

September 26, 2017

Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Request for Comment on Second Notice of Inquiry, CG Docket No. 17-59
Advanced Methods to Target and Eliminate Unlawful Robocalls

Dear Ms. Dortch:

The American Bankers Association¹ (ABA) appreciates the opportunity to comment on the Federal Communications Commission's (Commission) Second Notice of Inquiry (Second NOI) regarding its proposal to establish a mechanism to mitigate the problem presented by calls made to phone numbers of consumers who consented to receive the call but whose numbers have subsequently been reassigned to another consumer (reassigned numbers).² The Second NOI seeks information about the "best ways" for companies that provide telephone service (Voice Service Providers or Providers) to report information about reassigned numbers and how that information can be made available to banks and other companies.³

ABA shares the Commission's goal to minimize calls to reassigned numbers, and we support the Commission's initiative to establish a database or other resource to notify companies about reassigned numbers. Banks regularly need to contact their customers with important, beneficial, and time-critical calls, and make significant efforts to promote the accuracy of the numbers they call. Despite these efforts, banks cannot completely avoid calling reassigned numbers. The Commission's conclusion in its 2015 Declaratory Ruling and Order⁴ (2015 Order) that a caller is liable for a call made in good faith to a party who has consented to receive the call but whose

¹ The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits and extend more than \$9 trillion in loans.

² *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59 (Second Notice of Inquiry released July 13, 2017), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0713/FCC-17-90A1.pdf (hereinafter *Second Notice of Inquiry*).

³ *Id.* at 1.

⁴ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, 30 FCC Rcd. 7961, 7999-8000 (Declaratory Ruling and Order released July 10, 2015) ¶ 72 (hereinafter *TCPA Order*).

telephone number has been reassigned to another consumer, without notice to the bank, has led banks to limit—and, in certain instances, to eliminate—many pro-consumer communications.

ABA supports the creation of a centrally administered database or other resource that contains information on the permanent disconnection and reassignment of phone numbers (Reassigned Number Resource or Resource). If the Commission decides to create a Reassigned Number Resource, we urge the Commission to provide a safe harbor for companies that utilize the Resource. Even with the establishment of a well-functioning Resource, the possibility of inadvertently calling a reassigned number will remain. Numbers that were reassigned prior to the Resource’s creation will not be reflected in the Resource, and other numbers may be excluded from the Resource because of error. In addition, the Resource may not provide necessary disconnect and reassignment information for numbers belonging to a family calling plan (where phones may be registered to a member of the household who is not the phone’s user) or that have been assigned to a phone for which no customer identification information is available, such as a prepaid phone. In the absence of a safe harbor, the regulatory risk—and potential liability—for calling a reassigned number will inhibit banks from placing many pro-consumer communications, including suspicious activity alerts, data security breach notifications, and low balance alerts.

If the Reassigned Number Resource reports timely, accurate, and comprehensive information on disconnected and reassigned numbers, it could provide significant value to banks and, more importantly, to those customers who currently may not receive important communications from their banks because of the regulatory risk of calling a customer number that has been reassigned. However, the Resource will not remove all barriers to effective communication between a bank and its customers. ABA urges the Commission to reconsider its interpretations of the Telephone Consumer Protection Act (TCPA),⁵ particularly the Commission’s expansive definition of “automatic telephone dialing system” (Autodialer),⁶ which has imposed substantial obstacles to banks seeking to contact their customers using efficient dialing technologies. To facilitate communications best between banks and consumers, the Commission should promulgate a more sensible interpretation of this term.

I. Background

Banks work hard to promote accuracy in the numbers they call. These efforts include providing consumers multiple means to edit contact information, confirming a consumer’s contact information during any call with the consumer, regularly checking the database administered by the Local Number Portability Administrator to confirm that a residential number has not been

⁵ Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 et seq.

⁶ See 47 U.S.C. § 227(a)(1) (defining “automatic telephone dialing system”); *TCPA Order*, 30 FCC Rcd. at 7971-7978 ¶¶ 10-24 (interpreting statutory definition).

transferred to a wireless number,⁷ providing instructions for reporting a wrong number call, and purchasing one or more vendor-provided solutions to identify customer numbers that have been disconnected and/or reassigned to other consumers.⁸ However, banks—which need to initiate billions of informational calls annually—cannot completely avoid calling reassigned wireless telephone numbers.

The volume of phone numbers that are disconnected (and then reassigned) each day is substantial. One large bank reported that, when it first compared its base of customer numbers against current numbering information provided by a vendor, the bank could not “match” 7 million of its customer numbers—a strong indication that these numbers had been disconnected. Another large bank reported that, on average, it cannot match 1.5 million of its customer wireless numbers against vendor-provided numbering information each month.

These figures are unsurprising, because telephone companies recycle as many as 37 million telephone numbers each year.⁹ In 2016, one quarter of wireless phone subscribers disconnected their service.¹⁰ Consumers who change their wireless number *should* notify the businesses and organizations with whom they interact of the change; however, they often fail to do so.

In addition, the sellers of prepaid phones require purchasers to provide *no* information about purchasers’ identity. Consequently, existing vendor-provided databases of phone numbers currently in use do not list the names of consumers who have prepaid phones. When a bank seeks to “match” its base of customer numbers (for which the bank has obtained consent to make autodialed calls) against a vendor-provided list of current number assignments, numbers belonging to bank customers with prepaid phones will not match the information on the vendor-

⁷ The Local Number Portability Administrator oversees the system that allows consumers to keep their phone numbers when they switch Voice Service Providers.

⁸ As an example of the lengths that banks will go to avoid calling reassigned numbers, one large bank that uses the services of multiple vendors reported spending \$4 million per year on a single vendor’s services to identify those customer phone numbers in its records that have been relinquished (or otherwise no longer used) by the customer and thus potentially reassigned to another consumer.

⁹ Alyssa Abkowitz, *Wrong Number? Blame Companies’ Recycling*, Wall Street J. (Dec. 1, 2011), available at <http://www.wsj.com/articles/SB10001424052970204012004577070122687462582#ixzz1fFP14V4h>.

¹⁰ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, WT Docket No. 17-69, at 16 (Twentieth Mobile Wireless Competition Report proposed Sept. 7, 2017), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0907/DOC-346595A1.pdf (hereinafter *Twentieth Mobile Wireless Competition Report*) (referencing data calculated by CTIA).

provided list, suggesting wrongly that these numbers have been disconnected.¹¹ Moreover, these numbers are disconnected at higher rates than other numbers; in 2016, 58 percent of prepaid phone users relinquished their number.¹²

The placement of calls to numbers belonging to a family calling plan also presents challenges. A Voice Service Provider may register all phone numbers assigned to a family calling plan under a single person's name, often the head of the household. However, the bank's records of customers' consents to receive autodialed calls may indicate that a *different* member of the household, having a different first and/or last name, is the user of one (or more) numbers under the family plan. Under these circumstances, the bank's records will not match those of the Provider, and the bank may conclude that the regulatory risk of calling a reassigned number is too great to call the customer's number. In addition, one family member may provide the bank with consent to receive autodialed calls on *another* family member's phone number. When the bank calls that number, it may expose itself to potential liability, as the phone number's subscriber did not provide consent to be called.

Moreover, there are many instances when a bank will place a call to a number that has been reassigned but not learn of the reassignment during the call. A call could receive no response, be received by an answering machine that does not identify the recipient, or be answered by a live person who does not reveal that he or she is not the intended recipient of the call. Under the Commission's 2015 Order, any of these scenarios would constitute the one or *first* call, to which no liability attaches.¹³ Any subsequent calls could subject the bank to liability, even if it had no actual knowledge that the number had been reassigned, as the Commission conceded in its Order.¹⁴

The numbers of lawsuits demanding awards of statutory damages because of such inadvertent and good faith calls continue to grow.¹⁵ The potential liability for making these calls—and the

¹¹ Because of the difficulty in determining when a number assigned to a consumer's prepaid phone has been reassigned to another consumer, a plaintiff seeking to generate TCPA lawsuits can purchase such phones, "wait[] for them to ring" with calls intended for the phone's prior owner, and "file[] TCPA actions as a business," as one plaintiff in fact did, in *Stoops v. Wells Fargo Bank, N.A.*, Civ. Action No. 3:15-83, at 2 & 22 (W.D. Pa. June 24, 2016). In *Stoops*, the plaintiff purchased at least 35 prepaid phones for her TCPA "business." *Id.* at 2.

¹² *Twentieth Mobile Wireless Competition Report* at 16.

¹³ See *TCPA Order*, 30 FCC Rcd. at 8000 ¶ 72 (providing safe harbor, under certain circumstances, for a first call attempt to a number that has been reassigned).

¹⁴ See *id.* at 8006 ¶ 85 ("[W]e agree with commenters who argue that callers lack guaranteed methods to discover all reassignments immediately after they occur. The record indicates that tools help callers determine whether a number has been reassigned, but that they will not in every case identify numbers that have been reassigned.").

¹⁵ A white paper published in May 2017 found that "TCPA litigation has consistently increased year-after-year. Between 2010 and 2016 there was a **1,273% increase in litigants**; between

draconian litigation costs that must be incurred to defend against the resulting lawsuits—threatens to curtail important and valued communications between banks and their customers.¹⁶

II. Discussion

A. ABA Supports the Creation of a Reassigned Number Resource and Safe Harbor to Protect Callers that Use the Resource

ABA supports the creation of a Reassigned Number Resource that contains information in a centrally accessible location regarding (a) the permanent disconnection (relinquishment) of a number from the consumer to whom it was assigned; and (b) the reassignment of that number to another consumer. Because the creation of this Resource will involve a significant level of technical complexity, we urge the Commission to work with the banking industry to identify the universe of circumstances where banks risk calling reassigned numbers, despite their best efforts, and design the Resource to address those circumstances. Because the risk of calling a reassigned number will remain after establishment of the Resource, we also urge the Commission to establish a safe harbor for callers that use the Resource when placing calls.

1. The Reassigned Number Resource Should Contain Information on Disconnected and Reassigned Numbers at a Centralized Source

Most importantly, the Reassigned Number Resource should contain information identifying phone numbers that have been disconnected or otherwise relinquished by a consumer. The Resource should distinguish between a number that has been relinquished by a consumer and a number that the consumer has ported from one Voice Service Provider to another. Not infrequently, consumers change Providers while maintaining the same phone number. Under existing vendor-provided solutions, the consumer's change in Providers may be reported wrongly as a relinquished number, even though the number continues to be used by the consumer. The Resource should avoid reporting such "false positives" as numbers that have been *relinquished* by the consumer.

2015 and 2016 alone the total number of litigants increased 32%.” Josh Adams, Dir. of Research, ACA Int’l, *Unintended Consequences of an Outdated Statute: How the TCPA Fails to Keep Pace with Shifting Consumer Trends 2* (May 2017), available at <http://www.acainternational.org/assets/research-statistics/p4-aca-wp-tcpaconsequences.pdf> (emphasis in original).

¹⁶ As the Commission knows, the damages claims and legal costs to defend a TCPA action are substantial. *See TCPA Order*, 30 FCC Rcd. at 8072-73 (Comm’r Pai, dissenting) (“The TCPA’s private right of action and \$500 statutory penalty could incentivize plaintiffs to go after the illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters. But trial lawyers have found legitimate, domestic businesses a much more profitable target.”).

In addition, the Reassigned Number Resource should include information on numbers that have been reassigned, in addition to numbers that have been relinquished. In certain instances, a consumer's number may be *temporarily* disconnected, such as when the consumer is traveling abroad (or otherwise does not need service during a period of time) or has missed payments. A temporarily disconnected number may be reported in a database containing only disconnected numbers. However, callers accessing the database will likely desire information on numbers that consumers have *permanently* relinquished. Consequently, the Resource should provide information on reassignments, to help callers identify customer numbers that have been permanently, rather than temporarily, disconnected.

Information on disconnections and reassignments should be accessible from a centrally administered source to callers seeking to use the Reassigned Number Resource. Requiring callers to query or otherwise receive that information from multiple data sources, such as from all Voice Service Providers, is not efficient or cost-effective for callers or providers of the information.

In assessing whether the Commission, a data aggregator, or another entity should administer the Reassigned Number Resource, the Commission should consider, among other factors, (a) whether the aggregation of data is a core competency of the entity, and (b) how costs to establish and administer the Resource would be allocated. Imposing on callers the costs to establish and administer the Resource could create a significant disincentive to use the Resource, as callers would need to weigh the benefits of using the Resource against its costs. We suggest the Commission consider an alternate source of funding for the Resource, perhaps by seeking an appropriation from Congress.

2. The Commission Should Provide a Safe Harbor for Callers that Use the Reassigned Number Resource

We agree with the Commission that the information reported in the Reassigned Number Resource should be “comprehensive,”¹⁷ in that it should include the full inventory of phone numbers that consumers have relinquished. No matter how well designed and constructed, however, the Reassigned Number Resource will not eliminate completely calls to reassigned numbers. We agree with Commissioner O’Rielly that a “properly constructed compliance safe harbor must be part” of the solution.¹⁸ A safe harbor will ensure that banks are not discouraged from placing important calls to consumers, and that callers do not face enormous liability and litigation costs for inadvertently calling a reassigned number notwithstanding their attempt to identify such numbers through use of the Resource. We urge the Commission to provide a safe harbor from liability for banks and other entities that call a number for which the caller had obtained consent to place autodialed calls, but that was subsequently reassigned to another consumer, when the caller (a) reviewed information in the Resource within the past 31 days to

¹⁷ *Second Notice of Inquiry* at 7 ¶ 20.

¹⁸ *Id.* at 14 (statement of Comm’r O’Rielly).

determine whether the number had been reassigned, and (b) received no information that the number had been reassigned.

A bank or other caller that fully utilizes the Reassigned Number Resource could inadvertently call a reassigned number under one of several circumstances. First, a number disconnected or reassigned prior to the Resource's establishment is unlikely to be listed in the Resource. Consequently, a caller will not be able to learn of the number's reassignment by accessing the Resource.

Second, there will likely be a delay between the time when a number is disconnected or reassigned and the time when that information is reported in the Resource. For example, if the Resource is updated once each day, there could be a period of up to 24 hours wherein a number has been reassigned to a new consumer but which reassignment is not reported in the Resource.¹⁹

Third, banks face significant, potentially insurmountable, challenges in accurately identifying the assignment and reassignment of phone numbers that belong to a family calling plan. As described in Part I, a Voice Service Provider may list all phone numbers assigned to a family calling plan under the head of the household, but the bank's records of customers' consents to receive autodialed calls may indicate that a *different* member of the household is the user of one (or more) numbers under the plan. This can make the bank's accurate identification of the current holder of the number nearly impossible, because the Resource's information for that number (which will be obtained from Providers) will not match the bank's records of consents, and the bank will not be able to determine conclusively whether the number has been reassigned. Also, as described in Part I, we are aware of instances where a bank customer provided consent to call the number belonging to his or her spouse's phone; the spouse then filed a lawsuit when the bank called that number.²⁰ The Resource is unlikely to provide callers with information sufficient to prevent such calls from being made. A safe harbor is needed to protect callers who rely upon the Resource but call numbers that have nonetheless been reassigned.

A fourth reason a safe harbor is needed is to protect calls made to numbers assigned to prepaid phones that, unbeknownst to the caller, were subsequently reassigned to another consumer. As discussed in Part I above, sellers of prepaid phones do not collect information on the identity of the consumer who purchased the phone or report when a phone has been returned and the phone's number reassigned to another consumer. Consequently, banks will have limited ability

¹⁹ In addition, some banks, particularly community banks, may not have the staffing or other resources to access the Resource after each update. These banks will face increased risk of calling reassigned numbers, and thus liability, without a safe harbor.

²⁰ Under these circumstances, the caller will not benefit from the Commission's finding, in the 2015 Order, that a caller may rely on the consent provided by a "non-subscriber customary user of the phone." *TCPA Order*, 30 FCC Rcd. at 7999 ¶ 72. Where a consumer provides consent for the bank to place autodialed calls to the phone belonging to the consumer's spouse, the consumer is not a customary user of the phone; only the spouse is a customary user.

to determine whether the current user of the phone provided consent to be called.²¹ In the absence of a safe harbor, banks will likely continue to forego placing calls to prepaid phone numbers, and bank customers with these phones will not receive important and time-sensitive calls that the bank seeks to make, even if the customer had consented to receive such calls on that number.

A fifth reason a safe harbor is needed is because there will inevitably be errors in the disconnect and reassignment information reported through the Resource, despite the best efforts of the Commission, Voice Service Providers, and third party data aggregators. If a bank or other caller relies on erroneous information in placing a call to a reassigned number, the caller should not be liable for the call.

B. The Reassigned Number Resource Does Not Obviate the Need for a More Sensible Interpretation of the TCPA's Requirements

A Reassigned Number Resource that reports timely, accurate, and comprehensive information on disconnected and reassigned numbers will provide significant value to banks, bank customers, and consumers. However, the Resource will not remove all of the barriers that currently limit a bank's ability to communicate with its customers. We urge the Commission to revisit its interpretations of the TCPA, particularly its interpretation of the statutory definition of an Autodialer, to facilitate the use of efficient dialing technologies by banks to contact their customers with important messages. As Chairman Pai and Commissioner O'Rielly have noted, the Commission has construed the definition of an Autodialer so broadly that it sweeps in technologies used by banks and other callers to send messages to consumers that were never contemplated to fall within the definition of this term.²² The broad definition has encouraged the filing of class action lawsuits, and the resulting risk of significant litigation costs has led financial institutions to limit or eliminate many pro-consumer communications. The Commission should act expeditiously to correct its flawed interpretation.

²¹ To assist callers in determining whether a phone number belonging to a prepaid phone has been reassigned, the Resource should report the date when a number was relinquished. That information would permit callers to compare the date on which the number was relinquished to the date when the bank received consent to call that number. If consent was provided after the date the phone was last relinquished, then a caller may have greater confidence that the phone is still used by the person who provided consent. Because information on the relinquishment of such numbers may not be complete, a safe harbor should protect callers who rely on the information in the Resource but nonetheless call a number belonging to a prepaid phone that has been reassigned.

²² See, e.g., *TCPA Order*, 30 FCC Rcd. at 8074 (Comm'r Pai, dissenting) (concluding that the TCPA Order "dramatically expands the TCPA's reach"); *id.* at 8087 (Comm'r O'Rielly, dissenting in part and approving in part) (concluding that the TCPA Order "impermissibly expands the statutory definition of an [Autodialer] far beyond what the TCPA contemplated").

The Commission’s interpretation of the meaning of an Autodialer deviates sharply from Congress’ intent when it passed the TCPA. In 1991, Congress acted to regulate the use of a specific dialing technology to call mobile, emergency, healthcare-related, and public safety-related telephone numbers.²³ As defined in the TCPA, an Autodialer has the “capacity- (A) to store or produce telephone numbers to be called, *using a random or sequential number generator*; and (B) to dial such numbers.”²⁴ Significantly, an Autodialer uses a random or sequential algorithm to generate numbers *without regard* to whether all of the numbers so generated have been assigned to subscribers, or whether those numbers are assigned to emergency services, healthcare providers, or public safety agencies.

Put simply, banks do not make such random or sequential calls. Instead, banks call the telephone numbers of actual customers, which are not random or sequential numbers. But the Commission has departed from the statutory text and interpreted the term Autodialer to mean any equipment that can dial numbers “without human intervention,”²⁵ including equipment that has the “*potential ability*” to function in this manner.²⁶ In essence, the Commission has read out of the TCPA the requirement that equipment must generate numbers in a random or sequential manner to be an Autodialer. The practical effect of the Commission’s interpretation is that many efficient dialing technologies—even those that do not use a random or sequential number generator—may be used only if the calling financial institution can demonstrate that it has received the consumer’s prior express consent to call that number. This significantly limits the ability of banks to communicate with their customers and other consumers.

As the Commission addresses the problems posed by calls made to reassigned numbers, it should re-consider the definition of an Autodialer and re-interpret the term in a manner that facilitates, rather than impairs, the important communications that banks and other businesses seek to send to their customers.

III. Conclusion

ABA supports the Commission’s initiative to establish a Reassigned Number Resource. Despite banks’ significant efforts to promote accuracy in the numbers they call, banks cannot completely avoid calling reassigned numbers. The Resource could significantly reduce calls placed to reassigned numbers, while permitting banks to call customer numbers with confidence that those numbers have not been reassigned to other consumers.

²³ See H.R. Rep. No. 102-317, at 10 (1991) (explaining that TCPA was intended to address telemarketers who “often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers”).

²⁴ 47 U.S.C. § 227(a)(1) (emphasis added).

²⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14092 (Report and Order released July 3, 2003) ¶ 132.

²⁶ *TCPA Order*, 30 FCC Rcd. at 7975 ¶ 19 (emphasis added).

ABA urges the Commission to create a Reassigned Number Resource that contains information on both the permanent disconnection of phone numbers and the reassignment of those numbers. Additionally, because no resource of this nature, no matter how well designed, will prevent all calls to reassigned numbers, ABA urges the Commission to include a safe harbor for callers that use the Resource when placing calls.

Although a Reassigned Number Resource could provide significant value to banks and consumers, it will not completely remove barriers to effective bank communications. ABA urges the Commission to re-visit its interpretations of the TCPA, particularly its interpretation of the definition of an Autodialer. The Commission should promulgate a more sensible interpretation of this term, one that is consistent with the text of the TCPA and congressional intent.

Sincerely,

A handwritten signature in black ink that reads "Jonathan Thessin". The signature is written in a cursive, flowing style.

Jonathan Thessin
Senior Counsel, Center for Regulatory Compliance