

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
 )  
Rules and Regulations Implementing the ) CG Docket No. CG 02-278  
Telephone Consumer Protection Act of 1991 )  
 )  
Rubio's Restaurant, Inc. Petition for Expedited )  
Declaratory Ruling )

To: The Commission

COMMENTS OF NATIONAL COUNCIL OF NONPROFITS

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The National Council of Nonprofits submits these comments in support of the Rubio's Restaurant, Inc. Petition for Expedited Declaratory Ruling, which seeks Commission clarification that callers who obtain "prior express consent" from a "called party" are not liable under the Telephone Consumer Protection Act<sup>1</sup> for calls or text messages to a telephone number for which prior express consent to contact has been obtained, but where the number has been reassigned without the caller's knowledge.<sup>2</sup>

## I. Background

The National Council of Nonprofits (Council of Nonprofits) is a network of state associations of nonprofits and 25,000-plus members – the nation's largest network of nonprofits – that serves as a central coordinator and mobilizer to help nonprofits achieve greater collective impact in local communities across the country. The issues raised in the Rubio's Restaurant Petition significantly affect the charitable nonprofit community which itself has a significant impact on the United States economy. Nonprofit organizations employed more than 10% of the workforce in 2010 (13.7 million workers).<sup>3</sup> Indeed, more individuals work for nonprofit employers than are employed in the defense and aerospace, construction, real estate, management, and information industries combined.<sup>4</sup> The nonprofit sector contributed an estimated \$836.9 billion to the US economy in 2011, which made up

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<sup>1</sup> Telephone Consumer Protection Act of 1991, Pub L. No. 102-243, 105 Stat. 2394 (1991)(codified at 47 U.S.C. § 227)("TCPA").

<sup>2</sup> Rubio's Restaurant Inc., Petition for Expedited Declaratory Ruling at 6, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed Aug. 11, 2014). The National Council of Nonprofits also supports similar petitions seeking clarification or relief related to any potential liability for calls to reassigned numbers. See Stage Stores, Inc.'s Petition for Expedited Declaratory Ruling Regarding Reassigned Wireless Numbers, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed June 3, 2014)(Stage Stores Petition); United Healthcare Services, Inc.'s Petition for Expedited Declaratory Ruling Regarding Reassigned Wireless Numbers, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed Jan. 16, 2014)(United Healthcare Petition); Petition for Rulemaking of ACA International, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed Jan. 31, 2014)(ACA Petition).

<sup>3</sup> Katie L. Roeger, Amy S. Blackwood, and Sarah L. Pettijohn. *The Nonprofit Almanac 2012*, Washington, DC: The Urban Institute.

<sup>4</sup> Deloitte, [The Aerospace and Defense Industry of the U.S.: A Financial and Economic Impact Study](#), March 2012 and "[Table B-1. Employees on Nonfarm Payrolls by Industry Sector and Selected Industry Detail](#)," accessed March 28, 2014.

5.6 percent of the country's gross domestic product (GDP).<sup>5</sup> Despite the significant contribution of the nonprofit sector as a whole to the U.S. economy, most nonprofits are small in both budget size and number of employees. In 2010, 82.5% of all reporting public charities had annual revenue of less than one million dollars.<sup>6</sup> Of greatest importance to this Comment letter, charitable organizations rely on individuals to volunteer their time to the work and mission of the nonprofits; more than 62 million people, or 25.4% of Americans age 16 and older, volunteered through or for a nonprofit organization at least once between September 2012 and September 2013.<sup>7</sup>

Nonprofits work in every community: caring for returning soldiers, rebuilding cities, educating children, supporting the workforce, nursing the sick, supporting our elders, elevating the arts, mentoring our youth, protecting natural resources, and much more. For example:

- Nonprofits such as the American Red Cross, Salvation Army, and United Ways address the needs of communities across the country by providing and coordinating disaster responses and recovery efforts.
- Tens of thousands of food banks, emergency shelters, food pantries and soup kitchens touch the lives of Americans in every county in the nation by providing families and individuals with nutritious food, hope, and dignity.
- Nonprofit schools, colleges, and universities educate millions of students, conduct cutting edge research on behalf of governments and society, and strengthen communities.
- Cultural institutions, from the smallest local theater to the largest museums and internationally renowned performing organizations, improve the quality of life in communities and touch the lives of tens of millions around the world.

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<sup>5</sup> Sarah L. Pettijohn, "[\*The Nonprofit Sector in Brief: Public Charities, Giving and Volunteering, 2013\*](#), Washington, DC: The Urban Institute.

<sup>6</sup> Amy S. Blackwood, Katie L. Roeger, Sarah L. Pettijohn, "[\*The Nonprofit Sector in Brief: Public Charities, Giving and Volunteering\*](#)," 2012, Washington, DC: The Urban Institute.

<sup>7</sup> [\*Volunteering in the United States, 2013\*](#)," Bureau of Labor Statistics News Release, February 25, 2014.

In each of these examples and many more, nonprofits perform their work and advance their missions through prompt and effective communications with individuals who have voluntarily expressed their support for that work. Thus, the issues presented in the Rubio's Restaurant Petition, are of great concern to the charitable nonprofit community.

## **II. Nonprofits Utilize Modern Technology to Promote Their Interests and Connect with Their Employees, Volunteers, Clients, and Supporters.**

Many employees, volunteers, clients, donors, and other supporters provide their wireless telephone numbers to nonprofits as a preferred method for staying in contact with the organizations to receive desired information. Nonprofits call and send text messages to individuals who have provided prior express consent to contact them on their wireless devices to:

- Alert parents, students, employees, and volunteers of school emergencies, event updates, schedule changes, and important safety information;
- Provide patients and clients with reminders of appointments;
- Alert event ticket holders of scheduling changes, traffic alerts, and other helpful information;
- Schedule meetings and coordinate logistics for emergency preparedness;
- Inform volunteers of work schedules and of upcoming volunteer opportunities;
- Share news, reports of impact, and developments of interest to stakeholders; and
- Seek support for fundraising events.

Nonprofits are careful about securing prior consent from employees, volunteers, clients, donors, and other supporters before sharing such information through cellphone calls or text messages. The use of modern technologies to call or send text messages to individuals who prefer to be contacted on their wireless devices provides a cost-effective way for nonprofits to share desired and expected information with those who have requested it. As shown above, the vast majority of charitable nonprofits are small organizations. They typically have limited staff and scarce funding; many simply cannot afford to expend the time and other resources related to making manual calls. Nor should

they be expected to divert scarce funds for manual calls when employees, board members, volunteers, individuals served, and various other supporters have requested calls or text messages as their preferred method of communication.

**III. Clarification Regarding the Meaning of “Called Party” Related to “Prior Express Consent” Exemption under the TCPA is as Critical for the Nonprofit Sector as it is for Commercial Entities.**

The TCPA provides an exemption from liability for calls to a telephone number assigned to a cellular service using an automatic telephone dialing system or an artificial or prerecorded voice, if the call is made with the “prior express consent of the called party.”<sup>8</sup> Nonprofit organizations are like other organizations – they rely, as they are entitled to under the TCPA – on the prior express consent provided when they make a call or send a text message to a called party.

The Council for Nonprofits agrees with commenters seeking clarification from the FCC that “called party” under the TCPA can only mean “intended recipient.”<sup>9</sup> If the Commission chooses to instead move forward with a “safe harbor” or similar approach, the Council for Nonprofits would support such an alternative, but only if the FCC allows for retroactive relief at least for callers that previously obtained appropriate express consent to call that phone number.

**IV. A Clarification that “Called Party” Means “Intended Recipient” is Consistent with the Statute and Consistent with Common Sense.**

The National Council of Nonprofits urges the FCC to apply common sense when evaluating TCPA issues. We believe that common sense dictates that the FCC recognize that Congress did not intend to impose liability under the TCPA for calls made to numbers for which prior express consent was provided, but which, unknown to the nonprofit caller, have been reassigned. Nonprofit organizations have no way of predicting whether someone other than the person who provided consent for the call will happen to answer the phone.

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<sup>8</sup> 47 U.S.C. § 227(b)(1)(A)(iii).

<sup>9</sup> See, e.g., Wells Fargo Notice of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed July 21, 2014).

Nonprofit organizations rely heavily on volunteers and others to perform services in communities across the country; effective communication with supporters is vital to advancing the organizations' missions. Nonprofit organizations, like other business entities, experience the challenge of having a previously provided phone number be reassigned to another individual without the knowledge of the nonprofit organization. This is not surprising, since the number of reassigned telephone numbers is estimated to be nearly 37 million.<sup>10</sup> And, like other organizations, nonprofit supporters often do not notify nonprofits in a timely manner that they have changed phone numbers and that the new number is their preferred number for receiving future information. We are not aware of any website or service that reflects all reassigned number changes.<sup>11</sup> Therefore, without knowledge of this changed information, nonprofits may attempt to contact an employee, volunteer, client, or other supporter at the old number and inadvertently reach another person.

Nonprofits are concerned that TCPA class-action litigation can undermine nonprofit communications and effectiveness, and force already-strapped nonprofits to adopt unnecessary and expensive alternatives. Each of the communications listed at the outset of these comments is critical to the effectiveness of nonprofit organizations, and each could be subject to resource-draining litigation when individuals elect to join class actions rather than inform nonprofits that the previously supplied phone number has been reassigned.

The Council of Nonprofits joins others in asking the FCC to provide clarity to the courts by issuing a ruling that "called party" means "intended recipient." A number of courts agree that callers should not be liable under the TCPA when their call was directed toward an intended recipient who

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<sup>10</sup> See United Healthcare Petition at 5, (citing Alyssa Abkowitz, *Wrong Number? Blame Companies' Recycling*, *Wall Street Journal* (Dec. 1, 2011)).

<sup>11</sup> Indeed, "there is no reasonable means for companies that make informational and other non-telemarketing calls to wireless numbers for which they have obtained prior express consent, to know if such numbers are actually assigned to someone other than the consenting party or if they have been reassigned." Comments of CTIA – The Wireless Association at 4, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Ruling of United Healthcare Services, Inc.*, CG Docket No. 02-278 (filed Mar. 10, 2014).

had previously provided consent, but the call was actually answered by someone other than the intended recipient.<sup>12</sup> However, there are also conflicting and varying other opinions.<sup>13</sup>

## V. Conclusion.

The Commission should confirm that callers who obtain prior express consent from a called party are not liable under the TCPA for phone calls and text messages to telephone numbers for which the caller has obtained prior express consent, but that have been reassigned without the caller's knowledge, or for other types of "wrong number" calls. The National Council of Nonprofits urges the FCC to apply common sense and clarify that "called party" under the "prior express consent" exemption means "intended recipient." If the Commission chooses to instead move forward with a "safe harbor" or similar approach, the FCC must provide an avenue for retroactive relief at least for callers who previously obtain appropriate express consent to call a particular phone number. Clarification that "called party" means "intended recipient" under the TCPA's prior express consent defense would allow nonprofits to perform their vital work and services without diverting scarce resources to the defense of class-action lawsuits when, in good faith, they are simply attempting to communicate with a person who provided express consent to do so.

Respectfully submitted,



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<sup>12</sup> See, e.g. *Leyse v. Bank of Am.*, No. 09-7654 (JGK), 2010 WL 2382400 at \*4 (S.D.N.Y. June 14, 2010) (only the intended recipient of a telemarketing call could pursue TCPA claim); *Cellco Partnership d/b/a Verizon Wireless v. Dealers Warranty, LLC*, No. 09-1814 (FLW), 2010 WL 3946713 (D.N.J. Oct. 5, 2010); *Kopff v. World Research Grp., LLC*, 568 F. Supp. 2d 39, 40-42 (D.D.C. 2008).

<sup>13</sup> See, e.g. *Meyer v. Portfolio Recovery Associates, LLC*, 707 F. 3d 1036, 1043 (9th Cir. 2012) ("called party" means "recipient"); *Manno v. Healthcare Revenue Recovery Group, LLC*, 289 F.R.D. 674, 682 (S.D.Fla.2013) ("called party" means "regular user of the phone"); *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 643 (7th Cir.2012) ("called party" means "subscriber").