

June 7, 2018

*Via ECFS*

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

Re: Request for Comment on Second Further Notice of Proposed Rulemaking, CG Docket No. 17-59, Advanced Methods to Target and Eliminate Unlawful Robocalls, 78 Fed. Reg. 17,631 (Apr. 23, 2018)

Dear Ms. Dortch:

The American Bankers Association<sup>1</sup> (ABA) appreciates the opportunity to comment on the Federal Communications Commission's (Commission) Second Further Notice of Proposed Rulemaking (Notice). The Notice proposes, and seeks feedback concerning, the establishment of a database of phone numbers that have been disconnected from their current subscriber and reassigned to another consumer (Reassigned Numbers Database).<sup>2</sup>

As discussed in our letter of September 26, 2017, to the Commission,<sup>3</sup> which is attached, ABA shares the Commission's goal to minimize calls to reassigned numbers, and we support the establishment of a Reassigned Numbers Database. Banks regularly need to contact their customers with important, beneficial, and time-critical calls, such as suspicious activity alerts, data breach notifications, notices of address discrepancies, and low-balance and over-limit transactions. Banks make significant efforts to promote the accuracy of the numbers they call but, despite these efforts, cannot completely avoid calling reassigned numbers. In its 2015 Declaratory Ruling and Order (2015 Order), the Commission concluded that a caller may be liable under the Telephone Consumer Protection Act<sup>4</sup> (TCPA) for a call made in good faith to a

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<sup>1</sup> The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits and extend nearly \$10 trillion in loans.

<sup>2</sup> Second Further Notice of Proposed Rulemaking, *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59 (released Mar. 23, 2018), <https://www.fcc.gov/document/fcc-seeks-address-robocalls-reassigned-phone-numbers-0> [hereinafter *Notice*].

<sup>3</sup> Letter from Jonathan Thessin, Am. Bankers Ass'n, to Marlene H. Dortch, Sec., Fed. Comm'ns Comm'n (Sept. 26, 2017), <https://www.aba.com/Advocacy/commentletters/Documents/cl-FCC-Robocalls-Sept2017.pdf> [hereinafter ABA 2017 Letter].

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

party who has consented to receive the call but whose telephone number has been reassigned to another consumer without notice to the caller.<sup>5</sup> The Commission's conclusion led banks to limit—and, in certain instances, to eliminate—many communications that they believe would be helpful to consumers were it not for the legal obstacles to the communication. Moreover, the recent decision by the U.S. Court of Appeals for the D.C. Circuit, which set aside the Commission's treatment of reassigned numbers, has created uncertainty over whether banks and other callers are liable for calls placed to reassigned numbers.<sup>6</sup>

We urge the Commission to adopt a more reasonable interpretation of the TCPA that does not impose liability for calls to reassigned numbers when the caller has obtained the consent of the intended recipient of the call. We also urge the Commission to establish a comprehensive Reassigned Numbers Database. With these two steps, the Commission can best ensure that banks will not continue to limit communications to their customers out of fear of calling a reassigned number and facing the threat of significant liability and litigation costs for calling such numbers.

ABA supports the creation of a centrally administered Reassigned Numbers Database that contains information on the permanent disconnection and reassignment of phone numbers. A critically important aspect of the Database is the provision of a safe harbor for companies that utilize the Database. Even with the establishment of a well-functioning Database, the possibility of inadvertently calling a reassigned number will remain. For example, numbers that were reassigned prior to the Resource's creation will not be reflected in the Database, and other numbers may be excluded from the Database because of error. Moreover, depending on how the Database is structured, it may not accurately report the disconnection and reassignment of numbers belonging to family calling plans, prepaid phones, or businesses. In the absence of a safe harbor, the regulatory risk—and potential liability—for calling a reassigned number will inhibit banks from placing many pro-consumer communications.

If the Database reports timely, accurate, and comprehensive information on disconnected and reassigned numbers, it could provide significant value to banks and, more importantly, to those customers who currently may not receive important communications from their banks because of the regulatory risk of calling a customer number that has been reassigned. However, the Database will not remove all barriers to effective communication between a bank and its customers. ABA supports the Commission's request for comment on how the Commission should re-interpret key provisions of the TCPA in light of the D.C. Circuit's recent decision,<sup>7</sup>

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<sup>5</sup> See Declaratory Ruling and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, 30 FCC Rcd. 7961, 7999-8000 (released July 10, 2015) ¶ 72 [hereinafter *TCPA Order*].

<sup>6</sup> See *ACA Int'l v. FCC*, 885 F.3d 687, 704-10 (D.C. Cir. 2018).

<sup>7</sup> 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 (released Mar. 14, 2018), <https://www.fcc.gov/document/cgb-seeks-comment-tcpa-light-dc-circuit-decision-aca-intl>.

particularly the statutory definition of an “automatic telephone dialing system” (autodialer).<sup>8</sup> The Commission’s prior interpretations of that term have imposed substantial obstacles to banks seeking to contact their customers using efficient dialing technologies. To facilitate communications between banks and consumers, we urge the Commission to grant the joint petition filed by the U.S. Chamber of Commerce, ABA, and 15 other industry stakeholders that proposes an interpretation of the definition of an autodialer that is consistent with the text of the TCPA and congressional intent.<sup>9</sup>

### **I. A Reassigned Numbers Database Continues to Be Needed After the D.C. Circuit’s Decision**

Banks initiate billions of consumer-benefitting informational calls annually. Banks have every incentive to reach their customer—and not another customer—and work hard to promote accuracy in the numbers they call. These efforts include providing consumers multiple means to edit contact information, confirming a consumer’s contact information during any call with the consumer, regularly checking the database administered by the Local Number Portability Administrator to confirm that a residential number has not been transferred to a wireless number,<sup>10</sup> providing instructions for reporting a wrong number call, and purchasing one or more vendor-provided solutions to identify customer numbers that have been disconnected and/or reassigned to other consumers.

Despite these efforts, and as explained in greater detail in ABA’s 2017 Letter, banks cannot completely avoid calling reassigned wireless telephone numbers.<sup>11</sup> The bank may not learn of the reassignment during a call attempt, and there is no centralized, complete database of numbers that have been permanently disconnected and reassigned to another user. Existing vendor-provided solutions are incomplete and, particularly for smaller institutions, can be cost-prohibitive.

In its March 16, 2018, decision, the D.C. Circuit set aside the Commission’s treatment of reassigned numbers, including the Commission’s provision in the 2015 Order of a safe harbor from liability for the first call attempt made to a number that has been reassigned.<sup>12</sup> Courts now have greater discretion to apply their own interpretation of the TCPA, but there is no guarantee that they will interpret the statute in a manner that protects callers who call reassigned numbers

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<sup>8</sup> See 47 U.S.C. § 227(a)(1) (defining “automatic telephone dialing system”); *TCPA Order*, 30 FCC Rcd. at 7971-7978 ¶¶ 10-24 (interpreting statutory definition).

<sup>9</sup> See Petition for Declaratory Ruling, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed May 3, 2018), [https://www.aba.com/Advocacy/LetterstoCongress/Documents/cl-TCPA-20180503.pdf?utm\\_campaign=ABA-Newsbytes-050418&utm\\_medium=email&utm\\_source=Eloqua](https://www.aba.com/Advocacy/LetterstoCongress/Documents/cl-TCPA-20180503.pdf?utm_campaign=ABA-Newsbytes-050418&utm_medium=email&utm_source=Eloqua).

<sup>10</sup> The Local Number Portability Administrator oversees the system that allows consumers to keep their phone numbers when they switch Voice Service Providers.

<sup>11</sup> ABA 2017 Letter, *supra* note 3, at 2-5.

<sup>12</sup> *ACA Int’l*, 885 F.3d at 706-10.

through no fault of the caller.<sup>13</sup> Consequently, banks and other callers have a continuing need for the Commission to establish a Reassigned Numbers Database.

## **II. ABA Supports the Creation of a Centrally Accessible and Comprehensive Reassigned Numbers Database Containing Information on the Permanent Disconnection and Reassignment of Phone Numbers**

ABA supports the creation of a Reassigned Numbers Database that contains information regarding (a) the permanent disconnection (relinquishment) of a number from the consumer to whom it was assigned, and (b) the reassignment of that number to another consumer. We continue to believe it is critical that this information be accessible from a centrally administered source. Requiring callers to query or otherwise receive information from multiple data sources, such as from multiple data aggregators or from all Voice Service Providers, is not efficient or cost-effective for callers or providers of the information. We agree with the Commission that the Database should be comprehensive and contain all numbers from all Voice Service Providers.<sup>14</sup>

In constructing the Database, the Commission should require a caller to provide the telephone number for which the user seeks to determine disconnection or reassignment information. The caller should not be required to provide, as part of its query, any additional information related to the number to be queried, such as the name of the customer associated with that number or the date on which the caller is confident the customer possessed the number. Such information is not necessary in order for the Database to provide the date of last disconnection and date of last reassignment for that number, as described further below.

In response to a caller's query, the Database should provide the date on which the number was last disconnected from a subscriber and the date on which the number was last reassigned to a new subscriber (i.e., to the current subscriber). In the Notice, the Commission proposed to provide callers with disconnection information and to "utilize disconnections as a proxy for reassignments."<sup>15</sup> The Database should report both disconnection *and* reassignment information for a number. As discussed in ABA's 2017 Letter, a number may be listed as disconnected in a Voice Service Provider's records (and thus in the Database), because the subscriber changed Providers (i.e., "ported" the number) or because the number has been temporarily disconnected, such as when the subscriber missed one or more payments.<sup>16</sup> Under these circumstances, the number continues to belong to the subscriber even though it may be listed as disconnected. A query involving that number should not lead the caller to conclude that the number has been reassigned.

It is important that the Database provide the actual date of last disconnection and date of last reassignment for a number queried. In the Notice, the Commission asked whether it would be sufficient for the Database to indicate solely whether a number has been reassigned since the

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<sup>13</sup> See *id.* at 706-07 (discussing other courts' treatment of calls made to reassigned numbers).

<sup>14</sup> See Notice, *supra* note 2, ¶ 18.

<sup>15</sup> *Id.* ¶¶ 15 & n.26.

<sup>16</sup> ABA 2017 Letter, *supra* note 3, at 5.

date (entered by the caller) on which the caller is confident that the number belonged to its customer.<sup>17</sup> That information is not sufficient. A bank may speak with its customer *after* the date on which the Database indicates the customer's number has been reassigned. For example, the bank may manually dial the number in an effort to make a definitive determination whether the number continues to belong to the bank's customer (i.e., the Database has erred in reporting the number as reassigned). The Database may erroneously report a number as reassigned if the reassignment is due to a change of the number's subscribership from the caller's customer to one of the customer's family members, as often occurs with family calling plans. In these instances, the date of reassignment is important for the bank to determine if the number has truly been reassigned.

The above example illustrates the need for the Database to accept feedback from users so that the Database accurately reports current assignments of numbers. When a caller determines that the Database inaccurately reports a number's assignment, the caller should be able to provide this feedback to the Database's administrator.

The Commission should also ensure that the Database has sufficient capacity to handle a large number of queries to the Database at approximately the same time. In the event of a data breach or similar incident that leads callers to place a large volume of calls in a short period of time, the Database is likely to experience a significant volume of queries.

In determining how costs to establish and administer the Database should be allocated, we encourage the Commission to consider requesting an appropriation from Congress. In light of bipartisan support for the Database,<sup>18</sup> Congress may be receptive to providing an appropriation for this purpose.

### **III. The Commission Should Provide a Safe Harbor for Callers that Use the Reassigned Numbers Database**

#### **A. The Commission Has Ample Statutory Authority To Adopt a Safe Harbor**

The Commission has ample authority under the TCPA to adopt a safe harbor from liability for callers that utilize the Reassigned Numbers Database. The TCPA provides the Commission with broad authority to “prescribe regulations to implement the requirements of *this subsection*,”<sup>19</sup> a reference to subsection (b) of § 227. Subsection (b) includes § 227(b)(3), which provides for a private right of action for violations of the TCPA's provisions. Thus, in implementing the TCPA,

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<sup>17</sup> Notice, *supra* note 2, ¶ 13.

<sup>18</sup> Press Release, Office of Senator Markey (D-Mass.), Senators Markey and Thune Applaud FCC for Initiating Rulemaking to Explore Solutions to Unwanted Robocalls and Robotexts (Mar. 22, 2018) (available at <https://www.markey.senate.gov/news/press-releases/senators-markey-and-thune-applaud-fcc-for-initiating-rulemaking-to-explore-solutions-to-unwanted-robocalls-and-robotexts>).

<sup>19</sup> 47 U.S.C. § 227(b)(2) (emphasis added).

the Commission is within its powers to “prescribe regulations” that provide a safe harbor from liability when certain conditions are met, particularly in light of Congress’ intent that the TCPA not be a “barrier to the normal, expected or desired communications between businesses and their customers.”<sup>20</sup> Without a safe harbor for callers that use the Reassigned Number Database, the TCPA will continue to be a barrier limiting callers from communicating with their customers, for the reasons stated in Part III.B below.

Significantly, in its March 2018 decision in *ACA International*, the D.C. Circuit did not question the Commission’s authority to adopt a safe harbor. The court set aside the Commission’s treatment of reassigned numbers, including the one-call safe harbor, because the Commission did not provide a “reasoned (and reasonable) explanation of why its safe harbor *stopped* at the seemingly arbitrary point of a single call or message.”<sup>21</sup> The court thus suggested that the Commission would have been well within its authority to adopt a *broad*er safe harbor than the one provided in the 2015 Order—i.e., a safe harbor that protected callers that made multiple calls to a reassigned number.

### **B. A Safe Harbor Would Ensure Consumers Receive Important Calls from Their Banks and Other Callers**

Because the risk of calling a reassigned number will remain after establishment of the Database, we urge the Commission to establish a safe harbor from liability for callers that use the Database when placing calls but nonetheless call a reassigned number. As we explained in ABA’s 2017 Letter, the provision of a safe harbor is critical to ensuring that banks are not discouraged from placing important calls to consumers due to the risk of liability and defense costs arising from an inadvertent call to a reassigned number notwithstanding the attempt to identify such numbers through use of the Database. We urge the Commission to provide a safe harbor from liability for banks and other entities that call a number for which the caller had obtained consent to place autodialed calls, but that was subsequently reassigned to another consumer, when the caller (a) reviewed information in the Database within the past 31 days to determine whether the number had been reassigned, and (b) received no information that the number had been reassigned.

A safe harbor is needed, because a bank or other caller that utilizes the Reassigned Numbers Database could inadvertently call a reassigned number under one of several circumstances, which are summarized below:

- A number disconnected or reassigned prior to the Database’s establishment is unlikely to be listed in the Database. Consequently, a caller will not be able to learn of the number’s reassignment by accessing the Database.
- There will likely be a delay between the date that a number is disconnected or reassigned and the time that information is reported in the Database. During this period of delay, callers will not have access to completely accurate information on disconnected and reassigned numbers.

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<sup>20</sup> H.R. Rep. No. 102-317, at 17 (1991).

<sup>21</sup> *ACA Int’l*, 885 F.3d at 708 (emphasis added).



- There inevitably will be errors in use of the Database. A customer may incorrectly report his or her number to the bank when providing consent (or the bank may incorrectly transcribe the customer's number), such as by transposing the number's digits. When bank staff check that number against the Database, they will not be checking the customer's actual number, but another number. Although the Database is likely to return disconnection and/or reassignment information for the number that demonstrates to the bank that a wrong number was submitted, it may not be clear in all instances. If a bank or other caller relies on erroneous information in using the Database, the caller should not be liable for the call.

A safe harbor also should protect callers that determine that a number for which the caller has consent to place autodialed calls continues to belong to the caller's customer, despite information reported in the Database that suggests otherwise. As described in Part II, a bank may speak with its customer at the number for which the bank has obtained consent to call on a date that occurs *after* the date on which the Database indicates the number has been reassigned. In the absence of a safe harbor, a caller may be reluctant to place calls to that number under these circumstances (where the information reported in the Database is inconsistent with the caller's more recent information), and consumers could be deprived of beneficial and potentially time-sensitive information.

As discussed in ABA's 2017 Letter, callers that use existing vendor-provided solutions encounter significant challenges in accurately identifying whether phone numbers that belong to a family calling plan or to a prepaid phone have been reassigned from the caller's customer to another customer.<sup>22</sup> Depending on how the Database is structured, these challenges in determining the number's current assignment could be present, and callers may have limited ability to determine whether the current user of the phone provided consent to be called. With respect to family calling plans, a Voice Service Provider (and thus the Database) may list all phone numbers assigned to a family calling plan under the head of the household, but the bank's records of customers' consents to receive autodialed calls may indicate that a different member of the household is the user of one (or more) numbers under the plan. Sellers of prepaid phones do not collect information on the identity of the consumer who purchased the phone or report when a phone has been returned and the phone's number reassigned to another consumer. Consequently, callers may have limited ability to determine whether the current user of the phone provided consent to be called, again depending on how the Database is structured.

An additional category of phone numbers that presents similar challenges are business numbers. A Voice Service Provider may list a business number under the name of the business' owner even though the caller's records list the number under the business itself. For example, the Provider may list a number under "Joe's Pizza," while the caller's records list the number under "Joe Smith."

The Commission should be aware of the challenges with existing vendor-provided solutions described above. To the extent necessary, the Commission should protect from liability callers that make calls, after checking the Database, to phone numbers in these categories.

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<sup>22</sup> See ABA 2017 Letter, *supra* note 3, at 7-8.

#### **IV. Conclusion**

ABA supports the Commission's initiative to establish a Reassigned Numbers Database. Despite banks' significant efforts to promote accuracy in the numbers they call, banks cannot completely avoid calling reassigned numbers. The Database could significantly reduce calls placed to reassigned numbers, while permitting banks to call customer numbers with confidence that those numbers have not been reassigned to other consumers.

ABA urges the Commission to create a Reassigned Number Database that contains comprehensive information on both the disconnection of phone numbers and the reassignment of those numbers, and the capacity to handle a large volume of queries at one time. Additionally, because no resource of this nature, no matter how well designed, will prevent all calls to reassigned numbers, ABA urges the Commission to include a safe harbor for callers that use the Database when placing calls. The Commission has ample statutory authority to create a safe harbor, as the D.C. Circuit recently affirmed, and the presence of a safe harbor will help ensure that banks are not discouraged from placing important calls to consumers.

Sincerely,

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

Jonathan Thessin  
Senior Counsel, Center for Regulatory Compliance



# APPENDIX

September 26, 2017

***Via ECFS***

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

Re: Request for Comment on Second Notice of Inquiry, CG Docket No. 17-59  
Advanced Methods to Target and Eliminate Unlawful Robocalls

Dear Ms. Dortch:

The American Bankers Association<sup>1</sup> (ABA) appreciates the opportunity to comment on the Federal Communications Commission's (Commission) Second Notice of Inquiry (Second NOI) regarding its proposal to establish a mechanism to mitigate the problem presented by calls made to phone numbers of consumers who consented to receive the call but whose numbers have subsequently been reassigned to another consumer (reassigned numbers).<sup>2</sup> The Second NOI seeks information about the "best ways" for companies that provide telephone service (Voice Service Providers or Providers) to report information about reassigned numbers and how that information can be made available to banks and other companies.<sup>3</sup>

ABA shares the Commission's goal to minimize calls to reassigned numbers, and we support the Commission's initiative to establish a database or other resource to notify companies about reassigned numbers. Banks regularly need to contact their customers with important, beneficial, and time-critical calls, and make significant efforts to promote the accuracy of the numbers they call. Despite these efforts, banks cannot completely avoid calling reassigned numbers. The Commission's conclusion in its 2015 Declaratory Ruling and Order<sup>4</sup> (2015 Order) that a caller is liable for a call made in good faith to a party who has consented to receive the call but whose

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<sup>1</sup> The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits and extend more than \$9 trillion in loans.

<sup>2</sup> *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59 (Second Notice of Inquiry released July 13, 2017), available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0713/FCC-17-90A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0713/FCC-17-90A1.pdf) (hereinafter *Second Notice of Inquiry*).

<sup>3</sup> *Id.* at 1.

<sup>4</sup> *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, 30 FCC Rcd. 7961, 7999-8000 (Declaratory Ruling and Order released July 10, 2015) ¶ 72 (hereinafter *TCPA Order*).

telephone number has been reassigned to another consumer, without notice to the bank, has led banks to limit—and, in certain instances, to eliminate—many pro-consumer communications.

ABA supports the creation of a centrally administered database or other resource that contains information on the permanent disconnection and reassignment of phone numbers (Reassigned Number Resource or Resource). If the Commission decides to create a Reassigned Number Resource, we urge the Commission to provide a safe harbor for companies that utilize the Resource. Even with the establishment of a well-functioning Resource, the possibility of inadvertently calling a reassigned number will remain. Numbers that were reassigned prior to the Resource’s creation will not be reflected in the Resource, and other numbers may be excluded from the Resource because of error. In addition, the Resource may not provide necessary disconnect and reassignment information for numbers belonging to a family calling plan (where phones may be registered to a member of the household who is not the phone’s user) or that have been assigned to a phone for which no customer identification information is available, such as a prepaid phone. In the absence of a safe harbor, the regulatory risk—and potential liability—for calling a reassigned number will inhibit banks from placing many pro-consumer communications, including suspicious activity alerts, data security breach notifications, and low balance alerts.

If the Reassigned Number Resource reports timely, accurate, and comprehensive information on disconnected and reassigned numbers, it could provide significant value to banks and, more importantly, to those customers who currently may not receive important communications from their banks because of the regulatory risk of calling a customer number that has been reassigned. However, the Resource will not remove all barriers to effective communication between a bank and its customers. ABA urges the Commission to reconsider its interpretations of the Telephone Consumer Protection Act (TCPA),<sup>5</sup> particularly the Commission’s expansive definition of “automatic telephone dialing system” (Autodialer),<sup>6</sup> which has imposed substantial obstacles to banks seeking to contact their customers using efficient dialing technologies. To facilitate communications best between banks and consumers, the Commission should promulgate a more sensible interpretation of this term.

## **I. Background**

Banks work hard to promote accuracy in the numbers they call. These efforts include providing consumers multiple means to edit contact information, confirming a consumer’s contact information during any call with the consumer, regularly checking the database administered by the Local Number Portability Administrator to confirm that a residential number has not been

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<sup>5</sup> Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 et seq.

<sup>6</sup> See 47 U.S.C. § 227(a)(1) (defining “automatic telephone dialing system”); *TCPA Order*, 30 FCC Rcd. at 7971-7978 ¶¶ 10-24 (interpreting statutory definition).

transferred to a wireless number,<sup>7</sup> providing instructions for reporting a wrong number call, and purchasing one or more vendor-provided solutions to identify customer numbers that have been disconnected and/or reassigned to other consumers.<sup>8</sup> However, banks—which need to initiate billions of informational calls annually—cannot completely avoid calling reassigned wireless telephone numbers.

The volume of phone numbers that are disconnected (and then reassigned) each day is substantial. One large bank reported that, when it first compared its base of customer numbers against current numbering information provided by a vendor, the bank could not “match” 7 million of its customer numbers—a strong indication that these numbers had been disconnected. Another large bank reported that, on average, it cannot match 1.5 million of its customer wireless numbers against vendor-provided numbering information each month.

These figures are unsurprising, because telephone companies recycle as many as 37 million telephone numbers each year.<sup>9</sup> In 2016, one quarter of wireless phone subscribers disconnected their service.<sup>10</sup> Consumers who change their wireless number *should* notify the businesses and organizations with whom they interact of the change; however, they often fail to do so.

In addition, the sellers of prepaid phones require purchasers to provide *no* information about purchasers’ identity. Consequently, existing vendor-provided databases of phone numbers currently in use do not list the names of consumers who have prepaid phones. When a bank seeks to “match” its base of customer numbers (for which the bank has obtained consent to make autodialed calls) against a vendor-provided list of current number assignments, numbers belonging to bank customers with prepaid phones will not match the information on the vendor-

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<sup>7</sup> The Local Number Portability Administrator oversees the system that allows consumers to keep their phone numbers when they switch Voice Service Providers.

<sup>8</sup> As an example of the lengths that banks will go to avoid calling reassigned numbers, one large bank that uses the services of multiple vendors reported spending \$4 million per year on a single vendor’s services to identify those customer phone numbers in its records that have been relinquished (or otherwise no longer used) by the customer and thus potentially reassigned to another consumer.

<sup>9</sup> Alyssa Abkowitz, *Wrong Number? Blame Companies’ Recycling*, Wall Street J. (Dec. 1, 2011), available at <http://www.wsj.com/articles/SB10001424052970204012004577070122687462582#ixzz1fFP14V4h>.

<sup>10</sup> *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, WT Docket No. 17-69, at 16 (Twentieth Mobile Wireless Competition Report proposed Sept. 7, 2017), available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0907/DOC-346595A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0907/DOC-346595A1.pdf) (hereinafter *Twentieth Mobile Wireless Competition Report*) (referencing data calculated by CTIA).

provided list, suggesting wrongly that these numbers have been disconnected.<sup>11</sup> Moreover, these numbers are disconnected at higher rates than other numbers; in 2016, 58 percent of prepaid phone users relinquished their number.<sup>12</sup>

The placement of calls to numbers belonging to a family calling plan also presents challenges. A Voice Service Provider may register all phone numbers assigned to a family calling plan under a single person's name, often the head of the household. However, the bank's records of customers' consents to receive autodialed calls may indicate that a *different* member of the household, having a different first and/or last name, is the user of one (or more) numbers under the family plan. Under these circumstances, the bank's records will not match those of the Provider, and the bank may conclude that the regulatory risk of calling a reassigned number is too great to call the customer's number. In addition, one family member may provide the bank with consent to receive autodialed calls on *another* family member's phone number. When the bank calls that number, it may expose itself to potential liability, as the phone number's subscriber did not provide consent to be called.

Moreover, there are many instances when a bank will place a call to a number that has been reassigned but not learn of the reassignment during the call. A call could receive no response, be received by an answering machine that does not identify the recipient, or be answered by a live person who does not reveal that he or she is not the intended recipient of the call. Under the Commission's 2015 Order, any of these scenarios would constitute the one or *first* call, to which no liability attaches.<sup>13</sup> Any subsequent calls could subject the bank to liability, even if it had no actual knowledge that the number had been reassigned, as the Commission conceded in its Order.<sup>14</sup>

The numbers of lawsuits demanding awards of statutory damages because of such inadvertent and good faith calls continue to grow.<sup>15</sup> The potential liability for making these calls—and the

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<sup>11</sup> Because of the difficulty in determining when a number assigned to a consumer's prepaid phone has been reassigned to another consumer, a plaintiff seeking to generate TCPA lawsuits can purchase such phones, "wait[] for them to ring" with calls intended for the phone's prior owner, and "file[] TCPA actions as a business," as one plaintiff in fact did, in *Stoops v. Wells Fargo Bank, N.A.*, Civ. Action No. 3:15-83, at 2 & 22 (W.D. Pa. June 24, 2016). In *Stoops*, the plaintiff purchased at least 35 prepaid phones for her TCPA "business." *Id.* at 2.

<sup>12</sup> *Twentieth Mobile Wireless Competition Report* at 16.

<sup>13</sup> See *TCPA Order*, 30 FCC Rcd. at 8000 ¶ 72 (providing safe harbor, under certain circumstances, for a first call attempt to a number that has been reassigned).

<sup>14</sup> See *id.* at 8006 ¶ 85 ("[W]e agree with commenters who argue that callers lack guaranteed methods to discover all reassignments immediately after they occur. The record indicates that tools help callers determine whether a number has been reassigned, but that they will not in every case identify numbers that have been reassigned.").

<sup>15</sup> A white paper published in May 2017 found that "TCPA litigation has consistently increased year-after-year. Between 2010 and 2016 there was a **1,273% increase in litigants**; between

draconian litigation costs that must be incurred to defend against the resulting lawsuits—threatens to curtail important and valued communications between banks and their customers.<sup>16</sup>

## **II. Discussion**

### **A. ABA Supports the Creation of a Reassigned Number Resource and Safe Harbor to Protect Callers that Use the Resource**

ABA supports the creation of a Reassigned Number Resource that contains information in a centrally accessible location regarding (a) the permanent disconnection (relinquishment) of a number from the consumer to whom it was assigned; and (b) the reassignment of that number to another consumer. Because the creation of this Resource will involve a significant level of technical complexity, we urge the Commission to work with the banking industry to identify the universe of circumstances where banks risk calling reassigned numbers, despite their best efforts, and design the Resource to address those circumstances. Because the risk of calling a reassigned number will remain after establishment of the Resource, we also urge the Commission to establish a safe harbor for callers that use the Resource when placing calls.

#### **1. The Reassigned Number Resource Should Contain Information on Disconnected and Reassigned Numbers at a Centralized Source**

Most importantly, the Reassigned Number Resource should contain information identifying phone numbers that have been disconnected or otherwise relinquished by a consumer. The Resource should distinguish between a number that has been relinquished by a consumer and a number that the consumer has ported from one Voice Service Provider to another. Not infrequently, consumers change Providers while maintaining the same phone number. Under existing vendor-provided solutions, the consumer's change in Providers may be reported wrongly as a relinquished number, even though the number continues to be used by the consumer. The Resource should avoid reporting such "false positives" as numbers that have been *relinquished* by the consumer.

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2015 and 2016 alone the total number of litigants increased 32%.” Josh Adams, Dir. of Research, ACA Int’l, *Unintended Consequences of an Outdated Statute: How the TCPA Fails to Keep Pace with Shifting Consumer Trends* 2 (May 2017), available at <http://www.acainternational.org/assets/research-statistics/p4-aca-wp-tcpaconsequences.pdf> (emphasis in original).

<sup>16</sup> As the Commission knows, the damages claims and legal costs to defend a TCPA action are substantial. *See TCPA Order*, 30 FCC Rcd. at 8072-73 (Comm’r Pai, dissenting) (“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.”).



In addition, the Reassigned Number Resource should include information on numbers that have been reassigned, in addition to numbers that have been relinquished. In certain instances, a consumer's number may be *temporarily* disconnected, such as when the consumer is traveling abroad (or otherwise does not need service during a period of time) or has missed payments. A temporarily disconnected number may be reported in a database containing only disconnected numbers. However, callers accessing the database will likely desire information on numbers that consumers have *permanently* relinquished. Consequently, the Resource should provide information on reassignments, to help callers identify customer numbers that have been permanently, rather than temporarily, disconnected.

Information on disconnections and reassignments should be accessible from a centrally administered source to callers seeking to use the Reassigned Number Resource. Requiring callers to query or otherwise receive that information from multiple data sources, such as from all Voice Service Providers, is not efficient or cost-effective for callers or providers of the information.

In assessing whether the Commission, a data aggregator, or another entity should administer the Reassigned Number Resource, the Commission should consider, among other factors, (a) whether the aggregation of data is a core competency of the entity, and (b) how costs to establish and administer the Resource would be allocated. Imposing on callers the costs to establish and administer the Resource could create a significant disincentive to use the Resource, as callers would need to weigh the benefits of using the Resource against its costs. We suggest the Commission consider an alternate source of funding for the Resource, perhaps by seeking an appropriation from Congress.

## **2. The Commission Should Provide a Safe Harbor for Callers that Use the Reassigned Number Resource**

We agree with the Commission that the information reported in the Reassigned Number Resource should be “comprehensive,”<sup>17</sup> in that it should include the full inventory of phone numbers that consumers have relinquished. No matter how well designed and constructed, however, the Reassigned Number Resource will not eliminate completely calls to reassigned numbers. We agree with Commissioner O’Rielly that a “properly constructed compliance safe harbor must be part” of the solution.<sup>18</sup> A safe harbor will ensure that banks are not discouraged from placing important calls to consumers, and that callers do not face enormous liability and litigation costs for inadvertently calling a reassigned number notwithstanding their attempt to identify such numbers through use of the Resource. We urge the Commission to provide a safe harbor from liability for banks and other entities that call a number for which the caller had obtained consent to place autodialed calls, but that was subsequently reassigned to another consumer, when the caller (a) reviewed information in the Resource within the past 31 days to

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<sup>17</sup> *Second Notice of Inquiry* at 7 ¶ 20.

<sup>18</sup> *Id.* at 14 (statement of Comm’r O’Rielly).

determine whether the number had been reassigned, and (b) received no information that the number had been reassigned.

A bank or other caller that fully utilizes the Reassigned Number Resource could inadvertently call a reassigned number under one of several circumstances. First, a number disconnected or reassigned prior to the Resource's establishment is unlikely to be listed in the Resource. Consequently, a caller will not be able to learn of the number's reassignment by accessing the Resource.

Second, there will likely be a delay between the time when a number is disconnected or reassigned and the time when that information is reported in the Resource. For example, if the Resource is updated once each day, there could be a period of up to 24 hours wherein a number has been reassigned to a new consumer but which reassignment is not reported in the Resource.<sup>19</sup>

Third, banks face significant, potentially insurmountable, challenges in accurately identifying the assignment and reassignment of phone numbers that belong to a family calling plan. As described in Part I, a Voice Service Provider may list all phone numbers assigned to a family calling plan under the head of the household, but the bank's records of customers' consents to receive autodialed calls may indicate that a *different* member of the household is the user of one (or more) numbers under the plan. This can make the bank's accurate identification of the current holder of the number nearly impossible, because the Resource's information for that number (which will be obtained from Providers) will not match the bank's records of consents, and the bank will not be able to determine conclusively whether the number has been reassigned. Also, as described in Part I, we are aware of instances where a bank customer provided consent to call the number belonging to his or her spouse's phone; the spouse then filed a lawsuit when the bank called that number.<sup>20</sup> The Resource is unlikely to provide callers with information sufficient to prevent such calls from being made. A safe harbor is needed to protect callers who rely upon the Resource but call numbers that have nonetheless been reassigned.

A fourth reason a safe harbor is needed is to protect calls made to numbers assigned to prepaid phones that, unbeknownst to the caller, were subsequently reassigned to another consumer. As discussed in Part I above, sellers of prepaid phones do not collect information on the identity of the consumer who purchased the phone or report when a phone has been returned and the phone's number reassigned to another consumer. Consequently, banks will have limited ability

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<sup>19</sup> In addition, some banks, particularly community banks, may not have the staffing or other resources to access the Resource after each update. These banks will face increased risk of calling reassigned numbers, and thus liability, without a safe harbor.

<sup>20</sup> Under these circumstances, the caller will not benefit from the Commission's finding, in the 2015 Order, that a caller may rely on the consent provided by a "non-subscriber customary user of the phone." *TCPA Order*, 30 FCC Rcd. at 7999 ¶ 72. Where a consumer provides consent for the bank to place autodialed calls to the phone belonging to the consumer's spouse, the consumer is not a customary user of the phone; only the spouse is a customary user.

to determine whether the current user of the phone provided consent to be called.<sup>21</sup> In the absence of a safe harbor, banks will likely continue to forego placing calls to prepaid phone numbers, and bank customers with these phones will not receive important and time-sensitive calls that the bank seeks to make, even if the customer had consented to receive such calls on that number.

A fifth reason a safe harbor is needed is because there will inevitably be errors in the disconnect and reassignment information reported through the Resource, despite the best efforts of the Commission, Voice Service Providers, and third party data aggregators. If a bank or other caller relies on erroneous information in placing a call to a reassigned number, the caller should not be liable for the call.

### **B. The Reassigned Number Resource Does Not Obviate the Need for a More Sensible Interpretation of the TCPA's Requirements**

A Reassigned Number Resource that reports timely, accurate, and comprehensive information on disconnected and reassigned numbers will provide significant value to banks, bank customers, and consumers. However, the Resource will not remove all of the barriers that currently limit a bank's ability to communicate with its customers. We urge the Commission to revisit its interpretations of the TCPA, particularly its interpretation of the statutory definition of an Autodialer, to facilitate the use of efficient dialing technologies by banks to contact their customers with important messages. As Chairman Pai and Commissioner O'Rielly have noted, the Commission has construed the definition of an Autodialer so broadly that it sweeps in technologies used by banks and other callers to send messages to consumers that were never contemplated to fall within the definition of this term.<sup>22</sup> The broad definition has encouraged the filing of class action lawsuits, and the resulting risk of significant litigation costs has led financial institutions to limit or eliminate many pro-consumer communications. The Commission should act expeditiously to correct its flawed interpretation.

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<sup>21</sup> To assist callers in determining whether a phone number belonging to a prepaid phone has been reassigned, the Resource should report the date when a number was relinquished. That information would permit callers to compare the date on which the number was relinquished to the date when the bank received consent to call that number. If consent was provided after the date the phone was last relinquished, then a caller may have greater confidence that the phone is still used by the person who provided consent. Because information on the relinquishment of such numbers may not be complete, a safe harbor should protect callers who rely on the information in the Resource but nonetheless call a number belonging to a prepaid phone that has been reassigned.

<sup>22</sup> See, e.g., *TCPA Order*, 30 FCC Rcd. at 8074 (Comm'r Pai, dissenting) (concluding that the TCPA Order "dramatically expands the TCPA's reach"); *id.* at 8087 (Comm'r O'Rielly, dissenting in part and approving in part) (concluding that the TCPA Order "impermissibly expands the statutory definition of an [Autodialer] far beyond what the TCPA contemplated").

The Commission’s interpretation of the meaning of an Autodialer deviates sharply from Congress’ intent when it passed the TCPA. In 1991, Congress acted to regulate the use of a specific dialing technology to call mobile, emergency, healthcare-related, and public safety-related telephone numbers.<sup>23</sup> As defined in the TCPA, an Autodialer 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.”<sup>24</sup> Significantly, an Autodialer uses a random or sequential algorithm to generate numbers *without regard* to whether all of the numbers so generated have been assigned to subscribers, or whether those numbers are assigned to emergency services, healthcare providers, or public safety agencies.

Put simply, banks do not make such random or sequential calls. Instead, banks call the telephone numbers of actual customers, which are not random or sequential numbers. But the Commission has departed from the statutory text and interpreted the term Autodialer to mean any equipment that can dial numbers “without human intervention,”<sup>25</sup> including equipment that has the “*potential ability*” to function in this manner.<sup>26</sup> In essence, the Commission has read out of the TCPA the requirement that equipment must generate numbers in a random or sequential manner to be an Autodialer. The practical effect of the Commission’s interpretation is that many efficient dialing technologies—even those that do not use a random or sequential number generator—may be used only if the calling financial institution can demonstrate that it has received the consumer’s prior express consent to call that number. This significantly limits the ability of banks to communicate with their customers and other consumers.

As the Commission addresses the problems posed by calls made to reassigned numbers, it should re-consider the definition of an Autodialer and re-interpret the term in a manner that facilitates, rather than impairs, the important communications that banks and other businesses seek to send to their customers.

### III. Conclusion

ABA supports the Commission’s initiative to establish a Reassigned Number Resource. Despite banks’ significant efforts to promote accuracy in the numbers they call, banks cannot completely avoid calling reassigned numbers. The Resource could significantly reduce calls placed to reassigned numbers, while permitting banks to call customer numbers with confidence that those numbers have not been reassigned to other consumers.

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<sup>23</sup> See H.R. Rep. No. 102-317, at 10 (1991) (explaining that TCPA was intended to address telemarketers who “often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers”).

<sup>24</sup> 47 U.S.C. § 227(a)(1) (emphasis added).

<sup>25</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14092 (Report and Order released July 3, 2003) ¶ 132.

<sup>26</sup> *TCPA Order*, 30 FCC Rcd. at 7975 ¶ 19 (emphasis added).

ABA urges the Commission to create a Reassigned Number Resource that contains information on both the permanent disconnection of phone numbers and the reassignment of those numbers. Additionally, because no resource of this nature, no matter how well designed, will prevent all calls to reassigned numbers, ABA urges the Commission to include a safe harbor for callers that use the Resource when placing calls.

Although a Reassigned Number Resource could provide significant value to banks and consumers, it will not completely remove barriers to effective bank communications. ABA urges the Commission to re-visit its interpretations of the TCPA, particularly its interpretation of the definition of an Autodialer. The Commission should promulgate a more sensible interpretation of this term, one that is consistent with the text of the TCPA and congressional intent.

Sincerely,

A handwritten signature in black ink, reading "Jonathan Thessin". The signature is written in a cursive, flowing style with a large initial 'J'.

Jonathan Thessin  
Senior Counsel, Center for Regulatory Compliance