

Consumer Mortgage Coalition



June 13, 2018

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

Re: *Public Notice on Interpretation of the Telephone Consumer Protection Act in Light of the DC Circuit's ACA International Decision*

To Whom It May Concern:

The Consumer Mortgage Coalition and the Housing Policy Council, mortgage industry trade associations, are pleased to submit comments on the *Public Notice on the interpretation of the Telephone Consumer Protection Act ("TCPA") in light of the D.C. Circuit's ACA International decision*.¹ We appreciate the Federal Communications Commission's ("FCC" and "Commission") willingness to explore much needed changes to the TCPA.²

Background

In 1991, the TCPA was enacted to regulate telemarketing calls and faxes, some of which were an irritant to consumers. The goal of the TCPA was to protect consumers from unwanted telemarketing calls and faxes. As construed today, the TCPA actually harms consumers and threatens businesses that are legitimately trying to serve their consumer customers. Consumers are harmed because businesses face barriers to communicating with them using forms of communication (cell phones, text, e-mail) that consumers prefer due to TCPA restrictions.

Consumer reliance on cell phones has changed dramatically since the TCPA was first enacted decades ago. U.S. households continue to move away from using landline

¹*Public Notice Seeking Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision*, FCC 18-493, CG Docket No. 18-152 & 02-278, FCC (2018)

² Pub. L. No. 102-243, 105 Stat. 2394, codified at 47 U.S.C. § 227.

telephones, which has meant that it has become increasingly more difficult to communicate with consumers other than by calling them on their cell phones. Today, 90 percent of Americans own wireless telephones and almost half, or 53.3 percent of households, are entirely or predominantly “wireless-only.”³ Those numbers are even higher in young adults with three in four adults, aged 25-29 (75.6%) and aged 30-34 (73.3%) living in households with only wireless telephones.⁴

Although many households continue to have landlines, it is often due to the fact they come with no or nominal costs as part of Internet and cable television packages. Notably, many of those households no longer answer their landline phone.

For the mortgage industry, the 2015 Order⁵ (the “Order”), under the TCPA, effectively prohibits mortgage lenders and servicers from calling their consumer customers to provide them the service they need and expect. For mortgage servicers, the Order significantly limits their ability to contact defaulted borrowers and owners of mortgaged properties, thereby interfering with important federal and state policies and efforts to prevent foreclosures of consumers’ mortgage loans.⁶ Foreclosure prevention policies rely on servicers calling their consumer customers.⁷

TCPA Reform is Needed

On March 16, 2018, the D.C. District Court released its long-awaited *ACA Int’l v FCC* final decision, which addressed the FCC’s 2015 Order. The Court addressed:

- the automatic telephone dialing system (ATDS or autodialer) definition
- reassigned phone numbers
- revoking TCPA consent

³ Stephen J. Blumberg & Julian V. Luke, Div. of Health Interview Statistics, Nat’l Ctr. for Health Statistics, Centers for Disease Control and Prevention, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July–December 2017 (June 2018)* (“CDC Wireless Substitution Estimates”), available at <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201806.pdf>.

⁴ Blumberg & Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey*

⁵ *Declaratory Ruling and Order*, CG Docket No. 02-278 (July 10, 2015).

⁶ In its June 6, 2016 comment letter to the FCC (CG Docket No. 02-278 Telephone Consumer Protection Act and Bipartisan Budget Act of 2015 Filed at <http://apps.fcc.gov/ecfs/>), the Consumer Mortgage Coalition delineated some of the foreclosure prevention actions taken by policymakers. The comment letter also lists the requirements under HAMP, FHA, VA, RHS, Fannie Mae, Freddie Mac, and the Bureau of Consumer Financial Protection to contact consumers by telephone. The Consumer Mortgage Coalition and the Mortgage Servicer Working Group together submitted further commentary to the FCC (CG Docket No. 02-278 Telephone Consumer Protection Act and Bipartisan Budget Act of 2015 Reply Comments Filed at <http://apps.fcc.gov/ecfs/>) on June 21, 2016 that again reviewed the reasons why the Order effectively prohibits mortgage servicers from calling defaulting borrowers and owners of mortgaged properties. The Consumer Mortgage Coalition also wrote to the FCC and other involved federal Administration policymakers on August 31, 2015 advising them of the conflicts between the Order and the federal foreclosure prevention policies and goals.

⁷ *Ibid.*

Following the Court decision, we urge the FCC to make changes to TCPA regulations pertaining to these three important issues.

Autodialer Definition

Under the FCC's Order, a caller who uses an autodialer or prerecorded message to make non-emergency call to a consumer's wireless phone must have the consumer's prior express consent.

The definition of autodialer is very broad. It includes dialing equipment that can store or produce, and dial numbers, even if the equipment is not presently used for that purpose, with or without the need for human intervention. If the equipment's "potential functionalities" include autodialing, the equipment is an autodialer. This reaches all modern phone calling equipment, including smartphones.

Therefore, we urge the FCC to quickly provide clarity as to what constitutes an autodialer. As a longer-term solution, the TCPA regulations should focus on how technology is used and not the type of device used, as well as an existing business relationship. We recommend that the TCPA regulations differentiate between business calls made to a consumer with an existing relationship versus a cold call via a third-party lead (telemarketing call). An existing business relationship should also include consumers that have requested contact from a business.

The consumer does not know or have an interest in how they are called. Their concern is whether the call they are receiving is unwanted. The discussion should change from the technology used to make the call to the purpose of the call, and consideration should be given as to whether the caller has a legitimate business relationship with the consumer. As businesses attempt to reach a consumer regarding their account, the consumer should be able to receive their message via their preferred manner of communication.

In defining an "autodialer," we recommend that a clear ATDS definition note the following:

- Dialing from a list does not constitute an autodialer, and
- To be considered an ATDS, the technology needs to generate a phone number in random and sequential order **and** call the number generated.

Reassigned Number

As noted above, the 2015 Order prohibits non-emergency autodialed calls to a consumer's wireless number without the consumer's consent. If a consumer's wireless number was reassigned to a different consumer and the caller is unaware of this, the caller was not liable for the first call to that number. However, under the Order, the caller was liable for the second call to that number, even if its affiliate made the first call a minute earlier, and even if the caller was unaware of the reassignment. Consent could be revoked orally, and no designated address was required for revocations. Given the

possibility of reassigned numbers, the difficulty of tracking affiliates' calls in real time, and the possibility of a caller not knowing of a revocation of consent, effectively, mortgage servicers' telephone calls to consumer borrowers was prohibited.

We were pleased that the Court said a one free-pass on calling a reassigned number did not make sense, but the Court did not provide additional guidance that is needed in this area. While businesses have specific consumers intended for a call, it continues to be impossible to know who they are calling until a person answers the phone.

When consumers change their phone numbers, no agency or organization keeps a single, comprehensive reassigned phone number database, making it nearly impossible to know if the call violates the TCPA. As recommended in many of the industry comment letters filed with the FCC received last week, we support the FCC's creation of a reassigned number database and a safe harbor for businesses that check the database.

Revocation of Consent

The FCC stated that a consumer needs to provide "express written consent" to receive calls from a company and, at the same time, give the consumer the option to opt-out of the consent by "any reasonable means." While the Court upheld this area, "any reasonable means" is problematic and broad. It could mean verbal, in-person, over the phone, postal service mail and other means of communication leaving businesses vulnerable and consumers frustrated without clear rules as to how to revoke consent.

We recommend that the FCC clarify the definition of "any reasonable means" as a company that:

1. establishes and follows procedures for revoking consent; and
2. does not use intentionally deceptive options to opt-out.

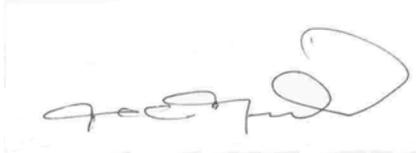
We also recommend that the FCC adopt clear guidelines as to how a consumer can opt-out of receiving calls. Without a structured process, the consumer may not know how to revoke consent. Consumers should be able to revoke consent verbally or in writing, either by designated address, e-mail address, or designated company webpage, which would explain to consumers how to revoke consent. Providing consumers with many avenues to opt-out of calls with clear guidelines will increase the likelihood of unwanted calls ending.

Conclusion

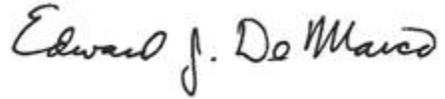
We appreciate the FCC's consideration of views and recommendations. We look forward to working with the FCC as it moves forward in updating the TCPA so that the rules and regulations allow businesses to best serve the needs of their consumer customers while protecting consumers from receiving unwanted telephone solicitations on their mobile phones.

If you have further questions or need additional data or information, please feel free to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read "Anne C. Canfield". The signature is fluid and cursive, with a large loop at the end.

Anne C. Canfield
Executive Director
Consumer Mortgage Coalition

A handwritten signature in black ink, appearing to read "Edward J. DeMarco". The signature is cursive and clearly legible.

Edward J. DeMarco
President
Housing Policy Council