

June 7, 2018

Office of the Secretary
Federal Communications Commission
45 12th Street SW, Room TW-A325
Washington, DC 20554

RE:

- FCC Proposed Rule Advance Methods to Target and Eliminate Unlawful Robocalls | CG Docket No. 17-59; FCC 18-31
- Comments of Education Finance Council (EFC) to the Second Further Notice of Proposed Rulemaking (FNPRM)
- Comments filed via Electronic Comment Filing System (ECFS)

Education Finance Council (EFC) submits these comments in response to the Second Further Notice of Proposed Rulemaking – CG Docket No. 17-59; FCC 18-31. EFC supports the Commission’s efforts to establish a comprehensive and robust database for detecting reassigned numbers. The database should provide for a reasonable and effective safe harbor, however, the development of the database should in no way deter the Commission from promptly revising its current unworkable approach to reassigned numbers.

EFC is the national trade association representing nonprofit and state-based higher education finance organizations. All EFC Members, as public-purpose organizations, strive to increase college access, success, and affordability in their states and nationwide, operating as supplemental loan originators and loan servicers while providing a wide array of college access and student success services and resources. In the past year, EFC Members directly worked with over 2.5 million families to help them successfully plan, save, and pay for college.

EFC Members, who are intimately involved with their communities, have the knowledge necessary to serve the unique needs of their communities and states, and work to ensure that all families — especially middle-income borrowers and first-generation or low-income students with no family experience in the intricacies of education financing — are provided the tools and guidance they need to choose the best-fit school, borrow appropriately, complete their degree, maximize their earning potential, and successfully repay their loans.

Background

The Telephone Consumer Protection Act (TCPA) states that it “shall be unlawful” to “make any call” using an autodialer or an artificial or prerecorded voice, absent certain exceptions, without “the prior express consent of the called party.” On July 18, 2015, the Federal Communications Commission (FCC) adopted a Declaratory Ruling and Order that concluded the term “called party” means the “current subscriber (or the nonsubscriber customary user of the phone),” not the “intended recipient” of the call. Under this approach, a caller faces potential TCPA liability if it attempts to call a consenting individual that is a former subscriber to the phone number called and inadvertently reaches someone else to whom the number has been reassigned. To mitigate this “severe” result, the FCC allowed callers that were unaware of a reassignment to make one liability-free call (attempt) to the new subscriber. The caller was liable for all calls after the first, regardless

if the caller was aware that the number had been reassigned, if placed without consent from the current subscriber or customary user.

On March 16, 2018, the D.C. Circuit Court's decision in *ACA International v. FCC* struck down the entirety of the FCC's 2015 Order as it related to reassigned numbers. The court affirmed the FCC's interpretation that "called party" means "current subscriber," but found arbitrary and capricious the safe harbor that exempts callers from liability from the first — and only the first — call (attempt) to a reassigned number. The court invalidated the entirety of the reassigned numbers framework because it could not sever the "called party" and safe harbor issues.

On March 23, 2018, the FCC adopted the Second Further Notice of Proposed Rulemaking, which proposes "to ensure that one or more databases are available to provide callers with the comprehensive and timely information they need to avoid calling reassigned numbers." On May 14, 2018, the FCC released the ACA Remand Notice, which seeks comment on certain issues left open by the ACA decision, including liability for calls to reassigned numbers and the proper legal interpretation of "called party."

Definition of "Called Party" Should Mean "Intended Recipient"

The FCC should interpret the term "called party" to mean the caller's intended recipient. Under this approach, callers could demonstrate that they intended to reach the prior subscriber based on a variety of facts and reasonable steps to verify the subscriber. Some examples include:

- Subscribing to one of the third-party reassigned number verification services;
- Providing a mechanism for an individual to update his or her contact information;
- Seeking to confirm that an individual's contact information remains accurate if the individual places an inbound call to the organization's customer service line;
- Taking other steps to encourage or require (e.g., through contractual provisions) an individual to notify the caller if his or her telephone number changes; or
- Adopting internal policies or procedures, including for example a process to update databases in a timely manner when new contact information is received.

Liability for calls to a reassigned number would only apply when the caller has actual knowledge of the reassignment. Actual knowledge of the reassignment would mean that the caller could no longer "intend" to reach the prior subscriber at the same number.

Adopt a Safe Harbor for Callers That Utilize Reassigned Numbers Compliance Solutions

If the FCC were to create a new database, a Safe Harbor should apply to parties that check that database. However, a Safe Harbor should also apply when the caller checks on one or more other database(s), or demonstrates that reasonable steps were taken to verify that the subscriber is the "intended recipient," but nevertheless inadvertently still reached a reassigned number. Under these circumstances, the caller would not be in violation of the TCPA because it has established that it "intended" to reach the prior subscriber (who had granted consent). Checking a reassigned numbers database would be sufficient — but not necessary — to establish that the caller "intended" to reach the recipient or reasonably relied on the "prior express consent" it had obtained. It allows for other "best practice" steps to demonstrate intent/reliance, as mentioned above. In addition, the Safe Harbor should allow for a reasonable window of time during which a caller can check the database, prior to placing a call. This will avoid the expense of having to check the database before every single call.

The establishment of a realistic Safe Harbor is particularly critical for EFC's Members given the importance of reaching borrowers. As EFC and some of its nonprofit and state-based Members informed the Commission in connection with its implementation of the Bipartisan Budget Act (BBA), calls to borrowers are most frequently made to assist struggling borrowers find a manageable repayment plan, determine eligibility for deferment, forbearance, or forgiveness, and to help the borrower avoid further delinquency or default. EFC Members are not collection agencies demanding payment on defaulted debt — they are servicers whose goal is to help the borrower.

The federal student loan program is enormously complex, with a plethora of options designed to help borrowers afford their student loan debt payments (15 possible repayment plans, including 6 different income-driven repayment plans; 21 types of deferments; 13 types of forbearance; 8 different loan forgiveness/discharge options). These options are so complex that many borrowers are overwhelmed and need help navigating their choices. Live contact is absolutely key to helping federal student loan borrowers select their best repayment option and stay current on their loans. An effective Safe Harbor that lifts the risk of litigation not only protects the caller, but also helps ensure that borrowers are receiving this important information.

In its 2015 TCPA Order, the Commission adopted an unrealistic “one-call safe harbor.” The D.C. Circuit Court held that the FCC's one-call Safe Harbor was arbitrary and capricious, but it did not say that the FCC lacked the authority to adopt a more reasonable Safe Harbor, or any Safe Harbor at all.

EFC Responses to the Commission's Questions Regarding Database Information, Access, and Use

EFC agrees with the FCC's goals for an effective reassigned numbers database: it should contain comprehensive and timely data to enable callers to determine potential reassignments as quickly as possible. It should be both easy to use and cost-effective for callers while minimizing the burden on service providers supplying the data. EFC also agrees that a caller would possess the minimum information assumed by the Commission: name of consumer the caller is trying to reach, telephone number, and date (which might vary, depending on the circumstances) on which the caller was confident that the borrower was associated with that number.

In discussing how the database would operate, EFC is assuming that a caller would query the database using the telephone number and date, and that the database would provide a binary “yes” or “no” answer as to whether that number has been assigned since the date in question. EFC is concerned about entering the consumer's name as part of the match criteria based on experience with the Department of Defense's DMDC database, which servicers are required to use to verify whether any borrowers are active duty servicemembers and therefore eligible for an interest rate reduction on their student loans under the Servicemembers Civil Relief Act. In that database servicers are providing a name, birth date, and social security number, and an active duty status date. The name is the data element that causes the most problems, particularly if it is hyphenated, or there has been a change in marital status. And, because a borrower may not use their full proper name when purchasing a cell phone, EFC believes that may exacerbate mismatches with student loan records. In addition, EFC has concerns about transmitting any more personally identifiable information (PII) than is absolutely necessary; EFC would recommend that the data being exchanged be as limited as possible.

EFC also suggests the database provide both the disconnect date and the reassignment date. This would allow the system to respond correctly when there is an extended period between when the number was disconnected and when it was reassigned. Also, there is some concern about the possibility of temporary disconnections creating false positives in terms of reassigned numbers. But EFC does not have sufficient information on how frequently numbers are temporarily disconnected to assess the extent of this problem.

In terms of the comprehensiveness of the database, given the risk of TCPA litigation, and the growing use of class actions, it must be comprehensive, and data is needed from all types of voice service providers. To the extent that it cannot be completely comprehensive, then that increases the need for a Safe Harbor. Similarly, in terms of the timeliness of the database, callers need certainty regarding how often the data is updated so that they can create inquiry protocols that ensure the accuracy of the information. A minimum aging period, or else tailoring reporting frequency to how long a service provider ages numbers, would be helpful in providing certainty.

Regarding timeframe, the issue of reassigned numbers is particularly complex in the student loan context, as there is frequently a span of several years or more between when the borrower obtains a loan and provides his or her contact information, including phone number, and when the payments are due. This passage of time increases the likelihood that the borrower may change his or her telephone number and not think to notify the servicer as he or she is required to do by the master promissory note for the loan.¹

In terms of user access to database information, EFC agrees with the Commission that there are likely to be two camps of users — those who use the database directly and those who use a third-party service to access the database. EFC has no objections to certifying that our purpose in using the database is only for TCPA compliance, and to registering in order to use the database. EFC shares the Commission's concerns that the database not be used for fraudulent robocallers or other bad actors, or for marketing or other improper purposes.

EFC strongly urges the Commission to ensure that the cost of using the database is reasonable. There are 44 million student loan borrowers in the United States, most of whom rely solely on cell phones. Federal student loan servicers are required by law to make calls to delinquent borrowers in order to prevent further delinquency and default. A reassigned numbers database would be a very helpful tool but only to the extent that it is affordable.

EFC strongly urges the Commission to create a Safe Harbor for use of the database, as well as for other steps that callers can take to demonstrate their good faith attempt to reach the intended recipient of the call.

¹ For example, the master promissory note for a Federal Direct Loan Program loan requires the borrower to report to the servicer certain changes in the borrower's personal information...

INFORMATION YOU MUST REPORT TO US AFTER YOU RECEIVE YOUR LOAN

You must notify your servicer and/or the financial aid office at your school about certain changes.

Until you graduate or otherwise leave school, you must notify your school's financial aid office if you:

- Change your address or telephone number;

...

...

You must also notify your servicer if any of the above events occur at any time after you receive your loan.

Conclusion

EFC Members are very interested in and supportive of the Commission's efforts to explore the possibility of a reassigned number database. EFC Members would use such a database so long as it is accurate, economical, and would provide a safe harbor against TCPA liability. Such a resource, however, may take some years to implement and become operational. In the interim, given the pressing need to reach struggling student loan borrowers in order to help them avoid delinquency and default, EFC urges the Commission to adopt a more immediate solution to address the issue of reassigned numbers by revising the misguided definition of "called party" to mean the intended recipient, and to permit callers to demonstrate that they intended to reach the prior subscriber based on a variety of facts and reasonable steps to verify the subscriber.

Sincerely,

A handwritten signature in black ink that reads "Debra J. Chromy". The signature is written in a cursive, flowing style.

Debra J. Chromy, Ed.D.
President