Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

To: The Commission

REPLY COMMENTS OF ACA INTERNATIONAL

ACA International ("ACA"), through counsel, submits these Reply Comments in support of the Petition for Declaratory Ruling filed by the Consumer Bankers Association ("CBA").[1] As the comments demonstrate, there is overwhelming support for the logical and straightforward approach urged by CBA to confirm that "called party," as used in 47 U.S.C. § 227(b)(1)(A)(iii) of the Telephone Consumer Protection Act ("TCPA"),[2] means "intended recipient."[3] The record makes

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[1] 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 (Sept. 19, 2014) ("CBA Petition" or "Petition"); *see also Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from Consumer Bankers Association*, Public Notice, CG Docket No. 02-278, DA 14-1511 (rel. Oct. 17, 2014).

[2] 47 U.S.C. § 227(b)(1)(A)(iii) (2012) ("It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States **to make any call** (**other than a call** made for emergency purposes or **<u>made with the prior express consent of the called party</u>**) **using any automatic telephone dialing system or an artificial or prerecorded voice to any telephone number assigned to a** paging service, **cellular telephone service**, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.") (emphasis added).

[3] *See e.g.*, Comments of the American Bankers Association, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Declaratory Ruling of the Consumer Bankers Association,*

clear that the confirmation requested by CBA is not only desperately needed to shield good-faith callers from impossible-to-avoid liability never intended by Congress, but is also critical to ensure consumers continue to receive "normal, expected, or desired"[4] communications that will be impeded in the absence of clarification. ACA respectfully urges the Federal Communications Commission ("Commission") to not be misled by the unsupported attempt of the joint Consumer Groups to paint CBA's very narrow request into a broad-based effort to "gut" the TCPA, and to grant CBA's request.[5]

I. Confirming that "Called Party" Means "Intended Recipient" is the Only Interpretation that Provides Meaning to the Explicit "Prior Express Consent" Exception Provided by Congress; No Commenter Has Argued Otherwise.

It is a fundamental tenet of administrative law that while the Commission has the authority to interpret terms of a statute that are unclear, it does not have the authority to disregard or nullify

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CG Docket No. 02-278 (Nov. 17, 2014) (ABA Comments); Comments of the National Rural Electric Cooperative Association at 1, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Declaratory Ruling of the Consumer Bankers Association*, CG Docket No. 02-278 (Nov. 17, 2014) (NRECA Comments); Comments of Genesys Telecommunications Laboratories, Inc., at 1, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Declaratory Ruling of the Consumer Bankers Association*, CG Docket No. 02-278 (Nov. 14, 2014) (Genesys Comments); Letter from Twitter to Ms. Marlene H. Dortch, Federal Communications Commission, Re: Petition for Declaratory Ruling from Consumer Bankers Association at 1 (CG Docket No. 02-278) (Nov. 17 2014) (Twitter Letter); Comments of Wells Fargo at 1*, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Declaratory Ruling of the Consumer Bankers Association*, CG Docket No. 02-278 (Oct. 29, 2014) (Wells Fargo Comments).

[4] CBA Petition at 5 (citing House Report, Energy and Commerce Committee, *Telephone Consumer Protection Act of 1991*, H.R. Rep. No. 102-317 at 17).

[5] Comments of the National Consumer Law Center, the National Association of Consumer Advocates, Americans for Financial Reform, Consumer Action, Consumers Union, Public Citizen, and the U.S. Public Interest Research Group to CBA Petition at 5, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Declaratory Ruling of the Consumer Bankers Association*, CG Docket No. 02-278 (Nov. 17, 2014) (Consumer Groups' Comments).

the will of Congress.[6] In 47 U.S.C. § 227(b)(1)(A)(iii), Congressional intent is expressly clear: to provide an exception to the prohibition on calls to mobile numbers made through an automatic telephone dialing system if the call is made with prior express consent.

While Congress was crystal clear that callers should be able to rely on this exception when dialing mobile numbers, there is confusion regarding the meaning of the phrase "called party" in this section. Some argue that "called party" in this section must mean the "subscriber" of the phone line or the person who actually happens to pick up the phone. However, in the context of this defense, interpreting "called party" as the "subscriber" or the "actual recipient" completely eviscerates the ability of a caller from ever being able to rely on the prior express consent affirmative defense provided by Congress. By contrast, defining called party in this section as the "intended recipient" provides much-needed certainty in the only way that gives effect to Congress's clear intent.

The silence is deafening in the lack of any counterargument to how alternative interpretations of "called party" honor the intent of Congress or allow the exception to have any meaning. Instead, the Consumer Groups appear to be grasping at straws trying to find ways to scare the Commission into not making the logical, statutorily-supported request urged by the CBA. However, these "straws" are neither legally nor factually supported. For example, the Consumer Groups mischaracterize CBA's Petition as seeking an exemption,[7] claim the Commission lacks the authority to interpret "called party,"[8] appear to argue that statutory interpretation is limited to

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[6] *See* Comments of ACA International at 5, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Declaratory Ruling of the Consumer Bankers Association*, CG Docket No. 02-278 (Nov. 17, 2014) (ACA Comments).

[7] *See* Consumer Groups' Comments at 5.

[8] *See* Consumer Groups' Comments at 5.

phrases found within a statute itself,[9] and completely ignore the Supreme Court's recent admonition that words of a statute must be read in their context by citing various instances of the phrase "called party" in other parts of the TCPA that have no relation to CBA's limited request for a clarification.[10] Nowhere, however, is any argument that Congress's clear intent to include a prior express consent exception can be achieved with any interpretation of "called party" other than the "intended recipient," which is telling.

II. Callers Cannot Simply "Choose" to Avoid Inadvertently Dialing Reassigned Numbers; Clarification Is Needed to Fill in the Gap Between When a Number has been Reassigned and When a Caller Learns of a Reassignment.

In their comments, the Consumer Groups state, "[w]e appreciate that companies are not perfect, and that genuine mistakes may occur resulting in wrong number calls to consumer phones. However, this is no reason to effectively rewrite the TCPA to permit otherwise prohibited calls to wrong numbers. We firmly believe that companies, if they choose to, can comply with the TCPA."[11] These three sentences illustrate perfectly the Consumer Groups' lack of understanding of both the problem posed by reassigned numbers and CBA's requested solution.

ACA appreciates the Consumer Groups' recognition that mistakes can occur that lead to wrong number calls. This "accident" scenario is precisely the issue CBA and others are attempting to address. The multiple calls to known wrong numbers and other egregious caller conduct described by the Consumer Groups is untouched by the request made by CBA. In fact, not one

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[9] *See* Consumer Groups' Comments at 6 (making the irrelevant point that the phrase "intended recipient" is not used in the text of the TCPA).

[10] *See Util. Air Regulatory Grp. v. Environmental Protection Agency*, 134 S. Ct. 2427, 2441 (2014) (*Utility Air Regulatory Group*); Consumer Groups' Comments at 7.

[11] Consumer Groups' Comments at 10.

example cited by the Consumer Groups' comments would be transformed into lawful activity if the Commission moves forward with CBA's request. As a result, there is absolutely no basis to suggest that somehow defining "called party" as "intended recipient" would "effectively rewrite the TCPA to permit otherwise prohibited calls to wrong numbers." Either the Consumer Groups fundamentally misunderstand the request made by CBA or they are engaged in a strategy of fear-mongering.

Furthermore, while a caller can "choose" to not comply with the TCPA by knowingly dialing a reassigned number or any other wrong number, unfortunately – despite the Consumers Groups' "firm" belief otherwise – a caller who "chooses" to comply with the TCPA cannot guarantee they will never dial a reassigned number because there is no bulletproof solution to completely avoid dialing reassigned numbers. Nor is there a bulletproof solution to avoid someone other than the intended recipient simply picking up the phone. Thus, the limited clarification requested by CBA would simply fill in the current gap that exists in the latter scenario in which massive and potentially devastating liability lurks for callers that dial a number for which prior express consent had been obtained, but had later been reassigned to another person without the knowledge of the caller.

It is crucial for the Commission to understand that CBA's request is inherently limited because once a caller learns that a mobile telephone number no longer belongs to an intended recipient, further calls to that number remain unlawful.

III. Without Clarification, Liability Will Continue to be Unpredictable, Causing Consumers Who Provide Prior Express Consent to Receive Fewer "Normal, Expected, and Desired" Calls.

The Consumer Groups ignore the reality that both Congress and the Commission have consistently recognized: there are certain calls to mobile phone numbers that are "normal, expected, and desired" by consumers.[12] Unnecessarily hindering consumer access to these types of calls fails to take into account consumer preference to receive such calls on their mobile phones, and even worse can actually harm consumers in certain instances. Without CBA's requested clarification, liability for dialing reassigned numbers will continue to be so unpredictable that some callers will begin making the business decision to stop communicating with consumers on mobile phones. This unfortunate consequence is already occurring, creating situations where consumers might not receive notifications and other information that they want and expect.[13]

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[12] *See e.g.*, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Declaratory Ruling, GroupMe, Inc./Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling ¶ 8, CG Docket No. 02-278, FCC 14-33 (Mar. 27, 2014) (stating "Congress did not expect the TCPA to be a barrier to normal, expected, and desired business communications."); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Order, Cargo Airline Association Petition for Expedited Declaratory Ruling ¶ 19, CG Docket No. 02-278, FCC 14-32 (Mar. 27, 2014) (stating, " . . . we find that these notifications are the types of normal, expected communications the TCPA was not designed to hinder, thus further persuading us that an exemption is warranted. We believe that consumers generally desire, expect, and benefit from, package delivery notifications."); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Declaratory Ruling, Soundbite Communications, Inc. Petition for Declaratory Ruling ¶ 8, CG Docket No. 02-278, FCC 12-143 (Nov. 29, 2012) (stating "… we find it reasonable to conclude that opt-out confirmation text messages with the characteristics discussed below appropriately are considered part of the opt-out process, informing consumers that 'a service was scheduled or performed' and are normal communications 'expected or desired' between consumers and the entities to which they provided prior express consent to receive text messages.").

[13] *See* NRECA Comments at 5 (stating that some NRECA members have suspended or shut down their prepayment programs due to the risk of litigation).

In the debt collection context, hindering calls to mobile phones can cause a consumer substantial harm. As ACA has emphasized previously, business communications are important to prevent much more severe consequences related to failure to pay an obligation, including foreclosure, repossession of a car, or a lawsuit.[14] In a recent meeting with the Commission, the National Council of Higher Education Resources ("NCHER") described how the current TCPA legal landscape adversely impacts the ability and willingness of servicers and collectors to use telecommunications technology to contact student loan borrowers by phone, and the resulting harm to borrowers that follows, stating:

> The result is a heightened reluctance to use dialer technology, especially when calling cell phones. This means we have to call manually, which increases costs, places unnecessary restraint on finite resources, and, more importantly, reduces the number of student borrowers who can be reached, and extends the time it takes to reach them to let them know about ways to avoid default or options to resolve their defaults, like the loan rehabilitation program. Though presumably intended to benefit consumers, the result is more and more borrowers cannot get timely information, and therefore face involuntary collection options such as administrative wage garnishment, tax offset, or litigation, with no earlier or better opportunity to address their situations.[15]

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[14] ACA International, Inc., Notice of Ex Parte, Petition for Rulemaking, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. CG 02-278, RM-11712 (May 9, 2014) (also noting that "around 25% of identity theft occurrences are discovered through the debt collection process – identity thefts that may otherwise have gone undiscovered.").

[15] National Council of Higher Education Resources, Notice of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278 (Nov. 14, 2014) (emphasis added). *See also* Comments of the Coalition of Higher Education Assistance Organizations at 2, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Declaratory Ruling of the Consumer Bankers Association,* CG Docket No. 02-278 (Nov. 17, 2014) (COHEAO Comments) (noting "the difficulties and challenges caused to students who are unable to receive information and assistance [due to] the TCPA," and explaining that "TCPA rules that inhibit or discourage communication between institutions of higher education and their students and former students for non-marketing purposes may lead to unnecessary and avoidable student loan defaults, missed notifications for entrance and exit interviews that provide vital information on loan obligations, [and] missed notifications of approaching deadlines for class registrations.").

Making the narrow clarification requested by CBA will introduce fairness and certainty into the TCPA landscape that will incentivize callers providing "normal, expected, and desired business communications" to continue making such calls until they learn of a number reassignment. This strikes the appropriate balance among not demanding the impossible from callers, ensuring those who have provided prior express consent will continue to receive the calls they expect and desire, and respecting the privacy interests of unintended recipients by continuing to make unlawful all unwanted calls after a caller is informed of a reassignment.

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As described above, granting the CBA Petition will not undermine the purpose of the TCPA, nor will it flood consumers with unwanted calls. Granting CBA's narrow, limited clarification will, however, provide much-needed certainty surrounding what constitutes a "called party" in the narrow instance of 47 U.S.C. § 227(b)(1)(A)(iii) in a way that effectuates explicit Congressional intent to allow callers to rely on the TCPA's prior express consent exception, as well as Congressional intent to ensure consumers continue to have access to "normal, expected, and desired" calls to their mobile telephones.

Respectfully submitted,

Monica S. Desai
Squire Patton Boggs LLP (US)
2550 M Street, NW
Washington, DC 20037
(202) 457-7535
Counsel to ACA International

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