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October 16, 2014

Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20036

Re: Notification of *Ex Parte* Presentation, CG Docket No. 02-278

Dear Ms. Dortch:

On October 14, 2014, the undersigned, along with Kate Larson and David Pommerehn of the Consumer Bankers Association ("CBA"), met with: Mark Stone, Deputy Chief of the Consumer & Governmental Affairs Bureau; Kurt Schroeder, Chief of the Consumer Policy Division of the Consumer & Governmental Affairs Bureau; Legal Advisor Aaron Garza; and Attorney-Advisor Kristi Lemoine. Also present was Virginia O'Neill of the American Bankers Association ("ABA"). The undersigned participated as counsel to CBA and ABA.

The meeting focused principally on CBA's pending Petition for Declaratory Ruling, which asks the Commission to confirm that the "called party," for purposes of the Telephone Consumer Protection Act ("TCPA") prohibition on non-emergency automated calls to mobile telephone numbers, is the intended recipient of the call.[1] CBA described the practical inability of senders of informational calls and texts to avoid contacting some numbers that have been reassigned from the consumers who originally consented to receive automated communications from the sender. CBA discussed the public-interest benefits of sending automated fraud alerts, data security breach notifications and similar informational messages, and pointed out that the threat of class-action lawsuits arising from calls to reassigned numbers discourages the beneficial use of text and voice channels to send informational messages most efficiently. CBA also discussed the basis for its belief that

[1] Petition for Declaratory Ruling of the Consumer Bankers Association, CG Docket No. 02-278 (filed Sep. 19, 2014).

defining the called party as the intended recipient of a call is well within the Commission's authority to interpret ambiguous TCPA terms and is consistent with congressional intent and the public interest.

The meeting also included discussion of the ABA's pending Petition for Exemption, which had been filed on the morning of October 14, 2014.[2] The ABA Petition for Exemption asks the Commission to exercise its authority, under 47 U.S.C. § 227(b)(2)(C), to exempt from the TCPA's prior express consent requirement automated calls to mobile telephone numbers that are sent without charge to the called parties, subject to such conditions as are necessary to protect recipients' privacy interests. The ABA Petition requests an exemption for free-to-end-user calls that: (1) alert consumers to possible fraudulent transactions; (2) give notice of data security breaches concerning the recipients' personal information; (3) advise consumers as to remediation measures they might take to prevent fraud and secure their data; and (4) notify recipients of money transfers.

The CBA representatives distributed to participants at the meeting the attached PowerPoint slides and summary of legal authorities relevant to CBA's Petition.

If there are any questions concerning the matters discussed in this notice, please do not hesitate to contact the undersigned.

Respectfully submitted,

/s/ Charles H. Kennedy

Charles H. Kennedy

cc: Mark Stone
Kurt Schroeder
Kristi Lemoine
Aaron Garza
Kris Monteith

[2] Petition for Exemption of the American Bankers Association, CG Docket No. 02-278 (filed Oct. 14, 2014).

CONSUMER BANKERS ASSOCIATION

FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR DECLARATORY RULING
OCTOBER 14, 2014

PETITION OVERVIEW

For non-telemarketing informational calls, the FCC should confirm that "called party" refers to the "intended recipient" of the call for the TCPA's prior express consent requirement.

CONSUMER BANKERS ASSOCIATION

INTENDED RECIPIENT IS THE MOST LOGICAL DEFINITION OF CALLED PARTY

- The definition conforms with Congressional intent
- Congressional Committee Report uses "called party" and "customer" interchangeably
- Consistent with past FCC actions of specifying callers' rights and obligations

CBA CONSUMER BANKERS ASSOCIATION

INFORMATIONAL COMMUNICATIONS BENEFIT CONSUMERS

Threat of TCPA litigation chills informational communications that:

- Are legally mandated
- Prevent fraud and identity theft
- Improve money management
- Reduce avoidable fees
- Promote customer service

CBA CONSUMER BANKERS ASSOCIATION

BEST PRACTICES ARE INSUFFICIENT IN THE DIGITAL AGE

- Technological advancements changed telephone market
- Manually placing non-telemarketing calls is unrealistic
- Best practices cannot shield caller from liability
  - Stringent compliance procedures not a guarantee
  - Costly third party systems inaccurate

CBA | CONSUMER BANKERS ASSOCIATION

NEEDLESS TCPA LITIGATION BURDENS COURTS

- Litigation drains judicial resources and creates excessive expense
  - Autodialer class action lawsuits up 500%;
  - Predictive dialer lawsuits up 800%
- Congress urged FCC to establish "common-sense reforms"

CBA | CONSUMER BANKERS ASSOCIATION

MULTIPLE JUDICIAL DEFINITIONS ESTABLISH INCONSISTENT LAW

- *Leyse v. Bank of America*
  - Roommate was the "unintended and incidental recipient"
  - Court cautioned about business uncertainty
- Other interpretations inconsistent with prior express consent
  - telephone subscriber, regular user of the telephone that received the call, and recipient of the call.
- *Utility Air Regulatory Group*: U.S. Supreme Court emphasized statutory terms must be interpreted in context

CBA CONSUMER BANKERS ASSOCIATION

CONSENT IS LIMITED

- Right of action exists once caller knows number no longer belongs to intended recipient
- Institutions provide ample opportunity to discontinue calls
  - 800 Number to call
  - Stop or Quit on Text
  - Mail
  - Proactively solicit updated demographics online, at ATMs, and on account statements

CBA CONSUMER BANKERS ASSOCIATION

TCPA LITIGATION AFFECTS MOST MAJOR SECTORS

- Health: United Healthcare
- Food Safety: Rubios
- Nonprofits: National Council of Nonprofits
- Education: student loan servicers
- Retail: Stage Stores
- Communication: Twitter

CBA CONSUMER BANKERS ASSOCIATION

COURTS NEED FCC'S GUIDANCE

- Confirming that "called party" means intended recipient is an appropriate exercise of the Commission's authority to interpret statutory terms.
- Expert agency must interpret statutory term if ambiguous
- Commission has long history of interpreting ambiguous TCPA terms

CBA CONSUMER BANKERS ASSOCIATION

CLARITY AND CONTEXT ARE ESSENTIAL

- *Soppet* and *Osorio* are not obstacles to FCC
- Continued delay will create more opportunity for inconsistent precedent
- Imprecise terms may have multiple meanings depending on context (*Verizon*)
- Statutory term must be read in context (*Utility Air Regulatory Group*)

CONCLUSION

- While we commend the spirit of the TCPA, we echo Commissioner O'Rielly's assertion that the "FCC should also follow through on the pending TCPA petitions to make sure that good actors and innovators are not needlessly subjected to enforcement actions or lawsuits, which could discourage them from offering new consumer-friendly communications services."
- To give courts clarity, we ask the FCC to adopt the simplest solution: define "called party" as "intended recipient."

CBA | CONSUMER BANKERS ASSOCIATION

• Confirming that "called party" means intended recipient is an appropriate exercise of the Commission's authority to interpret statutory terms.

• Where a statutory term, such as "called party," is ambiguous, it is the responsibility of the expert agency charged with interpreting the statute to determine the term's meaning, and that decision is entitled to judicial deference. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Mais v. Gulf Coast Collection Bureau, Inc.*, 2014 U.S. App. LEXIS 18554 at *3-12 (11th Cir. 2014) ("*Mais*").

• The Commission has a long history of interpreting ambiguous TCPA terms, and courts have deferred to those interpretations. *See Leckler v. Cashcall, Inc.*, 2008 U.S. Dist. LEXIS 97439 (N.D. Cal. 2008); *Mais, supra; Griffith v. Consumer Portfolio Services, Inc.*, Case No. 10-C-2697 (N.D. Ill. 2011).

• The two Circuit Court opinions declining to adopt the "intended recipient" interpretation of "called party" are not an obstacle to the Commission's adopting that interpretation. *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 640 (7th Cir. 2012) ("*Soppet*"); *Osorio v. State Farm Bank, F.S.B.*, D.C. Docket No. 0:11-cv-61880-DMM (11th Cir. 2014) ("*Osorio*"). Prior judicial interpretations of statutory terms do not deprive the FCC of its authority to adopt contrary interpretations. In fact, continued delay by the FCC likely will result in additional Circuit Court decisions that are inconsistent with the decisions reached so far, adding to the present confusion and litigation risk. Disagreements among the courts concerning the meaning of "called party" increase, rather than reduce, the urgency of FCC clarification.

• The *Soppet* and *Osorio* decisions rely upon the same mistaken rationale, which assumes that the meaning given to a term in one part of a statute controls the meaning of that term in other parts of the statute. In fact, as the D.C. Circuit has confirmed, "it is not impermissible under *Chevron* for an agency to interpret an imprecise term differently in two sections of a statute which have different purposes." *Verizon California, Inc. v. Federal Communications Commission*, 555 F.3d 270, 276 (D.C. Cir. 2009). As the U.S. Supreme Court recently confirmed, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Utility Air Regulatory Group v. Environmental Protection Agency*, 573 U.S. ___, 15 (2014). As CBA's petition shows and a number of courts have confirmed, faithfulness to the overall statutory scheme of the TCPA's prior express consent requirement requires that "called party" be defined as the intended recipient of a call. *Leyse v. Bank of America*, No. 09-7654, 2010 WL 2382400 (S.D.N.Y. 2010); *Leyse v. Bank of America, National Association*, Civ. Action No. 11-7128 (D.N.J. 2014) (designated as not for publication); *Cellco Parntership v. Dealers Warranty, LLC*, 2010 WL 3946713 (D. N.J. 2010); *Kopff v. World Research Group, LLC*, 568 F.Supp.2d 39 (D.D.C. 2008).