

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

In the Matter of)	
)	
Advanced Methods to Target and Eliminate)	CG Docket No. 17-59
Unlawful Robocalls)	

COMMENTS OF VIBES MEDIA, LLC

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TABLE OF CONTENTS

I. Introduction and Executive Summary	1
II. Mobile Marketers and Carriers Have Developed an Imperfect Process to Identify Disconnected Numbers and Remove Them from Marketing Databases	3
A. The Industry-Developed Workarounds Are Good, But Not Perfect.....	5
B. The Available Third Party Solutions are Also Imperfect	8
III. The Commission Should Take Carefully Calibrated Action to Improve the Reassigned Number Identification Process.....	10
A. The Commission Can Work Within the Existing Industry Model	10
B. The FCC Can Encourage Industry to Establish Guidelines Collaboratively	12
C. The Commission Should Adopt a TCPA Safe Harbor	14
1. A Safe Harbor Is Necessary to Protect Companies Engaging in Best Practices	15
2. The Commission Has the Authority to Adopt a Safe Harbor for Reassigned Numbers.....	19
IV. Conclusion	20

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Vibes Media, LLC (“Vibes”) hereby comments on the Federal Communications Commission’s (“FCC” or “Commission”) Second Notice of Inquiry regarding the issue of reassigned numbers in the mobile marketing context.¹ Vibes applauds the Commission’s efforts to address the issue of marketing communications made to phone numbers of consumers who consented to receive the communications but whose phone numbers have been reassigned to a new consumer. Targeted action is needed to allow responsible mobile marketers, like Vibes, to provide consumer satisfaction while meeting all regulatory obligations.

I. Introduction and Executive Summary

Founded in 1998, Vibes is a mobile marketing technology leader that helps some of the world’s biggest brands acquire, engage, and deepen relationships with an interested and engaged consumer base. Vibes’ mobile solutions include mapping out a mobile strategy, building permission-based mobile databases, driving sales with mobile coupons, activating sponsorships, and integrating with companies to forge immediate, long-lasting, and mutually beneficial customer relationships.

¹ *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Notice of Inquiry, FCC 17-90 (rel. July 13, 2017) (“Second NOI”).

By way of background, Vibes has messaging agreements with almost every wireless carrier that operates in the United States. These agreements allow Vibes to connect with the carrier so that Vibes can deliver messages via short codes to consumers. In the case of the largest carriers, these agreements provide Vibes with a direct connection to these carriers' networks. Smaller wireless carriers generally enter into carrier consortiums that are managed by third parties such as Interop and ClearSky. These third parties manage the short code connections for a group of smaller carriers, including by establishing and maintaining the connections between Vibes and the smaller carriers' networks.

Vibes also works with its clients to develop program ideas, provide compliance assistance, and generate strategic support, analytics, short code management, and carrier connectivity services. In addition, Vibes has several aggregation customers that leverage Vibes' carrier connections. Vibes works closely with mobile governing bodies, such as the Mobile Marketing Association and CTIA-The Wireless Association ("CTIA"), to ensure that all of its messaging is compliant and adheres to industry rules, regulations, and best practices.

Vibes supports the Commission's efforts to work with industry to develop an efficient and effective solution that enables mobile marketers to remove reassigned numbers from their databases. The industry has developed a fairly successful workaround that many responsible industry actors, including Vibes, use. The Commission should use this opportunity to facilitate relatively minor modifications to this industry-designed workaround, which can significantly reduce the risk of consumers with reassigned numbers receiving unwanted communications. This could be achieved through broad-stroked Commission rulemaking, combined with industry guidelines regarding technical and administrative details. Finally, the Commission can and

should adopt a safe harbor, which would prevent good actor mobile marketers that utilize this resource from facing unwarranted liability if they unknowingly contact a reassigned number.

II. Mobile Marketers and Carriers Have Developed an Imperfect Process to Identify Disconnected Numbers and Remove Them from Marketing Databases

Today, there is no industry-wide solution or government-approved process that enables mobile marketers to learn of number reassignment or disconnections. Despite this, the mobile marketing industry has long understood that a process was needed to identify and remove numbers in their databases that had been reassigned in order to ensure that consumers that had not provided consent were not receiving marketing messages. For many years, carriers have made disconnection lists available to mobile marketers in order to allow responsible mobile marketers to avoid sending messages to reassigned numbers. Motivated by customer satisfaction, Vibes developed its own internal system to scrub numbers contained on carriers' disconnection lists from its databases. Vibes did so many years before the Commission's decision to impose liability under the Telephone Consumer Protection Act ("TCPA") in the reassigned number context, knowing that its customers (*i.e.*, the brands that deliver messages to consumers) desired to ensure that marketing messages were not delivered to the wrong consumers. Implementing such a system was particularly important to reputable and TCPA-complaint actors like Vibes, and the customers that utilize Vibes' service to market to their own customers, that wanted to be distinguishable from the bad actors in the industry.

The Commission's 2015 TCPA Omnibus Order magnified the absence of an end-to-end reassigned numbers identification solution. Despite this absence, the order imposed strict liability on marketers that continued to market to numbers that had been reassigned (after an

arbitrary “one call” safe harbor).² The FCC, under the previous Chairman, imposed this liability on marketers despite (1) warnings that there was no process available to mobile marketers to identify reassigned numbers accurately and timely;³ (2) evidence that the “one call” safe harbor was unworkable as applied to marketing via text messages;⁴ (3) the concern of opening “the floodgates to more TCPA litigation” and creating “perverse incentives”;⁵ and (4) over the objection of the Republican Commissioners.⁶ Vibes participated as a petitioner in the pending

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, ¶ 72 (2015) (“2015 TCPA Omnibus Order”) (“[T]he TCPA requires the consent not of the intended recipient of the call, but of the current subscriber (or non-subscriber customary user of the phone) and that caller best practices can facilitate detection of reassignments before calls. . . . [C]allers who make calls without knowledge of reassignment and with a reasonable basis to believe that they have valid consent to make the call should be able to initiate one call after reassignment as an additional opportunity to gain actual or constructive knowledge of the reassignment and cease future calls to the new subscriber. If this one additional call does not yield actual knowledge of reassignment, we deem the caller to have constructive knowledge of such.”).

³ See, e.g., Letter from Jennifer P. Bagg, Counsel to Vibes Media, LLC, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2 (filed June 10, 2015) (“Vibes June 10 Ex Parte Letter”) (“[A]ccurate and timely lists of deactivated telephone numbers published by large carriers are the only plausible way for a mobile marketer to determine if a number has been taken out of service or reassigned. However, not all carriers publish such lists, and the lists are not always accurate and up to date. Without timely and accurate lists of deactivated telephone numbers, and in the absence of any customer notification, there is no technological way for a mobile marketer to know that a number has been reassigned.”). See also Comments of CTIA, CG Docket No. 02-278 (filed Mar. 10, 2014).

⁴ See, e.g., Vibes June 10 Ex Parte Letter at 2 (“[A] ‘one call’ limit makes little sense and is unworkable in the text context since the nature of a text communication does not involve any direct human interaction.”).

⁵ See, e.g., *id.* at 2-3; 2015 TCPA Omnibus Order, Dissenting Statement of Commissioner Ajit Pai (“The [2015 TCPA Omnibus Order] opens the floodgates to more TCPA litigation against good-faith actors The [2015 TCPA Omnibus] Order’s strict liability approach leads to perverse incentives.”).

⁶ See 2015 TCPA Omnibus Order, Dissenting Statement of Commissioner Ajit Pai; Dissenting Statement of Commissioner O’Rielly.

appeal of the 2015 TCPA Omnibus Order for these very reasons.⁷ In particular, Vibes understood the limitations of the existing industry-developed solutions and knew the FCC’s order would incentivize trolling TCPA lawyers to sue companies that were using the *best available solutions* to identify reassigned numbers.

In fact, the 2015 TCPA Omnibus Order created what parties and what then-Commissioner Pai and Commissioner O’Reilly warned of: a floodgate of litigation. Since the 2015 TCPA Omnibus Order, Vibes is aware of numerous cases that have been filed against mobile marketers claiming violation of the reassigned number strict liability provision.⁸ This has occurred despite the industry-developed workarounds designed to identify reassigned numbers because the workarounds are not perfect.

A. The Industry-Developed Workarounds Are Good, But Not Perfect

As explained above, in order to help further customer and consumer satisfaction, to comply with the TCPA regulations, and to diminish (to the extent possible) unscrupulous litigation, responsible mobile marketers and carriers have worked together to identify numbers that have been disconnected and attempt to have that information effectively communicated from carriers to marketers. Responsible marketers, such as Vibes, have developed internal

⁷ The D.C. Circuit is currently considering a challenge from Vibes and other co-petitioners regarding the FCC’s 2015 TCPA Omnibus Order. *See* Petition for Review, *Vibes Media, LLC v. FCC*, No. 15-1311 (D.C. Cir. Sept. 4, 2015).

⁸ *See, e.g.*, Plaintiffs’ Unopposed Motion for Preliminary Approval of Class Action Settlement, *James v. JPMorgan Chase Bank, N.A.*, No. 8:15-cv-2424-T-23JSS (M.D. Fla. June 6, 2016) (settling for \$3.75 million a lawsuit involving alleged TCPA violations resulting from calls to reassigned numbers); Mem. in Supp. of Motion to Stay, *Farnham v. Caribou Coffee Co., Inc.*, No. 16-CV-295 (W.D. Wash. June 15, 2016) (arguing for a stay pending the D.C. Circuit’s review of the 2015 TCPA Omnibus Order, on the ground that the named plaintiff raised a reassigned number claim); Complaint, *Halfon v. Buy Buy Baby Inc.*, No. 2:16-cv-05037 (D.N.J. Aug. 10, 2016) (raising reassigned number claims).

mechanisms to remove disconnected numbers from their databases. These systems are good but not perfect.

As an initial point of clarification, this workaround does not actually identify reassigned numbers. That is, the industry workaround does not provide notification when a number assigned to one customer is returned to the number pool and then is assigned to another customer. Instead, the workaround is more accurately described as a disconnection notification. That is, the workaround identifies numbers that have been disconnected for any reason. This distinction is important because it results in the removal of numbers from marketing programs that have been disconnected for reasons other than reassignment. For instance, the disconnection lists that Vibes receives from carriers include numbers that have been disconnected due to service cancellation, including non-payment, and numbers that have been disconnected by one carrier so that the consumer can port the number to a new carrier.

Each carrier, and each consortium of carriers, employs a different process for notifying Vibes of numbers that have disconnected from that carrier's network. Most carriers and carrier consortiums produce and release daily disconnection lists. Some carriers send these lists directly to Vibes, while others require Vibes to download the list from an external location. The lists are all formatted differently. In terms of timing, two of the major carriers typically add disconnected numbers to their disconnection lists on the same day that the disconnect is performed. One of the major carriers places a disconnected number on its disconnection list three days after the carrier disconnects the number. Most other carriers add disconnected numbers to the list on the next day (*i.e.*, the day following disconnection). Vibes relies on these lists from carriers to determine when a number has been disconnected and to remove those numbers from Vibes' subscriber databases.

Vibes creates its own daily list that aggregates and standardizes the data from the various lists it receives from the carriers. Vibes refers to this file as its “deactivation file.” Vibes runs this deactivation file daily against its subscriber databases. If a number on the deactivation file appears in one of Vibes’ subscriber databases, Vibes removes the number from the database and records that it has been removed due to a disconnect. Vibes also provides this deactivation file to its customers that operate as aggregators (*i.e.*, customers that leverage Vibes’ connections with carriers with which they do not have direct connections).

In Vibes’ experience, while this workaround is good, it contains flaws. And, given the litigation risks involved, good is not good enough. From Vibes’ perspective, there are several major problems with the current workaround.

Most fundamentally, the lists are sometimes missing numbers, likely as a result of technical or administrative errors that are inherent in creating large lists from complex databases with great frequency. Vibes has no way to detect that a number is missing from a disconnection list at the time Vibes receives it—or typically any time before inadvertently sending a message to a consumer who was issued a reassigned number.

In addition to being under-inclusive (*i.e.*, missing reassigned numbers in some instances), the workaround process is also over-inclusive. The lists Vibes receives from carriers do not distinguish between numbers that have been disconnected due to reassignment and numbers that have been disconnected for other reasons, such as when a consumer is just porting her number to a new carrier. Vibes has no insight into port requests, so it must remove all numbers on the disconnection list to ensure that it removes all the numbers that have been reassigned. In order to continue receiving messages, erroneously unsubscribed consumers have to re-subscribe to the message lists that they have already given their express consent to join. And, more often than

not, the consumer does not realize he or she needs to opt back in and will miss valuable messages (from both the consumer and company perspective). This leads to consumer frustration and increased costs to businesses that utilize mobile marketing solutions.

Last, there can be up to a three-day delay in receiving notice that a number has been disconnected, and then marketers need a brief but reasonable period of time to scrub that number from their databases. In Vibes' experience, there could be up to a 24 hour lag, depending on when a carrier posts its disconnection list and when Vibes pulls the file in order to scrub its database.⁹ This does not ordinarily create any litigation risk because of the aging and reassigned number process, but Vibes potentially faces liability if a carrier recycles its own numbers more quickly than anticipated.

B. The Available Third Party Solutions are Also Imperfect

The Second NOI states that “[e]xisting tools can help callers identify reassignments,” but notes that there is no guaranteed method to discover all reassignments in a timely manner.¹⁰ The Second NOI asks whether the FCC could leverage the existing tools to meet its goals in this proceeding.¹¹ Vibes urges the Commission not to rely on these third party tools or mandate that other companies rely on these to identify reassigned numbers. Instead, the Commission should take steps, as Vibes describes below, to improve the current reassigned numbering process developed by carriers and mobile marketers like Vibes.

⁹ Vibes checks each list every twenty-four hours. Because there is no standardization in when carriers release updated lists, carriers could provide an updated list very shortly after Vibes has checked for an update—so Vibes will not receive it until a day later. Vibes provides its deactivation file to its aggregator customers at the same time Vibes uses the file to scrub its own database.

¹⁰ See Second NOI ¶¶ 6, 15.

¹¹ *Id.* ¶ 15.

The third-party solutions mentioned in the Second NOI create disconnection lists primarily using the same process that Vibes and other mobile marketers undertake to remove disconnected telephone numbers from their databases. Some of these third parties also supplement their lists with big data sources that theoretically contain useful information regarding whether a number has been disconnected. Vibes does not have any information about whether such supplementation changes the accuracy of disconnection lists. However, given that the type of data processing at issue here is virtually never completely reliable—and that these third parties do not claim or provide any sort of guarantee that their lists are error free—the Commission should not treat them as such.

Moreover, many of the messaging agreements that Vibes has with carriers require Vibes to use the carrier-provided disconnection list. Requiring Vibes and similarly situated companies to meld carriers' lists with lists from an independent third party would further complicate matters and introduce another opportunity for technical error. It would also add unnecessary cost; third parties are unlikely to offer their solutions for free or cheap. Putting Vibes in the position where it must pay for multiple different forms of reassigned number scrubbing¹² would unduly burden legitimate mobile marketing activity. Indeed, even marginal increases in the already high cost of mobile marketing could steer companies toward contacting their customers through other means, even with customers who prefer to receive communications via text.

¹² As described below in Section III.A, a portion of the fees Vibes currently pays to carriers covers the administrative costs associated with the creation of the carriers' disconnection lists.

III. The Commission Should Take Carefully Calibrated Action to Improve the Reassigned Number Identification Process

A. The Commission Can Work Within the Existing Industry Model

Vibes believes the FCC can and should work within the current model that the industry has created to identify disconnected numbers. With some carefully tailored changes, this process will most effectively and efficiently fulfill the FCC's goal.

Vibes supports allowing each carrier to report reassigned numbers to data aggregators and robocallers.¹³ Among the alternatives suggested in the Second NOI, this is the most similar to the current approach. Carriers and many marketers already have systems set up to use such an approach, so adopting it will enable the industry to build on current efficiencies. Moreover, as discussed below, with targeted action, the current approach can be tailored to meet the Commission's goals.

Vibes would also support the public report alternative, which would require each carrier to create the number reports, but, rather than receiving the reports from the carriers, Vibes would download the reports from a website or other interface.¹⁴ Vibes suggests, however, that it may be more administratively efficient to tweak the current system rather than design a new interface.¹⁵

Vibes believes the queriable databases approach is problematic because the query capabilities will not operate at the needed send speeds.¹⁶ Moreover, unless the APIs are

¹³ See Second NOI ¶ 17.

¹⁴ See *id.* ¶ 19.

¹⁵ Vibes has no opinion on the FCC-established database alternative, *id.* ¶ 16, though it is likely that this approach would take even more time and resources to set up and, therefore, is likely to not be the most effective or efficient option.

¹⁶ See *id.* ¶ 18.

standardized, Vibes would have to create different API calls to each carrier, which is costly and more difficult than processing and maintaining Vibes' own list and introduces additional risk of administrative and technical errors.

In order to improve the usefulness and accuracy of the carrier-provided lists, Vibes suggests the following clarifications or modifications to the carrier reporting approach.

First, the carriers must add disconnected numbers to their disconnect list, as has long been the practice.

Second, the carriers should provide marketers with updated lists at a standard frequency that gives marketers enough time to scrub numbers from their databases before a number is reassigned. It can adapt its system and processes to any format, so long as the format is consistent across all carriers. Having carriers report only when a number has been reassigned to a new customer¹⁷ would not give marketers sufficient time.

Third, there should be a standard format that all carriers use to prepare their disconnection lists. Vibes receives these lists in various forms today and has no preference for which standard is best.

Fourth, the FCC should institute a rule requiring carriers to indicate which numbers on their disconnection lists have been ported to other carriers. Such a list would enable marketers to remove numbers from their subscriber databases when they are no longer associated with a consumer who has consented to receiving messages, while also enabling marketers to send wanted communications to consumers who port their numbers. Simply having carriers scrub their disconnection lists of ported numbers would not achieve the same result. Vibes also must know which carrier provides service to a given number in order to continue sending a text

¹⁷ See *id.* ¶ 11.

message to that number. Without knowing to which carrier a number has been ported, Vibes would continue sending messages to that number through its connection to the wrong carrier. These messages would fail because the number and the new carrier code would not match.

Fifth, there should be enough transparency in the process to enable marketers to validate the disconnection lists. Specifically, controls are needed to enable recipients of the lists, such as Vibes, to confirm proper data generation and number inclusion, including that the entire file was generated, downloaded, and loaded successfully. Inclusion of row counts, last update timestamps per carrier, or other common techniques in data migration would enable validation.

Last, the FCC should not allow carriers to charge additional fees or assess other compensation for reporting disconnected number information. Most carriers already charge a messaging fee to aggregators for each message that it delivers. The messaging fees include the cost of delivering the message, as well as administration costs. Vibes, therefore, already pays the carrier for generating the disconnected number information in the form of the messaging fees it pays to the carriers.

B. The FCC Can Encourage Industry to Establish Guidelines Collaboratively

It is essential for the FCC to establish that carriers must consistently provide lists of disconnected numbers (scrubbed of ported numbers) before they are reassigned to a new customer, on a standard timetable and in a standard format, and that there must be a way to validate the lists. However, Vibes does not believe it is absolutely necessary for the FCC to establish detailed regulation on how industry is to do so. Instead, the process that the industry created can be perfected by the industry so long as the FCC requires everyone to adhere to the guidelines.

The telemarketing ecosystem has successfully engaged in this type of standards-setting in the past. For example, CTIA convened wireless messaging ecosystem stakeholders to develop

and continually update its widely used Messaging Principles and Best Practices.¹⁸ Companies that abide by these principles are able to provide consumers with relevant mobile communications while honoring consumer privacy and choice.

In many contexts, the FCC has encouraged industry to develop standard practices collaboratively rather than having the Commission engage in top-down decision-making that reaches deep into industry operations. For example, industry and other interested stakeholders collaborated to develop the ATSC 1.0 standard for digital television transmission and the Motorola C-Quam system for transmission of stereophonic AM broadcast radio service, which the Commission later incorporated into its rules.¹⁹ In a slightly different model, the National Telecommunications and Information Administration of the Department of Commerce has convened a number of multi-stakeholder processes, where participants develop industry standards, publicly commit to following those standards, and are subject to Federal Trade Commission enforcement in the event the participants fail to live up to their commitments.²⁰

Here, the Commission could take a similar approach. It could allow industry to set standards that are later adopted into Commission rules that meet the six requirements described

¹⁸ CTIA, *Messaging Principles and Best Practices* (Jan. 19, 2017), <https://www.ctia.org/docs/default-source/default-document-library/170119-ctia-messaging-principles-and-best-practices.pdf>.

¹⁹ *Amendment of the Commission's Rules to Establish a Single AM Radio Stereophonic Transmitting Equipment Standard*, Report and Order, 8 FCC Rcd. 8216 (1994); *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fourth Report and Order, 11 FCC Rcd. 17771 (1996).

²⁰ See, e.g., NTIA, *Multistakeholder Process: Unmanned Aircraft Systems* (June 21, 2016), <https://www.ntia.doc.gov/other-publication/2016/multistakeholder-process-unmanned-aircraft-systems>.

above,²¹ or it could adopt a rule authorizing the industry to adopt and commit to follow self-regulatory guidelines that meet the six requirements described above.

C. The Commission Should Adopt a TCPA Safe Harbor

The Commission assumes for the purposes of the Second NOI that it will continue to impose TCPA liability on a caller who unknowingly places an autodialed or prerecorded call without the consent of the person who receives the call, solely because the number was reassigned without the knowledge of the caller.²² Vibes agrees that the Commission should allow the D.C. Circuit to finish evaluating this determination before commencing proceedings to alter it. Assuming solely for the purposes of the Second NOI that the Commission's determination will stand,²³ the FCC must adopt a safe harbor for marketers that use the reassigned number resource, regardless of whether the FCC acts by rule or the industry adopts guidelines. Adopting such a safe harbor will minimize the impact of rampant litigation that marketers currently face, even when they embrace best practices.

²¹ In short:

1. Carriers must add disconnected numbers to their disconnection list.
2. Carriers must provide marketers with updated lists at a standard frequency that gives marketers enough time to scrub numbers from their databases before a number is reassigned.
3. Carriers must use a standard format to prepare their disconnection lists.
4. The disconnection lists should indicate which numbers have been ported to another carrier, and to which carrier a number has been ported.
5. Marketers must be able to validate the disconnection lists they receive.
6. Carriers should not charge for disconnection lists.

²² See Second NOI n.3; Second NOI, Statement of Commissioner Michael O'Rielly (the Second NOI's provisions on reassigned numbers would be "mooted by court action or [the Commission's] own initiative" repealing the Omnibus Order).

²³ It should not. Vibes maintains, as it has argued to the D.C. Circuit, that the 2015 TCPA Omnibus Order's interpretation of the statutory term "called party" in the context of calls placed or text messages sent to numbers that have been reassigned is arbitrary, capricious, and in violation of the TCPA and the First Amendment.

1. A Safe Harbor Is Necessary to Protect Companies Engaging in Best Practices

The Commission must protect companies that use best practices to comply with the TCPA. Even with improvements to the current process or the creation of a centralized database, technical and administrative errors will inevitably cause some reassigned numbers to be left off of the lists of numbers to be scrubbed. Companies that use an FCC-endorsed or FCC-run solution should not face liability for such errors. Where (1) there is an FCC established or endorsed process in place to identify reassigned numbers, (2) a caller uses this resource to remove numbers from its databases, and (3) the caller uses autodialing technology or a pre-recorded voice to contact a recipient who did not previously provide consent solely as a result of an undiscovered number reassignment, the caller should be deemed to have complied with the FCC's TCPA regulations.

Responsible mobile marketing platform providers, like Vibes, and the brands that use these platforms, take great pains to comply with TCPA regulations. Vibes has a vigorous TCPA compliance program, which includes technical safeguards, employee training, and monitoring. As described in Part II, Vibes invests significant time and effort to ensure that its clients' messages reach the correct consumer, including by attempting to identify reassigned numbers.

Nevertheless, responsible companies still face numerous TCPA lawsuits, many in the form of class actions. Indeed, as then-Commissioner Pai recognized in 2015, the high statutory penalties associated with the TCPA have not "incentivize[d] plaintiffs to go after the illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters," who tend to lack deep

pockets or, in many cases, are entirely judgment-proof.²⁴ Instead, “trial lawyers have found legitimate, domestic businesses a much more profitable target.”²⁵

These types of lawsuits against legitimate American companies are why the TCPA has become “the poster child for lawsuit abuse.”²⁶ Many of these lawsuits are frivolous, involving consumers that “misremember” consenting to receiving calls or messages or manufactured evidence.²⁷ In short, few lawsuits against legitimate American businesses that employ best practices are a result of marketers engaging in conduct that Congress intended to address when enacting the TCPA. But faced with the burden of proving consent, the cost of litigation, and the chance that a court could order catastrophic damages in the event the company loses, some defendant companies settle for large sums.²⁸

In the case of reassigned numbers specifically, companies have faced lawsuits for not removing disconnected numbers from their databases *despite* these companies having obtained and used the disconnection list from the carriers. Nor is there anything further responsible marketers can do. Because there is no transparency and no process for parties like Vibes to evaluate the accuracy of the disconnection lists independently, Vibes has no choice but to rely

²⁴ 2015 TCPA Omnibus Order, Dissent of Commissioner Ajit Pai at 1.

²⁵ *Id.*

²⁶ *Id.* at 2.

²⁷ *See, e.g., Zente v. Credit Mgmt., L.P.*, 789 F.3d 601 (5th Cir. 2015) (declining to review a district court’s decision to refer plaintiff’s counsel to bar authorities for allegedly knowingly filing a TCPA complaint in federal court based on fabricated evidence); *Phan v. Convergent Outsourcing, Inc.*, No. 3:14-CV-84-J-25 JBT, 2015 WL 12856781, at *5 (M.D. Fla. Mar. 27, 2015) (granting Rule 11 sanctions where plaintiff manufactured screen shots purportedly showing calls from the defendant—calls the defendant never made).

²⁸ U.S. Chamber Institute for Legal Reform, *The Juggernaut of TCPA Litigation*, at 3 (Oct. 2013), http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF.

exclusively on the carriers to ensure accuracy. Unsurprisingly then, exposing marketers to TCPA liability for any errors in disconnection lists has not resulted in any meaningful impact on the accuracy of these lists.²⁹ Ultimately, the disconnection lists are not perfect, and technical or administrative error can occur during the scrubbing process.

Until recently, the FCC recognized that the TCPA does not impose liability on companies that make an understandable and not reasonably avoidable mistake when placing autodialed calls—an approach that would avoid the current undesirable state of affairs. For example, the Commission put in place a limited-duration safe harbor, which prevents companies from being held liable for calls placed to a wireless number without the requisite consent when the number at issue has been recently ported from a landline. The FCC determined that “absent a limited safe harbor” for ported numbers, “telemarketers simply would not be able to comply with the statute.”³⁰ Here too, absent a limited safe harbor for calls companies make to reassigned numbers that fall through the cracks—*i.e.*, that Commission-mandated or industry-recommended methods fail to identify as reassigned—companies that use autodialing technology or prerecorded messages to contact wireless customers cannot possibly comply with the TCPA 100% of the time. As is the case with recently ported numbers, absent a limited safe harbor, imposing liability will serve only to dissuade companies from using autodialing and pre-recorded

²⁹ Theoretically, the messaging contracts between Vibes and the carriers and the consortium of carriers could contain contractual obligations to produce accurate disconnection lists and indemnify Vibes or its customers if a lawsuit is filed based on an inaccuracy in the disconnection list, thus incenting carriers to improve the accuracy of their lists. In the real world, however, carriers are unlikely to agree to such terms. More fundamentally, it is impossible to make the ongoing creation and communication of huge amounts of data completely error-free, and shifting liability for inevitable error from one industry actor (Vibes) to another (carriers) would do little if anything to protect consumers.

³⁰ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd. 19215 (2004) (“2004 TCPA Order”).

technology to efficiently send messages that consumers have asked for. Here too, the Commission should adopt a narrow safe harbor that protects legitimate companies from abusive litigation.

As long as the Commission continues to impose TCPA liability for reassigned numbers, no reasonable alternative to a safe harbor exists. As discussed above, the current “one free call to reassigned numbers” rule does little good. Responsible marketers frequently do not learn that a number has been reassigned after calling it once, especially in the text messaging context. When faced with a TCPA suit based on a reassigned number, marketers realistically cannot seek relief from carriers who failed to report a reassigned number to the marketer. The warranty clauses in the carrier messaging contracts typically expressly exclude any warranty that the service will be error free, and carriers have the upper hand because marketers need to connect with every carrier in order to be able to connect with that carrier’s customers. Contractually requiring consumers to notify a marketer when they change phone numbers or have service cut off—as the 2015 Omnibus Order suggests³¹—does not pass the laugh test. Even assuming a consumer were to keep accurate records of every list she consented to join and which contractually requires notification, how does a person who no longer has phone or Internet service because she could not pay her mobile phone bill—or an individual whose service has ended due to her passing—submit such a notification?

Moreover, the Second NOI’s suggestion that a safe harbor might not be necessary because marketers will already be incented to use Commission-endorsed reassigned number solutions misses the point.³² In enacting the TCPA, Congress strove to balance “[i]ndividuals’

³¹ 2015 TCPA Omnibus Order ¶ 86.

³² Second NOI ¶ 14.

privacy rights, public safety interests, and commercial freedoms of speech and trade . . . in a way that protects the privacy of individuals *and permits legitimate telemarketing practices*.”³³ Thus, whether marketers will adopt an FCC-mandated or FCC-endorsed solution is only part of the inquiry. If the Commission fails to adopt a safe harbor, its TCPA rules will continue to penalize legitimate telemarketing practices and prevent consumers from receiving wanted messages, contravening Congressional intent. Therefore, if the Commission’s decision to impose TCPA liability for calls to reassigned numbers stands, it must adopt a safe harbor.

2. The Commission Has the Authority to Adopt a Safe Harbor for Reassigned Numbers

The Commission has the authority to adopt a limited safe harbor, shielding companies who adhere to FCC rules or adopt FCC-endorsed best practices for identifying disconnected numbers against TCPA claims based on the companies’ alleged failure to identify a reassigned number. As the Commission recognized when adopting the ported-number safe harbor, a safe harbor that is necessary to allow callers to come into compliance with the rules “is not an ‘exemption’ from the [TCPA]; it is instead a period of time necessary to allow callers to come into compliance with the rules. Otherwise, the statute would demand the impossible.”³⁴ The Commission therefore has the inherent authority to adopt a TCPA safe harbor under those circumstances. Here, a limited safe harbor is necessary to allow marketers to comply with the TCPA until either (1) a reassigned number that was originally missing from a carrier’s disconnection list is added to the relevant reassigned number resource or (2) the called party informs the marketer that the called party never consented to receiving calls from the marketer or

³³ Pub. L. No. 102-243, § 2(9), 105 Stat. 2394, 2394 (1991) (uncodified in 47 U.S.C.).

³⁴ 2004 TCPA Order at 19219.

does not wish to receive further communications from the marketer. Thus, the Commission has the inherent authority to adopt a limited safe harbor covering these narrow circumstances.³⁵

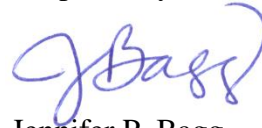
IV. Conclusion

Vibes is eager to work with the Commission and the industry to develop an efficient and effective solution that enables mobile marketers to remove disconnected numbers from their databases. The industry has developed a fairly successful workaround that, with minor modifications, can ensure consumers with reassigned numbers do not receive unwanted communications. This could be achieved through broad-stroked Commission rulemaking, combined with industry guidelines regarding technical and administrative details. Finally, the Commission should adopt a safe harbor that applies to the good actor mobile marketers that utilize this resource.

³⁵ In the event judicial review of the Commission's 2015 TCPA Omnibus Order concludes in the Commission's favor during the pendency of the instant inquiry, the Commission could ground a safe harbor in the explicit statutory text by recalibrating its definition of the statutory term "called party." The TCPA allows marketers to engage in autodialed or pre-recorded communications with wireless customers "with the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). In order to avoid construing the statute to create obligations marketers cannot meet, the Commission could interpret the term "called party" to mean "the current subscriber (or non-subscriber customary user of the phone), except where the called number (1) was previously assigned to or customarily used by an individual who provided sufficient consent for the call at issue, (2) the caller did not have actual knowledge of the number reassignment, and (3) the caller adopted appropriate procedures to identify reassigned numbers. Where these three requirements are met, the term 'called party' means the individual who was previously assigned to or customarily used the number at issue and provided sufficient consent."

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