ACA INTERNATIONAL
The Association of Credit and Collection Professionals

December 4, 2020

VIA ECFS

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

Re: Ex Parte Presentation
CG Docket No. 02-278

Dear Ms. Dortch:

ACA International[1] writes with major concerns about a recent proposal to curtail the Telephone Consumer Protection Act's ("TCPA") time-tested exemptions for certain non-marketing calls to residential landlines.[2] After decades of unqualified success, a single commenter now asks the Commission to require callers to operationalize new opt-out, internal recordkeeping compliance, and call-frequency limitations. The record confirms that new restrictions remain wholly unnecessary today and in many instances would prevent some of the most vulnerable consumers from receiving important, time-sensitive information. For these and other reasons discussed below, the Commission should reject this proposal.

[1] ACA International is the leading trade association for credit and collection professionals. Founded in 1939, and with offices in Washington, D.C. and Minneapolis, Minnesota, ACA represents approximately 3,000 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates in an industry that employs more than 230,000 employees worldwide. ACA members include small businesses that operate within a limited geographic range of a single state and large, publicly held, multinational corporations that operate nationwide. The majority of ACA-member debt-collection companies, however, are small businesses. ACA members work to help consumers understand, address, and improve their financial situation. ACA members are also consumers, and like many consumers, ACA's members greatly dislike fraudulent and illegal robocalls.

[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, 35 FCC Rcd. 11186 ¶¶ 11-15 (2020) (NPRM). As used herein, the "non-marketing exemptions" refer to (1) the exemption for calls "made for a commercial purpose but [that] do[] not include or introduce an advertisement or constitute telemarketing"; and (2) the exemption for calls "not made for a commercial purpose." *See id.*

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Imposing new requirements and restrictions on the ability of legitimate callers to place non-marketing, informational calls to residential landlines—most notably the inscrutable "one-call-per-event" limitation proposed by the National Consumer Law Center ("NCLC") for informational calls[3]— is unnecessary and contrary to the public interest. Moreover, given the specific text of the TRACED Act and its legislative history,[4] as well as the state of the Commission's record in this proceeding, adopting NCLC's proposed restrictions or other call limits would be arbitrary, capricious, and unlawful under the Administrative Procedure Act and the First Amendment. And action here would be legally unnecessary: new opt-out or message-frequency limitations on the non-marketing exemptions are not required by the TRACED Act.

If, however, the Commission were to move forward with any new requirements or restrictions on the TCPA exemption for prerecorded non-marketing calls to residential landlines, it should adopt a safe harbor when callers comply with other federal regulations that already govern telephonic outreach and ensure that such requirements or restrictions do not create tension with other federal law. As one notable example, the Consumer Financial Protection Bureau's ("CFPB") recent debt-collection rule establishes a limit of **seven calls per week** among other things. If callers—like ACA's members—comply with the CFPB's call limits, they should not be subject to conflicting FCC conditions on the number of calls allowed under the non-marketing exemptions.[5]

* * *

The time-tested exemption for non-marketing calls to residential landlines is woven into the TCPA's original fabric. The exemptions were adopted in the *1992 TCPA Order*,[6] the Commission's very first action to implement the TCPA. In the *1992 TCPA Order*, the Commission found that artificial or prerecorded-voice messages that do not seek to sell a product or service do not tread heavily upon the consumer interests implicated by the TCPA.[7] At the

[3] *See* Comments of National Consumer Law Center, CG Docket No. 02-278, at 9 (filed Oct. 26, 2020) ("NCLC Comments").

[4] U.S. Senate. Committee on Commerce, Science, and Transportation for the 116th Congress. (116 S. Rpt. 41), *available at* https://www.congress.gov/116/crpt/srpt41/CRPT-116srpt41.pdf ("The majority of companies who use robocalls are legitimate companies. And valid robocalls can benefit consumers. Many important services are carried out via robocalls when institutions and call recipients have established a prior relationship: pharmacies provide updates to consumers that a prescription is ready for pick up; school closing announcements provide families with important and timely information; banks provide customers with fraud alerts, data security breaches, and even calls to convey measures consumers may take to prevent identity theft following a breach; auto manufacturers can warn vehicle owners of urgent safety recalls. These legitimate calls can have life or death consequences for the intended recipient.").

[5] Of course, the CFPB's call limitations may not apply with equal force to other classes of non-marketing callers that rely on the exemption, and the Commission should not impose separate limits on those parties without robust factfinding.

[6] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, ¶ 41 (1992) (*1992 TCPA Order*).

[7] *See id.*

time, the Commission did not impose call-frequency limitations or require callers to develop means for a called party to opt out of such exempted calls.

In the years following the *1992 TCPA Order*, the Commission had numerous opportunities to curtail the non-marketing exemptions through call-frequency or opt-out provisions. But it did not. Even when the Commission eliminated the existing business relationship exemption in the *2012 TCPA Order*,[8] the agency refrained from disrupting the non-marketing exemptions and imposing new conditions on their use. Most recently in the *2015 TCPA Order*,[9] the Commission adopted a new standard for revocation of consent, but here again the Commission left the non-marketing exemptions unchanged.

The Commission has never determined that new restrictions on the non-marketing exemptions are warranted. And commenters, including in this proceeding, have not presented the Commission with any—let alone, any compelling—evidence to change course since 1992. Absent new evidence to the contrary, any new restrictions would be highly susceptible to judicial invalidation as arbitrary and capricious.[10]

The exemption supports a wide variety of use cases and cannot be wholesale limited as the NPRM presumes. The Commission has ample evidence in the record describing the numerous and varied examples of calls made under the exemption for prerecorded calls to residential landlines. Examples include calls placed by healthcare providers, researchers and survey professionals, political campaigns, package delivery companies, financial institutions, the accounts receivable industry, and more.

Unlike other exemptions that may be limited to specific industries or callers, it is not feasible to ascertain a one-size-fits-all rule to govern these industry-spanning calls without a copious evidentiary record. A specific call limit, for example, may adequately cover school closing notifications but not healthcare messages during the COVID-19 pandemic. Nor would the same limit cover time-sensitive utility outages or identity theft notifications. No party has identified an administrable and fact-based standard to develop rules that would cover many, much less all, of these use cases. Nor has anyone provided any data related to a cost-benefit analysis of such changes.

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[8] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830 (2012) (*2012 TCPA Order*).

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

[10] *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (holding that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."); *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (noting that an agency has a duty to "explain its departure from prior norms").

Adopting NCLC's amorphous criteria would be arbitrary and capricious and unconstitutional. NCLC proposes one message "per event" for non-marketing prerecorded messages to residential landlines.[11] If the Commission were to adopt that standard, it would almost certainly be vacated on appeal for numerous reasons.

- **First, the Administrative Procedure Act prohibits the Commission from plucking numerical limits out of thin air without supporting record evidence.**[12] Here, NCLC has made no empirical or qualitative attempt to justify one message "per event," let alone show why a single numerical standard should apply with equal force for school closing notifications, hospital follow-up calls, utility outage notifications, identity theft notifications and follow-ups, as well as other calls from political campaigns, package delivery companies, educational institutions, banks, credit professionals, and other non-marketing callers that face a wide panoply of different business requirements and federal regulations. And the Commission has no record evidence showing why a specific number will adequately cover all—or even a reasonable number of—industries, callers, or non-marketing use cases. Although the Commission will receive some deference in drawing numerical lines, it must at least do so based on "a rational connection between the facts found and the choice made."[13] Adopting NCLC's standard based on the state of the record—which supplies no evidence whatsoever—would not meet that baseline for lawful agency action.

- **Second, the Commission lacks any rational basis to draw numerical limitations that are more restrictive than those already in the FCC's rules.** Compared to other exemptions, the limitation proposed by NCLC is arbitrarily narrow. The wireless healthcare exemption for calls to a wireless number limits the number of calls to one message/call per day, up to a maximum of three voice calls or text messages combined per week.[14] For calls from inmate service providers to wireless phones, the Commission adopted limits of three notifications following an unsuccessful collect call.[15] The Commission limits exempted financial institution calls to no more than three calls to wireless phones per event over a three-day period for each affected account.[16] And as

[11] NCLC also proposes that transactional calls that are related to debt collection should be limited to three calls per thirty days per person called, and other transactional calls to confirm or complete a transaction that the called party has initiated, the limit should be two calls per action that the called party needs to take. *See* NCLC Comments at 3. These limitations suffer from similar legal and constitutional infirmities.

[12] *See Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1137 (D.C. Cir. 2001) (invalidating the FCC's 40% vertical concentration limit for cable ownership); *Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148, 164 (D.C. Cir. 2002) (invalidating the FCC's "eight voices" test for media ownership).

[13] *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1404-05 (D.C.Cir.1995) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

[14] *See 2015 TCPA Order* ¶ 147.

[15] *See id.* ¶ 45.

[16] *See id.* ¶ 138.

discussed below, the CFPB recently adopted a limit of seven collection calls per week. If the Commission draws lines, it must have a reasoned basis to explain why the line it draws here is more restrictive than lines drawn before – including what would be in some cases for the exact same call content. NCLC has supplied the Commission with no reasoning, and no such justification exists to draw the arbitrary lines NCLC recommends.

- **Third, NCLC's "per-event" trigger is unconstitutionally vague.** The Due Process Clause of the Fifth Amendment requires federal agencies to give fair notice of conduct that is forbidden or required.[17] The void-for-vagueness doctrine is especially salient when the government restricts speech, as is the case with the case with the TCPA. That is why courts invalidate laws that are impermissibly vague and "fail[] to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[18] Even when speech is not at issue, (1) "regulated parties should know what is required of them so they may act accordingly," and (2) "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."[19]

  NCLC's per-event standard does neither. It leaves regulated parties guessing at what qualifies as an "event" and whether calls qualify for the exemption. This ambiguity is fatal, not a trivial edge case. For example, a caller that discovers fraud on day 1 and sends an update on day 180 may be exposed to millions (or billions) in class action damages based on whether the "event" is the discovery of the fraud or the subsequent update.[20] This type of uncertainty will certainly chill lawful speech and prevent calls to some at-risk consumer populations.

  Under any standard of scrutiny, such a restriction is unlawful. As Commissioner O'Rielly previously noted, a per-event scenario does not account for a situation "where, a week later, the institution determines that the event was broader in scope than initially anticipated and the institution needs to provide updated information to its customers; for example, about additional information that was compromised. In fact, this just happened with the breach of federal government personnel information." What qualifies as an "event" may be different depending on the industry and fact pattern, and extending NCLC's framework to a multi-industry exemption would chill lawful constitutional speech.

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[17] *See United States v. Williams*, 553 U.S. 285, 304 (2008).

[18] *FCC v. Fox Television Stations, Inc*., 132 S. Ct. 2307, 2317 (2012).

[19] *Id.*

[20] Although the *2015 TCPA Order* used the "per event" criteria, it was tailored to a specific type of caller and a specific type of call – namely those of financial institutions. Here, by contrast, the "per event" criteria extends to schools, hospitals, researchers, banks, debt collectors, and other non-marketing callers. The "per event" criteria cannot be reasonably narrowed in a way that gives all regulated parties guidance on the permitted scope of their communications.

In short, adopting NCLC's one call "per event" standard would be unlawful in light of: (1) the diversity of calling practices it would implicate; (2) the absence of empirical evidence used to support it; (3) tensions with the number of calls allowed under some of the Commission's other exemptions; and (4) the unjustifiable litigation burdens it would impose on small businesses.

The TRACED Act does not specifically require the Commission to select a "digit" or adopt other blanket prescriptive requirements. As codified in the TCPA, the TRACED Act requires that the Commission: "*shall ensure* that any exemption under [sections 227(b)(2)(B)-(C)] *contains requirements* for calls made in reliance on the exemption with respect to—(i) the classes of parties that may make such calls; (ii) the classes of parties that may be called; and (iii) the number of such calls that a calling party may make to a particular called party."[21] And Section 8 of the TRACED Act requires the Commission to "prescribe" or "amend" regulations "as necessary to ensure that such exemption contains each [of the foregoing] requirement[s]."[22]

As an initial matter, the TRACED Act's use of "the number of such calls" does not require the Commission to pick a numerical limitation. Agencies have considerable discretion to implement Congress' statutory directive so long as the interpretation is reasonable under *Chevron*.[23] And courts have upheld agency decisions to rely on qualitative criteria for words like "minimum level," "volume," and "number." In one case, the D.C. Circuit considered a statute requiring an agency to establish "minimum staffing levels."[24] Despite that language, the agency could reasonably implement the statute's directive without specifying the actual number of personnel and rely instead on qualitative factors. In another case, the court upheld an agency's finding that "volume" meant the number of products, not the actual volume.[25] Here too, the Commission could reasonably conclude that it has "ensured" that the TCPA "contains" "requirements" with respect to the "number of calls" by determining that no call limitations are justified by the record.

The highly qualified phrasings in the TRACED Act provides stark textual evidence that Congress did not intend to mandate numerical limits. Rather, Congress merely required the Commission to consider the issue in a rulemaking. By issuing this NPRM, the Commission has already discharged its responsibility to "ensure" that the TCPA "contains requirements" for calls. The TRACED Act as implemented in the TCPA, notably, does not require the Commission to "restrict" or "limit" the number of calls, nor does it require the agency to "promulgate," or "issue" restrictions. Rather, the statute uses the word "ensure," which means "to make sure, certain, or safe."[26] If Congress intended to require the Commission to pick a

[21] *See* 47 U.S.C. § 227(b)(2)(I).

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

[23] *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

[24] *Public Citizen v. FAA*, 988 F.2d 186 (D.C. Cir. 1993).

[25] *Prime Time International, Co. v. U.S. Dep't of Agriculture*, 753 F.3d 1339 (D.C. Cir. 2014).

[26] *See* Merriam-Webster, *Ensure*, https://www.merriam-webster.com/dictionary/ensure (last visited Dec. 4, 2020).

number, it would have used less qualified language than appears in the TRACED Act. For example, the now-invalidated exemption for federal debts calls provided that the Commission "may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service."[27] That such direct and precise language does not exist in the TRACED Act provides compelling evidence of Congressional intent.

And if the Commission determines no new restrictions are needed, the agency doubly will have "ensure[d]" that the TCPA "contains requirements" for classes of exempt calls (including, e.g., the requirement that each call be a non-marketing call). Here again, the active verb used by Congress does not direct the Commission to behave in a particular way. It merely requires that the Commission consider the relevant factors in any rulemaking. The Commission could defensibly conclude under principles of agency deference that it has "ensured" that the TCPA "contains requirements" by finding existing requirements adequate. Finally, even under the broadest reading imaginable, the TRACED Act plainly requires no new opt-out requirements, and those rules would not be warranted given the thin state of the record. The TRACED Act's requirements are procedural in nature, not substantive.

If the Commission adopts new limits, they should at a minimum respect the CFPB's recent rule (and other federal rules) on debt collection outreach. On October 30, while this NPRM was still under comment, the CFPB issued final rules on debt collection practices that had been pending since 2013.[28] The 653-page document incorporated more than 23,000 comments, dozens of economic studies, and hundreds of agency meetings, and numerous public fora. It is a truly substantial undertaking reflecting a massive amount of work and public stakeholder input. In the final rules, the CFPB:

- Clarified restrictions on the times and places at which a debt collector may communicate with a consumer, including by clarifying that a consumer need not use specific words to assert that a time or place is inconvenient for debt collection communications.

- Clarified that a debt collector is presumed to violate the Federal Debt Collection Practices Act's ("FDCPA") prohibition on repeated or continuous telephone calls if the debt collector places a telephone call to a person more than seven times within a seven-day period or within seven days after engaging in a telephone conversation with the person. It also clarifies that a debt collector is presumed to comply with that prohibition if the debt collector places a telephone call not in excess of either of those telephone call frequencies. The final rule also provides non-exhaustive lists of factors that may be used to rebut the presumption of compliance or of a violation.

- Clarified that newer communication technologies, such as emails and text messages, may be used in debt collection, with certain limitations to protect consumer privacy and to

[27] 47 U.S.C. § 227(b)(2)(H).

[28] *See* Bureau of Consumer Financial Protection, *Debt Collection Practices (Regulation F)*, Final Rules, Docket No. CFPB-2019-022 (rel. Oct. 30, 2020), https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_final-rule_2020-10.pdf.

protect consumers from harassment or abuse, false or misleading representations, or unfair practices. For example, the final rule requires that each of a debt collector's emails and text messages must include instructions for a reasonable and simple method by which a consumer can opt out of receiving further emails or text messages. The final rule also provides that a debt collector may obtain a safe harbor from civil liability for an unintentional third-party disclosure if the debt collector follows the procedures identified in the rule when communicating with a consumer by email or text message.6

- Defined a new term related to debt collection communications: limited-content message. This definition identifies what information a debt collector must and may include in a voicemail message for consumers (with the inclusion of no other information permitted) for the message to be deemed not to be a communication under the FDCPA. This definition permits a debt collector to leave a voicemail message for a consumer that is not a communication under the FDCPA or the final rule and therefore is not subject to certain requirements or restrictions.

The Commission cannot cavalierly override these CFPB regulations absent significant record evidence. Anything else would constitute arbitrary and capricious action. Courts and the Commission have long recognized that the TCPA is not a debt collection statute,[29] and making credit and collections professionals subject to a duplicative and/or inconsistent regime would undermine the prerogatives of a sister federal agency, subject regulated parties to contradictory legal requirements, and chill activities that promote sound credit and liquidity throughout the financial markets.

At a minimum, the Commission should ensure that it does not obstruct calls that are allowed under other federal law that have established call limits - including but not limited to the CFPB's recent final rules. Where Congress has spoken through legislation, or an agency has occupied the field through regulation, the Commission should avoid creating duplicative or inconsistent regulations that might upset the reliance interests of regulated parties. For example, the Commission can adopt a safe harbor stating:

> "*Provided, however, that any limitations on exempt communications in this subsection shall not apply if the sender complies with express requirements of another local, state, or federal agency relating to telephonic outreach, including but not limited to the number of such calls that a calling party may make to a particular called party*."

This safe harbor would help avoid any conflicts-of-law issues that might arise from Commission intruding on the regulatory authority of another agency. And this language would be fully consistent with the TRACED Act's directive for the Commission to "ensure" that the TCPA "contains requirements" for "(i) the classes of parties that may make such calls; (ii) the classes of

[29] *See, e.g., Osorio v. State Farm Bank*, 746 F.3d 1242, 1255 (2014) (Because the TCPA "lacks equivalent language [to the Fair Debt Collection Practices Act's requirement that requests to not be called be in writing], we have no reason to assume that Congress intended to impose a similar in-writing requirement on the revocation of consent under the TCPA.").

parties that may be called; and (iii) the number of such calls that a calling party may make to a particular called party."

* * *

ACA International supports the Commission's efforts to combat illegal automated calls while at the same time protecting lawful callers from abusive TCPA lawsuits. Through its actions implementing the TRACED Act, ACA International is confident the Commission can strike that balance in its resolution of the non-marketing exemption. ACA International urges the Commission to keep the exemption as-is, but at a minimum respect the efforts of parallel regulatory agencies. Such a disposition would be lawful, consistent with the record evidence, and consonant with the Commission's policy goals. Please contact me with any questions.

Respectfully submitted,

/s/ Leah Dempsey

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