

November 23, 2020

Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

Re: Notice of *Ex Parte* Presentation, *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-278

Dear Ms. Dortch:

On November 19, 2020, representatives of the American Bankers Association (ABA), ACA International, American Association of Healthcare Administrative Management (AAHAM), American Financial Services Association, Consumer Bankers Association, Credit Union National Association, and National Association of Federally-Insured Credit Unions (collectively, the Associations) met by phone with members of the Federal Communications Commission's (Commission) Consumer and Governmental Affairs Bureau.¹ The purpose of the meeting was to discuss the Notice of Proposed Rulemaking (Notice)² issued by the Commission to implement

¹ The meeting's participants are listed in the Attachment.

² Notice of Proposed Rulemaking, *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-278, 85 Fed. Reg. 64,091 (Oct. 9, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-10-09/pdf/2020-22331.pdf> (Notice). The Associations individually submitted comment letters during the comment period, which expand upon the arguments made in this *ex parte* letter. *See* Comments of American Bankers Association, CG Docket No. 02-278 (Oct. 26, 2020), <https://www.aba.com/advocacy/policy-analysis/aba-seeks-to-facilitate-informational-calls-to-bank-customers> (ABA Comments); Comments of Credit Union National Association, CG Docket No. 02-278 (Oct. 26, 2020), <https://www.fcc.gov/ecfs/filing/10260604520841> (CUNA Comments); Reply Comments of Credit Union National Association, CG Docket No. 02-278 (Nov. 3, 2020), <https://www.fcc.gov/ecfs/filing/1103181721184> (CUNA Reply Comments); Comments of Consumer Bankers Association, CG Docket No. 02-278 (Oct. 26, 2020), <https://www.consumerbankers.com/cba-issues/comment-letters/cba-comment-letter-re-exemptions-implemented-under-tpa-1991>; Comments of American Financial Services Association, CG Docket No. 02-278 (Nov. 3, 2020), <https://www.fcc.gov/ecfs/filing/11033075814296>; Comments of National Association of Federally-Insured Credit Unions, CG Docket No. 02-278 (Nov. 2, 2020), <https://www.fcc.gov/ecfs/filing/1102916229482>.

section 8 of the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act or the Act).³

The Telephone Consumer Protection Act (TCPA) ordinarily prohibits certain calls and text messages using an automatic telephone dialing system or prerecorded or artificial voice, unless the caller has the prior express consent of the called party or the call is placed under an exemption to that consent requirement.⁴ The TRACED Act requires the Commission to perform a review of certain TCPA exemptions. Specifically, section 8 of the TRACED Act requires the Commission to prescribe or amend its regulations to ensure that any exemption to the TCPA adopted pursuant to 47 U.S.C. §§ 227(b)(2)(B)-(C) contains certain baseline requirements.⁵ Pursuant to this provision, the Commission sought comment on whether any of the TCPA's exemptions requires amendment.

Informational Calls to Residential Numbers. During the meeting, the Associations urged the Commission not to impose additional restrictions on the existing exemption for informational calls placed to residential telephone numbers (Informational Calls Exemption).⁶ The TRACED Act does not require the Commission to impose a numerical limit on the number of exempted calls that may be placed. The Act requires only that the Commission “ensure” that the Informational Calls Exemption “*contains requirements . . . with respect to . . . the number of such calls that a calling party may make to a particular called party.*”⁷ If the Commission determines that a caller should not be limited in the number of calls it places under the Exemption, that determination would constitute the Commission's establishment of a requirement regarding the number of permissible exempted calls. This would satisfy the TRACED Act's mandate.

A numerical limitation also is not needed or warranted because there is no evidence that informational calls to residential numbers cause the harm that Congress sought to address in the TCPA or the TRACED Act. Congress passed the TCPA in 1991 to combat abusive telemarketing, not informational calls placed to customers regarding the customer's account.⁸

³ Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act), Pub. L. No. 116-105, 133 Stat. 3274, § 8 (2019).

⁴ Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227 *et seq.* (2012).

⁵ TRACED Act, *supra* note 3, § 8.

⁶ *See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8770-71 ¶ 34 (1992).

⁷ TRACED Act, *supra* note 3, § 8(a)(3) (emphasis added).

⁸ *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(1), 105 Stat. 2394 (2012) (observing the “increased use of cost-effective telemarketing techniques”); S. Rep. No. 102-178, at 1 (1991) (“The use of automated equipment to engage in telemarketing is generating an increasing number of consumer complaints.”); H.R. Rep. No. 102-317, at 6 (1991) (observing that automatic dialing systems permit telemarketers to provide a message to potential customers “without incurring the normal cost of human intervention”).

Last year, Congress passed the TRACED Act to combat *illegal* and *unsolicited* automated calls.⁹ Again, Congress did not target informational calls containing important account-related information. Instead, Congress has concluded that automated informational calls from legitimate companies “can benefit consumers” by providing valuable, timely, and often urgent information.¹⁰ In many instances, these calls “can have life or death consequences for the intended recipient.”¹¹

No Commission-adopted numerical limitation could realistically account for the variety of use cases and industry-specific calling practices currently in place today. As one example, healthcare companies may have a need to place a greater number of calls today than previously, to provide information relating to the COVID-19 pandemic. As another example, in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress granted the Consumer Financial Protection Bureau (CFPB) exclusive authority to write rules to implement the Federal Debt Collection Practices Act in order to protect consumers from unfair, deceptive, and abusive debt collection practices.¹² The CFPB recently issued a final rule that limits the number and frequency of calls that third-party collectors may place to consumers.¹³ The Commission should defer to the CFPB’s policy judgment — developed over seven year of research on this issue, including consumer surveys — on the appropriate number of collections-related calls that may be placed to consumers. The Commission should not impose any limitations that would be inconsistent with the CFPB’s final rule. More broadly, a one-size-fits-all limitation on exempted calls is not workable because it would have significant impacts on a wide array of industry practices and other regulatory efforts outside of the Commission.

A numerical limitation on the number of calls that may be placed under the Informational Calls Exemption also would impair the ability of banks, credit unions, other financial services providers, health care companies, and other businesses to communicate with their customers, and may impede their ability to comply with a regulatory requirement. For example, in the context of mortgage servicing, the CFPB’s rules require a servicer to make a good faith effort to establish

⁹ The Senate’s report on the TRACED Act makes clear that the legislation is intended to combat illegal and unsolicited calls. *See* S. Rep. No. 116-41, at 1-2 (2019) (“Unsolicited robocalls are among the top consumer complaints to the FCC, the Federal Trade Commission (FTC), and many State attorneys general.”); *id.* at 2 (“Illegal and abusive robocalls are a clear problem.”); *id.* (“Consumers today are increasingly plagued by illegal robotic or prerecorded messages.”); *id.* (“The legislation provides the Commission flexibility to adopt rules . . . to combat unlawful calls and texts . . .”).

¹⁰ S. Rep. No. 116-41, at 2.

¹¹ *Id.* at 3.

¹² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 2092 (2010).

¹³ Debt Collection Practices (Regulation F), Docket No. CFPB-2019-0022 (Oct. 30, 2020) (to be codified at 12 C.F.R. pt. 1006), https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_final-rule_2020-10.pdf.

live contact, which “may include telephoning the borrower on more than one occasion”¹⁴ Frequently, a caller receives a busy signal, answering machine, or no answer when calling a number, requiring the caller to dial the called party’s number multiple times before making “live contact.” It is critical that the Commission not discourage financial institutions’ mortgage servicing or other informational calls to its customers by imposing a numerical limitation on calls to residential numbers. If institutions are subject to litigation or regulatory risk for exceeding a numerical limitation on such calls, the institutions will be discouraged from contacting their customers.

One large bank provided the following statements of customer appreciation for the bank’s attempts to reach customers on the phone to help resolve delinquency or offer payment deferments or other assistance during the COVID-19 pandemic:

- “Oh my, if you could do that you would be my guardian angel [referring to the bank’s offer of a payment option]. Thank you! I just really appreciate your patience and your help. You don’t know what that means to me. It will definitely help me to move in the right direction. And again, thank you for being my guardian angel today. I don’t know what I would have done if you didn’t have anything to offer me because I have exhausted everything.”
- “Oh, my Gosh! This is huge! Thank you! Everyone I have talked to (you are the fourth person) has been amazing and really understanding, and I do appreciate it. This is really tough and I appreciate all your guys’ help [with payment assistance]!”

The Associations also expressed concern with the Commission’s proposal to prohibit a caller from placing additional calls under the Informational Calls Exemption after the called party has made a request to “opt out” of future calls from the caller.¹⁵ Under the proposal, the Commission would require the caller to provide an automated opt-out mechanism for the called party to make a do-not-call request and require the caller to maintain records of individuals who have opted out of additional informational calls. As described in the Notice, the proposed opt-out regime would apply the Commission’s existing rules, which require callers that place telemarketing calls to record a recipient’s request not to receive telemarketing calls on a company-specific do-not-call list, to callers that place informational calls.¹⁶

Under a broad opt-out right, it may be very difficult for a caller to ensure that its customers’ intentions are understood and carried out. In the context of a customer’s revocation of consent to receive autodialed calls to wireless numbers, many customers’ expressions of possible revocation are unclear as to whether the customer wants to revoke consent to receive all calls, to revoke consent to receive a certain type of call, or to revoke consent to receive calls relating to a certain

¹⁴ 12 C.F.R. § 1024.39(a) (2020) (comment 39(a)-3).

¹⁵ Notice, 85 Fed. Reg. at 64,092.

¹⁶ See 47 C.F.R. § 64.1200(d).

account with the institution.¹⁷ The risk of a TCPA claim may lead institutions to interpret *any* statement by a customer of a potential desire to opt out — however ambiguous — as a request to opt out of receiving *all* autodialed informational calls to the customer’s residential number.

The TCPA directed the Commission to establish a regime for allowing consumers who do not wish to receive *telemarketing* calls to be protected from doing so.¹⁸ This regime imposes obligations on callers to have a written policy regarding its do-not-call list, to train employees on the policy, and to record the do-not-call requests of call recipients. The Commission’s proposal would apply these do-not-call requirements to *informational* (non-telemarketing) calls, despite the absence of a specific mandate from Congress to impose such requirements on informational calls. In so doing, the proposal would impose burden on callers, particularly smaller businesses that do not engage in telemarketing and have had no reason to set up a do-not-call regimen.¹⁹

Financial Institution Calls. The Associations representing financial institutions also addressed the exemption to the TCPA for financial institutions to place free-to-end-user fraud alerts, data breach notifications, remediation messages, and messages regarding actions needed to arrange for receipt of pending mobile money transfers, to wireless telephone numbers. This exemption also remains in the public interest because banks, credit unions, and other financial institutions must be able to contact customers quickly to alert them to fraud on an account, a breach of personal information, or necessary remediation action. As ABA and others have noted in previous filings, the Commission imposed conditions on use of the exemption that thwart its purpose. The Associations urged the Commission to remove the condition that permits exempted calls only to a number provided by the customer. We also asked the Commission to permit three exempted breach and fraud-related messages to each authorized user on the account, and to clarify that a message that protects the consumer from fraud or identity theft may exceed the 160-character limit if the content in the message is limited to certain specified information.²⁰

¹⁷ In its individual comment letter, ABA urged the Commission, if it establishes an opt-out right, to require that a customer may opt out only through “clearly-defined and easy-to-use opt-out methods” provided by the bank or other business. *See* ABA Comments, *supra* note 2, at 8-9. This is the standard suggested by the U.S. Court of Appeals for the District of Columbia Circuit in its 2018 decision in *ACA International v. FCC*, which addressed the manner in which a consumer may revoke consent to receive autodialed calls under the TCPA. *ACA Int’l v. FCC*, 885 F.3d 687, 709 (D.C. Cir. 2018). This standard protects consumers and callers alike by ensuring that opt-out requests are clear and can be efficiently processed.

¹⁸ *See* 47 U.S.C. § 227(c)(1) (directing the Commission to initiate a rulemaking to protect consumers from “receiving telephone solicitations to which they object”).

¹⁹ The concerns regarding the proposal to impose do-not-call list obligations on informational callers are addressed extensively in the CUNA Comments and CUNA Reply Comments. *See* CUNA Comments, *supra* note 2; CUNA Reply Comments, *supra* note 2.

²⁰ For a more in-depth discussion of these requests, *see* ABA Comments, *supra* note 2, at 9-14.

Healthcare Calls. AAHAM expressed support for keeping the healthcare exemption for wireless calls and the exemption for HIPAA calls to a residence. Moreover, AAHAM urged the Commission to grant as part of this proceeding AAHAM's 2016 petition,²¹ which seeks two clarifications regarding healthcare-related communications under the TCPA and the FCC's *2015 Omnibus TCPA Order*.²²

1. That the provision of a phone number to a "covered entity" or "business associate" (as those terms are defined under Health Insurance Portability and Accountability Act of 1996 (HIPAA)) constitutes prior express consent for non-telemarketing calls allowed under HIPAA for the purposes of treatment, payment, or healthcare operations.
2. That the prior express consent clarification in paragraph 141 and the non-telemarketing healthcare message exemption granted in paragraph 147, both in the *2015 Omnibus TCPA Order*, be clarified to include HIPAA "covered entities" and "business associates." Specifically, each use of the term "healthcare provider" in paragraphs 141 and 147 of the *2015 Omnibus TCPA Order* should be clarified to encompass "HIPAA covered entities and business associates."

AAHAM asserted that, to date, there has been an outpouring of support for AAHAM's petition from healthcare stakeholders,²³ along with bipartisan support among members of the House²⁴

²¹ Joint Petition of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management for Expedited Declaratory Ruling and/or Clarification of the 2015 TCPA Omnibus Declaratory Ruling and Order, CG Docket No. 02-278 (filed July 28, 2016).

²² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) ("*2015 Omnibus TCPA Order*"), *rev'd in part by ACA Int'l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

²³ See generally Comments of the Ass'n. for Community Affiliated Plans, CG Docket No. 02-278 (Aug. 26, 2016); Comments of AAHAM, CG Docket No. 02-278 (Sept. 16, 2016) (AAHAM Comments); Comments of CareMessage, CG Docket No. 02-278 (Sept. 16, 2016); Comments of Nat'l Ass'n. of Chain Drug Stores, CG Docket No. 02-278 (Sept. 16, 2016); Comments of America's Health Insurance Plans, CG Docket No. 02-278 (Sept. 19, 2016) (AHIP Comments); Comments of Cardinal Health, Inc., CG Docket No. 02-278 (Sept. 19, 2016); Comments of AmeriHealth Caritas, CG Docket No. 02-278 (Sept. 19, 2016); Comments of Eliza Corporation, CG Docket No. 02-278 (Sept. 19, 2016); Comments of Envision Insurance Co., CG Docket No. 02-278 (Sept. 19, 2016); Comments of mPulse Mobile, Inc., CG Docket No. 02-278 (Sept. 19, 2016); Comments of Mercy Hospital, CG Docket No. 02-278 (Sept. 15, 2016); Comments of Silverlink Communications, LLC, CG Docket No. 02-278 (Sept. 19, 2016); Comments of TracFone Wireless, Inc., CG Docket No. 02-278 (Sept. 19, 2016); and Comments of United HealthCare, CG Docket No. 02-278 (Sept. 19, 2016). There were also an additional 31 comments from individuals in support of the Joint Petition.

²⁴ See Letter from Rep. Gus Bilirakis, *et al.* to FCC Chairman Ajit Pai, at 1 (Oct. 13, 2017) (asking Chairman Pai to act promptly to "afford clarity to covered entities and business associates making non-marketing communications that benefit patients" and observing that

and Senate.²⁵ The Commission has been presented with substantial evidence that granting the Joint Petition will advance the Commission’s telehealth agenda by improving health outcomes while lowering costs.²⁶ Telehealth services are growing rapidly.²⁷ Healthcare providers that have committed to incorporating telehealth services into their overall care delivery strategy have witnessed this growth firsthand. For example, at Stanford Children’s Health, “[t]he number of virtual visits . . . has exploded over the past two years, rising from just 192 in 2017 to more than 1,100 in 2018, and more than 1,500 already in the first few months of 2019.”²⁸ The reason for this growth is simple — telehealth provides convenience and value for patients “accessing care for minor health conditions.”²⁹

AAHAM contended in the meeting that the ongoing pandemic and Americans’ increasing reliance on telemedicine has fundamentally altered how Americans receive health care and their expectations for receiving communications from their health care providers. The imposition of additional limits on otherwise HIPAA-protected communications runs contrary to this shift in how health care is delivered and the expectations Americans have around how their doctors will communicate with them. Accordingly, AAHAM asked the Commission to grant AAHAM’s petition and clarify the specific language of the healthcare exemption as part of this proceeding.

* * * * *

“helpful, important non-marketing communications can be critical safeguards to reaching underserved populations and supporting more effective, efficient health care.”).

²⁵ See Letter from Sens. Corey Booker and Bill Nelson to FCC Chairman Ajit Pai, at 1 (Nov. 3, 2017) (noting that the calls and text messages subject to the Joint Petition convey “important medical and treatment information” and “improve patient outcomes” and stating that “time is of the essence to ensure that consumers’ access to health care is not jeopardized” and asked the FCC to “resolve these issues as soon as possible (preferably within the next 90 days) and to protect communications allowed under HIPAA in light of their unique value to consumers and their positive impact on Americans’ health and well-being.”).

²⁶ See Letter from Mark W. Brennan and Arpan A. Sura, Counsel to AAHAM, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, WC Docket. No. 18-213 (Dec. 5, 2018) (collecting references).

²⁷ See Steven Ross Johnson, *Modern Healthcare, Low Adoption of Telemedicine May Spur Patient Migration Away from Traditional Providers*, <https://bit.ly/2TWVCqm> (Mar. 23, 2019) (“[T]elehealth services have grown by 44% over the past five years, . . . with a total market revenue of \$2 billion in 2018.”).

²⁸ *Id.*

²⁹ *Id.*

The Associations appreciate the Commission's consideration of the views expressed in this letter.

Sincerely,

A handwritten signature in black ink that reads "Jonathan Thessin". The signature is written in a cursive style with a large, looping initial "J".

Jonathan Thessin
Vice President/Senior Counsel
Consumer & Regulatory Compliance
Regulatory Compliance and Policy

APPENDIX

Meeting Attendees

Commission's Consumer and Governmental Affairs Bureau

Mark Stone
Aaron Garza
Kurt Schroeder
Kristi Thornton
Richard Smith
Jerusha Burnett

Associations

Jonathan Thessin, American Bankers Association
Mark Brennan and Arpan Sura, Hogan Lovells (Counsel for the American Association of
Healthcare Administrative Management)
Damon Smith, Credit Union National Association
Michael Pryor, Brownstein Hyatt Farber Schreck (Counsel for the Credit Union National
Association)
Leah Dempsey, ACA International
Stephen Congdon, Consumer Bankers Association
Elizabeth LaBerge, National Association of Federally-Insured Credit Unions
David Androphy, American Financial Services Association