

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Rules and Regulation Implementing the)
Telephone Consumer Protection Act of 1991) CG Docket No. 02-278
)
ACA International’s Petition for an Expedited)
Clarification and Declaratory Ruling)

**COMMENTS OF AMERICAN BANKERS ASSOCIATION
AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF ACA
INTERNATIONAL’S PETITION FOR AN
EXPEDITED CLARIFICATION AND DECLARATORY RULING**

Pursuant to this Commission’s Public Notice of April 26, 2006, the American Bankers Association (“ABA”)¹ and Consumer Bankers Association (“CBA”)² hereby submit these comments in support of ACA International’s Petition for an Expedited Clarification and Declaratory Ruling (“ACA Petition”).³ The ABA and CBA ask that the relief requested in the

¹ The American Bankers Association, on behalf of the more than two million men and women who work in the nation’s banks, brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership -- which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks -- makes ABA the largest banking trade association in the industry.

² The Consumer Bankers Association is the recognized voice on retail banking issues in the nation’s capital. Member institutions are the leaders in consumer financial services, including auto finance, home equity lending, card products, education loans, small business services, community development, investments, deposits and delivery. CBA was founded in 1919 and provides leadership, education, research, and federal representation on retail banking issues such as privacy, fair lending and consumer protection legislation/regulation. CBA members include most of the nation’s largest bank holding companies as well as regional and community banks that collectively hold two-thirds of the industry’s total assets.

³ ACA International Petition for an Expedited Clarification and Declaratory Ruling, CG Docket No. 02-278 (Oct. 4, 2005); 71 Fed. Reg. 24634 (Apr. 26, 2006).

ACA Petition be granted, and be extended to include all calls made to wireless telephone numbers of existing customers by the use of predictive dialers.

Financial institutions use predictive dialers, programmed only with telephone numbers of persons with whom they have a business relationship, extensively for a number of non-telemarketing purposes. Those purposes include collection of overdue accounts, but also include fraud prevention, credit protection, and other reasons that are of significant benefit to customers. Without the efficiencies achieved by predictive dialers, many of these customer service calls would not be feasible.

Unfortunately, the legal uncertainties surrounding use of predictive dialers since this Commission's *2003 TCPA Order* have prevented financial institutions from offering these important services to a significant number of financial institution customers.⁴ Many consumers use their mobile telephones as a primary means of receiving calls, consistent with the ubiquity and declining cost of mobile service. Accordingly, if the service calls that financial institutions make to their customers are to serve those customers fully, they must include calls to mobile telephone numbers.

The Telephone Consumer Protection Act ("TCPA") is no impediment to such beneficial uses of predictive dialers.⁵ As ACA International's Supplemental Submission to Petition for an Expedited Clarification and Declaratory Ruling makes clear, predictive dialers do not meet the statutory definition of an "automatic telephone dialing system" and may therefore be used to place calls to wireless telephone numbers.⁶ As explained more fully herein, the Commission can

⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 (2003) ("*2003 TCPA Order*").

⁵ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227.

⁶ ACA International's Supplemental Submission to ACA Petition (Apr. 26, 2006).

confirm this conclusion without opening the floodgates to telemarketing calls placed to mobile telephone numbers, which consumers still may place on the national do-not-call registry or the callers' company-specific do-not-call lists. The only practical effect of granting the relief we have requested will be to permit businesses to make calls to their customers, using predictive dialers that they unquestionably are permitted to make by manual means. The ABA and CBA further believe that the Commission can and should exercise its authority to condition the use of predictive dialers in any other ways that would serve the public interest.

I. PREDICTIVE DIALERS FACILITATE CALLS THAT ARE HELPFUL TO CONSUMERS

The ABA and CBA member institutions place non-telemarketing calls for a number of purposes that facilitate customer relationships and serve the customers' interests.

One such purpose is fraud prevention. If a customer who has been mailed a debit or credit card has not activated the card after a certain period, financial institutions often will phone the customer to confirm that the card was not lost or stolen. Financial institutions also call customers to report unusual activity on the customers' debit and credit card accounts. If fraud is occurring, prompt notification can lead to quicker remedial action; if fraud is not occurring, prompt notification spares the customer the inconvenience of having the transaction denied. In either case, predictive dialers speed the notification process and serve the customers' interests.

Financial institutions also use telephone communications to protect customers' credit and to help them avoid fees and inconvenience. For example, a bank may wish to notify customers that their checking account is overdrawn. A phone call will allow the customer to deposit funds sooner than a mailed notice and thereby allow the customer to avoid additional overdrafts and the associated fees and embarrassment of dealing with the payee of the returned check.

Similarly, some financial institutions call those customers whose credit card payments are a few

days late, so that the customer can be reminded to pay before the delinquency is reported to a credit bureau. Again, a telephone call is often the best method of communication to ensure that the message arrives quickly enough for the customer to take timely corrective action.

Automatic dialers make these kinds of services more efficient, and thus more likely to be offered. Financial institutions might dial these service calls manually, but only by incurring additional costs. Financial institutions must pass some of those additional costs on to customers or limit service to those willing to pay extra for it. In many cases, in light of the present legal uncertainty, financial institutions will decide not to provide some of these services at all to customers who have given mobile telephone contact numbers to those banks.

As an example of the adverse impact of the present uncertainty concerning permissible uses of predictive dialers, one ABA member has used those devices to help customers with a change of their debit and ATM cards. To ensure that customers' new cards had not been lost or stolen and to remind customers of the steps that had to be taken before the replacement card could be used, the financial institution used a predictive dialer to call existing customers who had not activated the replacement card within 30 days after the card was mailed. However, because of the present uncertainty concerning the scope of the TCPA restrictions, the calling list was "scrubbed" against a list of known mobile telephone numbers. As a result, customers who had provided mobile telephone contact numbers to the financial institution were not alerted to the fact that a replacement card had been mailed and not activated. This could have caused a delay in the discovery of a lost or stolen replacement card or have left customers without debit card access to their accounts when needed.

As this example shows, continued uncertainty concerning the lawfulness of predictive dialer calls to wireless telephone numbers is having an immediate, adverse impact upon financial

institutions and their customers. Granting of the relief requested by the ABA and CBA will address this uncertainty and facilitate services that are of benefit to financial consumers.

II. CALLS TO MOBILE TELEPHONE NUMBERS ARE NOT CONTRARY TO CUSTOMERS' EXPECTATIONS OR CONGRESSIONAL INTENT

In 1991, when Congress enacted the TCPA, it identified three calling destinations for which automatic telephone dialing systems or artificial or prerecorded voices could not be used except in emergencies or with the prior express consent of the called party: emergency telephone lines, guest or patient rooms of health care facilities, and “any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call”⁷

The first two restrictions were based upon public safety considerations. The third, however, was based entirely upon the high cost of wireless telephone service at the time the TCPA was enacted, which made cost-shifting to wireless customers especially burdensome and justified Congress’s decision to limit the volume of such calls by requiring that they be made manually.⁸

Conditions have changed dramatically since 1991. In that year, the number of wireless telephone subscribers in the U.S. was 7,557,148, with an average monthly bill of \$72.74. As of December 2005, there were 207,896,198 wireless telephone subscribers in the U.S., with an average monthly bill of \$49.98. As the Cellular Telecommunications & Internet Association (“CTIA”) reports, the average monthly bill has declined 1.3% per year since 1987 (even as the

⁷ 47 U.S.C. § 227(b)(1)(A)(iii).

⁸ That the restrictions on calls to wireless numbers were based upon cost considerations, rather than any assumption that mobile services involve a greater expectation of privacy than wireline service, is demonstrated by the discretion Congress gave this Commission to except calls to wireless services for which the called party does not pay for the call. *Id.* § 227(b)(2)(C).

Consumer Price Index has sometimes risen at several times that rate), at the same time that average customer usage has *increased* by 24.2%.⁹

As wireless service has grown more widespread and affordable, consumers increasingly view mobile telephones as a complete, cost-effective substitute for wireline service. In fact, as of year-end 2004, about 5.5% of U.S. households had *only* a mobile telephone.¹⁰ That percentage undoubtedly has increased since 2004 and will continue to grow.

Against this background, Congress's assumptions concerning the interests and expectations of wireless telephone subscribers, however legitimate they may have been in 1991, have little application to the present world. This fact does not, of course, give the Commission discretion to ignore the TCPA's plain language; it does, however, mean that the interpretation of the autodialer restriction proposed in these comments not only is required by the relevant statutory language, but also is consistent with the public interest and consumers' expectations.¹¹

III. PREDICTIVE DIALERS ARE NOT AUTOMATIC TELEPHONE DIALING SYSTEMS AS DEFINED IN THE TCPA

As the ACA's Supplemental Filing in support of its Petition makes clear, predictive dialing devices of the kind financial institutions use to make service calls to their customers are not "automatic telephone dialing systems" as defined in the TCPA. Accordingly, calls may be

⁹ CTIA Semi-Annual Wireless Industry Survey (Apr. 6, 2006) (background and summary of the survey results can be found at <http://files.ctia.org/pdf/CTIAEndYear2005Survey.pdf>).

¹⁰ See Will Lester, *Rapid Growth of Those Who Use Only Cell Phones Puts Pressure on Polling Industry*, Associated Press, May 15, 2005.

¹¹ The ABA and CBA recognize that the use of an automatic telephone dialing system to call a telephone number assigned to a cellular telephone service is permitted by 47 C.F.R. § 64.1200(a)(1)(iii) with the prior express consent of the called party. However, reliance on this exception would preclude ABA and CBA members from providing this service to any customer whose agreement with the member institution did not anticipate that such express consent would be necessary for the service to be provided through the use of a predictive dialer. It also would impose the additional cost of revising all customer agreements to provide for such express consent.

dialed by means of those devices, consistent with other TCPA requirements and this Commission's rules, to wireless telephone numbers.

As the ACA Petition points out, the statutory definition of “automatic telephone dialing system” is precise and leaves no ambiguity. An automatic telephone dialing system is “equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator; and . . . to dial such numbers.”¹²

For our purposes, the key element of this definition is the phrase “using a random or sequential number generator.” Random and sequential number generators are algorithms (or devices employing algorithms) that calculate and produce sets of numbers displaying the property either of apparent randomness (especially useful, for example, in generating session encryption keys) or sequentiality (typically, where each number generated is $n+1$ the preceding number).¹³ Simply put, a device that merely dials stored numbers *not* generated in this way is not a random or sequential number generator and does not “use” a random or sequential number generator.

As the Commission acknowledged in its *2003 TCPA Order*, predictive dialers do not generate numbers in random or sequential fashion and do not “use” numbers generated in this way.¹⁴ The Commission nonetheless decided to include such devices within the statutory definition of “automatic telephone dialing system,” on the ground that predictive dialers pose the same hazard that the Commission believed the Congress to have had in mind when it enacted the

¹² 47 U.S.C. § 227(a)(1); *see also* 47 C.F.R. § 64.1200(f)(1).

¹³ *See, e.g.*, National Institute of Standards and Technology, Dictionary of Algorithms and Data Structures, <http://www.nist.gov/dads/HTML/pseudorandomNumberGen.html> (last visited May 10, 2006).

¹⁴ *2003 TCPA Order*, 18 FCC Rcd at 14090-91.

TCPA -- that is, “the *capacity* to dial telephone numbers without human intervention.”¹⁵ It appears that in the Commission’s view, the Congress would have included predictive dialers within its definition of “automatic telephone dialing system” if it had been aware of them at the time it enacted the TCPA, because those devices have the crucial capacity (nowhere identified as such by the statute) to “dial numbers without human intervention.” In this view, as expressed in the *2003 TCPA Order*, inclusion of predictive dialers in the statutory definition is simply an implementation of Congress’s intent that the FCC “consider changes in technologies” that might occur after enactment of the TCPA.¹⁶

In truth, the factual premise for the Commission’s 2003 decision is wrong. Predictive dialers are not a recent technological advance that Congress cannot have foreseen in 1991, thereby requiring the Commission to update the statutory definition in order to “consider changes in technologies.” Predictive dialers were in use at least as early as 1988 – three years before the TCPA was enacted. Indeed, those devices, defined as equipment that “automatically place[s] calls via programmed lists of telephone numbers” and that can transfer a call to a live operator as soon as a human voice is detected, were widely available from a number of vendors before the

¹⁵ *Id.* at 14092 (emphasis in original).

¹⁶ *Id.* There is some suggestion, in the *2003 TCPA Order*, that Congress intended to limit the use of any device with the *capacity* to generate numbers at random or in sequence, even if that capacity is not used in making a particular call. In fact, the predictive dialers used by ABA and CBA members lack any such capacity and could be programmed to generate random or predictive numbers only by fundamentally changing their design. However, even if the predictive dialers used by ABA and CBA members had the potential for such use, there is no reason to believe that Congress intended to prohibit the use of devices that have only an unused capacity to engage in the activities at which the autodialer restrictions are aimed. Specifically, if Congress had intended to prohibit the use of predictive dialers, it could have done so without reference to other capacities that those dialers also might have but that they might, or might not, utilize.

TCPA was enacted.¹⁷ If Congress had intended to restrict the use of *all* devices that permit dialing of telephone numbers without human intervention, including predictive dialers, it had all of the information it needed on which to base such a decision in 1991. The fact that it did not do so compels the conclusion that only the use of randomly or sequentially generated numbers was the object of Congress's concern – just as the statute says.

In fact, it was entirely reasonable for Congress to focus on random or sequential number generators as a source of excessive and burdensome calling to emergency numbers, health care facilities and wireless telephones, while not imposing similar restrictions on use of predictive dialers. When a telemarketer generates numbers sequentially or at random, it is not working from a list of persons with whom it has a business relationship or other preexisting basis for calling. The Congress legitimately could have concluded, and in fact did conclude, that random or sequential number generators pose a unique threat not presented by devices that simply dial numbers entered on a programmed list. We believe the Commission has erred in substituting its judgment for that of Congress in this matter.

IV. PREDICTIVE DIALING CAN BE CONFINED TO CALLS TO PERSONS WITH WHOM THE CALLER HAS AN ESTABLISHED BUSINESS RELATIONSHIP

The ABA and CBA recognize that if the FCC withdraws its earlier decision to include predictive dialers within the TCPA definition of “automatic telephone dialing system,” and makes no other findings or rules concerning the use of predictive dialers, telemarketers may be permitted to call mobile telephones numbers not on the national do-not-call list or numbers of customers not on the caller's internal do-not-call list using predictive dialing technology. In light of the changes in the wireless marketplace since 1991, and given the ability of subscribers to

¹⁷ Don Steinberg, *Dialing for Dollars*, PC Week, Oct. 31, 1988; *Debt Collection Software*, Computers in Banking (July, 1989); *Coral Companies Sells, Installs Its First Telemarketing Package*, PR Newswire, Nov. 1, 1989.

place their wireless telephone numbers on the national do-not-call registry and company-specific do-not-call lists, this result is entirely consistent with the intent of Congress when it chose not to include predictive dialers within the prohibition. This result will not harm the public interest.

However, because the TCPA does not address predictive dialer use at all, the Commission might reasonably conclude that the TCPA leaves the Commission discretion to limit the circumstances in which predictive dialers may be used. As these comments have pointed out, the interests of financial institutions and their customers will not be harmed if the FCC exercises its discretion to limit predictive dialing to calls to wireless numbers of persons with whom the caller has an established business relationship.

CONCLUSION

For all of the reasons stated herein, the ACA Petition should be granted without further delay, and the relief requested in that Petition should be extended to all predictive dialer calls to the wireless telephone numbers of persons with whom the caller has an established business relationship.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William C. Beckwith, certify that the foregoing **COMMENTS OF AMERICAN BANKERS ASSOCIATION AND CONSUMER BANKERS ASSOCIATION** were filed electronically with the Federal Communications Commission on this 11th day of May, 2006, and were served on that same day by electronic mail and/or U.S. first class mail, as indicated below, on:

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