



June 27, 2018

Submitted via electronic filing: <http://apps.fcc.gov/ecfs/>

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Reply Comments for the Public Notice concerning the Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, CG Docket No. 18-152 CG; Docket No. 02-278

Dear Ms. Dortch:

ACA International ("ACA") respectfully submits these reply comments in response to the Public Notice¹ related to the interpretation and implementation of the Telephone Consumer Protection Act ("TCPA") following the recent decision of the U.S. Court of Appeals for the District of Columbia ("D.C. Circuit") in *ACA International et. al. v. Federal Communications Commission (ACA Int'l)*.²

Our reply comments focus on responding to the National Consumer Law Center et. al. comments, ("NCLC Comments")³ which propose several misguided "solutions" to outdated and onerous TCPA interpretations by the Federal Communications Commission ("FCC" or "Commission") and courts. As a general matter, we think many of their proposals would create bad public policy for the ability to have a free flow of information between thousands of businesses and the consumers that are their customers or they otherwise need to communicate with regarding critical information. Instead, the NCLC Comments propose TCPA interpretations that continue to punish those making highly legal and regulated calls, and attempt to lump these types of communications in with illegal robocalls and telemarketing calls. Undoubtedly, the complexity and breadth of their proposed TCPA coverage would harm small businesses and

¹ Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, CG Docket Nos. 18-152, 02-278 (rel. May 14, 2018). ("Public Notice")

² *ACA Int'l, et al. v. FCC*, 885 F.3d 6(D.C. Cir. 2018) (mandate issued May 8, 2018) (affirming in part and vacating in part Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, WC Docket No. 07-1 Rcd 7961 (2015). ("*ACA Int'l v. FCC*")

³ Comments of National Consumer Law Center et. al., In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act and CG Docket No. 02-278 Interpretations in Light of the D.C. Circuit's CG Docket No. 18-152 ACA International Decision (June 13, 2018). ("NCLC Comments")

small community financial institutions in a disproportional way, if these already highly regulated institutions suddenly had to come into compliance with the TCPA and face its draconian liability. Lastly, the NCLC Comments continue to ignore the fact that the debt collection industry is already highly regulated and supervised with a separate federal law the Fair Debt Collections Practices Act, (FDCPA) already governing communications.

I. BACKGROUND ON ACA INTERNATIONAL

ACA International is the leading trade association for credit and collection professionals. Founded in 1939, ACA represents approximately 3,000 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates in an industry that employs more than 230,000 employees worldwide.

ACA members include the smallest of businesses that operate within a limited geographic range of a single state, and the largest of publicly held, multinational corporations that operate in every state. The majority of ACA-member debt collection companies, however, are small businesses. According to a recent survey, 44 percent of ACA member organizations (831 companies) have fewer than nine employees. Additionally, 85 percent of members (1,624 companies) have 49 or fewer employees and 93 percent of members (1,784) have 99 or fewer employees.⁴

As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community's businesses. ACA members work with these businesses, large and small, to obtain payment for goods and services consumers already received. In years past, the combined effort of ACA members has resulted in the annual recovery of billions of dollars – dollars that are returned to and reinvested by businesses and dollars that would otherwise constitute losses on the financial statements of those businesses. Without an effective collection process, the economic viability of these businesses and, by extension, the American economy in general, is threatened. Recovering rightfully-owed consumer debt enables organizations to survive, helps prevent job losses, keeps credit, goods, and services available, and reduces the need for tax increases to cover governmental budget shortfalls.

The credit and collections industry is a highly regulated industry complying with applicable federal and state laws and regulations regarding debt collection, as well as ethical standards and guidelines established by ACA. The collection activities of ACA members are regulated at the state level and by the Bureau of Consumer Financial Protection, (“BCFP”) which supervises and examines Large Market Participants in the industry, and has rulewriting and enforcement authority for the FDCPA. Additionally, the collections industry is also subject to the Federal Trade Commission (FTC) Act and FTC enforcement of the FDCPA, the Fair Credit Reporting Act, and the Gramm-Leach-Bliley Act, in addition to a myriad of other federal and state laws. It is also worth observing that the BCFP has indicated in its most recent rulemaking agenda that it plans to propose new rules for the FDCPA in March of 2019.⁵ This means other federal

⁴ Josh Adams, *Small Businesses in the Collections Industry 2018*, ACA International White Paper (May 2018), available at <https://www.acainternational.org/assets/research-statistics/aca-wp-smallbusiness-5-18.pdf>.

⁵ Bureau of Consumer Financial Protection, Spring 2018 Rulemaking Agenda (May 10, 2018), available at <https://www.consumerfinance.gov/about-us/blog/spring-2018-rulemaking-agenda/>.

agencies are already taking consumer protection measures, which allows the FCC to focus more narrowly on its statutory directive for telecommunications under the TCPA.⁶

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. The use of modern technology is critical for the ability to contact consumers in a timely and efficient matter, and often the sooner and earlier in the collections process that a consumer is put on notice of a debt, the better off they are.

II. Comments of ACA International

A. The Overly Broad Definition for an Autodialer Proposed by NCLC Would Create a Dangerous Environment in Which Preferred Consumer Communications were Unnecessarily Inhibited

The proposed interpretation of what is considered an autodialer in the NCLC comments is an unreasonable expansion of the TCPA that goes far beyond the purpose of the statute. In its comments, the National Consumer Law Center (NCLC) states,⁷

The statutory language should be interpreted to encompass any device that dials numbers from a stored list, regardless of whether it generates those numbers. In addition, the FCC should interpret the term —capacity in the ATDS definition broadly, coupled with a specific carve-out for the ordinary use of a smartphone. Finally, the word —sequential in the definition of ATDS should be interpreted not to be limited to numerical order, but to include the generation and dialing of numbers in any sequence, including a sequence selected from a list.

Such a definition would sweep in, and could impede, an extremely wide range of communications that consumers want and need to receive. It would essentially include any calling device that has a stored list, other than when using a smartphone in the vaguely termed “ordinary use”. This suggestion ignores the intent of Congress in enacting the TCPA to focus on limiting telemarketing calls and the plain language of the statute.⁸ It seems odd that a group representing consumers would want to make it more difficult to communicate with them about a wide range of informational calls that have benefits to them. Even the Bureau of Consumer Financial Protection (BCFP) in its comment letter in response to the Public Notice⁹ stated, “Consumers benefit from communications with consumer financial products providers in many contexts, including receiving offers of goods and services and notifications about their accounts. Recent years have seen rapid increases in the use of smart phones, text messages, email, social media, and other new or newer methods of communication. With the advent and deployment of

⁶ H.R. REP. NO. 102-317 (1991).

⁷ NCLC Comment, *supra* note 3 at ii.

⁸ H.R. REP. NO. 102-317(1991).

⁹ Comments of the Bureau of Consumer Financial Protection, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act and CG Docket No. 02-278 Interpretations in Light of the D.C. Circuit’s CG Docket No. 18-152 ACA International Decision (June 13, 2018). (“BCFP Comment”)

these communication technologies, it is important to review how statutes and regulations apply to them.”

B. NCLC throughout its Comments Conflates Illegal Robocalls with Highly Legal and Regulated Informational Calls

Throughout its comments, the NCLC intertwines illegal robocalls and informational calls that consumers have given consent to receive. This is misleading and a disservice to consumers, who have indicated they want certain calls. For example, the NCLC states,¹⁰

The petition of the U.S. Chamber Institute for Legal Reform (joined by many robocallers) urges the FCC to interpret the TCPA’s prohibition to —find that only calls made using actual ATDS capabilities are subject to the TCPA’s restrictions. Such an interpretation would indeed be a victory for the robocallers, because it would eviscerate the TCPA’s prohibition of autodialed calls to consumers who have not consented.

This is a troubling analysis of what the Chamber Petition, also signed by nearly 20 other industries, asks for.¹¹ The Chamber Petition focused narrowly on providing clarity surrounding the autodialer definition since a federal appellate court struck down the FCC’s interpretation of it, not any sort of license to engage in abusive practices as the NCLC Comments suggests. Furthermore, the group of “robocallers” that the NCLC refers to in addition to collectors, also includes small financial institutions, mortgage providers, and a multitude of other industries that consumers need to hear from about account information, data and security breaches, and other important information. Painting a group of highly regulated industries seeking to communicate about agreed upon goods or services as self-serving “robocallers” is a mischaracterization at best. The reason many of these industries are seeking clarity on the definition of autodialer is because currently it is so onerous that many businesses and financial institutions do not even know if what they are using is considered an autodialer.

C. The NCLC Seems to be Confused About the Purpose and Intent of the FDCPA Which Governs Third Party Debt Collection Activities

Congress passed the FDCPA in 1977 to govern third party debt collection practices. In 2010 when enacting the Dodd Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)¹² Congress also provided the BCFP with the authority to write rules for the FDCPA. The BCFP in its comment letter to the Public Notice outlined its extensive regulation of the debt collection industry noting,¹³

The Bureau has significant experience with debt collection and servicing through its supervisory, enforcement, regulatory, market monitoring, research, and consumer engagement activities. The Bureau has the authority to supervise certain nonbank entities

¹⁰ NCLC Comments, *supra* note 3 at 3.

¹¹ U.S. Chamber Institute for Legal Reform et al., Petition for Declaratory Ruling, CG Docket No. 02-278 (filed May 3, 2018). (“Chamber Petition”)

¹² Pub. L. 111-203.

¹³ BCFP Comment to the Public Notice, *supra* note 9.

that offer or provide consumer financial products or services and, in addition, has the authority to supervise “larger participants” as the Bureau defines by rule. For example, in the debt collection market, the Bureau has the authority to supervise any firm with more than \$10 million in annual receipts from consumer debt collection activities. The Bureau also brings enforcement actions against financial institutions, debt collectors, and servicers who violate the law.

Yet, it is concerning that NCLC Comments seem to confuse the purpose and legislative history surrounding the FDCPA and TCPA. For example the NCLC Comments state, “This leaves the TCPA as the principal federal law providing protections against unrelenting debt collection calls to consumers’ cell phones.” This is incorrect. The FDCPA was the law created to govern debt collection practices, not the TCPA. In fact, the BCFP, the agency charged with ensuring consumer protection in its comments on the Public Notice stated, “Notably, the Bureau is engaged in an ongoing rulemaking focused on debt collectors under the FDCPA concerning debt collection practices, including calling behavior by debt collectors.”¹⁴ Alternatively, the TCPA was created for the purpose of limiting telemarketing and spam calls. The legislative history of the TCPA provides no indication that it was created as the primary law governing the debt collection industry.¹⁵

In conclusion, we urge the FCC to consider the large number of highly regulated and legal businesses and financial institutions that filed comments in pursuit of much needed clarification concerning the TCPA, as ACA also outlined previously in our comment submitted on June 13.¹⁶ We also suggest that the Commission dissect commenters that often represent the views of the plaintiffs’ bar, which benefits if the TCPA remains a confusing regulatory burden with conflicting judicial and Commission interpretations, creating loopholes for class action litigation. Finally, we again would like to stress the point that consumers often need the information that callers are seeking to provide on their cell phone and via text message. Accordingly, there needs to be comprehensible rules to protect their interest in receiving this information in a timely and efficient manner.

Thank you for the opportunity to comment. Please feel free to contact me with any additional questions.

Respectfully submitted,



Leah Dempsey
Vice President and Senior Counsel, Federal Advocacy
Phone: 202-810-8901
Dempsey@acainternational.org

¹⁴ BCFP Comment to the Public Notice, *supra* note 9.

¹⁵ H.R. REP. NO. 102-317 (1991).

¹⁶ Comment of ACA International for the Public Notice, available at <https://www.acainternational.org/assets/comments/aca-international---comments-public-notice-tcpa.pdf> (June 13, 2018).