

March 4, 2014

VIA ELECTRONIC DELIVERY

Chairman Tom Wheeler
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Commissioner Michael O’Rielly
Federal Communications Commission
445 12th Street, SW
Room TWA325
Washington, DC 20554

**Re: Communication Innovators Petition for Declaratory Ruling
Ex Parte Presentation
CG Docket No. 02-278**

Dear Chairman Wheeler and Commissioners Clyburn, Pai, Rosenworcel, and O’Rielly:

The undersigned associations and organizations represent a wide-ranging membership base that uses modern calling technologies to contact their own accountholders, constituents, and members, and we are writing to express our support for the Communication Innovators (“CI”) Petition for Declaratory Ruling.¹ As discussed below, the Commission should grant the CI Petition and confirm 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 Telephone Consumer Protection Act (“TCPA”) and the Commission’s TCPA rules.² At a minimum, the Commission should issue a narrow declaratory ruling acknowledging that: (1) there are a variety of predictive dialing solutions available today; and (2) to be considered an autodialer, any solution must have the statutorily required “capacity to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers.”³

Predictive dialers that are used for non-telemarketing purposes offer many consumer benefits. These calling solutions connect live representatives with consumers as quickly as possible to provide timely, useful, non-telemarketing information. There are dozens of detailed

¹ Communication Innovators, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed June 7, 2012) (“CI Petition”).

² *Id.* at 1.

³ *Ex Parte* Letter from Communication Innovators, CG Docket No. 02-278 (filed Sept. 13, 2013).

examples where predictive dialer solutions are used today to ensure compliance with federal and state consumer outreach requirements and other laws (many of which post-date the TCPA) and to place critical, time-sensitive non-telemarketing calls to benefit consumers, including:

- **Healthcare.** Appointment reminders, follow-up appointment and exam scheduling, pre-operative instruction calls, prescription reminders, lab result discussions, post-discharge follow-up communications intended to prevent readmission, home healthcare instructions;
- **Financial services.** Identity theft and fraud prevention alerts, breach notifications, out-of-pattern activity alerts, customer service and general account notifications, funds transfer confirmations, anticipatory fee avoidance calls (including low balance, overdraft, over-the-limit, and late payment alerts), outreach calls to help customers avoid mortgage default and explore mortgage modification options, calls to customers behind on other credit obligations to explore alternative payment options and avoid fraudulent for-profit debt settlement companies;
- **Education.** Student correspondence, class registration and cancellation alerts, financial aid communications, truancy notifications, parent-teacher meeting notifications, missed payment and pre-default correspondence, school or building closure notifications;
- **Union Communications.** Correspondence with members and those seeking to form unions, union election information, collective bargaining agreement benefit updates;
- **Electric and Natural Gas Utilities.** Service curtailment alerts due to power or natural gas availability, outage updates, service restoration confirmation, service disconnection notices;
- **Insurance.** Impending policy lapse notifications, notifications of imminent catastrophe, calls with information about how and where to file a claim, required informational calls alerting consumers about eligibility for multi-policy discounts on policies already owned;
- **Transportation.** Flight delay or cancellation notifications; and
- **Other Consumer Protection and Safety Calls.** Product recalls, disaster relief resources, notifications for utility outages and upcoming service interruptions, road closure notifications, neighborhood watch alerts.

Today's predictive dialers also promote consumer privacy by protecting against improper calls and manual dialing errors, and by facilitating compliance with federal and state calling laws. For example, mortgage servicers attempting to provide more affordable mortgage payments under the Home Affordable Modification Program are required to make "reasonable efforts" to reach out to borrowers, including, *inter alia*, making a minimum of four telephone calls to the last known telephone numbers of record, at different times of the day, over at least 30 days.⁴ Moreover, under the Consumer Financial Protection Bureau's mortgage servicing rules, mortgage servicers must establish, or make good faith efforts to establish, *live contact* with borrowers by the 36th day of their delinquency and promptly inform such borrowers, where appropriate, that loss mitigation options may be available.⁵

⁴ See Home Affordable Modification Program – Borrower Outreach and Communication, Supplement Directive 10-02, U.S. Treasury, 2 (Mar. 24, 2010), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1002.pdf.

⁵ See Summary of the Final Mortgage Servicing Rules, Consumer Financial Protection Bureau, 4 (Jan. 17, 2013), *available at* http://files.consumerfinance.gov/f/201301_cfpb_servicing-rules_summary.pdf.

As another example, Section 605A of the Fair Credit Reporting Act provides consumers with a right to place fraud alerts on their credit reporting agency files. After the alert is placed, financial institutions must verify the consumer's identity before establishing any new credit plan or extension of credit. Section 605A expressly *directs* financial institutions to call consumers to conduct this verification.⁶

Additionally, Section 501(b) of the Gramm-Leach-Bliley Act requires financial institutions to establish response and customer notification programs following any unauthorized access to customers' personal information.⁷ Predictive dialers permit financial institutions to contact their customers promptly to alert them to threatened security breaches, allowing customers to monitor their accounts and take appropriate action.

In the healthcare sector, under the Affordable Care Act, an insurance exchange must make a "reasonable effort" to contact all applicants who provide information to the exchange that is inconsistent with the information maintained in official records.⁸ The same act also specifically grants federal and state health and human services programs the authority to make notifications of "eligibility, recertification, and other needed communication regarding eligibility" by placing calls to a patient's or client's wireless telephone number.⁹ Predictive dialers can help organizations comply with these requirements.

Predictive dialers are also used to assist student loan borrowers who are having difficulties in repaying their loans. In some cases, telephone contact is required by federal law. For example, under the Federal Family Education Loan Program, lenders of federally guaranteed loans must "engage in at least four diligent efforts" to contact a delinquent borrower by telephone.¹⁰

Predictive dialers also benefit consumers because they can be programmed to ensure compliance with laws that limit the timing or frequency of consumer contacts. For example, they can be programmed to restrict calls to specific telephone numbers, specific individuals, certain hours of the day, and other limitations. Additionally, modern predictive dialing solutions are exponentially more efficient than manual dialing, increasing productivity and lowering costs for consumers. They maximize the amount of time callers spend actually speaking to customers, account holders, and members. Callers using predictive dialers to place non-telemarketing calls also have no need for or incentive to call random or sequential numbers. Instead, they use predictive dialer solutions and other new technologies to place calls to specific individuals and for specific informational purposes.

Consumers will be harmed if the Commission fails to grant the CI Petition and confirm that predictive dialers that do not have the statutorily required capacity to store or produce, and dial, random or sequential numbers are not "autodialers." Predictive dialers and other technologies have made placing and receiving non-telemarketing, informational calls more consumer-friendly, but significant confusion among plaintiffs' attorneys and courts over the Commission's TCPA precedent continues to chill their use. The looming threat of TCPA class action liability hinders innovation, increases costs, diverts limited resources away from consumer-facing operations, and threatens job creation efforts. Moreover, confusion about whether certain predictive

⁶ 15 U.S.C. § 1681c-1.

⁷ Gramm-Leach-Bliley Financial Services Modernization Act of 1999, Pub. L. 106-102, 113 Stat. 1338 § 501(b).

⁸ The Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 § 1411(e)(4)(a)(i).

⁹ *Id.* § 3021(b)(6).

¹⁰ See 34 C.F.R. § 682.411(d) (for borrowers that are delinquent by more than 15 days).

dialers are autodialers will dissuade organizations – including unions and other non-profits – from placing consumer-friendly, non-telemarketing calls.¹¹ Many of these notifications, such as payment confirmations, healthcare reminders, or utility outage announcements, provide great benefits to the call recipient but may not be worth the risk if the caller believes class action liability could result.

Failing to grant the CI Petition would also be contrary to Congress's TCPA's goals. For example, uncertainty in this area can undermine the consumer privacy interests that the TCPA was intended to promote by making it impossible for callers to utilize call controls that ensure compliance with federal and state law and by increasing the number of inadvertently misdialed calls.¹²

The Commission should grant the CI Petition and confirm 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 autodialers under the TCPA and the Commission's TCPA rules.¹³ At a minimum, the Commission should issue a narrow declaratory ruling acknowledging that: (1) there are a variety of predictive dialing solutions available today; and (2) to be considered an autodialer, any solution must have the 'capacity to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers.'¹⁴

Pursuant to Section 1.1206(b) of the Commission's rules, we are filing this notice electronically in the above-referenced docket.

Respectfully submitted,

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¹¹ See *Ex Parte* Letter from the Service Employees International Union, CG Docket No. 02-278 (filed Jan. 29, 2014)

¹² See CI Petition ¶ 20 (listing compliance measures for which predictive dialers can be programmed).

¹³ *Id.* at 1.

¹⁴ *Ex Parte of Communication Innovators*, CG Docket No. 02-278 (filed Sept. 13, 2013).

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