

May 18, 2017

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *In the Matter of Petition for Declaratory Ruling filed by All About The Message, LLC, CG Docket No. 02-278*

Dear Ms. Dortch:

The U.S. Chamber of Commerce¹ in conjunction with the U.S. Chamber Institute for Legal Reform² (collectively referred to as “Chamber”) respectfully submit these comments to the Federal Communications Commission (“Commission”) in response to its Public Notice requesting comment on the Petition for Declaratory Ruling filed by All About The Message, LLC (“AATM”) (the “AATM Petition”) on April 18, 2017, in the above-referenced docket.³

The Chamber urges the Commission to grant the AATM Petition, which asks the Commission to declare that a new technology of direct-to-voicemail message delivery is not encompassed by the prohibitions contained within the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”). While the Chamber will let AATM’s descriptions of its technology speak for itself, the Chamber is well positioned to comment on the need for the

¹ The U.S. Chamber of Commerce is the world’s largest business federation, representing the interests of more than three million businesses of all size, sectors, and regions, as well as state and local chambers and industry associations.

² The U.S. Chamber Institute for Legal Reform seeks to promote civil justice reform through legislative, political, judicial, and educational activities at the global, national, state, and local levels.

³ Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on All About the Message, LLC Petition for Declaratory Ruling Under the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, DA 17-368 (Rel. Apr. 18, 2017).

Commission to stop expanding the TCPA's prohibitions to new technologies that did not exist in 1991, when the statute was enacted.

A central problem with the unchecked expansion of the TCPA's prohibitions is that it is not the unscrupulous scam telemarketers that are targeted by TCPA litigation, but rather legitimate domestic businesses.⁴ As the Chamber has explained in various comments filed with the Commission regarding the TCPA, in recent years American businesses have been besieged by litigation under the TCPA.⁵ The Chamber's members have reported that many lawsuits involve technologies that were not and could not have been part of Congress' discussions when it crafted the TCPA to combat certain abusive telemarketing technologies in use at the time. Indeed, well-intentioned companies and small businesses have been finding themselves pulled into lawsuits claiming staggering, and often annihilating, amounts of statutory damages tied to new technologies (such as text messaging, or Internet-to-phone messaging) that could have existed only in the realms of science fiction when the TCPA was enacted in 1991.⁶

The AATM Petition asks the Commission to stop the expansion of the TCPA by declaring that the statute, in its current form, does not encompass the kind of new technology described by AATM, and thus would not support litigation seeking the TCPA's hefty per-call statutory damages available under Section 227(b) for calls placed via certain specific methods. AATM's petition should be granted.

⁴ See *In re Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 8072-73 (2015) (Pai Dissent) ("The TCPA's private right of action and \$500 statutory penalty could incentivize plaintiffs to go after the illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters. But trial lawyers have found legitimate, domestic businesses a much more profitable target.").

⁵ See, e.g., U.S. Chamber Comments on Communication Innovators' Petition for a Declaratory Ruling (filed Nov. 15, 2012 in CG Docket No. 02-278); US Chamber Comments on PACE's Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking (filed Dec. 19, 2013 in CG Docket No. 02-278); U.S. Chamber Comments on United Healthcare's Petition for Expedited Declaratory Ruling (filed Mar. 10, 2014 in CG Docket No. 02-278); U.S. Chamber Comments on ACA International's Petition for Rulemaking (filed Mar. 27, 2014 in CG Docket No. 02-278); U.S. Chamber and Institute of Legal Reform Comments on American Association for Justice's Petition for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules (filed Feb. 18, 2015 in CG Docket No. 02-278, CG Docket No. 05-338); U.S. Chamber Comments on Petition for Rulemaking and Declaratory Ruling filed by Craig Cunningham and Craig Moskowitz (filed March 10, 2017, in CG Docket No. 02-278, CG Docket No. 05-338).

⁶ See *In re Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. at 8087 (O'Reilly Dissent) ("The TCPA was enacted in 1991 – before the first text message was ever sent. The Commission should have had gone back to Congress for clear guidance on the issue rather than shoehorn a broken regime on a completely different technology.").

Indeed, the Commission must recognize that Congress has not debated the expansion of the TCPA to new technologies and has not weighed in on whether the \$500/\$1,500 per call statutory damages made available in Section 227(b) for certain calling technologies in use in 1991 should also apply to different technologies that do not involve the same kind of privacy violations caused by the random and sequentially dialed cold-call telemarketing prevalent over 25 years ago when the TCPA was enacted to curb such calls. In fact, Chairman Pai underscored this point in his 2015 dissent to the TCPA Omnibus Declaratory ruling by stating:

Congress expressly targeted equipment that enables telemarketers to dial random or sequential numbers in the TCPA. If callers have abandoned that equipment, then the TCPA has accomplished the precise goal Congress set out for it. And if the FCC wishes to take action against newer technologies beyond the TCPA’s bailiwick, it must get express authorization from Congress—not make up the law as it goes along.⁷

The Commission cannot continue to sweep new technologies into this technologically-archaic statute. The language in Section 227(b) reflects a compromise by Congress.⁸ The Commission should stop undoing this compromise by expanding the reach of the TCPA into new technologies that Congress has yet to consider, weigh, and assess, so as to ascertain whether those technologies should be unlawful and to determine what penalty should attach to their use. Congress should be the entity that makes changes to the TCPA, so that businesses can be put on notice that when a revision to the statute is implemented, new restrictions on certain technologies will be put into effect on a forward-looking basis. This is the proper order of lawmaking that protects both businesses and consumers: statutes are updated by Congress to keep up with changes in technology, so that businesses striving to comply will know how to behave in order to conform with the statute’s requirements.

The Commission should thus use this opportunity to specify that when no legislative body has considered the reach of the TCPA into a new technology like that discussed by AATM, the TCPA will not be administratively expanded by the Commission to encompass that technology. Indeed, the Commission should clarify that it will no longer be expanding the reach of Section 227(b) of the TCPA into new technologies never considered by Congress in connection with that section.

⁷ See *In re Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. at 8076 (2015) (Pai Dissent).

⁸ See *id.*, 30 F.C.C. Rcd. at 8075, n.19 (Pai Dissent) (quoting *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94 (2002) (“like any key term in an important piece of legislation, the [statutory provision in question] was the result of compromise between groups with marked but divergent interests in the contested provision” and that “[c]ourts and agencies must respect and give effect to these sorts of compromises”).

The Commission should not act as a legislative body by expanding the reach of TCPA to new technologies. The role of lawmaker belongs to, and should be performed by, Congress.

Respectfully Submitted,



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