

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

Rules and Regulations Implementing the  
Telephone Consumer Protection Act of 1991-

CG No. 18-152  
CG No. 02-278

**COMMENTS OF THE NATIONAL ASSOCIATION OF CHAIN DRUG STORES**

On behalf of our members, the National Association of Chain Drug Stores (“NACDS”) submits the following in response to the Federal Communications Commission (FCC), Consumer and Governmental Affairs Bureau’s May 14<sup>th</sup> request for Comments on the Interpretation of the Telephone Consumer Protection Act (TCPA) in light of the D.C. Circuit’s *ACA International* Decision<sup>1</sup> (“Public Notice”). NACDS concurs with the court decisions that healthcare-related pharmacy communications to cell phones fall outside of the application of the TCPA under the emergency purposes exemption. *See Lindenbaum v. CVS Health Corp.*, 2018 WL 501307, \*2-3 (N.D. Ohio Jan., 22, 2018); *Roberts v. Medco Health Sols.*, No. 15-1368, 2016 U.S. Dist. LEXIS 97177, at \*8 (E.D. Mo. July 26, 2016). However, to the extent that there is a dispute that the emergency purposes exemption applies to a pharmacy’s healthcare-related phone calls or texts to patient cell phones, NACDS submits these comments in favor of the FCC’s continued use and expansion of a pharmacy caller’s “reasonable reliance” on consent until the caller is informed that consent has been revoked, including cases where the cell number has been reassigned. Additionally, NACDS also submits these comments in favor of allowing pharmacy callers the individual flexibility to determine what and how many “clearly defined and sufficiently easy to use” options to make available for revocation of consent.<sup>2</sup> NACDS encourages FCC adoption of

<sup>1</sup> *ACA Int’l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

<sup>2</sup> NACDS also concurs in the comments related to reassigned numbers and application of the “emergency purposes” exception to pharmacy healthcare communications submitted by the Retail Industry Leaders Association in response to the Public Notice.

these interpretations to minimize the burden on pharmacy healthcare communications to their patients and to avoid the potentially negative consequences to patient health.

NACDS represents traditional drug stores, supermarkets and mass merchants with pharmacies. Chains operate 40,000 pharmacies, and NACDS' nearly 100 chain member companies include regional chains, with a minimum of four stores, and national companies. Chains employ nearly 3 million individuals, including 152,000 pharmacists. They fill over 3 billion prescriptions yearly, and help patients use medicines correctly and safely, while offering innovative services that improve patient health and healthcare affordability. One of the increasingly critical tools in the pharmacist toolbox is the ability to quickly and efficiently contact patients on their cell phones to alert them to information related to their prescriptions and other healthcare benefits, such as notifications that the patient's supply of a maintenance medication is about to run out and is due under the doctor's orders to be refilled or that flu season has arrived and it is time for an updated vaccination.

#### **Treatment of Calls to Reassigned Cell Numbers Under TCPA**

In its Public Notice, the FCC seeks comment on "how to treat calls to reassigned [cell] numbers under the TCPA" since the recipient of a call to that reassigned number presumably has not granted prior express consent as required by the TCPA. Public Notice at 3. The FCC asks how to define the term "called party." *Id.* For the reasons below, NACDS recommends that the FCC interpret "called party" as the consenting party, *i.e.*, the person the caller expected to reach who had provided prior express consent, with no notice that such consent had been revoked.

NACDS takes the position that the issue is not whether consent lapses at reassignment of a cell number, but rather, whether the consent can be revoked without notice. Consent effectively is a mutual understanding. *See Black's Law Dictionary Free Online Legal Dictionary*, 2nd ed. (defining "consent" as "[a] concurrence of wills.") {found at <https://thelawdictionary.org/consent/>}; *see also* fn. 4, *supra*, at 4 (discussing revocation as a clear expression of a desire to no longer receive messages). Consequently, just as consent cannot be given to a grantee without some kind of notification, neither can it be revoked by the grantor



without notification. Absent such notification in either instance would make consent or its later revocation unrealized.

In *Soppet v. Enhanced Recovery Co., LLC*, the Seventh Circuit takes the position that when a cell number is reassigned, “any consent previously given [] lapses.” *Soppet v. Enhanced Recovery Co. LLC*, 679 Fed. 637, 641. However, NACDS argues that, without notification of such lapse (*i.e.*, revocation), consent is maintained or, in the alternative, it is reasonably relied upon by the caller. The Seventh Circuit gets distracted by the issue of who has the authority to grant and revoke consent, *see id.*,<sup>3</sup> without acknowledging the need to communicate a revocation of consent to impose liability on the one who relied upon it. Indeed, consent is not terminated until “the actor knows or has reason to know that the other is no longer willing for him to continue the particular conduct.” Restatement (Second) of Torts § 892A, cmt. i (1979). Consequently, until the caller is informed that the party who granted consent to be called effectively has revoked consent by allowing the number to be reassigned, the caller is calling the consenting party.

Additionally, this reasonable reliance on consent supports FCC expanding and redefining its safe harbor for callers to reassigned numbers, which allowed only one call to the reassigned number, but no more thereafter, even if the caller remains uninformed as to the reassignment. Indeed, the D.C. Circuit supports the same. *See ACA Int’l*, 885 F.3d at 708 (pointing out that “the premise of the [FCC’s] one-call safe harbor is that a caller can continue to rely on the previous subscriber’s consent. [Therefore],[t]he question that we face is, why should that necessarily stop with a single call?”).<sup>4</sup> Such a standard would help to ensure that pharmacies are not deterred from communicating critical healthcare information to their patients via convenient and accessible cell phone communications for fear of unknowingly contacting a person with a reassigned number, resulting in TCPA liability.

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<sup>3</sup> So did the Eleventh Circuit in the *Osorio* decision. *See also Osorio v. State Farm Bank, F.S.B.*, 746 Fed. 1242, 1251 (11<sup>th</sup> Cir. 2014) (relying on *Soppet* for its analysis of the authority to give consent for calls under TCPA directly or through an agent).

<sup>4</sup> The D.C. Circuit noted that the Seventh Circuit in *Soppet* did “not speak to that question.” *ACA Int’l* at 708.

### **Revocation of Prior Express Consent**

The FCC seeks comment on what the D.C. Circuit refers to “clearly-defined and easy to use” consent revocation methods.<sup>5</sup> NACDS believes that the FCC should defer to individual pharmacies in determining what constitutes such revocation methods. It should prescribe neither a certain type nor number of revocation methods. Pharmacies are the most informed on what methods will work best with their patient populations, which vary by location and patient characteristics. Such flexibility also allows pharmacies to ensure that their revocation procedures are not unduly burdensome or costly, and will not otherwise interfere with patient care and access.

### **Conclusion**

NACDS thanks the FCC for considering our comments on the interpretation of TCPA in light of the D.C. Circuit’s *ACA International* decision. Please do not hesitate to contact NACDS with any questions or for further assistance.

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Respectfully submitted,

  
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<sup>5</sup> Consistent with its comments above, NACDS points out that the D.C. Circuit notes that consent is revoked via “reasonable means *clearly expressing a desire to receive no further messages* from the caller.” Public Notice at 4 (internal citations and quotes omitted, emphasis added). A mere transfer of a cell-phone number, without any notification, does not qualify under this standard.