

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

Consumer and Governmental Affairs Bureau)	
Seeks Comment on Interpretation of the Telephone)	CG Docket No. 18-152
Consumer Protection Act in Light of the)	CG Docket No. 02-278
D.C. Circuit’s ACA International Decision)	
_____)	

COMMENTS OF BLACKBOARD INC.

Blackboard Inc. (“Blackboard”),¹ by its counsel, hereby respectfully submits these Comments on the Public Notice issued by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned dockets,² which seeks comment on several issues related to the interpretation and implementation of the Telephone Consumer Protection Act (“TCPA”)³ following the decision of the United States Court of Appeals for the District of Columbia in *ACA International v. FCC*.⁴ Specifically, Blackboard responds to the Commission’s request for comment on “how to treat calls to reassigned wireless numbers under the TCPA.”⁵

While Blackboard appreciates the Commission’s previous determination that “school callers may lawfully make robocalls and send automated texts to student family wireless phones pursuant to an ‘emergency purpose’ exception or with prior express consent without violating the

¹ Blackboard Inc. files these Comments on behalf of itself and its wholly owned subsidiary Blackboard Connect Inc. For convenience sake only, these separate and distinct legal entities will be referred to collectively herein as “Blackboard.”

² CG Docket Nos. 18-152, 02-278, *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*, Public Notice (rel. May 14, 2018) (“Public Notice”).

³ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) (“TCPA”), codified at 47 U.S.C. § 227.

⁴ *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018); see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd 1830 (2015) (“2015 TCPA Order”).

⁵ Public Notice at 3; see also *Advanced Methods to Target and Eliminate Unlawful Robocalls*, 32 FCC Rcd 6007 (2017) (“2017 Robocall NOR”); CG Docket No. 17-59, *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Further Notice of Proposed Rulemaking (rel. Mar. 23, 2018) (“2018 Robocall FNPRM”).

[TCPA],”⁶ there is no practical way for schools and other educational institutions to completely avoid calling reassigned numbers or to limit their liability under the TCPA for making such calls.⁷ As Blackboard previously explained, Blackboard and its educational institution customers have been subjected to private actions initiated by consumers who allege they have received education-related prerecorded messages on their wireless devices in error.⁸ The “reassigned number problem” can be a significant driver of such actions because consumers often change telephone numbers, but may not provide notice of that change to every party that has permission to send automated messages to the consumer.

The *ACA International* finding that the Commission’s “one-call safe harbor” rule was arbitrary and capricious, and inconsistent with the Commission’s “reasonable reliance” approach to interpreting the TCPA,⁹ provides an opportunity to implement a more practical solution. The now-vacated rule had a chilling effect on the ability of schools and other educational institutions to send important and essential education-related information to the educational community. These are not the messages Congress intended to deter in enacting the TCPA,¹⁰ and Congress specifically has recognized the Commission “should have the flexibility to design different rules

⁶ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 31 FCC Rcd 9054, ¶ 1 (2016). As the Commission is aware, Blackboard provides a mass notification platform that allows Blackboard’s customers to send emergency notifications and other informational messages to a targeted audience. Blackboard’s platform is used primarily in the educational setting to enable schools to send mass notifications to parents, guardians, students, and faculty regarding emergency weather closures, threat situations, event scheduling, and other important and essential education-related information.

⁷ *2015 TCPA Order*, Statement of Commissioner Michael O’Rielly Dissenting in Part and Approving in Part (noting the Commission’s “one free pass” rule “is particularly problematic for informational texts, such as reminders,” and schools have “noted the impracticability of determining whether a number has been reassigned before calling or texting”).

⁸ Comments of Blackboard Inc. on *2017 Robocall NOI* at 2; *see also*, e.g., No. 14-CV-10272, *Rafael Valladares v. Blackboard, Inc. et al.* (N.D. Ill. filed Dec. 22, 2014); No. 14-CV-21745, *Eric Gomez v. The Doral Academy, Inc. and Blackboard Connect, Inc.* (S.D. Fla. filed Jan. 2, 2015).

⁹ *ACA International*, 885 F.3d at 706-08.

¹⁰ *GroupMe, Inc./Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling*, 29 FCC Rcd 3442, ¶ 8 (2012) (finding Congress did not intend “the TCPA to be a barrier to normal, expected, and desired business communications”).

for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls.”¹¹

With this Congressional authorization in mind, any replacement solution must ensure the reassigned number problem does not threaten the delivery of important and essential education-related informational messages, and protects Blackboard and its educational partners from liability under the TCPA for messages directed to reassigned wireless numbers. To achieve these important goals, Blackboard supports the following two approaches to addressing the reassigned number problem.

First, the Commission could interpret the term “called party” to refer to the intended recipient of the message.¹² This interpretation is consistent with the purpose of the TCPA. Liability should be imposed only on callers who fail to obtain prior express consent before placing a call for which consent is required. Complete compliance with the prior express consent requirement would be impossible under any other interpretation because a caller would never be able to confirm whether the user of the wireless number has changed prior to a call being placed.

Several parties previously explained it would be impractical for an organization to reconfirm the subscriber for a particular wireless telephone number before every single prerecorded call is made (such as by placing a live, manually dialed call to that telephone number).¹³ The inherent benefit in utilizing automated messages - reaching a large number of people as quickly as possible - would be lost if organizations were required to use live operators to place informational calls to avoid exposure to potential liability for wireless telephone

¹¹ TCPA § 2(13).

¹² Public Notice at 3; *see also* CG Docket No. 02-278, Petition for Declaratory Ruling of the Consumer Bankers Association, at 4 (dated Sept. 19, 2014) (“Consumer Bankers Petition”).

¹³ *See, e.g.*, Consumer Bankers Petition at 7-8; CG Docket No. 02-278, United Healthcare Services, Inc. Petition for Expedited Declaratory Ruling, at 5 (dated Jan. 16, 2014) (“United Healthcare Petition”).

numbers reached in error. Commissioner O’Rielly reinforced this concept in his dissent of the *2015 TCPA Order*:

[m]any commenters noted the impracticability of determining whether a number has been reassigned before calling or texting. For example: Fairfax County Public Schools: ‘The messages FCPS sends are critical to and expected to be received by FCPS’s school community, especially in a threat or emergency situation. It would be impossible for FCPS to confirm whether a wireless telephone number is being used by the same recipient that gave FCPS consent before sending each automated message. The biggest advantage in using automated messages - reaching a large number of people as quickly as possible - would be lost if FCPS were required to make such a verification every time it sends an education-related message to a wireless telephone number.’¹⁴

Such an interpretation of the term “called party” also would stop the perpetual stream of new TCPA liability for organizations sending automated informational messages to wireless telephone numbers for which they believe they have the requisite consent. The reassignment of a wireless number should not automatically extinguish the consent given by the number’s previous holder and expose the caller to TCPA liability. As the Commission itself acknowledged, “[n]either the TCPA nor [Commission] related rules place any affirmative obligation on the user of a wireless number to inform all potential callers when that number is relinquished or reassigned.”¹⁵

Second, Blackboard supports the creation of an FCC-mandated database of reassigned numbers, populated by voice service providers, for which a safe harbor from TCPA liability would extend to callers that use the database.¹⁶ As Blackboard previously explained, under this approach, voice service providers would report information regarding reassigned numbers to the

¹⁴ *2015 TCPA Order*, Statement of Commissioner Michael O’Rielly Dissenting in Part and Approving in Part.

¹⁵ *2015 TCPA Order* ¶ 95.

¹⁶ Public Notice at 3-4.

database, and callers would in turn query the database for information about reassigned numbers. This approach has broad support throughout the industry.¹⁷

Unlike existing marketplace tools that “lack guaranteed methods to discover all reassignments immediately after they occur,”¹⁸ a centralized database established by the Commission would allow callers to more quickly learn of reassignments and would allow the Commission to “oversee the quality of the data and of database operations,”¹⁹ including the cost for accessing the database. Fees for access to the reassigned number database must be affordable for all callers, including non-profit entities such as schools and other educational institutions. The Commission must “ensure that such fees do not undermine the ability of robocallers to access reassigned number information, including non-commercial robocallers such as schools.”²⁰

In conjunction with the reassigned number database, the Commission should adopt a safe harbor from TCPA violations for callers who access the database prior to making calls.²¹ A safe harbor to shield schools and other educational institutions from liability for any calls made in good faith to reassigned numbers based on the results of the database query is critical to ensure the continuation of important and essential education-related communications to parents,

¹⁷ See, e.g., Comments of Comcast on *2018 Robocall FNPRM* at 5; Comments of the Retail Industry Leaders Association *2018 Robocall FNPRM* at 8-11; Comments of District of Columbia Public Schools on *2017 Robocall NOI* at 1; Comments of National Consumer Law Center on *2017 Robocall NOI* at 4; Comments of Vibes Media on *2017 Robocall NOI* at 14-15; Comments of Anthem on *2017 Robocall NOI* at 1; Comments of American Financial Services Association on *2017 Robocall NOI* at 1; Comments of Credit Union National Association on *2017 Robocall NOI* at 3; Comments of National Rural Electric Cooperative Association on *2017 Robocall NOI* at 4;; Comments of Student Loan Servicing Alliance on *2017 Robocall NOI* at 5; see also CG Docket No. 02-278, Letter from National Consumer Law Center (dated July 7, 2017) (“The idea for a reassigned number database has been supported by both industry and consumer advocates.”).

¹⁸ *2017 Robocall NOI* ¶ 6.

¹⁹ *2017 Robocall NOI* ¶ 14.

²⁰ *2017 Robocall NOI* ¶ 25.

²¹ *2017 Robocall NOI* ¶ 14.

guardians, students, and faculty. Such a safe harbor is consistent with Commission precedent,²² and also would satisfy the “reasonable reliance” considerations outlined by the *ACA International* court.²³ As Commissioner O’Rielly points out, the creation of a safe harbor goes hand-in-hand with the creation of a reassigned number database: “Simply put, there must be some benefit for companies to help establish, pay for and use such a database, and a properly constructed compliance safe harbor must be part of any equation”²⁴

In the absence of a safe harbor based on “reasonable reliance” considerations, schools and educational institutions will continue to be exposed to a high risk of TCPA liability, and could be forced to discontinue the practice of sending important and essential automated informational calls. These informational calls are crucial to parents, guardians, students, and faculty, and critically important to the overall education mission.²⁵ The Commission must ensure the TCPA is not abused at the expense of students and educational institutions across the country.²⁶

²² Comments of Blackboard Inc. on *2017 Robocall NOI* at 11-13; *see also 2017 Robocall NOI* ¶ 14; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 19 FCC Rcd 19215, ¶ 7 (2004) (adopting a “safe harbor” period in which persons will not be liable for placing autodialed or prerecorded message calls to numbers recently ported from wireline to wireless service); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, ¶ 38 (establishing a “safe harbor” for telemarketers that make a good faith effort to comply with the national do-not-call rules).

²³ *ACA International*, 885 F.3d at 706-08.

²⁴ *2017 Robocall NOI*, Statement of Commissioner Michael O’Rielly.

²⁵ Comments of Blackboard Inc. on *2017 Robocall NOI* at 4-7, 13.

²⁶ *2017 Robocall NOI*, Statement of Commissioner Michael O’Rielly (“Moreover, accidental misdials receive no protection whatsoever. In my limited time, I won’t belabor how bankrupt this really is and how it has ensnared legitimate companies in needless, financially-crippling litigation for the simple practice of trying to contact their willing customers.”); *see also* CG Docket No. 02-278, Declaration of Fairfax County Public Schools (“FCPS”), in Support of Reply Comments of Blackboard Inc. (dated May 7, 2015) (noting that school “operations are government-funded” and that “expense to defend against TCPA claims would expend funds that are designated to and essential for the education of America’s school children”).

CONCLUSION

For the foregoing reasons, Blackboard urges the Commission to adopt a rule to address the reassigned number problem that ensures consumers can continue to receive the education-related informational calls they desire and eliminates TCPA liability for schools and other educational institutions when they make calls to reassigned numbers in error.

Respectfully submitted,

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