

June 7, 2018

**VIA ELECTRONIC FILING**

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

**Re:   *Second Further Notice of Proposed Rulemaking  
In the Matter of Advance Methods to Target and Eliminate Unlawful Robocalls,  
CG Docket No. 17-59***

Dear Ms. Dortch:

The U.S. Chamber Institute for Legal Reform (“ILR”)<sup>1</sup>, in conjunction with the Chamber Technology Engagement Center (“C\_TEC”) (collectively referred to as “Chamber”) respectfully submit these comments to the Federal Communications Commission (“Commission”) in response to its Second Further Notice of Proposed Rulemaking regarding the Commission’s inquiry into whether a national reassigned numbers database would assist efforts to target unwanted calls to consumers.<sup>2</sup>

**I.     Introduction**

The Commission has solicited comments on how best to construct and employ a reassigned numbers database, which is one tool the Commission has been considering to

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<sup>1</sup> The U.S. Chamber Institute for Legal Reform seeks to promote civil justice reform through legislative, political, judicial, and educational activities at the global, national, state, and local levels.

<sup>2</sup> See Second Further Notice of Proposed Rulemaking, *In the Matter of Advance Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59 (Rel. April 23, 2018) (hereafter, “SFNPR”).

help combat the unwanted calls received by consumers on their cellular phones.<sup>3</sup> As the Chamber explained last year, in its comments on the Second Notice of Inquiry,<sup>4</sup> the Chamber has concerns that any such database (which would be expensive both to create and maintain) would impose considerable costs on companies in order make use of that database.<sup>5</sup> Further, those expenses may be incurred without providing adequate protection to companies from litigation brought under the Telephone Consumer Protection Act (“TCPA”).<sup>6</sup> The Chamber’s concerns with this proposed database have not changed since last year.

Given that many small businesses may not have the resources to make use of such a database, the Chamber does appreciate the Commission’s clarification that it would not require businesses to do so.<sup>7</sup> However, even in the optional state, the use or nonuse of such a database may, in practice, create a benchmark for reassigned number liability under the TCPA. That database may place a target on companies who chose not to use the database, particularly those companies viewed by the plaintiffs’ bar as having “deep pockets.” This then begs the question as to whether database use is truly optional or simply another cost for companies to reach out to their consumers and/or employees. Additionally, as discussed further below, the optional database still may not prove to be a workable solution.

The Chamber discusses three main points in these comments.

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

<sup>4</sup> See Second Notice of Inquiry, *In the Matter of Advance Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59 (Rel. Jul. 13, 2017), at Part II.

<sup>5</sup> See Comments of U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform re: Second Notice of Inquiry, *In the Matter of Advance Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59 (filed Aug. 28, 2017), at Part II.

<sup>6</sup> The TCPA, drafted to address certain, harassing cold-call marketing technologies, was never intended to be a “gotcha” statute imposing staggering statutory damages on legitimate companies reaching out to customer-provided numbers with transactional/informational communications. And yet, as the Commission is aware the Chamber’s membership has increasingly been besieged by litigation brought under the TCPA, and much of that litigation stems from unknowing calls to reassigned numbers. See, e.g., U.S. Chamber Institute for Legal Reform, Statement Regarding the Telephone Consumer Protection Act to U.S. House of Representatives Committee on the Judiciary Subcommittee on the Constitution and Civil Justice (B. Wahlquist), June 23, 2017, at <https://judiciary.house.gov/wp-content/uploads/2017/06/Witness-Testimony-Wahlquist-06.13.2017.pdf>.

<sup>7</sup> See SFNPR, ¶ 11 (“We also emphasize that usage of a reassigned numbers database would be wholly voluntary for callers.”).

First, the Chamber reiterates its concern with the costs/expenses to businesses of a reassigned numbers database. *See* Part II. Second, the Chamber queries whether the reassigned numbers database rulemaking should proceed at this time, given the intervening *ACA International* decision that has upended the Commission’s earlier findings regarding reassigned numbers and TCPA liability and the Commission’s decision to reassess its July 2015 Order. *See* Part III.

Third, if the Commission nonetheless decides to move forward with structuring a national reassigned numbers database, the Chamber asks that safe harbors be created to protect businesses from TCPA litigation involving calls to customer-provided numbers. First, the Commission should declare that there should be a moratorium on liability until this matter is settled. Second, a safe harbor under the TCPA for reassigned numbers calls should be put into place while the database is being formulated, constructed, and approved, as the Commission is well aware that there is no current approved means of determining when numbers have changed hands. This may include the use of private market databases that are approved by the FCC. Finally, once the FCC’s database is made available, there should be a safe harbor for companies that use that database and follow established protocols, as well as safe harbors for small businesses not using the database. *See* Part IV.

Finally, the Chamber reiterates its position that the complications, burdens, and imposition of costs on all consumer facing businesses could be alleviated through consumer empowerment—namely the individual answering a phone call could alert the caller that the number no longer belongs to the company’s consumer. The caller then has the appropriate knowledge of the reassignment and the de minimis effort of the consumer to notify the caller of the reassignment would be no greater than their obligations under the Do Not Call section of the TCPA.

## **II. Significant Costs And Burdens Would Be Imposed On Businesses By A New Database That Would Need To Be Checked Or Queried Against To Place Non-Marketing Calls.**

As the Chamber explained in its 2017 Comments regarding the proposed database, the Commission should consider and be wary of the significant costs and burdens that would be imposed on businesses by a new phone number database that would need to be checked or queried against before non-marketing calls would be placed. This proposed database is not like the Do Not Call (“DNC”) database that Congress, when it enacted the TCPA, gave the Commission power to create.<sup>8</sup>

In the body of the TCPA, Congress required a rulemaking to evaluate whether a national database should be created to contain Do-Not-Call information that

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<sup>8</sup> *See* 47 U.S.C. § 227(c)(3)-(4).

telemarketers would need to scrub against when calling consumers without the requisite established business relationship.<sup>9</sup> The DNC database was implemented after that rulemaking, and it is clear which businesses are required to make use of the DNC: if a non-exempt company wants to reach out via telemarketing to persons with whom it has no established business relationship (“EBR”)<sup>10</sup>, then the company takes the list of phone numbers it intends to call and first scrubs that list against the national DNC registry to eliminate phone numbers registered as DNC. This simple and clean process protects against unwanted cold-call telemarketing, which was the primary target of the TCPA.

The DNC registry also established fixed costs and burdens that a company can assess when deciding to telemarket outside of its EBR relationships. A company purchases access to the DNC registry on an annual basis: currently, access to five area codes is free, and each subsequent area code costs \$59, for up to a maximum of \$16,228 for all the area codes in the United States.<sup>11</sup> Alternatively, the company can hire a third-party service with its own subscription to the DNC registry, and then pay that company to perform scrubs using its own subscription data. The DNC list and/or change list needs to be checked at least once every 30 days, as a company has 30 days to process and to honor a consumer’s DNC request.<sup>12</sup> Thus, if a company decides to engage in telemarketing, it knows what types of calls must be scrubbed against the DNC list and the set costs of complying with DNC registry requirements.<sup>13</sup> Businesses need not pay to access or use the DNC registry unless they decide to engage in a specific kind of telemarketing to non-customers.

However, with the reassigned numbers database the Commission is now considering, businesses would not have the same certainty on whether or when to scrub against a reassigned numbers database when placing non-marketing calls. First, as the Commission is well aware, the state of the law is unclear as to what constitutes an “autodialed” call that could be subject to TCPA liability, and those are the types of calls that would need to use the database. Second, even if a company did decide that it needed

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<sup>9</sup> See 47 U.S.C. §227(c)(1-4).

<sup>10</sup> See 47 CFR § 64.1200(f)(5)(defining EBR to include current customers, former customers (for 18 months), and prospective customers (for 3 months after an inquiry)).

<sup>11</sup> See <https://telemarketing.donotcall.gov/faq/faqbusiness.aspx>, at Registry Fees.

<sup>12</sup> See 47 CFR 64.1200(c)(2)(i)(D) (requiring telemarketers to employ a version of the national do-not-call list obtained from the federal administrator at most 31 days before a marketing call is made).

<sup>13</sup> Importantly, so long as the company has appropriate policies, procedures, and training, and meets other set conditions, it has an affirmative defense to protect against TCPA claims that could arise from an error. See 47 U.S.C. §227(c)(5)(c); see also 47 CFR 64.1200(c)(2)(i).

to check for reassigned numbers in the event its calls were considered unlawful absent prior consent, how could it ensure immediate knowledge of a reassignment?

The DNC list only requires that a number be checked every 30 days as businesses have 30 days to implement a DNC request; there is no similar 30-day gap from potential TCPA liability when a number is reassigned, which causes significant problems with having a database that is ever-changing. For example, if a company had checked to ensure that a customer's number had not changed on May 1 before placing a call about a bounced payment, must it check again on May 8 before placing another call to that same customer-provided number to alert the same customer that absent payment, an account may be closed, or check again for potential reassignment on May 30 before issuing a notification of an upcoming and customer-requested service call? In other words, must a company conduct scrubs, or make queries to the phone providers, before every communication? This would place much higher burdens and costs in regards to the national DNC list. Such constant verification requirements could be prohibitively expensive, and would chill necessary and desired communications.

Indeed, the expense and effort involved in continual scrubbing before placing informational/transactional calls to customer-provided numbers would be tremendous, particularly when a company is simply reaching out to a customer-provided number for which it has a good faith belief that prior express consent exists, and when (as is most often the case) it also affirmatively secured that customer's permission for such calls to be placed to that number. This cost is in addition to costs of integrating the database with a company's IT infrastructure so that automated call and text message opportunities could be checked against the database. The costs involved with using the optional database may deter companies, particularly smaller entities, from using it at all, so that few companies might actually opt to participate in reviewing data in the database and providing information in turn.

Creating an optional database to curb unknowing calls to reassigned numbers will not address the central problem that causes consumers' phones to ring without recourse: spam telemarketing. The database would have no impact on consumer complaints to the FCC that are generated from calls by aggressive spam telemarketers who (often from overseas) are cold-calling consumer cellular phones on blast. Such telemarketers had no customer-provided numbers in the first place that could have been reassigned, and will not be checking against any reassigned numbers database.

Moreover, companies already do take steps to verify customer information. Businesses have no desire to reach someone other than their customer when contacting a customer-provided number with transactional/informational calls, and have policies to record notifications that a number has become outdated. Additionally, many businesses making large volumes of calls have sought the assistance of commercially available databases to decrease calls to known reassigned numbers.

### **III. Before Determining The Shape And Scope Of A Reassigned Numbers Database, The Commission Should First Determine If And When There Could Be TCPA Liability For Calls To Reassigned Numbers.**

In July 2015, the FCC determined that companies were liable for all but the first unknowing call to a reassigned number, even if knowledge of the reassignment was only constructive.<sup>14</sup> It was under this context that the Commission began considering a reassigned numbers database that would provide companies with information on when numbers had been reassigned, given the lack of cellular phone number databases. This situation has changed with the recent ruling in *ACA v. FCC*.<sup>15</sup> The DC Circuit unanimously found that the Commission's July 2015 order regarding the TCPA exceeded the Commission's authority on several levels.<sup>16</sup> Specifically, the court found the one call "safe harbor" for reassigned phone numbers to be arbitrary and capricious, giving the Commission the opportunity to address reassigned numbers issues anew.

The Chamber believes that it makes the most sense to determine what constitutes an "automatic telephone dialing system" ("ATDS") prior to moving forward with a reassigned numbers database. This definition is pivotal in understanding the scope of liability for companies reaching out unknowingly to reassigned numbers.<sup>17</sup>

First, as the Chamber (and other commenters) will be addressing in comments to be filed June 13, 2018, in regards to the impact of the *ACA International* decision, so long as a business legitimately believes that a customer-provided number still belongs to its customer (i.e., it has not been informed by its old customer or the new owner of the change in ownership), the intended recipient was the customer and the actual recipient should not have standing as a "called party" to assert TCPA claims. In other words,

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<sup>14</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) ("July 2015 Order").

<sup>15</sup> *ACA Int'l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (mandate issued May 8, 2018) (affirming in part and vacating in part *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-1 Rcd 7961 (2015) (2015 TCPA Declaratory Ruling and Order)).

<sup>16</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 18-152 and 02-278, Request for Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's *ACA International* Decision (Rel. May 14, 2018).

<sup>17</sup> See *id.*, requesting comments on what persons are "called parties" with standing to assert claims under the TCPA for the receipt of unwanted calls.

reasonable reliance by a company on the accuracy of customer-provided numbers should provide a bar to claims under the TCPA that a call was placed by an ATDS to a number without the required prior consent.<sup>18</sup> Importantly, this would also address the situations when “reassignment” of a number in the “classic” way described by the Commission—four steps beginning with disconnection<sup>19</sup>—is not the reason that a “wrong” number is called by a company reaching out to a customer-provided number.<sup>20</sup>

Second, a clarification of what systems constitute an ATDS, as well as a reassessment of potential TCPA liability for calls to reassigned numbers, would significantly impact what information the Chamber’s members might want a reassigned numbers database to include. For example, guidance on the underlying questions of liability would help ascertain how much risk any such database should involve (i.e., in deleting “reassignments” that might be false positives, given how disconnected numbers are often reconnected to the same person after payment of overdue phone bills). Further, should the Commission determine that a company’s reasonable reliance on the continued accuracy customer-provided number protects it from TCPA litigation, then any national reassigned-number database might not need much personally-identifiable information (which could lead to privacy issues) versus the detailed kind of information that would help provide a defense in a TCPA litigation. Much as with the current DNC database, a simple provision of the phone number (untethered to any person’s name) could provide sufficient information to companies referencing the database. Companies could then use this number to scrub their databases and not carry the additional burden of gathering information that could be relevant to TCPA defenses.

The Commission has called for comments on the ATDS and “called party” issues noted above, with initial comments due on June 13, 2018. There is no question that businesses and the Chamber will be in a better position to provide suggestions on the development of, and contents of, an optional reassigned numbers database once the Commission has clarified what its stance on TCPA liability for calls to reassigned numbers will be. Thus, the Chamber suggests that no decision be made on the proposed

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<sup>18</sup> There is no evidence or indication that Congress intended that TCPA compliance would require a company either to monitor a database of reassigned numbers or to hire third-parties to scrub existing customer lists for possible reassignments, in order to protect against potential class action liability for calls.

<sup>19</sup> See SFNPR, *supra* n. 3, at ¶ 14 (describing a “typical” four-step process of disconnection, aging, availability for assignment, and then new assignment).

<sup>20</sup> Many TCPA class actions are brought by family members or ex-partners of the customer who provided that number (i.e., a telephone number passed from parent to child within a family plan when the parent acquires a new phone), or by some whose number was erroneously provided by the customer from the start, and whose numbers were not “reassigned” in a manner that the database would capture.

database until after the Commission's new order issues addressing whether calls to reassigned (or wrongly-provided) numbers can be considered calls "made with the prior express consent of the called party" with a "ATDS" system," so as to create TCPA liability. This framework is necessary before the decision should be made on whether and/or how a reassigned numbers database should be constructed.

#### **IV. Finally, Should The Commission Decide To Move Forward With Adopting Or Creating A National Reassigned Numbers Database, Safe Harbors Should Both Precede And Follow That Database's Implementation.**

The Chamber has several concerns with establishing a potentially costly and unwieldy reassigned numbers database, for reasons addressed above and in previous comments.<sup>21</sup> However, if the Commission does decide to move forward with creating a reassigned numbers database or similar system, then the Commission should establish certain safe harbors.

Businesses using modern technologies to send calls and/or texts, and who find themselves at risk of facing claims that a given call was unlawful under the TCPA, should not be held liable for calls to reassigned numbers while the reassigned numbers database is under construction and not yet available to them. Thus, the Chamber would first ask the Commission to declare that given the longstanding confusion regarding reassigned numbers, the lack of any national database containing such information, and the plan to create and approve a national reassigned numbers database, that no TCPA liability should accrue for calls to reassigned numbers (absent affirmative notice from the called party that the customer-provided number does not belong to the customer) until after the database becomes available for use to businesses.

Simultaneously, the FCC should create a safe harbor for companies that use certain commercially available solutions, such as public market reassigned phone number databases, to ensure their communications are not unintentionally reaching reassigned phone numbers. These commercially available solutions could be individually approved by the FCC based on set criteria. This system will also help foster innovation and implementation of these solutions.

Once the FCC's database is up and running, a safe harbor should be provided for businesses that opt to use that database and that (1) access and scrub against that database/query system in a reasonable timeframe (i.e., quarterly based on the date the company last checked the database), and (2) have policies and procedures (i.e., including training) to ensure that customer records are updated to reflect phone number reassignments. Such a safe harbor after the finalization of the reassigned numbers

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<sup>21</sup> See Comments of U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform re: Second Notice of Inquiry, *supra*, n.6.



database should echo the TCPA's safe harbor that applies to the use of the Do Not Call database.

As already noted in the Chamber's 2017 comments, we propose that any safe harbor for companies using the database be based firmly in the safe harbor model established in regards to the DNC, which clarifies that there can be no TCPA liability when errors occur so long as practices and procedures existed to comply with reassigned numbers rules.

The Chamber reiterates the necessity of safe harbors due to the unsettled nature of the law and the time, costs, and resources necessary to facilitate the proper use of an FCC established reassigned numbers database. Incentivizing participation in the reassigned numbers database will help facilitate fewer unwanted calls to reassigned phone numbers, which should be the goal of any action taken in response to consumer complaints about calls.

## **V. Conclusion**

The Chamber appreciates the Commission's quick response to *ACA v. FCC* and its indication that it will be revisiting certain issues to provide more certainty and guidance so businesses may avoid abusive TCPA liability.

Wading into determinations involving how to construct, maintain, and operate an optional reassigned numbers database should follow clarifying the definition of an ATDS, particularly due to the potentially costly nature of establishing, maintaining, and using such a tool. Indeed, uncertainty under the law coupled with the creation of such a database may only provide more fodder for the professional TCPA bar to bring suits. Further, safe harbors or the optional use of such a database established by this Commission may be subjected to reconsideration by future administrations, and businesses may find themselves in an even worse position than they are now. The Chamber urges the FCC to instead take a critical look at empowering consumers to tell companies of a reassigned phone number, similar to the standards under the Do Not Call provisions of the TCPA.

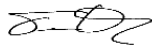
However, if the Commission moves forward with the creation of a database safe harbors should be established to protect businesses from unavoidable liability during the databases' creation and after it is made available for use. If companies are investing the necessary time and resources to ensure compliance with the database, they should be absolved from liability for their efforts, instead of being further subjected to needless litigation by plaintiffs' attorneys.

Respectfully Submitted,



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