Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	**)**	
	)	
Rules and Regulations Implementing the	**)**	**CG Docket No. 02-278**
Telephone Consumer Protection Act of 1991	**)**	**FCC number 10-18**
	)	

COMMENTS OF THE FINANCIAL SERVICES ROUNDTABLE, THE AMERICAN BANKERS ASSOCIATION, AND THE CONSUMER BANKERS ASSOCIATION

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EXECUTIVE SUMMARY

Efficient, effective communications are essential if financial institutions are to serve their customers and comply with their regulatory obligations. Fraud alerts, notices of address discrepancies, data security breach notifications, delinquency notifications and loan modification outreach, and other time-critical, non-telemarketing communications must reach large numbers of customers promptly and at reasonable cost. Only automated calling – not manual dialing by live agents – can meet these requirements in a timely and effective manner. And, as wireless service continues to replace the wireline telephone as consumers' communication method of choice, an increasing percentage of those automated calls must be placed to mobile devices.

As technology and consumer preferences change, regulation must adjust. The Commission should seek to reduce rather than increase the burdens on automated customer communications. Specifically, the Commission should decline to adopt the proposed written consent requirement for automated non-marketing calls to the very wireless numbers that customers have voluntarily provided to the callers. The proposed rule is irrelevant to the goal of harmonizing this Commission's rules with those of the Federal Trade Commission, serves no public interest purpose and overturns almost two decades of Commission guidance concerning the means by which called party consent to receive automated calls may be obtained. Rather than impose new constraints on automated calling, the Commission should confirm that businesses may place automated calls to customers' wireless contact numbers, and also should confirm that automated dialing technologies that do not generate numbers randomly or sequentially are not

automatic telephone dialing systems for purposes of the Telephone Consumer Protection Act.

DISCUSSION

I. THE COMMISSION SHOULD NOT ADOPT INCREASED RESTRICTIONS ON AUTODIALED NON-MARKETING CALLS TO WIRELESS NUMBERS

The Financial Services Roundtable (the "Roundtable"),[1] the American Bankers Association ("ABA")[2] and the Consumer Bankers Association ("CBA")[3] support the goal of harmonizing this Commission's telemarketing regulations with those of the Federal Trade Commission. However, the proposed, new restrictions on autodialed and prerecorded calls to wireless telephone numbers are irrelevant to that purpose and threaten substantial harm to consumers and the economy.

A. Automated Service Calls And Text Messages Provide Critical Consumer Service And Protection Needs

Today's mobile citizenry finds value in wireless connectivity. In the 21st century, cell phones are not just conveniences; they are becoming the principal means by which people stay connected to family, friends and providers of essential goods and services.

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[1] The Financial Services Roundtable is an association of financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine, accounting directly for $74.7 trillion in managed assets, $1.1 trillion in revenue, and 2.3 million jobs.

[2] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its two million employees.

[3] The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services – banking services geared toward consumers and small businesses. CBA provides leadership, education, research and federal representation on retail banking issues. CBA members include most of the nation's largest bank holding companies, as well as regional and super-community banks that collectively hold two-thirds of the industry's total assets.

Of all the institutions with which people must stay connected, their banks are among the most vital. Consumers value being connected to their banks for many purposes, including prevention of fraud and identity theft, notice of security breaches, and notice of missed payments. Automatic telephone dialing systems enable financial institutions to provide these important communications to large numbers of consumers quickly, efficiently and economically. Several examples of the direct benefits these communications provide to consumers, and that would be lost if these communications could not efficiently be made, are summarized below.

(1) Enhanced Consumer Security

With identity theft and fraud losses at all-time highs,[4] financial institutions are relentlessly pursuing fraud detection and prevention capabilities, a key component of which is autodialed calling to customers' wireline and mobile telephones, including text messaging to customers' mobile devices, to alert customers to out-of-pattern account activity and transaction requests. One large payment card issuer reports that it places 1,300,000 "suspicious activity" calls, and an additional 60,000 text messages concerning suspicious activities at point of sale, per month. Prompt action by both the customer and the institution following these incidents is crucial to limit identity theft and restore use of the card. Not surprisingly, consumers value card issuers' efforts to contact them immediately: a 2010 survey by SoundBite Communications reports that 89% of

[4] A recent Javelin Strategy & Research study reports that total annual fraud losses in 2009 were $54 billion, a 12.5% increase over 2008. The fraud incidence rate rose from 4.3% to 4.8% in one year. *2010 Identity Fraud Survey Report: Identity Theft Continues to Rise – New Accounts Fraud Drives Increase; Consumer Costs at an All-Time Low* (Javelin Strategy & Research, February, 2010).

consumers prefer to receive alerts about suspicious activity through multiple channels, including text, phone calls to mobile and residential lines, email and letter.[5]

Section 501(b) of the Gramm-Leach-Bliley Act, as well as the breach notification laws of 46 states and the District of Columbia, require financial institutions to establish response and customer notification programs following any unauthorized access to customers' personal information.[6] Autodialers and prerecorded messages permit banks to quickly contact large numbers of customers to alert them to threatened security breaches, enabling customers to monitor their accounts and take appropriate defensive action. Call automation technologies also are used to place the many calls required to help affected customers with the resolution of fraudulent charges.

(2) Reduced Consumer Fraud

For those individuals who are or may be victims of identity theft, section 605A of the Fair Credit Reporting Act provides a right to place fraud alerts on their credit reporting agency files. These alerts, like the active duty alerts filed by deployed military personnel, notify all prospective users of a consumer report that the consumer does not authorize the establishment of any new credit plan or extension of credit without verification of the consumer's identity. Further, section 605A expressly directs financial institutions to call consumers to conduct this verification:

> If a consumer requesting the alert has specified a telephone number to be used for identity verification purposes, before

[5] Andrew Johnson, "Text or Phone, Just Get the Alerts Out," *American Banker* (Apr. 6, 2010).

[6] Gramm-Leach-Bliley Financial Services Modernization Act of 1999, Pub. L. 106-102, 113 Stat. 1338, § 501(b); *see, e.g.*, Cal. Civ. Code § 1798.29; Fla. Stat. § 817.5681; 815 ILCS § 530/10(a); NY CLS Gen. Bus. § 899-aa; N.C. Gen. Stat. § 75-65; Rev. Code Wash. § 19.255.010.

> authorizing any new credit plan or extension described in clause (i) in the name of such consumer, a user of such consumer report shall contact the customer using that telephone number.[7]

Financial institutions rely on the efficiency of autodialers and other automation technologies to contact these consumers quickly, with the goal of verifying identity and immediately accommodating the customer's request. For those customers who have provided a mobile telephone number in the fraud or active duty alert, the inability to use automated calling methods is likely to delay the bank's ability to contact the customer, resulting in embarrassment – or worse – for those customers.

(3) Consumer Protection and Fee Avoidance

Financial institutions use autodialed telephone communications to protect customers' credit and help them avoid fees. Customers may be alerted by voice or text about low account balances, overdrafts, over-limit transactions or past due accounts in time for those customers to take action and avoid late fees. These reminder calls and texts also help consumers avoid late payments, accrual of additional interest, and negative reports to credit bureaus. Autodialed calls that deliver prerecorded messages are the quickest and most effective way for these courtesy calls to be made, providing an opportunity for the customer to take timely corrective action.

In addition, financial institutions increasingly use autodialed and prerecorded message calls to reach out to consumers experiencing financial hardship. Their goal is to initiate early conversations with customers who are behind on their credit obligations to inform them of alternative payment arrangements that the bank can offer. Autodialed and prerecorded messages permit large numbers of such calls to be placed, freeing customer

[7] Fair Credit Reporting Act § 605A, 15 U.S.C. § 1681c-1.

service representatives and loss mitigation specialists to devote their time to working with individual borrowers. Banks hope that these efforts will prevent consumers from falling prey to fraudulent for-profit debt settlement companies and will prevent litigation that is in no one's interest. These efforts, when successful, also promote the soundness and stability that financial institutions are required by statute and regulation to maintain.

Finally, failure to communicate promptly with customers who have missed payments or are in financial hardship can have severe, adverse consequences for those customers. Customers that are not reached and that fail to resolve their payment issues are more likely to face repossession, foreclosure, adverse credit reports and referrals of their accounts to collection agencies. Prompt communication is a vital step in the process of avoiding these harmful consumer outcomes.

(4) More Mortgage Modifications

Financial institutions also rely upon automated calling methods to reach out to the millions of consumers who are encountering difficulty paying their mortgages. Autodialers and prerecorded messages are used to initiate contact with delinquent borrowers, to remind them to return the paperwork needed to qualify for a modification, and to notify borrowers that a modification is being delivered so the that the package will be accepted.

Avoidance of foreclosure and stabilization of the housing market are public policy priorities of the Obama Administration, implemented specifically by the Home Affordable Mortgage Program ("HAMP"), which (among other obligations) requires

financial institutions to make at least four phone calls in a 30-day period to first-line borrowers who are potentially eligible for the program.[8]

(5) Better Customer Service

Financial institutions also rely upon the efficiency of autodialed and prerecorded message calling to provide other valued and important customer services. Autodialed calls often are made as a follow-up to resolve customers' service inquiries. For example, if a customer inquiry requires account research a customer service representative often completes the necessary research and places an autodialed follow-up call to the customer. Autodialed and/or prerecorded calls also are initiated to remind customers that a credit card they have requested was mailed and must be activated. Finally, autodialed and/or prerecorded calls are placed to customers who have applied for secured cards, or who have opened deposit accounts, to remind them to fund the account and/or return documents to the bank to permit the continued maintenance of the account.

(6) Service to Insurance Policyholders

All states require drivers to have automobile insurance or proof of financial responsibility, and insurers are required to give written notice 10-30 days in advance before terminating policies for failure to pay. Using an autodialer and a prerecorded message helps ensure the consumer is aware of the need to make payment in time to avoid a lapse of their auto policy, avoid late fees, and avoid driving without legally-required liability insurance.

Similarly, life insurance policies require advance written notice of cancellation. If a policy lapses for non-payment, some individuals may no longer be eligible for life

[8] *See* U.S. Department of the Treasury Supplemental Directive 10-02 (March 24, 2010).

insurance or may have to pay substantially more for that insurance. Use of the autodialed and recorded message or text messages helps avoid nonpayment cancellation of the life insurance. Finally, obtaining life insurance can be a lengthy process with extensive paperwork. Autodialers allow life insurance companies to follow-up on missing paperwork to ensure that coverage is created.

(7) Protection from Life Threatening Disasters

Many property insurance companies rely on the speed of autodialers and recorded messages to notify their customers when a catastrophe is imminent. In the event of a major catastrophe, such as a hurricane or wildfire, additional information may be provided about how and where to file a claim. Furthermore, immediately after these disasters, wireline phone use may be unavailable, claim locations may have changed and normal communications may not be operating. Similarly, autodialers and recorded messages may also be used by insurers to give information regarding the National Flood Insurance program. For example, when floods are predicted for a specific area due to excessive snowmelt or spring rains, insurers notify their existing customers that do not have flood coverage about the flood risks and the mandatory 60-day waiting periods before flood coverage is effective.

B. The Proposed Rule Will Prevent Critical Service Calls From Being Made And Will Increase The Cost Of Those Calls That Are Made

In order to place the millions of customer service calls that must be made every year, and to do so at acceptable speed, accuracy and cost, financial institutions must use

the most efficient communications technologies available, including automated dialing systems and delivery of prerecorded messages.

Notably, automated dialing and prerecorded messages permit substantial cost savings; increases in those costs would likely be passed on to consumers in the rates and fees charged for mortgages, credit card accounts and other financial services. Autodialing systems also promote legal compliance. For example, to ensure compliance with the Fair Debt Collection Practices Act's prohibition against harassment or abuse, financial institutions program autodialers with restrictions on the frequency of collection calls and the hours at which those calls are placed. With these technologies, the Fair Debt Collection Practices Act's consumer protections are observed more efficiently than would be the case if the associated calling decisions were made by human agents.[9] Similarly, automated methods ensure that heavy volumes of time-critical notifications can be made while customers still have time to take the required action.

An increasing percentage of these calls must be placed to wireless devices. Notably, the percentage of customers who use mobile devices as their primary means of personal and business communication, including those who have ceased to subscribe to wireline telephone service altogether, has grown dramatically in recent years. The percentage of households that are wireless-only increased by approximately five percentage points in just 12 recent months, from 17.5 % in the first eight months of 2008 to 22.7 % of households in the first six months of 2009.[10] Not surprisingly, the

[9] Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p. Automated calling also is used to avoid collections calls to federal disaster areas.

[10] U.S. Department of Health and Human Services, National Health Information Survey (December, 2009). The number of wireless-only households increases when the data are confined to younger Americans. Nearly one-half of adults aged 25-29 years live in

percentage of customers who furnish wireless telephone numbers as their sole or primary point of contact, when applying for accounts or making service inquiries, is equal to or exceeds this percentage. Accordingly, artificial regulatory obstacles to the normal use of these technologies for business-to-consumer communications are obstacles to the wireless revolution itself, including the goals set out in this Commission's National Broadband Plan.[11]

The existing restrictions on automated and prerecorded calls to mobile telephone numbers already complicate the task of efficient customer communication. For example, a bank that needs to send its customer a fraud alert must determine whether the contact number to which the alert will be sent is a wireline or wireless number. If the number is wireline, the call may simply be made using the most efficient method available. If the number is wireless, the call may not be made if the dialing method meets the (less than clear) statutory definition of an automatic telephone dialing system, or if the call will deliver an artificial or prerecorded voice message, unless the called party has given prior express consent to receive those calls.

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households with only wireless telephones, and approximately one-third of adults aged 30-34 live in households with wireless telephones only. *Id.*

[11] This Commission's National Broadband Plan makes wider deployment of wireless services, including the allocation of substantially more radiofrequency spectrum for use by those services, a high priority. That policy is expressly based on the critical importance of wireless services to the health of the economy. As the National Broadband Plan points out, the "contribution of wireless services to overall gross domestic product grew over 16% annually from 1992-2007 compared with less than 3% annual growth for the remainder of the economy." *Connecting America: the National Broadband Plan* (Federal Communications Commission, March, 2010) p. 75. Imposition of additional regulatory burdens on beneficial uses of wireless communications is inconsistent with the goals of the National Broadband Plan and impedes, rather than encourages, the growth of this vital sector of the U.S. economy.

In the nearly two decades since the TCPA was enacted, financial institutions have minimized the adverse impact of the autodialer restriction by integrating compliance into their day-day-day business practices. In complying with the prior express consent requirement, in particular, financial institutions have been guided by the FCC's consistent findings that: (1) prior express consent to receive an autodialed or prerecorded voice call at a mobile number may be given orally or in writing; and (2) a business may contact a customer at a mobile telephone number provided to that business by the customer.[12] Accordingly, some financial institutions have created and use application forms that ask customers to designate the numbers at which they wish to be contacted. Some financial institutions also use calling scripts in their telephone conversations with prospective and existing customers that are written to request and obtain contact numbers, including mobile numbers, at which the institutions may contact those customers. These compliance efforts have resulted in an "installed base" of millions of customer consents obtained in accordance with this Commission's guidance over nearly two decades of TCPA implementation orders. There is no evidence, in the record of proceedings before this Commission or elsewhere, that these practices have deceived or abused consumers in any way.

If the Commission replaces its longstanding guidance with the elaborate prior express consent obligations set out in the *NPRM*, financial institutions and other businesses will be faced with difficult compliance choices, all of which will have adverse consequences for the institutions and their customers. If the new rule is applied

[12] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752 (1992) (*"1992 TCPA Order"*) ¶ 31; *Rules and Regulations Implementing the Telephone Consumer Protection Act*, 23 FCC Rcd 559 (2008) (*"ACA Declaratory Ruling"*) ¶ 1.

retroactively, businesses must either forego important and valued communications with existing customers whose consents might not pass muster under the new rule, must incur extraordinary expense to call those existing customers manually, or must undertake an enormous, costly, and in large part futile effort to re-contact existing customers and replace consents already obtained with new consents. Even if the rule is only applied prospectively, many of the service calls that financial institutions now make will be discontinued or made by inefficient and costly manual means. Even if institutions decide to obtain consents from new customers to make automated calls under the new rules, the more burdensome consent procedure the Commission proposes will complicate, and therefore increase the cost of, the initiation and maintenance of customer relationships.

1. The Retroactive Compliance Burden

If the Commission decides to make the new requirements retroactive, financial institutions must decide how to treat the many thousands of customers who already have consented to receive calls at their wireless numbers. As a practical matter, a program of re-contacting all of these customers for the purpose of obtaining new, written consents pursuant to the required disclosure and signature requirements would be enormously expensive and would achieve only meager success.[13] Accordingly, many institutions will choose simply to eliminate many of the non-marketing communications programs they now maintain, or will continue those programs using less efficient manual methods,

[13] The efforts of telecommunications carriers to obtain "opt-in" consents under this Commission's customer proprietary network information rules suggest the cost of such an undertaking and the meagerness of the likely results. Notably, a US West campaign to obtain such consents "was only able to obtain an opt-in rate of 29 percent among residential subscribers, and at a cost of $20.66 per positive response." T. Lenard and P. Rubin, *Privacy and the Commercial Use of Personal Information: The Case of Customer Proprietary Network Information* (Progress & Freedom Foundation 2007), p. 6.

resulting in significant reductions in call volumes and significant contraction of important and valued customer communications.

The scale and cost of the retroactive compliance effort will not be reduced by use of electronic signatures. Compliance with the Electronic Signatures in Global and National Commerce (E-SIGN) Act carries with it its own compliance burdens and technical requirements that would add complexity rather than minimize burdens. Only a minority of financial institutions' customers have online accounts, and even those customers likely will make a limited response to online requests for consent. Customers that lack online accounts are not likely to visit a financial institution's website, establish their identities and select user IDs and passwords for the limited purpose of consenting to the receipt of autodialed calls at their wireless telephone numbers. For those customers, the attempt to obtain electronic consent will be a costly detour that will have to be supplemented with the mailing of physical forms, few of which will be returned.

2. The Prospective Compliance Burden

Prospective-only adoption of the proposed, new regulation also will force financial institutions to make hard choices that will be of no benefit to consumers. Financial institutions generally obtain customer contact information when an account relationship is initiated. In accordance with current Commission guidance, application forms (whether provided in paper form or online) typically require customers to provide contact numbers and generally include language to the effect that the customer consents to be contacted by the institution at any number the customer provides. Similarly, when customers apply for accounts over the telephone, the financial institutions'

representatives may request a contact numbers and ask for the customer's consent to be contacted at the number provided.

The proposed rule will preclude or substantially complicate these procedures. Consents obtained over the telephone no longer will be sufficient, necessitating an additional step in the transaction for the sole purpose of obtaining the customer's consent to be contacted at a number the customer already has provided for that purpose. Similarly, application forms must be revised to include elaborate disclosure language, which apparently will have to be set out separately with a signature separate from the one the customer provides to indicate assent to the application generally.[14] Finally, lack of consumer appreciation of the range of valued customer services provided by means of autodialed and prerecorded messages may lead few to consent initially, requiring additional costly outreach efforts.

Besides the adverse impact of the proposed rule on customer application and information request procedures, the proposed requirement that businesses may not condition a transaction on the customer's consent to receive autodialed calls ensures that a non-trivial percentage of customers will not consent and will have to be contacted by manual methods. The added costs and inefficiencies of manual methods likely will force financial institutions to conclude that many of these valuable calls should not be made at all. Where calls continue to be made, reliance on outdated manual methods will degrade service, complicate regulatory compliance and increase the cost of the services that financial institutions provide.

[14] As with the consent process for existing customers, the use of electronic signatures would be at most a partial solution to this problem, applicable only to customers who apply for accounts – or choose to do business – online.

C. There Is No Legal Or Public Interest Basis For Increased Autodialer Requirements

Given the serious harms that the proposed rule will cause to businesses, consumers and the public, its adoption could be justified only if unavoidably required by law or policy. The record is devoid of any such justification.

1. The Proposed Rule Is Not Mandated By Law

The *NPRM* devotes a single paragraph to the proposed, radical change in requirements for automated calls to wireless numbers.[15] That paragraph points to no consumer complaints, new legal developments, changes to public policy, or other sufficient reasons for such a sweeping reversal. In fact, the paragraph contains not even a citation, in the text or in a footnote, to the past Commission orders that the *NPRM* now proposes to abandon. The only rationale provided is that if "prior express consent" now will be interpreted to require written consent for prerecorded telemarketing calls to residential numbers, that phrase should have the same meaning when applied to automated non-telemarketing calls to wireless numbers.

This reasoning would be conclusive if the TCPA, the Administrative Procedure Act or other relevant authority required a particular piece of statutory language to mean the same thing wherever it appears. As the Commission's own rulemaking practices show, there is no such requirement. For example, in its Customer Proprietary Network Information ("CPNI") rules, the Commission defines the single word "approval" as requiring different actions in different circumstances, depending upon the strength of the

[15] *NPRM*, ¶ 20.

privacy interests that different approvals will affect.[16] Similarly, as discussed further below, the Commission historically has imposed different "prior express consent" requirements for automated calls to wireless numbers and for prerecorded voice telemarketing calls to residential numbers.[17] This approach is necessary and appropriate: when an agency has discretion to interpret statutory language, the agency must do so in a way that best serves the interests the statute was written to advance.[18] If the Commission takes that approach here, it will find that its longstanding guidance concerning automated calls to wireless numbers – not the proposed, new rule -- best serves the intent of Congress.

2. The Proposed Rule Would Not Advance The TCPA's Purpose

The TCPA is primarily a privacy statute, written to protect consumers from intrusive and unwanted telemarketing calls, but it also has other purposes. For example, the restrictions on automated calls to emergency and healthcare-related numbers were

[16] Section 222 of the Communications Act generally permits a carrier to use, disclose or permit access to a customer's CPNI only to provide the telecommunications service from which the information is derived or services necessary to, or used in, the provision of such service, except "with the approval of the customer." 47 U.S.C. § 222(c)(1). Recognizing that disclosures of CPNI to third parties or for marketing of non-communications services present stronger privacy issues than access, disclosure and use of CPNI by a carrier or its affiliates to market communications-related services, the Commission requires "opt-in" approval for the former and only "opt-out" approval for the latter. 47 C.F.R. § 64.2007(b). In adopting these approval requirements, the Commission quite properly exercised its discretion to interpret a statutory term differently in different circumstances, where necessary to serve the statutory purpose.

[17] *See* pp. 20-21, *infra.*

[18] "[I]t is not impermissible under *Chevron* for an agency to interpret an imprecise term differently in two separate sections of a statute which have different purposes." *Verizon California, Inc v. Federal Communications Commission,* 555 F.3d 270, 276 (D.C. Cir. 2009), *citing Abbott Labs. v. Young,* 920 F.2d 984, 987 (D.C. Cir. 1990), and *Weaver v. United States Information Agency,* 87 F.3d 1429, 1437 (D.C. Cir. 1996).

written to protect public safety as well as privacy.[19] Similarly, the restrictions on automated calls to wireless numbers expressly were written, not only to protect privacy, but to control the shifting of telemarketers' advertising costs to consumers by the use of random and sequential generators to run mass calling campaigns.[20] This last restriction, in particular, arguably was appropriate in 1991, when wireless service was expensive, relatively rare and almost never used by consumers as their primary means of telephone communication.

In keeping with the autodialer restriction's statutory purpose, the Commission always has taken a common-sense approach to its interpretation. This is what the Commission did in 1992, when it decided that a customer's decision to provide a wireless contact number to a business constituted consent to receive calls from that business at the number provided.[21] The Commission's decision correctly balances the consumer cost and privacy interests Congress wanted to promote. A customer who provides a wireless number already has weighed the costs, in privacy and calling charges, of receiving calls from the business at that number, and has decided to incur those costs as the price of receiving the corresponding benefit. A business that acts in accordance with this decision is not intruding unexpectedly on the consumer's privacy or imposing unexpected calling costs. Accordingly, as the Commission correctly decided, the intent of the statute is satisfied by the customer's act of providing a wireless contact number to the caller.[22]

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[19] *See Rules and Regulations Implementing the Telephone Consumer Protection Act,* 18 FCC Rcd 14014 *("2003 TCPA Order"*) ¶ 133 (citing S. REP. No. 102-178 at 5, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972-73 (1991).
[20] *Id.*
[21] *1992 TCPA Order*, ¶ 31.
[22] *Id.*

The Commission came to a similar common-sense decision 15 years later, when ACA International asked for a declaratory ruling on the question of autodialed collections calls to customer-provided wireless numbers. The Commission quite reasonably concluded that customers who provided wireless contact numbers in connection with an account expected collection calls concerning that account to be placed to the numbers they had provided.[23] Although the *ACA Declaratory Ruling* was specifically directed to collection calls, the underlying principle was the same one the Commission had announced in 1992: customers who provide a contact number to a business expect the business to contact them at that number.

Just as reasonably, the Commission has imposed different "prior express consent" requirements for artificial or prerecorded voice calls that are made for telemarketing purposes by a caller that does not have an existing business relationship with the called party. In this context, the Commission presently requires written consent if the called party's residential telephone number is listed on the national do-not-call registry.[24] This differential treatment of prior express consent has a common-sense basis: consumers who have provided a number to a business in connection with an existing business relationship ("EBR") can be assumed to expect calls from the business in connection with that relationship; but the act of providing a number to a business with which no such relationship exists, where the consumer already has declared his or her general intention not to accept telemarketing calls, is less likely to constitute consent to be solicited by that business. Accordingly, the Commission has imposed a more rigorous consent requirement in those cases.

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[23] *ACA Declaratory Ruling*, ¶ 10.
[24] *NPRM*, ¶¶ 13-14.

Similarly, the Commission's tentative decision, in the *NPRM*, to impose even stronger consent requirements for prerecorded telemarketing calls to residential numbers rests on an arguable basis. As the *NPRM* points out, the record of comments submitted to the Federal Trade Commission called into question the premise that consumers expect to receive prerecorded telemarketing calls from businesses on the strength of EBRs with those businesses.[25] On the basis of that record, the FTC has decided that prerecorded voice calls to consumers' residential telephone numbers should be based upon the consumers' prior express consent, regardless of the presence of an EBR, and that the consent should be in writing pursuant to clear and conspicuous disclosures and accompanied by the consumers' signatures.[26]

Based upon the comments filed with the FTC, and in order to harmonize the two agencies' rules, the Commission proposes to adopt the same regulation for telemarketers not subject to FTC jurisdiction, and to require prior express written consent even for consumers that have not listed their residential telephone numbers on the do-not-call registry.[27]

None of this, however, supports the extension of identical requirements to automated, non-telemarketing calls to wireless numbers. The record in the FTC's telemarketing proceedings does not address that question, and the reasoning on which this Commission relied in 1992 and 2008 remains as sound now as it was then. Now, as then, it is reasonable to conclude that when customers provide wireless numbers in

[25] *Id.*, ¶ 15.
[26] *Id.*
[27] *Id.*, ¶ 16.

connection with existing accounts, they expect to be contacted at those numbers for legitimate purposes connected with those accounts.

Against this background, the proposed rule is a costly, inefficient solution in search of a problem. There is no basis to suggest that a customer who gives a business a mobile contact number will be abused, as a cost-shifting matter or as a privacy matter. Indeed, banks depend upon forging strong relationships with customers, and will not risk alienating them by placing excessive or unnecessary calls.

On the statutory issue of cost shifting, giving the consumer the power to choose to be contacted inefficiently merely substitutes one form of inappropriate cost-shifting for another. The customer, by providing the wireless number, already has agreed to incur wireless charges in connection with legitimate calls from the business to which the number was provided. If the customer then refuses to consent to be contacted at that number by automated means, the customer does not avoid any cost to himself, as the call still can be placed manually. However, that decision *does* impose substantial, additional cost on the business. In the aggregate, millions of such decisions might result in useful calls not being made at all, or will increase the business's overall customer service costs. This is the reverse of the principle the autodialer rule is intended to promote – *i.e.*, that the power to make a decision should lie with the person who will bear the associated cost.[28]

There also is no reason to believe that forcing financial institutions to give their customers the option of being contacted by manual means will do anything to protect

[28] Of course, all increased costs of doing business ultimately are borne by the consumer. But, under the proposed rule, the customer will not know this when he or she decides to be contacted inefficiently.

consumer privacy. Regulatory compliance and customer needs still will require financial institutions to alert customers to unusual requests and transactions, resolve address discrepancies, alert customers to data security breaches, request missing information on account applications, and attempt to avoid late fees, adverse credit references and foreclosures by calling customers who are overdue on payments. A customer's refusal to permit automated calls to his or her wireless contact number will not necessarily prevent those communications from being made (although it might, if the compliance burden forces the financial institution to abandon some customer service calling programs), but it will require that all calls to that customer will be costlier and that some might not be made in a timely fashion.

Since the TCPA was enacted, the Commission has interpreted that statute's autodialer rule in a manner that prevents unauthorized cost-shifting and protects consumer privacy, as the statute intends. The Commission should continue to do so now, by declining to adopt the proposed amendments to its regulations.

Finally, the Commission should take this opportunity to clarify a matter that has resulted in needless – in fact, essentially frivolous – litigation against legitimate businesses. Specifically, the Commission should confirm that a customer consents to be contacted by a business at a number voluntarily provided to that business, regardless of the point in the customer relationship at which the number was provided. There is no reason, from the standpoint of a customer's intent, to distinguish between a consent given at the start of the relationship and a consent given at any point during the relationship. To

the extent language in past Commission orders has given a contrary impression, that misimpression should be removed.[29]

3. The Proposed Rule Is Not Necessary For Regulatory Consistency

Under the FCC's present rules and orders, a telemarketer may make a commercial, artificial or prerecorded voice call to a residential telephone number if the calling party and called party have an established business relationship or if the caller has obtained the called party's prior express consent (which in certain circumstances may be obtained orally) to make such calls.[30] Under the Federal Trade Commission's amended Telephone Sales Rule ("TSR"), in contrast, a telemarketer subject to FTC jurisdiction may make such a marketing call only if the called party has given prior express consent in writing, even if the telemarketer and the called party have an established business relationship.[31] The Notice of Proposed Rulemaking (*NPRM*) concludes that resolution of this regulatory inconsistency is in the public interest.[32]

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[29] Apparently, some plaintiffs have placed undue emphasis on the FCC's statement, in the *ACA Declaratory Ruling*, that "prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, *and that such number was provided during the transaction that resulted in the debt owed." ACA Declaratory Ruling*, ¶ 10 (*emphasis added*). The apparent argument of these plaintiffs is that a number provided voluntarily by a customer to a business at a later time in the customer relationship does not constitute prior express consent. This interpretation of the Commission's rule is without merit, and is contradicted by the FCC's more general statement, in the *1992 TCPA Order*, that businesses "will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached." *1992 TCPA Order*, ¶ 31.

[30] 47 C.F.R. § 64.1200(a)(2)(iv); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Second Order on Recon., 20 FCC Rcd 3788, 3804, ¶ 40 (2005).

[31] *Telemarketing Sales Act, Final Rule*, Federal Trade Commission, 73 Fed. Reg. 51164-01 (2008); *see also* http://www.ftc.gov/os/fedreg/2008/august/080829.tsr.pdf.

[32] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278 (Notice of Proposed Rulemaking rel. Jan. 22, 2010) (*"NPRM"*).

However, because the FTC's TSR applies only to telemarketing, the goal announced in the *NPRM* will be sufficiently served by adoption of the proposed express written consent and related requirements for prerecorded voice telemarketing calls.[33] No change is required to the FCC's present treatment of collections calls, fraud alerts and other non-telemarketing communications that are not subject to the TSR. Notably, regulatory consistency does not require the Commission to decide, as it suggests in paragraph 20 of the *NPRM*, that the more burdensome prior written consent obligations it proposes to extend to prerecorded telemarketing calls also should extend to autodialed or prerecorded voice calls that are placed to consumers' mobile devices for non-marketing purposes.[34] Adoption of this proposal will exacerbate rather than reduce the present differences in the regulatory treatment of calls to wireline and mobile numbers, which already are anachronisms in the age of the wireless revolution.

II. THE COMMISSION SHOULD CLARIFY ITS CLASSIFICATION OF DEVICES AS AUTOMATIC TELEPHONE DIALING SYSTEMS

The pending *NPRM* offers the Commission an opportunity to revisit issues that continue to complicate compliance with the TCPA. Perhaps the most critical of these issues is the confusion surrounding the kinds of systems and devices that constitute

[33] In addition to adoption of the prior express written consent requirement and elimination of the established business relationship exception, the *NPRM* tentatively concludes that the FCC's rules on artificial or prerecorded voice calls to residential numbers should be revised to state: (1) that health care related calls subject to the Health Insurance Portability and Accountability Act are exempted; (2) that such calls must include an automated, interactive mechanism by which a consumer may opt out of receiving future prerecorded messages from a seller or telemarketer; and (3) that the maximum percentage of live sales calls that a telemarketer may drop or abandon will be calculated on a "per campaign" basis. *NPRM* ¶¶ 33-36, 37-43, 44-47. The commenters take no position on these proposals.

[34] *NPRM*, ¶ 20.

automatic telephone dialing systems ("autodialers") for TCPA purposes. The Commission should align its interpretation, which now is both obscure and overbroad, with technological and business reality.

That effort begins with the statute, which defines an automatic telephone dialing system 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."[35] The TCPA's autodialer restriction incorporates this definition when it prohibits certain calls "using any automatic telephone dialing system . . ."[36]

The intention of the autodialer definition is clear: it is intended to control the use of technologies that do not merely facilitate dialing of numbers stored in databases compiled for a specific purpose (such as lists of numbers of a business's existing customers), but that create numbers at random or in sequence. Such devices are ideal for contacting large numbers of persons with whom the caller has no relationship, and that the caller has no reason to believe might be interested in the subject of the call. Any interpretation of the definition that ignores this "random or sequential number generator" criterion misses the entire point of the definition.

Unfortunately, the Commission has committed this very error by sweeping devices into the definition that merely automate the dialing of calls contained in databases of numbers that were not generated by a random or sequential algorithm. Notably, in 2003 the Commission made the following statement:

> [I[n order to be considered an "automatic telephone dialing system," the equipment need only have the "capacity to store or produce telephone numbers." It is clear from the legislative history that

[35] 47 U.S.C. § 227(a)(1).
[36] *Id.* § 227(b)(1)(A).

> Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies . . . Therefore, the Commission finds that a predictive dialer falls within the meaning and statutory definition of "automated telephone dialing equipment" and the intent of Congress.[37]

By adopting this reading of the statutory definition, the Commission substituted vague observations in the legislative history for the law's plain language, and adopted an interpretation of "automatic telephone dialing system" that ignores the narrow statutory definition in favor of a definition that is essentially boundless.

The consequences of the Commission's approach have grown more harmful as technology has advanced. Notably, the "capacity to store or produce telephone numbers" has become ubiquitous across a wide range of business and consumer products and services. Even a modern smartphone, of the kind carried in millions of pockets and purses, has this capacity. Similarly, businesses commonly use equipment that includes a wide range of storage and dialing capacities, not all of which might be used in a particular calling campaign. If any use of a device with this latent "capacity" invokes the autodialer restriction, then businesses and ordinary consumers are unknowingly violating that restriction every day.

Also, automated communications technologies have advanced significantly since 2003 in the purposes for which they can be used. Autodialers now operate in conjunction with sophisticated software to help ensure compliance with call abandonment rules, federal, state and company-specific do-not-call lists, calling hour restrictions, restrictions on calling during holidays and emergencies, and to meet TCPA record-keeping requirements and avoid misdialed numbers. As the Commission pointed out in its *2003*

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[37] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 18 FCC Rcd 14014 (Report and Order 2003) ¶ 133.

TCPA Order, Congress anticipated the need for the FCC "to consider changes in technologies" in its interpretation of the statutory restrictions.[38] If the Commission follows that guidance in the present proceeding, it will confirm that a prohibition against use of automated dialing systems to make otherwise lawful calls to mobile devices no longer serves the public interest.

The Commission has an obligation to provide guidance with which affected parties can comply, and to avoid guidance that prevents beneficial applications of technology that are consistent with the plain language of the law. Accordingly, the order adopted pursuant to the *NPRM* should confirm what the TCPA says: *i.e.*, that the autodialer restriction: (1) is directed at equipment with the capacity, not just to store or produce telephone numbers, but to store or produce telephone numbers using a random or sequential number generator and to dial such numbers; and (2) that the autodialer restriction is triggered, not just when that latent capacity is present, but when the random or sequential number generator is used to place calls.

CONCLUSION

The proposed, new express prior consent obligations for automated calls to mobile telephone numbers serve no public-interest purpose and will interfere drastically with the ability of financial institutions to engage in vital communications with customers. The commenters urge the Commission to confirm its existing guidance on the question of prior express consent to place non-telemarketing calls using autodialers and artificial or prerecorded voice messages, and to confirm that common and beneficial call-

[38] *2003 TCPA Order*, ¶ 132.

automation systems that do not generate called numbers on a random or sequential basis may be used to place such calls.

Respectfully submitted,

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