

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of the)
)
Rules and Regulations Implementing)
) **CG Docket No. 02-278**
the Telephone Consumer Protection)
)
Act of 1991)

**Comments of Joe Shields on the American Bankers Association Petition for
Exemption**

The Commission has not posted any Public Notice seeking comments on the American Bankers Association Petition for Exemption to ECFS. Consequently, I respectfully request that the Commission extend the comment and reply comment period in line with an appropriate posting of such notice. At a minimum the comment and reply comment period clock should be governed by the 1st Public Notice which has yet to be made by a posting to ECFS.

To avoid what will surely be one sided comments from the banking institutions and those seeking the same goal of neutering the TCPA, I hereby submit these comments in response to the Commission’s request for comments on the ABA Petition for Exemption. The petition, similar to many petitions before the Commission wants the Commission to convert a content neutral statute to a content based statute. Further, the petition asks the Commission to entirely eliminate the requirement for prior express consent of the called party. The petition seeks to exempt “...certain time-sensitive informational calls, placed without charge to the called parties, from the Telephone Consumer Protection Act’s restrictions on automated calls to mobile devices...” without any legally sound basis for such an exemption.

Not Charged For the Call Is Limited to Wireless Carriers

As a threshold matter the Commission has started down a slippery slope with the Cargo Airline Association (hereinafter “CAA”) Order which granted a blanket exemption for package delivery notifications “...that will not be charged to the called party.” The language in the TCPA that the Commission relied on to create such an exemption was never meant to extend beyond calls from wireless carrier to their subscribers. For example, in a recently introduced Senate bill that would criminalize the use of robocalls, S 1959, the bill states:

(b) PROHIBITION -

(2) EXEMPTIONS - Paragraph (1) shall not apply to a telephone call -

(C)(i) that is **made by a provider of commercial mobile radio service**, as that term is defined in section 20.3 of title 47, Code of Federal Regulations, or any successor thereto, **to subscribers of the service; and (ii) for which the subscribers described in clause (i) are not charged;**

Clearly, the above “not charged” applies only to calls made by carriers to their subscribers.

In fact, the Commission has acknowledged that “not charged for the calls” is limited to calls from wireless carriers to their subscribers: “Consistent with our determination in 1992, **calls made by cellular carriers to their subscribers, for which subscribers are not charged in any way for the call** (either on a per minute, per call, or as a reduction in their “bucket” of minutes) are not prohibited under the TCPA. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, -- FCC Rcd. --, 2003 WL 21517853, No. FCC 03-153 (F.C.C. Jul 03, 2003) Footnote 610

See also: “Moreover, neither TCPA nor the legislative history indicates that Congress intended to impede **communications between radio common carriers and their customers** regarding the delivery of customer services by barring **calls to cellular subscribers for which the subscriber is not called**. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8774 Para. 45.

Petitioner has not shown that it is entitled to the wireless carrier exemption.

The Commission Created a Content Based Exemption

In creating the CAA exemption the Commission based the exemption solely on the assumption that package delivery notifications may be desired communications. The Commission created a content based exemption for calls to cell numbers something the Commission does not have the authority to do.

The Commission miss-guided exemption is so broad that the requirement for prior express consent of the called party becomes useless language since the prior express consent of the called party can easily be bypassed by anyone as long as the called party is not charged for the call.

Wireless carriers will certainly exploit this exemption and make tons of money off of delivering all manner of calls including telemarketing, polling, political, debt collection, informational and health related calls to their subscribers as long as their subscribers are not being charged for the calls.

Congress never intended for such a broad exemption from the requirement of prior express consent of the called party. Such a broad exemption entirely eviscerates the “prior express consent” language of the TCPA!

Since the Commission has created such an exemption the Commission must now apply the same miss-guided interpretation to every call regardless of content. The Commission cannot grant the exemption on the one hand to CAA and then deny it for anyone else. The Commission has opened the floodgates and consumers will be paying for it in a loss of privacy on their cell phones.

The Commission could have approached the CAA petition the same as the GroupMe petition and granted a similar limited exemption to 3rd party consent of the package sender. The Commission chose to bypass consent entirely and now consumers are faced with increasingly more automated nuisance calls to their cell numbers from anyone that can show the Commission that the calls will not be charged to the called party. Prior express consent becomes surplusage as long as the called party is not charged for the call.

That is exactly what the banking institutions want to do – entirely eliminate prior express consent of the called party.

The TCPA Cannot Be Overridden By The FDCPA

Petitioner claims that they are required to provide certain notices yet fails to show that any law has provisions to override the TCPA. One law cannot work to override another law. "...construing one statute to trump another absent any statutory instruction to do so violates a bedrock principle of statutory construction: "when possible, courts should construe statutes... to foster harmony with other statutory and constitutional law." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994).

Further, there is no legal requirement to verify the identity of a credit applicant via automated phone calls. In fact, I have filled out many credit applications in my

lifetime and no one has ever called me to verify my identity. It is entirely unnecessary to make identification verification calls as the applicant presents physical identification during the credit application process which is much more reliable than any automated call could ever be.

As to any online credit application, again I have never been called to verify my identity. The fact remains that the security of consumer transactions and credit extensions are riddled with holes. The security measures on opening credit are extremely lax. Businesses have failed to protect sensitive consumer data at no fault of the consumer. Punishing consumers with banking institution identity theft, breach, remediation and money transfer messages will not solve the problem.

Prior Express Consent Works - Why Change It Now?

The petitioner points to data breach notifications as a reason for eliminating prior express consent of the called party. The claim is a non-starter. Consumers can willingly provide their cell phone number to their banking institution for breach notifications. If consumers have willingly provided their cell numbers to their banking institution for breach notifications then the consumer has provided prior express consent for breach notifications.

If the consumer **has not** provided their cell number to their banking institution for breach notifications then obviously the consumer does not want those notifications to be made to their cell phone. This schema has worked since 1991 when the TCPA was enacted. Why then should petitioner's members be granted an exemption to make automated breach notifications to cell numbers that were never willingly provided to them?

The motive for such an exemption is clear when one reads between the lines. Petitioner's requested exemption would apply: "...to mobile numbers that were not provided directly by the recipient..." This aligns squarely with the petitions seeking to create an intended called party exemption and to totally eliminate revocation of consent. See for example the petition foot note #30 page 17 which states that: "...for example, where a mobile telephone number has been reassigned without the caller's knowledge..." Clearly the ABA petition is more about a blanket exemption from liability for intended called party calls than an exemption with the consumer's best interests in mind.

Banks are not in business to do their customers a favor. Banks are in it for the money. Petitioner ABA considers consumer protection laws a regulatory burden¹. As Chief Justice Ruth Bader Ginsburg said: "Business can pay for the best counsel money can buy. The average citizen cannot, that's just a reality." That truism applies equally to these bank petitions that seek to entirely eliminate prior express consent of the called party.

The overwhelming theme throughout all of these petitions is the use of autodialers increase the bottom line for the banks. If banking institutions were interested, even marginally, about their customer's welfare they would have migrated to more secure storage of customer data and the use of secured "chip" credit cards. Such steps would eliminate identity theft and breaches as they have in many other countries. Until recently banks in this country have resisted issuing smart "chip" credit cards because of the impact to their bottom line.

Instead of ensuring secure customer transactions petitioner wants carte blanche to make unfettered automatic calls to cell numbers without any consent what so ever. Such

¹ <http://www.aba.com/Issues/Index/Pages/RegBurden.aspx>

unfettered automatic calls will not increase the security of consumer transactions. What these unfettered automatic calls will do is intrude on the privacy of cell phone users and place them in jeopardy when the calls come at inconvenient times such as operating an automobile, machinery or sensitive equipment.

We've all heard the phrase "adding insult to injury" here is a great example. You find out to your horror that you are the victim of Identity Theft. You call the credit card company (Bank of America, Capital One, Chase, Citi, Discover, etc) and tell them what happened. They ask for your phone number and you give them your cell. Now the bank is blowing up your cell phone with their remediation robocalls. So not only have you been victimized by ID theft but now the bank is calling you multiple times a day with robocalls you never asked for.

Let's put identity theft and breaches into perspective – 77% of breaches in 2013 occurred at healthcare facilities and businesses, including retailers². That's compared to just 4% at financial institutions. The recent newsworthy breaches all involve intrusions into the computer networks of various companies such as Target and Home Depot none of which were banks. What justification is there then for the Commission to create an exemption for banking institutions when it is retailers that are responsible for the majority of identity theft and security breaches? Those stores should be making notifications and sadly I never received any notice from either store. It was left to me to cancel my credit card twice!

**Petitioners Remediation and Money Transfer Messages Are Telemarketing
Messages**

² Source²: Identity Theft Resource Center - Breach Stats Report Summary 2013
<http://www.idtheftcenter.org/images/breach/2013/UpdatedITRCBreachReport2013.pdf>

Remediation messages are telemarketing messages – even the petitioner admits that they are offers for: “...subscribing to credit monitoring services.” In fact the petitioner admits that banking institutions will use remediation messages to: “... provide such services...” which is clearly an advertisement about the services of the institution. Even if the Commission were to consider remediation messages as informational calls then they are nuisance informational calls. Any message that a bank can make will be part of their “get in the face” or as the banks put it customer retention marketing or customer relationship marketing.

Just as remediation messages are telemarketing messages so are money transfer notifications. For example in *Barani v Wells Fargo Bank NA*, Case No.: 3:12-cv-02999, (S.D. CA Filed 12/18/12) suit was filed based on the receipt of the following text message:

Wells Fargo Send &
Receive Money:M,RAZAMARA sent
you \$10.0
Conf#WFCTEXKF8F5D. TO
receive funds:
wf.com/receive (mobile)
Reply STOP SRM to stop
Mgs

Clearly, the above is a telemarketing call as it is used to provide much more than a notice that a money transfer was initiated. It is clearly a text message offering the goods and services of Wells Fargo bank. And since money cannot be transferred through cell phone accounts each and every transfer notification is nothing more than a telemarketing call.

The Commission must be mindful that giving petitioner an inch will result in the industry taking a mile. "This industry since 1995 has had a chance to make a company-

specific do-not-call system work. This is an industry that was given more than an inch and has taken more than a mile." Eileen Harrington, Federal Trade Commission DMA Teleservices Conference 2002.

The Commission cannot ignore the reputation the banking industry has – for many years the banking industry insisted that do-not-call does not apply to them.

**Unlimited Number of Messages and No Opt Out Contravenes Congressional Intent
Of An Opt In Statute**

The petitioner suggests that the Commission expand its CAA order to banking institutions and not set any limits on the number of messages banking institutions can initiate. Not only is petitioner asking for no limit on the number of messages to cell phones without prior express consent the petitioner is also asking the Commission to create a law that denies consumers the right to opt out of calls that they never requested.

So not only are the message initiated without prior express consent they are unlimited and cannot be stopped! There goes cell phone privacy in the name of banking institutions demon autodialer efficiency. Sound familiar? It should – the Santander Consumer USA petition is seeking the same thing - irrevocable consent where even reassigned numbers cannot opt out of debt collection robocalls.

Banking institutions including debt collectors have asked the Commission for a business friendly anti-consumer limited definition of practically every word in the phrase: "...to make any call... other than a call 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 ... cellular telephone service..." Banking institutions, including debt collectors, have asked the Commission to make prior express

consent irrevocable and have asked the Commission to make a nonsensical and convoluted interpretation that called party somehow means intended called party.

The TCPA and consumer privacy are under attack from banking institutions and debt collectors. If banking institutions and debt collectors get what they want a child with their 1st cell phone will be subject to banking institutions missives and debt collection calls for a year³ without any protection from the TCPA whatsoever!

Is that what Congress intended with the TCPA? Surely not!

If the Commission does grant the exemptions banking institutions seek the TCPA will become a meaningless statute with a perverse definition of called party that serves only the banks and debt collectors. Prior express consent will become a mockery when consumer's cell phone numbers are obtained from 3rd parties. Consumers cannot opt in or opt out from automated calls to their cell phones⁴. That decision will be made by banks and debt collectors.

Again, is that what Congress intended?

The TCPA Is Much More Than a Telemarketing Statute

Petitioner, once again, attempts to distinguish between telemarketing and non-telemarketing calls in regard to automated calls to cell phones. The Commission is to blame for that. The Commission started that with the CAA Order. Yet there is no content specific exemption for automated calls to cell numbers.

The claim that the exemption would be limited to non-telemarketing calls is entirely without merit. For example Bill Raney claimed that a prerecorded solicitation

³ See United Healthcare Services reply comments on the Consumer Bankers Association petition at page 6 and 7.

⁴ Both the ABA petition and the Santander Consumer USA petition want the Commission to agree that consumers cannot opt out or otherwise revoke consent.

message can be crafted so it is not a solicitation under the TCPA: “In my opinion, you can script a call so as to avoid this definition by not including information concerning the availability or quality of any property, goods or services.” Letter to SmartReply Inc.⁵ RE: Delivery of Recordings Dated October 16th, 2002.

The original purpose of the TCPA was to regulate certain uses of technology that are abusive and potentially dangerous. The TCPA regulates these abuses by prohibiting certain technologies altogether, rather than focusing specifically on the content of the messages being delivered. Contrary to petitioners claim, Congress did foresee the changes in technology that would allow increased access to consumers and in response crafted the TCPA.

The TCPA is more than just telemarketing regulation; it is an important consumer protection statute. Opening cell phones to more calls through an EBR or similar exemption would drastically increase the amount of calls a consumer could receive. The heightened cost-shifting, privacy, and safety concerns for cell phones justify a continued strict consent scheme with respect to such communications.⁶

“The TCPA is not only directed at telephone solicitations, it is also directed at autodialer calls to cellular phones, as reflected by the different subsections of § 227, which create separate causes of action for telephone solicitations and automated calls to cellular phones.” *Adamcik v. Credit Control Servs., Inc.*, 832 F. Supp. 2d 744, 752 (W.D. Tex. 2011).

The Commission Has Created a Content Based Exemption

⁵ SmartReply Inc. was acquired by Soundbite Communications Inc.

⁶ *Heidtke, Daniel B. and Stewart, Jessica and Waller, Spencer Weber, The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology* (September 17, 2013). Loyola University Chicago School of Law Research Paper No. 2013-016.

The Commission has made the decision to convert a content neutral statute to a content based statute. The door has been opened for all calls to cell phones that are not charged to the called party. Since Congress did not intend to create an exemption that would bypass prior express consent entirely there will inevitably be challenges to the Commission's authority to do so. In the same manner as the Commission's fax EBR was struck down by the courts the Commission's content based exemption most likely will be struck down. The Commission should be setting an example in protecting cell phone privacy not creating controversy with content based exemptions. The Commission has opened the door for content based calls that are not charged to the called party. The Commission should not have created such an exemption.

The door has been opened and the Commission must now navigate the slippery slope of exempting every call that is not charged to the called party. The Commission has chosen to treat content of the message as a determining factor in exempting autodialed calls to cell phones for which the called party is not charged. The Commission, in stark contrast to Congress which dismissed the same arguments made with HR 3035 bill, has done exactly what the HR 3035 supporters wanted – created a content based TCPA exemption. Such a content based exemption does not pass strict constitutional muster.

Conclusion

As pointed out in earlier comments the Commission never hears from those businesses that comply with the TCPA. The Commission only hears from those being sued for violating the TCPA. Further, lack of enforcement has led many to stop filing complaints with the Commission. For example, I filed 509 Rachel robocall to cell number complaints with the Commission – the Commission has done nothing those complaints.

The Commission did send me a response to 4 of my complaints - letters stating that the calls are scams and because they are scams the calls did not violate the TCPA. Due to the lack of taking any action on my complaints I have stopped filling complaints with the Commission. Consequently, the Commission cannot use Commission records as a basis for a determination when Commission records fail to accurately reflect consumer sentiment.

Truth be told, the claimed caller efficiency fails to take into account the invasion of privacy that occurs when automatically dialed text message or prerecorded message calls are made without consent of the called party. The schema of prior express consent has worked since the enactment of the TCPA. Now that automatically dialed text or prerecorded message calls have become so cheap businesses want to do away with the TCPA. It is a war on privacy in the name of efficiency. Yet with consent there is no impediment against efficiency. Therefore ABA already has what it wants – it can use efficiency all it wants as long as it respects the privacy of cell phone users and obtains prior express consent of the called party.

Cell phones are not like landlines. Consumers carry cell phones wherever they go. Unlimited calls that ABA advocates will create safety issues and distractions for the called party. There is no constitutional right for any business to barrage us on our cell phones with unwanted automatically dialed text message or prerecorded message calls that invade consumer privacy and create safety issues and distractions. The risk to the called party far outweighs any efficiency benefits to the banking industry. Those that use technology responsibly and obtain prior express consent of the called party can and do enjoy the efficiency that comes with technology.

Petitioner lost their baseless argument with HR 3035 to exempt banking institution autodialed messages from the TCPA. Petitioner should not prevail with the same arguments before the Commission. The Commission should exercise its authority to protect the privacy and safety of cell phone users. The Commission can and should deny the ABA petition in its entirety.

Respectfully submitted,

_____/s/

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