

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

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

To: The Commission

**REPLY COMMENTS OF WELLS FARGO**

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Wells Fargo respectfully submits these reply comments in support of the Petition for Declaratory Ruling of the Consumer Bankers Association (CBA).<sup>1</sup> The record, the law, and common sense all overwhelmingly support a finding by the Commission that “called party” in the context of the TCPA’s prior express consent defense can only mean “intended recipient.”<sup>2</sup> In the alternative, Wells Fargo supports a “safe harbor” approach if accompanied by a retroactive waiver or similar form of relief related to past actions.

**Background.** Wells Fargo provides for its customers personalized banking, insurance, mortgage, and consumer finance services and guidance, and depends on advanced technologies to convey important, time sensitive information.<sup>3</sup> Wells Fargo strives to maintain an informed and well-served client base. The persistent and frivolous TCPA litigation currently clogging courts nationwide ultimately makes a mockery of the statute and undermines the public interest.<sup>4</sup>

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<sup>1</sup> 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). See also Comments of Wells Fargo, *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 Oct. 29 Comments); Comments of Wells Fargo, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*; *Rubio’s Restaurant, Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (Sept. 12, 2014) (Wells Fargo Sept. 12 Comments); Comments of Wells Fargo, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*; *Stage Stores, Inc. Petition for Expedited Declaratory Ruling Regarding Reassigned Wireless Telephone Numbers*, CG Docket No. 02-278 (Aug. 8, 2014) (Wells Fargo Aug. 8 Comments).

<sup>2</sup> 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 made with the prior express consent of the called party) 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).

<sup>3</sup> More detailed background is provided in the Wells Fargo Oct. 29 Comments at 1-2.

<sup>4</sup> See Comments of the Consumer Bankers Association in Support of its Petition for Declaratory Ruling at 2-3, *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 (Nov. 17, 2014) (noting that “some plaintiff’s attorneys are advertising that plaintiffs can receive up to \$1500 per TCPA violation and ‘laugh all the way to the bank,’” as well as marketing an application that

**The record overwhelmingly supports the conclusion that “called party” means “intended recipient” in the context of the TCPA’s “prior express consent” defense.** A wide range of commenters representing interests spanning from rural electric cooperatives to financial associations, social media companies to student service organizations, and nonprofit technology organizations to retailers, all agree that the Commission should clarify that “called party” means “intended recipient” because: (1) the statutory defense of “prior express consent of the called party” is rendered meaningless unless the FCC clarifies that “called party” means “intended recipient;”<sup>5</sup> (2) a narrow, “intended recipient” approach will not have “unintended consequences,” but the opposite approach will have a chilling effect on important business communications;<sup>6</sup> and (3) it is impossible

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captures incoming call information to assist with bringing TCPA lawsuits). *Accord* Letter from Bill Himpler, Executive Vice President, American Financial Services Association, to Marlene H. Dortch, Federal Communications Commission, Re: Petition for Declaratory Ruling from Consumer Bankers Association at 2 n.7 (CG Docket No. 02-278) (Nov. 17, 2014) (mentioning the “Block Calls Get Cash” app developed by a law firm “in an attempt to encourage consumers to file TCPA claims”).

<sup>5</sup> See Comments of ACA International at 5-6, *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) (“Any interpretation of ‘called party’ other than ‘intended recipient’ nullifies the ‘prior express consent’ exception because . . . it is impossible for callers to know with complete certainty to whom a telephone number is currently assigned, whether the person providing consent is the actual ‘subscriber’ of a number, or even who might just happen to answer the telephone.”).

<sup>6</sup> See Comments of Noble Systems Corporation at 4, *Consumer Bankers Association Petition for Declaratory Ruling Regarding Definition of “Called Party;” Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Nov. 17, 2014) (Noble Systems Comments) (“[A] caller who learns of the number reassignment and continues to call that number intending to reach the prior subscriber should be liable under the TCPA.”); Letter from Santander Consumer USA, Inc. to Marlene H. Dortch, Federal Communications Commission, Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, GC Docket No. 02-278; Petition for Rulemaking of Consumer Bankers Association (CBA) at 2 (Nov. 17, 2014) (Santander Letter) (“The threat of TCPA litigation arising from calls to reassigned numbers, among other things, discourages important, time-sensitive informational communications that are legally mandated, improve money management, reduce avoidable fees, and promote customer service.”); Comments of the National Rural Electric Cooperative Association at 5,7, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Declaratory Ruling of the Consumers Bankers Association*, CG Docket No. 02-278 (Nov. 17, 2014) (NRECA Comments) (“If the calls continue after a reasonable time period after being informed that the number has been reassigned, a wireless subscriber then may justifiably subject the caller to enforcement and private actions under the

to solve for “wrong number” calls due to number reassignment or a person other than the “intended recipient” just randomly picking up the phone.<sup>7</sup>

**The “intended recipient” interpretation is the only interpretation that gives meaning and effect to the statutory language and that respects the intent of Congress.** The FCC has an obligation to interpret the provisions of the TCPA in a reasonable manner consistent with the intent of Congress.<sup>8</sup> Agencies “must operate ‘within the bounds of reasonable interpretation,’”<sup>9</sup> “must always ‘give effect to the unambiguously expressed intent of Congress,’”<sup>10</sup> and must analyze statutory terms “in context.”<sup>11</sup> The proper analysis in this case requires the FCC to consider the

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TCPA,” and “[i]nformational services may be discontinued unless ‘called party’ includes the ‘intended recipient.’”).

<sup>7</sup> See Noble Systems Comments at 4 (“[A] caller encountering the new subscriber should not be subject to liability under the TCPA for making such a call, if they did not know of the number reassignment and subsequently refrain from calling after being informed.”); Santander Letter at 2 (“Businesses cannot avoid calling reassigned wireless telephone numbers.”); NRECA Comments at 6 (“[I]here does not appear to be any credible evidence submitted to the Commission to date demonstrating the existence of any database that could instantaneously provide a caller with real time information on the reassignment of numbers.”); Letter from William Carty, Public Policy Director, Twitter, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission Re: Consumer Bankers Association Petition for Declaratory Ruling CG Docket No. 02-278 (Sept. 19, 2014) at 2 (Nov. 17, 2014) (“[T]he only realistic way to avoid inadvertently sending a text to a number that has been reassigned would be to stop sending texts altogether.”); Comments of the Computer & Communications Industry Association at 4, *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 (Nov. 17, 2014) (“At this [large] scale of reassignment, a caller cannot, without undue burden, track down mobile telephone numbers that might have been reassigned since consents were last obtained.”); Comments of the American Bankers Association at 3, *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 (Nov. 17, 2014) (ABA Comments) (“[F]inancial institutions – which place millions of authorized autodialed informational calls annually – cannot completely avoid calling reassigned wireless telephone numbers.”).

<sup>8</sup> *Util. Air Regulatory Grp. v. Environmental Protection Agency*, 134 S. Ct. 2427, 2445 (2014) (*Utility Air Regulatory Group*) (citing *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007)).

<sup>9</sup> *Utility Air Regulatory Group*, 134 S. Ct. at 2442.

<sup>10</sup> See *supra* note 8.

<sup>11</sup> *Utility Air Regulatory Group*, 134 S. Ct. at 2441; see also *Roberts v. Sea-Land Serv., Inc., et al.*, 132 S. Ct. 1350, 1360 (2012) (“[T]he presumption that ‘identical words used in different parts of the same act

purpose of the phrase “called party” in the context of the “prior express consent” exemption so as to give the phrase the meaning that best comports with the purpose of the exemption and the application of the statute generally.<sup>12</sup> Under this analysis, that interpretation is “intended recipient.”

Congress very specifically allowed callers to make calls using an automatic telephone dialing system (presumably for efficiency purposes) so long as the caller has the “prior express consent of the called party.”<sup>13</sup> The FCC may not render that ability to use an automatic telephone dialing system meaningless by, for example, as some have suggested, forcing the caller to make a manual call prior to each and every autodialed call.<sup>14</sup> A manual call prior to every autodialed call is cost prohibitive, impractical, and eliminates the ability to use autodialed calls, contrary to specific Congressional intent. Indeed, as emphasized by others, “[a] manual call for the purpose of just ‘checking to make sure’ the number has not changed hands . . . is nonsensical, cost-prohibitive, and undermines the very purpose of using an autodialer” and is “likely to be annoying to consumers.”<sup>15</sup>

Nor may the FCC apply an interpretation that renders the statute meaningless. As explained in numerous comments, there is no database of reassigned numbers, there is no database of users of a phone who may fall under a “business plan” or “family plan,” and there is obviously no way for a caller to predict who will happen to answer a phone call made to a number that the caller has been

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are intended to have the same meaning . . . readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.”).

<sup>12</sup> See *Utility Air Regulatory Group*, 134 S. Ct. at 2441.

<sup>13</sup> 47 U.S.C. § 227(b)(1)(A)(iii) (2012).

<sup>14</sup> See, e.g., Comments of the National Consumer Law Center at 10, *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) (NCLC Comments).

<sup>15</sup> ACA Comments at 7.

given express permission to call.<sup>16</sup> Accordingly, interpreting “called party” to mean anything other than “intended recipient” would eviscerate the defense entirely by rendering it meaningless.<sup>17</sup>

Moreover, courts across the country have assigned at least four different meanings to the phrase “called party.” Several courts have found correctly that “called party” must mean the “intended recipient,” and that to find otherwise renders the “prior express consent” defense useless.<sup>18</sup> Other courts have held differently, finding that “called party” means “current subscriber,” “regular user of the phone” and/or “the person who happened to answer the phone.”<sup>19</sup> The FCC has the obligation to clarify the meaning so that there is one, consistent national interpretation – and to provide an interpretation that does not undermine Congressional intent.

**Opposition comments wrongly argue that the FCC has no authority to interpret the term “called party,” and do not address the fundamental legal and policy arguments regarding why “called party” must mean “intended recipient” in the context of the statutory exemption.** An assertion that “there is no authority for the Commission to ‘clarify’ the definition

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<sup>16</sup> Wells Fargo Oct. 29 Comments at 3-4 and 6 (citing Wells Fargo Sept. 12 Comments at 3-4).

<sup>17</sup> See generally Wells Fargo, Notice of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (July 21, 2014) (Wells Fargo July 21 Ex Parte).

<sup>18</sup> Cases finding that “called party” means “intended recipient” include *Leyse v. Bank of Am.*, No. 11-7128, ECF No. [31] (D.N.J. Sept. 8, 2014) (unpublished opinion) (“Leyse II”) (following the Southern District of New York’s holding in *Leyse I* and holding that plaintiff lacks standing because he was not the intended recipient of the call); *Cellco P’ship v. Dealers Warranty, LLC*, No. 09-1814 (FLW), 2010 WL 3946713, at \*10 (D.N.J. Oct. 5, 2010) (finding that the phrase “called party” means “the intended recipient of the call”); and *Leyse v. Bank of Am.*, No. 09-7654, 2010 WL 2382400, at \*4 (S.D.N.Y. June 14, 2010) (“*Leyse I*”) (unintended recipient not the “called party” because businesses will have no way of knowing whether the individual on the other end has given prior express consent). See also *Kopff v. World Research Grp., LLC*, 568 F. Supp. 2d 39, 40-42 (D.D.C. 2008) (unintended recipient of faxes lacks standing to sue).

<sup>19</sup> See, e.g. *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F. 3d 1036, 1043 (9th Cir. 2012) (called party means “recipient”); *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 643 (7th Cir. 2012) (called party means “subscriber”); *Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 682 (S.D. Fla. 2013) (called party means “the regular user of the phone”).

of ‘called party’ under the TCPA”<sup>20</sup> is inaccurate. It is well-established that an agency charged with administering a statute has authority to interpret any ambiguous statutory terms therein.<sup>21</sup>

Moreover, the Commission is not only authorized, but it is obligated to make such a clarification as the expert agency responsible for carrying out Congressional mandates related to the TCPA.<sup>22</sup>

This is especially true when, like here, courts across the country continue to interpret the statute inconsistently.<sup>23</sup> As NRECA states in its comments, when liability “turn[s] on the location in which the receiver of the informational call has subscribed to [a] reassigned phone number . . . [n]ot only will a caller not know whether a number has been reassigned, the caller will not know whether the call would be received in a jurisdiction within which a court has adjudicated it permissible to make the call.”<sup>24</sup> ACA International agrees, explaining that, “not only is liability contingent on the ‘luck’ of who happens to answer the telephone, but also the ‘luck’ of which particular court or judge is interpreting the ‘prior express consent of the called party’ defense.”<sup>25</sup>

Second, the phrase “called party” plainly has different meanings as used in different contexts throughout the statute.<sup>26</sup> The task, therefore, is to determine the proper meaning of the phrase *in*

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<sup>20</sup> NCLC Comments at 5.

<sup>21</sup> See *Utility Air Regulatory Group*, 134 S. Ct. at 2439 (“Under Chevron, we presume that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity.”); *Accord City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

<sup>22</sup> See *Utility Air Regulatory Group*, 134 S. Ct. at 2446 (“Under our system of government, Congress makes laws and the President, acting at times through agencies . . . “faithfully execute[s]” them. The power of executing the laws necessarily *includes both authority and responsibility to resolve some questions left open by Congress that arise during the law’s administration.*”) (emphasis added) (internal quotation marks removed).

<sup>23</sup> See *supra* note 18.

<sup>24</sup> NRECA Comments at 7.

<sup>25</sup> ACA Comments at 4-5.

<sup>26</sup> For example, the TCPA requires that a system sending a pre-recorded message to a phone line release the line “within 5 seconds of the time . . . the called party has hung up . . .” 47 U.S.C. §

*context.* Indeed, the United States Supreme Court recently chided the Environmental Protection Agency for thoughtlessly applying the credo “the same word means the same thing” when context – and common sense – reflected that Congress intended otherwise.<sup>27</sup> The fact that “called party” may mean “subscriber” in other parts of the TCPA is irrelevant. What is relevant here is the context of the statutory defense provided by Congress in Section 227(b)(1)(A)(iii) of the TCPA for calls made with the “prior express consent of the called party.” It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme,” and that “the presumption of consistent usage readily yields to context, and a statutory term – even one defined in the statute – may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.”<sup>28</sup> The critical points are that (1) the meaning of “called party” is unclear on the face of the statute, and (2) the Commission should apply the most reasonable meaning consistent with Congressional intent.

Third, the Seventh Circuit was incorrect as a factual matter in concluding that “[f]or cell service, the subscriber and the person who answers almost always are the same, given the norm that one person does not answer another’s cell phone.”<sup>29</sup> Obviously, in both the “family plan” context and the “business plan” context, millions of phones habitually are used by persons who do not pay the phone bill and whose names do not appear on the phone account. Yet, a non-subscribing user

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227(d)(3)(B). A “subscriber” to a phone line that does not actually “use” a phone (for example in a business plan context, or a family plan context) could never “hang up” because she/he does not physically possess the phone at the time of the call – someone else does. Hence, in this particular provision, “called party” can only mean “answerer,” not “subscriber.”

<sup>27</sup> *Utility Air Regulatory Group*, 134 S. Ct. at 2441.

<sup>28</sup> *Id.*

<sup>29</sup> *Soppet*, 679 F. 3d at 640.

of a cell phone often provides that number as their contact information on which to be called or texted.<sup>30</sup>

Fourth, forcing callers to make a manual call before making any call through an automatic telephone dialing system would be annoying to consumers – who would get double the number of calls – in addition to being costly, impractical (making it virtually impossible to comply with all of the numerous regulations with which callers must comply),<sup>31</sup> and rendering the statutory provision specifically *allowing for autodialed calls* meaningless.

Fifth, there is no public directory of reassigned numbers and consumers may change numbers without notifying callers. Equally critical, there is no viable market solution or database that solves the challenges created by reassigned cell phone numbers.<sup>32</sup> Given the lack of a

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<sup>30</sup> Such scenarios are not far-fetched in litigation, either. *See e.g., Jordan v. ER Solutions, Inc.*, 900 F.Supp.2d 1323, 1325 (S.D. Fla. 2012) (the phone number was registered to husband under a family plan while wife used the phone, paid the bill for use of that phone, and consented to be called); *Agne v. Papa John's Int'l, Inc.*, 286 F.R.D. 559 (W.D. Wash. 2012) (ex-husband was primary account owner on shared cellular plan and paid the bill while ex-wife owned and used the phone).

<sup>31</sup> *See, e.g.,* ACA Notice of Ex Parte at 5 n.16, ACA International Petition for Rulemaking, CG Docket No. 02-278, RM-11712 (May 9, 2014) (For example, the collection activity of ACA members is governed by the Federal Trade Commission Act, 15 U.S.C. § 45 et seq.; the Fair Debt Collection Practices Act, codified at 15 U.S.C. § 1692 et seq.; the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (as amended by the Fair and Accurate Credit Transactions Act); the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 et seq.; the Fair Credit and Charge Card Disclosure Act, 15 U.S.C. § 1637(c), Pub. L. No. 100-583, 102 Stat. 2960; the Federal Bankruptcy Code, Title 11 of the U.S.C., Pub. L. No. 95-598, 92 Stat. 2549; and numerous other federal, state and local laws. *See, e.g.,* Illinois Collection Agency Act, 225 ILCS 425 et seq.; California Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code § 1788 et seq.; Florida Fair Consumer Credit Practices Act, Fla. Stat. Ann. § 559.55 et seq.; West Virginia Collection Agency Act of 1973, W.Va. Code Ann. § 47-16-1 et seq. *See also* ACA Comments at 6-7.

<sup>32</sup> 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 (Mar. 10, 2014). For a more extensive discussion of the problems associated with marketplace “solutions,” see Wells Fargo Aug. 8 Comments at 8-10. Others have expressed similar concerns. *See* Reply Comments of Stage Stores, Inc., CG Docket No. 02-278 (Aug. 26, 2014) (explaining problems with Neustar services in response to multiple commenters’ suggestions); Reply Comments of the Computer & Communications Industry Association (CCIA) at 2, CG Docket No. 02-278 (Aug. 25, 2014) (“The Neustar database cannot, in its current incarnation, eliminate the risk that a business will send a marketing or informational message to a reassigned

reassigned number database and the fallibility of the solutions currently on the marketplace, it is imperative that calling parties must be able to rely on the intended recipient of the call to provide updated information.

Finally, the regulatory approach proposed by Wells and others is reasonable – once a caller is informed that the number no longer belongs to the intended recipient, it must cease all efforts to contact the intended recipient via that number or face TCPA liability.<sup>33</sup> When a customer updates his or her contact information, or when the caller is otherwise notified that the number for which it was given prior express permission to call is no longer valid for the intended recipient, then “prior express consent” is no longer a defense under the “intended recipient” framework advocated by CBA, Wells Fargo, and others.

**Wells Fargo would support the creation of a safe harbor combined with retroactive relief as an alternative approach to defining “called party” as “intended recipient.”**<sup>34</sup> There is recent Commission precedent supporting implementation of a regulatory safe harbor and retroactive relief in the TCPA context.<sup>35</sup> To the extent that the FCC chooses to clarify that “called party” in the context of the prior express written consent defense means something other than “intended

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mobile phone number. Neustar itself acknowledges that its database does not capture as much as 30% of mobile phone numbers used in the United States. The FCC should not mandate reliance on a technology that is 70% accurate.”) (internal citations omitted); Reply Comments of United Healthcare Services, Inc. at 12, CG Docket No. 02-278 (Mar. 24, 2014) (“Neustar claims to provide the most comprehensive coverage; however, it only claims to encompass 80% of wireless and hard-to-find telephone numbers.”).

<sup>33</sup> Wells Fargo Oct. 29 Comments at 4-5.

<sup>34</sup> See, e.g., Wells Fargo Oct. 29 Comments at 1; Wells Fargo Sept. 12 Comments at 1; Wells Fargo July 21 Ex Parte at 1.

<sup>35</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order ¶ 26, FCC 14-164, CG Docket Nos. 02-278, 05-338 (Oct. 30, 2014) (TCPA Solicited Facsimile Order) (providing a six-month safe harbor to come into compliance, and retroactive waivers of certain requirements related to facsimile advertisements).

recipient,” then the FCC should provide retroactive relief and a safe harbor framework going forward for wrong number calls.

First, section 1.3 of the FCC’s rules authorizes the Commission to waive its rules for good cause shown.<sup>36</sup> As the Commission most recently observed, “a waiver may be granted if (1) special circumstances warrant a deviation from the general rule, and (2) the waiver would better serve the public interest than would application of the rule.”<sup>37</sup>

Second, substantial confusion among regulates – or “misplaced confidence with regard to how the rule applies” – is a “special circumstance[] warrant[ing] deviation from the general rule.”<sup>38</sup> Furthermore, the fact that “failure to comply with the rule – which . . . could be the result of reasonable confusion or misplaced confidence – could subject parties to potentially substantial damages” supports the proposition that granting a waiver “would better serve the public interest than would application of the rule.”<sup>39</sup> The Commission recently emphasized that special circumstances warranted deviation from the general rule where the disparity between an order issued by the Commission and a Commission rule led to substantial confusion among affected parties.<sup>40</sup> The Commission further found that the private right of action under the TCPA and the “possible liability for forfeitures under the Communications Act” established that “a retroactive waiver would serve the public interest” better than would application of the rule.<sup>41</sup>

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<sup>36</sup> 47 C.F.R. § 1.3.

<sup>37</sup> TCPA Solicited Facsimile Order ¶ 23.

<sup>38</sup> TCPA Solicited Facsimile Order ¶ 24.

<sup>39</sup> TCPA Solicited Facsimile Order ¶ 27.

<sup>40</sup> *See generally*, TCPA Solicited Facsimile Order.

<sup>41</sup> TCPA Safe Harbor Order ¶ 28.

Here, the substantial confusion surrounding the interpretation of the term “called party” and the FCC’s implementing rule,<sup>42</sup> as evidenced by the record and by varying court opinions on this topic, is a special circumstance warranting deviation. Accordingly, the substantial confusion combined with the private right of action and strict liability standard support the proposition that a retroactive waiver would better serve the public interest than would strict application of the rule.

**Conclusion.** Wells Fargo urges the Commission to expeditiously clarify that “called party” under the TCPA’s prior express consent defense can only mean “intended recipient.” In the alternative, should the Commission choose not to make that clarification, Wells Fargo continues to support a safe harbor for the limited class of calls described herein, if accompanied by a retroactive waiver. Compliance-oriented companies continue to be unfairly subjected to devastating liability under the TCPA. Failure to act in this regard will only facilitate the continued and unchecked boom of frivolous and costly TCPA lawsuits currently clogging up an already saturated court system. Clarification from the FCC that “called party,” under the TCPA means “intended recipient” is urgently needed.

Respectfully submitted,



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<sup>42</sup> 47 C.F.R. § 64.1200(a).