

1700 G Street NW,
Washington, DC 20552



June 13, 2018

Commission's Secretary
Office of the Secretary
Federal Communications Commission
445 12th St., SW
Room TW-A325
Washington, DC 20554

Subject: Comments of the Bureau of Consumer Financial Protection on the FCC's Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's *ACA International* Decision

The Bureau of Consumer Financial Protection (Bureau) thanks the Federal Communications Commission (FCC) for the opportunity to file this comment in response to the FCC's Notice of Proposed Rulemaking seeking views on 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 in *ACA International v. FCC*.¹

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.

The FCC has commenced this rulemaking to evaluate how to interpret critical provisions of the TCPA, especially with regard to new and newer communication technologies. Among other things, the TCPA generally requires callers to obtain prior express consent before calling consumers using an "automated telephone dialing system," or "ATDS," which the TCPA defines

¹ *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 the FCC, *TCPA Omnibus Declaratory Ruling and Order*). See 30 FCC Rcd 7961 (2015); FCC, *2015 TCPA Omnibus Declaratory Ruling and Order*, CG Docket No. 02-278, WC Docket No. 07-135 (June 18, 2015), available at <https://www.fcc.gov/document/tpca-omnibus-declaratory-ruling-and-order>.

as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”²

In 2015, the FCC issued a Declaratory Ruling and Order that set forth a broad interpretation of the term “capacity” in the definition of an ATDS,³ an interpretation which the D.C. Circuit earlier this year set aside.⁴ In the wake of the D.C. Circuit’s ruling, the FCC is now seeking comment on how to interpret “capacity” under the TCPA. While not offering specific views as to how to define ATDS, the Bureau believes that a properly circumscribed definition of that term could be critical to fostering communications between consumers and debt collectors, servicers, and other financial service providers.

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 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.⁵ 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.⁶ The Bureau also brings enforcement actions against financial institutions, debt collectors, and servicers who violate the law. And the Bureau has authority to issue rules addressing the communication practices of debt collectors, servicers, and other financial service providers under the Dodd-Frank Act and other laws the Bureau implements.⁷

² 47 U.S.C. § 227(a)(1).

³ 2015 TCPA Declaratory Ruling and Order, *supra* note 1, at 7971.

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, 83 FR 26284, 26285 (June 6, 2018).

⁵ Specifically, the Bureau has authority to supervise nonbank entities in the residential mortgage, payday lending, and private education lending markets. The Bureau also has the authority to supervise persons who offer or provide consumer financial products or services where it has “reasonable cause to determine, by order, after notice to the person and a reasonable opportunity for such person to respond . . . that such person is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.” 12 U.S.C. § 5514(a)(1)(C).

⁶ *See* Defining Larger Participants of the Consumer Debt Collection Market, 77 FR 65775 (Oct. 31, 2012).

⁷ For example, the Bureau’s mortgage servicing rules require certain communications between mortgage servicers and borrowers, including live contact by telephone with delinquent borrowers, which aim, in part, to help borrowers avoid foreclosure. Under these rules, servicers must establish or make good faith efforts to establish live contact with a delinquent borrower no later than the 36th day of the borrower’s delinquency and again no later than 36 days after each payment due date so long as the borrower remains delinquent. Servicers must inform borrowers about the availability of loss mitigation options if appropriate. *See* 12 CFR 1024.39(a); *see also* Mortgage Servicing Rules Under the Real Estate Settlement Act (Regulation X), 78 FR 10696, 10789 (Feb. 14, 2013) (describing the Bureau’s goal of helping borrowers avoid foreclosure).

Notably, the Bureau is engaged in an ongoing rulemaking focused on debt collectors under the Fair Debt Collection Practices Act (FDCPA) concerning debt collection practices, including calling behavior by debt collectors. Since the FDCPA was enacted in 1977, technological developments have raised concerns about the application of the FDCPA's restrictions on collector communications with consumers. In 1977, placing a telephone call was a manual process that required a caller to dial a telephone number one digit at a time. Since then, development of predictive dialers and other outbound dialing technology has substantially reduced the cost to callers, such as debt collectors, of placing telephone calls and has enabled debt collectors to place many more calls at a very low cost. Consumers, however, consistently complain about frequent or repeated collections telephone calls. The Bureau's rulemaking is considering, among other topics, collector telephone calling behavior. The Bureau also is evaluating alternatives that would reduce uncertainty surrounding the use of newer technologies that could facilitate communication and conform more closely to consumers' preferences. Input from stakeholders has helped and will continue to help the Bureau understand the practical ramifications of potential new rules. The Bureau's goal is to develop standards which will protect consumers without imposing unnecessary or undue costs on debt collectors.

The Bureau supports the FCC's effort in this rulemaking to seek comment on how to define ATDS under the TCPA and other issues that may affect whether and how collectors, servicers, and other consumer financial service providers communicate with consumers. The Bureau believes that, by soliciting and reviewing comments from those who are involved in this space, the FCC will gain important information. As with the Bureau's debt collection rulemaking, such information is likely to be helpful to the FCC in interpreting ATDS in a manner that protects consumers without imposing unnecessary or undue costs on industry. The Bureau appreciates the opportunity to file this comment and looks forward to working with the FCC and others to develop standards for consumer financial service providers and others who communicate with consumers via telephone.