

**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 ACA INTERNATIONAL**

ACA International (“ACA”) respectfully submits these comments in response to the *Second Notice of Inquiry* (“NOI”) released by the Federal Communications Commission (“Commission”) in the above-referenced docket.<sup>1</sup> In the NOI, the Commission explores the idea of a potential reassigned number database so that callers would be able to determine if a phone number for which consent had been granted has been subsequently reassigned before initiating a call to that number. According to the NOI, the Commission believes “a comprehensive reassigned numbers resource would greatly benefit both consumers (by not getting unwanted calls intended for another consumer) and robocallers (by not wasting resources calling the wrong consumer and by avoiding potential TCPA violations).”<sup>2</sup>

ACA understands the Commission’s desire to move quickly to address the growing issue of reducing unwanted robocalls. However, as these comments make clear, the Commission should first focus its efforts on addressing underlying, related definitional issues under the Telephone Consumer Protection Act (“TCPA”) that have opened legitimate businesses up to potential catastrophic liability and hindered beneficial communications between businesses and consumers before attempting to

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<sup>1</sup> *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Notice of Inquiry, CG Docket No. 17-59, FCC 17-24 (rel. July 13, 2017) (“NOI”).

<sup>2</sup> NOI at ¶14.

create a complicated, costly, and burdensome reassigned number database. Furthermore, while a reassigned number database could be a useful tool to reduce inadvertent calls to the wrong party and minimize TCPA liability, ACA firmly believes that the most effective way to reduce the number of robocalls that cause most harm to consumers would be to focus Commission efforts on combating illegal robocallers.

To the extent the Commission nevertheless moves forward with the creation of a reassigned number database, it is critical that the Commission develop a safe harbor to protect callers from liability in exchange for the extreme burden and cost that would be posed by continuously needing to verify each wireless number against the database to ensure it has not been unknowingly reassigned.

Finally, ACA uses this comment letter to once again urge the Commission to properly clarify the term “robocall” so that legitimate business calls are not lumped into the same category as unwanted or scam calls. It is critical that these vastly different categories of calls stop being conflated so that meaningful, desperately-needed TCPA reform can occur.

## **I. BACKGROUND ON ACA INTERNATIONAL**

ACA is an international trade organization of credit and collection professionals that provide a wide variety of accounts receivable management services. With offices in Washington, D.C. and Minneapolis, Minnesota, ACA represents approximately 3,000 members ranging from third-party debt collectors, debt purchasers, attorneys, credit grantors, and vendor affiliates who employ more than 230,000 employees worldwide.

ACA members include the smallest of businesses that operate within a limited geographic range of a single state, and the largest of publicly held, multinational corporations that operate in every state. The majority of debt collection companies, however, are small businesses with nearly

seventy percent maintaining fewer than twenty employees.<sup>3</sup> Of particular note, the debt collection industry is also one of the most diverse industries in the United States. As of 2016, racial and ethnic minorities comprised forty percent of the workforce population. Additionally, the debt collection industry is overwhelmingly female, with women accounting for seventy percent of the total workforce.<sup>4</sup>

## II. COMMENTS ON THE NOI

### A. **The Commission Can Better Meet the Goals Underlying the NOI by Restoring Fairness and Balance to the TCPA Through Much-Needed Definitional Fixes and by Focusing Its Efforts on Illegal Robocallers.**

Approximately 100,000 cell phone numbers are reassigned to new users each day.<sup>5</sup> The issue with this large number of reassignments is that consumers who provide their phone number to businesses to receive communications might at some point in the future no longer possess that phone number. In such cases, in the absence of any notification by the consumer, when that business attempts to contact that consumer, a call ends up getting inadvertently placed to an unrelated consumer.

Against this backdrop, the Commission has put forth an NOI to begin the process of trying to address the reassigned number issue. The idea behind the NOI is to establish a database to track number reassignments in an effort to reduce unwanted robocalls and to improve TCPA compliance. ACA applauds the Commission's interest in pursuing a potential solution that could, at least in theory, benefit consumers and legitimate businesses alike. However, while a reassigned number

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<sup>3</sup> Josh Adams, *Small Businesses in the Collection Industry: An Overview of Organization Size and Employment*, ACA International White Paper (Aug. 2016) available at <http://www.acainternational.org/files.aspx?p=/images/40363/aca-wp-smallbusiness.pdf>.

<sup>4</sup> Josh Adams, *Diversity in the Collections Industry: An Overview of the Collections Workforce*, ACA International White Paper (Jan. 2016) available at <https://www.acainternational.org/assets/research-statistics/aca-wp-diversity.pdf>.

<sup>5</sup> ACA International, et al. Petition for Review from *2015 TCPA Declaratory Ruling* (D.C. Cir. Nov. 25, 2015).

database could be useful in some respects, ACA does not believe that the establishment of such a database is the best or most appropriate shield to protect businesses from the unfair and potentially ruinous TCPA liability that can come along with inadvertently dialing a reassigned number.<sup>6</sup> In addition, ACA believes such a database will impose enormous burdens on legitimate businesses while illegal robocallers will continue their harmful practices, thereby resulting in heavy compliance costs for likely little benefit.

For avoiding potential TCPA violations – one of the purported benefits stated in the NOI – development of a reassigned number database should not take the place of much-needed revisions to the Commission’s current interpretation of the TCPA and should not precede those efforts. Without appropriate changes to the *2015 TCPA Ruling and Order* (“2015 TCPA Order”), all callers using modern dialing equipment to call wireless numbers would have to check each mobile number against the reassigned number database prior to placing any call in order to reliably shield themselves against TCPA liability. In practice, it would be incredibly burdensome for every single call made to a cell phone number to have to first be checked against a database to confirm it has not been reassigned since the time consent was provided. In that scenario, a caller would never be able to rely on the prior express consent provided by a consumer, despite Congress’s clear intent for that to be the case when creating the TCPA.

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<sup>6</sup> Contrary to n.18 of the NOI, which cites comments filed by ACA in March 2014 as indicative of industry support for the development of a reassigned number database, ACA’s position on reassigned number liability has remained consistent. In those comments, ACA’s point was to make clear that it would not be fair or make sense to assign liability for inadvertent calls to reassigned numbers when there simply was no method, including any kind of comprehensive database, which a caller could use to guarantee that a number had been reassigned. However, ACA – both then and now – does not believe the proper solution to the reassigned number problem is to de facto require companies to pay for and scrub all wireless numbers against a reassigned number database before each call, but instead for the Commission to properly interpret the TCPA statute to create a clear regulatory pathway for compliance that is consistent with the text of the statute.

While a reassigned number database may be something to consider in the future as a tool for businesses to increase right party contacts, it cannot take the place of desperately-needed revisions to the Commission’s flawed interpretations in the *2015 TCPA Order* which the Commission should prioritize. As Commissioner O’Rielly rightly remarked in his statement accompanying the NOI:

Quite frankly, I think this item shines a bright light on just how misguided and fundamentally broken the Commission’s *2015 TCPA Declaratory Ruling* really was. At that time, I begged the Chairman, my fellow Commissioners, and the staff to accept reality and address the issue of reassigned telephone numbers in a meaningful way. I was ultimately unsuccessful. Instead, the Commission tried to pretend the problem wasn’t valid despite estimates that 100,000 cell phone numbers are reassigned to new users each day and telephone numbers are typically withheld for only 90 days or less before being recycled to new users. This meant the scope of the problem was much larger and thornier than the Commission ever acknowledged, making any type of “prior consent” extremely difficult and essentially worthless in a short amount of time.<sup>7</sup>

Whether through a decision from the D.C. Circuit on the lawsuit filed by ACA and others challenging the *2015 TCPA Order*<sup>8</sup> or through action from the Commission, the most effective way to shield legitimate businesses from TCPA litigation traps is to bring the statute in line with the statutory language and congressional intent by revising the definitions of an “automatic telephone dialing system” and “called party.” Once this is accomplished, then the TCPA framework will be properly aligned, legitimate businesses will have a clear pathway to TPCA compliance, and other ideas – like a reassigned number database – can be more meaningfully explored.

For reducing unwanted robocalls to consumers – another beneficial reason identified in the NOI to create the database – the reassigned number database is also not the most effective path forward. After all, if a reassigned number database is established, illegal robocallers – who have zero interest in following the law, much less scrub against any new reassigned number database – will still be operating unlawfully while legitimate businesses seeking to communicate with consumers – who

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<sup>7</sup> NOI, Statement of Commissioner Michael O’Rielly at 14.

<sup>8</sup> See *ACA International, et al. v. Federal Communications Commission and United States of America*; Case No. 15-1211.

expressly consented to be called – will face even more regulatory burdens under the TCPA.

Although well meaning, the Commission's intent in the NOI to reduce unwanted robocalls would be better served by focusing on technological solutions that could have a much greater impact on reducing the randomly-dialed, prerecorded calls about which consumers complain most vociferously.

As a result, while it is unquestionably a laudable goal to reduce the number of unwanted robocalls, the Commission must be very cautious that in its zeal to combat illegal and unwanted robocalls quickly, it is not unfairly saddling legitimate businesses with substantial burdens, especially before addressing the underlying regulatory issues related to reassigned numbers and without attempting less burdensome alternatives that could be more effective. Instead, ACA respectfully urges the Commission to not put the cart before the horse and focus first on restoring the balance that has been lost in recent Commission TCPA interpretations and to push forward on efforts that will most effectively thwart illegal robocallers.

**B. To the Extent a Reassigned Number Database is Developed, It Must Provide a Safe Harbor to Callers, Not Serve as a Substitute for Commission Action Addressing Underlying TCPA Definitional Issues, and Contain Other Characteristics.**

If the Commission moves forward with creating a reassigned number database without making any changes to current TCPA interpretations, then the only way a caller could be assured that it is not being exposed to potential ruinous liability for calls made to a wireless number would be: (1) a caller checks the database before making a call to every wireless number for which they have already obtained consent, and (2) the Commission creates a safe harbor for callers who utilize the database.

First, even if not an outright requirement to use the reassigned number database, given the strict liability nature of the TCPA, callers would face enormous risk if they did not utilize the database. While this may reduce some inadvertent calls, it would come at the enormous cost of a

potential de facto requirement for every mobile phone caller to continuously verify through the database that a number provided by a consumer with express consent has not been reassigned. This type of system would be extremely burdensome and expensive, particularly for small businesses and for industries that are predicated on a high volume of calls, such as debt collection (the overwhelming majority of which are small businesses). This result stands in direct contrast to the heavy focus on reducing regulatory burdens espoused by President Trump, including in Executive Order 13777 which asks agency heads to identify regulations that “impose costs that exceed benefits” for repeal, replacement, or modification.<sup>9</sup>

Second, in the absence of any TCPA definitional changes impacting the handling of reassigned numbers, it is absolutely critical that use of the database would provide callers operating in good faith with an affirmative defense against reassigned number liability. Even in the best of circumstances, given the huge number of reassignments that occur on a daily basis, it is hard to imagine that the database could be one hundred percent accurate at any given time. Thus, as described above, the burden of continuously checking the reassigned number database for many businesses would only make sense if there was an assurance that doing so would serve as a shield to TCPA lawsuits if a reassigned number was somehow dialed. As a result, ACA agrees with Commissioner O’Rielly that “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 ...”.<sup>10</sup>

Despite ACA’s reservations about a mandated reassigned number database – especially before the Commission addresses related TCPA definitional issues and more thoroughly explores

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<sup>9</sup> See Executive Order 13777, Enforcing the Regulatory Reform Agenda, February 24, 2017, *available at* <https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda>.

<sup>10</sup> NOI, Statement of Commissioner Michael O’Rielly at 14.

less burdensome, but potentially more effective solutions – to the extent this item moves forward, ACA offers the following suggestions:

- Establishing a reassigned number database does not take the place of revising current TCPA interpretations that have turned the statute into a litigation trap for even the most compliance-minded businesses. The Commission should move expeditiously to create other pathways for compliance to avoid reassigned number liability so that use of the database does not become a de facto requirement.
- The Commission should explore ways to reduce calls to reassigned numbers that do not put the burden entirely on callers. Legitimate businesses should be able to rely on properly obtained prior express consent as intended by Congress without having to continually verify it.
- A safe harbor must be developed in combination with the reassigned number database.
- Providers must make updates as close to real time as possible.
- Any fees charged should take into account the wide array of callers that would be accessing the database.
- The database administrator must ensure that ported numbers will not register as a “reassignment” in the database which could cause a loss of communication.
- Safeguards must be instituted to minimize false positives in the database, i.e. numbers displaying a reassignment even though they have not been reassigned. In these instances, a consumer will lose access to normal, expected, and desired information.

**C. Continual Use of the Loaded Term “Robocall” to Describe All Calls Made Using Modern Communications Technology Hinders Much-Needed TCPA Reform and Needs to Be Appropriately Clarified.**

Underlying the efforts in this proceeding is the Commission’s continual use of the pejorative term “robocall.” As ACA has previously indicated, the problem is that the Commission broadly interprets “robocall” to mean any call made to a wireless number using an automated telephone dialing system or a prerecorded voice.<sup>11</sup> Using this loaded word – which clearly has a negative connotation and brings to mind unwanted, random, and illegitimate calls – to sweep normal,

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<sup>11</sup> See, e.g., Federal Communications Commission, “FAQs on Robocalls,” Consumer Guide, available at <https://transition.fcc.gov/cgb/consumerfacts/robocalls.pdf>



expected, and desired communications into the same bucket as telemarketing and scam calls – is misleading and has impeded much-needed communication reform under the TCPA.

In fact, in his accompanying statement, Commissioner O’Rielly emphasized an important point that often seems to get lost in the “robocall” discourse, i.e., many robocalls by legitimate businesses are targeted to specific consumers and contain important information that consumers want:

Overall, I appreciate the challenge of trying to corral and decrease illegal robocalls, many of which originate overseas. Do note that I said *illegal* robocalls, as not every robocall is problematic. In fact, many are extremely beneficial to consumers, providing information they want and expect to receive from trusted companies.<sup>12</sup>

Given this, ACA could not agree more with Commissioner O’Rielly’s well-put statement that, “The Commission’s job should be to ensure that it doesn’t prevent or squash legitimate robocalls in its ferocious quest to curtail unlawful ones.”<sup>13</sup>

### III. CONCLUSION

Overall, ACA believes the reassigned number database idea is well-intentioned, but too complicated, costly, and burdensome to justify its potential benefits. Instead, the better and most straightforward way to accomplish the two stated goals of the NOI – reducing unwanted robocalls and promoting TCPA compliance – would be to address the TCPA definitional issues described in Section II.A. and to continue focusing on technological solutions to combat illegal robocalls, including narrowly-tailored call blocking authority for carriers as described in the Commission’s latest Notice of Proposed Rulemaking<sup>14</sup> and exploring call authentication efforts.<sup>15</sup>

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<sup>12</sup> NOI, Statement of Commissioner Michael O’Rielly at 14.

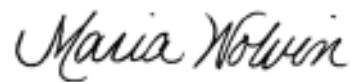
<sup>13</sup> *Id.*

<sup>14</sup> See *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Notice of Proposed Rulemaking and Notice of Inquiry, CG Docket No. 17-59, FCC 17-24 (rel. March 23, 2017); see also ACA’s comments available at <https://ecfsapi.fcc.gov/file/10703029145993/Comments-ACA%20International-TCPA%20NPRM%20and%20NOI-7-3-17-FINAL.pdf>

To the extent the Commission nevertheless moves forward with the creation of a reassigned number database, ACA respectfully urges the Commission to develop a safe harbor to protect callers from liability, address definitional issues that impact TCPA liability, and to consider the other suggestions listed in Section II.B.

Finally, ACA continues to urge the Commission to clarify the term “robocall” so that legitimate business calls are not lumped into the same category as unwanted or scam calls thereby hindering much-needed TCPA reform.

Respectfully submitted,



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<sup>15</sup> See *Call Authentication Trust Anchor*, Notice of Inquiry, WC Docket No. 17-97 (rel. July 14, 2017).