



November 15, 2012

Secretary
Federal Communications Commission
445 12th St., SW, Room TW-A325
Washington, DC 20554

Re: CG Docket No. 02-278

I hereby submit the attached comments on behalf of the Marketing Research Association (MRA) in response to the Petition for Declaratory Ruling by Communications Innovators regarding the applicability of the TCPA's rules to "predictive dialers" used for non-telemarketing purposes.

Sincerely,

A handwritten signature in black ink, appearing to read 'Howard Fienberg', written in a cursive style.

Howard Fienberg, PLC
Director of Government Affairs
Marketing Research Association (MRA)

**Before the
Federal Communications Commission (FCC)**

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

COMMENTS OF THE MARKETING RESEARCH ASSOCIATION (MRA)

Howard Fienberg, PLC
Director of Government Affairs
Marketing Research Association
1156 15th St, NW, Suite 302
Washington, DC 20005
Ph: (202) 800-2545

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1. Introduction

Communications Innovators (“CI”) has petitioned¹ the Federal Communication Commission (“the Commission”) for a Declaratory Ruling on the applicability of the Commission’s Telephone Consumer Protection Act of 1991 (“TCPA”) rules² to “predictive dialers” used for non-telemarketing purposes. According to the Petition, “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 TCPA³ and the Commission’s TCPA rules.”

The Marketing Research Association (“MRA”), a non-profit national membership association, is the leading and largest association of the survey, opinion and marketing research profession⁴ in the United States. MRA promotes, advocates and protects the integrity of the research profession and strives to improve research participation and quality.

MRA requests that the Commission grant the CI Petition and confirm that predictive dialers used for non-telemarketing purposes are not autodialers under the TCPA and the TCPA rules if they do not currently have the ability to generate and dial random or sequential numbers. Further, MRA urges that the Commission exclude research calls to cell phones from the TCPA requirements for express prior consent using an autodialer.

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

² 47 CFR 64.1200

³ 47 U.S.C. 227

⁴ The research profession is a multi-billion dollar worldwide industry, comprised of pollsters and government, public opinion, academic and goods and services researchers, whose members range from large multinational corporations and small businesses to academic institutes and non-profit organizations.

2. Survey, Opinion and Marketing Research

Survey, opinion and marketing research is the scientific process of gathering, measuring and analyzing public opinion and behavior. On behalf of their clients -- including the government (the world's largest purchaser), media, political campaigns, and commercial and non-profit entities -- researchers design studies and collect and analyze data from a small but statistically-balanced sample of the public. Researchers seek to determine the public's opinion regarding products, services, issues, candidates and other topics. Such information is used to develop new products, improve services, and inform policy.

Survey, opinion and marketing research is thus sharply distinguished from commercial activities like sales lead generation and the efforts that are the subject of the national telemarketing Do-Not-Call (DNC) Registry. In fact, MRA and other research associations expressly prohibit sales or fundraising under the guise of research (referred to as "sugging" and "frugging") and any attempts to influence or alter the attitudes or behavior of research participants as a part of the research process. Quite to the contrary, professional research is dedicated to the true and accurate assessment of public sentiment in order to help individuals, companies, organizations and governments design products, services and policies that meet the needs of and appeal to the public.

3. The original TCPA statute and legislative intent were focused on telemarketing and a limited interpretation of what constituted an autodialer

MRA agrees with CI's point that Congress did not "intend to restrict the use of technologies such as predictive dialers" – nor did Congress intend to restrict non-telemarketing uses of such technologies:

"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."⁵ Under this definition, the phrase "using a random or sequential number generator" 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

⁵ 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 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).

random or sequential numbers are excluded from the definition of an autodialer.”

The Congressional sponsors of the TCPA stated that the TCPA was focused on the use of the telephone (and associated technology) when such use is designed to encourage or sell products or services.⁶ The initial sponsor of the Senate bill, Senator Hollings, stated that, “This bill is purely targeted at those calls that are the source of the tremendous amount of consumer complaints at the FCC and at the State commissions around the country --- the telemarketing calls placed to the home.”⁷ Likewise, Senator Pressler stated that, “This legislation is the result of a House and Senate conference on comprehensive telemarketing legislation... [p]eople are increasingly upset over this invasion of their privacy by unrestricted telemarketing... [t]he primary purpose of this legislation is to develop the necessary ground rules for cost-effective protection of consumers from unwanted telephone solicitations.”⁸

In contravention of that legislative intent, and after over a decade of Commission implementation, CI points out that the Commission seemingly expanded the scope of the TCPA and left enough ambiguity to confuse non-telemarketing telephone users, such as researchers:

“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 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.”

As CI notes, “The TCPA’s primary purpose was and remains protecting individuals from telemarketing activity and ensuring the smooth transmission of emergency communications.” CI further states that, “To the extent that Congress was concerned about some non-

⁶ H.R. Rep. No. 102-317 (1991).

⁷ 137 Congressional Record S9874 (daily ed. July 11, 1991) (statement of Sen. Hollings).

⁸ 137 Congressional Record 518317 (daily ed. Nov. 26, 1991) (statement of Sen. Pressler).

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.”

The Commission itself differentiated predictive dialers from “random and sequential number generators” when used for non-telemarketing purposes in 1992 and 1995. Unfortunately, in its 2003 TCPA Order,⁹ as CI notes:

“the Commission ruled that some predictive dialers that do not use a random or sequential number generator are nonetheless “autodialers” under the TCPA. The Commission held that “to be considered an autodialer, the equipment need only have the capacity to store or produce telephone numbers.” 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. 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.”

So the Commission restricted all uses of a given technology (predictive dialers) instead of the specific potential problem it identified (abusive telemarketing uses of predictive dialers) and left enough ambiguity to confuse non-telemarketing telephone users, such as researchers.

The Commission’s 2003 interpretations (examined at length in the CI Petition¹⁰) created an unnecessarily expansive and confusing regulatory landscape for conducting survey, opinion and marketing research in the United State. In order to protect our members, MRA has had to recommend consistently that the research profession avoid essentially any automation in research calls to cell phones and rely instead on insufficient and costly manually dialing by hand.

4. Predictive dialers used for non-telemarketing purposes do not fit the intended definition of an autodialer

The Commission’s interpretations appear somewhat antiquated, since dialing technology has changed dramatically even in the last decade. Today’s predictive dialers generally do not have “the capacity... to store or produce numbers to be called, using a random or sequential number generator,” as described in the TCPA statute.¹¹ As CI notes:

“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

⁹ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Rcd 14014 (2003).

¹⁰ See CI Petition.

¹¹ 47 U.S.C. § 227(a)(1)A).

telemarketers. Rather, the predictive dialers in use today are complex and innovative equipment and technologies used by a wide array of non-telemarketing businesses... 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.”

Predictive dialers are an essential tool of telephone survey, opinion and marketing research. Almost every telephone research call requires their use, in order to reduce both the time it takes to dial a number manually (a significant cost) and the chance of calling the wrong number. Automatic dialing also synchronizes better with the industry standard “computer-assisted telephone interviewing” (CATI)¹² software that helps researchers execute and conduct calls with fewer errors and greater efficiency.

Like CI, MRA requests that the Commission focus on the meaning of the term “capacity” in the definition of an autodialer and declare that capacity refers to a present ability to generate and dial random or sequential numbers “without additional modifications to the equipment” – at least for non-telemarketing calls.

Research use of predictive dialers clearly does not constitute use of a device that has the capacity to randomly or sequentially dial numbers. Researchers dial pre-determined lists of numbers for any given research study – lists that are generated or provided separately from and well prior to the act of dialing. Even in a random digit dial (RDD) study, the “randomization” is handled either by a researcher or company that specializes in compiling an appropriate sample of the population. Numbers are not generated randomly by the dialer or the dialer’s equipment, but are scientifically determined by technical experts based on the needs of specific research studies and their target audience of research participants.

Research use of predictive dialers also provides significant benefit to consumers. They can help comply with state laws such as time-of-day restrictions, as well as legal and ethical considerations in how many times and how frequently a given number can be called. They also eliminate the significant problem of human error inherent in manual dialing – errors that can corrupt a research study’s data while wasting the time of the research company, the client waiting for results, and most importantly, the consumer incorrectly called.

MRA also agrees with CI that manual dialing “increases communications and staffing costs, which could be particularly 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).”¹³

¹² CATI is a method of collecting data in which interviewers use computer technology to assist in administering a survey over the telephone to survey participants.

¹³ The most recent figures from the Census Bureau indicate there are 5,823 for-profit survey, opinion and marketing research companies employing 117,822 in the United States. A majority of those companies are small businesses. That does not even include the many non-profit and academic research organizations conducting research, nor the many thousands of researchers and research departments within non-research companies and organizations, or their counterparts within all levels of government. While the TCPA restrictions

5. Research calls should be excluded from the TCPA restrictions on autodialer calls to cell phones

Should the Commission decline to appropriately clarify the definition of an automatic telephone dialing system, MRA urges that the Commission instead rule that Bona Fide Survey, Opinion and Marketing Research¹⁴ calls be excluded from the TCPA restrictions on autodialer calls to cell phones. Congress empowered the Commission with the authority to make such necessary exclusions.

The existing TCPA rules severely limit researchers' ability to get unbiased, reliable and accurate data efficiently and cost-effectively representative of all demographics. The rules increase the costs of research (including for small businesses and government), hinder already low response rates, and make it hard to produce representative samples – all to restrict an activity for which there is no evidence of harm.

The rules were written in a vastly different era, before the predominance of cell phones, when hardly anyone had a cell phone and users paid inordinate sums for each minute of incoming or outgoing calls. Times have changed and it is time that the Commission change the rules to suit the times, in order to protect survey, opinion and marketing research and its social utility.

6. The TCPA requirement of express prior consent for autodialer calls to cell phones adds to the time and cost of research studies

Survey and opinion researchers already encounter significant public apathy with respect to research participation. Research “response” rates have been falling for the last couple of decades, driving up the cost of and time involved in achieving the required number and strata of participants to reach representative samples for most research studies.

The TCPA requirement for express prior consent to use an autodialer to call a cell phone has thus helped to increase non-response bias and adversely impacted the accuracy of research results.

on research calls to cell phones may not impact all of them directly, since not all researchers do research by phone, it has definitely influenced many researchers to do less of their work over the phone because of rising costs and decreased efficiencies. It has also made it more costly for this country's companies, organizations and governments to purchase accurate and timely research.

¹⁴ MRA developed a legal definition of research, in consultation with the broader research profession: the term “Bona Fide Survey, Opinion and Marketing Research” means “the collection and analysis of data regarding opinions, needs, awareness, knowledge, views, experiences and behaviors of a population, through the development and administration of surveys, interviews, focus groups, polls, observation, or other research methodologies, in which no sales, promotional or marketing efforts are involved and through which there is no attempt to influence a participant's attitudes or behavior.”

Researchers have estimated to MRA that including cell phone users in their study samples increases the cost of a research study by two to four times that of an ordinary telephone study.

The increased time involved in cell phone research can be even more of a problem than cost. Time-sensitive studies, like most political and public opinion polling, are constantly imperiled. In situations where timely data is as critical as accurate data, information is not readily deliverable to companies, government agencies, and other entities that need to make swift decisions.

Most importantly, this equivalent of a tariff and delay on telephone research is ultimately passed on to the individuals the Commission is trying to protect, in the form of:

- higher prices for goods and services;
- lengthier time before new or better goods and services are brought to the marketplace;
- delayed introduction of new or better public policies; and
- a decreased amount of research ordered by companies, who might then bring less well-tested and researched products to market, harming consumers in the end because the goods did not fulfill consumer expectations.

7. No demonstration of harm in research calls to cell phones

The Commission has not demonstrated any harm from survey, opinion and marketing research calls to cell phones using an autodialer, nor did Congress identify any such harms when it drafted and passed the TCPA.

Any potential harm from cell phone users receiving possibly unwanted research calls is likely to be very small. First of all, there are far fewer legitimate research surveys than there are potential telemarketing calls (legal or otherwise). The expense of conducting research and the ongoing innovations in statistical sampling limit the potential number of cell phone users who may be called for research studies. Second, since common research practice entails an introduction that explains the purpose of the call, research participants can make a quick decision – usually within a minute – as to whether or not they want to participate. Third, continuing focus of consumer complaints with regard to unwanted calls are commercial or political robocalls, not research calls. Finally, as far as the cell phone user is concerned, technology makes automated dialing virtually indistinguishable from manual dialing – the average ear will never notice the difference.

8. The TCPA negatively impacts representativeness of research studies by making it harder to reach half the nation's households

The number of American households that are cell phone only or cell phone mostly continues to skyrocket. Preliminary results from the National Center for Health Statistics' (NCHS) July-December 2011 National Health Interview Survey (NHIS) indicate that more than a third of American homes (34 percent) had cell phones and no landline phones in the 2nd half

of 2011 – almost double since 2008.¹⁵ In addition, one of every six American homes (16 percent) still had a landline, but received all or almost all calls on their cell phones.¹⁶ About 32.3 percent of all adults (74 million) lived in wireless only homes – and the same for 38.1 percent of all children (28 million children).¹⁷

These data mean that 50 percent of American households can only be reached on their cell phones. Without following sometimes arduous procedures to obtain consent, such numbers must be separately identified, sampled and then dialed manually. Because of the added cost in time and resources, many studies inevitably miss this half of American households – and data indicate that this half of households are by no means identical to the other half.

The cell phone only population is more likely to be younger, include more renters, consist of a higher proportion of non-Whites, and have lower income as compared to the entire U.S. landline population.¹⁸ Therefore, these populations will be under-represented in critical research areas, like political polling, unemployment measures, health care access, and most importantly, in certain key health indicators.

The higher prevalence of some key health indicators among the cell phone only population is the reason that NCHS started regular measurement versus cell phone mostly and landline households in the first place. For example, cell phone only adults are much more likely to binge drink and be current smokers than adults living in landline households.¹⁹ Cell phone only adults are also more likely to lack health insurance.²⁰ Interestingly, they also are more likely to report that their health status was excellent or very good, more likely to experience serious psychological distress, less likely to have ever been diagnosed with diabetes, but more likely to have ever been tested for human immunodeficiency virus (HIV), the virus that causes AIDS.²¹

It is unlikely that these populations would wish to be disenfranchised from research studies (which serve as an ombudsman for the American public). The federal government goes to great lengths to ensure that all citizens are represented equally in the decennial Census. So why should the Commission seek to continue to impose a tariff on research, fueling coverage bias and making these populations less likely to be represented? The Commission has a responsibility to avert this outcome.

9. The cell phone marketplace has changed dramatically

¹⁵ Blumberg SJ, Luke JV. Wireless substitution: Early release of estimates from the National Health Interview Survey, July–December 2011. National Center for Health Statistics. June 2012. Available online: <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201206.pdf>

¹⁶ Id.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

The broader marketplace of wireless service has changed significantly since the TCPA's passage in 1991 and the Commission's 2003 TCPA Order.

According to recent Congressional testimony, there were as few as 7 million cell phone subscribers in the country when Congress passed the TCPA in 1991 as compared to the more than 300 million subscribers today.²² As already noted, 50% of American households can only be reached on their cell phones.²³

Hurdles facing survey and opinion research with the cell phone only and cell phone mostly populations are further exacerbated by the prepaid cell phone market. Cell phone numbers assigned to prepaid plans change subscribership frequently, making it more challenging to reach such users in a timely fashion. CTIA-The Wireless Association estimates that 1 in 5 Americans with a cell phone had a prepaid plan at the end of 2009, compared with 15% in 2007. CTIA also claims that some markets have up to 30% of subscribers in prepaid plans.²⁴

Moreover, the cost of a cell phone call in the early nineties was ten times more than today, dropping from approximately 44 cents per minute in 1993 to less than five cents per minute by recent estimates.²⁵

12. Conclusion

For the reasons explained, MRA urges the Commission to accept the CI Petition for Declaratory Ruling by confirming that predictive dialers are not considered autodialers by the TCPA if used for non-telemarketing purposes and lacking the current ability to generate and dial random or sequential numbers.

Should the Commission decline to clarify the autodialer definition in such a manner, the Commission should instead rule that use of an autodialer for bona fide survey, opinion and marketing research is not subject to the express prior consent requirements of the TCPA when calling a cell phone.

²² 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 (Nov. 4, 2011).

²³ Blumberg (Footnote 15).

²⁴ Niraj Sheth and Roger Cheng. "As Growth Slows, Phone Rivals Start Dialing Prepaid Services." *Wall Street Journal*. May 14, 2010. Page B1.

²⁵ 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).