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Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

Re: Notification of *Ex Parte* Presentation, CG Docket No. 02-278

Dear Ms. Dortch:

On January 22, 2015, representatives of the American Bankers Association (ABA) and several of its members met with personnel of the commissioners' offices and the Consumer & Governmental Affairs Bureau. Attending for ABA and its members were: Richard Riese of ABA; Michelle Beckman of American Express; Donna Turner of Bank of America; Stephanie Green, Richard Santoro and Scott Ellis of Discover; Frank Borchert of JPMorgan Chase; David Leiker and Carol Rossman of U.S. Bank; and Charles Kennedy, counsel for ABA.

FCC personnel who attended the meetings were:

- Amy Bender, Legal Advisor to Commissioner O'Reilly.
- Maria Kirby, Legal Advisor to Chairman Wheeler.
- Matthew Collins, Honors Attorney, Office of General Counsel.
- Adonis Hoffman, Chief of Staff for Commissioner Clyburn.
- Nicholas Degani, Legal Advisor to Commissioner Pai.

- Travis Litman, Legal Advisor to Commissioner Rosenworcel.
- Kris Monteith, Acting Chief, Consumer & Governmental Affairs Bureau.
- Kurt Schroeder, Chief, Consumer Policy Division, Consumer & Governmental Affairs Bureau.
- Christina Clearwater, Legal Advisor, Consumer & Governmental Affairs Bureau.
- Aaron Garza, Front Office Legal Advisor.

All of the meetings concerned ABA's pending Petition for Exemption (Petition) filed on October 14, 2014.[1] The Petition asks the Commission to exercise its authority, under 47 U.S.C. § 227(b)(2)(C), to exempt from the TCPA's prior express consent requirement automated texts and other calls (together "messages") to mobile telephone numbers that are sent without charge to the recipients, subject to such conditions as are necessary to protect recipients' privacy interests. The ABA Petition requests an exemption for free-to-end-user messages that: (1) alert consumers to possible fraudulent transactions; (2) give notice of data security breaches concerning the recipients' personal information; (3) advise consumers as to remediation measures they might take to prevent fraud and secure their data; and (4) notify recipients of money transfers.

In all of the meetings, ABA emphasized the urgency of its Petition in the present environment of escalating cybersecurity and identity theft threats. ABA also responded to commenters that question the need for the requested relief.

The Heightened Risk of Fraud, Identity Theft and Other Financial Harm to Consumers Necessitates Prompt Action on the Petition

The rapid growth of fraud and identity theft requires urgent action if customers are to be protected from increasing financial loss, embarrassment and

[1] Petition for Exemption of the American Bankers Association, CG Docket No. 02-278 (filed Oct. 14, 2014).

inconvenience. Data breach incidents affecting bank customers have increased 27.5% since 2013, and a Javelin Strategy & Research study shows that an increasing percentage of persons affected by such breaches are victims of identity theft (up from 1 person in 9 in 2010 to 1 person in 3 in 2014). Similarly, one ABA member reported at the meetings that 30% more fraudulent transactions were attempted against its customers in 2014 than in 2013.

Both unauthorized transactions and identity theft impose substantial costs on consumers. Although banks, where possible, pay costs to customers for the vast majority of their direct loss, out-of-pocket expenses for identity theft victims range from an average of $63 for misuse of a credit card to $289 for fraud involving a stolen Social Security number. These numbers do not include the consumer's lost time and stress, including inability to use a payment card during the interval between a bank's identification of a suspicious transaction and the bank's initial contact with the customer.

Customers also report that declined payment card transactions, many of which could be prevented by prompt communication with customers through their mobile devices, cause embarrassment and inconvenience. In fact, one ABA member reports that 60% of its consumer complaints concerning questionable transactions refer to the embarrassment of having a transaction declined at the point of sale. The general experience of ABA members is that consumers expect their banks to contact them promptly to resolve issues that might result in declined transactions, fraudulent transactions or identity theft, and to convey information needed to restore their accounts and minimize loss and inconvenience.

Messages sent to mobile devices, and text messages in particular, are by far the most effective means of conveying such information to today's consumers. Research shows that 98% of text messages are opened and most are read within three minutes of delivery, compared to 24% of email messages.[2] To the extent litigation risk prevents the use of these communications channels, customers will continue to suffer needless harm.

Finally, by preventing identity thieves from exploiting the data they have stolen from consumers, the requested communications can be expected to reduce the incidence of identity theft. Aside from criminal prosecutions, which usually occur long after an identity theft event, if at all, the best way to reduce identity theft is to reduce its profitability.

Because of the urgency of the Petition, and because of the significant financial harm to consumers if the requested relief is not promptly granted, ABA urged the FCC personnel with whom it met to address the Petition promptly, without making it part of a larger rulemaking or other proceeding. Many of the Telephone Consumer Protection Act (TCPA) petitions pending before the Commission raise broad questions of TCPA interpretation that have challenged the FCC and the courts for many years. Although ABA agrees that the Commission should address and resolve those broader questions, there is no need to delay the granting of the ABA

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2 Aine Doherty, *SMS Versus Email Marketing*, business2community.com (July 28, 2014), available at http://www.business2community.com/digital-marketing/sms-versus-email-marketing-0957139#bth7SG; Cheryl Conner, *Fifty Essential Mobile Marketing Facts*, FORBES.COM (Nov. 12, 2013), available at http://www.forbes.com/sites/cherylsnappconner/2013/11/fifty-essential-mobile-marketing-facts.

Petition while those questions are addressed.

The Consumer Groups' Comments Acknowledge the Urgency of the Petition and Do Not Support its Rejection

On December 19, 2014 — the same day that ABA filed its reply comments in favor of the Petition — the National Consumer Law Center and other organizations filed an *ex parte* letter opposing the Petition (the NCLC Letter).[3] ABA had no opportunity to reply to the NCLC Letter in its reply comments.

Except for broad assertions to the effect that some customers might not want to receive fraud alert, breach notification, remediation and money transfer messages (a claim that is flatly contrary to the feedback ABA members have been receiving from their customers), the NCLC Letter principally argues that the requested relief is not needed because banks already can send the subject messages. Specifically, NCLC contends that banks can readily obtain customers' prior express consent to receive automated messages in these four categories; and that some or all of the messages already are covered by the "emergency exception" to the prior express consent requirement.[4] NCLC also argues that the Petition should be denied because ABA has not specified how it will send messages on a free-to-end-user basis.[5]

The consumer groups' claim that the emergency exception might support sending of the messages described in the Petition is especially telling. By acknowledging that the circumstances giving rise to these messages constitute emergencies, the consumer groups

[3] Letter from Margot Saunders, National Consumer Law Center, to Marlene H. Dortch, Federal Communications Commission, in CG Docket No. 02-278 (Dec. 19, 2014) (NCLC Letter).
[4] NCLC Letter at 4-5.
[5] NCLC Letter at 3-4.

effectively concede the urgency of ABA's request for exemption.

However, reliance upon the "emergency exception," as the NCLC Letter suggests, is impractical in the present litigation environment. Although ABA believes that the emergency exception is and should be a sufficient ground on which to base the sending of fraud and identity theft related messages, the courts and the FCC have not clarified the scope of that exception.[6] Accordingly, to send the messages described in the Petition in reliance on the emergency exception would present an unacceptable litigation risk.

Similarly, the claim that banks simply may rely upon consents already obtained from customers ignores the present litigation environment. Even where a customer furnished a mobile telephone number to the institution sending the automated message, plaintiffs' attorneys may argue that the consumer providing the number did not specifically consent to receive fraud and identity theft alerts.[7] For this reason, financial institutions that

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[6] For example, in 1992 the Commission stated that the emergency exception could support the sending of automated messages to mobile devices concerning "service outages and interruptions in the supply of water, gas or electricity, [which] in many instances [could] pose significant risks to public health and safety . . ." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8778 (1992). However, the Commission has not expressly found that the exception would extend to messages intended to prevent financial loss or theft of personal information or identity.

[7] ABA agrees with this Commission's finding that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8769 (1992); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling*, 23 FCC Rcd 559, 564 (2008). Accordingly, ABA continues to take the position that when customers of its member banks provide mobile contact numbers in the course of a transaction or account relationship, the bank has obtained prior express consent to call that number by automated means in the course of the relationship. However, some courts have rejected the Commission's interpretation of the prior express consent requirement, thereby creating a risk that TCPA class-action plaintiffs will defeat defenses based on such consent. *See, e.g., Mais v. Gulf Cost Collection Bureau, Inc.*, Case No. 11-61936-CIV, 2013 WL 1899616 (S.D. Fla. 2013); *see also Leckler v. Cashcall, Inc.*, 554 F.Supp.2d 1025 (N.D.

attempt to reach customers in the most timely and reliable fashion may find themselves defending class action suits alleging that they violated the TCPA by sending automated messages to mobile devices without the recipients' prior express consent.[8]

As ABA representatives advised Commission representatives in their meetings, banks are making ongoing efforts to obtain consents from customers which specify particular categories of messages that customers agree to receive at their mobile devices. However, only 3% to 5% of customers respond to requests that they act affirmatively to provide additional consents, making the process of obtaining more robust consents lengthy and uncertain. ABA members will continue to make those efforts. In the meantime, the growing threats of fraud and identity theft require that the risk of using mobile contact numbers already provided to banks be reduced to an acceptable level. Only by granting the Petition can the Commission ensure that result.

Furthermore, the NCLC Letter is simply incorrect in suggesting that the Petition may not be granted unless ABA and its members demonstrate their immediate readiness to send messages on a free-to-end-user basis. ABA, like the Cargo Airline Association in its earlier petition, has stated that it will work with vendors of free-to-end-user services to ensure that any messages sent pursuant to the requested relief are sent without charge to recipients.[9] Because the requested relief will expressly be conditioned upon those messages

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Cal. 2008), *vacated by Leckler v. Cashcall, Inc.*, 2008 WL 5000528 (N.D. Cal. 2008). By granting ABA's request for exemption, the FCC will reduce or remove this risk with no harm to consumers.

[8] ABA members report that their confidence that express consents meet standards asserted by TCPA class action litigants only extends to 6% to 30% of the number of customer cell phone numbers they have on file.

9 *Cargo Airline Association Petition for Expedited Declaratory Ruling; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Order rel. March 27, 2014) ¶ 12 (noting that "CAA states that it is working with

being sent without charge, there is no risk that granting the Petition will permit ABA members to send those messages on any other basis.

Finally, an ABA member related that customers who express interest in not receiving fraud alerts by text message are less than ½ of 1% of customers contacted. Even then the extent of their request is often not well articulated and can be imprecise with respect to the scope of the request and the products meant to be covered. On the other hand, customer satisfaction with bank outreach on fraudulent transaction alerts is 26% higher through text messaging than through either email, voice call or other means.

CONCLUSION

ABA and its members appreciate the opportunity to meet with Commission staff to discuss the pending Petition. FCC personnel asked a number of useful questions in the meetings that are not expressly addressed in this *ex parte* notice, but

other carriers toward [free-to-end-user] capability").

that ABA will answer in subsequent filings that will be made part of the public record in this proceeding. In the meantime, we welcome the opportunity to provide any additional information the Commission may require.

Respectfully submitted,

/s/ Charles H. Kennedy

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