

April 10, 2015

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

Re: **Notice of Ex Parte – CG Docket No. 02-278**
ACA International

Dear Ms. Dortch:

ACA International (“ACA”) submits this letter to highlight developments related to the Telephone Consumer Protection Act (“TCPA”) that have occurred since we last met with staff on January 15, 2015,¹ all of which underscore the critical need for the Federal Communications Commission (“FCC” or “Commission”) to act quickly to address the issues raised in ACA’s pending Petition.² Plaintiffs have been relentlessly brazen in bringing TCPA claims based on overreaching theories of liability – with a former FCC Commissioner advisor noting that we should refer to the TCPA by its “real” name, the “Total Cash for Plaintiff’s Attorneys” law.³ Common-sense reforms to modernize the TCPA are desperately needed to provide a clear, fair, and consistent framework that appropriately protects consumers without impeding normal, expected and desired communications.

¹ See ACA International, Inc. Notice of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Jan. 15, 2015) (“ACA January 15 Ex Parte”).

² 47 U.S.C. § 227; see also Petition for Rulemaking of ACA International, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Jan. 31, 2014) (“ACA Petition”), and related Comments (Mar. 24, 2014) (“ACA Comments”) and Reply Comments (Apr. 8, 2014) (“ACA Reply Comments”) of ACA.

³ John Eggerton, *FCC’s Hoffman Looks Back, Moves Forward*, Broadcasting and Cable (Mar. 23, 2015), available at <http://www.broadcastingcable.com/news/washington/fcc-s-hoffman-looks-back-moves-forward/139013>.

I. TCPA Litigation = “Total Cash for Plaintiff’s Attorneys”

The astronomical fees awarded to plaintiffs’ attorneys in TCPA settlements are fueling increasingly aggressive litigation predicated on unprecedented theories of TCPA liability. ACA respectfully requests that the Commission act swiftly to address persisting areas of uncertainty. For example, in a \$75.5 million settlement involving Capital One Financial Corp., the plaintiffs’ attorneys will receive \$15.67 million in fees while class members are expected to receive \$20 to \$40 each.⁴ While the \$15.67 million was \$7 million less than what was requested, the attorneys still considered it to be a “quite fair result.”⁵

In a nearly \$40 million settlement involving HSBC, the plaintiffs’ attorneys will receive almost \$12 million in fees.⁶ Because only about 300,000 of the 9 million members of the class filed a timely claim, the members each received \$93.22; however, had all 9 million members of the class filed, each member would have received only \$2.95.⁷ Significantly, both the Capital One and HSBC cases hinged on ambiguities in the TCPA as related to FCC guidance.

Astronomical plaintiffs’ attorneys fees is not the only issue. A recent Wall Street Journal article reports that civil cases are “piling up” in federal courts, with pending cases “up nearly 20% since 2004.”⁸ Yet, by striking contrast, TCPA cases filed are up by **560%** since 2010 – further fueling this trend.⁹

⁴ Scott Flaherty, *Over Objection, Record TCPA Settlement Makes for Record Fees*, AmLaw Litigation Daily (Feb. 15, 2015), available at <http://www.litigationdaily.com/top-stories/id=1202718004979/Over-Objection-Record-TCPA-Settlement-Makes-for-Record-Fees?mcode=1202616050057&curindex=87>; Anne Bucher, *Capital One TCPA Class Action Settlement*, Top Class Actions (Aug. 19, 2014), available at <http://topclassactions.com/lawsuit-settlements/closed-settlements/37817-capital-one-tcpa-class-action-settlement/>.

⁵ *Id.*

⁶ David Siegel, *HSBC’s \$40M TCPA Deal Goes to Judge for Final Approval*, Law 360 (Oct. 29, 2014), available at <http://www.law360.com/articles/591410/hsbc-s-40m-tcpa-deal-goes-to-judge-for-final-approval>.

⁷ *Id.*

⁸ Joe Palazzolo, *In Federal Courts, the Civil Cases Pile Up*, The Wall Street Journal (Apr. 6, 2015), available at <http://www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746?mod=djem10point>.

⁹ *Debt Collection Litigation & CFPB Complaint Statistics, December 2014 & Year in Review*, WebRecon LLC (Jan. 22, 2015), available at <http://dev.webrecon.com/debt-collection-litigation-cfpb-complaint-statistics-december-2014-and-year-in-review/>.

April 10, 2015

Page 3

It is clear that federal courts are anxious for the FCC, as the expert agency, to render a decision on pending TCPA issues. In January, the court in *Gensel v. Performant Technologies, Inc.* granted a motion to stay a TCPA lawsuit based largely on ACA's pending TCPA Petition.¹⁰ In *Gensel*, the plaintiff received a number that was previously assigned to another person who had defaulted on a loan.¹¹ When the collection agency called that number in an attempt to collect on the debt, the plaintiff – on the advice of counsel – did not inform the collection agency that the agency had dialed the wrong number, instead keeping track of incoming phone calls for the specific purpose of increasing damages.¹² The plaintiff alleged that the calls she received, at \$500 per alleged violation, amounted to \$94,000 in purported damages.¹³

Perturbed by the plaintiff's "transparent attempt" to rack up damages, the court stated that such "opportunistic behavior" is encouraged by the TCPA's imposition of strict liability, and determined that strict liability was "particularly inappropriate" in this case because the collection agency *stopped calling* the plaintiff once the plaintiff finally answered the phone and informed the agency that it had the wrong number.¹⁴ The court emphasized that granting a stay in order to allow the FCC time to act would "promote uniformity in the administration of the TCPA[.]" while ruling on the issue might only further the split of authority on TCPA issues.¹⁵ The court also noted that the "behavior of litigants" such as the plaintiff may "inform the FCC's determination" regarding a solution to wrong number calling.¹⁶

¹⁰ *Gensel v. Performant Technologies*, 2015 U.S. Dist. LEXIS 9736, at * 5 (E.D. Wisc. Jan. 28, 2015). ACA has asked the Commission to: (1) confirm that not all predictive dialers are categorically automatic telephone dialing systems; (2) confirm that "capacity" under the TCPA means *present* ability to store, produce, or dial phone numbers; (3) clarify that prior express consent attaches to the person incurring a debt, and not the specific telephone number provided by the debtor at the time a debt was incurred; and (4) address the problem of wrong number calls by clarifying that "called party" means "intended recipient" for purposes of the exemption from liability under the TCPA when a call is made with the "prior express consent of the called party" or, in the alternative, by creating a safe harbor for wrong number non-telemarketing calls as outlined in its Petition. *See* ACA Petition at 1-2; ACA January 15 Notice of Ex Parte at 7-8.

¹¹ *Gensel*, 2015 U.S. Dist. LEXIS 9736 at * 1, 5.

¹² *Id.* at * 1.

¹³ *Id.* at * 6.

¹⁴ *Id.* at * 6.

¹⁵ *Id.* at * 6.

¹⁶ *Id.* at * 6.

In the absence of cohesive guidance, the split in authority continues to grow and further increases the uncertainty faced by legitimate, compliance-minded companies – making liability a matter of sheer luck and every call subject to TCPA liability roulette. For example, in *Soulliere v. Central Florida Investments, et al.*, a federal court ruled that the “primary user” of a cell phone line has standing to sue under the TCPA.¹⁷ Compliance with the *Soulliere* court’s interpretation of the TCPA is impossible as callers have no reasonable means of determining who is the “primary user” of a phone line.

These examples of current TCPA litigation underscore how damaging continuing uncertainty around the interpretation of the TCPA is to the public interest. In the *2014 Junk Fax Order*, the Commission emphasized this point specifically when it granted retroactive relief from the opt-out notice requirement for facsimiles to petitioners who were facing legal action as a result of a failure to comply with that decidedly unclear rule.¹⁸ In so doing, the FCC determined that because there was “[c]onfusion or misplaced confidence” regarding the opt-out notice requirement, “some relief from [the TCPA’s] potentially substantial consequences” was warranted.¹⁹ One such “potentially substantial consequence[]” was the “risk of substantial liability in private rights of action.”²⁰

Similarly, there is significant uncertainty regarding many of the TCPA’s requirements that also carries “risk of substantial liability in private rights of action.” These issues include ones that require common-sense FCC clarification: (1) whether “capacity” refers to the present ability of the equipment or to the hypothetical ability of the equipment to be modified at some uncertain point in the future;²¹ (2) whether the statutory elements of an automatic telephone dialing system under the TCPA must be present in order for equipment to meet the statutory definition of an automatic telephone dialing system;²² and (3) whether

¹⁷ See *Greg Soulliere v. Central Florida Investments, et al.*, Order on Motion for Summary Judgment, Case No. 8:13-CV-2860-T-27AEP (M.D. Fla. 2015).

¹⁸ The Commission stated that because the record indicated that the Commission’s previous guidance caused confusion regarding the applicability of the opt-out notice requirement, there was “good cause” to grant a retroactive waiver of the rule, which would better serve “the public interest” than would strict application of the rule. See *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, et al.*, CG Docket No. 02-278, *et al.*, Order, FCC 14-164, ¶¶ 15, 22, 28 (Oct. 30, 2014).

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *Hunt v. 21st Mortgage Corp.*, 2013 U.S. Dist. LEXIS 132574, at * 11 (D. Ala. Sept. 17, 2013); *Gragg v. Orange Cab Co.*, 2014 U.S. Dist. LEXIS 16648, at *8-9 (W.D. Wa. Feb. 7, 2014); *Glauser v. GroupMe, Inc.*, 2015 U.S. Dist. LEXIS 14001, at * 8-17 (N.D. Cal. Feb. 4, 2015).

²² See, e.g., *Griffith v. Consumer Portfolio Serv. Inc.*, 838 F. Supp. 2d 723, 727 (N.D. Ill. 2011).

Congress intended the statutory defense of having the prior express consent of the “called party” to be meaningful, or whether Congress intended TCPA liability to be a matter of “sheer luck” imposed even when the caller in good faith dialed a number for which it had the prior express consent to call, and had no reason to know that someone other than the “intended recipient” of the call would, for whatever reason, answer the phone.²³

II. The White House Recognizes the Importance of Using Modern Dialing Technology to Contact Mobile Phones for Non-Telemarketing Purposes

Consistent with the White House’s FY 2015 budget proposal, the White House’s FY 2016 budget proposal calls on Congress to reform the TCPA to allow the Treasury Department to employ the use of autodialers to call mobile phones in the collection of delinquent government debts.²⁴ The White House determined that:

In this time of fiscal constraint . . . the Federal Government should ensure that all debt owed to the United States is collected as quickly and efficiently as possible and this provision could result in millions of defaulted debt being collected. While protections against abuse and harassment are appropriate, changing technology should not absolve these citizens from paying back the debt they owe their fellow citizens.²⁵

This same concept applies equally to the private sector. While protections against abuse and harassment are entirely appropriate, changing technology should not shield a debtor from paying back debt that is owed.

III. Common-Sense Reforms Are Not Partisan

Recent remarks from current and former FCC officials demonstrate that there is bi-partisan support for common sense reforms to the TCPA. In March, Adonis Hoffman, a former chief of staff to a democratic Commissioner, stated that the TCPA causes “regulatory challenges every day that were not intended by Congress or the FCC” and is failing to

²³ See *Greg Soulliere v. Central Florida Investments, et al.*, Order on Motion for Summary Judgment, Case No. 8:13-CV-2860-T-27AEP (M.D. Fla. 2015).

²⁴ The Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2016*, Budget.Gov, at 116 (Feb. 2, 2015) (*WH FY 2016 Budget*), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/budget.pdf>; The Office of Management and Budget, *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2016*, at 127-28 (2015) (*FY 2016 Budget Analytics*), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/spec.pdf>.

²⁵ *FY 2016 Budget Analytics* at 128.

April 10, 2015

Page 6

advance the public interest responsibly.²⁶ Mr. Hoffman observed that the TCPA “has been leveraged by aggressive plaintiffs’ lawyers to line their pockets lavishly with millions, while consumers usually get peanuts.”²⁷ Indeed, the “proliferation” of class action litigation under the TCPA has reached such an “outlandish level” that the TCPA “should be known by its real acronym – ‘Total Cash for Plaintiffs’ Attorneys.’”²⁸

Roughly a week later, republican Commissioner Michael O’Rielly publicly decried the increasing uncertainty and litigation risk surrounding the TCPA, as a result of which legitimate businesses “have to avoid making calls to their existing customers or clients even if the purpose of the call could directly and immediately help the customer.”²⁹ Commissioner O’Rielly questioned whether it should be a violation of the TCPA if a company is making calls to “offer ways to mitigate a potential upcoming student loan or mortgage default.”³⁰ He also expressed concerns that “catering [to certain consumer groups] unfounded fear” that the FCC will “gut the TCPA” might “end up hurting the people they are trying to help.”³¹ This is because the FCC has “heard that consumers *appreciate* receiving information as long as it is both *timely* and *relevant*.”³² Commissioner O’Rielly emphasized that legitimate companies should not be painted “with the brush that every call from a private company is a form of harassment,” and urged the FCC to act to “provide clear rules of the road that will benefit everyone.”³³

ACA continues to urge the Commission to move forward expeditiously with the requested clarifications in its Petition. Making the much-needed clarifications will ensure that consumers are not deprived of beneficial, informational communications that increasingly are being chilled, as well as ensure that legitimate, non-telemarketing businesses

²⁶ John Eggerton, “FCC’s Hoffman Looks Back, Moves Forward.” *Broadcast and Cable* (March 23, 2015) available at <http://www.broadcastingcable.com/news/washington/fcc-s-hoffman-looks-back-moves-forward/139013>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Michael O’Rielly, *Remarks of Commissioner Michael O’Rielly, Federal Communications Commission, Before the Association of National Advertisers*, at 4 (Apr. 1, 2015); available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0401/DOC-332813A1.pdf.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* (emphasis retained).

³³ *Id.*

April 10, 2015

Page 7

will be able to operate without facing astronomical risk that Congress never contemplated for legitimate calls made by compliance-minded organizations.

Respectfully submitted,



Monica S. Desai
Squire Patton Boggs, LLP
2550 M Street, NW
Washington, DC 20037
202-457-7535
Counsel to ACA

cc:

Maria Kirby
Nicholas Degani
Amy Bender
Travis Litman
Rebekah Goodheart
Matthew Collins
Mark Stone
Kurt Schroeder
Aaron Garza
Kristi Lemoine