

*Before the*  
**Federal Communications Commission**  
Washington, DC

*In the matter of*

Petition for Declaratory Ruling of the  
Consumer Bankers Association

Rules and Regulations Implementing the  
Telephone Consumer Protection Act of 1991

CG Docket No. 02-278

**COMMENTS OF THE  
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)<sup>1</sup>**

CCIA respectfully submits these comments in support of the Petition for Declaratory Ruling filed by the Consumer Bankers Association (CBA).<sup>2</sup> The Commission should clarify that under the Telephone Consumer Protection Act (TCPA), “called party” refers to the intended recipient of the call. Favorable action on the Petition and clarification of this section of the TCPA will serve the public interest and encourage innovation in the communications sector by preventing excessive frivolous litigation.

**I. Summary**

Recent efforts to expand the provisions under the TCPA outside their intended purpose are a serious threat to mobile communications and e-commerce. CCIA has submitted comments

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<sup>1</sup> CCIA is an international nonprofit membership organization representing companies in the computer, Internet, information technology, and telecommunications industries. Together, CCIA’s members employ more than 600,000 people and generate annual revenues in excess of \$465 billion. CCIA promotes open markets, open systems, open networks, and full, fair, and open competition in the computer, telecommunications, and Internet industries. A list of CCIA’s members is available online at <http://www.ccianet.org/members>.

<sup>2</sup> *Consumer Bankers Association, Petition for Declaratory Ruling*, CG Docket No. 02-278 (filed Sept. 19, 2014) (“CBA Petition” or “Petition”).

on multiple occasions in the current docket.<sup>3</sup> The emergence of TCPA “trolls”<sup>4</sup> and meteoric rise in suits in recent years<sup>5</sup> is illustrative of the urgent need for clarifications. Faced with potential damages in the billions, companies are forced to settle<sup>6</sup> which cultivates ample opportunity and incentive for predatory litigation. While the TCPA plays an instrumental role in protecting consumers from marketing abuse, its ambiguous language welcomes a floodgate of frivolous litigation outside the legislative intent of the TCPA and incidentally hurts consumers by discouraging the advancement of desired services. Under the varied, and at times over expansive, interpretation of the TCPA,<sup>7</sup> good faith actors are potentially liable, despite this liability being contrary to the goals of TCPA and other laws that seek to promote consumer preference and ensure a diversity of services.<sup>8</sup>

Particularly concerning is the lack of clarity over what constitutes the “called party” under 47 U.S.C. § 337(b)(1)(A)(iii) in determining the existence of a violation. The Commission should act on CBA’s Petition and rule that the term “called party” within the TCPA refers to the intended recipient of the call. This is the most straightforward solution in addressing the issues

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<sup>3</sup> See Stage Stores Petition, Comments of CCIA, CG Docket No. 02-278 (Aug. 25, 2014) (“CCIA Stage Store Comments”); TextMe, Inc. Petition, Comments of CCIA, CG Docket No. 02-278 (May 22, 2014); Milton H. Fried, Jr. and Richard Evans Petition, Comments of CCIA, CG Docket No. 02-278 (Aug. 8, 2014).

<sup>4</sup> Ali Sternburg, *TCPA Tarnished: Opportunist Litigants Abuse Telemarketing Statute for Statutory Damages*, Disruptive Competition Project, Sept. 2, 2014, at <http://www.project-disco.org/telecom/090214-tcpa-tarnished-opportunist-litigants-abuse-telemarketing-statute-for-statutory-damages/> (“[T]he TCPA grants plaintiffs large statutory damages per violation. The availability of these awards, which require no proof of any actual harm, has incentivized class action litigants to seeks out opportunities to allege technical violations of the statute.”).

<sup>5</sup> In 2013, TCPA litigation increased 69 percent from 2012. See WebRecon LLC, *Debt Collection Litigation & CFPB Complaint Statistics December 2013 & Year in Review* (2013), available at <http://dev.webrecon.com/debt-collection-litigation-cfpb-complaint-statistics-december-2013-year-in-review/>. See also CCIA Stage Store Comments at 3-4.

<sup>6</sup> See U.S. Chamber Institute for Legal Reform, *The Juggernaut of TCPA Litigation*, Oct. 2013, available at [http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit\\_WEB.PDF](http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF) (citing *Rose et al. v. Bank of Am. Corp et al*, No. 5:11-cv-02390-EJD (N.D. Cal. filed Sept. 27, 2013), where authors estimate that if Bank of America had not entered into a \$32 million settlement, they would have faced damages in the upwards of \$3.5 billion under the TCPA).

<sup>7</sup> See *infra* notes 13-15.

<sup>8</sup> CBA Petition at 7. See also CCIA Stage Stores Comments at 3 (stating that holding companies in these circumstances liable wholly undermines the FCC’s disinterest in prohibiting purely information messaging and discouraging proliferation of services customers rely on).

around contacting reassigned numbers under the TCPA, giving companies the necessary clarity to operate effectively. Favorable action will not allow companies to circumvent the law and open consumers up to abuse, but will instead only reiterate that, within the confines of the law, “callers are permitted to place non-emergency, informational, non-telemarketing calls to mobile telephone numbers, using an automatic telephone dialing system, an artificial or prerecorded voice, or text message based upon the prior express consent of the person the caller intends to reach.” CBA Petition at 14.

## **II. Companies that practice good faith efforts to obtain consent before contacting subscribers should not be penalized for reaching reassigned numbers in error.**

The caller is permitted to conduct business with its customers in the manner in which it has contracted. Companies that practice good faith efforts to obtain consent before contacting subscribers should not be penalized for failing inadvertently to reach the intended party. This is especially relevant in the context of calling reassigned numbers.<sup>9</sup> The Petition takes into account the practical reality that rapid transition and porting of telephone numbers is routine. Clarifying that “called party” refers to the intended recipient is the simplest, most straightforward method to provide clarity to companies without imposing excessive compliance measures.

The prevalence of reassigned numbers poses a huge liability burden if the Commission fails to act on this Petition. With 37 million phone numbers recycled each year (and that number

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<sup>9</sup> The Commission has on two previous occasions in this docket asked for public comments on the issue of reassigned numbers in TCPA liability. *See Rubio’s Restaurant, Inc., Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (Aug. 11, 2014) (“Rubio’s Petition”); *Stage Stores, Inc., Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (Aug. 8, 2014) (“Stage Stores Petition”). In both instances, the majority of respondents filed in support of the Commission stating that contacting a reassigned number does not immediately violate the TCPA. *See* Rubio’s Petition, Comments of National Council of Nonprofits, CG Docket No. 02-278 (Sept. 24, 2014); Rubio’s Petition, Comments of Twitter, Inc., CG Docket No. 02-278 (Sept. 24, 2014); Rubio’s Petition, Comments of the U.S. Chamber of Commerce, CG Docket No. 02-278 (Aug. 30, 2014); Rubio’s Petition, Comments of ACA International, CG Docket No. 02-278 (Aug. 30, 2014); Rubio’s Petition, Comments of Wells Fargo, CG Docket No. 02-278 (Aug. 18, 2014); Stage Stores Petition, Comments of Wells Fargo, CG Docket No. 02-278 (Aug. 8, 2014); CCIA Stage Stores Comments; Stage Store Petition, Comments of Twitter, Inc., CG Docket No. 02-278 (Aug. 8, 2014).

increasing annually),<sup>10</sup> it is critical that the law reflects the current state of technological realities. At this scale of reassignment, a caller cannot, without undue burden, track down mobile telephone numbers that might have been reassigned since consents were last obtained. The other untenable option would be for companies to police their users to update, possibly for every service offered by the company, their contact information. Such a duty, if imposed, would undermine the Commission's rulings designed to limit TCPA liability when callers obtain written user consent to receive voice or SMS communications.<sup>11</sup>

Phone subscribers are free to change their mobile numbers at will and do not have an obligation to inform any companies of the change. CCIA members simply do not possess information about mobile phone number disconnections and reassignments, and a public directory of mobile telephone numbers does not exist. While there have been developments toward the offering of a database of mobile phone numbers, the technology has not reached reliable levels as of yet.<sup>12</sup> If a number formerly assigned to an individual who gave consent to the company is reassigned, the only practical way to confirm the identity of the individual with the reassigned number is to contact them. Under current, varying statutory interpretation of "called party" this could result in a violation, when the only intent of the company was to confirm identity. It is only appropriate for the Commission to consider this problem in the current broader discussion of "called party" under the TCPA and prevent companies from being

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<sup>10</sup> Alyssa Abkowitz, *Wrong Number? Blame Companies' Recycling*, WALL ST. J., Dec. 1, 2011, available at <http://online.wsj.com/news/articles/SB10001424052970204012004577070122687462582> ("Almost 37 million phone numbers get recycled each year, a 16% increase since 2007, according to the most recent figures from the Federal Communications Commission. That means with more and more people going cellular, it is increasingly common to get calls intended for previous subscribers.").

<sup>11</sup> CCIA Stage Store Comments at 6.

<sup>12</sup> Neustar offers a verification system for phone data, providing an up-to-date record of mobile telephone numbers, but has stated that their system only reaches 70 percent of all numbers. CCIA member companies cannot be expected to subscribe to a commercially driven private company's service in order to comply with the TCPA, especially when their service imposes a 30 percent chance of facing liability in spite of the precaution. See Neustar, *Understanding TCPA: Maximizing Customer Outreach & Mitigating Risk* (Neustar Insights 2013), available at <http://www.neustar.biz/information/docs/whitepapers/understanding-tpa-law.pdf>, at 5.

held liable for calls placed to numbers they reasonably believed were covered by their compliance with TCPA's consent requirements.

**III. The clarification is consistent with the legislative intent of the TCPA and within the Commission's legal authority.**

The clarification requested by CBA will not disturb the legislative intent of the TCPA. As stated in CBA's Petition, the intent of Congress when constructing the TCPA was not for the law to become a barrier to "the normal, expected or desired communications" between businesses and their customers. CBA Petition at 5. By distinguishing the "called party" from the actual recipient, the TCPA furthers this goal.

The Commission has authority to review the TCPA where the statutory language is ambiguous. *See City of Arlington v. Federal Commc'ns Comm'n*, 133 S. Ct. 1863, 1868 (2013). The phrase "called party" (referring to the person that must give prior express consent for a caller to make a call to a mobile telephone using a prerecorded voice), within the constructs of the TCPA is ambiguous. Courts have been inconsistent in their definition and have held that "called party" refers to the regular user of the telephone<sup>13</sup>, the subscriber of the telephone number<sup>14</sup>, and the intended recipient of the telephone call<sup>15</sup>. The identity of the "called party" is critical – and often dispositive – to a determination of liability under the TCPA.<sup>16</sup> To establish a uniform application of the law, the Commission should resolve this ambiguity by stating that "called party" refers to the *intended* recipient of the call.

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<sup>13</sup> *See, e.g., Swope v. Credit Mgmt.*, 2013 U.S. Dist. LEXIS 21991, at \*9-10 (E.D. Mo. 2013).

<sup>14</sup> *See, e.g., Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637 (7th Cir. 2012); *Breslow v. Wells Fargo Bank*, 755 F.3d 1265 (11th Cir. 2014) (holding that "called party" means the subscriber to the cell phone service).

<sup>15</sup> *See, e.g., Maraan v. DISH Network LLC*, No. 1:2013-cv-00436 (S.D. Ohio Apr. 22, 2014).

<sup>16</sup> *See, e.g., Meadows v. Franklin Collection Serv.*, 414 F. App'x 230 (11th Cir. 2012) (holding that prerecorded debt-collection calls were exempt from TCPA prohibitions because the collection agency had an existing business relationship with the *intended recipient* of its prerecorded calls) (emphasis added); *Leyse v. Bank of America*, No. 09-7654, 2010 WL 2382400 (S.D.N.Y. 2010) (holding there was no TCPA violation where an "unintended and incidental recipient" was called on a number the company had been given consent to contact).

**IV. A complete safe harbor framework would successfully implement the clarifications the Petition seeks to adopt.**

The Commission in the past has granted leniency to companies who effectively obtain prior consent, allowing for a grace period after consent is retracted to contact the individual once again to confirm revocation. *See FCC, Declaratory Ruling on SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (Nov. 29, 2012). Likewise, the Commission should apply this standard to this issue, allowing for a similar grace period to confirm the presence or absence of consent to a called number. The clarifications can be implemented in a way that balances the ultimate consumer protection purpose of the TCPA against the legitimate need of businesses to reach their customers efficiently to deliver account-related information. While implementation of a complete safe harbor framework might require a formal rulemaking, action on the current Petition need not await such a protracted process.

**V. Conclusion**

Only after a company is on notice that the individual contacted was not the intended recipient should they be held liable under the TCPA. CCIA therefore respectfully urges the Commission to act favorably on CBA's petition and clarify that "called party" refers to the intended recipient under the TCPA.

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Respectfully submitted,

Catherine R. Sloan  
VP, Government Relations  
Rachael Stelly  
Law Clerk  
Computer & Communications Industry Association  
900 17th Street, NW, Suite 1100  
Washington, DC 20006  
(202) 783-0070  
csloan@ccianet.org