

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

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

**BLACKBOARD INC.
PETITION FOR EXPEDITED DECLARATORY RULING**

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BLACKBOARD INC. PETITION FOR EXPEDITED DECLARATORY RULING

Blackboard Inc. (“Blackboard”),¹ by its counsel and pursuant to Section 1.2² of the rules and regulations of the Federal Communications Commission (“Commission” or “FCC”), hereby respectfully submits this Petition for Expedited Declaratory Ruling. Blackboard seeks a declaratory ruling that the Telephone Consumer Protection Act of 1991 (“TCPA”)³ and certain Commission implementing rules⁴ do not apply to informational, non-commercial, non-advertising, and non-telemarketing autodialed and prerecorded messages sent by Blackboard’s educational institution customers because those calls are made for “emergency purposes.”⁵ In the alternative, Blackboard asks the Commission to declare that the prior express consent that Blackboard’s educational institution customers obtain before sending such informational

¹ Blackboard Inc. files this Petition on behalf of itself and its wholly owned subsidiary Blackboard Connect Inc. (collectively referred to as “Blackboard”).

² 47 C.F.R. § 1.2 (“The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.”).

³ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) (“TCPA”), *codified at* 47 U.S.C. § 227.

⁴ 47 C.F.R. § 64.1200.

⁵ 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd 1830, ¶ 28 (2012) (“2012 TCPA Order”) (discussing “non-telemarketing, informational calls . . . and calls for other noncommercial purposes, including those that deliver purely informational messages such as school closings”) (emphasis in original).

messages extends to (1) the wireless telephone number provided to the educational institution even if, unbeknownst to the educational institution, the number has been reassigned by a wireless carrier to another user or (2) the recipient the educational institution intended to receive the call, and not to the person who inadvertently receives the call.

INTRODUCTION AND BACKGROUND

Blackboard is not engaged in telemarketing. Blackboard provides innovative technologies and products to educational, government, and business customers, including software-based communications solutions, consulting services, online learning environments, interactive classrooms, and mass notification services. At issue here is the Blackboard Connect mass notification platform, which allows Blackboard's customers to send emergency notifications and other informational messages to a targeted audience.⁶

The Blackboard Connect platform is used primarily in the educational setting to enable schools to send mass notifications to parents, guardians, students, and faculty regarding emergency weather closures, threat situations, event scheduling, or to provide other important education-related information. Specifically, Blackboard makes an interactive web portal available to its educational organization customers (usually an individual school or larger system covering several school locations), which allows each school to draft informational messages and distribute them as the school chooses. The message can be distributed as an automated/prerecorded telephone call to either a wireline or wireless telephone number, as a text message (or short message service ("SMS")) to a wireless device, or as an e-mail, and can be sent via all methods simultaneously if that option is selected by the school. The school also can determine whether to distribute the message to certain subgroups defined by the school, or to the

⁶ The current version of Blackboard's mass notification platform is known as "Connect 5." Blackboard also continues to support its legacy messaging platform, which is interchangeably called "Connect Classic" or "Connect Ed." For consistency, Blackboard will refer to its mass notification product as "Connect" herein.

entire school population. Blackboard does not take the steps necessary to physically place the call, and does not “initiate” or “make” the telephone call.⁷

The school determines what contact methods it will use for the distribution of informational messages (telephone call, text message, or e-mail). The school also is responsible for obtaining from recipients the information relating to each distribution method used (telephone number(s) or e-mail address) and the recipients’ consent for messages to be distributed via those methods. In most school settings, recipients are able to designate how they prefer to be contacted by the school. The contact information and methods used by the school to distribute messages are gathered by the school and entered by the school into the interactive web portal (or in some cases, the school’s existing contact information database can be uploaded into the web portal). Blackboard’s educational customers employ high standards and practices in securing and maintaining the consent and information necessary to contact recipients via the recipients’ requested method of notification.⁸

As the Commission is aware, private actions under the TCPA have become commonplace given the ease with which a consumer can file a claim for monetary damages.⁹ In recent months,

⁷ 47 U.S.C. § 227(b)(1)(A) (stating it is unlawful “to make” certain types of calls); 47 U.S.C. § 227(b)(1)(B) (stating it is unlawful “to initiate” certain types of calls); 47 C.F.R. § 64.1200(a) (stating it is unlawful “to initiate” certain types of calls); *The Joint Petition Filed by DISH Network, LLC, the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules, et al.*, 28 FCC Rcd 6574, ¶ 26 (2013) (“We conclude that a person or entity ‘initiates’ a telephone call when it takes the steps necessary to physically place a telephone call, and generally does not include persons or entities, such as third-party retailers, that might merely have some role, however minor, in the casual chain that results in the making of a telephone call.”).

⁸ For example, Chicago Public Schools (“CPS”) has adopted “Communications and Blackboard Connect Guidelines” to govern its distribution of messages (hereinafter, “CPS Guidelines”). The CPS Guidelines specify that CPS “is responsible for the content management” of messages and “[e]nsuring that all student information records are current and complete.” Each individual school/principal in the CPS system is required address situations of “bad contact information” and make “all reasonable attempts to acquire new and current information” within five (5) days of any bounce backs. The CPS Guidelines are available at <http://cps.edu/Pages/BlackboardConnect.aspx>.

⁹ *See, e.g.*, CG Docket No. 02-278, Letter from the U.S. Chamber of Commerce and various other trade associations and business groups (dated Feb. 2, 2015) (“Given that compliance-minded organizations in a variety of sectors are being dragged into court and strong-armed into large settlements on an almost daily basis under the TCPA, for actions that do not remotely threaten the privacy interests that the statute was intended to protect,

Blackboard has been subjected to several private actions initiated by consumers who allege they have received education-related prerecorded messages on their wireless devices in error. A consumer may receive messages from a school in error due to the disconnection and reassignment of a telephone number by a wireless carrier (which then provides the number to a new subscriber), a recipient's decision to forward calls to a new telephone number, or other good faith errors all of which can occur without the knowledge of the school (or Blackboard).

The “significant and growing litigation risk from such calls - and the potential for devastating TCPA class action damage awards - threatens organizations that have earnestly and in good faith attempted to meet their TCPA obligations.”¹⁰ It is inconsistent with the purpose of the TCPA to allow the statute to be the basis for initiating litigation claims against Blackboard and its educational customers when its educational customers transmit informational messages to wireless telephone numbers for emergency purposes or when the educational customer has obtained consent but the numbers have been reassigned, forwarded, or other good faith errors have resulted in a different subscriber receiving the message. It is imperative that the Commission declare that parties like Blackboard and its educational customers are not liable under the TCPA for the informational autodialed and prerecorded calls to wireless telephone numbers made by schools when such calls are made for emergency purposes or are made with prior express consent, but do not reach the intended recipient due to wireless number reassignment or other good faith error.¹¹

regulatory relief by the Commission is desperately required. We ask for clarification from the FCC to help curb abusive lawsuits that likely harm consumers overall.”).

¹⁰ CG Docket No. 02-278, United Healthcare Services, Inc. Petition for Expedited Declaratory Ruling, at 3 (dated Jan. 16, 2014) (“United Healthcare Petition”).

¹¹ Blackboard's Petition focuses only on the applicability of the TCPA and the Commission's regulations to automated messages sent to wireless telephone numbers. As the Commission's rules reflect, there is no prior consent required to send non-telemarketing, non-commercial, informational automated messages to residential wireline telephone numbers. *See* 47 C.F.R. § 64.1200(a)(3)(ii), (iii); *see also* 2012 TCPA Order ¶ 28.

ARGUMENT

Under the TCPA and the Commission’s implementing rules, an entity may not use an automatic telephone dialing system¹² or an artificial or prerecorded voice to make or initiate a telephone call to a telephone number assigned to a wireless service unless the call is made “for emergency purposes” or the call is made with the “prior express consent” of the called party.¹³ When the call contains an advertisement or otherwise constitutes telemarketing, “prior express written consent” is required to initiate a telephone call to a telephone number assigned to a wireless service using an automatic telephone dialing system or an artificial or prerecorded voice.¹⁴ If a call does not contain a telemarketing message, no consent is required when made to a residential wireline number, and consent may be “either written or oral” if made to a wireless number.¹⁵ Consent also is not required when autodialed or prerecorded calls are placed for emergency purposes.¹⁶ The TCPA’s protections encompass both voice calls and text messages, including SMS calls, if the call is made to a telephone number assigned to such service.¹⁷

I. CONSUMERS WANT TO RECEIVE EDUCATION-RELATED MESSAGES ON THEIR WIRELESS DEVICES

Automated calls made for non-commercial purposes are distinguishable from telemarketing or solicitation calls under the TCPA.¹⁸ The automated notifications sent by

¹² The Blackboard Connect platform is not an “automatic telephone dialing system.” *Cf.* 47 C.F.R. § 64.1200(f)(2).

¹³ 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1)(iii).

¹⁴ 47 C.F.R. § 64.1200(a)(2).

¹⁵ *2012 TCPA Order* ¶ 28.

¹⁶ *2012 TCPA Order* at n.73 (citing 47 U.S.C. §§ 227(b)(1)(A), 227(b)(1)(B)).

¹⁷ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, ¶ 165 (“*2003 TCPA Order*”). When used herein, the terms “call” or “message” to a wireless telephone number refer to both voice calls and text messages, including SMS.

¹⁸ *2012 TCPA Order* ¶ 28.

Blackboard’s educational customers are non-telemarketing, informational calls.¹⁹ There is no question that “school and university notifications” or messages regarding “school closings” are “purely informational messages” and are considered “non-telemarketing calls.”²⁰ The calls are not “intended to offer property, goods, or services for sale either during the call, or in the future,” and thus do not qualify as an advertisement or solicitation under the TCPA or the Commission’s rules.²¹ Only those messages with an educational purpose (as determined by the school) are transmitted to the wireless telephone number provided, and the school does not use the wireless telephone number to transmit messages for any other non-educational or telemarketing purpose.²²

The TCPA was intended to consider both the interests of the public and of the legitimate telemarketing industry based on Congress’ determination that “[i]ndividuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.”²³ In adopting rules to implement the TCPA, the Commission’s “goal is to make sure the TCPA is not interpreted to inhibit communications consumers may want and that do not implicate the harms [the] TCPA was designed to prevent.”²⁴ The automated messages distributed by Blackboard’s educational customers are precisely the types of informational messages that consumers want to

¹⁹ 2012 TCPA Order ¶ 28.

²⁰ 2012 TCPA Order ¶ 28, n.76.

²¹ 2012 TCPA Order ¶ 30 (citing 2003 TCPA Order ¶ 142).

²² For example, the CPS Guidelines specify the type of “informational” messages permitted to be sent by a school (attendance, emergencies, testing reminders, event cancellation, parent-teacher conference information, etc.) and the type of messages that are not allowed to be sent: fundraising or solicitation of any kind, political messages or campaigning, messages from non-CPS organizations, commercial event or product promotion, weekly status updates, and community messages unrelated to CPS.

²³ TCPA § 2(9).

²⁴ *GroupMe, Inc./Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling*, 29 FCC Rcd 3442, ¶ 1 (2014) (“*GroupMe Declaratory Ruling*”).

receive on their wireless devices, which is why most recipients provide a wireless telephone number as the primary method for a school to contact them.²⁵ The National School Boards Association noted in 2010 that the “growing number of students, parents and other caretakers using wireless devices for either primary or secondary contact makes it all but inevitable that notifications about schedules, parent engagement activities, and school events will be issued to wireless devices.”²⁶ As the Commission has recognized, “wireless services offer access to information that consumers find highly desirable” and thus it should refrain from taking any action “to discourage [the sending of] purely informational messages” via wireless services.²⁷

II. BLACKBOARD’S EDUCATIONAL CUSTOMERS PLACE AUTOMATED OR PRERECORDED CALLS TO WIRELESS NUMBERS FOR EMERGENCY PURPOSES

No form of consent is required when autodialed or prerecorded calls are placed to wireless telephone numbers for emergency purposes.²⁸ The Commission defines “emergency purposes” as “calls made necessary in any situation affecting the health and safety of consumers.”²⁹ The Commission found the legislative history of the TCPA demonstrates a Congressional intent to interpret the term emergency purposes “broadly rather than narrowly,” finding that the term was intended to include, among other things, “any automated telephone call that notifies consumers of impending or current power outages, whether these outages are for scheduled maintenance, unscheduled outages caused by storms, or power interruptions for load

²⁵ Susan Dynarski, *Helping the Poor in Education: The Power of a Simple Nudge*, THE NEW YORK TIMES (Jan. 17, 2015), http://www.nytimes.com/2015/01/18/upshot/helping-the-poor-in-higher-education-the-power-of-a-simple-nudge.html?smprod=nytcare-ipad&smid=nytcare-ipad-share&_r=1&abt=0002&abg=0 (explaining how receiving educational messages via text is helping students and their parents improve literacy, testing, and college-planning).

²⁶ CG Docket No. 02-278, Letter from National School Board Association, at 2 (dated May 21, 2010).

²⁷ 2012 TCPA Order ¶ 29.

²⁸ 2012 TCPA Order at n.73 (citing 47 U.S.C. §§ 227(b)(1)(A), 227(b)(1)(B)).

²⁹ 47 C.F.R. § 64.1200(f)(4).

management programs.”³⁰ More recently, the Commission determined it is “in the public interest to recognize an exception for autodialed emergency purpose calls which promote public safety,” based in part, on the “principles of the Communications Act, which includes promoting ‘the safety of life and property through the use of wire and radio communication services.’”³¹

Given the broad definition, all school-initiated informational messages should be considered sent for “emergency purposes.” A school can distribute several types of informational messages to recipients: (1) “Attendance” messages, which alert parents to an unexcused absence and can be critical when a parent is unaware that a child did not arrive at school as expected;³² (2) “Emergency” messages, which alert the school community to a variety of emergency situations (weather, facilities issue, fire, health risk, threat situation); (3) “Outreach” messages, which provide important education-related information to parents regarding school activities (teacher conferences, back-to-school night, etc.); and (4) “Simple Survey” messages, which allow recipients to RSVP to events or provide input on an important issue using a telephone keypad.³³ Each of these message types are used to provide information “affecting the health and safety” of the school community. If Congress contemplated that informational calls regarding a scheduled power outage constitute “emergency purposes,” there

³⁰ Statement of Cong. Edward Markey, Chair, House Telecom. & Fin. Subcommittee, 137 Cong. Rec. H 11307-01 (Nov. 26, 1991); see also *Rules and Regulating Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, ¶ 50 (1992) (“1992 TCPA Order”).

³¹ *Implementation of the Middle Class Tax Relief and Job Creation Act of 2012*, 27 FCC Rcd 13615, ¶ 27 (2012) (allowing the use of automatic dialing or robocall equipment to contact registered numbers for public safety answering points (“PSAPs”) when such calls are made for an emergency purpose).

³² One school system recently changed its absence alert policy to ensure parents were notified as soon as possible when a child does not arrive at school as expected. See Alison Knezevich, *Perry Hall Middle School changes parent notification after alleged kidnapping*, BALTIMORE SUN (Nov. 18, 2014, 8:00 PM), <http://www.baltimoresun.com/news/maryland/baltimore-county/perry-hall/bs-md-co-perry-hall-school-changes-20141118-story.html> (“After the alleged kidnapping of a 12-year-old student as she walked to school last week, Perry Hall Middle School officials say they are calling parents in the morning to report when a child is absent.”)

³³ More information on each of these message types, including when and how they are to be sent, is outlined in the CPS Guidelines.

is no question a message regarding an unplanned school closure, threat situation, or other education-related information also would qualify.

III. BLACKBOARD’S EDUCATIONAL CUSTOMERS OBTAIN PRIOR EXPRESS CONSENT TO SEND AUTOMATED OR PRERECORDED EDUCATION-RELATED INFORMATIONAL MESSAGES TO WIRELESS DEVICES

Automated or prerecorded informational calls made to wireless telephone numbers are permitted under the TCPA when the caller has received the “prior express consent” of the called party.³⁴ The consent may be “either written or oral” when the call does not include an advertisement or constitute telemarketing.³⁵ The Commission has not designated a specific format for such consent, leaving it to the caller “to determine, when making an autodialed or prerecorded *non-telemarketing* call to a wireless number, whether to rely on oral or written consent in complying with the statutory consent requirement.”³⁶ This is because “Congress did not expect the TCPA to be a barrier to normal, expected, and desired business communications.”³⁷ Prior express consent also may be obtained and conveyed via intermediaries or third-parties, when such consent “facilitates these normal, expected, and desired business communications in a manner that preserves the intended protections of the TCPA.”³⁸

It is well-recognized 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,

³⁴ 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1)(iii).

³⁵ 2012 TCPA Order ¶ 28. As noted above, when an automated or prerecorded call to a wireless device constitutes telemarketing, an advertisement, or a solicitation, “prior written express consent” is required. 47 C.F.R. § 64.1200(a)(2); *see also* 2012 TCPA Order ¶ 28.

³⁶ 2012 TCPA Order ¶ 29 (emphasis in original).

³⁷ *GroupMe Declaratory Ruling* ¶ 8.

³⁸ *GroupMe Declaratory Ruling* ¶ 9.

absent instructions to the contrary.”³⁹ Congress contemplated that “[t]he restriction on calls to emergency lines, pagers, and the like” would not “apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications.”⁴⁰ The Commission has determined that autodialed and prerecorded messages sent to wireless numbers in connection with an existing debt are made with the “prior express consent” of the called party.⁴¹ In this respect, when a consumer provides its cell phone number to a creditor as part of a credit application, there is reasonable evidence that the consumer provides prior express consent to be contacted at that number regarding the debt.⁴²

Applying these standards, Blackboard’s educational customers have received the necessary “prior express consent” to place informational, non-telemarketing calls to wireless telephone numbers. As discussed above, a recipient provides its contact telephone number to the school for the receipt of communications from the school, and that contact information is used by the school to send informational messages to the recipient. When a recipient provides its wireless telephone number to a school, she is giving her “prior express consent” to be contacted and receive automated informational messages via that number.⁴³ Blackboard’s educational customers send such messages only when a recipient provides the wireless telephone number to

³⁹ *1992 TCPA Order* ¶ 31 (citing House Report, 102-317, 1st Sess., 102nd Cong. (1991) at 13 (“noting that in such instances ‘the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications’”)).

⁴⁰ H.R. Rep. 102-317 at 17.

⁴¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd 559, ¶ 9 (2008) (“2008 Declaratory Ruling”).

⁴² *2008 Declaratory Ruling* ¶ 9.

⁴³ Cf. CG Docket No. 02-278, Edison Electric Institute and American Gas Association Petition for Expedited Declaratory Ruling, at 2 (dated Feb. 12, 2015) (asking the Commission “to confirm that providing a telephone number to an energy utility constitutes ‘prior express consent’ to receive non-telemarketing, informational calls at that number related to the customer’s utility service”).

the school and requests that the number be used by the school to communicate with the recipient.⁴⁴

IV. THE COMMISSION HAS AUTHORITY TO ADDRESS BLACKBOARD'S REQUEST FOR A DECLARATORY RULING

The Commission has broad authority to “issue a declaratory order to terminate a controversy or remove uncertainty.”⁴⁵ The purpose of the declaratory ruling process “is to give guidance to affected persons in areas where uncertainty or confusion exists” such that a “case or controversy in the judicial sense is not required.”⁴⁶ Congress specifically recognized that the Commission “should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls.”⁴⁷ An express declaration from the Commission regarding the applicability of the TCPA and the Commission’s rules to automated informational messages made for emergency purposes or those received in error by a consumer on its wireless device⁴⁸ would remove uncertainty in this area and benefit Blackboard and its educational customers. Three declarations consistent with the law and public policy can resolve this controversy.

First, the Commission should declare that all automated informational messages sent by an educational organization via a recipient’s requested method of notification are calls made for

⁴⁴ Cf. *2008 Declaratory Ruling* ¶ 10 (focusing on the “transaction that resulted in the debt owed”). As discussed with respect to the CPS Guidelines, under Blackboard’s contractual arrangements with its customers, Blackboard’s educational customer is responsible for the accuracy or validity of the data and contact information that is entered into the web portal and used by the school to distribute messages to recipients via the method designated by the recipient.

⁴⁵ 5 U.S.C. § 554(e); see also 47 C.F.R. § 1.2.

⁴⁶ *Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, et al.*, 92 F.C.C.2d 864, ¶ 43 (1983) (subsequent history omitted).

⁴⁷ TCPA § 2(13).

⁴⁸ As noted above, recipients can receive messages on their wireless devices in error due to disconnection and reassignment of wireless numbers, use of call forwarding services, or simple human error when providing the wireless number to the school or in entering the wireless number into the school’s database.

“emergency purposes,” and thus are outside the requirements of the TCPA.⁴⁹ As explained above, schools routinely send messages to provide information affecting the health and safety of consumers, and it would be consistent with the broad definition of “emergency purposes” to classify all education-related informational messages as calls made for emergency purposes under the TCPA and the Commission’s implementing regulations.⁵⁰

Second, the Commission should declare that automated informational messages to wireless phones are calls made with “prior express consent” when the wireless telephone number has been provided to the caller as a means of providing information to the consumer, even if the wireless telephone number later is in use by another consumer. As explained above, Blackboard’s educational customers have obtained the necessary prior express consent to send automated informational messages to wireless telephone numbers, and such consent should continue to apply regardless of whether the wireless telephone number is now being used by a different subscriber. In today’s communications marketplace, it is inevitable that consumers will switch telephone numbers without notifying all entities to which they previously provided express consent that the telephone number should no longer be used for receiving informational messages. This, coupled with the Commission’s number optimization policies and wireless carriers’ number reassignment practices, further compound the likelihood for good faith error.⁵¹

⁴⁹ 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1).

⁵⁰ Cf. CG Docket No. 02-278, Letter from National School Board Association (dated May 21, 2010) (asking the Commission to clarify that the TCPA and the Commission’s rules are not applicable to school districts).

⁵¹ Under the Commission’s rules, telephone numbers previously assigned to residential customers may be aged for no more than 90 days. See 47 C.F.R. § 52.15(f)(ii). While the Commission acknowledged “that too short of an aging period could cause confusion and unnecessary disruptions to subscribers,” it allows carriers to “selectively reduce some aging limits near zero if necessary,” especially in “areas of acute number shortages” and when consumers are not charged for calls of less than one minute in duration. *Numbering Resource Optimization*, 15 FCC Rcd 7574, ¶ 29 (2000); see also *id.* ¶ 30 (recognizing that “[w]ireline customers generally need longer aging periods than wireless service providers”).

Adoption of a good faith exemption from TCPA liability would “ensure that callers have a reasonable opportunity to comply with [the TCPA] rules while continuing to protect consumer privacy interests,” especially where “it is impossible”⁵² for organizations like Blackboard and its educational customers to identify whether a wireless telephone number is being used by a subscriber other than the one that previously provided prior express consent.⁵³ The Commission has recognized other good faith exemptions to strict enforcement of the TCPA. For example, callers are not liable for automated voice calls placed to wireless numbers that have been ported from wireline service, were not knowingly made to a wireless number, and were made within 15 days of the porting process.⁵⁴ Similarly, the Commission has provided a good faith exemption for some non-autodialed or prerecorded telemarketing calls to residential telephone numbers on the Do-Not-Call registry even when a consumer has stated she does not wish to be contacted.⁵⁵ A good faith exemption to TCPA liability also has been recognized by at least one federal court.⁵⁶

⁵² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 19 FCC Rcd 19215, ¶¶ 1, 9 (2004).

⁵³ *See, e.g.*, United Healthcare Petition at 10; CG Docket No. 02-278, Rubio’s Restaurant, Inc. Petition for Expedited Declaratory Ruling, at 6-7 (dated Aug. 11, 2014).

⁵⁴ 47 C.F.R. § 64.1200(a)(1)(iv). For this exemption to apply, the telephone number may not be on the national Do-Not-Call registry or the caller’s company-specific Do-Not-Call list. *See id.*

⁵⁵ 47 C.F.R. § 64.1200(c)(2). Under this rule, entities are not liable for Do-Not-Call violations if they can demonstrate the call was made in error and they maintain certain “routine business practices” to comply with the Do-Not-Call rules. *See id.*

⁵⁶ *See, e.g., Chyba v. First Fin. Asset Mgmt., Inc.*, No. 12-CV-1721-BEN (WVG), Corrected Order: (1) Denying Plaintiff’s Motion to Strike (2) Granting in Part Defendant’s Motion for Summary Judgment, 2014 WL 1744136, *11-12 (S.D. Cal. Apr. 20, 2014) (“Here, the documents provided gave Defendant a good-faith basis to believe that it had consent to contact Plaintiff at that number. The Court notes that the cell number listed as her ‘home’ number. There appears to have been little that the Defendant could have done to further ascertain whether there was consent, except to call Plaintiff at her home number. . . . Thus, although Plaintiff did not give consent directly to Defendant to call her cell phone number, it is sufficient that Defendant had a good-faith basis to believe that Plaintiff had provided consent to the creditor on whose behalf Defendant sought to collect a debt. Even if Plaintiff is correct in stating that she never gave Defendant or Enterprise consent to call, and there was no *actual* prior consent from Plaintiff, Defendant is not liable for acting in good faith upon the information provided to it.”); *see also* United Healthcare Petition at 11 (“federal courts have started to recognize a good faith exception to TCPA liability”).

Third, the Commission should declare that “called party” in the TCPA and the Commission’s regulations refers to the “intended recipient” of the automated informational message.⁵⁷ The Coalition of Higher Education Assistance Organizations supports this approach, 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, missed notifications of approaching deadlines for class registrations, and many other campus activities that define the campus life experience for millions of students.”⁵⁸ This interpretation is consistent with the purpose of the TCPA. Liability should be imposed only on callers who fail to obtain prior express consent before placing a call for which consent is required.⁵⁹ Any other interpretation would mean that complete compliance with the prior express consent is impossible⁶⁰ because a caller would never be able to confirm whether the user of the wireless number has changed prior to a call being placed. Several parties have explained that it would be impractical for an organization to reconfirm the subscriber for a particular wireless telephone number before every single autodialed or prerecorded is made (such as by placing a live, manually dialed call to that telephone number).⁶¹ The inherent benefit in utilizing automated messages - reaching a large

⁵⁷ CG Docket No. 02-278, Petition for Declaratory Ruling of the Consumer Bankers Association, at 4 (dated Sept. 19, 2014) (“Consumer Bankers Petition”).

⁵⁸ CG Docket No. 02-278, Comments of the Coalition of Higher Education Assistance Organizations in Support of Petition for Declaratory Ruling of the Consumer Bankers Association, at 2 (filed Nov. 17, 2014).

⁵⁹ The second and third declarations requested by Blackboard would not alter a caller’s obligation to obtain valid prior express consent to make or initiate automated or prerecorded calls to a consumer’s wireless telephone number in the first instance. *See, e.g., GroupMe Declaratory Ruling* ¶ 12 (“We stress that our clarification in no way mitigates GroupMe’s duty (or that of any other caller), except in emergencies, to obtain the prior express consent of the called party before placing an autodialed or prerecorded call to that party’s wireless telephone number.”); *see also* United Healthcare Petition at 11; Consumer Bankers Petition at 14.

⁶⁰ Consumer Bankers Petition at 5.

⁶¹ United Healthcare Petition at 5; Consumer Bankers Petition at 7-8.

number of people as quickly as possible (especially in the context of an emergency school closing or student body threat) - would be lost if organizations were required to use live operators to place informational calls to avoid exposure to potential liability for wireless telephone numbers reached in error. As one federal court has determined, a finding that unintended recipients of a communication have standing to pursue TCPA violations means “a business could face liability even when it intends in good faith to comply with the provisions of the TCPA.”⁶²

Lawmakers have recognized that “the TCPA has turned [from] a vehicle to protect consumers from unwanted random solicitations into a booming practice for opportunistic attorneys to take advantage of ambiguous rules and profit personally by receiving millions of dollars by suing businesses and overburdening the courts while providing only nominal relief to their clients.”⁶³ A ruling by the Commission would stop the “perpetual stream of new TCPA liability”⁶⁴ for organizations placing automated informational messages to wireless telephone numbers for emergency purposes or for which they believe they have the requisite consent. The Commission should expeditiously implement “common-sense reforms to facilitate the delivery of time-sensitive consumer information to mobile devices while continuing to protect consumers from unwanted telemarketing calls”⁶⁵ as requested herein.

⁶² *Leyse v. Bank of America, Nat. Ass’n (Leyse I)*, No. 09-CV-7654 (JGK), Memorandum Opinion and Order, 2010 WL 2382400, *4 (S.D.N.Y. June 14, 2000) (“If any person who receives the fax or answers the telephone call has standing to sue, then businesses will never be certain when sending a fax or placing a call with a prerecorded message would be a violation of the TCPA.”); *see also Leyse v. Bank of America, Nat. Ass’n (Leyse II)*, No. CV-11-7128 (SDW) (MCA), Opinion, 2014 WL 4426325, *6 (D.N.J. Sept. 8, 2014) (agreeing with prior “well-reasoned decision” and finding in *Leyse I* that “the TCPA cannot be construed as broadly as Plaintiff suggests” because Plaintiff “was an unintended and incidental recipient of a properly-directed communication to someone else”).

⁶³ Letter from Rep. Marsha Blackburn, *et al.* to Tom Wheeler, FCC, at 1 (Aug. 1, 2014), *available at* <http://www.ballardspahr.com/~/media/files/alerts/2014-08-07-letter1.pdf> (“Congressional 2014 Letter”).

⁶⁴ United Healthcare Petition at 7.

⁶⁵ Congressional 2014 Letter at 2.

CONCLUSION

For the foregoing reasons, the Commission should issue a ruling to declare that entities like Blackboard and its educational customers are not liable under the TCPA or the Commission's implementing rules when they distribute education-related informational messages for emergency purposes or to wireless telephone numbers that are being used by new subscribers without the calling party's knowledge when the calling party previously obtained valid prior express consent to make calls to that wireless telephone number.

Respectfully submitted,

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