

June 13, 2018

Federal Communications Commission

Commission's Secretary

445 12th St. SW

Room TW-A325

Washington, D.C. 20554

Re: CG Docket Nos. 18-152 and 02-278: Public Notice on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision

To Whom It May Concern:

With a membership comprising more than 90 percent of the mortgage servicing market, the National Mortgage Servicing Association (NMSA) is a nonpartisan organization driven by senior executive representation from the nation's leading mortgage servicing organizations, formed for the purpose of effecting progress on the key challenges that face the mortgage servicing industry. By bringing together industry leaders from across the nation, the NMSA drives the conversation on shaping the American housing industry for the benefit of homeowners.

The NMSA appreciates the opportunity to submit comments on the *Public Notice on the Interpretation of the Telephone Consumer Protection Act ("TCPA") in light of the D.C. Circuit's ACA International Decision*.¹ We thank the Federal Communications Commission (FCC or Commission) for exploring much-needed changes to the TCPA.

THE TCPA AND FINANCIAL SERVICES INDUSTRY

In 1991, the TCPA was enacted to regulate telemarketing calls. Under the purview of the FCC, the original intention of the law was admirable; recently, however, the TCPA has been expanded far beyond its intended purpose and is in need of reform.

The goal of the TCPA is to protect consumers from unwanted telemarketing calls, and the law must protect—not harm—consumers. The TCPA, as construed now, actually harms both consumers and businesses attempting to comply with the law. Consumers are harmed because businesses face barriers in communicating vital and often legally required information using forms of communication (text, e-mail, cell phones) that are impacted by TCPA restrictions.

The TCPA restricts calls to cell phones without recognizing the importance of keeping this communication channel open. Consumer reliance on cell phones has changed drastically since the TCPA was drafted. U.S. households continue to move away from landline telephones, meaning it will become increasingly difficult to communicate

¹Public Notice Seeking Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, FCC 18-493, CG Docket No. 18-152 & 02-278, FCC (2018)

with consumers by means other than calling them on their cell phones. Today, 90 percent of Americans own wireless telephones and almost half (53.3 percent) of households are entirely or predominantly “wireless-only.”² Those numbers are even higher among young adults, with three in four adults aged 25–29 (75.6 percent) and aged 30–34 (73.3 percent) living in households with only wireless telephones.³

The financial services industry’s outreach efforts to assist borrowers who have fallen behind in their loan payments will be directly impacted by the TCPA.

TCPA REFORM IS NEEDED

On March 16, 2018, the D.C. District Court released its long-awaited *ACA Int’l v FCC* final decision, which addressed the FCC’s 2015 Order. The court addressed the automatic telephone dialing system (ATDS or autodialer) definition; reassigned phone numbers; and revoking consent aspects of TCPA. Following the Court decision, we urge the FCC to make changes to TCPA regulations pertaining to the definition of an autodialer, reassigned numbers, and revocation of consent as follows:

Autodialer Definition

The FCC quickly needs to provide clarity on what constitutes an autodialer. A clear ATDS definition should note the following: (1) dialing from a list does not constitute an autodialer; and (2) to be considered an ATDS, the technology needs to generate a phone number in random or sequential order AND call the number generated. These changes would appropriately focus regulations on unwanted telemarketing calls.

As a long-term fix, the TCPA should focus on how technology is used and not the type of device used. The TCPA should delineate between calls made to a consumer with an existing relationship versus a cold call via a third-party lead (telemarketing call). An existing business relationship would also include consumers who have requested contact from a business.

The consumer doesn’t know or care how they are called; they only care whether telemarketing calls are unwanted. Discussion should shift from the technology being used to the purpose of the call and whether a caller has a legitimate business relationship with the consumer. As businesses attempt to reach out regarding an account, the consumer should be able to receive their messages via their preferred manner of communication.

Reassigned Numbers

While the court said one free pass on calling a reassigned number does not make sense, it did not provide additional guidance in this area. While businesses have specific consumers intended for a call, it remains impossible to know who they are calling until a person picks up the phone.

When consumers change their phone numbers, no agency or organization keeps a single, comprehensive reassigned phone number database. This makes it nearly impossible to know in advance if the call will violate the TCPA. We support the FCC’s creation of a reassigned number database and a safe harbor for businesses that check the database.

²Stephen J. Blumberg & Julian V. Luke, Div. of Health Interview Statistics, Nat’l Ctr. for Health Statistics, Centers for Disease Control and Prevention, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July–December 2017 (June 2018)* (“CDC Wireless Substitution Estimates”), available at <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201806.pdf>.

³Blumberg & Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey*

Revocation of Consent

The TCPA states that a consumer needs to provide “express written consent” to receive calls from a company, and, at the same time, gives the consumer the option to opt out of the consent by “any reasonable means.” While the court upheld this aspect of the regulation, “any reasonable means” is problematic and overly broad. It could mean verbal, in-person, over the phone, or via mail or other means of communication, leaving businesses vulnerable in trying to comply with regulations and consumers frustrated without clear rules on how to revoke consent. We recommend clarifying the definition of “any reasonable means” as: (1) a company establishing and following procedures for revoking consent; or (2) not using intentionally deceptive options of opt-out.

Without a structured process, the consumer may not know how to revoke consent. Providing the consumer with clear guidelines and many avenues to opt out of calls will decrease the likelihood of unwanted calls. Also, it will increase consumers’ confidence, knowing that they clearly revoked consent, and it will assist businesses in capturing an opt-out list of phone numbers.

Conclusion

We appreciate the FCC considering industry input as it explores regulatory reforms to the TCPA. As the FCC moves forward, we ask the Commission to use us as a resource and look forward to continuing the conversation on how the TCPA impacts the financial services industry. Should you have additional questions, please reach out to Derek Templeton at Derek.Templeton@TheFiveStar.com or 214.525.6757.