



December 19, 2013

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

Re: Professional Association for Customer Engagement's Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking (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 Expedited Declaratory Ruling and/or Expedited Rulemaking ("Petition") from the Professional Association for Customer Engagement ("PACE"). We support PACE's request for clarification that a dialing system is not an automatic telephone dialing system ("ATDS") for purposes of the Telephone Consumer Protection Act ("TCPA") unless it has the capacity to dial numbers without human intervention, regardless of whether a call is initiated by manually entering ten digits of a telephone number or manually clicking a mouse or pressing a key for the one-click dialing method. We also support PACE's request for clarification that, for TCPA purposes, a dialing system's "capacity" is limited to what it is capable of doing at the time the call is placed, without further modification.

We believe that the Federal Communications Commission ("FCC") could provide the requested clarification in a Declaratory Ruling, but in the alternative, should the FCC disagree, we support PACE's request for an Expedited Rulemaking. If the FCC decides to issue an Expedited Rulemaking, the FCC should define the term "capacity" as used in the TCPA and the FCC's rules as "the current ability to operate or perform an action, when placing a call, without first being modified or technologically altered." In an Expedited Rulemaking, the FCC should also modify the definition of "automatic telephone dialing system" in section 64.1200(f)(2) of the FCC's rules by adding, to the end of the definition, "without human intervention."

TCPA litigation is unnecessarily increasing costs to businesses and consumers.

When the TCPA was passed in 1991, there were about 7.5 million cell phone subscribers in the U.S.² Currently, there are more than 326 million cell phone subscribers in the U.S. According to a recent report, 54.1 percent of U.S. households rely either exclusively or predominantly on

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 infoplease. "Cell Phone Subscribers in the U.S., 1985–2010." <http://www.infoplease.com/ipa/A0933563.html>

wireless telephone service and 38.2 percent of all U.S. adults live in households with only wireless telephones (i.e. no landline).³ As importantly, the subscription cost to consumers for cell phones in 1991 was significantly higher in 1991 than it is 2013.⁴

If AFSA members are trying to reach their customers to tell them that there is a fraud alert on their account, that a payment is due, that there is a work-out plan available to them, that their lease is almost up, or for some other account servicing reason, the most expedient way to reach the customer is to call or text message the customer on the customer's cell phone. This is especially true if the customer travels or works out of town and may not receive mail for a period of time. If it is not the only way to reach the customer, it is likely the way that the customer prefers to be contacted, as reflected by the study mentioned above.

The TCPA prohibits the use of an ATDS to call cell phones unless the call recipient has provided "prior express consent" to receive such calls. AFSA members have worked hard to be in compliance with the TCPA rules and obtain "prior express consent" from their account holders to use an ATDS to contact them on their wireless telephones. When a company cannot get such consent, the TCPA permits the company to reach that customer on his or her cell phone if the call placed without using an ATDS (subject to any do-not-call restrictions for telemarketing calls).

The problem is that there is a lack of clarity regarding what type of equipment constitutes an ATDS. The TCPA defines an ATDS as one that 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."⁵ As AFSA and other parties have stated, under an extremely broad reading of the TCPA, any modern phone technically could have that capacity. A standard cell phone or landline that has a redial feature could be viewed as having that capacity. Even a rotary phone has the capacity, in a broad sense of the word, because a rotary phone plugged into a computer could have the capacity to store or produce random or sequential telephone numbers and dial the numbers.⁶ Instead of adopting this erroneous interpretation of the term "capacity," the Commission should instead confirm that "capacity" is limited to what a particular piece of calling equipment capable of doing, without further modification, at the time the call is placed.

Moreover, as PACE asserts, there is no difference under the TCPA whether a call is initiated by entering ten digits of a telephone number or by a one-click "speed dialing" method. Therefore,

³ Xanthopoulos, Judy. "Modifying the TCPA to improve Services to Student Loan Borrowers and Enhance Performance of Federal Loans Portfolios." *Quantria Strategies, LLC*, July 2013.
<http://www.acainternational.org/files.aspx?p=/images/30493/quantriastudyretcpa-july2013.pdf>

⁴ In 1995, the average U.S. consumer paid \$0.44 per minute for a cell phone call (CTIA Resource Library, <http://www.ctia.org/resource-library/facts-and-infographics/archive/average-consumer-voice-price>). In 2004, the average price per minute was down to \$0.09 (CTIA Resource Library, <http://www.ctia.org/resource-library/facts-and-infographics/archive/average-voice-2004>).

⁵ 47 U.S.C. § 227(a)(1), *see also* 47 CFR 64.1200(f)

⁶ *Ex Parte* Letter from Communication Innovators, *et al.*, CG Docket No 02-278 (filed July 10, 2013).

to prevent further frivolous TCPA lawsuits, the FCC should confirm that equipment is not an ATDS unless it can dial numbers without human intervention.

The lack of clarity, combined with penalties of up to \$1500 per violation, has provided plaintiffs’ attorneys with plenty of fodder for lawsuits that enrich the attorneys rather than benefit their clients. Hundreds of TCPA class actions seeking multi-millions of dollars from companies have been filed in recent years, and their number continues to climb. 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 2013.⁷

Plaintiffs’ attorneys see dollar signs with every potential TCPA case. As is evident in the chart⁸ 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

Recently, Bank of America entered into a \$32 million TCPA settlement.⁹ Without conceding any violation, Bank of America agreed to settle with a class of 7.7 million people. The bank agreed not to oppose any request from plaintiffs’ counsel for fees up to \$8 million. The settlement provides less than \$5 per plaintiff, if every single person submitted a claim (with the exception of seven named class representatives who receive \$2,000 each).

⁷ 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/>.

⁸ 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

⁹ Dkt. No. 59-1, Rose et al. v. Bank of Am. Corp. et al, N.D. Cal. Case No. 5:11-cv-02390-EJD (filed Sept. 27, 2013).

And the situation for companies striving to comply with the FCC's new TCPA 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 insatiable TCPA plaintiffs 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."¹⁰

Plaintiffs' attorneys are making so much money from TCPA lawsuits against financial services companies, wireless companies, and other businesses, it seems likely that they will challenge other groups as well. Could charities be their next target? There is nothing to stop plaintiffs' attorneys from suing charities who likely contact their donors the same way that businesses contact their customers. Schools, hospitals, and municipalities could also be targeted by plaintiffs' attorneys looking to exploit the TCPA. With the amount of money at stake, the existing regulations encourage attorneys who thrive on class actions to pursue TCPA violations in every area.

TCPA class actions help no one but the plaintiffs' attorneys. The chart above demonstrates that although the statutory award to a consumer is between \$500 and \$1,500 per call, consumers are unlikely to see an award close even close to those amounts. Instead, consumers see rising costs as businesses struggle to make up the massive legal fees incurred during TCPA litigation.

Even on the few occasions that companies prevail, the cost of defending a TCPA class action (often through an appellate court) is very rarely less than \$100,000, which may be exhaustive for small and mid-size companies. If the FCC does not act to clarify the definition of ATDS, companies must seriously consider shutting down call centers in the U.S. which provide thousands of Americans with jobs paying over minimum wage. Instead, companies would open call centers in India where it is possible to pay workers a smaller amount to manually dial every call on old-fashioned telephones.

The FCC should clarify the definition of an ATDS.

The purpose of the TCPA is not to line the pockets of the plaintiffs' class action attorneys, but to prevent consumers from being harassed by telemarketers. Clarifying in an Expedited Declaratory Ruling that "(1) a system is not an automatic telephone dialing system (ATDS) unless it has the capacity to, *inter alia*, dial numbers ***without human intervention***; and (2) a system's "capacity" is limited to what it is capable of doing, without further modification, ***at the time the call is placed***,"¹¹ will not open up consumers' cell phones to a rash of telemarketing calls. It will simply

¹⁰ "Get Ready For More Aggressive TCPA Disputes." Law360. June 24, 2013.
<http://www.law360.com/articles/451539/get-ready-for-more-aggressive-tcpa-disputes>

¹¹ Professional Association for Customer Engagement, Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking, CG Docket No. 02-278 (filed Oct. 18, 2013).

allow businesses to expediently communicate with their customers with account information in the manner contemplated by Congress when it enacted the TCPA.

If the FCC does not believe an Expedited Declaratory Ruling is appropriate, we also support PACE's alternative solution, a Rulemaking pursuant to 47 CFR 1.401 to, "(1) define the term 'capacity,' as used in the Telephone Consumer Protection Act and the Commission's TCPA regulations, as 'the current ability to operate or perform an action, when placing a call, without first being modified or technologically altered;' and (2) modify the definition of ATDS in 47 CFR 64.1200(f)(2) by adding the phrase 'without human intervention' to the end of the definition."¹²

In the Expedited Declaratory Ruling, it would be appropriate for the FCC to include an exception for calls that violate the TCPA, but which result from a forensically established and confirmed software programming error. In testing software, unintentional errors can occur and businesses who address those errors quickly and responsibly should not be penalized.

There is a clear distinction between an ATDS and a "robo-call." We ask that the FCC recognize that distinction. A robo-call is typically made by a telemarketer with a pre-recorded message on a predictive dialing system. These are the kind of calls that the FCC is trying to prevent consumers from receiving without their consent. A call made by an ATDS, on the other hand, is typically a live agent on the phone call with a customer, or attempting to reach that customer using predictive dialing technology.

Conclusion

We look forward to continuing to work with the FCC on this 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

¹² *Ibid.*