CBA CONSUMER BANKERS ASSOCIATION

The Voice of the Retail Banking Industry

June 13, 2018

VIA Electronic Submission
Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
44 12th Street SW
Washington, D.C., 20554

Re: Comments on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, CG Docket No. 18-152.

Dear Ms. Dortch,

The Consumer Bankers Association ("CBA")[1] appreciates the opportunity to respond to the Federal Communication Commission's ("Commission") Public Notice regarding the Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, CG Docket No. 18-152. As a co-petitioner in ACA's suit with the Commission,[2] we remain vigilant in our pursuit of better laws built to protect the necessary and desired communications our members make on a daily basis, and appreciate the Commission's continued efforts on this front.

CBA Members' customers utilize many useful communications through calls and text messages, ranging from low balance notifications to repayment counseling, among other important notices and alerts. CBA's members communicate with their customers to enhance their customers' financial well-being, while helping customers avoid financial crimes and hardship. CBA members seek to better serve their customers in every way possible, and more effective means of communication is a key part of enhancing that relationship.

In 1991, when wireless phones were considered a luxury item, and smartphones were years beyond invention, the Telephone Consumer Protection Act ("TCPA") was enacted to address certain telemarketing practices considered an invasion of consumer privacy, as well as certain automated calls to wireless phones. Today, 90% of Americans own wireless telephones, and 58.8% of households are mostly or entirely wireless-only. While consumer preferences have changed, the 2015 Omnibus Order[3] made it harder – and more expensive – for businesses to contact their customers.

---

[1] The Consumer Bankers Association is the only national trade focused exclusively on retail banking. Established in 1919, the association is now a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly $3 trillion in consumer loans, and provide $270 billion in small business loans.

[2] *ACA Int'l et al v. FCC*, 885 F.3d 687 (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. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (*2015 TCPA Declaratory Ruling and Order*)).

[3] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. ("*Omnibus Order*").

In response to the Commission's 2015 Omnibus Order, CBA, along with other petitioners, filed suit to challenge many of the issues the Commission is examining in this Public Notice, including the definition of an Automatic Telephone Dialing System ("ATDS"), issues surrounding reassigned numbers, and revocation of consent.

In light of the D.C. District Court of Appeal's decision in *ACA International v. FCC*, the Commission has great opportunity to help address many of the concerns consumers and businesses alike have with the arduous TCPA rules. While we value this opportunity, CBA notes that the original purpose of the TCPA, to curb telemarketing calls and unwanted communications to unwilling consumers, is upheld. To this end, CBA recommends the Commission consider the items herein.

Re-Defining "Capacity" of an "Automatic Telephone Dialing System"

Under the TCPA, confusion exists around what exactly constitutes an ATDS, leading to a significant increase in lawsuits surrounding calls made to customer-provided numbers. CBA, along with other petitioners, asked the Commission to provide clarity on what constituted an ATDS in 2014,[4] however the Commission's 2015 Omnibus Order created more confusion over the issue by expanding the definition of an ATDS.

The Commission's overly broad interpretation of the term "capacity" of an ATDS lead to a reading that not only included devices that randomly and sequentially dial random numbers, but also devices that do not currently have the capability, but may have the capability in the future.[5] In addition, the broad definition of an ATDS has led to many financial institutions decoupling even their most basic computer-to-telephony ("CTI") technologies. This prevents institutions from linking the customer contact phone number on record to the actual number that is dialed by forcing a manual match and dialing of all ten digits of the number. This, in turn, increases the chance of misdialed phone numbers caused by human error. The overly broad reading of "capacity" has led to a major explosion in litigation surrounding the issue,[6] and chilled many of the important communications our member's customers desire.

The D.C. Circuit vacated the Commission's interpretation of an ATDS in *ACA Int'l v. FCC*, holding that the Commission's interpretation was "utterly unreasonable," "incompatible with" the statute's goals, "impermissively expansive",[7] and essentially, made everyone a "TCPA violator in waiting".[8] In May, 2018, CBA, along with other petitioners, signed on to the petition

[4] Petition for Declaratory Ruling of the Consumer Bankers Association, CG Docket No. 02-278 (filed Sept. 19, 2014).
[5] *Omnibus Order*, ¶¶ 10-14.
[6] *Id*.
[7] *ACA Int'l*, 885 F.3d at 699-700.
[8] *Id*. at 693.

for declaratory ruling filed by the U.S. Chamber Institute for Legal Reform[9] asking the Commission to clarify the definition of an ATDS in light of the District Court's decision.

In our petition, CBA argues that the Commission should promptly:
(1) confirm that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention, and
(2) find that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions.[10]

CBA continues to urge the Commission to clarify that a "random or sequential number generator" must be truly "random" or "sequential." For example, the Commission's guidance should clearly state that a "random or sequential number generator" involves the use of an automated program to call all phone numbers from "302-354-**0000**" through "302-354-**9999**." Furthermore, the FCC should also clarify that a "random or sequential number generator" is not the use of a program—automated or manual—that schedules calls or dials from a deliberate and purposeful list or database of phone numbers of customers or prospects who have made an inquiry to a business.

A workable test for "human intervention" would, at a minimum, recognize that human intervention occurs when a person manually initiates the call. Illustrative examples could include pre-loaded numbers or a "click-to-dial" system where the caller both selects the number to be called and manually initiates the call. Each of these examples demonstrate quality and accuracy control features that benefit the consumer.

As detailed in CBA's petition, the plain reading of the statutory text as well as Congressional intent support clarifying that only phone calls made ***using*** the equipment's autodialing functionality trigger the TCPA's restrictions. This approach to "capacity", when married to a workable test for "human intervention", will help solve the key issue at the heart of consumer harm -- avoiding the intrusive burden of unwanted "robocalls".

Clear rules with defined, workable terms from the Commission will help establish best practices for callers, and can help our members make the communications desired by customers without inadvertently violating the TCPA. Further guidance on the 2003 & 2008 Commission orders on predictive dialers, as well as guidance to create a workable test for human intervention could also help provide callers with more informed means to contact their customers.

CBA reiterates that should the Commission act as outlined above, it will do much to address the issues that are often brought up in frivolous lawsuits against financial institutions, and help ensure that customers receive the consented-to calls they desire.

---

[9] U.S. Chamber Institute for Legal Reform *et al.,* Petition for Declaratory Ruling, CG Docket No. 02-278 (filed May 3, 2018).
[10] *Id*. at 20.

Addressing the Reassigned Numbers Problem

CBA appreciates the Commission's efforts to address the reassigned numbers issue through the various hearings and Notice of Inquiries the Commission has conducted since the 2015 Omnibus Order. In addition to CBA's petition on the issue filed in 2014,[11] CBA has responded to the Commission's Notice of Inquiries regarding a reassigned numbers database,[12] and appreciates another chance to comment on this important issue.

CBA agrees with the Court's decision in *ACA International* that a one-call safe harbor is "arbitrary and capricious".[13] Only allowing financial institutions one call to ascertain if a number has been reassigned is not sufficient to avoid issues contacting an intended recipient. It is difficult for financial institutions to ensure that a number has actually been reassigned in just one call, as often the call may go to voicemail or otherwise not be answered by the correct recipient. Additionally, excessive litigation is often exacerbated by the Plaintiff's bar as often, consumers are instructed not to answer calls and inform the caller they have the wrong party, as to open the caller up to a TCPA lawsuit. In addition to increasing the potential for TCPA litigation, this leads to those customers who have had their number reassigned not receiving the vital communications they desire. These obstacles create a massive burden on financial institutions seeking to contact their consenting customers while avoiding frivolous litigation.

The Commission should adopt a true "reasonable reliance" approach to reassigned, disconnected, or wrong numbers whereby callers are given a legitimate opportunity to verify accuracy and quality of phone numbers before liability attaches to any good faith calls made to an erroneous current subscriber or non-subscriber customary user thereafter. There is a precedent for a reasonable reliance approach under the Commission's Do Not Call registry regulation, which establishes means for a safe-harbor.[14]

In the alternative, as CBA stated in our 2014 petition to the Commission on reassigned numbers, "called party" should refer only to the "intended recipient" of the call. CBA feels that by declaring that only intended recipients are called parties, the Commission will: 1) prevent potential chilling of beneficial consumer communications; 2) shield consumers from higher costs stemming from institutions' increased litigation and compliance expenses; 3) quash frivolous litigation that is inundating courts and creating inconsistent law; and 4) allow small businesses to grow and nonprofits to reach their goals without the threat of litigation.

In regards to the Commission's examination of a reassigned numbers database to help address this issue, CBA applauds the purpose of a reassigned numbers database, and hopes that any tool developed will be of great use to our members attempting to contact their customers. However,

---

[11] *See* note 4.
[12] Consumer Bankers Association, *Re: Reply Comments on Second Notice of Inquiry Regarding Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59 (filed Sept. 21, 2017).
[13] *ACA Int'l*, 885 F.3d at 675.
[14] 47 CFR 64.1200(c)(2).

CBA cautions the Commission to consider potential unforeseen burdens that could be placed on legitimate callers through the database's implementation. As such, we ask the Commission to consider safe-harbor provisions for those companies that use the database, if created. CBA also recommends the Commission install such a database at little to no cost to its users. Additionally, CBA asks the Commission continue to promote voluntary, not mandatory, use of the database.

CBA notes the Commission should also remain cognizant of the issue surrounding those numbers which are wrongly provided to callers, either through customer error, or other means. Often, callers may inadvertently contact the wrong consumer in an effort to communicate with their customer as the contact number provided is incorrect. While the Commission's efforts to address the reassigned numbers issue is admirable, a solution for wrong numbers must also be considered to fully protect callers and consumers alike.

Though an all-encompassing reassigned numbers database that provides a safe harbor to callers at little to no cost could be useful to both the industry and consumers, CBA feels the most pressing solution to the reassigned numbers issue is ensuring that "called party" refers to "intended recipient" of a call.

"Reasonable" and Effective Revocation

CBA values the Commission's willingness to address revocation of consent issues raised under the 2015 Omnibus Order. CBA recommends that the Commission confirm that bilateral agreements between callers and their customers can be binding, and these agreements also include non-negotiated contracts and contracts of adhesion. Contracting for consent is an informative way for callers to ensure they contact those customers who desire it, and establishing a particular method for revocation of consent is useful for callers and customers alike.

Without a standardized and reasonably narrowed means of revocation, financial institutions have had many of their communications chilled in an effort not to inadvertently open themselves up to litigation from customers attempting to opt out of communications, either legitimately or nefariously. Often, financial institutions are forced to cease calling their customers at the slightest indication that the customer may have revoked their prior express consent, even when this was not the customer's intent. The lack of a standardized and reasonably narrowed means of revocation has placed an unworkable burden on callers, and also negatively impacts consumers by denying them effective methods of revocation.

While CBA does not advocate for any particular means of revocation, such as those listed in the Commission's NOI, we do press that the Commission should act "consistent with other statutes that expressly address the issue"[15] when imposing a standard for revocation.

One particular means of revocation the Commission raises for consideration in the Public Notice is the use of "*7" on the phone's keypad as a means to revoke consent. While CBA appreciates

[15] *Omnibus Order*, ¶ 19 n.70.

the Commission looking in to narrowly defining a means of revocation, we take issue with this particular method for some associated complicated shortcomings derived from its use. Use of "*7" to revoke consent can create uncertainty around what calls a consumer is revoking their consent to, to what phone numbers they own, and for how long. Additionally, the potential for callers to unintentionally dial "*7" could create a situation where customers inadvertently revoke consent for the calls they desire.

For this reason, the Commission should continue to pursue a standardized and reasonably narrowed means of revocation, while remaining cognizant of the consequences various specific means may have for callers and their customers. Allowing callers to contract for reasonable means of revocation is the best way to ensure customers are able to properly revoke their consent, while callers are able to make the communications their customers desire. Many financial institutions line up their revocation procedures with the method of contact, and will often reference the terms provided to the customer upon enrollment.

Reconciling the Great Lakes Higher Education Corp Federal Debt Collection Rules Petition

CBA commented on the Petition filed by Great Lakes Higher Education Corp, et al in 2017,[16] and re-emphasize that we support their petition to the Commission challenging the 2016 Report and Order.[17] We believe that the Commission committed a material error by replacing Congress' policy determinations with its own, rendering conclusions unsupported by the plain language of the TCPA and the record in the proceeding, and adopting rules outside the scope of its rulemaking authority. In addition, the Commission's rules were inconsistent with legal mandates from other Federal agencies that are designed to facilitate loss mitigation and assistance to delinquent borrowers.

In the Order, the Commission also declined to clarify that the prior express consent requirement applies to loans owed to or guaranteed by Fannie Mae and Freddie Mac — entities that were chartered by Congress and over which the Federal government has ultimate control — or loans reinsured by the Federal government.[18]

For these reasons, we stated the Commission erred and should reconsider the Order. We urge the Commission to issue a new order that authorizes the full range of communication strategies that the Federal government itself would undertake to service and collect its debts. The order also

[16] Comments of the American Bankers Association and Consumer Bankers Association, CG Docket No. 02-278 (filed Feb. 11, 2017).

[17] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, FCC 16-99 (Aug. 2, 2016).

[18] As stated in our June 6, 2016 letter to the Commission, CBA believes that the 2015 Budget Act TCPA exemptions should include calls made by Fannie Mae and Freddie Mac as the U.S. Government effectively owns these entities, meaning their loans are insured or guaranteed by the Federal government. *See* Comments of the American Bankers Association and Consumer Bankers Association, *Re: Request for Comment on Proposed Rule*, CG Docket No. 02-278 (filed June 6, 2016).

should be in harmony with the servicing rules of other Federal agencies that require financial institutions to contact distressed borrowers to provide assistance.

Conclusion

CBA greatly appreciates the Commission's timely and comprehensive response to the District Court's decision in *ACA International*, and looks forward to further engaging the Commission on the issues listed above. Comprehensive solutions to the definitions of "random or sequential number generator," "human intervention," and "capacity" for an ATDS, the reassigned and wrong numbers issue, revocation of consent, and other communication practices will ensure that consumers have access to the vital communications they desire, and our members hope to better provide. If you require any more information on any of the issues outlined above, please do not hesitate to contact the undersigned directly.

Sincerely,

Stephen Congdon
Regulatory Counsel
Consumer Bankers Association
scongdon@consumerbankers.com