



U.S. CHAMBER

Institute for Legal Reform

U.S. CHAMBER OF COMMERCE

1615 H Street, NW  
Washington, DC 200062-2000  
[www.uschamber.com](http://www.uschamber.com)

December 1, 2014

**VIA ELECTRONIC FILING**

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

**Re: *In the Matter of Application of Rules and Regulations Implementing the Telephone Consumer Protection Act: Petition for Declaratory Ruling of the Consumer Bankers Association; CG Docket No. 02-278***

Dear Ms. Dortch:

On behalf of the U.S. Chamber of Commerce<sup>1</sup> and the U.S. Chamber Institute for Legal Reform<sup>2</sup> (collectively referred to as “Chamber”), we respectfully submit these reply comments to the Federal Communications Commission (“Commission”) in response to its Public Notice<sup>3</sup> requesting comment on the Petition for Declaratory Ruling filed by the Consumer Bankers Association (“CBA Petition”) in the above-referenced docket. The CBA Petition asks the Commission to clarify that “called party” for purposes of the Telephone Consumer Protection Act (TCPA)<sup>4</sup> and the Commission’s rules<sup>5</sup> refers to the intended recipient of the call.<sup>6</sup>

To ensure the continued ability of businesses and other organizations to provide important and time-sensitive information to their consumers, the Chamber urges the Commission

---

<sup>1</sup> The U.S. Chamber of Commerce is the world’s largest business federation, representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America’s free enterprise system.

<sup>2</sup> 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.

<sup>3</sup> Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling from Consumer Bankers Association*, CG Docket No. 02-278, DA 14-1511 (rel. Oct. 17, 2014), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DA-14-1511A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DA-14-1511A1.pdf).

<sup>4</sup> Codified as 47 U.S.C. § 227.

<sup>5</sup> 47 C.F.R. § 64.1200.

<sup>6</sup> *Petition for Declaratory Ruling of the Consumer Bankers Association* at 3, 15, CG Docket No. 02-278 (filed Sept. 19, 2014). (“CBA Petition”).

to resolve the confusion around the meaning of “called party” for purposes of the prior express consent provisions of the TCPA. Consistent with the Chamber’s previous filings in this docket,<sup>7</sup> we urge the Commission to take favorable action on the various TCPA petitions filed with the agency, including the CBA Petition, that would result in the Commission confirming that there is no liability under the TCPA for a call made to a wireless number for which the caller has obtained valid consent to call but has been reassigned—unbeknownst to the caller—to a new consumer, wrongly dialed, or answered by a different person (e.g., a roommate or a family member).

### **I. Consumer Use of Wireless Phones is Vastly Different Than When the TCPA Was Enacted in 1991**

When Congress enacted the TCPA in 1991, wireless phones were a luxury item and the landline was the dominant consumer telecommunications device. Thus, certain restrictions in the TCPA are only applicable to calls made to cell phones. However, as the Commission itself has acknowledged, “wireless use has expanded tremendously since passage of the TCPA in 1991.” The number of “wireless-only” households increased to 41.0% during the second half of 2013 from 39.4% during the first half of 2013.<sup>8</sup> An additional 16.1% of U.S. households were “wireless-mostly” (i.e., the household has a landline but receives all or most calls on a wireless phone).<sup>9</sup> Thus, 57.1% of U.S. households rely either exclusively or predominantly on wireless telephone service.

No matter where they are at the moment, consumers want to be connected. Consumers use their phones to communicate in the manner (e.g., voice calls, text messaging, e-mail, video chat, social media, gaming, etc.) that best meets their needs at the time.

### **II. There is no Practical Way to Avoid Making Calls to Reassigned Telephone Numbers, and Exposing Calling Parties to TCPA Liability for These Types of Calls Would Run Counter to the Purpose of the TCPA**

For a variety of reasons, telephone numbers can be reassigned to a new customer. As many as 37 million telephone numbers are recycled each year by telephone companies.<sup>10</sup> Consumers communicate with a variety of organizations and businesses but, often, do not

---

<sup>7</sup> See, U.S. Chamber Comments and Reply Comments on United Healthcare Services Petition (filed Mar. 10, 2014, and Mar. 24, 2014, respectively), U.S. Chamber *ex parte* letter regarding ACA Petition for Rulemaking (filed Mar. 27, 2014), and U.S. Chamber and U.S. Chamber Institute for Legal Reform Joint Comments on Rubio’s Restaurant Petition (filed Sept. 24, 2014), CG Docket No. 02-278.

<sup>8</sup> 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 2013*, at 1 (July 2014), available at

<http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201407.pdf>

<sup>9</sup> *Id.* at 4.

<sup>10</sup> Alyssa Abkowitz, “Wrong Number? Blame Companies’ Recycling,” *The Wall Street Journal* (Dec. 1, 2011), available at <http://online.wsj.com/news/articles/SB10001424052970204012004577070122687462582>.

immediately, if ever, provide those entities with updated telephone number contact information. Even companies that require by contract that a customer updates contact information are finding that they may not have that customer's most recent telephone number.

As the Chamber has pointed out in its previous filings, there is no simple fix or solution available for businesses to verify the continued accuracy of mobile phone numbers provided to the company by a customer but reassigned without the knowledge of the caller. Many companies have taken aggressive TCPA compliance measures. However, even when working with wireless carriers and others to identify reassigned numbers and remove those numbers from their companies' systems, updates regarding reassigned numbers may be "provided at varied and sometimes sporadic, intervals" and may not reflect data from all carriers.<sup>11</sup> There is no single, authoritative wireless telephone number directory or currently available tool that can prevent all calls to phone numbers that once belonged to a client, customer, or other contact but have been reassigned without the knowledge of the caller. Even businesses and organizations that pay for high-cost products that purport to be "TCPA solutions" still have significant litigation risk because those products often are missing a significant percentage of reassigned numbers and do not account for family or workplace plans covering multiple individuals.<sup>12</sup>

The CBA Petition reflects the reality that reassignment of numbers is routine. Some have suggested that organizations—despite already receiving prior express consent—should manually verify every number prior to placing a call using an automated dialer.<sup>13</sup> Given the sheer size of a company's customer contact management system, a company cannot efficiently or cost-effectively manually re-verify that all of the numbers in its database currently belong to the individuals that granted consent to be called on those numbers.<sup>14</sup> Moreover, it would be nonsensical for a statute aimed at reducing unwanted communications to require companies to continually contact their customers with live operators in order to ensure the phone number provided is still assigned to the individual who provided the original consent.

### **III. Regulatory Clarity Regarding the TCPA is Desperately Needed**

The Chamber and many others from a variety of industry sectors have previously and frequently highlighted TCPA litigation abuses that could be ameliorated by Commission action.<sup>15</sup> There is, unfortunately, a tsunami of class action TCPA lawsuits driven not by aggrieved consumers, but by opportunist plaintiffs' firms taking advantage of uncertainty in the law to rake in attorney fees. TCPA lawsuits against businesses are skyrocketing. 2,069 TCPA lawsuits have been filed in 2014 (as of 10/31), an increase of 27.9% over the same period last

---

<sup>11</sup> Twitter Comments at 1 (filed Nov. 17, 2014).

<sup>12</sup> See, CBA Petition at 9.

<sup>13</sup> See, e.g., *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 642 (7th Cir. 2012), and National Consumer Law Center et al. Comments at 10 (filed Nov. 17, 2014).

<sup>14</sup> See, Computer and Communications Industry Association Comments at 4 (filed Nov. 17, 2014).

<sup>15</sup> See, *Id.* at 2.

year.<sup>16</sup> Confusion over TCPA liability for calls to reassigned and wrongly dialed phone numbers is an emerging area of TCPA litigation.

Even a recipient of a single call can seek to have a nationwide class certified that covers other call recipients. The significant and growing litigation risk from such calls made in good faith exposes businesses to potentially annihilating “class actions lawsuits for technical violations that cause no actual injury or harm to any consumer.”<sup>17</sup> Therefore, guidance from the Commission on this issue would provide regulatory certainty.

At the time the TCPA was created, the bill’s sponsor, Senator Ernest “Fritz” Hollings (D-SC), explained the law was intended to facilitate actions in state small claims courts, which involve smaller sums and do not require (or even allow) the participation of attorneys.<sup>18</sup> However, today, TCPA cases are anything but small. Trial lawyers have used the law to file large class action lawsuits. The defendants in these cases are no longer just abusive telemarketers. They are businesses, big and small alike, forced to decide whether to reach a settlement with the plaintiff’s counsel or to accept the risk and spend significant resources defending itself against an action where the alleged statutory damages may be in the millions or even billions of dollars.

To make matters worse, TCPA litigation is now accompanied by abusive tactics pursued by certain members of the trial bar. “Block Calls Get Cash” is an Android app being marketed by Lemberg Law, a self-described consumer protection law firm.<sup>19</sup> The firm says the app can help those who download it determine whether they have a claim under the TCPA, in which case they could win up to \$1,500 per robodial or debt collection call. The app’s Web site boasts that with no out-of-pocket cost for the app or legal fees, its users will “laugh all the way to bank.”<sup>20</sup>

Concern over TCPA liability for calls made in good faith intended for individuals who have provide their consent but whose phone numbers have been reassigned, wrongly dialed, or answered by a different person (e.g., a roommate or a family member) has or may cause some businesses and organizations to cease communicating important and time-sensitive information via voice and text to existing customers, clients, and members.<sup>21</sup> Therefore, the Commission should address this issue to ensure that consumers can continue to receive urgent and needed calls and texts (e.g., alerts concerning data breaches, fraud, prescription refills, flight delays, power outages, package delivery, billing issues, appointments, etc.).

---

<sup>16</sup> *Debt Collection Litigation & CFPB Complaint Statistics, October 2014*, WebRecon, Nov. 21, 2014, available at <http://dev.webrecon.com/debt-collection-litigation-cfpb-complaint-statistics-october-2014/>

<sup>17</sup> Becca J. Wahlquist, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages* (prepared for the U.S. Chamber Institute for Legal Reform) at 1, (Oct. 2013), available at <http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit WEB.PDF>.

<sup>18</sup> 137 Cong. Rec. 30821-30822 (1991).

<sup>19</sup> See, *Lawsuit Abuse? There's an App for That*, U.S. Chamber Institute for Legal Reform, Oct. 29, 2014, available at <http://www.instituteforlegalreform.com/resource/lawsuit-abuse-theres-an-app-for-that>.

<sup>20</sup> See, *Block Calls Get Cash*, Lemberg Law, <http://www.blockcallsgetcash.com/>.

<sup>21</sup> See, National Rural Electric Cooperative Association Comments at 6 (filed Nov. 17, 2014) and Coalition of Higher Education Assistance Organizations Comments at 3 (filed Nov. 17, 2014).

#### IV. Conclusion

The Chamber urges the Commission to resolve the issues in the CBA Petition regarding confusion around the meaning of “called party” for purposes of the prior express consent provisions of the TCPA and to confirm that there is no liability under the TCPA for a call made to a wireless number for which the caller has obtained valid consent to call but has been reassigned—unbeknownst to the caller—to a new consumer, wrongly dialed, or answered by a different person (e.g., a roommate or a family member). By taking these actions, the Commission can help curtail abusive lawsuits, provide American businesses with desperately needed certainty, and ensure that businesses maintain the ability to communicate in the manner that best meets the demands of their customers.

Respectfully Submitted,



---

William L. Kovacs  
Senior Vice President  
Environment, Technology & Regulatory Affairs  
U.S. Chamber of Commerce



---

Harold Kim  
Executive Vice President  
U.S. Chamber Institute for Legal Reform