Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Advanced Methods to Target	)	CG Docket No. 17-59
and Eliminate Unlawful Robocalls	)	

COMMENTS OF THE RETAIL INDUSTRY LEADERS ASSOCIATION

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June 7, 2018

EXECUTIVE SUMMARY

The Retail Industry Leaders Association ("RILA") respectfully submits these Comments in response to the Commission's Second Further Notice of Proposed Rulemaking on Methods to Target and Eliminate Unlawful Robocalls (the "Reassigned Numbers Further Notice").

RILA's members include retail companies that engage in consumer outreach and that endeavor to honor consumers' expectations regarding such communications. As the Commission is aware, however, consumers' expectations can be frustrated—and callers' businesses can be jeopardized—when a telephone number is reassigned from one consumer to another without a caller's knowledge. RILA therefore commends the Commission for its ongoing efforts, both in this Reassigned Numbers Further Notice and in the TCPA Public Notice issued on May 14, 2018 (the "TCPA Public Notice"), to address the problem of reassigned numbers.

The Reassigned Numbers Further Notice seeks comment on the creation of a comprehensive database to assist callers to identify reassigned numbers and a reasonable safe harbor for callers who use it. Previous comments in this proceeding demonstrated broad support for this approach. RILA likewise strongly supports the proposed solution, which would enable and encourage callers to honor consumers' communications preferences and deliver desirable messages—such as appointment reminders, order confirmations, shipping and delivery notifications, prescription refill reminders, fraud alerts, product and services notifications, satisfaction surveys, and loyalty program alerts—without risking unavoidable liability for calling numbers that they could not know had been reassigned. As discussed below, the Commission can and should establish a centralized database and a safe harbor for its users that persists and can be relied upon for a reasonable period. These changes would serve the Commission's goals of reducing unwanted calls to consumers and making compliance feasible for scrupulous callers.

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The Retail Industry Leaders Association ("RILA") submits the following Comments in response to the Commission's Second Further Notice of Proposed Rulemaking on Methods to Target and Eliminate Unlawful Robocalls,[1] which proposes the creation of a reassigned numbers database and reasonable safe harbor for its users. For the reasons set forth below and in its prior Comments, RILA strongly supports that proposal.

I. INTRODUCTION

The Commission plays a vital role in ensuring that the Telephone Consumer Protection Act ("TCPA")[2] addresses the evolving landscape of consumer communications. RILA appreciates the Commission's focus on protecting consumers and deterring illegal robocalls, including its recent

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1 *In re Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Second Further Notice of Proposed Rulemaking (released Mar. 23, 2018) (the "Reassigned Numbers Further Notice").

2 47 U.S.C. § 227 *et seq*.

$120 million forfeiture penalty against a serial spoofer who intentionally placed tens of millions of illegal robocalls.[3]

RILA likewise applauds the Commission's renewed attention, both in the Reassigned Numbers Further Notice and in the TCPA Public Notice of May 14, 2018,[4] to the problem of inadvertent calls to reassigned numbers, which has been exacerbated by the lack of a comprehensive and authoritative database against which legitimate callers can scrub calling lists. Neither callers nor consumers have been well-served by the Commission's prior approach to this issue, which created an unachievable standard for compliance, an unavoidable risk of liability, and an undeniable chilling effect on speech—none of which was defensible as a matter of law or advisable as a matter of policy.

Indeed, as Commissioner O'Rielly observed, the Commission's prior approach to this issue "penalize[d] businesses and institutions acting in good faith to reach their customers," which of course turned the statute "on its head."[5] Commissioner Pai likewise noted that, "[r]ather than focus on the illegal telemarketing calls that consumers really care about," the Commission's prior decision

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[3] *See In re Adrian Abramovich, Marketing Strategy Leaders, Inc., and Marketing Leaders, Inc.*, FCC 18-58, Forfeiture Order (May 10, 2018) (Forfeiture Order imposing full penalty of $120 million proposed in a prior Notice of Apparent Liability for placing 96,758,223 illegal spoofed robocalls in 2016).

[4] *See 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*, CG Docket Nos. 18-152, 02-278, DA Docket No. 18-493, Public Notice (May 14, 2018) (the "TCPA Public Notice"). Insofar as reassigned numbers are concerned, the TCPA Public Notice seeks comment on whether the actual or intended recipient of a call is the "called party" from whom the caller must have obtained prior consent, and under what circumstances a caller can continue to "reasonabl[y] rel[y]" on the provision of consent from the former holder of a subsequently reassigned number. RILA submits that "called party" is best understood as the intended recipient of the call, and that "reasonable reliance" is best understood as allowing the caller to rely on the provision of consent until it has actual notice that a given number has or may have been reassigned. In the interest of brevity, however, RILA will address those issues only in response to the TCPA Public Notice.

[5] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8084 (2015) ("2015 Omnibus Order") (O'Rielly, dissenting).

"target[ed] useful communications between legitimate businesses and their customers" and "ma[d]e abuse of the TCPA much, much easier."[6] "[T]he primary beneficiaries," he presciently predicted, "will be the trial lawyers, not the American public."[7]

The Reassigned Numbers Further Notice proposes a practical solution to the problem of reassigned numbers that will benefit both consumers and callers, specifically the creation of a comprehensive database of reassigned numbers, coupled with a reasonable safe harbor for callers that choose to use it. Prior comments in this proceeding overwhelmingly supported such a solution.[8] RILA also supports such a solution, which would enable legitimate and scrupulous callers to deliver desirable information—*e.g.*, order confirmations, appointment reminders, shipping and delivery notifications, product and services notifications, prescription refill reminders, fraud alerts, satisfaction surveys, and loyalty program alerts—without risking crushing liability for calling numbers that they could not know had been reassigned. RILA also supports a reasonable safe harbor for callers that use such a database, one that contains a reasonable period during which a caller can rely upon the accuracy of the information it retrieves from the database. Such a safe harbor would encourage callers to scrub calling lists against the database and thus eliminate unintended calls to reassigned numbers. Together, an authoritative database and safe harbor mechanism would be a meaningful step forward in the Commission's broader effort to encourage important communications and discourage illegal robocalls.

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6 *Id.* at 8073 (Pai, dissenting).

7 *Id.*

8 *See In re Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Second Notice of Inquiry, 32 FCC Rcd. 6007 (2017) ("Reassigned Numbers NOI").

II. RILA AND ITS MEMBERS

RILA is the trade association of the world's largest and most innovative retail companies. Its more than 200 members include retailers, product manufacturers, and service suppliers that collectively account for more than $1.5 trillion in annual sales, millions of American jobs, and more than 100,000 retail stores, manufacturing facilities, and distribution centers around the world.

Many RILA members work hard to develop deep, meaningful, and sustained relationships with consumers. As noted above, retailers engage in important consumer outreach through a variety of informational and promotional calls and text messages. The retail industry continues to evolve in response to rapidly changing consumer preferences and technological advancements. Retailers are adapting to modern commerce through the pursuit of transformative innovation, particularly concerning the myriad ways in which they interact with consumers. The convergence of retail and technology ("(R)Tech") has caused the retail business model to fundamentally change, resulting in a business imperative to delight profoundly empowered consumers. To thrive in this era of (R)Tech, retailers must prioritize the careful delivery of informational and promotional communications that consumers have come to expect and desire. Empowering and honoring consumer choice is a key tenet of RILA's R(Tech) Center for Innovation, which helps retailers navigate and transform during this era of disruptive change, including with respect to communications.[9]

Retailers support a consumer's freedom of choice and ability to give or withhold consent for company communications as he or she sees fit. For consumers who have provided consent, many RILA members have built robust compliance regimes in reliance on the Commission's conclusion that, absent instructions by the consumer to the contrary, the provision of a phone number to a business constitutes prior express consent to receive informational communications

[9] Retail Industry Leaders Association, (R)Tech Center for Innovation, http://rtech.org/.

from or on behalf of that business to that phone number. That rule allows retailers and other businesses to meet modern consumers' expectations for the rapid and efficient communication of information. Many RILA members also send commercial communications to consumers and have adopted best practices in an effort to ensure that they reach only the consumers who have provided the requisite consent.

As the Commission has recognized, however, consumers' expectations can be upset when, unbeknownst to the caller, a consenting consumer has abandoned his or her telephone number and that number is reassigned to a person who did not consent to receive calls. This situation is also frustrating to legitimate callers, who have an interest in reaching the intended recipient and avoiding potential litigation that may arise from inadvertently reaching an unintended recipient. Creating a comprehensive and authoritative reassigned numbers database and safe harbor would benefit both consumers and callers, not only by ensuring that communications continue to reach the consumers who desire them, but also by preventing potentially catastrophic liability for callers who inadvertently call unintended consumers.

III. DISCUSSION

A. Reassigned Numbers Have Resulted in Unavoidable—and Often Abusive—Litigation

When the TCPA was enacted in 1991, its drafters intended that consumers would enforce it in small claims courts where they would not need the assistance of an attorney[10] and set statutory damages at an amount that would encourage individual claims and also be fair to callers.[11]

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[10] *See, e.g.*, 137 Cong. Rec. S16204 (Nov. 7, 1991) (Statement of Sen. Hollings) ("[I]t is my hope that States will make it as easy as possible for consumers to bring such actions, ***preferably in small claims court***. . . . Small claims court . . . would allow the consumer to appear before the court ***without an attorney***.").

[11] *See, e.g., id.* (Statement of Sen. Hollings) ("The amount of damages . . . is set to be fair to both the consumer and the telemarketer.").

But as Chairman Pai has observed, the Commission's implementation of the statute has "strayed far from its original purpose."[12] So far, in fact, that the statute is now "the poster child for lawsuit abuse."[13] Indeed, between 2007 and 2017, the number of TCPA suits filed in federal courts has increased by over ***31,000%***, with over 20,000 lawsuits filed in that period. (Compare the 14 lawsuits filed in 2007 to the 4,392 filed in 2017.[14]) Roughly one-third of those actions were styled as putative class actions,[15] which carry with them the risk of potentially annihilating aggregate statutory damages. And as shocking as these statistics are, these figures actually ***underrepresent*** the full extent of TCPA litigation, as they do not account for the countless number of state court actions, arbitrations, and pre-litigation demands that callers confront each year.[16]

Litigation involving inadvertent calls to reassigned numbers is no exception. On the contrary, one court recently remarked that "[t]he problem of recycled cellphone numbers has spurred a number of Telephone Consumer Protection Act lawsuits. . . ."[17] That is an understatement, as the last few years have witnessed a flood of reassigned number cases,[18] often despite callers' good-faith attempts at compliance. For example, the defendant in *Sterling v. Mercantile Adjustment*

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12 2015 Omnibus Order, 30 FCC Rcd. at 8073 (Pai, dissenting).

13 *Id.*

14 *See* WebRecon LLC, *WebRecon Stats for Dec 2017 & Year in Review*, https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review.

15 *See* U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* at 3 (Aug. 2017), http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf.

16 *See, e.g.*, *In re Petition of SUMOTEXT Corp. for Expedited Clarification or, in the Alternative, Declaratory Ruling*, CG Docket No. 02-278 at 4–6 (Sept. 3, 2015) ("SUMOTEXT Petition").

17 *Holt v. Facebook, Inc.*, 240 F. Supp. 3d 1021, 1025 n.1 (N.D. Cal. 2017) (citing cases).

18 *See, e.g.*, *Eldridge v. Cabela's Inc.*, No. 16-0536, 2017 WL 4364205 (W.D. Ky.. Sept. 29, 2017); *Glick v. Performant Fin. Corp.*, No. 16-5461, 2017 WL 786293 (N.D. Cal. Feb. 27, 2017); *Sliwa v. Bright House Networks, LLC*, No. 16-0235, 2016 WL 3901378 (M.D. Fla. July 19, 2016); *Nunes v. Twitter, Inc.*, 194 F. Supp. 3d 959 (N.D. Cal. 2016); *Jones v. A.D. Astra Recovery Servs., Inc.*, No. 16-1013, 2016 WL 3145072 (D. Kan. June 6, 2016); *Molnar v. NCO Fin. Sys., Inc.*, No. 13-0131, 2015 WL 1906346 (S.D. Cal. Apr. 20, 2015); *Sterling v. Mercantile Adjustment Bureau, LLC*, No. 11-0639, 2014 WL 1224604 (W.D.N.Y. Mar. 25, 2014).

Bureau was haled into court by a plaintiff who never—during 17 phone calls—reported the reassignment or asked for the calls to stop.[19] Notwithstanding the fact that it had no way of knowing about the reassignment and took immediate measures to stop calling the number once it learned of the reassignment, the defendant was held liable for the calls.

Some plaintiffs have gone to even more "ridiculous lengths" to profit from the TCPA.[20] Indeed, the problem of professional plaintiffs is so pronounced under the TCPA that at least one plaintiff aspired to write a book about his exploits.[21] In response to this problem, several compliance vendors offer services that help identify and scrub these reassigned numbers from dialing lists.[22] Nevertheless, the relative ease of manufacturing a reassigned number case has spawned one of the most remarkable—and most easily replicated—species of contrived claims. As one entrepreneurial plaintiff admitted, she had made a "business" out of the TCPA[23] by purchasing at least ***35 different cellphones*** with area codes in economically depressed areas in order to attract debt-collection robocalls that were intended for other people.[24] Although one of her cases

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19 *Sterling*, 2014 WL 1224604, at *2.

20 *See* 2015 Omnibus Order, 30 FCC Rcd. at 8073 (Pai, dissenting).

21 *See* Archive of Publisher's Marketplace Post, http://web.archive.org/web/20100420075855/http://www.publishersmarketplace.com/rights/display.cgi?no=6960 (Apr. 15, 2010) (proposing book by Craig Cunningham to be called "Tales of a Debt Collection Terrorist: How I Beat the Credit Industry at Its Own Game and Made Big Money from the Beat Down").

22 *See, e.g.*, Tatango, *Tatango Launches Professional TCPA Plaintiff Monitoring to Protect Monitors* (May 11, 2018), https://www.tatango.com/blog/tatango-launches-professional-tcpa-plaintiff-monitoring-to-protect-marketers/; Do-Not-Call Protection, *Known TCPA/FDCPA Plaintiffs & Litigant Scrub*, http://www.donotcallprotection.com/litigant-scrub-b2c.

23 *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 799 (W.D. Pa. 2016) ("In discussing her business, Plaintiff testified: 'Q. Why do you have so many cell phone numbers? A. I have a business suing offenders of the TCPA . . . [i]t's what I do. Q. So you're specifically buying these cell phones in order to manufacture a TCPA [lawsuit]? In order to bring a TCPA lawsuit? A. Yeah.'") (internal citation omitted);

24 *See id.* ("Plaintiff also described the process of activating her cell phones: . . . Q. And what ZIP code did you select or do you select? A. Normally, Florida number—Florida ZIP codes. Q. And why is that? A. Because there's a depression in Florida. Q. Okay. So you're—what do you mean by there's a depression in Florida? Why are you selecting a Florida number? A. I knew that people had hardships in Florida, that they would be usually defaulting on their loans or their credit cards.") (internal citation omitted).

was dismissed because the court concluded that her alleged "harms" had been manufactured,[25] others were settled in order to avoid the expense and uncertainty of litigation.

In short, Chairman Pai was right when he predicted that the Commission's prior approach to reassigned numbers would "create[] a trap for law-abiding companies," "giv[e] litigious individuals a reason *not* to inform callers about a wrong number," and "help trial lawyers update their business model for the digital age."[26] It is past time that that approach be undone.

B. The Commission Has the Opportunity to Meaningfully Address Reassigned Numbers

The Commission's 2015 Omnibus Order interpreted the term "called party" not as the "intended recipient of a call," but rather as the "current subscriber (or non-subscriber customary user of the phone)."[27] One of the many problems with that interpretation is, if a wireless number has been reassigned, the caller will not know that it did not have the actual recipient's consent until after the call and, as demonstrated by the cases discussed above, it may not learn that even then. The Commission acknowledged as much, agreeing with commenters that "callers lack guaranteed methods to discover all reassignments."[28] Indeed, it recognized that, "[e]ven where the caller is taking ongoing steps reasonably designed to discover reassignments and to cease calls, . . . these steps may not solve the problem in its entirety."[29] Although it tried to address this problem by exempting the first call to a reassigned number,[30] it acknowledged that this would simply kick the

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25 *Id.* at 798–99, 801.

26 2015 Omnibus Order, 30 FCC Rcd. at 8080 (Pai, dissenting).

27 *Id.* at 7999; *see also id.* at 8000–03.

28 *Id.* at 8006.

29 *Id.* at 8006–07; *see also id.* at 8009 (acknowledging that callers using "best practices and available tools . . . may nevertheless not learn of reassignment before placing a call").

30 *Id.* at 8001 n.265 ("We interpret the TCPA to permit the caller to make or initiate one additional call to a reassigned number, over an unlimited period of time, where the caller does not have actual knowledge of the reassignment and can show that he had consent to make the call to the previous subscriber or customary user of the number."); *see also id.* at 8009–10.

can down the road, as "a single call to a reassigned number will [not] always be sufficient for callers to gain actual knowledge of the reassignment,"[31] for example if the call were not picked up or, as in the *Sterling* case, if the recipient did not disabuse the caller of its belief that it had consent to call. The Commission nevertheless held that callers should be deemed to have "constructive knowledge" after that first call no matter what, which in its view was an appropriate allocation of "risk."[32]

In *ACA International v. FCC,*[33] the United States Court of Appeals for the D.C. Circuit found that the Commission had not gone far enough to protect good-faith callers from unavoidable liability. Specifically, it "set aside the Commission's interpretation on the ground that the one-call safe harbor is arbitrary and capricious."[34] The court reasoned that, although the Commission had purportedly premised the one-call-only safe harbor on a "reasonable-reliance" standard, the Commission had given "no explanation of why reasonable-reliance considerations would support limiting the safe harbor to just one call or message."[35] In light of the Commission's "concession that the first call may give no notice of a reassignment" and "disavowal of any expectation that a caller should 'divine from the called consumer's mere silence [regarding] the current status of a

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31 *Id.* at 8009 n.312.

32 *Id.* at 8007, 8010.

33 885 F.3d 687 (D.C. Cir. 2018).

34 *Id.* at 705.

35 *Id.* at 707; *see also id.* ("[W]hy does a caller's reasonable reliance on a previous subscriber's consent necessarily cease to be reasonable once there has been a single, post-reassignment call? The first call or text message, after all, might give the caller no indication whatsoever of a possible reassignment (if, for instance, there is no response to a text message, as would often be the case with or without a reassignment). The Commission outlined a number of measures callers could undertake 'that, over time, may permit them to learn of reassigned numbers.' But the Commission acknowledged that callers 'may nevertheless not learn of reassignment before placing a call to a new subscriber,' and that the first post-reassignment call likewise might give no reason to suspect a reassignment. In that event, a caller's reasonable reliance on the previous subscriber's consent would be just as reasonable for a second call." (internal citations omitted)).

telephone number,'" the court concluded that "no cognizable conception of 'reasonable reliance' support[ed] the Commission's blanket, one-call-only allowance."[36]

Although the court noted that "called party" could conceivably be read as referring to "the current subscriber,"[37] it "set aside the Commission's treatment of reassigned numbers as a whole."[38] It did so because, after excising the one-call-only safe harbor, the court could not "be certain that the [Commission] would have adopted" the same interpretation of "called party," which would result in a "severe . . . strict-liability regime."[39] The court then invited the Commission to go back to the drawing board and noted that, by virtue of this proceeding, it was "already on its way to designing a regime to avoid the problems of the 2015 ruling's one-call safe harbor."[40]

In the aftermath of *ACA International*, the Commission is on the right path in developing an effective, cost-effective way for scrupulous callers to avoid making inadvertent calls to reassigned numbers. Specifically, it should establish an authoritative database of reassigned numbers and encourage its use by creating a safe harbor mechanism for callers that choose to consult it. We discuss these proposals below.

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36 *Id.* (internal citations omitted).

37 *Id.* at 706.

38 *Id.* at 709.

39 *Id.* at 708–09. The court was right about that, as the Commission rejected a proposed "'zero call' approach under which no allowance would have been given for the robocaller to learn of the reassignment." 2015 Omnibus Order, 30 FCC Rcd. at 8009 n.312. The TCPA, the Commission concluded, did not require a result "that severe." *Id.*

40 *ACA Int'l*, 885 F.3d at 709.

C. The Commission Has the Authority to Establish a Reassigned Numbers Database and Safe Harbor

The Reassigned Numbers Further Notice seeks comment on whether the Commission has the authority to require the reporting of number reassignments and to establish a database and safe harbor tied to its use.[41] The answer to that question is "yes."

The Commission's statutory authority over the North American Numbering Plan ("NANP") empowers it to require that recipients of NANP numbers report the reassignment of those numbers.[42] All U.S. phone numbers, including those that are reassigned, are within the Commission's purview.[43] Reassigned number reporting requirements would be akin to the Commission's existing number utilization reporting requirements.[44]

The Commission likewise has the statutory authority to adopt reasonable rules to encourage participation by all stakeholders, such as rules establishing a safe harbor mechanism for callers who choose to utilize the database, as well as specifying the parameters of a safe harbor for this voluntary use. A safe harbor tied to the use of a reassigned numbers database would be consistent with several other TCPA safe harbors that the Commission already has adopted, including those related to ported numbers and the national Do-Not-Call Registry.[45] Indeed, the court in *ACA International* recognized the Commission's authority in this space by lauding its ongoing efforts in this very proceeding.[46]

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41 *See* Reassigned Numbers Further Notice ¶¶ 10, 31, 57.

42 *See* 47 U.S.C. § 251(e)(1) ("The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis.").

43 *See id.* ("The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States.").

44 *See* 47 C.F.R. § 52.15.

45 *See infra* Section E.

46 *See ACA Int'l*, 885 F.3d at 709 (characterizing the creation of "a comprehensive repository of information about reassigned wireless numbers" and "a safe harbor for callers that inadvertently reach reassigned numbers after consulting the most recently updated information" as "naturally bear[ing] on the

In short, there is no legal impediment to the Commission's establishment of a database for reassigned numbers and a reasonable safe harbor for callers that choose to utilize such a resource, and there is overwhelming support for its doing so. It follows that the Commission should pursue these and other solutions to address the problem of reassigned numbers.

D. A Reassigned Numbers Database Should Be Comprehensive and Cost-Effective

The Reassigned Numbers Further Notice seeks comment on several reassigned numbers database options. Specifically, it asks what information would ensure that a database is authoritative and timely, how to require the reporting of that information, and how to make information available to callers. Each of these issues requires consideration of multiple factors, including how the Commission should balance the costs and benefits of any requirements that it adopts.

RILA is on record in its Comments on the Reassigned Numbers NOI regarding the type of data that any reassigned numbers database should collect and share, as well as the functional elements of a useful database.[47] As the Reassigned Numbers Further Notice suggests, a legitimate caller may not always have the name of the individual it is trying to reach. For example, a caller may not have the intended party's name if prior consent exists exclusively by virtue of the provision of the phone number. But even without name information that may not be universally available, a database query should allow a caller to know that a number that is associated with a consumer's valid consent either remains a "good" number as of the date of the database query, or has been reassigned since the time of the last contact or another date specified by the user. If a number has

reasonableness of calling numbers that have in fact been reassigned, and hav[ing] greater potential to give full effect to the Commission's principle of reasonable reliance"); *see also* Reassigned Numbers Further Notice ¶ 10 n.18.

[47] Aug. 28, 2017 Comments of Retail Industry Leaders Association *In re Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Notice of Inquiry, 32 FCC Rcd 6007 (July 13, 2017) (hereinafter "RILA NOI Comments").

been reassigned since the last contact, a caller is put on notice that the number may no longer be associated with the consumer who previously provided consent to contact that number. It is also important that any database be able to handle both single-number queries as well as batch lists of numbers.

Critically, and as detailed in RILA's comments on the Reassigned Numbers NOI, any database information requirements should not be designed in order to create a "one size fits all" solution, as companies use contact phone numbers in different ways according to the expressed desires of their customers and the needs of their individual businesses. RILA agrees with the Commission's expressed view that, at a minimum, any database should be able to validate by a simple "yes or no" as to whether the queried number has been reassigned, using a date range to target the inquiry to the time when the caller last had a reasonable expectation that the number was associated with the person intended to be contacted.

The Reassigned Numbers Further Notice also seeks comment on the type of phone number information that might be reported to a reassigned numbers database. Citing comments filed in response to the Reassigned Numbers NOI, the Reassigned Numbers Further Notice proposes the use of information regarding when a number has been disconnected as the earliest possible indicator as to when a person can no longer be reached at a particular number.[48] RILA believes that this information is generally appropriate and actionable.[49]

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[48] Reassigned Numbers Further Notice ¶ 15.

[49] As the RILA NOI Comments observed, additional insight into the status of a number (*i.e.*, whether it is disconnected versus aging) would be highly valuable to some callers if it is administratively feasible and cost-effective to provide. Such additional detail could mitigate the risk that an entity using the database would opt-out a phone number that is not permanently disconnected from further contact and fail to provide expected and desired communications to the person associated with that number.

The Reassigned Numbers Further Notice also seeks comment on whether a caller using the database "should reasonably expect that the database is sufficiently comprehensive such that they do not need to rely on any other databases."[50] RILA is on record in its Comments on the Reassigned Numbers NOI as supporting a comprehensive, authoritative database.[51] Any database that the Commission sanctions in this proceeding must be sufficiently comprehensive and reliable so that it is of demonstrable practical benefit to—and thus used by—scrupulous callers. RILA envisions that, in the first instance, a caller would consult its own business records to determine if an individual has reported that his or her phone number has changed. But, as the Commission plainly recognized in issuing the Reassigned Numbers Further Notice, supplemental methods for discovering number reassignment that are external to a single company are critical to stemming the flow of mistaken calls.[52] A comprehensive and authoritative database would be an important additional tool that should be available for callers to consult in good faith, as another check on unwanted and unwelcome calls.

RILA's Comments on the Reassigned Numbers NOI also noted that the comprehensiveness and accuracy of any database would be enhanced by the Commission's adoption of mandatory reporting of reassigned numbers.[53] All entities that assign U.S. phone numbers must be part of this reporting ecosystem, either directly or indirectly, to ensure that reportable number-change events

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50 Reassigned Numbers Further Notice ¶ 18.

51 RILA NOI Comments at 13.

52 As Chairman Pai correctly observed in his July 2015 Omnibus Order dissent, "consumers often give up their phone numbers and those numbers are then reassigned to other people. And when that happens, consumers don't preemptively contact every business to which they have given their number. . . . So even the most well-intentioned and well-informed business will sometimes call a number that's been reassigned. . . . After all, over 37 million telephone numbers are reassigned each year. And no authoritative database . . . exists to 'track all disconnected or reassigned telephone numbers' or 'link[] all consumer names with their telephone numbers.'" 2015 Omnibus Order, 30 FCC Rcd. at 8077 (Pai, dissenting).

53 RILA NOI Comments at 13.

are properly recorded. Any regime that relies exclusively on voluntary reporting, or that exempts entities that assign NANP numbers from reporting, would not result in the creation of a sufficiently comprehensive, authoritative source to be consulted.[54] The Commission can play a crucial role in simplifying the service-provider reporting process by ensuring that any reporting rules incorporate standardized definitions and conventions. Reporting rules can be designed to be flexible and take account of the way data is already processed without sacrificing comprehensiveness. This should ease some of the concerns expressed by entities that assign phone numbers that they not be saddled with significant reporting burdens.[55] But it is indisputable that entities that choose to use NANP numbering resources to provide communications services understand that access to those resources is subject to regulatory obligations that may change over time. The strong public interest in timely identification of reassigned numbers via an authoritative database simply requires a new approach to reporting.

Any costs incurred by a service provider as a result of any new reporting requirements should be assumed to be incremental to, and recovered by, the provider's operations. If the Commission concludes, based on the record compiled in this proceeding, that there are new costs that appropriately are recovered from entities that are not the customers of the reporting service provider, then the Commission should also specify reasonable limits on any third-party compensation, so that use of the database is a cost-effective option.

The Reassigned Numbers Further Notice also seeks comment on other aspects of database administration, including whether the Commission should oversee a single designated database or

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[54] As a practical matter, however, the Commission could phase-in the reporting responsibility for smaller providers.

[55] *See, e.g.*, Reassigned Numbers Further Notice ¶ 14.

the necessary data could be made available through one or more data aggregators.[56] RILA sees strong advantages to a single Commission-designated reassigned numbers database over which the Commission can maintain direct oversight and urges the Commission to adopt this as its reassigned numbers database framework. However, to the extent that the Commission concludes, based on the record to be developed in this rulemaking, that the same functionality and comprehensiveness can be achieved by directing mandatory reporting of number reassignments to commercial database aggregators, then that alternative could be workable. That is only the case, however, if data aggregators and commercial database providers are required to be transparent in sharing reportable information from service providers, to minimize the reporting burden on service providers. Moreover, the Commission would have to establish, direct, and oversee the quality of any designated databases and ensure that any costs of access to necessary reassigned-number information is reasonable.

As the Reassigned Numbers Further Notice observes, imbuing commercial database aggregators with reassigned-numbering data responsibility would entail the development of minimum requirements for a qualifying reassigned numbers database to ensure that its information is authoritative, comprehensive, and timely, and its use cost-effective. It would be essential for the Commission to adopt rigorous eligibility criteria against which each data aggregator's operations could be compared and judged. The Commission also would have to assume the ongoing responsibility to ensure that each aggregator adhered to a range of auditable privacy, accuracy, and other controls. For these reasons, RILA is not convinced that the processes required to vet and to oversee multiple commercial aggregators would take substantially less time or be less expensive for callers than the development of a single, centralized database.

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56 *Id.* ¶ 32.

Critically, for the Commission to determine that a commercial database has the requisite characteristics to be designated, it should find that the database being evaluated is sufficiently comprehensive for users to be able to rely upon that database for TCPA-liability protection. The Commission exclusively must make such determinations. Further, if there are several databases that the Commission determines should qualify as authoritative, a caller should not have to connect to more than one to discover number reassignments. It would be a waste of resources for users to be required to connect to, pay for, and consult with multiple, separate commercial database aggregators in order to benefit from a safe-harbor presumption.

Regardless of whether there is a centralized database or mandatory service provider reporting to commercial aggregators, it would appear that the number-reassignment reporting function might be least burdensome for the reporting providers as a centralized function or through use of a centralized portal. Alternatively, the Commission could require the sharing of reporting information among all designated reassigned numbers databases, so that each designated database has the same reassignment information. Finally, whatever the reporting mechanism, the Commission must maintain effective oversight and commit to periodic review to ensure that the entire process continues to function in a manner that achieves the Commission's stated goals.

E. There are Compelling Reasons for a Reassigned Numbers Database to be Coupled with a Reasonable Safe Harbor

As RILA observed in its prior Comments to the Reassigned Numbers NOI, a presumptive safe harbor for use of any Commission-designated reassigned numbers database is a critical aspect of any new regulation in this area. A safe harbor that provides a good-faith database user with a defense to TCPA liability for mistakenly calling a reassigned number would provide substantial public interest benefits that support the Commission's goals. First, the primary benefit is that consumers will not be subjected to unintended calls. There is little question that scrupulous callers

will want to take advantage of a comprehensive database if it is coupled with a predictable and reasonable safe harbor mechanism. Second, a workable safe harbor will allow businesses to plan their communications with consumers, knowing that, if they diligently scrub their call lists against both internal resources and designated databases, they will protect themselves against potential liability. Lastly, a safe harbor will refocus TCPA enforcement litigation on illegal robocallers, as was originally intended by the statute, and discourage entrepreneurial plaintiffs from manufacturing TCPA claims by failing to inform the caller of a number reassignment. Each of these benefits are mutually reinforcing public policy reasons for adopting a safe harbor.

The Reassigned Numbers Further Notice asks about the Commission's authority to adopt a safe harbor mechanism for use of a Commission-designated reassigned numbers database.[57] It is plain that the Commission has extensive experience in adopting or applying regulatory presumptions that include safe harbors in other contexts, some of which are similar to this one. Indeed, recognizing that companies have to design or order their processes to comply with applicable regulations, the Commission specifically has endorsed safe harbors that accompany good-faith compliance activities on the part of businesses. For example, the Commission's Do-Not-Call regulations allow a safe harbor for businesses that have written Do-Not-Call policies and that adhere to the timetables within Commission rules for honoring a Do-Not-Call request.[58] Would-be callers have the benefit of this safe harbor by checking the status of a phone number within 30 days of a call. Similarly, the Commission maintains a safe harbor for the porting of

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57 *Id.* ¶ 31.

58 47 C.F.R. § 64.1200(c)(2).

telephone numbers of 15 days, a time the Commission deemed to be sufficient to discover the presence of a port within the Local Number Portability database.[59]

Finally, in 2004, in implementing its CAN-SPAM rules, the Commission adopted a safe-harbor defense option much like the one that RILA envisions here. Under the CAN-SPAM rules, a party in good faith can prove, if challenged, that a specific domain name where a commercial message was sent was not present on the domain name list for more than 30 days before the otherwise-violating message was sent. The Commission also specified that this safe-harbor defense would not be available to excuse any willful violation of the ban in circumstances where the sender had actual knowledge that the message was unwanted.[60] This appears to be a reasonable approach to use with any reassigned numbers database, namely that callers can use the database as an

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[59] 47 C.F.R. § 64.1200(a)(1)(iv). In adopting this safe harbor, the Commission observed, "We establish a limited safe harbor period in which persons will not be liable for placing autodialed or artificial or prerecorded message calls to numbers recently ported from wireline to wireless service. The majority of commenters in this proceeding support the adoption of such a safe harbor. . . . As discussed in greater detail below, we conclude that callers will not be considered in violation of 47 C.F.R. § 64.1200(a)(1)(iii) for autodialed or artificial or prerecorded message calls placed to a wireless number that has been ported from a wireline service within the previous 15 days, provided the number is not already on the national do-not-call registry or caller's company-specific do-not-call list. . . . We believe this safe harbor will provide a reasonable opportunity for persons, including small businesses, to identify numbers that have been ported from wireline to wireless service and, therefore, allow callers to comply with our rules." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, CG Docket No. 02-278, 19 FCC Rcd. 19215, 19218 (Sept. 21, 2004).

[60] The CAN-SPAM Act requires that the Commission promulgate rules to protect consumers from unwanted commercial emails. *See* 15 U.S.C. § 7712. In adopting these rules, the Commission created a safe harbor for senders that did not otherwise have actual knowledge of a domain name request. *See In re Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*, Order, CG Docket No. 04-53, 19 FCC Rcd. 15927, 15938–39 (Aug. 12, 2004) ("[W]e also adopt rules to prohibit the sending of any commercial message to an address that references a domain name on the Commission's domain name list, unless the sender has received the express prior authorization of the person or entity to which the message is sent or delivered . . . . While we will not require any person or entity to provide proof of when they consulted the domain name list, any person or entity may use as a 'safe harbor' defense proof that a specific domain name was not on the list more than 30 days before the offending message was initiated. This 'safe harbor' defense shall not excuse any willful violation of the ban on sending unwanted messages to wireless subscribers. Any person or entity will be considered in violation of the prohibition if the message is initiated knowingly to a subscriber of MSM service, even if it is sent within 30 days of the domain name appearing on the list. This prohibition applies to the entity on whose behalf the message is sent and to any other entity that knowingly transmits an MSCM without consulting the domain name list.").

auxiliary check on their own records, and not as a shield from liability when they were otherwise given reasonable notice of a number reassignment and failed to act upon that information.

Thus, it is not only within the Commission's legal authority to establish reasonable safe harbors to create regulatory certainty and to reinforce compliant behavior that has public benefits, there also are strong public policy reasons for establishing a safe harbor in this case. Notably, the reason the D.C. Circuit vacated the "one-call" safe harbor was ***not*** that the agency lacked the authority to adopt a safe harbor. Rather, the particular safe harbor unquestionably was ineffective in addressing the issue of a caller's reasonable reliance, as there was no correlation between a single call to a number and the ability of the caller to have notice that the number had been reassigned.

In contrast, a comprehensive reassigned numbers database coupled with a reasonable safe harbor mechanism is a far superior method for discovering that the person sought to be reached no longer holds a particular phone number. It offers the promise of a much more accurate result than the previous one-call safe harbor, as well as the prospect that the general public will receive fewer mistaken calls if such a database is consulted routinely.

Assuming that any Commission-sanctioned database of reassigned numbers is reasonably complete and accurate, its use should be accompanied by a reasonable safe harbor, one that allows a caller to rely upon the accuracy of the information retrieved for a reasonable period of time, such as 30 days or more.[61] That presumption could be defeated if, for instance, a consumer could show that it had reported a number change to the caller in a reasonable manner, and after a period of 30

[61] It is not feasible or cost effective in many use cases for callers to check and recheck each number multiple times on a real-time basis, for example, during the course of a campaign. RILA urges the Commission to model a safe harbor to be similar to the safe harbor available under its Do-Not-Call rules, which provide a safe harbor to a caller if it scrubs its calling list in intervals "no more than 31 days prior to the date any call is made." *See* 47 C.F.R. § 64.1200(c)(2)(i)(D).

days, the caller's records were not updated to reflect the new contact information. In other words, individual company records would still be relevant if the called party was a consumer who had previously provided consent to be contacted.[62] Reasonable reliance on reassignment information provided directly by consumers, coupled with the ability to discover reassignments through the use of a database, are the key elements of any workable safe-harbor framework.

IV. CONCLUSION

For the reasons set forth above and in its prior Comments in this proceeding, RILA strongly supports the Commission's proposed establishment of a centralized, authoritative database of reassigned numbers and an associated safe harbor mechanism for callers that use it.

June 7, 2018

Respectfully submitted,

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[62] RILA will address issues implicated by consumers' revocation of consent in separate comments to be filed in response to the TCPA Public Notice. *See also, supra*, n.4.