

**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)	

REPLY COMMENTS OF THE RETAIL INDUSTRY LEADERS ASSOCIATION

On June 7, 2018, the Retail Industry Leaders Association (“RILA”) filed extensive comments¹ that strongly supported the Federal Communications Commission’s (“Commission”) proposal to address the challenge posed by reassigned phone numbers and urged the Commission to establish a reassigned numbers database and associated safe harbor.² RILA’s recent comments built upon its prior comments and reply comments filed in response to the Commission’s earlier Notice of Inquiry on this subject. Of the many comments filed, the majority support Commission action on a comprehensive reassigned numbers database and associated safe harbor because of the obvious public benefits that a database and safe harbor would have in reducing the number of calls mistakenly placed to reassigned numbers.

¹ See *Retail Industry Leaders Association Comments to Second Further Notice Re Reassigned Numbers Database*, CG Docket No. 17-59 (filed June 7, 2018).

² *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).

Dozens of parties, including RILA,³ also filed comments in the broader proceeding regarding a number of Telephone Consumer Protection Act (“TCPA”) rule requirements and statutory interpretations in light of the D.C. Circuit’s ruling in *ACA International*.⁴ A number of those commenters correctly identified the interaction between the separate proceedings on the utility of a reassigned numbers database. RILA submits these reply comments to underscore two key points regarding the use of databases coupled with a safe harbor.

First, as discussed in RILA’s ACA Proceeding Comments, a commonsense interpretation of the statutory term “called party” would be limited to the person the caller intended to reach. Recognizing that the Commission is considering adoption of such a definition, some commenters argued that this would reduce the need for any reassigned numbers database. As a practical matter, RILA disagrees with this assessment. The Commission should continue to move ahead with a reassigned numbers database with a safe harbor, as consumers and callers benefit when callers are able to reach the intended party and have a known and reliable method for discovering that a number is no longer associated with that party. The proposed database and safe harbor would supplement—and not duplicate—other TCPA rule revisions or clarifications.

Second, the record demonstrates the current challenge callers face when trying to discover if a number has been reassigned and plainly that challenge will persist while the Commission takes the steps necessary to create a reassigned numbers database. Consequently,

³ See *Retail Industry Leaders Association Comments to Consumer and Governmental Affairs Bureau Notice on ACA International Decision*, CG Docket No. 18-152 (filed June 13, 2018) (“ACA Proceeding Comments”).

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); see also *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

RILA joins other commenters in urging the Commission to encourage callers to use currently available commercial databases in good faith, by creating a reasonable safe harbor from that use until a Commission database can be developed and implemented.

I. ANY REVISED DEFINITION OF “CALLED PARTY” DOES NOT OBVIATE THE NEED FOR A REASSIGNED NUMBERS DATABASE AND SAFE HARBOR

As Chairman Pai stated in his dissent to the 2015 Omnibus Order, “[i]nterpreting the term ‘called party’ to mean the expected recipient—that is, the party expected to answer the call—is by far the best reading of the statute.”⁵ RILA supports this proposed reinterpretation. Some commenters observed that were the Commission to reinterpret its prior definition in this manner, the challenge of reassigned numbers would be solved.⁶ However, standing alone, this reinterpretation will do little if anything to stop a caller from making mistaken calls to unintended recipients or to protect consumers from unwanted calls. Therefore, RILA urges the Commission to not abandon its plans to implement a comprehensive database and safe harbor if it reinterprets the term “called party.” As the Commission’s stated goal of significantly reducing calls to reassigned numbers is tied to having a practical mechanism to discover number reassignments, a database remains critical.

Without a reassigned numbers database and safe harbor, callers would have to rely on being informed by the number holder that his or her number has been reassigned, and experience

⁵ See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8078 (2015) (Pai, dissenting).

⁶ See, e.g., *Comments of Professional Association for Customer Engagement*, CG Docket No. 17-59 at 3–4 (“By defining ‘called party’ in this manner, the Commission would negate the need for a potentially costly reassigned number database while preserving the ability of consumers to stop calls to their numbers simply by informing the caller that the number was reassigned.” (footnote omitted)).

demonstrates that in the vast majority of cases this notification by the consumer simply does not occur. Thus, as a practical matter callers would remain unaware that a number has been reassigned. Without a comprehensive and authoritative database to consult, callers would have no reliable way to avoid unintentionally placing calls to these reassigned numbers. Unfortunately, the brunt of this confusion would be borne by consumers who have reassigned numbers through no fault of their own.

Callers such as RILA's members seek to stay in touch with their customers and provide them with important information they value, and RILA's members do not wish to call reassigned numbers. If the goal of reducing mistaken calls to consumers is to be realized, a comprehensive and authoritative reassigned numbers database and safe harbor is crucial. Thus, an intended recipient definition of "called party," a comprehensive and authoritative reassigned numbers database, and a reasonable safe harbor for database use are all complementary, mutually reinforcing mechanisms or solutions that will advance the public interest.

II. UNTIL A COMPREHENSIVE DATABASE CAN BE ESTABLISHED, THE COMMISSION SHOULD ADOPT AN INTERIM SAFE HARBOR AVAILABLE FOR CALLERS THAT USE COMMERCIALY AVAILABLE DATABASES

RILA's Comments in this proceeding demonstrated why a comprehensive and authoritative database is the best way to reduce erroneous calls to consumers who have reassigned numbers. Notably, most commenters agreed that use of reassigned number databases, both the currently incomplete databases commercially available today and the comprehensive and authoritative database the Commission has proposed, would allow discovery of some reassigned numbers and thus reduce the number of mistaken calls made to consumers. As several commenters observed, however, any Commission-designated database, as a practical

matter, will take time to design and to implement fully.⁷ As a result, RILA urges the Commission to establish an interim safe harbor for callers making good-faith efforts to avoid calling reassigned numbers by using available commercial solutions. This interim safe harbor could be conditioned on caller use of a currently available commercial database to filter out numbers designated by the database as reassigned.⁸

An interim safe harbor would advance the Commission's goals for all of the reasons that RILA previously identified as supporting the need for a permanent safe harbor:

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.⁹

⁷ See *Quicken Loans' Comments*, CG Docket No. 17-59 at 3 (“As the FCC creates the database, an interim safe harbor should be established for utilizing and checking currently technology solutions and practices to give businesses peace of mind for consumer outreach.”); *American Financial Services Association Comments*, CG Docket No. 17-59 at 5 (“While the FCC establishes its singular database, the safe harbor should permit Callers to use private providers until the FCC database is up and running. Use of this database would actually encourage and facilitate compliance, *i.e.*, reducing so-called ‘robocalls.’”). See also *Reply Comments of ADT LLC d/b/a ADT Security Services*, CG Docket Nos. 18-152, 02-278 at 8 (“A number of commenters, like ADT, state that they utilize existing, commercially available mechanisms to try to identify reassigned numbers, and they propose that the Commission adopt a safe harbor for companies undertaking such efforts. ADT agrees. A safe harbor should also apply to the use of a comprehensive reassigned number database should one be developed. Adoption of a safe harbor has strong support even among those that otherwise have concerns about the creation a comprehensive database.” (footnote omitted)).

⁸ Alternatively, the Commission might embrace another well-defined measure to avoid calling reassigned numbers as an interim safe harbor.

⁹ RILA's Comments at 17–18.

There inevitably will be delays in the development of a new database to accomplish the important public policy objectives the Commission has identified. In the meantime, the Commission should encourage callers to use the imperfect but currently available tools to identify reassigned numbers and to avoid calling them. Prior to the advent of any Commission-administered database, the Commission should adopt a rule that allows callers that rely on a commercially available database solution to filter reassigned numbers to have the benefit of an interim safe harbor. This interim safe harbor would apply as long as the caller has consulted its internal records and has scrubbed its lists against the commercial database within the last month. The Commission could also adopt objective measures to ensure the relative comprehensiveness of commercial databases to be accorded interim safe harbor status.¹⁰

An interim safe harbor would be consistent with the D.C. Circuit's opinion in *ACA International*, which noted that a strict liability regime for a mistaken call would constitute a severe outcome.¹¹ Moreover, an interim safe harbor would incentivize the use of existing database resources as a proxy for the more comprehensive database RILA encourages the Commission to adopt, along with a safe harbor.

¹⁰ See *Comments of CTIA*, CG Docket No. 17-59 at 10 (“The Commission should establish a rule such that a caller that checks a ‘covered compliance solution’ within a ‘covered period’ (e.g., a few weeks) would not be liable for inadvertent calls to reassigned numbers. Under this approach, the FCC’s rules would codify the criteria for what qualifies as a ‘covered compliance solution.’” (footnote omitted)). The Commission also could establish reasonable criteria for commercial databases to meet in order to confer safe harbor protection. For example, the American Cable Association stated that “[t]o ensure that aggregators are willing to enter into agreements with service providers and that their verification services are comprehensive and reliable enough to make a meaningful reduction in the number of unwanted calls to reassigned numbers, the safe harbor should only apply to commercial data aggregators who meet certain qualifications. Among those qualifications should be a requirement that the commercial data aggregator have access to number information that covers a threshold percentage of all telephone service subscribers.” *Comments of American Cable Association*, CG Docket No. 17-59 at 11.

¹¹ *ACA Int’l*, 885 F.3d at 706–08.

CONCLUSION

RILA emphasizes the importance of a comprehensive, authoritative reassigned numbers database even if the Commission acts to reinterpret a “called party” as the “intended recipient” of a covered call. Standing alone, that reinterpretation will not reduce the number of mistaken calls; but coupled with a comprehensive and authoritative database and safe harbor, mistaken calls to reassigned numbers should diminish significantly. Moreover, recognizing that development of such a database will take time, RILA urges the Commission to establish reasonable interim safe harbor conditions to which callers may adhere while any Commission-administered database is under development.

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