

December 4, 2018

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
455 12th Street SW
Washington, DC 20554

**Re: Advanced Methods to Target and Eliminate Unlawful Robocalls,
CG Docket No. 17-59**

Dear Ms. Dortch,

On December 4, 2018, Stephanie Kuhl and Steve Morris of NCTA – The Internet & Television Association (“NCTA”) met with Zenji Nakazawa, Legal Advisor to Chairman Pai, to discuss the draft order in the above-referenced proceeding to be voted on at the Commission’s December agenda meeting.¹ Consistent with NCTA’s comments in this proceeding, we encouraged the Commission to include a safe harbor from TCPA liability for callers that make use of the reassigned numbers database contemplated in the draft order.² In particular, we proposed that the Commission include the attached language in the item to provide a safe harbor from TCPA liability for callers that consult the reassigned numbers database within 31 days prior to calling and do not have actual knowledge that the number has been reassigned or that their consent to call the number has been revoked. We explained that there is broad support in the record for adopting such a safe harbor because it would increase the incentive of callers to use the database and thereby reduce the number of calls made to reassigned numbers.³

Respectfully submitted,

/s/ **Steven F. Morris**

Steven F. Morris

cc: Zenji Nakazawa

¹ *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Second Report and Order, FCC-CIRC1812-03 (rel. Nov. 21, 2018).

² NCTA Comments at 3 (filed Aug. 28, 2017) (“[A]ny callers using any reassigned numbers identification mechanism consistent with the Commission’s rules should get the benefit of a safe harbor for any violations that result from an error.”).

³ *See, e.g.*, National Consumer Law Center, *et al.* Comments at 8 (filed May 29, 2018) (“To incentivize the use of the reassigned number database, and thus reduce the number of unwanted and illegal robocalls, we agree that a limited safe harbor might not be inappropriate, as long as it is carefully written and will reinforce incentives to comply with the consumer protection purposes of the TCPA.”); ACA Int’l Comments at 5 (filed June 5, 2018) (“The success of any reassigned number database hinges on the safe harbor that the FCC associates with use of it, particularly to protect legitimate businesses from predatory TCPA litigation.”).

CG Docket No. 17-59
Proposed Safe Harbor Language

1. In the *Second Further Notice*, we proposed to adopt a safe harbor from TCPA liability for entities relying on a reassigned numbers database.¹ Our proposal received broad support in the record, including by commenters representing callers, voice providers, and others.² We agree with consumer groups and other commenters that adoption of a safe harbor would incentivize voluntary use of the database by callers and thereby reduce the number of unwanted and illegal robocalls.³

2. The safe harbor framework we adopt focuses on assessing whether a caller was reasonable in relying on the information obtained from the database.⁴ A caller will not be liable under the TCPA for a call inadvertently placed to a reassigned telephone number where the caller (1) has previously obtained the necessary consent to call a particular number and that consent has not been revoked; (2) did not have actual knowledge of the reassignment at the time the call was made; and (3) reasonably determined, based on a query of the Commission's database conducted within 31 days before making a call to that number, that the number has not been reassigned since consent was obtained. This approach is consistent with other similar safe harbors in our rules. For example, the safe harbor from liability for telephone solicitations placed to numbers on the national do-not-call list similarly protects callers that update their calling lists based on queries of the FTC's do-not-call database conducted "no more than 31 days prior to the date any call is made."⁵

¹ *Second Further Notice* ¶ 31.

² See, e.g., USCC *Second Further Notice* Comments at 8-9; Encore *Second Further Notice* Comments at 2; EFC *Second Further Notice* Comments at 3; SLSA *Second Further Notice* Reply Comments at 3-4; 15 SMS *Second Further Notice* Reply Comments at 4-5; RILA *Second Further Notice* Reply Comments at 2-7; Comcast *Second Further Notice* Comments at 14-20; CTIA *Second Further Notice* Comments at 10-11; CenturyLink *Second Further Notice* Comments at 4; TracFone *Second Further Notice* Reply Comments at 2-3; Tatango *Second Further Notice* Comments at ii-iii; Comcast *Second Further Notice* Reply Comments at 3-6; CHEAO *Second Further Notice* Reply Comments at 2-3.

³ See, e.g., Comcast *Second Further Notice* Comments at 5; NCLC *Second Further Notice* Comments at 8.

⁴ Such an approach is supported by the record. See NCLC *Second Further Notice* Comments at 8 (noting that an appropriate safe harbor should turn on "whether the caller was reasonable in relying on the information obtained from the database"); see also Comcast *Second Further Notice* Comments at 17 (noting that safe harbor protection should apply "where a caller relies on the comprehensive reassigned number database to ascertain whether it continues to be reasonable to rely on previously obtained consent").

⁵ 47 C.F.R. § 64.1200(c)(2)(D). In adopting this safe harbor, the Commission explained that a caller "that has made a good faith effort to provide consumers with an opportunity to exercise their do-not-call rights should not be liable for violations that result from an error." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 38 (2003). The FTC made the same observation when it adopted an analogous safe harbor under its do-not-call rules. See Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4646 (Jan. 29, 2003) ("Sellers or telemarketers who have made a good faith effort to provide consumers or donors with an opportunity to exercise their 'do-not-call' rights should not be liable for violations that result from error."); see also 16 C.F.R. § 310.4(b)(3) (codifying FTC safe harbor).

3. Section 227 of the Act provides authority for the Commission to adopt a safe harbor. In particular, Section 227(b)(2) grants the Commission the power to “prescribe regulations to implement the requirements” of subsection (b), which includes the core requirements under the TCPA to obtain prior express consent when calling mobile numbers using an automatic telephone dialing system or an artificial or prerecorded voice, and when calling residential telephone lines using an artificial or prerecorded voice.⁶ As described in the record, the Commission’s authority to establish a safe harbor was confirmed by the D.C. Circuit in *ACA International*.⁷ In that case, the court pointed to the Commission’s proposal to establish a comprehensive reassigned number database and to adopt a TCPA safe harbor for entities that rely on the database, and explained that “[t]hose proposals . . . naturally bear on the reasonableness of calling numbers that have in fact been reassigned, and have greater potential to give full effect to the Commission’s principle of reasonable reliance” grounded in Section 227(b).⁸

⁶ 47 U.S.C. § 227(b)(2).

⁷ See CUNA *Second Further Notice* Comments at 6; ABA *Second Further Notice* Comments at 5-6; Comcast *Second Further Notice* Comments at 17-20.

⁸ *ACA Int’l*, 885 F.3d at 709.