

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Consumer and Governmental Affairs Bureau)	CG Docket No. 18-152
Seeks Comment on Interpretation of the)	
Telephone Consumer Protection Act in Light)	
of the D.C. Circuit's <i>ACA International</i>)	
<i>Decision</i>)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	

COMMENTS OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION

EXECUTIVE SUMMARY

The Federal Communications Commission (“FCC” or Commission”) released its *2015 TCPA Omnibus Order* in response to numerous industry requests to clarify the scope and applicability of the Telephone Consumer Protection Act (“TCPA”). Rather than provide this clarity, the *2015 TCPA Omnibus Order* created confusion and uncertainty for good-faith actors seeking to comply with the TCPA, resulting in a significant increase in frivolous lawsuits against legitimate businesses trying to communicate with their customers and misdirecting significant financial and other resources away from offering innovative services to meet consumer demand.

The American Financial Services Association (“AFSA”) supports the Commission’s efforts to help protect consumers from scammers, fraudsters, and other bad actors, and to provide clarity to good faith-callers such as AFSA members and others who must contact consumers with important, time-sensitive information. As it seeks to address key unsettled issues under the TCPA, the Commission should ensure that its regulatory framework and policies are consistent with the TCPA’s statutory language, Congressional intent, and modern communications technologies, and that they facilitate legitimate, pro-consumer business practices.

As part of this effort, the Commission should **first** provide a reasonable interpretation of automatic telephone dialing system (“ATDS” or “autodialer”) that is consistent with the TCPA’s statutory language and Congress’s intent, including granting the recent petition filed by 19 leading industry associations (including AFSA). At a minimum, the Commission should confirm that calls placed with human intervention are not made using an ATDS, and that calls that are not made randomly or sequentially, *i.e.*, calls by creditors to their customers on existing accounts, are not made using an ATDS. **Second**, the Commission should formally rescind inconsistent portions of its prior TCPA guidance on the definition of ATDS to clear up any remaining

uncertainty. **Third**, the Commission should confirm that “called party” means the “intended recipient” of the call and that callers may reasonably rely on the “prior express consent” provided by the intended recipient until they learn about the reassignment. **Fourth**, AFSA encourages the FCC to provide examples of consent revocation methods that qualify as “reasonable,” and confirm that parties may contractually agree to specific revocation methods. **Fifth**, the FCC should exempt all debt collection calls from the scope of the TCPA. **Finally**, the Commission should grant the American Bankers Association Petition for Reconsideration regarding the free-to-end-user exemption for certain time-sensitive financial calls and the Federal Housing Finance Agency Request for clarification that mortgage servicer calls after a natural disaster are exempt from TCPA requirements.

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COMMENTS OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION

I. INTRODUCTION.

The American Financial Services Association (“AFSA”) respectfully submits these comments in response to the Federal Communications Commission (“FCC” or “Commission”) Consumer and Governmental Affairs Bureau’s Public Notice seeking comment on Telephone Consumer Protection Act (“TCPA”) issues in response to the D.C. Circuit’s recent *ACA International* decision.¹

AFSA supports the Commission’s efforts to help protect consumers from scammers, fraudsters, and other bad actors, and to provide clarity to good faith-callers such as AFSA members and others who must contact consumers with important, time-sensitive information. As it seeks to address the key unsettled issues under the TCPA, the Commission should ensure that its regulatory framework and policies are consistent with the TCPA’s statutory language, Congressional intent, and modern communications technologies, and that they facilitate

¹ *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*, Public Notice, CG Docket Nos. 18-152, 02-278, DA 18-493 (rel. May 14, 2018) (“TCPA Public Notice”); *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

legitimate, pro-consumer business practices.² Specifically, as discussed in more detail below, the Commission should:

1. Provide a reasonable interpretation of “automatic telephone dialing system” (“ATDS”) that is consistent with the TCPA’s statutory language and Congress’s intent, including by granting the recent ATDS petition filed by 19 leading industry associations (including AFSA); at a minimum, the Commission should confirm that calls placed with “human intervention” are not made using an ATDS and that only calls randomly or sequentially dialed are calls to which the TCPA applies;
2. Formally rescind inconsistent portions of its prior guidance on the definition of ATDS to eliminate current uncertainty in the courts regarding the applicability of those rulings;
3. Confirm that “called party” means the “intended recipient” of the call, and that callers may reasonably rely on the “prior express consent” provided by an intended recipient until they learn about the reassignment;
4. Provide examples of consent revocation methods that qualify as “reasonable,” and confirm that parties may contractually agree to specific revocation methods;
5. Support a reasonable interpretation of the Balanced Budget Act TCPA Amendment and exempt debt collection calls from the scope of the TCPA; and
6. Grant the American Bankers Association Petition for Reconsideration regarding the free-to-end-user exemption for certain time-sensitive financial calls and the Federal Housing Finance Agency Request for clarification that mortgage servicer calls after a natural disaster are exempt from TCPA requirements.

Taking these steps will help the Commission and courts protect consumers and appropriately target bad actors without hindering important, time-sensitive calls that consumers demand from good-faith callers.

II. ABOUT AFSA.

AFSA is the primary trade association for the consumer credit industry, protecting access to credit and consumer choice. Since 1916, AFSA members have provided consumers with

² See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, 8754 ¶ 3 n.1 (1992) (“1992 TCPA Order”) (“The President signed the bill into law because it gives the Commission ‘ample authority to preserve legitimate business practices.’”).

many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance. AFSA members aim to shape the financial industry's direction and positions on a broad range of policy issues to benefit consumers, competition, and innovation. AFSA believes in a collaborative regulatory process between agencies like the FCC and the parties directly affected by proposed regulations.

III. THE COMMISSION SHOULD GRANT THE U.S. CHAMBER *ET AL.* ATDS PETITION TO PROTECT CONSUMERS AND SUPPORT THE ABILITY OF AFSA MEMBERS TO COMMUNICATE EFFICIENTLY WITH THEIR CUSTOMERS.

Almost 20 leading trade associations (including AFSA) that represent a variety of industry sectors such as financial services, public utilities and healthcare providers recently submitted a petition asking the FCC to clarify the meaning of ATDS under the TCPA.³ As the petitioners (and many others) have explained, the well-intentioned TCPA has been distorted by past FCC decisions that did not reflect marketplace realities and did not comport with Congressional findings and the intended reach of the TCPA.⁴ In light of the *ACA International*

³ Petition for Declaratory Ruling, U.S. Chamber Institute for Legal Reform, *et al.*, CG Docket No. 02-278 (May 3, 2018) (“Chamber Petition”); *see also* TCPA Public Notice at 3 (seeking comment on the Chamber Petition’s proposal to clarify the definition of ATDS).

⁴ *See, e.g.*, Chamber Petition at i-ii; 14, 17; (“[T]he Commission’s implementation of the Act . . . ha[s] fostered a whirlwind of litigation not against abusive callers and scammers, but against legitimate businesses attempting to lawfully communication with their customers. . . . Despite pleas for clarity, the [2015 TCPA Omnibus Order] made matters worse by expanding the Commission’s interpretation of what constitutes an ATDS.”); Letter from Jonathan Thessin, American Bankers Assoc., and Richard Foster, Financial Services Roundtable, to Marlene H. Dortch, CG Docket No. 02-278, at 2 (Dec. 11, 2017) (“[T]he Commission’s interpretations of the TCPA have strayed far from the statute’s purpose to become instead a frequent vehicle for lawsuit abuse The number of lawsuits demanding awards of statutory damages because of inadvertent and good faith calls continues to grow. The potential liability for making calls . . . threatens to curtail important and valued communications between financial institutions and their customers.”); Comments of Digital Liberty, CG Docket No. 02-278, at 1 (Nov. 2, 2017) (“People want to hear from their financial institution about instances of fraud, data breach, overdrawn accounts, or other pertinent account information, but Federal Communications Commission Rules adopted in July of 2015 have created serious uncertainties.”).

decision, in which the D.C. Circuit struck down the Commission’s interpretation of ATDS from its *2015 TCPA Omnibus Order*, the FCC should revisit its approach and provide an interpretation of ATDS that protects consumers, better comports with the TCPA’s statutory language, and provides much-needed clarity to good-faith callers.

The TCPA defines an ATDS 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.”⁵ Consistent with the language of that definition and its express reference to required functions, an ATDS should only include equipment that has and uses a random or sequential number generator to store or produce numbers and to dial those numbers without human intervention.⁶

In addition, the Commission should interpret “capacity” to mean only the “present ability” of the equipment at the time of the call. As the TCPA directs and the D.C. Circuit recognized, an ATDS is equipment which “has the capacity” to store or produce numbers using a random or sequential number generator. These are the functions that equipment must be able to perform to qualify as an ATDS. Moreover, only calls made using actual (existing) ATDS capabilities stated in the TCPA should be subject to the TCPA’s restrictions.

Finally, AFSA recommends that the Commission confirm that calls made with “human intervention” (including, for example, a single click to launch a call) are not made using an ATDS because such calls would not qualify as “automatic.” The Commission has recognized that the “basic function . . . of an automatic telephone dialing system is to ‘dial numbers without

⁵ 47 U.S.C. § 227(a)(1) (emphasis added).

⁶ 47 U.S.C. § 227(a); 47 C.F.R. §§ 64.1200(a)(1), 64.1200(f)(2).

human intervention,”⁷ and it should explicitly clarify that equipment is not an ATDS unless it has the capacity to dial numbers without human intervention.

By adopting these proposals and providing a clear, “bright line” standard for what equipment qualifies as an ATDS, the Commission can continue to help protect consumers against unlawful calls by bad actors seeking to circumvent the TCPA’s requirements. It can also incentivize compliance by good-faith callers (because, for example, they will know more clearly which technologies may be used only with prior express consent) and promote legitimate communications between those businesses and consumers. Such clarifications will also help stem the tide of unwarranted TCPA class action litigation against companies over confusion about the meaning of ATDS. Courts need clear and consistent standards for interpreting the TCPA, and the inconsistencies created by the *2015 TCPA Omnibus Order* have fostered a breeding ground for eager and unscrupulous plaintiffs’ attorneys.

These clarifications would also help the Commission address the concerns raised by the D.C. Circuit. The *2015 TCPA Omnibus Order* erroneously distorted the TCPA’s meaning and expanded it to potentially include devices such as smartphones and tablets.⁸ As Chairman Pai said in his dissent, “[r]ather than focus on the illegal telemarketing calls that consumers really care about, the *Order* twist[ed] the law’s words even further to target useful communications between legitimate businesses and their customers.”⁹ The 2015 interpretation also conflicted

⁷ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7975 ¶ 20 (2015) (“*2015 TCPA Omnibus Order*”)

⁸ The Commission interpreted the term “capacity” so broadly as to include a device “even if, for example, it requires the addition of software to actually perform the functions described in the definition.” *Id.* at 7975 ¶ 18.

⁹ *2015 TCPA Omnibus Order*, 30 FCC Rcd at 8073, Dissenting Statement of Commissioner Ajit Pai.

with Congressional findings and intent behind the TCPA.¹⁰ As recognized by the D.C. Circuit, “Congress enacted the TCPA . . . based on findings that the ‘use of the telephone to market goods and services to the home and other businesses had become ‘pervasive due to the increased use of cost-effective telemarketing techniques.’”¹¹ Accordingly, the D.C. Circuit vacated the FCC’s interpretation, noting that its interpretation of “capacity” was “an unreasonably expansive interpretation of the statute” and “considerably beyond the agency’s zone of delegated authority.”¹²

IV. THE COMMISSION SHOULD RESCIND PORTIONS OF ITS PRIOR GUIDANCE ON WHAT CONSTITUTES AN ATDS TO PROVIDE CLARITY TO PARTIES AND COURTS THAT THESE RULINGS NO LONGER APPLY.

The FCC should formally rescind inconsistent portions of its prior TCPA decisions interpreting what constitutes an ATDS to eliminate confusion in the courts.¹³ Given the D.C. Circuit’s sweeping criticism of the FCC’s 2015 guidance on what constitutes an ATDS and its decision to vacate that guidance, a number of courts have viewed the slate as having been wiped clean and have issued reasonable rulings based on the plain language of the statute.¹⁴ Yet, other

¹⁰ *Id.* at 8074 (“Had Congress wanted to define automatic telephone dialing system more broadly it could have done so by adding tenses and moods, defining it as ‘equipment which has, has had, or could have the capacity.’ But it didn’t. We must respect the precise contours of the statute that Congress enacted.”).

¹¹ *ACA Int’l v. FCC*, 885 F.3d at 692.

¹² *See id.* at 699 (finding the FCC’s interpretation had “the apparent effect of embracing any and all smartphones”)

¹³ *See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14093 (2003); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling*, Report and Order, 23 FCC Rcd 559, 556 (2008); *Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 15391, 15399 (2012).

¹⁴ *See Herrick v. GoDaddy.com LLC*, -- F.Supp. --, 2018 WL 2229131, at *1, *5 (D. Ariz. May 14, 2018) (granting defendant summary judgment on grounds that it “did not use an [ATDS]”; further holding that *ACA Int’l* “‘set aside’ . . . the FCC’s interpretations of “using a random or

courts have reached the opposite conclusion, putting consumers and financial institutions alike at risk of conflicting decisions. These courts have concluded that earlier FCC guidance may still be binding, including the finding that certain predictive dialers constitute an ATDS.¹⁵

As the D.C. Circuit pointed out, however, “[t]he agency’s prior rulings left significant uncertainty about the precise functions an [ATDS] must have the capacity to perform.”¹⁶ Moreover, the D.C. Circuit expressly rejected the argument that it lacked jurisdiction to “entertain petitioners’ challenge concerning the functions [an ATDS] must be able to perform” because the FCC’s prior rulings had concluded that a predictive dialer was an ATDS.¹⁷ The D.C. Circuit held that, while the *2015 TCPA Omnibus Order* “purported to ‘provid[e] clarification on the definition of ‘autodialer,’ ” it failed to deliver on that promise.¹⁸ The court thus found the FCC’s interpretation of “ATDS” reviewable, and set the FCC’s interpretation aside. Despite the D.C. Circuit’s clear holding setting aside the FCC’s interpretation of “ATDS,” some courts continue to look to the FCC’s prior uncertain guidance on this issue. To clear up the uncertainty, the Commission should formally rescind the relevant portions of that guidance that no longer

sequential number generator,” and as a result “declin[ing] to defer to any of the FCC’s ‘prior pronouncements’ regarding the first required function of an ATDS, i.e. whether a device has the capacity to store or produce telephone numbers ‘using a random or sequential number generator.’”) (citations omitted); *Marshall v. CBE Grp., Inc.*, No. 16-02406, 2018 WL 1567852, at *7 & n. 4 (D. Nev. Mar. 30, 2018) (same).

¹⁵ See *Reyes v. BCA Fin. Servs.*, 2018 U.S. Dist. LEXIS 80690, *31-32 (S.D. Fla. May 14, 2018) (holding that though ACA Int’l “has given the Court considerable pause[,] the Court finds that the prior FCC Orders are still binding”); *Maddox v. CBE Group, Inc.*, 2018 WL 2327037 (N.D. Ga. May 22, 2018) (holding that the 2003 FCC Ruling “[m]aking short-shrift of the requirement that an ATDS use ‘a random or sequential number generator,’ . . . has the force of law, and the Court is without authority to determine its validity”).

¹⁶ *ACA Int’l*, 885 F.3d at 701.

¹⁷ *Id.* at 701.

¹⁸ *Id.* a 702-03.

apply that are inconsistent with the TCPA’s statutory language and clarify whether any portions of the Commission’s prior guidance still remain in effect.

V. THE COMMISSION SHOULD CLARIFY THAT “CALLED PARTY” MEANS “INTENDED RECIPIENT.”

Millions of phone numbers are reassigned each year,¹⁹ and there is no perfect solution that can prevent all inadvertent calls to reassigned numbers.²⁰ As Commissioner O’Rielly recognized in his dissent to the *2015 TCPA Omnibus Order*, “companies acting in good faith to contact consumers that have consented to receive calls or texts are exposed to liability when customers’ numbers have been reassigned without their knowledge.”²¹

Congress did not intend for businesses to either subject themselves to litigation risk or entirely avoid contacting consumers solely to avoid TCPA class action lawsuits.²² Nor did Congress intend for businesses to divert resources away from meeting consumer demand for

¹⁹ See, e.g., *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Notice of Inquiry, CG Docket No. 17-59 ¶ 5 (2017) (“[A]pproximately 35 million telephone numbers are disconnected and aged each year” and “100,000 are reassigned by wireless carriers every day”); North American Numbering Plan Administrator Number Resource Utilization/Forecast Reports (average of aggregate numbers for the time period Jan. 1, 2013 through Dec. 31, 2016).

²⁰ *2015 TCPA Omnibus Order* at 8092, Dissenting Statement of Commissioner Michael O’Rielly (discussing the many “good practices that a number of parties routinely employ to minimize the risk of litigation over reassigned numbers” but noting “they are not foolproof, either individually or collectively”).

²¹ *2015 TCPA Omnibus Order* at 8092, Dissenting Statement of Commissioner Michael O’Rielly; *id.* at 8078 Dissenting Statement of Commissioner Ajit Pai (“The *Order* opens the floodgates to more TCPA litigation against good-faith actors for another reason as well. . . . [E]ven the most well-intentioned and well-informed business will sometimes call a number that’s been reassigned to a new person. . . . Even if a company has no reason to know its calling a wrong number, it’ll be liable.”).

²² See, e.g., *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Further Notice of Proposed Rulemaking, CG Docket No. 17-59 (rel. Mar. 23, 2018) Statement of Chairman Ajit Pai at 1 (“legitimate businesses, through no fault of their own, waste their time and effort calling the wrong consumers while subjecting themselves to potential liability under the [TCPA]”).

innovative services in order to offset the high cost of unwarranted TCPA litigation.²³ Therefore, the Commission should clarify that “called party” under the TCPA means “intended recipient,”²⁴ under all circumstances and that callers can reasonably rely on the consents that they obtain from intended recipients until callers learn of the reassignment. This better aligns with the Commission’s “reasonable reliance” approach to “prior express consent.” To demonstrate that they acted reasonably, callers should be able to point to a variety of steps, including for example:

- Providing a mechanism for the prior or current subscriber to notify the caller about a changed telephone number;
- Periodically seeking to verify contact information for an individual;
- Checking a third-party or FCC-administered reassigned number database solution; or
- Taking other reasonable steps.

If the Commission were to adopt any new reassigned numbers database requirements, it should provide a safe harbor for callers that check such database(s) but still inadvertently contact a reassigned number. While responsible companies may use a database to keep their call lists up to date and reduce calls to reassigned numbers, a database is not completely foolproof.²⁵ Given the volume of reassigned numbers and potential that numbers included in the database may not be updated real-time, the FCC should adopt a safe harbor as a backstop for good-faith callers.

²³ U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl* at 3 (Aug. 2017); *id.* at 1, 3 (reporting over 3,000 cases brought against companies in the 17-month period following the *2015 TCPA Omnibus Order*, many of which were against financial industry).

²⁴ *2015 TCPA Omnibus Order* at 8078, Dissenting Statement of Commissioner Ajit Pai (finding proposals for the FCC to interpret “called party” to mean “intended recipient” to be “by far the best reading of the statute”); *id.* at 8094, Dissenting Statement of Commissioner Michael O’Rielly (finding interpreting “called party” to mean “intended recipient” to be “reasonable” and “commonsense”).

²⁵ *2015 TCPA Omnibus Order* at 8092, Dissenting Statement of Commissioner Michael O’Rielly (noting that the reassigned numbers database contained “at best 80 percent of wireless numbers and is not updated in real time”).

Though the D.C. Circuit recognized that the Commission’s “reasonable reliance” approach did not support limiting a safe harbor to just one call or message, it also recognized that the Commission’s consideration of “whether to provide a safe harbor for callers that inadvertently reach reassigned numbers after consulting a database would naturally bear on the reasonableness of calling numbers that have in fact been reassigned and have greater potential to give full effect to the Commission’s principle of reasonable reliance.”²⁶ Accordingly, the Commission already has the authority to implement rules establishing a safe harbor.

VI. THE COMMISSION SHOULD PROVIDE ADDITIONAL CLARITY REGARDING WHAT CONSTITUTES REASONABLE CONSENT REVOCATION.

The Commission should confirm that providing certain consent revocation options qualifies as “reasonable means.” In 2015, the Commission found (and the D.C. Circuit confirmed in *ACA International*) that called parties may reasonably revoke their consent.²⁷ However, as the court acknowledged, “the statute does not elaborate on the processes by which consumers may validly do so,” and the Commission adopted a “totality of the facts and circumstances” test for assessing reasonableness that the petitioners in *ACA International* challenged as being vague.²⁸ AFSA recommends that the Commission provide much-needed certainty for consumers and businesses alike by confirming that certain means of consent revocation qualify as “reasonable,” including for example by offering an opt-out mechanism by phone, letter, website form, or e-mail. Additional methods for text messaging programs could include supporting “STOP” replies or similar approaches. These methods can be sufficiently clearly defined and easy to use.

²⁶ *ACA International*, 885 F.3d at 709.

²⁷ *2015 TCPA Omnibus Order* at 7997 ¶ 66; *ACA International*, 885 F.3d at 709.

²⁸ *2015 TCPA Omnibus Order* at 7996 ¶ 64 n.233.

The Commission should also confirm that parties may engage in bilateral contracts that determine consent revocation methods. The D.C. Circuit clarified that nothing in the *2015 TCPA Omnibus Order* precluded the ability of parties to agree upon revocation procedures.²⁹ Consumers today are sophisticated communicators and may appreciate the ability to tailor their modes of engagement with companies. Allowing companies and their customers to contractually agree to revocation mechanisms will promote transparency, give consumers more clarity on how to revoke consent, and provide businesses with more tools to identify and honor customers' consent revocations. Companies and their customers should not be required or expected to agree to the entire universe of opt-out methods but should be able to agree upon those that can be sufficiently clearly defined and easy to use to stop unwanted calls and text messages.

VII. THE COMMISSION SHOULD SUPPORT A REASONABLE INTERPRETATION OF THE BALANCED BUDGET ACT TCPA AMENDMENT AND EXEMPT ALL DEBT COLLECTION CALLS FROM THE SCOPE OF THE TCPA.

The Commission should expand the current federal debts exemption to include other debt collection calls—not just those made solely to collect a debt owed to or guaranteed by the United States. Congress recognized that an exemption for federal debt calls would support efforts to provide much-needed outreach to borrowers and result in millions of dollars in defaulted debt being collected. The same public interest benefits apply equally to private lenders.

AFSA also encourages the Commission to increase the three-calls-per-month limit on the number of exempt calls, and to not impose a limit on the duration of exempt calls. The three-calls-per-month standard is arbitrary and fails to take into account how many calls and other communications are required to help borrowers avoid further delinquency and default. For

²⁹ *ACA International*, 885 F.3d at 710.

example, it often takes more than three calls to determine why the customer is delinquent and which loss mitigation option would best benefit a borrower.

Limiting the duration of exempt calls and the length of exempt texts is unnecessary and potentially counterproductive. For instance, limiting call duration may require a caller to hang up mid-conversation, which could lead to customer dissatisfaction and ultimately require additional calls to that customer. And businesses have an interest in keeping texts short to avoid confusing their customers. In situations where a lengthy text would be required, it may be more efficient for a company to have a two-way, real-time dialogue with the customer over the phone.

The Commission should also defer to the Bureau of Consumer Financial Protection (“Bureau”) to regulate debt collection calls. This question is far afield from the FCC’s expertise on the underlying and consumer-facing communications technologies covered by the TCPA. The Bureau is explicitly tasked with regulating “the offering and provision of consumer financial products or services.”³⁰ The FCC should focus on reforming the aspects of the TCPA framework, including the ATDS definition and reassigned numbers issues discussed above, and defer other debt collection matters to the Bureau.

VIII. OTHER ISSUES

AFSA encourages the Commission to grant the American Bankers Association (“ABA”) Petition for Reconsideration regarding the free-to-end-user exemption for certain time-sensitive

³⁰ *See About Us*, Bureau of Consumer Financial Protection, <https://www.consumerfinance.gov/about-us/> (last visited June 5, 2018); Comments of the Bureau, CG Docket No. 02-278, at 2, 5 (June 6, 2016) (“The Bureau has significant experience with debt collection and servicing through its supervisory, enforcement, regulatory, market monitoring, research, and consumer engagement and engagement activities. . . . In addition to the supervision of debt collectors, the Bureau supervises entities in connection with servicing loans. . . . The [Bureau] has a strong interest in ensuring that the FCC’s regulations do not interfere with consumer protections that fall under the Bureau’s authority.”).

financial calls.³¹ The current exemption only allows calls and text to be sent to “the wireless telephone number provided by the customer of the financial institution.”³² AFSA agrees with the ABA that the exemption is unduly restrictive (and therefore arguably makes the exemption superfluous), as financial institutions would only be able to make a call or text if the customer had already given their phone number. Financial institutions often have customer phone numbers from other sources and should be able to call those numbers in time-sensitive situations. As one bank reported, it would only be able to contact 25 percent of its customers in the event of fraud or a data breach under the current exemption.³³ The provided-number restriction undermines the purpose of the exemption and is unnecessary to facilitate critical outreach to consumers.³⁴ The exemption is also unnecessary to protect consumers’ privacy or prevent the receipt of anti-fraud-related messages not intended for them because companies are already required to give consumers an easy means to opt out of messages.

The Commission should also grant the Federal Housing Finance Agency (“FHFA”) Request for clarification regarding servicer calls after a natural disaster. In September 2017, FHFA submitted an urgent request that the Commission clarify that the TCPA consent obligations do not apply to mortgage servicers attempting to provide assistance for homeowners affected by Hurricanes Harvey and Irma.³⁵ In October 2017, FHFA reiterated its request that the

³¹ See Petition for Reconsideration of the American Bankers Association, CG Docket No. 02-278, WC Docket No. 07-135 (Aug. 8, 2015) (“ABA Petition”).

³² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, American Bankers Association Petition for Exemption*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order ¶ 138(1) (2015) (“ABA Order”).

³³ ABA Petition at 7.

³⁴ ABA Order ¶ 132.

³⁵ Federal Housing Finance Agency Request Re: Hurricane Relief — Request for Expedited Response, CC Docket No. 02-278 (Sept. 13, 2017) (“FHFA September Request”).

Commission declare that mortgage servicers may make autodialed calls to borrowers, regardless of whether lenders have prior express consent or not, to provide information regarding mortgage assistance in the aftermath of a natural disaster.³⁶

AFSA agrees with FHFA that the Commission should issue a declaratory ruling exempting disaster-affected areas from the scope of the TCPA. As AFSA members are well aware, when a borrower provides a phone number, they anticipate receiving communications that affect their mortgage. And as the Commission itself has recognized, “persons who knowingly release phone numbers have in effect given their invitation or permission to be called.”³⁷ In the case of a disaster, borrowers seek prompt notice that their payment obligation is suspended, that they should be aware of potential fraud scams, and that they may qualify for a mortgage loan modification or other relevant matters provided by a reputable service provider. FHFA explained that even though “emergency purposes” calls are exempt from the TCPA, servicers are hesitant to use autodialers given the lack of clarity regarding this exemption. Mortgage servicers have important information to provide to borrowers, and borrowers often only have their cell phone since they are forced to evacuate with limited possessions and in a timely fashion.

³⁶ Federal Housing Finance Agency Request Re: Hurricane Relief — Request for Expedited Response, CC Docket No. 02-278 (Oct. 3, 2017) (“FHFA October Request”).

³⁷ *1992 TCPA Order*, 7 FCC Rcd at 8769 ¶ 31.

IX. CONCLUSION.

For the foregoing reasons, the Commission should adopt AFSA's proposals for addressing key TCPA issues to better protect consumers and support important communications from good-faith callers.

Respectfully submitted,

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