

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of

Rules and Regulations Implementing the  
Telephone Consumer Protection Act of  
1991

CG Docket No. 02-278

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**PETITION FOR DECLARATORY RULING**

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## SUMMARY

The U.S. Chamber of Commerce, the U.S. Chamber Institute for Legal Reform, and the U.S. Chamber Technology Engagement Center (collectively “the Chamber”), ACA International, American Association of Healthcare Administrative Management, American Bankers Association, American Financial Services Association, Consumer Bankers Association, Consumer Mortgage Coalition, Credit Union National Association, Edison Electric Institute, Electronic Transactions Association, Financial Services Roundtable, Insights Association, Mortgage Bankers Association, National Association of Federally-Insured Credit Unions, National Association of Mutual Insurance Companies, Restaurant Law Center, and Student Loan Servicing Alliance request that the Commission expeditiously issue a declaratory ruling to clarify the Telephone Consumer Protection Act’s (“TCPA”) definition of automatic telephone dialing system (“ATDS”). In light of the D.C. Circuit’s decision on the FCC’s interpretation of ATDS, Petitioners ask that the Commission (1) confirm that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention, and (2) find that only calls made using actual ATDS capabilities are subject to the TCPA’s restrictions.

The TCPA landscape is dysfunctional and in need of clarity from the FCC. The statute, originally intended to target a specific abusive telemarketing practice, has been expanded by courts and the FCC, turning it into a breeding ground for frivolous

lawsuits against legitimate businesses trying to communicate with their customers. As a result, TCPA litigation has skyrocketed, harming businesses large and small, with no clear benefit to consumers. Recent regulatory efforts, like the 2015 *Omnibus Order*, have not helped—they made matters worse. That *Order* distorted the TCPA’s plain meaning and clear definition of “ATDS,” expanding it to potentially include devices such as smartphones and tablets.

The D.C. Circuit recognized the serious flaws in the 2015 *Omnibus Order* and recently vacated its ATDS interpretation as unreasonable, arbitrary and capricious. In that opinion, the court provided a logical roadmap for how the Commission should interpret ATDS. The Commission should follow the court’s guidance in interpreting that phrase.

First, the Commission should confirm that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention. This straightforward interpretation flows from the functions of an ATDS outlined in the TCPA. The Commission should also make clear that these functions must be actually—not theoretically—present and active in a device at the time the call is made. The FCC should also clarify that if human intervention is required in generating a list of numbers to call or in making a call, then the equipment in use is not automatic and therefore not an ATDS. Adopting this interpretation follows the statutory text and would provide clarity to businesses seeking to reach their customers.

Next, the Commission should find that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions. The D.C. Circuit noted that the FCC's expansive interpretation of ATDS could be addressed by reinterpreting the statutory phrase "make any call . . . using [an ATDS]," to mean that a device's ATDS capabilities must actually be used to place a call for TCPA's restrictions to attach. This interpretation, first espoused by Commissioner O'Rielly, would diminish the significance of the Commission's expansive understanding of capacity, comport with the ordinary meaning of the statute, and limit TCPA liability.



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**PETITION FOR DECLARATORY RULING**

Pursuant to 47 C.F.R. § 1.2, the U.S. Chamber of Commerce, the U.S. Chamber Institute for Legal Reform, and the U.S. Chamber Technology Engagement Center (collectively “the Chamber”), ACA International, American Association of Healthcare Administrative Management, American Bankers Association, American Financial Services Association, Consumer Bankers Association, Consumer Mortgage Coalition, Credit Union National Association, Edison Electric Institute, Electronic Transactions Association, Financial Services Roundtable, Insights Association, Mortgage Bankers Association, National Association of Federally-Insured Credit Unions, National Association of Mutual Insurance Companies, Restaurant Law Center, and Student Loan Servicing Alliance respectfully request that the Federal Communications Commission (“FCC” or “the Commission”) expeditiously issue a declaratory ruling to clarify the Telephone Consumer Protection Act’s<sup>1</sup> (“TCPA” or “the Act”) definition of automatic telephone dialing system (“ATDS”) in light of the

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<sup>1</sup> 47 U.S.C. § 227.

D.C. Circuit's guidance in its recent *ACA Int'l. v. FCC* decision.<sup>2</sup> Specifically, Petitioners request that the Commission promptly: (1) confirm that to be an automatic telephone dialing system ("ATDS"), equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention, and (2) find that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions.

The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses of all sizes and sectors, as well as state and local chambers and industry associations. The U.S. Chamber Technology Engagement Center ("C\_TEC") promotes the role of technology in our economy and advocates for rational policy solutions that drive economic growth, spur innovation, and create jobs. The U.S. Chamber Institute for Legal Reform ("ILR") is an affiliate of the Chamber that promotes civil justice reform through regulatory, legislative, judicial, and educational activities at the global, national, state, and local levels. ILR has long been involved in issues involving the TCPA, which imposes substantial compliance burdens on American business and generates enormous litigation risk and expense. Over many years, ILR has engaged in research and published papers analyzing the TCPA, concluding that the TCPA has

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<sup>2</sup> *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687 (D.C. Cir. 2018).

become a major impediment to commerce, burdening how businesses communicate with their customers and generating thousands of lawsuits.

ACA International (“ACA”) is an international trade organization of credit and collection professionals that provides a wide variety of accounts receivable management services. With offices in Washington, DC and Minneapolis, MN, ACA represents approximately 3,000 members ranging from third-party debt collectors, debt purchasers, attorneys, credit grantors, and vendor affiliates who employ more than 230,000 employees worldwide. ACA members contact consumers exclusively for *non-telemarketing* reasons to facilitate the recovery of payment for services that have already been rendered, goods that have already been received, or loans that have already been provided. Debt collection companies play an important role in the U.S. economy by returning funds owed to both businesses and public-sector entities as well, including federal, state, and local governments. The use of modern technology is critical for facilitating compliance with the myriad federal, state, and local laws that govern all aspects of communications between ACA member companies and consumers. In particular, the TCPA has a significant impact on the ability of debt collectors to lawfully contact consumers. Given the importance of effective communication to successful debt recovery, ACA has consistently led advocacy efforts to modernize the TCPA to better balance consumer privacy with legitimate business communications.

The American Association of Healthcare Administrative Management (“AAHAM”) is the premier professional organization in healthcare administrative management focused on education and advocacy in the areas of reimbursement, admitting and registration, data management, medical records, and patient relations. AAHAM was founded in 1968 as the American Guild of Patient Account Management. Initially formed to serve the interests of hospital patient account managers, AAHAM has evolved into a national membership association that represents a broad-based constituency of healthcare professionals. Professional development of its members is one of the primary goals of the association. Publications, conferences and seminars, benchmarking, professional certification and networking offer numerous opportunities for increasing the skills and knowledge that are necessary to function effectively in today’s health care environment. AAHAM actively represents the interests of healthcare administrative management professionals through a comprehensive program of legislative and regulatory monitoring and its participation in industry groups such as ANSI, DISA and NUBC. AAHAM is a major force in shaping the future of health care administrative management. One of AAHAM’s main focuses has been on efforts to change the TCPA for the healthcare profession. Today’s TCPA is outdated and limits our ability meet all the regulatory requirements placed on the healthcare industry through the Affordable Care Act. Healthcare has changed and how we reach patients and

consumers has changed. This is why AAHAM continues to be engaged in an effort to modernize the TCPA to fit today's healthcare environment.

The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits, and extend more than \$9 trillion in loans.

Founded in 1916, the American Financial Services Association ("AFSA") is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

The Consumer Bankers Association is the only national trade focused exclusively on retail banking. Established in 1919, the association is now a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly \$3 trillion in consumer loans, and provide \$270 billion in small business loans. Our members greatly value the important communications their customers consent to, including notifications such as low-balance alerts, due-date reminders, and account milestone notices. Our members strive to provide the best customer experience possible, and effective means of communication is a key aspect of that relationship.

The Consumer Mortgage Coalition is a mortgage industry trade association committed to streamlining and simplifying the rules and regulations governing the industry so that they can best serve consumers.

The Credit Union National Association (“CUNA”) represents America's credit unions and their 110 million members. Credit union members are being harmed by unclear guidance about how they can receive communications such as text messages about vitally important financial information, including ways they can improve and protect their own finances. The Bureau of Consumer Financial Protection has recognized that protecting consumers includes the ability to be in timely communication with them, and the FCC should do the same. CUNA further believes wireless informational calls to credit union member-owners with whom the credit union has an established business relationship, or where such call or text message is free, should be exempt from the TCPA's prior express consent requirement for autodialed and artificial or prerecorded voice calls.

Edison Electric Institute (“EEI”) is the trade association that represents all U.S. investor-owned electric companies. Our members provide electricity for 220 million Americans, and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports over seven million jobs in communities across the United States. In addition to our U.S. members, EEI has more than 60 international electric companies, with operations in more than 90 countries, as International Members, and hundreds of industry suppliers and related organizations as Associate

Members. Organized in 1933, EEI provides public policy leadership, strategic business intelligence, and essential conferences and forums. EEI's members are major users of telecommunications systems to support the goals of clean power, grid modernization, and providing customer solutions. On behalf of the owners and operators of a significant portion of the U.S. electricity grid, EEI has filed comments before the Commission in various proceedings affecting the telecommunications' rights and obligations of its members who are impacted by the FCC's rules and policies.

The Electronic Transactions Association ("ETA") is the global trade association representing more than 500 payments and technology companies. ETA members make commerce possible by processing more than \$4.5 trillion in purchases in the U.S. and deploying payments innovations to merchants and consumers.

Representing more than 4,000 members across the United States, the Insights Association is the leading nonprofit trade association for the market research and data analytics industry, and the leader in establishing industry best practices and enforcing professional standards. The Insights Association's membership includes both research and analytics companies and organizations, as well as the researchers and analytics professionals and research and analytics departments inside of non-research companies and organizations. Marketing researchers are an essential link between businesses and consumers, and between political leaders and constituents; they provide important insights about consumer and constituent preferences through

surveys, analytics, and other qualitative and quantitative research. On behalf of their clients—including the government, media, political campaigns, and commercial and non-profit entities—researchers design studies and collect and analyze data from small but statistically-balanced samples of the public. Researchers seek to determine the public’s opinion and behavior regarding products, services, issues, candidates, and other topics in order to help develop new products, improve services, and inform public policy. The TCPA makes it exceptionally challenging, and legally hazardous, for telephone survey researchers to connect with the 67.6 percent of American households who are essentially only reachable on their wireless phones, which is why we intervened in the court challenge to the 2015 FCC rules.

The Financial Services Roundtable (“FSR”) is the leading advocacy organization for America’s financial services industry. With a 100- year tradition of service and accomplishment, FSR is a dynamic, forward-looking association advocating for the top financial services companies, keeping them informed on the vital policy and regulatory matters that impact their business. FSR member banks frequently face compliance challenges with TCPA in a variety of contexts, particularly relating to banks’ ability to fight fraud.

The Mortgage Bankers Association (“MBA”) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, DC, the association works to ensure the continued strength of the



nation's residential and commercial real estate markets; to expand homeownership; and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage-lending field.

The National Association of Federally-Insured Credit Unions ("NAFCU") is the only national trade association focusing exclusively on federal issues affecting the nation's federally-insured credit unions. NAFCU provides its members with advocacy, education, and compliance assistance to meet the ongoing challenges that cooperative, community-based financial institutions face in today's economic and regulatory environment. The association proudly represents many smaller credit unions with relatively limited operations, as well as many of the largest, most sophisticated credit unions in the country. Currently, NAFCU represents 70 percent of total federal credit union assets and 46 percent of all federally-insured credit union assets.

For more than 120 years, the National Association of Mutual Insurance Companies ("NAMIC") has been serving in the best interests of mutual insurance companies—large and small—across the United States, as well as Canada. NAMIC is

the largest property/casualty insurance trade association with more than 1,400 member companies serving more than 170 million auto, home, and business policyholders. NAMIC member companies write nearly \$230 billion in annual premiums, and have 54 percent of homeowners, 43 percent of automobile, and 32 percent of the business insurance markets. Insurance companies rely upon systems that require the combination of human interaction with automation, ranging from notifying claimants of completion of repairs to the lateness of a payment. Such customer services are essential to the transactions.

The Restaurant Law Center (“Law Center”) is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. Nationally, the industry is made up of one million restaurant and foodservice outlets employing over 14 million people—about ten percent of the American workforce. Restaurants and other foodservice providers are the nation’s second-largest private-sector employers. The Law Center provides courts with the industry’s perspective on legal issues significantly impacting it. Many restaurants and other foodservice outlets communicate with their customers and employees by phone and by text messages, and many have been defendants in suits filed under the Telephone Consumer Protection Act, Pub. L. No. 102-243, 105 Stat. 2394, codified at 47 U.S.C. § 227 (“TCPA”), based on such communications. The Law Center, therefore, has a strong interest in the proper interpretation and application of the statute.

The Student Loan Servicing Alliance (“SLSA”) is a nonprofit trade association made up of approximately 20 federal student loan servicers that collectively service over 95 percent of the outstanding student loans in the two chief federal student loan programs, the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan Program. SLSA members also service the vast majority of private education loans. There are over 40 million borrowers with almost \$1.5 trillion in outstanding student loans, and servicing this massive loan portfolio requires substantial communications to assist borrowers. Servicers call borrowers to educate them on and facilitate the use of myriad repayment options, and federal loan servicers are required by regulation and contract to make calls to delinquent borrowers. The majority of student loan borrowers have only a cell phone, and thus the ability to reach borrowers to help them avoid delinquency and default hinges on the ability to contact them effectively and efficiently by cell phone.

The Petitioners represent legitimate businesses and organizations, large and small, covering nearly every aspect of the economy. They seek to send time-critical, communications to their customers and members promptly and efficiently. Moreover, the Petitioners’ members are operating in good-faith when trying to contact consumers but have been subject to abusive class action litigation by plaintiffs’ attorneys asserting an unreasonably expansive interpretation of ATDS. Ultimately, these lawsuits are harming consumers and the public at large. They are chilling helpful, time-sensitive communications with customers, while leaving fewer

resources for businesses to innovate and create jobs. We have consistently urged the FCC to rationalize the dysfunctional TCPA regime,<sup>3</sup> which no longer reflects the statute's purpose or text. We urge the FCC to take prompt action on the ATDS issue in light of the D.C. Circuit's recent opinion vacating the 2015 *Omnibus Order's* treatment of the issue, and adopt the court's roadmap for interpreting this issue.

**I. THE TCPA LANDSCAPE IS DYSFUNCTIONAL AND IN NEED OF CLARITY FROM THE FCC.**

**A. In the TCPA, Congress targeted specific telemarketing practices and spam activities but the statute's reach has been improperly expanded many times.**

Congress enacted the TCPA in 1991 to stop an abusive form of cold-call telemarketing and fax-blast spamming: dialing random or sequential numbers.<sup>4</sup> In promulgating its initial rules implementing the Act, the Commission acknowledged the TCPA's goal of "restrict[ing] the most abusive telemarketing practices."<sup>5</sup> As then-

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<sup>3</sup> See, e.g., U.S. Chamber Reply Comments on Petition for Clarification or Declaratory Ruling filed by ContextMedia, Inc. d/b/a Outcome Health, CG Docket No. 02-278 (filed Dec. 12, 2017); U.S. Chamber Comments on Advance Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59 (filed Aug. 28, 2017); U.S. Chamber Comments on Petition for Declaratory Ruling filed by All About the Message, LLC, CG Docket No. 02-278 (filed May 18, 2017); U.S. Chamber Comments on Petition for Rulemaking and Declaratory Ruling filed by Craig Cunningham and Craig Moskowitz, CG Docket No. 02-278; CG Docket No. 05-338 (filed Mar. 10, 2017).

<sup>4</sup> See S. Rep. 102-178 at 1-2 (1991) (stating that the purpose of the TCPA is to "plac[e] restrictions on unsolicited, automated telephone calls to the home" and noting complaints regarding telemarketing calls); H.R. Rep. No. 102-317 at 6-7 (1991) (citing telemarketing abuse as the primary motivator for legislative action leading to the TCPA). See also Comments of the U.S. Chamber and ILR, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 2-3 (filed Mar. 10, 2017).

<sup>5</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd. 8752, n.24 (Oct. 16, 1992) ("*1992 Report and Order*").

Commissioner Pai observed, “Congress passed the [TCPA] to crack down on intrusive telemarketers and over-the-phone scam artists.”<sup>6</sup> The TCPA was intended to target nuisance calls using a specific technology, not legitimate business calls consumers desire that are placed to telephone numbers belonging to those consumers. Indeed, in the Preamble, Congress cited to the “proliferation of *intrusive, nuisance calls* to [consumers’] homes from telemarketers” as a reason for enacting the legislation.<sup>7</sup> The Supreme Court recognized that “Congress determined that federal legislation was needed because *telemarketers*, by operating interstate, were escaping state-law prohibitions on *intrusive nuisance calls*.”<sup>8</sup> The D.C. Circuit recently described the TCPA as “a statute grounded in concerns about hundreds of thousands of ‘solicitors’ making ‘telemarketing’ calls on behalf of tens of thousands of ‘businesses.’”<sup>9</sup> At the same time, the Commission has recognized repeatedly that the

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<sup>6</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8072 (“*Omnibus Order*”) (Dissenting Statement of then-Commissioner Ajit Pai) (“Pai Dissent”).

<sup>7</sup> Telephone Consumer Protection Act of 1991, PL 102-243, 105 Stat. 2394, § 2 (Dec. 20, 1991) (emphasis added).

<sup>8</sup> *Mims v. Arrow Financial Services, LLC*, 565 U.S. 368, 370 (2012) (also citing the Preamble of the TCPA) (emphasis added); see also *Emanuel v. Los Angeles Lakers, Inc.*, 2013 WL 1719035, at \*3 (Courts “broadly recognize that not every text message or call constitutes an actionable offense; rather, the TCPA targets and seeks to prevent the proliferation of intrusive, nuisance calls.”) (internal quotations omitted).

<sup>9</sup> *ACA Int'l*, 885 F.3d at 698.