



September 21, 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: 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; Public Notice concerning the Consumer and Government Affairs Request for Input for the Report on Robocalling, CG Docket No. 17-59.

Dear Ms. Dortch:

On September 19, 2018, Mark Neeb, CEO at ACA International, Leah Dempsey, Vice President and Senior Counsel, Federal Advocacy at ACA International, Jane Luxton, ACA's retained Counsel from Clark Hill PLC, and Joann Needleman, ACA's retained Counsel from Clark Hill PLC via phone met with Travis Litman, Chief of Staff and Senior Legal Advisor to Commissioner Jessica Rosenworcel to discuss Federal Communications Commission (FCC) Telephone Consumer Protection Act (TCPA) interpretations and call blocking and labeling technologies.

**I. Overarching Points Made by ACA International**

1. FCC Interpretations of the TCPA over the past two decades have gone far beyond the scope of what Congress intended and must come back in line with the statutory intent to target unwarranted telemarketing calls.
2. Litigation following the ACA International (ACA) March decision in the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) has created a patchwork of requirements, that has left legal businesses subject to frivolous litigation emboldened by circuit splits and unclear requirements.
3. The FCC should act on its Public Notice concerning the ACA D.C. Circuit decision and provide the clarity requested by ACA and encouraged by the D.C. Circuit, other regulators, and Members of Congress.

ASSOCIATION HEADQUARTERS  
4040 WEST 70TH STREET 55435  
P.O. BOX 390106, MINNEAPOLIS, MN 55439-0106  
TEL (952) 926-6547 FAX (952) 926-1624

FEDERAL GOVERNMENT AFFAIRS OFFICE  
509 2ND STREET NE, WASHINGTON, D.C. 20002  
TEL (202) 547-2670  
FAX (202) 547-2671

4. Call blocking and labeling Apps are impeding legitimate business communications and are raising consumer protection concerns when obstructing calls that contain needed and in some cases exigent information.
5. Phone carriers are also contributing to the call blocking and labeling issues and it has been reported that in certain instances are delivering fake busy signals to block legal calls.

## **II. Summary of Discussion on September 19, 2018**

The credit and collection 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. ACA members contact consumers exclusively for non-telemarketing and legitimate business 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. Often if a consumer is put on notice of a debt sooner and earlier in the collection process, their chances improve of resolving that matter favorably.

Yet, because of unclear requirements for how the credit and collection industry can use modern, and even not so modern, technologies to communicate with consumers, the industry often remains unable to provide critical financial information in a timely and effective manner.

ACA has asked the FCC to consider the following points to provide clarity on TCPA interpretations:

- Provide an appropriately tailored interpretation of what is considered to be an ATDS, with the pertinent clarification that not all predictive dialers fit the definition of an ATDS;
- Clarify that capacity under the TCPA means present ability and explain that when human intervention is required for a call, the call is not made using an ATDS;
- Provide a safe harbor for reassigned numbers that better aligns with its statutory directive and address key questions about what is considered a called party including interpreting it is an intended recipient;
- Provide better parameters for how a consumer can revoke consent, which gives both consumers and businesses flexibility but also more certainty about what is considered reasonable, including methods outlined in contractual agreements; and
- Reexamine the overly narrow past FCC interpretation of the Bipartisan Budget Act of 2015, which was intended to exempt calls made solely to collect a debt owed to or guaranteed by the United States from the prior express consent requirement of the TCPA. However, the prior FCC interpretation conversely created new burdens and confusion for attempting to collect this kind of debt.

## **III. The FCC Should Act on the Public Notice Concerning TCPA**

Enacted nearly 30 years ago, the TCPA and the FCC's regulations have failed to keep up with numerous technological developments. For example, contacting consumers on their cell phones

and sending text messages are no longer revolutionary methods of communication, but current rules have yet to fully address this form of outreach.<sup>1</sup> This is despite that these communication methods have proven to be consumers' preferred option of communication for well over a decade. Yet, in recent years the FCC has refused to provide much needed clarifications surrounding TCPA compliance for legitimate and highly regulated businesses seeking to provide consumers with vital information on their cell phones. Unfortunately, this ambiguity has been a detriment to both consumers and those trying to comply.

Instead of addressing outdated and in some cases outright flawed interpretations of the TCPA, the FCC in its 2015 Omnibus TCPA Ruling and Order (2015 Order) made matters worse by creating an extremely unworkable and broad definition of what is considered an autodialer (ATDS).<sup>2</sup> This extreme and ill-advised interpretation by the FCC effectively swept the most routine communication, like the sending of a text from a smartphone, within the TCPA's purview. Informational communications that very clearly were not even imagined when enacting the statute were then subject to the TCPA's liability. This is notwithstanding that the TCPA was actually developed for the purpose of limiting mass telemarketing calls, not informational calls for legitimate business purposes, which defines all the communications made by the credit and collection industry.<sup>3</sup>

As a result of this action, ACA International filed a lawsuit in the D.C. Circuit challenging several aspects of the 2015 Order.<sup>4</sup> In March of 2018, the D.C. Circuit struck down some of the most egregious aspects of the 2015 Order including the FCC's definition of an ATDS and the FCC's reassigned number one-call safe harbor.<sup>5</sup> However, the operating environment still remains far from certain or workable for businesses and consumers alike. Since the 2018 D.C. Circuit Order, there has been conflicting case law throughout the country regarding how legitimate businesses can contact consumers as well as whether the Court's decision invalidated other FCC's orders defining ATDS. During the meeting, ACA outlined circuit splits and other lack of clarity resulting from case law since the ACA decision in March. ACA expressed that it is imperative that the FCC act to fill these holes and provide much-needed clarity on these issues, as well as other outstanding issues surrounding past TCPA interpretations.

---

<sup>1</sup> National Center for Health Statistics. *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2017*, available at

<https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201712.pdf>. More than one-half of American homes (52.5%) had only wireless telephones (also known as cellular telephones, cell phones, or mobile phones) during the first half of 2017—an increase of 3.2 percentage points since the first half of 2016. Nearly three-quarters of all adults aged 25-34 were living in wireless-only households; more than two-thirds (70.7%) of adults renting their homes were living in wireless-only households.

<sup>2</sup> Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd. 7961 (2015). (“2015 Order”)

<sup>3</sup> The TCPA's restriction on calls to wireless numbers and other mobile devices was not meant to apply where—the called party has provided the telephone number of such a line to the caller for use in normal business communications. The Committee does not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their customers. H.R. REP. NO. 102-317, at 17 (1991).

<sup>4</sup> 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). (ACA Int'l Public Notice)

<sup>5</sup> *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. 02278, WC Docket No. 07-1 Rcd 7961 (2015). (2018 D.C. Circuit Order)

ACA stated that it supports the Commission's recent increased efforts to combat illegal and fraudulent calls that are being made using ATDS, including its strong and swift enforcement actions against those harming consumers. Nevertheless, these efforts alone are not enough to provide much needed certainty in the marketplace and create clear rules that distinguish between legitimate communications and bad actors. As the 2018 D.C. Circuit Order highlighted, the FCC has more work to do to address flaws in the 2015 Order and other past TCPA interpretations. The FCC should act immediately for the protection of both consumers, who need to understand their rights, as well as businesses such as those in the collections industry that remain vulnerable to predatory litigation based on impracticable and unclear requirements.

#### **IV. Call Blocking and Labeling Technologies are Improperly Impeding Legitimate Business Communications**

Despite that the credit and collection industry is already highly regulated, and despite that the industry is making informational calls not subject to the Do Not Call List, which is aimed at telemarketing communications, many industry calls have been blocked or impeded by technologies allegedly targeting "robocalls." The FCC efforts in this area concerning robocalls have been laudable for the focus on bad actors making those illegal and abusive calls. However, going forward it is imperative that the FCC develop protocols and/or a regulatory framework directed at call blocking and labeling companies to require them to differentiate between legal informational calls and illegal robocallers. ACA also raised consumer protection concerns about legitimate calls being blocked or mislabeled. Specifically, they raised examples of consumers' not receiving information they need for their financial safety, or for other exigent reasons when providers arbitrarily block calls.

ACA has argued that service providers and carriers in the marketplace should not be permitted to use technologies that enable third parties to unilaterally determine what calls consumers should receive in place of federal laws and regulations that already govern communications with consumers. While illegal actors, by their very nature, are not concerned with laws governing communications, those operating legally such as those in the credit and collection industry already adhere to consumer protections laws such as the Fair Debt Collection Practices Act (FDCPA). Technologies including mobile applications and carrier services should not unfairly mislabel, erroneously block, or create fake busy signals for highly legal calls being made for informational and legitimate business purposes. Moreover, even if they are accidentally doing so based on faulty analytics, there must be greater consequences for this harmful activity.

ACA's concerns fall into the following categories:

##### **A. Mislabeled Calls**

In 2017, ACA members became increasingly alarmed as they began to discover drops in right-party contacts coupled with discoveries that their legitimate business calls were being labeled as "suspected scam," "scam likely," or some other label that implied the call was not from a legitimate caller. This has escalated to even a new level of concern, when recently ACA became aware of a call labeling which identified legal collection calls as "Extortion." This has prompted

misguided complaints about legitimate call attempts against the industry, and even worse has caused reputational harm when calls are labeled with confusing and even sometimes slanderous labels. Moreover, the inability to communicate with consumers about their debt has forced creditors to resort to instead file lawsuits and obtain default judgments, without ever having the ability to work out terms and conditions of repayment that may be more favorable or preferable to consumers.

#### B. Fake Busy Signals

Currently, industry members continue to report that many carriers will provide a busy signal to the call originator when they block a legitimate call. Often the consumer does not even know a call attempt was made. If a legitimate caller receives a busy signal, typically the caller will make repeated attempts in an effort to make live contact, wasting time and resources. It is inherently deceptive for a carrier to return a signal that a called number is busy when in fact the call has been blocked by the carrier. This results in a slippery-slope in limiting all types of communications.

#### C. Erroneously Blocked Calls

When calls are erroneously blocked, there must be more responsibility placed on providers to be able to identify this mistake and alert callers to it sooner. As the FCC considers longer term solutions to the problem of illegal robocalls such as SHAKEN/STIR, it should immediately address current problems that erroneously blocked calls are causing. As part of this effort, the FCC should help outline how carriers or other third parties should remediate these mistakes and adopt protocols for doing so.

#### D. Scammers are Evading Many Call Blocking Technologies

The worst actors and illegal robocallers have found ways around call blocking technologies and continue to plague consumers with scam and other fraudulent calls. Thus, the main focus of the FCC should be on narrowly targeting these illegal actors through enforcement actions and appropriately tailored technological solutions.

#### E. Conflict with FDCPA

Call labeling technologies targeting legitimate debt collection activities also pose a risk of disclosing the existence of debts to third parties, which could potentially invoke FDCPA related concerns.<sup>6</sup> Certain technologies have been reported to flash “debt collector” or identify a collection agency, even lighting up in different colors drawing attention to the call when a debt collection call comes in on cell phone. A consumer may be in a crowded room or in a situation where others could become aware of this call labeling. Yet, the FDCPA does not allow disclosure of debts or that a debt collector is attempting to contact the consumer to third parties. The debt collection industry is already subject to voluminous, often frivolous, litigation in this area and unknown threats such as labeling that is beyond a credit and collection professionals control is very concerning. A different, but just as pressing concern for collection agencies is

---

<sup>6</sup> 15 U.S. Code § 1692c (b).

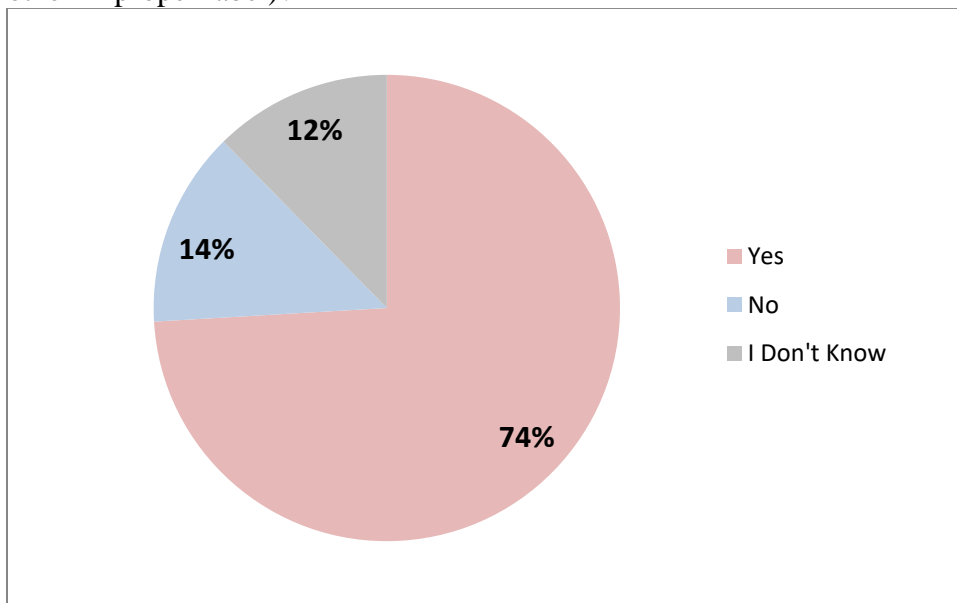
when the labeling does not provide sufficient identification, making it less likely for a consumer to trust or answer the unknown call.

ACA urged the FCC to work with the Bureau of Consumer Financial Protection (BCFP) to consider whether these types of alerts raise privacy concerns, if debt collections calls need to be treated differently and to encourage carriers and providers to work with the industry to develop acceptable labeling protocols. While debt collectors have no control over these alerts, it is problematic that they could be unfairly blamed, face reputational harm with their customers, or worse, lose the trust of consumers. Furthermore, ACA noted that the FCC should work closely with the BCFP, who is currently developing debt collection rules to ensure that debt collectors are on the same level playing fields as other industries when it comes to call blocking and labeling.

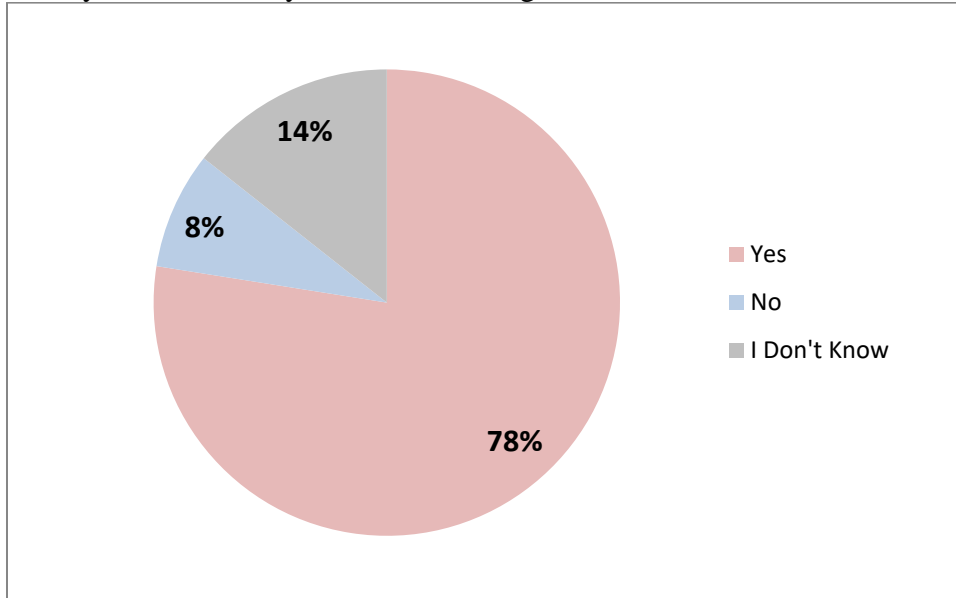
#### **V. ACA Member Survey Results for Call Blocking and Labeling**

During the meeting, ACA also provided the FCC with the following survey results concerning call blocking and labeling.

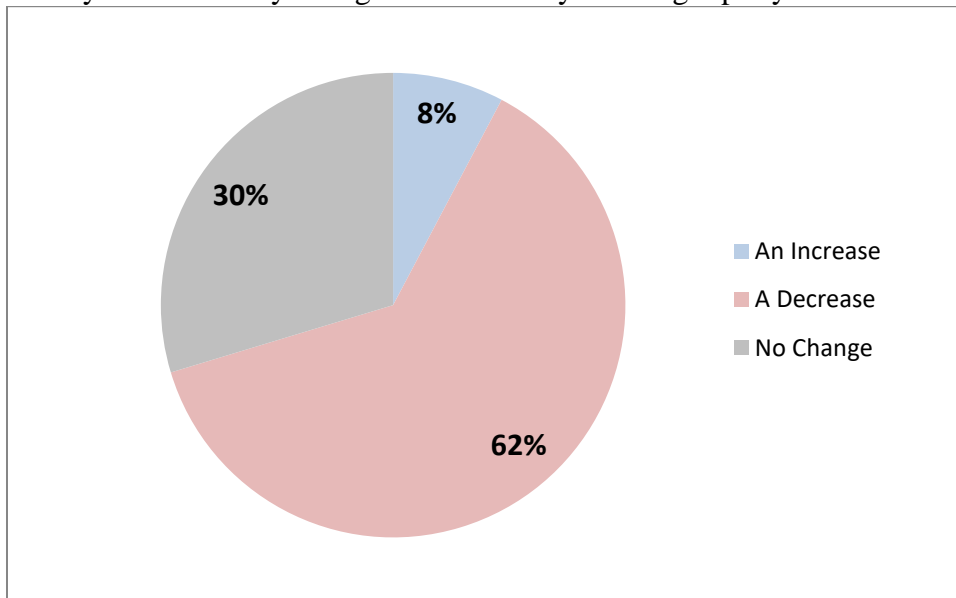
Have you discovered your calls are being mistakenly labeled as “scam” or “fraud” (or some other improper label)?



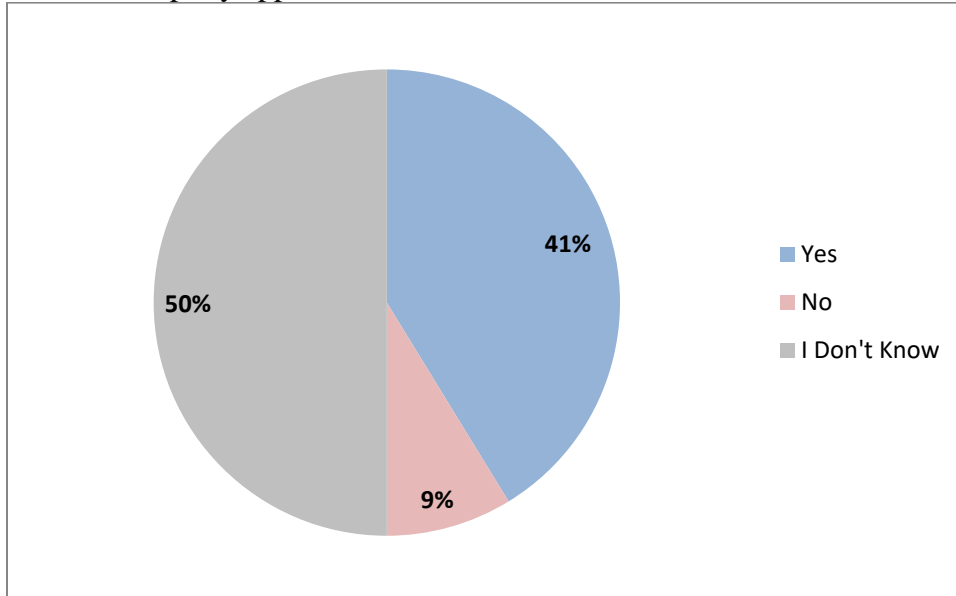
Have you discovered your calls are being blocked?



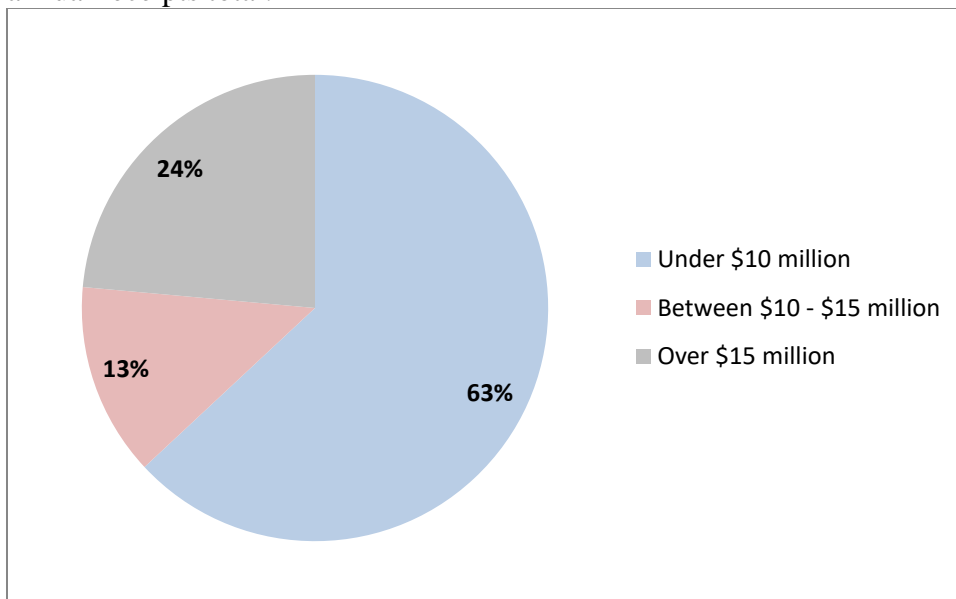
Have you noticed any change over the last year in right party contacts?



In making calls to consumers, have you ever received a busy signal that you believe originated from a third-party application?



Are you considered a small business debt collection agency? Specifically, do your average annual receipts total:



#### **VI. Other Regulators Have Recently Stressed the Need for Clarity Concerning the TCPA, the Importance of the Work the Credit and Collection Industry, and the Ability to Communicate with Consumers**

ACA also highlighted concerns from other regulators about outdated or onerous interpretations of the TCPA. Specifically, it outlines that the U.S. Department of Treasury recently acknowledged in its report *A Financial System That Creates Economic Opportunities Nonbank Financials, Fintech, and Innovation* that, "Debt collectors and debt buyers play an important role



in minimizing losses in consumer credit markets, thereby allowing for increased availability of and lower priced credit to consumers.”<sup>7</sup> In addition to overall economic benefits the industry provides, the Treasury Report also addresses how the ability to communicate with consumers is harmed by the TCPA. In the report the Treasury states, “Current implementation of the TCPA constrains the ability of financial services firms to use digital communication channels to communicate with their customers despite consumers’ increasing reliance on text messaging and e-mail communications through their mobile devices.”

Similarly, the SBA Office of Advocacy addressed the confusion surrounding the TCPA as it pertains not only to consumers but small business owners. The SBA Office of Advocacy stated, “In an environment where fifty to seventy [percent] of a business’ customers might only be reachable by mobile phone, it is important that the FCC move quickly to establish clear guidance to small business compliance without depriving customers of required or desired communications.”<sup>8</sup>

Furthermore, the BCFP recently noted in a letter to the FCC that, “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 these communication technologies, it is important to review how statutes and regulations apply to them.”<sup>9</sup>

ACA pointed out that multiple regulatory agencies have recently recognized there are significant benefits to consumers when they can communicate with credit and collection professionals through the channels that the consumers prefer. Allowing service providers or carriers to inhibit communications, even unintentionally, ultimately harms consumers when they do not receive information that they need.

Please feel free to contact me with questions about these matters.

Sincerely,



---

<sup>7</sup> U.S. Department of Treasury, *A Financial System That Creates Economic Opportunities Nonbank Financials, Fintech, and Innovation* (July 2018), available at <https://home.treasury.gov/sites/default/files/2018-07/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financi....pdf>.

<sup>8</sup> Ex parte Notice of SBA Office of Advocacy, Consumer and Government 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.

<sup>9</sup> 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. Circuits CG Docket No. 18-152 ACA International Decision (June 13, 2018).

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