics/debt-buying/tcpa-lawsuits-really-are-growing-compared-to-fdcpa-claims/.

[5] Hoffman, Erin, Eileen Hunter, and Aaron Van Oort. "Recent Developments in TCPA Litigation." *Faegre Baker Daniels*. April 5, 2013. http://www.minncle.org/attendeemats/30313/10_VAN%20OORT.pdf

insatiable TCPA plaintiff's bar will continue and likely increase as application of the act is conformed to technological advancements subjecting a new genre of entities to TCPA liability."[6]

Even when companies prevail in lawsuits, the cost to defend the lawsuit (often through an appellate court) is over $100,000.

III. The FCC Should Eliminate Confusion Regarding Predictive Dialers

Although not the subject of this Petition, AFSA takes this opportunity to urge the FCC to affirmatively state that only equipment that has the current capacity to store and produce telephone numbers to be called using a random or sequential number generator – and is currently being used for that purpose – should be considered an autodialer.

The FCC should use the authority granted by the TCPA to regulate actions taken by businesses, not the ability or capacity of the employed equipment either as it currently is or as it could conceivably be modified. We understand that the TCPA defines an autodialer 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."[7] However, the TCPA also states:

> "The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—
> . . .
>
> (B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—
>
> (i) calls that are not made for a commercial purpose; and
>
> (ii) such classes or categories of calls made for commercial purposes as the Commission determines—
>
> (I) will not adversely affect the privacy rights that this section is intended to protect; and
>
> (II) do not include the transmission of any unsolicited advertisement."[8]

This exemptive authority granted to the FCC must apply to calls made on equipment that meets the definition of "autodialer" or else it has no meaning because no exemption is needed for calls made on non-autodialer equipment. Clearly this grant of the power to exempt must inform the

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[6] "Get Ready For More Aggressive TCPA Disputes." Law360. June 24, 2013. http://www.law360.com/articles/451539/get-ready-for-more-aggressive-tcpa-disputes

[7] TCPA 47 U.S.C. § 227(a)(1)

[8] TCPA 47 U.S.C. § 227(b)(2)(B)

FCC that the intent of Congress was for it to regulate calls based on the content and purpose of the call, not on the technical characteristics of the equipment used.

The FCC should use its exemptive authority under 47 U.S.C. § 227(b)(2)(B)(ii)(I) to specify that predictive dialers that are not used for telemarketing purposes or that are not used to generate and dial random or sequential numbers are not autodialers.

AFSA members use phone systems that, either as designed or with the addition of hardware or software, have the capacity, and may or may not then have the current ability, to generate, store and dial random or sequential numbers. AFSA members, however, do not avail themselves of either that capacity or availability. The systems are used solely by AFSA members to contact their existing customers with important information such as account information, fraud alerts, or identity theft notifications, thus actually enhancing the customer's privacy. These systems are not used by AFSA members to harass random consumers with telemarketing solicitations at all hours of the day or night.

In today's world it is almost impossible to use telephone systems that do not have, either as originally configured or as could be modified, the capacity to generate, store and dial random or sequential numbers. As a petition filed with the FCC earlier this year explains, "Much like any ordinary computer could (with a complete overhaul) be transformed into a device to launch nuclear missiles, any desktop computer or smart phone could be modified to store telephone numbers to be called by a sequential number generator and dial those numbers."[9]

The legislative history confirms that the TCPA's autodialer provision was enacted to curtail unwanted *telemarketing calls* – not to curtail important informational calls to existing customers. Congress enacted the TCPA to protect consumers' privacy interests, not to create unnecessary barriers to account-servicing calls where those privacy interests are not implicated. The FCC confirmed that the TCPA should not "impede" or "unnecessarily restrict" purely informational calls in its recent Robocall Report and Order.[10] Calls made to existing customers, for the commercial purpose of servicing a customer's account that do not include or introduce an unsolicited advertisement or constitute a telephone solicitation do not adversely affect the privacy rights that the TCPA is intended to protect. Placing additional and unnecessary communication barriers between financial institutions and their customers at a time when more frequent and open communication is needed to solve and/or mitigate problems, such as repossessions, foreclosures, and potential fraudulent account activity, is counterproductive and could negatively impact not only the customer, but the economy as a whole.

The FCC's interpretation of "autodialer" has caused significant confusion and an array of unintended consequences that limit innovation. We believe that today's innovative predictive dialing technology provides significant benefits to customers and businesses. Using a predictive dialer not only saves time, but substantially reduces the likelihood of human error, which can lead to inadvertent TCPA violations and inconvenience to non-customers who are manually

[9] YouMail, Inc., Petition for Declaratory Ruling, CG Docket No. 02-278 (filed April 19, 2013).

[10] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, FCC 12-21 ¶ 21 (rel. Feb. 15, 2012)

dialed by accident. As discussed above, the penalties for TCPA violations are considerable, and there has been a surge in purely opportunistic, financially motivated TCPA claims and class action litigation in recent years.

AFSA emphasizes that clearly and expressly allowing predictive dialers to be used to place non-telemarketing calls without being considered "autodialers" would not lead to an increase in calls to customers. AFSA members and other businesses already can contact customers on their wireless numbers using manual dialing and AFSA's members have no incentive to place unnecessary calls. (However, we note that companies face litigation even when they use manual dialing because the numbers are dialed manually on telephones that have the "capacity to store or produce telephone numbers." It is practically impossible to use a telephone today that does not have that capacity.) Thus, it is only how some calls are made that would change, not whether or how often the calls are made. The ability to use a predictive dialer instead of manually dialing wireless numbers has become more and more crucial as technology continues to advance. Today there are millions of wireless subscribers, and more importantly, almost one-third of all households are wireless-only.[11] The number of wireless-only households continues to increase.

The FCC should act quickly to remove the unnecessary confusion over predictive dialers.

We look forward to continuing to work with the FCC on this important issue. Please contact me by phone, 202-466-8616, or e-mail, bhimpler@afsamail.org, with any questions.

Sincerely,

Bill Himpler
Executive Vice President
American Financial Services Association

[11] CDC Study: Wireless Substitution: Early Release of Estimates From The National Health Interview Survey, July-December 2010, available at http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201106.htm