

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling of the Consumer Bankers Association)	CG Docket No. ____
)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	

**COMMENTS OF CONSUMER BANKERS ASSOCIATION IN SUPPORT OF ITS
PETITION FOR DECLARATORY RULING**

The Consumer Bankers Association (“CBA”) respectfully submits these Comments in support of its Petition for Declaratory Ruling filed on September 19, 2014 (the “CBA Petition”).¹

As the growing record of petitions and comments in this docket amply shows, resolution of the ongoing confusion concerning the meaning of “called party” as used in the prior express consent provisions of the Telephone Consumer Protection Act (“TCPA”) would benefit consumers and organizations throughout major sectors of the U.S. economy. Besides the financial services institutions that CBA represents, favorable Federal Communications Commission (“FCC” or “Commission”) action on this issue would encourage efficient communications by nonprofit organizations,² communications and social media companies,³

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

² Comments of National Council of Nonprofits to Rubio’s Restaurant, Inc. Petition, CG Docket No. 02-278 (filed Sep. 24, 2014) (“*Nonprofits Council Comments*”).

³ National Rural Electric Cooperative Association Notice of *Ex Parte*, CG Docket No. 02-278, (filed Oct. 1, 2014); letter from David H. Kramer and Tonia Ouellette Klausner to Marlene H. Dortch, Secretary, Federal Communications Commission in CG Docket No. 02-278 (Sep. 24, 2014); Comments of Twitter, Inc. in Support of Stage Stores, Inc.’s Petition for Expedited

educational institutions,⁴ healthcare insurance providers,⁵ food services providers,⁶ retailers,⁷ employers⁸ and every organization that needs to communicate rapidly with customers and the public — including government agencies such as this Commission.⁹

When considering a ruling, it is only prudent for the Commission to anticipate unintended consequences of granting a specific form of relief. We support this sensible approach and appreciate the Commission’s thoughtfulness when interpreting and enforcing the TCPA. However, we also ask the Commission to consider the unintended consequences of failing to confirm the plain meaning of “called party” in the face of growing TCPA class-action litigation that exploits misunderstanding of that term. Currently, the class actions bar is introducing marketing campaigns intended to increase TCPA litigation. Some plaintiff’s attorneys are advertising that plaintiffs can receive up to \$1500 per TCPA violation and “laugh all the way to the bank.”¹⁰ More remarkably, a group of plaintiff’s firms has created an app that captures incoming call information and enlists consumers in gathering information that might be useful to

Declaratory Ruling, CG Docket No. 02-278 (Aug. 8, 2014) (“*Twitter Comments*”); Comments of Time Warner Cable Inc., CG Docket No. 02-278 (filed Mar. 10, 2014).

⁴ Reply Comments of Ceannate Corp., Coalition of Higher Education Assistance Organizations, Nat’l Ass’n of College and University Business Officers, and Nat’l Council of Higher Education Resources, CG Docket No. 02-278 (filed Mar. 24, 2014).

⁵ United Healthcare Services, Inc. Petition for Declaratory Ruling Regarding Reassigned Wireless Telephone Numbers, CG Docket No. 02-278 (filed Jan. 16, 2014) (“*United Healthcare Services Petition*”).

⁶ Rubio’s Restaurant, Inc., Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Aug. 15, 2014) (“*Rubio’s Petition*”).

⁷ Stage Stores, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed June 3, 2014).

⁸ *Rubio’s Petition, supra.*

⁹ See Comments of Wells Fargo, CG Docket No. 02-278 (filed Oct. 29, 2014) at 8-10 (noting large number of government agencies, including this Commission, that use Twitter and other channels to communicate with the public).

¹⁰ <http://www.blockcallsgetcash.com/>

the plaintiff's firms in bringing lawsuits.¹¹ These perverse results are clearly an unintended consequence of a well-meaning law passed to protect consumer privacy. As litigation escalates, companies will continue to expend valuable resources on legal expenses and compliance instead of creating products and services that benefit consumers. Only the Commission can prevent further such misuse of the TCPA's remedies.

Although the record reflects overwhelming and broad-based support for FCC action on the called party issue, petitioners and commenters have proposed varying solutions to the problem. For example, CBA, Wells Fargo, Twitter and the National Council of Nonprofits request a straightforward declaratory ruling that the term "called party," as used in the prior express consent requirement for automated calls to wireless numbers, refers to the intended recipient of the call.¹² Others, however, have asked the Commission to make more complex findings that those petitioners believe will accomplish the same beneficial result.¹³ For example, United Healthcare offers the following alternative approaches for the Commission to consider:

- Find that when a caller has properly obtained prior express consent from a party to call that party's telephone number, such prior express consent encompasses autodialed and prerecorded non-telemarketing, informational calls to that telephone number until the caller learns that the telephone number has been reassigned.¹⁴

¹¹ *Id.*

¹² *CBA Petition* at 15; *Nonprofits Council Comments* at 4-6; *Twitter Comments* at 11; letter from Monica S. Desai to Marlene H. Dortch in CG Docket No. 02-278 (May 15, 2014); letter from Monica S. Desai to Marlene H. Dortch in CG Docket No. 02-278 (July 21, 2014).

¹³ *United Healthcare Services Petition, supra*; *Rubio's Petition, supra*; Petition of Stage Stores, Inc. for Expedited Declaratory Ruling, CG Docket No. 02-278 (June 3, 2014).

¹⁴ *United Healthcare Services Petition* at 4; *see also Rubio's Petition* at 6; Comments or, in the Alternative, Petition for Declaratory Ruling of Comcast Corporation in CG Docket No. 02-278 (filed Mar. 10, 2014) at 8 ("*Comcast Comments*").

- Issue a declaratory ruling confirming that the term “called party” encompasses both the consenting party and the new subscriber to a reassigned number until the caller learns from the call recipient that the two parties are not the same.¹⁵
- Confirm that a good faith exemption from liability exists for autodialed and prerecorded informational, non-telemarketing calls to telephone numbers that have been reassigned from a prior express consenting party (until the caller learns of the reassignment).¹⁶

As CBA states in its Petition, a Commission order adopting any of these proposed solutions would be a welcome step in the right direction.¹⁷ However, CBA is concerned that these approaches would create more confusion and fail to resolve all of the uncertainties presently facing callers who inadvertently reach non-consenting parties. Notably, if the Commission adopts any of the United Healthcare alternatives, a caller would be able to avoid liability for calls inadvertently placed to a telephone service subscriber at a reassigned number, but would continue to face liability when a telephone number currently assigned to a consenting party is answered by a different person.¹⁸ A calling party can no more avoid having some calls answered by non-consenting members of a consumer’s household, or by other non-consenting parties that happen to pick up the phone, than it can avoid having some calls answered by parties to which consenting customers’ numbers have been reassigned. In both cases, imposing liability for calls that are intended for persons who have given prior express consent, but that are

¹⁵ *Id.*; see also *Rubio’s Petition* at 7; *Comcast Comments* at 8.

¹⁶ *Id.*; see also *Rubio’s Petition* at 7.

¹⁷ *CBA Petition*, n. 3 at 4.

¹⁸ See, e.g., *Leyse v. Bank of America, National Association*, Civ. Action No. 11-7128 (D.N.J. Sep. 8, 2014 (opinion designated as not for publication)); *Leyse v. Bank of America*, No. 09-7654, WL 2382400 (S.D.N.Y. 2010); *Kopff v. World Research Group, LLC*, 568 F.Supp.2d 39 (D.D.C. 2008).

answered by other persons through no fault of the caller, effectively reads Congress’s decision not to impose liability for certain calls placed with prior express consent out of the statute. A finding that “called party” means the intended recipient of a call, which is amply supported by the language and intent of the TCPA autodialer restriction, would better serve the purpose of “removing uncertainty” on which the Commission’s power to issue a declaratory ruling is based.¹⁹

An order that addressed both of the principal “wrong party” scenarios by simply defining called party as the intended recipient would not have consequences that are contrary to the purpose of the statute. Fraud alerts and other informational calls directed to customers do not serve their purpose when they reach the wrong party. CBA members have no incentive deliberately to call parties that do not need and cannot respond to the information conveyed. In fact, our members have every incentive to avoid doing so. Also, CBA, along with other petitioners and commenters, fully supports TCPA liability when callers deliberately target non-consenting parties by calling numbers they know have been reassigned.²⁰ Similarly, a caller that purposely aimed automated calls at non-consenting members of a customer’s household (in other words, when the caller’s intended recipient was in fact a non-consenting person) would appropriately face a TCPA enforcement action. Accordingly, the relief requested by CBA would facilitate useful communication with customers without encouraging harassing calls and without reducing consumers’ rights to bring TCPA actions when a caller’s conduct supports such actions.

For all of the reasons stated herein, CBA asks that the Commission enter a declaratory ruling confirming that “called party,” for purposes of the prior express consent provisions of the

¹⁹ 47 CFR § 1.2, stating that the Commission may “on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.”

²⁰ *CBA Petition* at 14.

TCPA automated calling restriction, is the intended recipient of an autodialed or artificial/prerecorded voice call. In the alternative, if the Commission should enter relief in the form of an exemption from liability for automated calls inadvertently placed to reassigned mobile numbers, CBA requests: (1) that the relief granted also apply to any call intended for a party that gave the caller prior express consent to place those calls to a number currently assigned to that party, but that is answered by a person other than the consenting party; and (2) that the relief granted be made retroactive.

CONCLUSION

CBA appreciates the opportunity to comment in support of its Petition for Declaratory Ruling, and will be pleased to provide any further information that will assist the Commission in reaching a prompt and favorable conclusion.

Respectfully submitted,

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