Before the
Federal Communications Commission
Washington, D.C.

In the Matter of	)	
	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Petition for Rulemaking of	)	
ACA International		

COMMENTS OF THE AMERICAN BANKERS ASSOCIATION

The American Bankers Association (ABA) submits these comments in support of the Petition for Rulemaking filed by ACA International (ACA) on January 31, 2014 (Petition).[1] ABA represents banks of all sizes and charters and is the voice for the nation's $14 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than $185 million in assets. ABA urges the Federal Communications Commission (FCC or Commission) to take the opportunity presented by the Petition to resolve the legal uncertainty surrounding a broad range of consumer-friendly, non-telemarketing communications to wireless phones.

I. Background on the banking industry's use of informational, non-telemarketing calls.

As ABA has written on numerous occasions in comments filed in this docket, autodialed and prerecorded messages provide a critical channel for non-telemarketing communications

[1] *Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (filed January 31, 2014).

between financial institutions and their customers. Fraud alerts, notices of address discrepancies, low balance and over-limit alerts, data security breach notifications, delinquency notifications, loan modification outreach, and other time-critical, non-telemarketing communications must reach large numbers of customers promptly and at reasonable cost.[2] Only automated calling – not manual dialing by live agents – can meet these requirements in a timely, efficient, and economical manner. And, as wireless service continues to replace the landline telephone as consumers' communication method of choice, an increasing percentage of those automated calls must be placed to mobile devices.

As the Commission is aware, there continues to be significant confusion among plaintiffs' attorneys and courts over the Commission's prior Telephone Consumer Protection Act (TCPA) decisions, leading to conflicting decisions and erroneous interpretations of the statute. This confusion, particularly the confusion surrounding the TCPA's definition of an "automatic telephone dialing system," (ATDS or autodialer) has resulted in skyrocketing class action litigation. As ACA notes in its Petition, "TCPA class action lawsuits involving autodialers have risen by a staggering 592% in the last few years alone."[3] Recent reports indicate that trend shows no signs of abating; there were 160 TCPA cases filed in January 2013 and 208 filed in the same month this year – a 30 percent increase.[4]

The ongoing confusion and the threat of TCPA liability is discouraging innovation, diverting time and resources away from consumer-facing operations, chilling critical account

[2] For a detailed description of these calls *see* Comments of the American Bankers Association, the Financial Services Roundtable, and the Consumer Bankers Association, GC Docket No. 02-278 (May 21, 2010).
[3] ACA Petition, *supra* at 7.
[4] Hogan Lovells *TCPA Alert,* (March 13, 2014) *available at* http://ehoganlovells.com/rv/ff0015febf4c0d4adc7edb1e1f49bde51f3ce4b1.

communications, and creating substantial costs that are inevitably passed on to consumers. Thus, it is essential that the Commission clarify how the TCPA should be applied, particularly before additional courts issue decisions and create the potential for even more confusion and inconsistency.

I. **Through multiple comment cycles responding to a wide variety of petitions for declaratory ruling, stakeholders have provided the Commission with the record it needs to support the clarifications and confirmations ACA requests.**

Although entities subject to the TCPA have asked the FCC to resolve the uncertain status of various dialing technologies since the early 2000s, the rising tide of TCPA class action litigation in the last few years has led to a flurry of petitions for declaratory relief. Through multiple comment cycles on these petitions, stakeholders have provided the Commission with the record it needs to support the clarifications and confirmations ACA requests in its Petition. Interested parties have had ample opportunity to comment, and they have. Indeed, more than 1200 comments have been filed in this docket in just the last two years, the vast majority of which have thoroughly addressed the legal and policy issues presented by ACA's Petition.[5] It is hard to imagine a more complete record than that before the Commission today.

In the past two years ABA, like many other interested parties, has filed more than ten comments and *ex parte* notices in this docket and has attended numerous meetings with FCC staff to explain how the TCPA increasingly interferes with the development and deployment of consumer-friendly communications and services based on mobile devices. It is unlikely that the

[5] As noted above, stakeholders have urged the Commission to clarify the autodialer definition since the early-2000s; however, ABA tallied only the comments filed since June, 2012 when Communication Innovators filed a petition for declaratory relief. *See* Communication Innovators *Petition for Declaratory Ruling*, CG Docket No. 02-278 (filed June 7, 2012).

comments received through the rulemaking process will add to the record before the Commission. Instead, initiating a rulemaking will simply delay resolution of the uncertainty and will prompt additional companies to seek declaratory rulings on a case-by-case basis as they are sued, imposing an unnecessary administrative burden on FCC staff and stakeholders.

Accordingly, we urge the Commission to resolve the uncertainty and issue the clarifications and confirmations ACA requests promptly. Specifically, ACA asks the FCC to: (1) confirm that not all predictive dialers are autodialers; (2) confirm that "capacity" under the TCPA means present ability; and (3) confirm that callers are not liable for autodialed non-telemarketing calls to wireless numbers for which prior express consent has been obtained but which, unbeknownst to the calling party, have subsequently been reassigned from one wireless subscriber to another.

I. The Commission should confirm that predictive dialers are not necessarily "automatic telephone dialing systems."

The TCPA defines an autodialer as "equipment 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."[6] The legislative history of the TCPA leaves no doubt that Congress adopted this definition in 1991 to control the use by telemarketers of then prevalent equipment that generated numbers using a random or sequential algorithm, which could also potentially flood mobile telephone users with costly calls.[7]

[6] 47 U.S.C. §227(a)(1).

[7] As the Senate Report accompanying the TCPA pointed out, the statute was enacted to control "the use of automated equipment to engage in telemarketing." Sen. Rep. No. 102-178 at 1, 1991 U.S.C.C.A.N. 1968, 1969 (1991).The Senate Report also noted that telemarketers "often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations as well as unlisted telephone numbers." *Id.* Nothing in the legislative history suggests that Congress intended to require prior express

As newer technologies facilitated the dialing of calls from databases of numbers of existing customers, the Commission and courts reasonably could have declared that devices that do not rely upon random or sequential number generators fall outside the ATDS definition. However, the Commission and courts have not consistently taken this path. Instead, in 2003 the FCC addressed a specific type of dialing technology that paired predictive software with an autodialer and stated that it would extend the autodialer definition to any equipment that has the "capacity to dial numbers without human intervention."[8] This approach, however, entirely reads out of the definition the statutory requirement that an autodialer must have the capacity to store, produce, and dial numbers *using a random or sequential number generator*.[9]

As ABA, Communication Innovators, and others have pointed out in numerous filings in this docket, the Commission's interpretation has led to a conflicting patchwork of district court decisions that embolden TCPA litigants. Some courts have interpreted the Commission's decisions to mean that any predictive dialing solution is 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.[10] Other courts have held that the Commission "slightly altered" the statutory definition such that now any equipment that "has the capacity to dial numbers without human intervention" is an autodialer.[11] Moreover, some

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consent for non-telemarketing calls, or for calls that were dialed by automated means that did not involve the use of random or sequential number generators.

[8] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014¶ 132 (2003)(2003 TCPA Order).

[9] *See also Rules and Regulations Implementing the Telephone Consumer Protection Act,* 23 FCC Rcd 559 (2008)(*ACA Declaratory Ruling*) ¶ 12 ("a predictive dialer constitutes an automatic telephone dialing system and is subject to the TCPA's restrictions on the use of autodialers").

[10] *See, e.g., Griffith v. Consumer Portfolio Services, Inc.*, 838 F. Supp. 2d 723 (2011).

[11] *Gragg v. Orange Cab Co., Inc.*, _ F.Supp.2d_, 2013 WL 1788479 at *2 (W.D. Wash. April 26, 2013)(finding that the Commission "slightly altered the autodialer definition when it determined that equipment that dials a list of

class action plaintiffs' attorneys assert that under the Commission's prior decisions, *manually* dialing wireless telephone numbers is a violation of the TCPA, if the calls are made using equipment that "has the capacity to autodial."[12]

Notably, the most recent district court to apply the autodialer decision has expressly rejected the notion that equipment that dials numbers without human intervention, but does not generate those numbers randomly or in sequence, falls within the ATDS definition.[13] In *Dominguez v. Yahoo!, Inc.*, the U.S. District court for the Eastern District of Pennsylvania considered equipment that sent text messages without human intervention by retrieving stored telephone numbers from a queue. Noting the absence of evidence that the system had the capacity to generate numbers using a random or sequential number generator, the court concluded the equipment was not an autodialer and granted summary judgment to Yahoo. The court acknowledged the FCC's contrary interpretation, but concluded that due to the clarity of the statutory autodialer definition, the FCC's interpretation is not entitled to deference.

A declaratory ruling is needed to resolve the existing confusion and to confirm the meaning of the autodialer definition as Congress wrote it. ABA agrees with ACA, "simply because a predictive dialer *can be* an ATDS for purposes of the TCPA, this does not mean that a predictive dialer *must be* an ATDS under the TCPA." [14] Rather, to be an ATDS under the TCPA, dialing equipment must meet each of the statutory elements: it must have the capacity to use a

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numbers (such as a business's list of customers), rather than dials random or sequential numbers, is still an ATDS, because the basic function of such dialing equipment is the same – 'the capacity to dial numbers without human intervention.'"); *see also Buslepp v. Improv Miami,* 2012 WL 4932692 at *2 (S.D. Fla. Oct. 16, 2012).

[12] *See Mudgett v. Navy Federal Credit Union*, 2012 WL 870758 at *2 (E.D. Wis. 2012); *Dobbin v. Wells Fargo Auto Finance, Inc.*, 2011 WL 2446566 at *4 (N.D. Ill. 2011).

[13] *Dominguez v. Yahoo!, Inc.,* Civ. Case No. 13-1887 (E.D. Pa. March 20, 2014).

[14] ACA Petition, *supra* at 6.

random or sequential number generator to store or produce, and to dial, telephone numbers to be called.

II. The Commission should also confirm that "capacity" under the TCPA means present, enabled ability.

ABA also supports ACA's request that the Commission confirm that the word "capacity" in the autodialer definition means the *present ability* of equipment to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers, at the time the call is made – not the hypothetical, potential capacity of the equipment if it is re-programmed to generate random or sequential numbers.

As the Commission is aware, "capacity" is not defined in either the statute or the TCPA regulations. Under the circumstances, the FCC should adopt the ordinary meaning of the word: present ability or current capability.[15] The fact that Congress used the present tense in statute – defining an autodialer as "equipment which *has* the capacity"— instead of the future tense "will have the capacity" is significant.[16] As ACA notes, a federal district court in Alabama recently addressed the definition of capacity and held "[T]o meet the TCPA definition of an "automatic telephone dialing system," a system must have a **present** capacity, at the time the calls were being made, to store or produce and call numbers from a number generator."[17] As the court explained, common sense dictates such a conclusion because "in today's world, the

[15] *See* Professional Association for Consumer Engagement *Petition for Expedited Declaratory Ruling or in the Alternative, Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed October 18, 2013)(PACE Petition)(Asking the Commission to define the term "capacity" as the "current ability to operate or perform an action, when placing a call, without first being modified or technologically altered.").

[16] *See* 47 U.S.C. §227(a)(1)(emphasis added).

[17] *Hunt v. 21st Mortgage Corp*., 2013 U.S. Dist. LEXIS 132574 at *11 (D. Ala. Sept. 17, 2013)(emphasis in original).

possibilities of modification and alteration are virtually limitless."[18] To hold otherwise would subject every smartphone, tablet, or personal computer user to the mandates of the TCPA because each device could be modified with an application or software to store or produce, and dial, random or sequential telephone numbers.

ABA urges the Commission to clarify further that to fall within the autodialer definition a device must have the present, *enabled* ability "to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers." The fact that a device has the capability of generating numbers randomly or sequentially should not render that device an autodialer, if that capability is not currently enabled. After all, most of the technology available today has capabilities far beyond those the average person or business seeks and intends to use.

Thus, ABA urges the Commission to adopt a common sense reading of the capacity requirement and confirm that dialing systems lack the required capacity unless the equipment can be used, without modification of the hardware, reprogramming of the software, or enabling features that the device could support but that are not available as the device is currently operated or configured, to generate numbers randomly or in sequence.[19]

The clarifications requested in sections II and III, above, would confirm the meaning of the autodialer definition as Congress wrote it and will advance the intent of Congress to prevent vexatious dialing of cell phone customers by telemarketers using random or sequential number generators. Moreover, the use of any autodialer, so defined, to place calls to mobile or

[18] *Id.*

[19] *See also* Reply Comments of ABA and CBA in Support of Soundbite Communications, Inc. *Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed May 15, 2012)(urging the Commission to adopt a "common sense reading of the capacity requirement).

emergency numbers would continue to be prohibited except in an emergency or with the "prior express consent" of the called party. However, the requested clarifications also will make it clear that many modern dialing technologies, including predictive and preview dialers that cannot or do not store or produce, and dial, random or sequential numbers fall outside the scope of the TCPA.

These simple clarifications will permit financial institutions and other entities to use predictive and preview dialers to efficiently and economically place the non-telemarketing calls and texts that consumers value without fear of TCPA liability. They will also permit the personal group texting services, package delivery notifications, and other useful services that are the subjects of pending petitions and comments, without encouraging telemarketers to place unsolicited advertising calls to mobile telephones by autodialers. Finally, the confirmations will encourage businesses to develop and implement new non-telemarketing equipment and services without seeking piecemeal rulings from the Commission as to their legality and without risking needless litigation. At the same time, consumers will continue to be protected from abusive telemarketing practices.

III. The Commission should confirm that parties are not liable for autodialed "wrong-number" non-telemarketing calls to wireless numbers, including calls placed in error to wireless numbers for which prior express consent has been obtained but which, unbeknownst to the calling party, have subsequently been reassigned from one wireless subscriber to another.

ACA asks the Commission to initiate a rulemaking to establish a safe harbor for "wrong number" non-telemarketing calls to wireless numbers for which the caller had prior express consent, but the number has been reassigned from one wireless subscriber to another—and the caller is unaware of the reassignment. ABA strongly agrees that it is unfair and inconsistent

with the purpose of the TCPA to impose liability on callers that have properly obtained consent to call a number but inadvertently have reached a consumer to whom the number was reassigned.

On March 10, 2014, we filed comments in support of United Healthcare Services, Inc.'s Petition for Expedited Declaratory Ruling that asks the Commission to address this issue on an expedited basis.[20] Without repeating those comments, we urge the Commission to issue promptly a declaratory ruling confirming that callers are not liable under the TCPA for informational, non-telemarketing autodialed and pre-recorded calls to wireless numbers that have been reassigned, as long as the caller previously had "prior express consent" to call that number. However, to the extent that the Commission believes that a rulemaking is necessary, ABA supports the safe harbor proposed by ACA in its Petition.

IV. Conclusion

ABA respectfully urges the Commission make the requested clarifications to its TCPA rules to bring an end to the ambiguity and confusion that has facilitated the explosion of frivolous class action litigation and threatens to curtail important and valued communications between a bank and its customers.

Respectfully submitted,

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[20] *See* ABA comment to United Healthcare, Inc. *Petition for Expedited Declaratory Ruling,* CG Docket No. 02-278 (filed March 10, 2014).

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