

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling Regarding)	CG Docket No. _____
Non-Telemarketing Use of Predictive Dialers)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	

PETITION FOR DECLARATORY RULING

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PETITION FOR DECLARATORY RULING

Communication Innovators (“CI”),¹ pursuant to Section 1.2 of the Federal Communications Commission’s (“Commission”) rules,² hereby respectfully submits this Petition for Declaratory Ruling to eliminate significant confusion regarding the applicability of the Commission’s Telephone Consumer Protection Act (“TCPA”) rules³ to “predictive dialers” used to provide informational, non-telemarketing calls to consumers. Specifically, CI requests that the Commission clarify, consistent with the text of the TCPA and Congressional intent, that predictive dialers that (1) are not used for telemarketing purposes and (2) do not have the current ability to generate and dial random or sequential numbers, are not “automatic telephone dialing systems” (“autodialers”) under the TCPA⁴ and the Commission’s TCPA rules.

¹ CI is a 501(c)(4) organization that seeks to maximize the pace of telecommunications innovation and its benefit for American consumers and businesses. CI and its member technology companies strongly endorse efforts by the President, the Commission, and many in Congress to minimize the burden imposed on innovators and entrepreneurs by outdated, unnecessary, or inefficient regulations.

² 47 C.F.R. § 1.2.

³ *See id.* § 64.1200.

⁴ *See* 47 U.S.C. § 227.

I. SUMMARY

Congress enacted the TCPA specifically to curb aggressive telemarketing practices that were found to be an invasion of privacy, a risk to public safety, and that improperly shifted marketing costs to consumers. As the Commission recognized for more than a decade, 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. Nor did Congress intend to restrict the use of technologies such as predictive dialers – innovative equipment that dials specifically programmed contact numbers and enables company representatives to provide important, timely informational calls to consumers accurately, efficiently, and cost-effectively.⁵

In 2003, however, the Commission determined that certain predictive dialers are autodialers under the TCPA, irrespective of whether such equipment uses a statutorily required random or sequential number generator. In finding that certain predictive dialers are autodialers, the Commission's stated concern was that the telemarketing industry had evolved to the point where calling lists of numbers using a predictive dialer was more cost-effective than calling arbitrary (*i.e.*, random or sequential) numbers, so it was necessary to take steps to prevent telemarketers from circumventing the TCPA's restrictions on automated calls. The Commission's 2003 decision did not discuss the use of predictive dialers in non-telemarketing contexts, and it did not address whether the Commission was simply determining that devices with the unused capacity to generate and dial random or sequential numbers are autodialers under the statute, or whether it was reading the requirement of a random or sequential number

⁵ Predictive dialers help live representatives dial telephone numbers in a manner that "predicts" the time when a consumer will answer the phone and a representative of the caller will be available to take the call.

generator out of the statutory definition altogether. In 2008, the Commission reiterated that certain predictive dialers that did not make use of a random or sequential number generator are autodialers, but provided no additional clarity as to the rationale for including these devices. Combined, these decisions have created significant confusion for companies that use predictive dialers to place live calls for non-telemarketing purposes.⁶

Expanding the definition of autodialer to include equipment that does not have the current ability to generate and dial random or sequential numbers and is not used for telemarketing purposes would be contrary to both the text of the TCPA and Congressional intent. It would be contrary to the text because the statute requires that, to be an autodialer, equipment must have “the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator.”⁷ It would be contrary to Congressional intent because non-telemarketing calls to accountholders and other consumers made using these predictive dialers do not jeopardize consumer privacy, threaten public safety, or shift marketing costs to consumers. Moreover, the Commission’s current expansive interpretation – and the resulting confusion – has led to unintended consequences that harm consumers and businesses alike. The current skyrocketing TCPA class litigation environment is also hindering innovation, diverting time and resources away from consumer-facing operations, chilling critical account communications, and creating substantial costs that inevitably are passed on to consumers.

⁶ The Commission may issue a declaratory ruling terminating a controversy or removing uncertainty. 47 C.F.R. § 1.2.

⁷ As discussed below, the confusion has also led GroupMe, Inc. to seek clarification from the Commission over the meaning of the term “capacity” in the autodialer definition. *See infra* Section III.A.

Predictive dialer usage and technology have also changed significantly over the past decade, further warranting a declaratory ruling on this issue.⁸ Today's predictive dialers do not and cannot generate and dial random or sequential numbers, and the companies that rely on them are often not telemarketers. Rather, the predictive dialers in use today are complex and innovative equipment and technologies used by a wide array of non-telemarketing businesses that need to connect their live representatives with consumers quickly and efficiently. Their use benefits both consumers and businesses by, among other things, increasing productivity, performing critical regulatory compliance functions, and ensuring that consumers are not subject to improper calls. Thus, it advances Chairman Genachowski's goal of "harnessing the power of communications technology to grow our economy, create jobs, enhance U.S. competitiveness, empower consumers, and unleash broad opportunity and a higher quality of life for all Americans."⁹

Importantly, clarifying that predictive dialers may be used to place non-telemarketing calls without being considered "autodialers" would not lead to an increase in calls or costs to consumers. The same callers can already contact consumers on their mobile devices using manual dialing, and they have no incentive to place unnecessary informational calls. Thus, it is only *how* some calls are made that would change, not whether the calls can be made or the number of calls that can be placed.

In addition, there has been a significant shift in consumer calling demographic patterns over the last decade due in part to a significant decrease in the cost of a wireless telephone call,

⁸ The Commission is "especially mindful of the need to clarify [its] rules in light of technological changes." *See, e.g., Closed Captioning of Video Programming*, Declaratory Ruling, 23 FCC Rcd 16674 (2008).

⁹ Remarks of FCC Chairman Julius Genachowski, Georgetown Center for Business and Public Policy, Georgetown University, Washington, DC, 1 (Nov. 7, 2011) ("Genachowski Remarks").

as approximately one-third of all households now have only wireless telephone numbers and consumers can easily “port” their wireline number to their wireless device. Now that wireless service is so inexpensive and accessible that it has replaced traditional (landline) telephone service for one-third of the U.S. population, such unnecessary restrictions on predictive dialer use are counterproductive and can prevent consumers from receiving important, time-sensitive notifications from companies that they do business with, and are thus counterproductive.

In light of these changed circumstances and the growing benefits of informational calls to wireless consumers, the Commission should clarify that companies may use predictive dialers to place non-telemarketing calls to wireless telephone numbers without triggering the TCPA’s autodialer restrictions, particularly when such dialers do not have the current ability to generate and dial random or sequential numbers.

II. THE TCPA’S AUTODIALER PROVISION ONLY APPLIES TO EQUIPMENT THAT HAS THE CURRENT ABILITY TO GENERATE AND DIAL RANDOM OR SEQUENTIAL NUMBERS, AND IT IS PRIMARILY FOCUSED ON ABUSIVE TELEMARKEETING CALLS.

A. The Text of the TCPA Autodialer Provision Excludes Predictive Dialers That Do Not Have the Current Ability to Generate and Dial Random or Sequential Numbers.

The TCPA and the Commission’s TCPA rules define an “automatic telephone dialing system” (“autodialer”) 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.”¹⁰ Under this definition, the phrase “using a random or sequential number generator”

¹⁰ 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(1). The TCPA prohibits the use of an autodialer to place any call, absent an emergency or the prior express consent of the called party, “(i) to any emergency telephone line (including any ‘911’ line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency); (ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or (iii) to any telephone

modifies “to store or produce telephone numbers to be called.” In addition, the phrase “to dial such numbers” refers to dialing numbers that have been randomly or sequentially generated. Thus, under the plain language of the TCPA, predictive dialers that do not have the *ability* to generate and dial random or sequential numbers are excluded from the definition of an autodialer.

B. The Legislative History Confirms that the TCPA’s Autodialer Provision Was Enacted to Curtail Unwanted *Telemarketing* Calls.

Congress enacted the TCPA in response to an increasing number of consumer complaints regarding “the use of automated equipment to engage in telemarketing.”¹¹ The legislation was created to address the explosion of unwanted automated telephone advertising and solicitations made possible by automatic dialing machines that could generate and dial random or sequential telephone numbers and bombard parties with “computerized” solicitations.¹²

Congress recognized that, in addition to being annoying and intrusive, computerized telephone sales calls threatened public health and safety. For example, telemarketers could use autodialers to generate random or sequential telephone numbers and “dial numbers in sequence,

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[.]” 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1).

¹¹ See, e.g., Sen. Rep. No. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969; 137 Cong. Rec. 35302 (1991) (“The compromise gives the public a fighting chance to start to curtail unwanted telemarketing practices.”).

¹² See, e.g., TCPA, Pub. L. No. 102-243, 105 Stat. 2394, 2395 (finding that “automated or prerecorded calls are a nuisance and an invasion of privacy”); 137 Cong. Rec. 35304 (1991) (explaining that the legislation “target[s] that abusive robotic use of [telemarketing] technology”); 137 Cong. Rec. 30818 (1991) (“[T]his legislation does not cover calls made by live persons. The intention of this bill is to deal directly with computerized calls.”); 137 Cong. Rec. 18123 (1991) (stating that the bill was introduced to ban “computer voice” telemarketing calls).

thereby tying up all the lines of a business and preventing outgoing calls.”¹³ Such telemarketing activities also tied up the emergency lines of police, fire, and medical services and prevented real emergency calls from getting through.¹⁴ In addition, when unwanted telemarketing calls were placed to cell phones or paging services, they imposed costs on the called party.

The TCPA’s primary purpose was and remains protecting individuals from telemarketing activity and ensuring the smooth transmission of emergency communications; it “targets calls that are the source of consumer complaints – telemarketing calls placed to the home.”¹⁵ It was not intended to prohibit businesses from using predictive dialers to place non-telemarketing calls that deliver account-related information to their customers and accountholders.¹⁶ In fact, the legislative history recognizes that there are certain classes of helpful calls that consumers do not mind receiving, and that Congress did not pass the legislation to prohibit, such as a bank contacting a customer about his or her credit card.¹⁷ Real world examples abound where such calls are, in fact, helpful to the average consumer:

- Data breach and identity theft notifications;
- Fraudulent activity warnings and updates;
- Parcel delivery notifications;

¹³ *See, e.g.*, S. Rep. No. 102-178, at 1-2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969; H.R. Rep. No. 102-317, at 10 (1991) (“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.”).

¹⁴ *See, e.g.*, 137 Cong. Rec. 35303 (1991); 137 Cong. Rec. 30821 (1991).

¹⁵ *See* 137 Cong. Rec. 18123 (1991).

¹⁶ *See, e.g.*, 137 Cong. Rec. 35302 (1991) (describing the TCPA as allowing the FCC to exempt certain types of calls, including calls “to leave messages with consumers to call a debt collection agency to discuss their student loan”); *id.* at 35304 (“Calls informing a customer that a bill is overdue, or a previously unstocked item is now available at a store are clearly not burdensome, and should not be prohibited.”).

¹⁷ *See* 137 Cong. Rec. 30817-18 (1991).

- Appointment reminders, including from hospitals, healthcare providers, or repair technicians;
- Calls inquiring about missed payments and advising of the prospect of interrupted service or coverage;
- Service outage or interruption reports;
- School closing announcements;
- Product recall and safety notifications; and
- Urgent employee communications.

Consistent with this approach, the Commission affirmed in the recent Robocall Report and Order that it did not want to “impede” or “unnecessarily restrict” purely informational calls when implementing the TCPA.¹⁸

To the extent that Congress was concerned about some non-telemarketing calls – those made through autodialers with the capacity to generate and dial random or sequential numbers – Congress was clearly focused on extensive wide-reaching “scattershot” calls, not specific and targeted calls to accountholders. As discussed below, predictive dialers used for non-telemarketing purposes reduce the number of improper calls received by consumers and improve regulatory compliance.

Members of Congress also distinguished live calls from intrusive autodialed telemarketing calls lacking human-to-human interaction in passing the TCPA. Representative Cooper, for example, expressed hope that “the FCC [would] regard robotic calls by machines such as autodialers and computer-generated voices to be a much greater threat to the privacy of our homes than calls by live operators.”¹⁹ Predictive dialers can connect the called party to a live

¹⁸ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, FCC 12-21 ¶ 21 (rel. Feb. 15, 2012) (“Robocall Report and Order”).

¹⁹ See 137 Cong. Rec. 35304 (1991).

person so he or she has the opportunity to speak to the person, ask questions, and address the matter at hand.²⁰ This further underscores that Congress did not intend to restrict the use of predictive dialers to place non-telemarketing calls to wireless telephone numbers.

C. Commission Precedent Demonstrates That Predictive Dialers Should Not Be Subject to the TCPA’s Autodialer Restriction Unless They Have the Current Ability to Generate and Dial Random or Sequential Numbers.

The Commission’s original interpretation and implementation of the TCPA acknowledged that the use of predictive dialers to place non-telemarketing commercial calls should be regulated differently than unwanted, autodialed telemarketing communications made to random or sequential telephone numbers. Specifically, in 1992, the Commission appropriately stated that certain non-telemarketing uses of predictive dialers are not intended to be prohibited by the TCPA.²¹ The Commission determined that debt collection calls, for example (which were not directed to random or sequential numbers), did not fall within the definition of autodialer.²² It also stated that the TCPA’s overall intent was to protect consumers from unrestricted telemarketing practices,²³ so the provisions were not intended to restrict the use of predictive dialers for non-telemarketing activities. In 1995, the Commission again confirmed that certain non-telemarketing calls are not prohibited by the TCPA’s autodialer restriction because they “are

²⁰ *See id.*

²¹ *See Rules and Regulations Implementing Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, 7 FCC Rcd 2736 ¶ 15 (1992) (“1992 TCPA NPRM”) (discussing the use of predictive dialers in the debt collection industry and noting the benefits of increased efficiency and better communication with the called party).

²² *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 ¶ 39 (1992) (explaining that debt collection calls are not subject to the FCC’s identification rules for artificial or prerecorded messages “because such calls are not autodialer calls (*i.e.*, dialed using a random or sequential number generator) . . .”).

²³ *See id.* ¶ 9.

not directed to randomly or sequentially generated telephone numbers, but instead are directed to the *specifically programmed contact numbers . . .*”²⁴

In the Robocall Report and Order, the Commission imposed new requirements on telemarketing calls but declined to do so for informational calls. It recognized that consumers find informational calls and messages to be “highly desirable” and noted that it did not want to “discourage” the delivery of purely informational calls and messages.²⁵ It also stated that it was “employ[ing] the flexibility Congress afforded to address new and existing technologies.”²⁶

III. THE COMMISSION’S INTERPRETATION OF “AUTODIALER” HAS CAUSED SIGNIFICANT CONFUSION AND AN ARRAY OF UNINTENDED CONSEQUENCES THAT LIMIT INNOVATION, HARMING CONSUMERS AND BUSINESSES ALIKE.

A. The Commission’s 2003 TCPA Order and 2008 Declaratory Ruling Have Created Substantial Uncertainty for Businesses Using Predictive Dialers.

As discussed above, in 1992 the Commission confirmed that (1) non-telemarketing use of a predictive dialer is not intended to be prohibited by the TCPA,²⁷ and that (2) certain non-telemarketing calls that are not made to randomly or sequentially generated telephone numbers do not fall within the TCPA’s autodialer restriction.²⁸ However, in 2003, contrary to the TCPA’s plain language, the legislative history, and its own precedent, the Commission ruled that some predictive dialers that do not use a random or sequential number generator are nonetheless

²⁴ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391 ¶ 19 (1995) (“1995 TCPA Order”) (discussing debt collection calls; emphasis added), *citing* Household International Petition for Reconsideration, CC Docket No. 92-90, at 6.

²⁵ Robocall Report and Order ¶ 29.

²⁶ *Id.*

²⁷ 1992 TCPA NPRM ¶ 15.

²⁸ See Section II.C., *supra*.

“autodialers” under the TCPA.²⁹ The Commission held that “to be considered an autodialer, the equipment need only have the *capacity* to store or produce telephone numbers.”³⁰ The Commission was concerned that the telemarketing industry had evolved such that it was more cost-effective for telemarketers to use predictive dialers to call lists of numbers than to call random or sequential numbers.³¹ Thus, the Commission concluded that it was necessary to classify some predictive dialers as autodialers to “ensure that the prohibition on autodialed calls not be circumvented” by telemarketers who operate by automatically dialing “lists of numbers” instead of “creat[ing] and dial[ing] 10-digit numbers arbitrarily.”³²

In essence, the Commission’s decision in the 2003 TCPA Order indirectly regulated the telemarketing *use* of predictive dialers by focusing on the underlying equipment *design*. However, by taking an indirect approach, and focusing only on one aspect of the equipment design (*i.e.*, a capacity to store or produce numbers rather than the capacity to generate and dial random or sequential numbers), the Commission did not address squarely whether predictive dialers that have no current “capacity” or ability to generate and dial random or sequential numbers also qualify as autodialers, particularly if such dialers are used for non-telemarketing purposes. Nor did it explain whether such dialers raise similar concerns justifying the same treatment as predictive dialers used for telemarketing purposes.

It is not clear how this ruling squares with the statutory definition of autodialer or Congress’s intent in passing the TCPA. In the 2003 ruling, the Commission seemed to focus on

²⁹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 133 (2003) (“2003 TCPA Order”).

³⁰ *Id.* ¶ 132 (emphasis in original).

³¹ *Id.*

³² *Id.* ¶ 133.

what it believed to be the equipment’s potential capacity to generate and dial random or sequential numbers, noting that predictive dialing hardware “when paired with certain software, has the capacity to store or produce numbers and dial those numbers and dial those numbers at random, in sequential order, or from a database of numbers.”³³ But then the Commission described the “basic function” of autodialer equipment as being the “capacity to dial numbers *without human intervention*”³⁴ – a concept that appears nowhere in the statute and is very different from the ability to “store or produce telephone numbers to be called,” use “a random or sequential number generator,” and dial numbers that have been randomly or sequentially generated.³⁵

The Commission did not explain how focusing on the ability to dial numbers without human intervention was consistent with the text of the TCPA or with Congressional intent, especially if such numbers were not randomly or sequentially generated. Nor did it explain whether it was making a blanket rule that all predictive dialers and other equipment that dials numbers without human intervention fall within the statute, or whether it was simply finding that predictive dialers can be autodialers if they have the capacity to generate and dial random or sequential numbers. In addition, the Commission did not explain whether calls to the “specifically programmed contact numbers” of existing customers qualified as dialing numbers “without human intervention.” This absence of clarity has generated significant confusion among businesses as to what types of predictive dialers and other equipment, if any, can be used to place non-telemarketing calls and, in particular, whether a predictive dialer that has *no ability*

³³ *Id.* ¶ 131.

³⁴ *Id.* (emphasis added).

³⁵ 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(1).

to generate and dial random or sequential numbers, and which is not being used by telemarketers to circumvent the TCPA, falls within the statute.

In 2008, ACA International requested that the Commission clarify that a predictive dialer “meets the definition of autodialer only when it randomly or sequentially generates telephone numbers, not when it dials numbers from customer telephone lists.”³⁶ In response, the Commission reiterated its 2003 determinations and held that the autodialer restrictions apply when predictive dialers operate through calling lists. However, it did not elaborate on or clarify the ambiguities created by the 2003 ruling, and thus did not answer the question of whether a predictive dialer that, without significant alteration, has *no ability* to generate and dial random or sequential numbers, and which is not being used by telemarketers to circumvent the TCPA, is nonetheless still subject to the TCPA’s restrictions on autodialers. Thus, further clarification is warranted.

It is also unclear whether calls to “specifically programmed contact numbers” of *existing* customers (discussed above as part of the 1995 TCPA Order) are part of the “lists of numbers” mentioned in the Commission’s 2003 and 2008 decisions. Specifically, the Commission’s reference to “lists of numbers” appeared to be intended to address telemarketer’s use of a list of non-customer phone numbers in place of the random or sequential dialing of phone numbers.

As further evidence of the confusion created by the Commission’s 2003 and 2008 decisions, GroupMe, Inc. (“GroupMe”) recently filed a Petition for Expedited Declaratory Ruling and Clarification requesting that the Commission clarify and limit the scope of the term “capacity” in the autodialer definition to encompass “only equipment that, at the time of use,

³⁶ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 23 FCC Rcd 559 (2008) (“2008 ACA Declaratory Ruling”).

could, in fact, have employed the functionalities described in the TCPA without human intervention and without first being technologically altered.”³⁷ GroupMe offers a free service that allows a group creator to define a group of individuals who may exchange non-commercial text communications (and conference calls) to individuals that comprise the group.³⁸

B. The Uncertainty from the 2003 and 2008 Decisions Has Created an Array of Unintended Consequences that Harm Consumers and Businesses Alike.

The Commission’s 2003 and 2008 decisions regarding autodialers have led to unintended consequences that harm consumers and businesses alike, including skyrocketing class action litigation for businesses and increased costs to consumers. It also has curtailed the ability of companies to offer new products and services that consumers demand. To prevent further harm, the Commission should confirm, at a minimum, that consistent with the statutory language, companies may use predictive dialers to place non-telemarketing informational calls to wireless telephone numbers when there is no current ability or “capacity” to generate and dial random or sequential numbers.

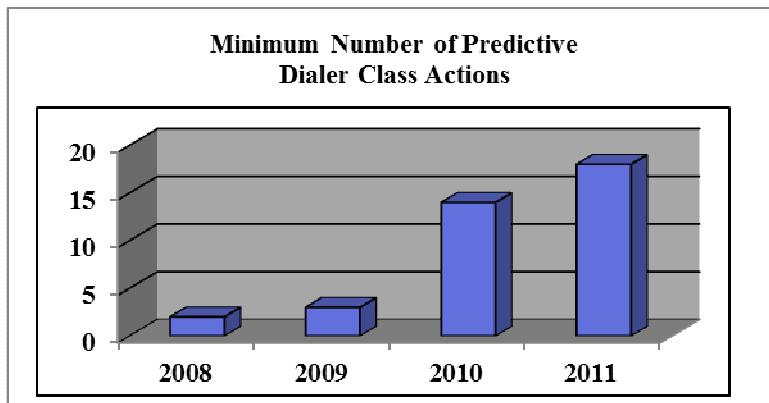
As the Commission is aware, the penalties for TCPA violations are substantial – up to \$1,500 per call. Plaintiffs’ lawyers are aggressively filing larger and larger numbers of TCPA lawsuits based on alleged violations. Specifically, there has been a surge in TCPA claims and class actions in recent years involving alleged autodialer use, filed against a wide array of leading, established companies in the financial services industries and other sectors. For example, conservative estimates indicate that at least 13 TCPA class actions involving autodialers were filed in 2008, at least 36 in 2009, and at least 60 in 2010. In 2011, there were at

³⁷ See *Petition for Expedited Declaratory Ruling and Clarification*, GroupMe, Inc., CG Docket No. 02-278 (filed Mar. 1, 2012).

³⁸ See *id.* at 2.

least 90 TCPA class actions filed involving autodialers.³⁹ Thus, TCPA class actions involving autodialers have risen a staggering 592% in the last few years alone. And hundreds of TCPA cases overall (including non-class actions) have been filed since the Commission’s 2008 ACA Declaratory Ruling.⁴⁰

TCPA class actions are also increasingly targeting predictive dialer use in light of the confusion created by Commission’s 2003 and 2008 TCPA decisions. As shown in the chart below, by conservative estimates there has been an 800% increase in the number of predictive dialer class actions filed in the last few years.⁴¹ And the true number of such class actions is likely much higher.⁴²



Under the current regulatory environment, almost every major financial institution using dialing technology to accurately and efficiently call accountholders is, or soon will be, a defendant in TCPA litigation. And as the *Griffith* case demonstrates, the confusion and

³⁹ These statistics exclude cases focused on the TCPA’s fax restrictions. In addition, these statistics only include data from courts with records that are searchable online. As a result, the numbers provided likely underreport the true number of TCPA class actions that have been filed.

⁴⁰ One San Diego plaintiffs’ firm alone has filed at least 32 class action complaints since 2008.

⁴¹ As with the statistics above, these statistics exclude cases focused on the TCPA’s fax restrictions and only include data from courts with records that are searchable online.

⁴² TCPA complaints that only reference “autodialers” have been excluded, even though they often involve the alleged use of predictive dialers.

regulatory uncertainty created by the 2003 TCPA Order potentially subjects companies to crippling liability for non-telemarketing calls, and for calls made using predictive dialer equipment that has no ability to generate and dial random or sequential numbers.⁴³

The current wave of TCPA litigation harms both consumers and businesses and stifles innovation. The lawsuits divert time and resources away from consumer-facing operations and have a chilling effect on critical account communications. They also create substantial litigation costs for defendants and increase costs for companies that want to place informational calls to their own customers.⁴⁴ Unless the Commission confirms that companies may use predictive dialers to place non-telemarketing calls to wireless telephone numbers, these TCPA class actions will continue to have a significant detrimental impact on consumers and businesses, even where there is no telemarketing activity involved. They will also continue to threaten jobs and the viability of entire companies, increase costs for consumers, and hinder future consumer lending and financial services efforts, all contrary to Chairman Genachowski's and the Administration's goals of promoting economic growth, innovation, competitiveness, and job creation.⁴⁵

IV. TO ADDRESS THE EXISTING CONFUSION, THE COMMISSION SHOULD CLARIFY WHAT CONSTITUTES AN "AUTODIALER" UNDER THE TCPA.

To address the confusion and remedy these problems, the Commission should issue a declaratory ruling to clarify, consistent with the text of the TCPA and Congressional intent, that predictive dialers that (1) are not used for telemarketing purposes and (2) do not have the current

⁴³ *Griffith v. Consumer Portfolio Serv., Inc.*, Memorandum Opinion, Case No. 10-2697 (N.D. Ill., Aug. 16, 2011) (holding that irrespective of the statutory language, pursuant to the Commission's 2003 and 2008 decisions, predictive dialers fall within the TCPA's autodialer definition because they "have the capacity to dial numbers without human intervention").

⁴⁴ *See, e.g.*, Reply Comments of the Federal Reserve Board Staff, CG Docket No. 02-278, 4 (filed June 8, 2010).

⁴⁵ *See* Genachowski Remarks at 2.

ability to generate and dial random or sequential numbers are not “automatic telephone dialing systems” (“autodialers”) under the TCPA and the Commission’s TCPA rules. In reaching this decision, the Commission should focus on the meaning of the term “capacity” in the autodialer definition and declare that, at least for informational calls, capacity refers to a present ability to generate and dial random or sequential numbers.

“Capacity” is not defined by the TCPA and thus the Commission as the expert agency can define this important term. The Commission should clarify that the definition of an autodialer under the TCPA reflects equipment that has a *present* capacity, such as having the current ability to generate and dial random or sequential numbers without additional modifications to the equipment. The Commission should not interpret capacity as encompassing any conceivable hardware or software modification to a device that would permit it to generate, store, and dial numbers randomly or in sequence. For example, mobile phones, smart phones, tablets, e-readers, and personal computers can all theoretically be modified with sufficient effort and ingenuity, using various third-party software or hardware configurations, to randomly or sequentially generate and dial telephone numbers. Such an unconstrained interpretation would make the statutory term capacity superfluous, contrary to elementary rules of statutory interpretation.

To continue protecting wireless consumers against unwanted automated telemarketing calls, the Commission can also distinguish between telemarketing and informational calls when it clarifies the meaning of capacity. The Commission has correctly recognized that changes in technology and industry practices must be taken into account under the TCPA,⁴⁶ and it could, for example, find that predictive dialers and other equipment used for *informational calls* only have

⁴⁶ 2003 TCPA Order ¶ 132 (internal citations omitted).

the required “capacity” to generate and dial random or sequential numbers when the capacity is actually *enabled* (e.g., installed as a functioning feature on the device without requiring further modifications to the device), while also finding that the requisite “capacity” for *telemarketing calls* includes the current ability to dial numbers from a list. The Commission made a similar distinction between telemarketing and informational calls when it amended its prior express consent requirements in the Robocall Report and Order.

V. CHANGED CIRCUMSTANCES AND THE BENEFITS OF PREDICTIVE DIALER USE FOR INNOVATIVE, NON-TELEMARKETING PURPOSES WARRANT A CLARIFICATION.

The Commission has correctly recognized that changes in technology and industry practices must be taken into account under the TCPA,⁴⁷ and the circumstances regarding predictive dialer use have changed significantly over the past decade. The growing use of predictive dialers to place telemarketing calls was a dispositive factor in the Commission’s 2003 decision. However, today’s predictive dialers – many of which have no current capacity to dial random or sequential numbers – are used for a number of innovative non-telemarketing purposes that simultaneously bring benefits to both consumers and businesses. There has also been a significant shift in consumer calling patterns over the last decade, resulting in approximately one-third of households now having only wireless telephone numbers. In light of these changed circumstances, the Commission should clarify that companies may use predictive dialers to place non-telemarketing calls to wireless telephone numbers without triggering the TCPA’s autodialer restrictions, especially if the dialers also cannot generate and dial random or sequential numbers.

⁴⁷ *Id.* (internal citations omitted).

A. Today's Innovative Predictive Dialing Technology Provides Significant Benefits to Consumers and Businesses.

The predictive dialers in use today are a far cry from the autodialing machines that telemarketers used in the early 1990s to bombard random households with pre-recorded sales pitches. Today's predictive dialers provide significant benefits to both consumers and businesses by allowing businesses with a legitimate need to contact a large number of specific accountholders or other consumers to do so accurately, efficiently, and cost-effectively. They are used to place a variety of non-telemarketing calls, including informational calls to: discuss time-sensitive account transactions; provide appointment or service reminders or cancellation notifications; prevent or review fraudulent account activity or potential identity theft; confirm or arrange payments; provide data security breach notifications;⁴⁸ notify policyholders in advance of an insurance termination or lapse;⁴⁹ make calls to employees regarding workplace closures, personnel benefits, and use of annual flexible spending account funds; and discuss other legitimate account-related issues with existing customers, accountholders, and other parties with whom a caller has an existing business relationship.⁵⁰ Today's predictive dialers also help protect consumers against improper calls. Many states, for example, have varying laws regarding what hours it is permissible to call consumers, the number of times it is permissible to call consumers, waiting periods for contacting consumers, the circumstances under which calls must cease, and whether or when consumers can be called at work, and predictive dialers can be

⁴⁸ See, e.g., Comments of the Financial Services Roundtable, The American Bankers Association, and The Consumers Bankers Association, CG Docket No. 02-278, 3 (filed May 21, 2010).

⁴⁹ See *id.* at 9.

⁵⁰ See also Robocall Report and Order ¶ 21 (stating that the Commission does not want to “unnecessarily impede” informational calls including, for example, “bank account balance, credit card fraud alert, package delivery, and school closing information”).

programmed to accommodate these and other limitations. For example, they can be programmed to restrict calls to:

- Specific telephone numbers;
- Specific individuals or accountholders;
- Certain area codes or regions;
- Certain hours of the day;
- Certain days of the week;
- A limited number of attempts or contacts per telephone number, individual, or accountholder;
- A limited number of messages left per telephone number; and
- A minimum amount of time between calls to a particular telephone number, individual, or accountholder.

Thus, predictive dialers also better protect consumer privacy and perform a critical regulatory compliance function. Limiting companies' ability to rely on predictive dialing technology, on the other hand, means that more calls will have to be dialed manually. As the U.S. Department of the Treasury has recognized in supporting exceptions to the autodialer restrictions, manual dialing creates a heightened risk of human error, which harms both consumers who may receive improper calls and companies that face liability for such calls under myriad statutes and regulations⁵¹ (including, in some cases, a strict liability standard such as under the Federal Debt Collection Practices Act). Predictive dialers also substantially increase employee productivity.

Requiring companies to contact consumers manually for informational and other non-telemarketing calls also increases communications and staffing costs, which could be particularly

⁵¹ See, e.g., Comments of the Financial Management Service of the Department of the Treasury, CG Docket No. 02-278, 2-3 (filed May 20, 2010) (stating that the restrictions on the use of autodialers should not apply to debt collection calls, and explaining that the use of autodialers helps collectors ensure compliance with the Fair Debt Collection Practices Act).

harmful to small businesses. These increased costs divert critical resources away from innovative products and services. Given how limited many companies' resources are in this economy, this diversion has a particularly severe negative impact (especially on small businesses).

In addition, clarifying that predictive dialers may be used to place non-telemarketing calls without being considered "autodialers" would not lead to an increase in calls to consumers. Callers already can contact consumers on their wireless telephone numbers using manual dialing, and they have no incentive to place unnecessary calls. Thus, it is only *how* some calls are made that would change, not whether or how often the calls can be made.⁵²

B. Many of Today's Predictive Dialers Do Not Have the Ability to Generate and Dial Random or Sequential Telephone Numbers.

Many of today's predictive dialers do not fall within the statutory autodialer definition because they cannot randomly or sequentially generate and dial telephone numbers. In fact, representatives of seven leading manufacturers and marketers of predictive dialer equipment have submitted declarations stating that their respective predictive dialers:

- Do not have the capacity to store or generate telephone numbers using a random or sequential number generator;
- Have not been upgraded with separate software to provide the capacity to do so; and
- Cannot function without a list of telephone numbers provided by the user.⁵³

⁵² To the extent that the Commission has any concerns about a ruling being inappropriately applied to provide additional flexibility for companies to place telemarketing calls, CI notes that such calls would, at a minimum, be subject to the National Do Not Call Registry.

⁵³ Reply Comments of ACA International, CG Docket No. 02-278, Exhibit 1 (filed June 21, 2010) ("ACA Robocall NPRM Reply Comments"); *see also* Letter from Sen. Blunt to FCC Chairman Julius Genachowski, CG Docket No. 02-278 (dated June 28, 2011) (stating that "[t]he current generation of predictive dialers does not raise concerns about calling random numbers – the practice that Congress intended to prevent when it enacted the TCPA").

Several also declared that their predictive dialer equipment is not used for telemarketing, advertisements, or solicitations.⁵⁴ And most indicated that it would require “fundamentally changing the architecture of the hardware and software” to provide even the *capacity* to randomly or sequentially generate telephone numbers using a number generator.⁵⁵ Quite simply, this is not the type of equipment that Congress sought to regulate when it enacted the TCPA, and it is not the type of equipment that is encompassed in the statutory definition of autodialer.

C. The Number of Wireless-Only Households Continues to Climb, Making it Difficult to Provide Time-Sensitive Information to a Growing Portion of Consumers.

Another significant changed circumstance with respect to the TCPA’s restriction on autodialed calls to wireless telephone numbers is the surge in the number of wireless subscribers and, in particular, the number of wireless-only households – a trend that shows no signs of slowing. When the TCPA was enacted in 1991, there were only an estimated 7 million wireless subscribers in the United States.⁵⁶ Today, there are more than 300 million wireless subscribers,⁵⁷ and almost one-third of all households only have wireless telephones (with that number expected to continue rising).⁵⁸ In addition, more than half of consumers aged 25-29 are living in wireless-

⁵⁴ ACA Robocall NPRM Reply Comments at Exhibit 1.

⁵⁵ *Id.*

⁵⁶ Prepared Testimony of Michael Altschul, General Counsel, CTIA – The Wireless Association® before the House Subcommittee on Communications & Technology regarding the Mobile Informational Call Act of 2011, 1 (Nov. 4, 2011) (“Altschul Testimony”).

⁵⁷ *Id.* at 2.

⁵⁸ *See, e.g.*, CDC Study: Wireless Substitution: Early Release of Estimates From The National Health Interview Survey, July-December 2010, *available at* <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201106.htm> (last accessed Oct. 18, 2011).

only households.⁵⁹ The cost of a wireless telephone call was also ten times higher when Congress enacted the TCPA than it is today, having dropped dramatically from approximately 44 cents per minute in 1993 to less than five cents per minute in recent years.⁶⁰

Subjecting all calls made using predictive dialers to the autodialer restrictions thus significantly limits the ability of companies to provide service to their customers and contact their accountholders. In particular, it hinders their ability to provide critical, time-sensitive notifications regarding identity theft, fraudulent account activity, service or appointment cancellations, or other transaction-related information. Moreover, given that the percentage of wireless-only households is higher among low-income groups, restricting such informational calls could have a disproportionate negative impact on such individuals.⁶¹ And the fact that consumers can now easily “port” their wireline number to their wireless device further restricts the ability of companies to place such informational calls. Although the Commission provides a very limited 15-day grace period for ported numbers,⁶² that period would be too short for companies looking to place critical informational calls on even a monthly basis.

⁵⁹ Lance Whitney, *Over Half of Late-20s Crowd Own Cell Phones Only*, CNET (Dec. 22, 2010), at http://news.cnet.com/8301-1035_3-20026395-94.html.

⁶⁰ Altschul Testimony at 1, *citing Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fifteenth Report, 26 FCC Rcd 9664, Table 20 (2011) (indicating that the average revenue per minute for a wireless telephone call dropped from approximately 44 cents per minute in 1993 to five cents per minute in 2009) and Glen Campbell, Bank of America Merrill Lynch, 3Q Global Wireless Matrix, 2 (Sept. 28, 2011) (reporting that the average revenue per wireless minute was three cents, down from four cents at the end of 2010).

⁶¹ *1 in 4 Homes Have Cell Phone, No Landline*, CBS NEWS (May 12, 2010), at <http://www.cbsnews.com/stories/2010/05/12/tech/main6476743.shtml>.

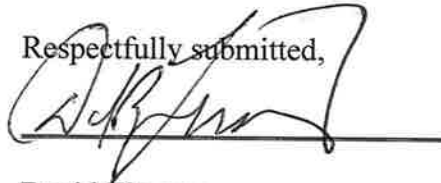
⁶² 47 C.F.R. § 64.1200(a)(1)(iv).

Finally, the use of predictive dialers for non-telemarketing purposes creates *no* additional costs for wireless consumers because callers can already contact the same consumers on their wireless telephone numbers (through manual dialing), and they have no incentive to place unnecessary calls. Using predictive dialers merely changes the mechanics of how those consumers are reached in a way that reduces improperly dialed calls, better protects their privacy, and promotes regulatory compliance.

VI. CONCLUSION

For the foregoing reasons, the Commission should clarify and confirm that predictive dialers that (1) are not used for telemarketing purposes and (2) have no current ability to generate and dial random or sequential numbers are not considered “autodialers” under the TCPA.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Thomas', is written over a solid horizontal line.

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