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March 3, 2014

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 February 27, 2014, as counsel to Communication Innovators ("CI"), I met with Adonis Hoffman, Chief of Staff to Commissioner Mignon Clyburn, and Louis Peraertz, Legal Advisor to Commissioner Clyburn, to discuss the pending CI request for a narrow declaratory ruling confirming that predictive dialer solutions that do not have the capacity to store or produce, and dial, random or sequential numbers are not "automatic telephone dialing systems" ("autodialers") under the Telephone Consumer Protection Act ("TCPA").[1]

The attached presentation, which was distributed at the meeting, illustrates that predictive dialers that do not have the statutorily required ability to store or produce, and dial, randomly or sequentially generated numbers offer a number of consumer benefits. Today's predictive dialing solutions connect live representatives with consumers as quickly as possible to provide timely, useful information. They promote consumer privacy by protecting against improper calls and manual dialing errors and by facilitating compliance with federal and state calling laws. They are also exponentially more efficient than manual dialing, increasing productivity and lowering costs for consumers. Predictive dialing solutions allow consumers to receive a variety of critical, time-sensitive non-telemarketing calls, including fraudulent activity and identity theft alerts, flight delay updates, school closing notifications, warnings about utility outages, and healthcare reminders.

I also explained that there continues to be significant confusion among plaintiffs' attorneys and courts over the Commission's prior TCPA decisions and the applicability of the TCPA to predictive dialers. For example, some courts have interpreted the FCC's past statements to mean that any predictive dialing solution is an autodialer, regardless of whether it has the statutorily required "capacity to store or produce numbers to be called, using a random or sequential number

[1] *See Petition for Declaratory Ruling*, Communication Innovators, CG Docket No. 02-278 (filed June 7, 2012).

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generator, and to dial such numbers."[2] Other courts have held that the Commission altered the statutory definition of autodialer such that now any equipment that has "the capacity to dial numbers without human intervention" is an autodialer.[3] These rulings and the FCC's orders have opened the door for virtually every type of telephone or computer equipment in existence to be deemed an autodialer.

The Commission can resolve this uncertainty by issuing a narrow declaratory ruling confirming that: (1) there are a variety of predictive dialing solutions available today; and (2) to be considered an autodialer, any solution must have the "capacity to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers." Such a ruling would be consistent with and supported by the Commission's prior TCPA decisions, including the FCC's longstanding precedent that the autodialer restriction "clearly" does not apply "to functions like 'speed dialing,' 'call forwarding,'" and other services where "the numbers called are not generated in a random or sequential fashion."[4] It would also give effect to each word of the statute chosen by Congress, including the phrase "using a random or sequential number generator."[5] Any approach that fails to adhere to this statutory language would not only be contrary to law but harmful to consumers, as it would sweep in all kinds of electronics, including smartphones, under the autodialer definition.

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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cc: Adonis Hoffman
Louis Peraertz

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[2] *See, e.g.*, *Griffith v. Consumer Portfolio Services*, Inc., 838 F. Supp. 2d 723 (2011); *see also* 47 U.S.C. § 227(a)(1).

[3] *See, e.g.*, *Gragg v. Orange Cab Co., Inc.*, 942 F.Supp.2d 1111, 1113 (W.D. Wash. 2013); *Buslepp v. Improv Miami*, 2012 WL 4932692 at *2 (S.D. Fla. Oct. 16, 2012).

[4] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 ¶ 47 (1992).

[5] *See* 47 U.S.C. § 227(a)(1).

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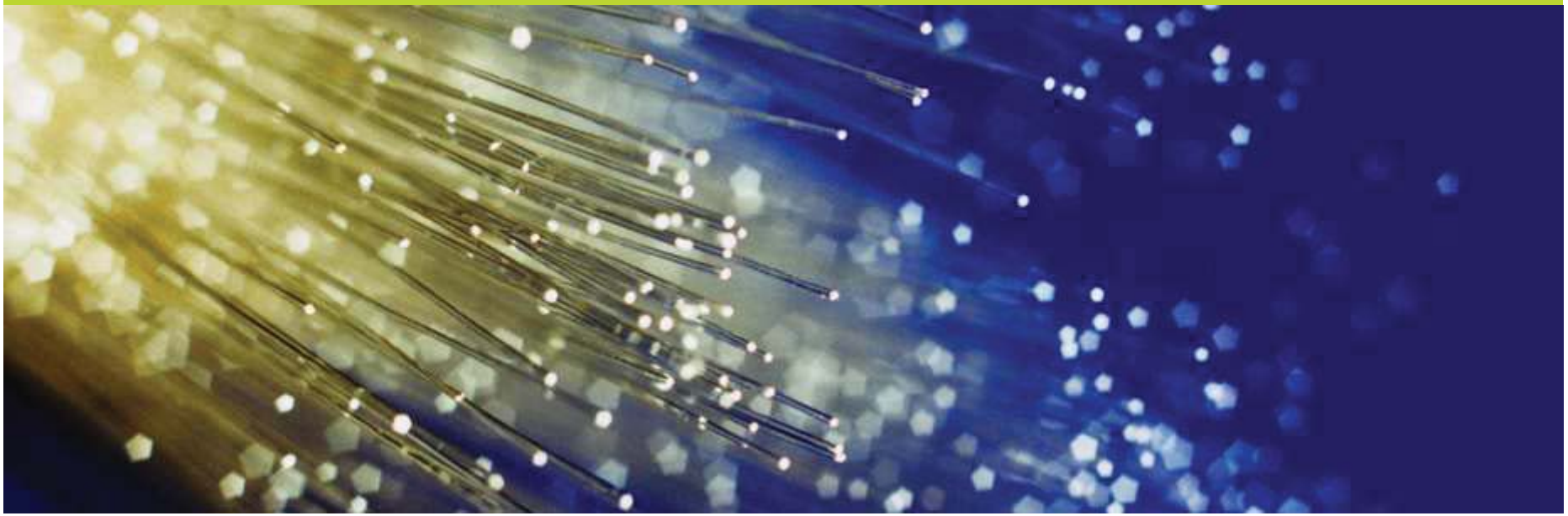
The TCPA and Today's Predictive Dialer Solutions

Communication Innovators

February 27, 2014



Summary

- Confusion among courts and plaintiffs' attorneys regarding the TCPA's applicability to modern predictive dialers is hindering innovation, undermining the FCC's consumer protection goals, harming wireless consumers, and creating administrative burdens on FCC staff.
- The FCC should grant the Communication Innovators Petition and issue a narrow declaratory ruling confirming that predictive dialer solutions that do not have the capacity to store or produce, and dial, random or sequential numbers are not "automatic telephone dialing systems."
- Granting the Communication Innovators petition will resolve this confusion and ensure that wireless consumers can receive critical, time-sensitive non-telemarketing calls.

Overview

- Predictive Dialer Solutions – Use Live Representatives and Avoid Robocalls
- Predictive Dialer Solutions Provide Many Significant Consumer Benefits
- Background on the TCPA
- The World Has Gone Wireless
- Many Predictive Dialer Solutions Do Not Meet the Statutory Definition for “Autodialers”
- Confusion over the FCC’s TCPA Decisions
- The Solution

Predictive Dialer Solutions – Use Live Representatives and Avoid Robocalls

- Predictive dialer solutions connect live representatives with consumers.

- They enable organizations with a legitimate need to contact large numbers of specific customers for particular **non-telemarketing** purposes to do so accurately and cost-effectively.

- **They do not place "robocalls."**

Predictive Dialer Solutions Provide Many Significant Consumer Benefits

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

Predictive Dialer Solutions Provide Many Significant Consumer Benefits (cont'd)

- They promote consumer privacy by protecting against improper calls and manual dialing errors.
- They also facilitate compliance with federal and state calling laws.
- They are exponentially more efficient than manual dialing, increasing productivity and lowering costs for consumers.
- Many of today's solutions are software- or cloud-based application platforms.

Background on the TCPA

- Congress enacted the TCPA in 1991 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.

Background on the TCPA (cont'd)

- 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.

The World Has Gone Wireless

- There has been a dramatic shift in the use of wireless telephones over the last decade.
- Two out of five (39.4%) of all American homes are wireless-only households.
- Another 15.7% of households receive all or almost all calls on wireless telephones despite also having a landline telephone (“wireless-mostly”).
- Consumers can easily “port” their landline number to their wireless device.

Many Predictive Dialer Solutions Do Not Meet the Statutory Definition for "Autodialers"

- **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 store, produce, and dial random or sequential numbers – those features have not been built into the solution.
- 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 – those call attempts would be rejected.
- Substantial additional changes would be needed to rebuild the solutions to store, produce, and dial random or sequential numbers.

Many Predictive Dialer Solutions Do Not Meet the Statutory Definition for "Autodialers" (cont'd)

- Even if they could, companies that use predictive dialers for non-telemarketing purposes have absolutely no need to store, produce, and dial random or sequential numbers (nor can they benefit from using such numbers).
- When used to place **non-telemarketing calls**, predictive dialer solutions do not raise **any** of the concerns expressed by Congress when passing the TCPA in 1991.
- When used for telemarketing calls, the caller is subject to the FCC's: (1) do-not-call; (2) abandoned call; (3) caller identification; and (4) automated opt-out mechanism requirements. Solutions with the requisite "capacity" would also be subject to: (5) written consent requirements and related disclosures; and (6) the PSAP do-not-call registry requirements.

Confusion over the FCC's TCPA Decisions

- There is significant confusion by plaintiffs' attorneys and courts over the FCC's prior TCPA decisions regarding the applicability of the TCPA to predictive dialers
- The FCC has previously distinguished between autodialed telemarketing calls and the use of predictive dialer solutions 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 dialer solutions qualify as autodialers, creating widespread confusion and devastating class action litigation.

Confusion over the FCC's TCPA Decisions (cont'd)

- Some courts have interpreted the prior decisions to mean that:
  - Any predictive dialing solution is an autodialer, regardless of whether it has the statutorily required "capacity to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers";
  - Any equipment that has "the capacity to dial numbers without human intervention" is an autodialer;
  - Manually dialing wireless telephone numbers is a violation of the autodialer restriction if the calls are made using equipment that "has the capacity to autodial."
- In short, the FCC's orders have opened the door for virtually every type of telephone or computer equipment in existence to be deemed an autodialer.

Confusion over the FCC's TCPA Decisions (cont'd)

- **<u>These court decisions are undermining the FCC's consumer protection goals.</u>**
- They are hindering innovation and deterring companies from placing consumer-friendly, non-telemarketing calls.
- They are also harming wireless consumers by limiting callers' ability to place critical, time-sensitive non-telemarketing calls without significant fear of a TCPA class action lawsuit.

Confusion over the FCC's TCPA Decisions (cont'd)

- In addition, they are making it impossible for companies to utilize call controls that enhance consumer privacy and ensure compliance with federal and state law.
- The confusion is also creating additional administrative burdens for FCC staff, as reflected by the number of TCPA petitions pending before the agency.

The Solution

- The FCC should issue a narrow declaratory ruling acknowledging that:

  (1) there are a variety of predictive dialing solutions available today; and

  (2) to be considered an autodialer, any solution must have the "capacity to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers."
- It should also confirm that equipment and technologies can only qualify as autodialers if they have the "present capacity" or "current ability" to store or produce, and dial, random or sequential numbers without first being technologically altered.

The Solution (cont'd)

- This request is consistent with and supported by the FCC's prior TCPA decisions.
- In its 2003 TCPA Order, the FCC addressed a specific type of predictive dialing solution that involved taking an autodialer and pairing it with predictive dialing software, and it affirmed that parties may not circumvent the autodialer restriction in that way.
- The FCC recognized that other solutions were likely to evolve and stated that it "fully expect[ed]" dialing technology to continue to develop.
- It also recognized in the 2003 TCPA Order the importance of construing the TCPA to give effect to every word of the statute – "using a random or sequential number generator."

The Solution (cont'd)

- Issuing the requested declaratory ruling would also be consistent with the FCC's longstanding precedent that the autodialer restriction "clearly" does not apply "to functions like 'speed dialing,' 'call forwarding,'" and other services where "the numbers called are not generated in a random or sequential fashion."
- Any approach that fails to give effect to these elements would not only be contrary to law but extremely harmful to consumers, as it would sweep in all kinds of electronics, including smartphones, under the autodialer definition.

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