



November 15, 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 November 15, 2018, Mark Neeb, CEO at ACA International, Leah Dempsey, Vice President and Senior Counsel, Federal Advocacy at ACA International, Joann Needleman, ACA's retained Counsel from Clark Hill PLC, and Jay Gonsalves, President of Action Collection Agencies, Inc. met with Arielle Roth Wireline Advisor to Commissioner O'Rielly.

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.
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 November 13, 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.¹ 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).² 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.³

As a result of this action, ACA International filed a lawsuit in the D.C. Circuit challenging several aspects of the 2015 Order.⁴ 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.⁵ 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.

¹ 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.

² 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”)

³ 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).

⁴ 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)

⁵ *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.

V. 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.”⁶ 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

⁶ 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>.

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.”⁷

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.”⁸

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,

A handwritten signature in black ink that reads "Leah Dempsey". The signature is written in a cursive, flowing style.

Leah Dempsey
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⁷ 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.

⁸ 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).