

June 5, 2015
Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **Notice of Ex Parte – CG Docket No. 02-278**
Wells Fargo & Company

Dear Ms. Dortch:

On June 3, 2015, Monica Desai of Squire Patton Boggs (US) LLP, counsel to Wells Fargo; Michael Selle (Senior Counsel, Litigation, Wells Fargo Law Department); Larry Tewell (Senior Vice President, Consumer Credit Solutions, Wells Fargo & Company); Jennifer Peterson (Senior Counsel, Wells Fargo Law Department); Heather Enlow-Novitsky (Senior Counsel, Wells Fargo Law Department); John Heyse (Call Center Planning and Analysis Manager, Wells Fargo Home Mortgage); and Eric Troutman (Partner, Severson & Werson) held a series of meetings with the Federal Communications Commission (FCC or Commission).¹

Those meetings were held with Maria Kirby (Legal Advisor, Office of the Chairman); Travis Litman (Legal Advisor, Office of Commissioner Rosenworcel); Jennifer Thompson (Special Advisor & Confidential Assistant, Office of Commissioner Rosenworcel); Nicholas Degani (Legal Advisor, Office of Commissioner Pai); and Amy Bender (Legal Advisor, Office of Commissioner O'Reilly).

The reason for the meetings was to note that the proposal as reflected by the Chairman's Fact Sheet² (1) appears to conflate two distinct statutory concepts – “making a call” vs. “initiating a call;” (2) fails to take into account the likely negative repercussions from the plan it proposes; and (3) fails to consider the many consumer benefits associated with automated dialing technologies. Wells Fargo also strongly urged the Commission (1) to clarify that “called party” means “intended recipient” in the context of the exemption from liability provided by Congress in the Telephone Consumer Protection Act (TCPA) for calls

¹ Larry Tewell and Jennifer Peterson joined by telephone.

² *Wheeler Proposal to Protect and Empower Consumers Against Unwanted Robocalls, Texts to Wireless Phones*, Fact Sheet (May 27, 2015) (Fact Sheet).

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made with the prior express consent of the “called party;”³ and (2) to clarify that the “one call” standard for reassigned numbers (and calls to wrong numbers) highlighted in Chairman Wheeler’s recently released Fact Sheet must allow the caller to accurately determine that the number has been reassigned – and that can only be done through a live connect.

A. The Fact Sheet appears to inadvertently interpret the phrase “make a call” as synonymous with “initiate a call,” thus blurring an important statutory distinction.

Congress used two different phrases in two distinct sections of the TCPA to create two distinct triggers for liability.⁴ Under the statute, it is unlawful to “make” a call – not merely to “attempt” a call – to a cell phone using an automatic telephone dialing system (ATDS) without prior express consent: “[i]t 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 . . . (iii) to any telephone number assigned to a . . . cellular telephone service.”⁵

By contrast, Congress determined that call “initiation” triggers liability in the context of pre-recorded voice messages to landlines even if the call is not placed through an ATDS: “[i]t 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 initiate any telephone call* to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B).”⁶ While neither the phrase “make a call” or “initiate a call” is defined by the TCPA, at least one court has observed that “initiating” a call encompasses broader conduct than “making” a call.⁷

While the Commission has not previously ruled on the meaning of the phrase “make a call” it has just recently had occasion to consider the definition of the phrase “initiate a call.” In that ruling, the Commission determined that a party does not “initiate a call” until

³ 47 U.S.C. § 227(b)(1)(A).

⁴ See *Save Our Valley v. Sound Transit*, 335 F. 3d 932, 960 (9th Cir. 2003) (“We generally assume that when Congress uses different words in a statute, it intends them to have different meanings.”) (citing *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir.2003)).

⁵ 47 U.S.C. § 227(b)(1)(A) (emphasis added).

⁶ 47 U.S.C. § 227(b)(1)(B) (emphasis added).

⁷ See, e.g., *Desai v. ADT Sec. Servs., Inc.*, No. 11 C 1925, 2011 WL 2837435 (N.D. Ill. Jul 18, 2011).

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“it takes the steps necessary to physically place a telephone call”⁸ That is, until the calling party actually “attempts” a call. But, if “initiating a call” means, in essence, “attempting a call,” a fortiori, “making a call” requires something different.⁹

Tracking *Satterfield*, a call is only actually “made” when a party is successfully “communicate[d] with.” On the other hand, liability for true “robocalls” to landlines attaches the instant the robot “initiates” a call by “try[ing] to get into communication with” a customer. Thus the statute adopts the dichotomy recognized in *Satterfield*.¹⁰ Consequently, Wells Fargo urged that liability based on an “attempted call” to a cell phone using an ATDS (i.e., a call that did not result in a live connection) would be inconsistent with the statute. Wells Fargo also pointed out that the only reasonable approach is that “one call” must mean “one connect” with a “live person” so that a determination of right/wrong person can be made and said person’s desire to continue or discontinue receiving calls can be logged and thereafter honored.

B. The “one call” standard contained in the Chairman’s Fact Sheet, if adopted, will have substantial and unintended negative consequences.

Wells Fargo discussed the portion of the Fact Sheet that states, “[i]f a phone number has been reassigned, callers must stop calling the number after *one call*.”¹¹ Wells Fargo emphasized that the “one call” standard must be implemented in a way that allows the caller to know if a number has been reassigned. Common sense dictates that if the caller is just given one opportunity to call an intended recipient and no one answers the call, it is impossible for a caller to determine whether the number has been reassigned. And, given

⁸ *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; The Petition Filed by Philip J. Charvat for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules; The Petition Filed by DISH Network, LLC for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, Declaratory Ruling, 28 FCC Rcd 6574, 6583 ¶ 26 (2013).

⁹ The term “call” itself is somewhat sui generis in that, unlike most verbs, it can be applied to mean either the successful act of “calling” or the mere attempted act of “calling” depending on the context. See *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (noting that Webster's dictionary's definition of “call” as “to communicate with or try to get into communication with a person by telephone.”).

¹⁰ Importantly, only pre-recorded voice messages are at issue with respect to calls to landlines, not calls placed by ATDS. 47 U.S.C. § 227(b)(1)(B). Given the narrower purview of 47 U.S.C. § 227(b)(1)(B) – governing only pre-recorded or automated voice messages – it makes sense that Congress would adopt a lower threshold for liability for such calls. This is especially true as the annoyance of being greeted with a pre-recorded message could potentially be considered greater than being met with a live person and the potential for the invasion of privacy could potentially be considered greater as well.

¹¹ Fact Sheet at 1.

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the strict liability nature of the statute, companies may be forced to discontinue important informational calls and alerts after just one call, or potentially face financially devastating legal liability even though their customers consented to calls and alerts and expect to hear from them. As explained in more detail below, from the consumer's prospective, failure to build in the "connection" requirement means that after missing one call, an "intended recipient" now risks missing time sensitive, important information he or she needs and expects to receive.

1. *Common sense dictates that without actual knowledge, if a caller is given just one opportunity to call an intended recipient and is not connected to a person who can notify the caller that the intended recipient no longer uses that phone number, it is impossible for a caller to determine whether the number has been reassigned.*

It is unreasonable and contrary to common sense to assume that, based on a single unconnected call, the number has been reassigned and that the caller should stop calling immediately. For example, a person may be busy and not be able to answer the call. The ringer may be off, the phone may be in airplane mode, the power may be out or the battery may be dead and the ringer or phone may not work. A person may use a child's voice on an answering machine message. An automatic telephone dialer may not be able to recognize the contents of a voice message. A message may not contain any name or any personal information at all. A person may not have set up any voicemail at all or instead may use the default voicemail message, which is typically just an automated reading of the dialed number. The caller may not be able to understand the message (for example, if the message is in a foreign language). Or call forwarding could lead to mistaken conclusions about a reassignment. In those and other cases, it is impossible to accurately discern whether or not the number has been reassigned.

Moreover, it is unreasonable to base TCPA liability for the second call on the theory that companies should have jumped to such a conclusion.

If, however, the Commission requires that a caller must stop calling an intended recipient based only on one attempt and without a live connect (for any of the myriad reasons noted above), the new rules must include a safe harbor to protect against lawsuits from consumers where the consumer was deleted from a calling list based on the FCC's "one free pass" rule, and subsequently failed to receive the communications they expected and needed.

2. *The "one call" rule will force companies to stop using automatic telephone dialing systems – even though use of ATDS is permitted by statute. This will result in higher costs for consumers, depriving consumers of real-time and recurring information via the self-serve features they have become accustomed to.*

Many small and medium sized businesses, non-profits, public utilities and others depend on technology, including automatic telephone dialing technology, to operate their business models. As the number one small business lender in America, Wells Fargo pointed out that the "one call" standard will be devastating to the American entrepreneur. The "one call" standard essentially requires a live person to conduct phone calls with the impossible task of determining if the phone number dialed has been reassigned to someone other than

the person they are intending to reach. Worse, it does not solve the ongoing reality that phone numbers confirmed to belong to consumer A today could be reassigned to consumer B tomorrow.

It also effectively prohibits companies from sending out large scale and time sensitive alerts and reminders by text or call. This includes important messages and notices consumers want such as: out-of-pattern activity on their accounts, confirmation notices, low balance alerts, fee avoidance and due date reminders, as well as home preservation and disaster assistance program notices. Manual calling is simply not workable in the twenty-first century in which tens of millions of consumers expect and need real-time communications – and is particularly nonsensical in the context of text messages. A narrow exemption for fraud or data breaches fails to contemplate the sophistication of the American consumer. Moreover, even if an exemption is made for situations such as data breaches, the failure to include a “connection” requirement could mean that after missing one call on an unrelated topic (such as an out-of-pattern activity call), an “intended recipient” will be taken off of a company’s contact list – and the consumer would end up not receiving the fraud alert.

3. *Disconnect tones will not enable callers to discern with certainty that a number has been reassigned.*

The Commission should not presume that a caller can determine if a call has been reassigned based on a “disconnect tone signal.” First, numbers are temporarily disconnected for a variety of reasons (for example, for subscriber nonpayment or due to a dispute with the carrier). The “one call” standard punishes individuals who have their service temporarily disconnected, as that individual will no longer receive important and timely updates when the caller is forced to stop those messages after receiving the disconnect tone once. Second, 37 million numbers are recycled every year. There is a standard waiting period of 90 days for personal numbers, but many carriers end up assigning recycled numbers before the standard waiting period has ended. A caller simply may not call during the disconnect period (which, as stated above, is often less than 90 days). In those cases, the “one call” standard, if defined as an attempt, is woefully inadequate because the caller would never receive the disconnect tone that might clue them in to a reassignment. This applies to any form of “signaling” or “context clues” – if the caller has no reason to call when the signal is active, then the signal accomplishes nothing. “One call” must mean “one connect,” and the connect must be to a “live person.”

4. *With regard to text messaging, the sender is dependent on the recipient to inform them that the number has been reassigned.*

It is unclear how a “one call” standard would work in the text context. Wells Fargo emphasized that it makes no sense for the Commission to require that a consumer confirm with each and every text message received that the consumer is still the intended recipient. Generally, texts are sent to notify and to inform, and there is no expectation that the recipient will respond to, for example, a payment reminder, prescription notice, delivery alert, or other informational text. Wells Fargo emphasized that the Commission should think through the practical implications and likely outcome of its plan in order to ensure it does not inadvertently chill desired and expected text communications.

5. *There will be unintended costs on consumers at large.*

Equally important is the cost this decision will have on businesses and ultimately all consumers. Eliminating automated dialer technologies and mandating a “one call” standard will greatly increase business costs and the cost will eventually be passed on to customers. Thus, the vast majority of consumers will be forced to pay higher prices for products and service as a result of a relatively small number of people determined not to inform the callers that they have reached the wrong person.

C. Applying a “current subscriber” standard is unworkable for several reasons, and inconsistent with basic statutory construction.

1. *There is no national database of reassigned numbers, and callers have no way of knowing whether the subscriber to a particular phone number is the same person who provided consent.*

There is no national subscriber database that matches the names and numbers to ensure accuracy. According to CTIA, “there is no reasonable means for companies that make informational and other non-telemarketing calls to wireless numbers for which they have obtained prior express consent to know if such numbers are actually assigned to someone other than the consenting party or if they have been reassigned.”¹² Wells Fargo’s experience has been that such databases contain approximately 85% of numbers. Of those 85%, approximately 27% are listed only as “wireless caller” with no name associated with the number. Of the remainder, sometimes the names are mismatched, and abbreviations or nicknames are included.

In the Family and Business plan contexts, millions of phones habitually are used by persons who are not subscribers, do not pay the phone bill, and whose names do not appear on the phone account. Yet, a non-subscribing user of a cell phone often provides that number as their contact information on which to be called or texted.

The Commission cannot expect that under circumstances where companies must rely on their customers to update contact information as it changes – which unfortunately does not always happen – that the company will be liable for the customers’ failure to provide such information.

2. *A “subscriber” approach is inconsistent with basic statutory construction.*

The Seventh Circuit, in adopting the “subscriber” approach, observed that “called party” means “subscriber” in a *different* section of the TCPA (Section 227(b)(1)(A)(iii)), then stated that courts are to presume that the use of the same phrase means the same thing throughout a statute, concluding that “called party” must mean “subscriber” for purposes of

¹² Comments of CTIA – The Wireless Association, *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, at 4 (Mar. 10, 2014) (CTIA March 10 Comments).

the prior express consent exemption.¹³ This was not the proper analysis. The phrase “called party” *plainly has different meanings as used in different contexts throughout the statute*. 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.” A “subscriber” to a phone that is not actually using the phone cannot hang up the phone – someone else does. Clearly, here, “called party” does not mean subscriber. Indeed, the U.S. 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.¹⁴

D. Confirming that “called party” in Section (b)(1)(A) means “intended recipient” is the most rational interpretation of the statute.

1. *There is overwhelming support in the record for the conclusion that “called party” means “intended recipient” in the context of the TCPA’s “prior express consent” defense.*

As Wells Fargo noted during the meetings and in prior filings submitted to the Commission, a substantial number of commenters covering a wide group of industries all agree the Commission should clarify that “called party” means “intended recipient” because: (1) the “prior express consent of the called party” statutory defense is otherwise rendered meaningless; (2) a narrow, “intended recipient” approach will not have “unintended consequences,” but the opposite approach will otherwise have a chilling effect on important and desired business communications; and (3) it is impossible for a caller to avoid liability-inducing calls because of “wrong number” situations, i.e., number reassignment, or because someone other than the “intended recipient” answers the call.¹⁵

¹³ See *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 643 (7th Cir. 2012).

¹⁴ See *Util. Air Regulatory Grp. v. Env'tl. Prot. Agency*, 134 S. Ct. 2427, 2441, 2442 (June 23, 2014).

¹⁵ See Reply Comments of Wells Fargo at 4, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Dec. 1, 2014) (*citing* United Healthcare Services, Inc. Petition for Expedited Declaratory Ruling at 7-11, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Rulemaking*, CG Docket No. 02-278 (Jan. 16, 2014) (noting that “parties should not be liable under the TCPA for calls to reassigned numbers when they are not aware of the reassignment”) (Wells Fargo Reply Comments); Petition for Rulemaking of ACA International at 15-17, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (Jan. 31, 2014) (explaining that “the Commission should establish a safe harbor for non-telemarketing calls when the debt collector had previously obtained appropriate consent and had no intent to call any person other than the person who had previously provided consent to be called, or had no reason to otherwise know that the called party would be charged for the incoming call”); Stage Stores, Inc. Petition for Expedited Declaratory Ruling Regarding Reassigned Wireless Telephone Numbers at 4, *Rules and Regulations Implementing the Telephone Consumer*

2. *Interpreting “called party” to mean “intended recipient” in Section (b)(1)(A) is the only reading that preserves the Congressional intent behind the statutory exception.*

Consistent with Supreme Court precedent, the Commission has both the authority and the duty to interpret parts of the statute that are facially unclear, and in so doing, Commission staff “must operate ‘within the bounds of reasonable interpretation,’” “give effect to the unambiguously expressed intent of Congress,” and analyze statutory terms “in context.”¹⁶ During the meeting, Wells Fargo reiterated that “intended recipient” is the only reasonable interpretation of the term “called party” in Section (b)(1)(A) of the TCPA that is consistent with Congressional intent within the context of the statutory defense of “prior express consent.”

Furthermore, “prior express consent” becomes meaningless if a company relies on the express consent it receives, only to be made liable later when the number is transferred to a different subscriber without the knowledge of the caller, and without any way of knowing with any acceptable degree of confidence that the number has been reassigned.

Indeed, it is effectively impossible to comply with the TCPA when non-telemarketing calls are made to numbers where prior express consent was obtained, but where – through no fault of the caller – the caller reached someone other than the intended recipient (i.e., the number was reassigned, or someone other than the person who provided consent answered the phone because that person was the subscriber of the phone line, normally used the phone, or just happened to answer the phone at the time the call was made).¹⁷ This could not be the result that Congress intended.

Protection Act of 1991; Petition for Expedited Declaratory Ruling Regarding Reassigned Wireless Telephone Numbers, CG Docket No. 02-278 (Jan. 16, 2014) (“Stage Stores submits there should be an exception to liability under the TCPA for autodialed marketing calls, including text messages, made to reassigned wireless numbers where the caller had obtained prior express consent to make such marketing calls, but the wireless number has been reassigned without notice to the caller, provided the caller updates its records and ceases calls to that wireless number within a reasonable time period after being informed that the number has been reassigned.”).

¹⁶ See *Util. Air Regulatory Grp.*, 134 S. Ct. at 2441, 2442, 2445 (2014) (citing *Env'tl. Def. v. Duke Energy Corp.*, 549 U. S. 561, 574 (2007)).

¹⁷ Wells Fargo Reply Comments at 4; see also Comments of CTIA – The Wireless Association at 4, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Rulemaking of United Healthcare Services, Inc.*, CG Docket No. 02-278 (Mar. 10, 2014) (explaining that “there is no reasonable means for companies that make informational and other non-telemarketing calls to wireless numbers for which they have obtained prior express consent, to know if such numbers are actually assigned to someone other than the consenting party or if they have been reassigned”).

3. *An “intended recipient” clarification does not provide a blank slate for incessant calls to reassigned numbers; nor does it create the ability for a caller to bind a new subscriber to the previous subscriber’s consent.*

Wells Fargo reiterated that it is not arguing for the chance to continue to make calls in perpetuity to a number once that number has been reassigned.¹⁸ As the company has previously noted, once a caller is aware that a number has been reassigned and that it no longer belongs to the party that once gave consent to receive calls, that caller should then be subject to a jury’s assessment of the facts if it continues to make calls to that number.¹⁹ Particularly, a jury has the opportunity to determine whether the caller was, in fact, trying in good faith to reach its customer – a determination that should be supported by Commission guidance explaining the factors to be considered in making such a good faith assessment.²⁰

Wells Fargo also noted, consistent with previous statements, that a new subscriber would not be bound to the consent provided by the previous subscriber.²¹ Under the construct advocated by Wells Fargo, if a company called a new subscriber knowing that subscriber was not the one who provided consent to be called, the new subscriber could still bring a lawsuit, and the caller would be responsible for showing good faith.²²

4. *The FCC should provide clarification to address inconsistent court interpretations.*

Federal courts have interpreted the phrase “called party” in myriad ways, including “intended recipient,” “current subscriber,” “regular user of the phone” and “the person who happened to answer the phone.”²³ None of the approaches applied by the courts present a workable standard except for the “intended party” interpretation.²⁴ As Wells Fargo explained, even a company with its size that has the resources to implement gold standard TCPA best practices still faces TCPA lawsuits. Only the FCC can provide a consistent national interpretation – and has the responsibility to do so.

E. The FCC must thoughtfully define a dialer and continue to allow the use of automatic telephone dialing technology, as Congress expressly intended.

Companies need clear guidance as to what constitutes dialing technology that *can* be used to contact consumers. The FCC must avoid an overly broad definition of dialing

¹⁸ See Wells Fargo Notice of Ex Parte at 2, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Dec. 22, 2014) (Dec. 22 Ex Parte).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See Dec. 22 Ex Parte at 2.

²³ Wells Fargo Reply Comments at 5.

²⁴ *Id.*

technology under which virtually anything can be classified as an ATDS. Otherwise, the TCPA may become vulnerable to the argument that it is constitutionally overbroad.²⁵

The use of technology is as important for the consumer experience as it is for the caller – non-ATDS dialing technology helps companies honor consumer preferences (e.g. times of day, specific dates, and when and to what number), improves the ability of callers to honor “do not call” requests, helps govern call frequency attempts (daily, weekly, monthly), helps manage timing between calls, and helps manage content. Moreover, if the purpose of the Chairman’s proposal is to eliminate wrong number calling, then limiting the use of dialing technology may actually have the opposite effect because dialing technology helps eliminate calls misplaced due to human error.

Congress, in enacting the TCPA, provided for a very specific definition of an Automated Telephone Dialing System (ATDS): “equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”²⁶ Congress specifically intended that callers be able to use such systems in making calls so long as consent has been provided.

The term “capacity” has not been defined in the statute, nor has it been interpreted by the FCC. Clarifying that “capacity” must mean current ability – not hypothetical future ability – is consistent with the plain language of the statute (which is written in the present tense: “has” the capacity, not “could have” the capacity). If the Commission were to interpret capacity as anything other than “current ability” then virtually any type of dialing technology or equipment (or any equipment that could be retrofitted or updated through software) could qualify as an ATDS – a result not contemplated by Congress.

Non-ATDS yet sophisticated technology allows callers to provide consumers with important access to disclosures, financial assistance and personal private information via links and authentication protocols embedded in text messages and pre-recorded outbound voice message systems. Consumers expect and appreciate when their financial institutions make them aware of important happenings related to their account, and empower them through alerts and notices. For example, out of pattern activity notices, overdraft or over limit notices, fund transfer confirmations, account closures and other milestones, low balance notifications, due date reminders, information related to home preservation programs, disaster relief/FEMA related financial relief and service options,²⁷ and fee

²⁵ See *Aja de Los Santos v. Millward Brown, Inc.*, United States’ Memorandum in Support of the Constitutionality of the Telephone Consumer Protection Act, 2014 U.S. Dist. Ct. Pleadings LEXIS 3897 (S.D. Fl. Jan. 31, 2014); *Aja de los Santos v. Millward Brown, Inc.*, Order Denying Defendant’s Motion to Dismiss Plaintiff’s Second Amended Complaint, 2014 U.S. Dist. LEXIS 88711 (S.D. Fl. June 29, 2014).

²⁶ 47 U.S.C. § 227(a)(1).

²⁷ We also discussed the issue of disaster relief/Federal Emergency Management Agency alerts, which Wells Fargo sends in connection with disaster relief and federal emergencies. Wells Fargo presumes that because these are associated with emergencies by definition, these

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avoidance notices are all examples the types of beneficial messages that consumers receive from their financial institutions.²⁸ These examples of normal, expected, and beneficial communications are not possible without modern dialing technology. Congress did not intend to make dialing so difficult that consumers would no longer receive such communications.

Finally, Wells Fargo stated that it supports the ability for consumers to have choice with respect to receiving calls and texts they have consented to receive and blocking those calls and texts that they do not want to receive. Wells Fargo emphasized that carriers should not be able to independently block lawful communications that consumers have consented to receive.

Respectfully submitted,



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alerts are covered under the exemption for calls related to emergencies. *See* 47 U.S.C. § 227(b)(1)(A).

²⁸ *See* Wells Fargo Notice of Ex Parte at 2 & Ex. 3, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Jan. 26, 2014) (see attached).

ATTACHMENT

WELLS FARGO & COMPANY JANUARY 26, 2015 NOTICE OF EX PARTE

January 26, 2015

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

Re: **Notice of Ex Parte – CG Docket No. 02-278**
Wells Fargo

Dear Ms. Dortch:

On January 22, 2015, Monica Desai of Squire Patton Boggs (US) LLP, counsel to Wells Fargo, Michael Selle (Senior Counsel, Litigation, Wells Fargo Law Department), Larry Tewell (Senior Vice President, Consumer Credit Solutions, Wells Fargo & Company), Heather Enlow-Novitsky (Senior Counsel, Wells Fargo Law Department), Jennifer Peterson (Senior Counsel, Wells Fargo Law Department), John Heyse (Call Center Planning and Analysis Manager, Wells Fargo Home Mortgage), and Eric Troutman (Partner, Severson & Werson), held a series of meetings with Federal Communications Commission (FCC or Commission) staff. Those meetings were held with Adonis Hoffman (Legal Advisor, Office of Commissioner Clyburn); Travis Litman (Office of Commissioner Rosenworcel); Amy Bender (Legal Advisor, Office of Commissioner O’Rielly); Nicholas Degani (Legal Advisor, Office of Commissioner Pai); and Kurt Schroeder (Chief, Consumer Policy Division, Consumer and Governmental Affairs Bureau).

The purpose of the meetings was to discuss the urgent need for the Commission to act on the pending CBA Petition¹ and clarify that “called party” means “intended recipient” in the context of the exemption from liability provided by Congress in the Telephone

¹ Consumer Bankers Association Petition for Declaratory Ruling, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed Sept. 19, 2014) (“CBA Petition”); *see also* Comments of Wells Fargo, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Mar. 24, 2014); Reply Comments of Wells Fargo, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Dec. 1, 2014).

Consumer Protection Act for calls made with the prior express consent of the “called party.”² Specifically, representatives of Wells Fargo highlighted the following points, noting the significant multi-industry support for Commission action related to reassigned numbers (*see Exhibit 1*):

1) Recent Rhetoric in the Docket Attacking the Proposed Clarification is False and Misleading.

Staff responded to misleading statements submitted in the docket that baselessly attack CBA’s proposed clarification.³ (*See Exhibit 2*). While comments are purportedly filed on behalf of consumers, consumers do not benefit from either the confusion surrounding the law or the frivolous litigation that accompanies it. Indeed, plaintiffs’ filings state that the proposed clarification will “open the floodgates” to unwanted calling while ignoring the myriad federal and state laws and regulations that require live contact with consumers and prohibit harassing calling practices. (*See Exhibit 3*).

Moreover, Wells Fargo emphasized the many types of informational, non-marketing messages that are beneficial to consumers and which consumers expect and appreciate from their financial institutions (*See Exhibit 4*).

Commenters opposing the requested clarification fail to acknowledge that the status quo is unsustainable – numerous court rulings on the issue have generated a litany of varying interpretations of “called party.”⁴ Congress could not have intended for liability under a federal statute to depend on where the case is filed.

² 47 U.S.C. § 227(b)(1).

³ *See* National Consumer Law Center Notice of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed Jan. 16, 2015); National Consumer Law Center, *et al.*, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Letter to Commissioners Wheeler, Clyburn, O’Rielly, Pai and Rosenworcel, CG Docket No. 02-278 (filed Jan. 15, 2015) (“NCLC, *et al.* Letter”).

⁴ *See* CBA Petition at 12-13; *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”); *Soppet v. Enhanced Recovery Co.*, 679 F. 3d 637 (7th Cir. 2012) (interpreting “called party” to mean the telephone subscriber); *Manno v. Healthcare Revenue Recovery Group, LLC*, 289 F.R.F. 674 (S.D. Fla. 2014) (interpreting “called party” to mean the regular user of the telephone that received the call); and *Meyer v. Portfolio Recovery Associates, LLC*, 707 F.3d 1036 (9th Cir. 2012) (interpreting “called party” to mean the recipient of the call).

But, most critically, the average consumer is not at all served by the continuing uncertainty. Rather, it is primarily the plaintiffs' attorneys and those that are similarly situated that profit off of the confusion, and ask the FCC to maintain the status quo. (See Exhibit 5 and Exhibit 6). This includes the Consumer Federation of America, which recently received a \$1 million payment in a TCPA class action settlement⁵ and is, not surprisingly, a signatory on a letter asking the Commission to resist any clarification of this issue.⁶

Finally, opponents of clarification suggest that callers make "manual calls" prior to ATDS calls – an approach that is entirely unworkable. First, such an approach entirely defeats the purpose of being allowed to use an ATDS in the first instance, as specifically permitted and envisioned by Congress.⁷ Second, such an approach is likely to annoy consumers who will end up receiving calls from various entities "just to confirm that this is still their actual number" before receiving the call through an ATDS. Third, such an approach is not feasible as a practical matter given the sheer volume of calls that may be at issue and the time sensitive nature of delivery. Fourth, and most ironically, a caller cannot know whose consent to seek in making manual calls until the Commission defines "called party" – just because a customer answers the phone does not mean a business is protected if "called party" means "subscriber" or "recipient." Fifth, because the FCC has not yet decided whether "capacity" means "present ability" or "potential future hypothetical ability," even manual calls have been subject to TCPA lawsuits on the theory that even systems that are not currently an ATDS under the statute are "capable" of becoming an ATDS in the future through hypothetical modification, and therefore should be regulated as such now.⁸

⁵ United States District Court for the Northern District of Illinois, *JPMorgan Chase Bank Class Action Settlement Notice*, at 1 (2013) ("*Class Action Settlement Notice*"), available at http://www.classactionsnews.com/sites/default/files/downloadables/settlements/jpmorgan_chase_bank_tcpa_violation_class_action_settlement_notice.pdf.

⁶ NCLC, *et al.* Letter at 3.

⁷ 47 U.S.C. §§ 227(a)(1), (b).

⁸ Even manual calls are subject to TCPA lawsuits under the theory that even systems that are not an Automated Telephone Dialing Systems (ATDS) under the statute are "capable" of becoming an ATDS. See *Hunt v. 21st Mortgage Corp.*, 2013 U.S. Dist. LEXIS 132574, at *1, 7-8 (D. Ala. Sept. 17, 2013) (Plaintiff's suit alleged that defendant made harassing phone calls to him in violation of the TCPA and argued that, even if defendant did make all calls to him manually, the calls were still made using an ATDS because defendant's phone system was at least capable of automatic dialing.); see also 47 U.S.C. § 227(a)(1) (ATDS is defined as "equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.").

And, finally, considering a phone number might change hands at any time, today's verification may not be helpful tomorrow.

2) Only the “Intended Recipient” Approach Gives Meaning to the Statutory Defense of Prior Express Consent.

Contrary to recent false statements made in the record, the requested clarifications will not “gut” the TCPA, but will rather retain the consumer’s right to private action against calls made without prior consent, while at the same time giving meaning to the statutory defense. (*See Exhibit 7*).

Opponents of clarification fail to acknowledge that any interpretation of “called party” other than “intended recipient” would eviscerate the statutory defense that allows calls when the caller has obtained the “prior express consent” of the called party.⁹ They also fail to recognize that Congress did not intend for the TCPA to be an impediment to American businesses contacting their own customers.¹⁰ They provide no response to the fact that, as a practical matter, it is impossible for a caller to know who will answer the phone when the number is dialed, who pays for the phone line, who regularly uses the line, or if the number is shared. For those reasons, even with the numerous protocols that Wells Fargo has put in place to ensure consumer consent and call accuracy (*see Exhibit 8*), every call made to its customers is a game of TCPA “Russian Roulette.” There is no single database, or even a combination of databases, that solves the problem of TCPA liability for unintentional calls to reassigned numbers.¹¹ Even as industry adopts increasingly helpful databases and other strategies to improve customer experience, TCPA liability continues.

3) The “Intended Recipient” Clarification Shares Common Ground with the “Safe Harbor” Proposed by at Least One “Consumer Advocate.”

⁹ 21 U.S.C. § 227(b)(1)(A)(iii). This provision holds that it “shall be unlawful for any person . . . 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 automated telephone dialing system or an artificial or prerecorded voice * * * to any telephone number assigned to a . . . cellular telephone service” (emphasis added).

¹⁰ *See* House Report, 102-317 at 17, 1st Sess., 102nd Cong. (1991) (emphasizing that “the restriction on calls to emergency lines, pagers and the like does not apply when the called party has provided the telephone number of such a line to the caller *for use in normal business communications.*”) (emphasis added).

¹¹ *See* CBA Petition at 9, discussing the inadequacy of even the most stringent compliance measures to eliminate inadvertently calling reassigned numbers.

As explained in previous filings and in Exhibit 9, Wells Fargo believes that the intended recipient approach is superior to the “safe harbor” for a number of reasons.¹² Wells Fargo noted to staff, though, the many parallels between CBA’s proposal and supplemental comments filed by Robert Biggerstaff, who frequently files comments to the FCC on TCPA issues in opposition to positions taken by industry.¹³

Mr. Biggerstaff proposed four “foundational principles” and nine basic elements that he believes should underlie a “safe harbor” for “wrong number” calls. (*See Exhibit 9*). Wells Fargo highlighted to staff that, critically, Mr. Biggerstaff’s “safe harbor” proposal correctly assumes “called party” to mean “intended recipient.”¹⁴ Perhaps most important is Biggerstaff’s express recognition that the phrase “called party” must be defined in this manner *even if* a safe harbor is adopted.

Wells Fargo also explained that any proposed “safe harbor” is unworkable unless it provides for retroactive relief. For instance, Mr. Biggerstaff’s “safe harbor” proposal requires the use of a reassigned number database.¹⁵ But although TCPA litigation began in earnest five years ago or more,¹⁶ fully comprehensive reassigned number databases still do not exist today, a fact that Mr. Biggerstaff acknowledges.¹⁷ With a four year look back for statutory liability, therefore, without retroactive relief companies could be held liable for failing to use products that did not even exist at the time a call was placed. Further, advocates who blithely contend (without evidence) that it is “easier” to violate the TCPA

¹² Wells Fargo Notice of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 2-3 (July 31, 2014); Comments of Wells Fargo, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 17-19 (Oct. 29, 2014).

¹³ *See* CBA Petition; Supplemental Comments of Robert Biggerstaff, *Petition for Expedited Declaratory Ruling filed by United Healthcare Services, Inc.*, CG Docket No. 02-278 (Dec. 19, 2014) (“Biggerstaff Comments”).

¹⁴ Biggerstaff Comments at 6 (ATDS calls made to a wireless telephone number will not incur TCPA liability if, among other requirements, those calls were made to “an intended recipient from whom the caller obtained valid express consent.”).

¹⁵ Biggerstaff Comments at 6.

¹⁶ 345 TCPA cases were filed in 2010, and 825 TCPA cases were filed in 2011. WebRecon Blog/Litigation Stats, *Debt Collection Litigation & CFPB Complaint Statistics*, WebRecon (2014), available at <http://dev.webrecon.com/debt-collection-litigation-cfpb-complaint-statistics-december-2013-year-in-review/>.

¹⁷ Biggerstaff Comments at 6, 11.

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and risk litigation than to comply fail to admit the obvious – that, because reassigned number databases are not accurate, and cannot account for family plans, business plans, shared numbers, or call forwarding, full compliance is impossible, and every single call or text therefore carries TCPA litigation risk unless an “intended recipient” approach is adopted.¹⁸

For these reasons, the FCC, as the expert agency on the TCPA, has the responsibility to provide a consistent definition of “called party” that reflects that, as a practical matter, it is impossible to know who will pick up the phone when a number is dialed. CBA’s proposal to interpret “called party” to mean “intended recipient” has been met by widespread support and acknowledgment that the current market and technological realities require the “intended recipient” approach. In order to give effect to that support and meaning to the statutory defense of “prior express consent,” Wells Fargo respectfully requests that the Commission promptly clarify that “called party” under the TCPA means “intended recipient.”

Respectfully submitted,



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¹⁸ See National Consumer Law Center Notice of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 2 (filed Jan. 16, 2015).

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LIST OF EXHIBITS

1. **MULTI-INDUSTRY SUPPORT**
2. **CHART CLARIFYING THE FALSE AND MISLEADING ASSERTIONS OF PLAINTIFFS' GROUPS IN THE DOCKET**
3. **MYRIAD FEDERAL AND STATE LAWS AND REGULATIONS GOVERN THE CALLING PRACTICES OF THE BANKING INDUSTRY**
4. **CONSUMER-BENEFICIAL INFORMATIONAL COMMUNICATIONS IMPACTED BY THE REASSIGNED NUMBER ISSUE**
5. **TCPA CLASS ACTIONS BY INDUSTRY**
6. **RECENT TCPA CLASS ACTION SETTLEMENT AVERAGES**
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EXHIBIT 1

MULTI-INDUSTRY SUPPORT

Wells Fargo highlighted the broad-based support for Commission action on the issue of reassigned numbers.¹⁹ This includes groups from a diverse range of sectors such as:

- Healthcare,²⁰
- Media and telecommunications,²¹
- Food services,²²
- Education,²³
- Retail sales,²⁴ and
- Nonprofit and community-based entities.²⁵

¹⁹ See Comments of Wells Fargo, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 7 (filed Oct. 29, 2014).

²⁰ See United Healthcare Services, Inc. Petition for Declaratory Ruling, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed Jan. 16, 2014).

²¹ See Comments of Twitter, Inc., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed Nov. 17, 2014); Comments of Genesys Communications Laboratories, Inc., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed Nov. 13, 2014).

²² See Rubio's Restaurant, Inc. Petition for Expedited Declaratory Ruling, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed Aug. 11, 2014).

²³ See Comments of Coalition of Higher Education Assistance Organizations, *et al.*, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Mar. 24, 2014).

²⁴ See Stage Stores, Inc. Petition for Expedited Declaratory Ruling, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (June 3, 2014).

²⁵ See Comments of the National Rural Electric Cooperative Association and Comments of the National Council of Nonprofits, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, filed in CG Docket No. 02-278 (each filed Nov. 17, 2014).

EXHIBIT 2

**CHART CLARIFYING THE FALSE AND MISLEADING ASSERTIONS OF
PLAINTIFFS' GROUPS IN THE DOCKET**

1.	The status quo is just fine.	<p>The status quo is unsustainable. Four interpretations of “called party” are being applied in federal courts. Congress could not have intended for liability under a federal statute to depend on where the case was filed. To the contrary, the TCPA legislative history reflects that Congress did not intend for the TCPA “to be a barrier to the normal, expected or desired communications between businesses and their customers.”²⁶</p> <p>The FCC has the responsibility to interpret the phrase “called party” so as to assure uniform and predictable application across the country, and must do so consistent with the intent of Congress.</p>
2.	A compliance-minded business can avoid liability for calls to recycled cell phones by using databases, or through manual calling.	<p>Not true. There is literally no way to avoid liability and all the “best practices” in the world cannot solve the “called party” problem without a clear definition of the phrase.</p> <p>All subscriber databases available today are incomplete and are not updated in real time. Furthermore, these services do not account for shared plans, family plans, employee-paid plans or call forwarding, and cannot account for when some random other person just happens to pick up the phone. Also, certain databases are known to contain false-positives, introducing the risk that consumers may not receive certain desired information, because the database may show that their number has been disconnected or reassigned, when it has not.</p> <p>Manual dialing is also unworkable. First, it entirely defeats the purpose of being allowed to use an ATDS – as specifically permitted by Congress. Second, it will be more annoying to consumers to get multiple “just making sure</p>

²⁶ See House Report, 102-317 at 17, 1st Sess., 102nd Cong. (1991).

		<p>you are still the same person who provided permission” calls. Third, even if a customer is reached at the number provided, this may not necessarily shield a caller unless the customer is also the “subscriber” of the line or “recipient” of the later call (depending on the jurisdictional definition of “called party”). Hence, the manual calling step is irrelevant without the Commission also clarifying that “called party” means “intended recipient.” Fourth, the sheer volume of calls that may be at issue and the time sensitive nature of delivery, such as in a FEMA, fraud, or data breach situation, makes this impossible. Fifth, even manual calls have been subject to TCPA lawsuits on the theory that a manual dialer is “capable” of becoming an ATDS through hypothetical future modification. Sixth, a phone number may change hands anytime; today’s verification may be outdated tomorrow.</p> <p>Even under a safe harbor approach the FCC still has to define “called party” so that American businesses can develop systems and processes that are consistent with FCC expectations.</p>
<p>3.</p>	<p>Clarifying that “called party” means “intended recipient” will (1) “gut” the TCPA’s private right of action, and (2) leave innocent bystanders without a remedy.</p>	<p>Not true. The TCPA will continue to operate precisely as before—with the burden of proving “express consent” squarely on the caller’s shoulders. As before, innocent bystanders may file a TCPA suit against a caller with nothing more than: i) proof that a call was received on the bystander’s cell phone; and ii) proof that the call was initiated by an ATDS.</p> <p>The caller continues to have the burden of then proving the application of the “express consent” defense. In the recycled cell phone context, that requires a two-fold showing. First, the caller must demonstrate that it actually had the consent of the person it was trying to call (its customer) in the first place. Second, the caller must prove to the jury that it was still trying to reach its customer (who was indeed, the intended recipient of the call). In some circumstances the caller will prevail, and in others, the jury will conclude the caller failed to meet its burden.</p> <p>Thus the “intended recipient” interpretation assures that a compliance-minded caller can make use of the “express consent” defense as Congress intended, while still</p>

		<p>protecting innocent consumer bystanders from abusive conduct. Importantly, therefore, the TCPA’s private right of action will remain in full effect to serve its intended deterrent function, as well as to compensate aggrieved parties.</p>
<p>4.</p>	<p>Clarifying that “called party” means “intended recipient” will “open the floodgates” for wrong number calls to cell phones.</p>	<p>Not true. As explained above, the private right of action remains in full force and effect. And, myriad federal and state laws, regulations, and rules govern calling practices in other contexts.</p> <p>Additionally, the Commission is well-empowered to provide guidance to Courts regarding the proper use of the defense to assure it retains its deterrent effect, just as it did in explaining the application of vicarious liability principles to the TCPA in 2013. <i>See In re Matter of the Joint Petition Filed by Dish Network, LLC</i>, FCC 13-54, (May 9, 2013) at ¶ 46.</p> <p>The Commission can instruct fact finders to consider the following evidence in evaluating the culpability of the caller:</p> <ul style="list-style-type: none"> i) The use of one or more commercially available phone match and / or disconnect databases; ii) The proactive nature of company practices intended to regularly update customer demographics, including phone numbers, to facilitate continued accurate records; iii) The presence of simple methods for consumers to stop calls and / or inform callers of wrong numbers (e.g. “STOP” or “QUIT” options in text; opt out or stop call options in pre-recorded interactive voice response units); and iv) The fact, if present, that the Plaintiff never informed the calling party that the number had changed hands.
<p>5.</p>	<p>Since the phrase “called party” means “subscriber” in one portion of the TCPA, the phrase must mean “subscriber” in all parts of the TCPA.</p>	<p>Not correct. As the U.S. Supreme Court made clear, the presumption that the “same words mean the same thing” throughout a statute readily yields where context plainly demonstrates that Congress intended otherwise.</p> <p>Courts that have adopted the “subscriber” approach have failed to consider the different purposes for which the phrase “called party” is used throughout the TCPA.</p>

		<p>While “called party” may mean subscriber in another location, it has to mean “intended recipient” as used in the “express consent” defense because the purpose of that provision is different; i.e. to afford a meaningful defense to a compliance-minded caller who has obtained the consent of the person the caller is intending to reach.</p> <p>Also, if “called party” is interpreted “subscriber” for “express consent” purposes, businesses must seek and obtain the consent of the person that pays for their customers’ cell phone bill. Nothing in the TCPA suggests that Congress intended to require calling parties to snoop into their customer’s personal lives or finances, or that a person under a family plan had to obtain consent from their spouse if the spouse is the named subscriber on a phone plan, to receive desired communications.</p> <p>Further, the “express consent” defense was drafted with a specific purpose in mind—to afford a meaningful defense to American businesses and assure that the TCPA did not interfere with communications between those businesses and their customers.</p> <p>The express consent exception must be read to accomplish that purpose. The “intended recipient” interpretation, therefore, is the only one consistent with Congressional intent in the context of that defense.</p>
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EXHIBIT 3

MYRIAD FEDERAL AND STATE LAWS AND REGULATIONS GOVERN THE CALLING PRACTICES OF THE BANKING INDUSTRY

Myriad federal and state laws, regulations, and rules govern the calling practices of the banking industry. Wells Fargo asks that the Commission take special note of the laws, rules, and regulations that require it to establish phone contact with consumers and to please appreciate the “catch-22” that arises in attempting to comply with both those requirements and the requirements of the TCPA as they are currently being interpreted by some courts.

The mortgage servicing activities of Wells Fargo Bank are governed by:

- The Consumer Financial Protection Bureau’s “Early Intervention Rule,” which requires Wells Fargo to establish live contact or make a good faith effort to establish live contact with customers within 36 days after a mortgage loan becomes delinquent;²⁷
- Fannie Mae’s “Quality Right Party Contact,” which is a standard that establishes a code of conduct for interactions with customers with delinquent debt that includes a requirement to establish a rapport with those customers and open an ongoing dialogue to attempt to resolve the delinquency in a positive manner.²⁸ Fannie Mae also requires sending the consumer a foreclosure prevention package and then making follow-up calls to the consumer at least every 3 days until resolution of the issue;²⁹ and
- The Home Affordable Modification Program, which requires that Wells Fargo “proactively solicit” customers for inclusion in the program by making a minimum of four telephone calls to the customer at different times of day.³⁰

²⁷ 12 C.F.R. § 1024.39(a).

²⁸ Fannie Mae, *Delinquency Management and Default Prevention (Reissued), Reissuance of the Delinquency Management and Default Prevention Announcement, Servicing Guide Announcement SVC-2011-08R*, at 3, 6 (Sep. 2, 2011), *available at* <https://www.fanniemae.com/content/announcement/svc1108.pdf>.

²⁹ *Id.* at 7.

³⁰ Home Affordable Modification Program, *Handbook for Servicers of Non-GSE Mortgages, Making Home Affordable Program*, at 46 (Dec. 2, 2010), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_30.pdf.

Wells Fargo also asked the Commission to recognize that the general collection activities of any entity are governed and constrained by numerous federal laws, including:

- The Federal Trade Commission Act,³¹ which includes prohibitions on Unfair or Deceptive Acts or Practices (UDAPs);³²
- The Fair Debt Collection Practices Act (FDCPA),³³ which includes prohibitions on making collection calls to consumers at any unusual time or place known or which should be known to be inconvenient to the consumer,³⁴ and on engaging in harassing or abusive collection tactics, such as making excessive or continuous calls to the consumer's telephone or engaging the consumer in repeated conversation with the intent to annoy the consumer.³⁵ Additionally, the FDCPA provides consumers with a legal right to opt-out of receiving collections communications from the debt collector altogether;³⁶
- The Fair Credit Reporting Act (as amended by the Fair and Accurate Credit Transactions Act);³⁷
- The Fair Credit and Charge Card Disclosure Act;³⁸
- The Federal Bankruptcy Code;³⁹ and
- The Dodd-Frank Act, establishing CFPB and authorities under UDAAP.

The general collection activities of any entity are also governed by state and local laws. Some examples are:

³¹ 15 U.S.C. § 45 et seq.

³² 15 U.S.C. § 45(a)(1).

³³ 15 U.S.C. § 1692 et seq.

³⁴ 15 U.S.C. § 1692c(a)(1).

³⁵ 15 U.S.C. § 1692d.

³⁶ 15 U.S.C. § 1692c(c).

³⁷ 15 U.S.C. § 1681 et seq.

³⁸ 15 U.S.C. § 1637(c), Pub. L. No. 100-583, 102 Stat. 2960.

³⁹ Title 11 of the U.S.C., Pub. L. No. 100-583, 92 Stat. 2549.

- Illinois Collection Agency;⁴⁰
- California Rosenthal Fair Debt Collection Practices Act;⁴¹
- Florida Fair Consumer Credit Practices Act;⁴² and
- West Virginia Collection Agency Act of 1973.⁴³

⁴⁰ 225 ILCS § 425 et seq.

⁴¹ Cal. Civ. Code § 1788 et seq.

⁴² Fla. Stat. Ann. § 559.55 et seq.

⁴³ W.Va. Code Ann. § 47-16-1 et seq.

EXHIBIT 4

CONSUMER-BENEFICIAL INFORMATIONAL COMMUNICATIONS IMPACTED BY THE REASSIGNED NUMBER ISSUE

Consumers expect and appreciate when their financial institutions make them aware of important happenings related to their account, and empower them through alerts and notices. Moreover, due to the size of the American consumer marketplace, as well as the widespread household adoption of cell phones as the sole or predominant form of communication, it would be impractical to exclude cell phone numbers from use by autodial, pre-recorded voice and text technologies.

The following is a sample list, not exhaustive, of the types of communications beneficial to consumers that are sent to their cell phones:

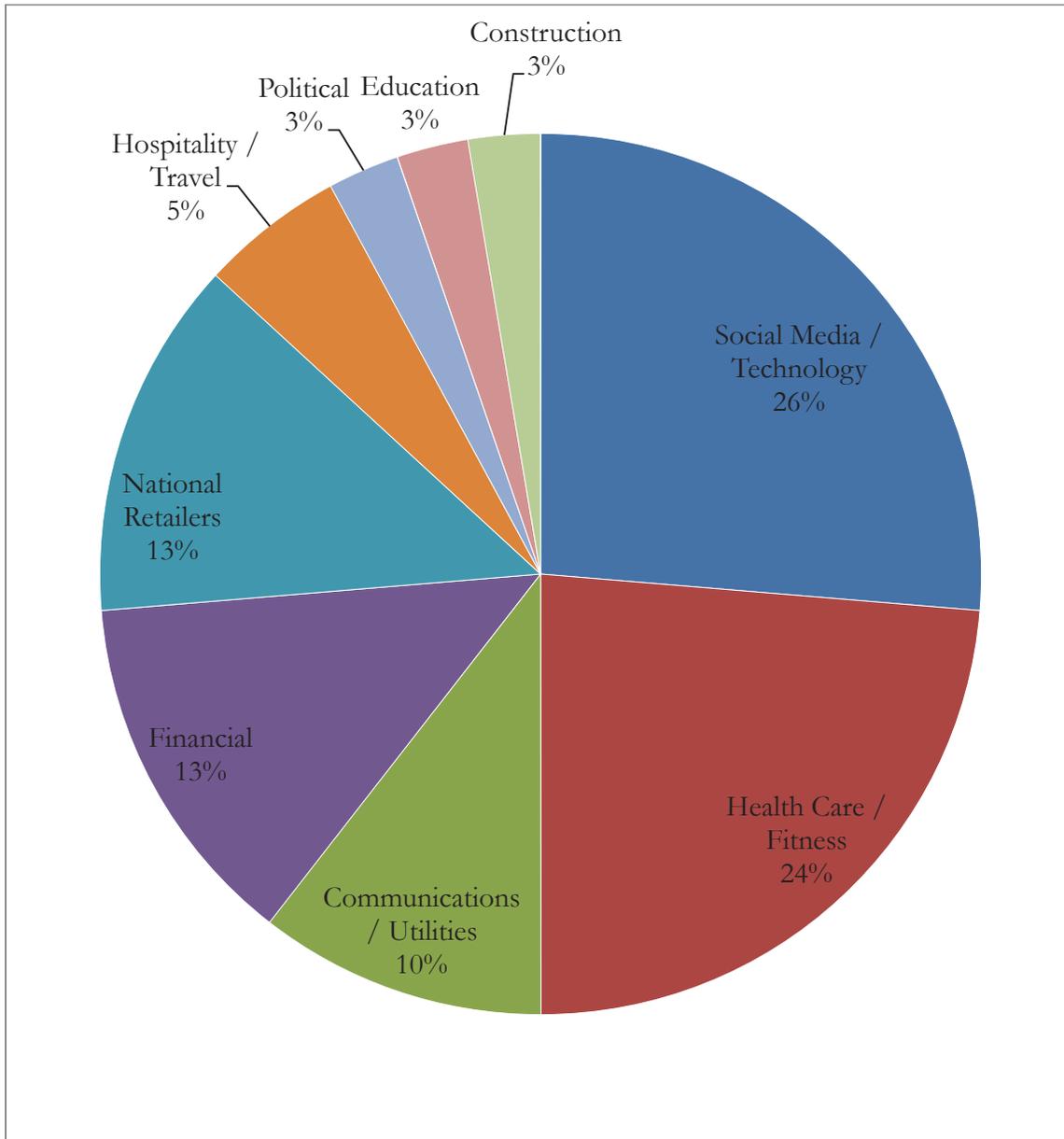
- Fraud and identity theft alerts;
- Out-of-pattern activity notices;
- Data breach information;
- Fund transfer confirmations;
- Account closure and other milestone notices;
- Low balance notifications;
- Due date reminders;
- Home preservation assistance programs (federal and private);
- FEMA disaster related financial relief and service options; and
- Fee avoidance notices (overdraft fee, late fee, over-limit fee, etc.).

Incorporating cell phones into automated technologies improves the consumer experience and generates compliance benefits such as (sample list, not exhaustive):

- Consumer contact preferences (e.g. times of day, specific dates, when and to what number);
- Improving the ability of the lender to honor “do not call” requests;
- Helping to govern call frequency attempts (daily, weekly, monthly);
- Helping to manage time between calls; and
- Improving consumer access to disclosures and financial assistance via links embedded in text messages.

EXHIBIT 5

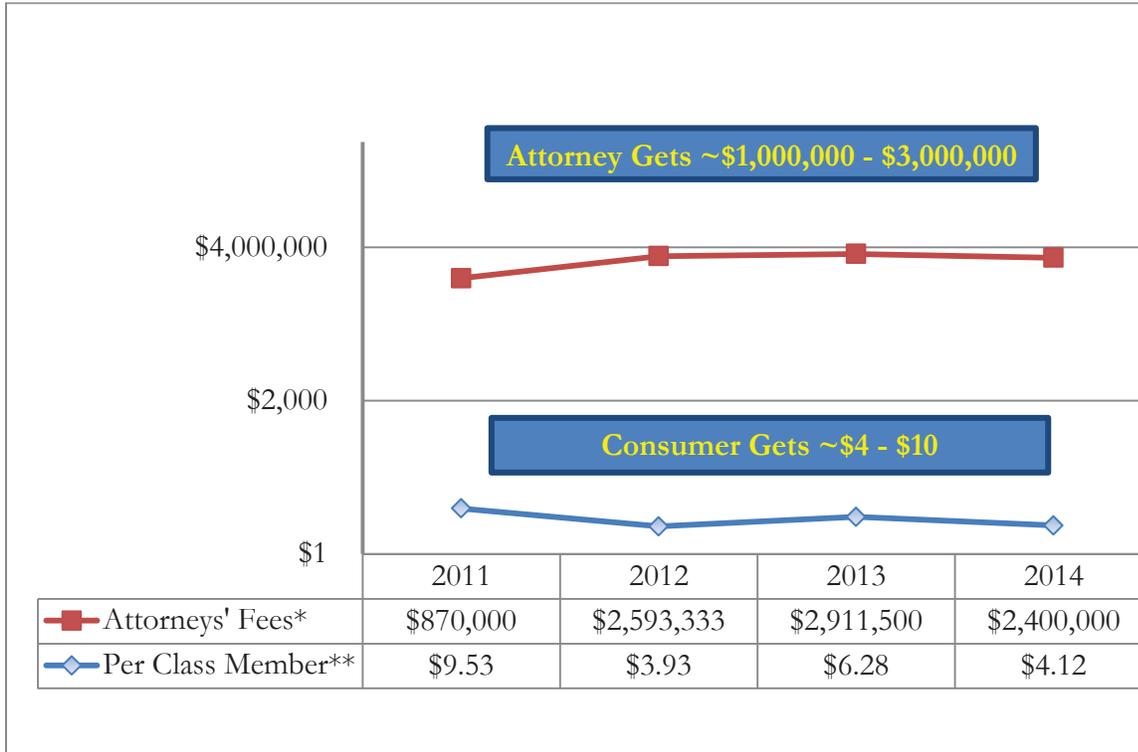
TCPA CLASS ACTIONS BY INDUSTRY



A broad spectrum of American businesses, government and nonprofits are burdened by the lack of clarity around TCPA and inconsistent court rulings.

EXHIBIT 6

RECENT TCPA CLASS ACTION SETTLEMENT AVERAGES



* The high average payments to plaintiff's attorneys make obvious their preference to continue the status quo.

** The average payments to consumers make obvious the frivolous nature of TCPA claims – these settlements are so low because the vast majority of class members do not have valid claims and it is impossible to ascertain those that do without extensive mini-trials that preclude class certification.

EXHIBIT 7

**THE “INTENDED RECIPIENT” APPROACH
RETAINS THE CONSUMER’S RIGHT TO PRIVATE ACTION
AGAINST CALLS MADE WITHOUT PRIOR CONSENT**

Contrary to recent false statements made in the record, an intended recipient approach will not open the floodgates for “wrong number” calls or “gut” privacy rights of cell phone users.⁴⁴ What this approach will do is provide consumers with a meaningful private right of action, while at the same time providing calling parties with a meaningful statutory defense when they have prior express consent to call.

The “intended recipient” approach does not (as falsely claimed by some) give a caller a blank slate to call a number forever, even after it changes hands.⁴⁵ Indeed, if the caller continues to call even after knowing that the number has been reassigned, this would evidence bad faith and the caller would be in violation of the TCPA. One determinant of whether a caller had subjective good faith when making a call should be, for example, whether the caller implemented precautionary measures to avoid a “wrong number” call. The Commission can and should provide guidance to the courts and future juries as to the factors they should take into account in assessing the subjective good faith of a caller claiming use of the “prior express consent” defense when calling an “intended recipient.” The new subscriber still has standing to bring her lawsuit – but the calling party will have the workable defense of consent that Congress expressly intended.

Finally, interpreting “called party” to mean “intended recipient” is unrelated to the “willfulness/knowing” standards of the statute applied in some cases to invoke treble damages.⁴⁶ When “called party” is interpreted to mean “intended recipient,” there remains ample room for a court or jury to determine that a calling party was not trying to reach its customer in subjective good faith or that, even if the calls were made without knowing that the number changed hands, there were other factors (such as repetition or call duration) that made the call unreasonable.

⁴⁴ Comments of Consumer Groups, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 5-7 (filed Nov. 17, 2014).

⁴⁵ 47 U.S.C. § 227(b)(1)(A)(iii). *See also* Wells Fargo Notices of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed July 21, 2014; June 19, 2014; and May 15, 2014).

⁴⁶ 47 U.S.C. § 227(b)(3).

EXHIBIT 8

BEST PRACTICES AND PROTOCOLS

Wells Fargo noted to staff some of the protocols that it employs to ensure consumer consent and facilitate call accuracy. Despite the following efforts, it is literally impossible to guarantee that a “wrong” or “recycled cell phone” number” will not be called or texted:

Steps taken to improve the consumer experience and manage consent:

- Made it easier for customers to edit contact information, keep it current, and stop unwanted calls through digital channels (web, mobile, etc.), traditional channels (mail, bank store, phone), and through consumer empowering “QUIT” or “STOP” commands in the text channel; and
- Engineered its consumer media to raise awareness of and obtain consent for: credit applications (both digital and physical), loan agreements, cardholder agreements, terms and conditions associated with account activation and setup, online disclosures, and digital channels (where consumer sign-up for fraud alerts and other account services).

Proactive activities to manage *intended party* cell phone accuracy and consent:

- Proactively adapting applications, customer agreements, terms and conditions, and certain call center scripts to inform consumers and properly obtain their consent to use mobile phone numbers;
- Phone numbers newly associated with an account (e.g. provided to Wells Fargo by family members or any non-customer source) are scrubbed daily through an enterprise scrub service to determine whether special TCPA handling is required;
- Regularly checking to determine whether a phone number is tied to a residential line or whether any landline numbers have been converted to cell numbers;
- Keeping close track of relevant rules and guidance and incorporating this information into its procedures and systems; and
- Wells Fargo Team Member policies, procedures and training emphasize the importance of updating demographics, including customer identity and associated cell phone accuracy.

Evolving practices to strengthen consent and *intended party* accuracy:

- Confirming that a call was made to the right number and right customer *verbally* during service interactions and noting responses in the account record;

- Manually dialing new-to-account cell phone numbers (obtained from noncustomer sources) to confirm identity and consent before placing calls through automated channels;
- Special policies and procedures for handling of “wrong party” and “do not call” accounts;
- Outbound-voice-response and pre-recorded message broadcasts make clear that the calling party is Wells Fargo and include instructions to report a wrong number call;
- Regular demographic validation, including cell phone number, at touch points with consumers (e.g. online, at ATMs);
- Procedures in place to shift to alternative lines of communication (e.g. email, web-based, manual call) if no contact is received from customers after an extended period of calling; and
- Leveraging one or more of the commercially available Disconnect/Recycle services to proactively identify reassigned cell phone numbers.

Wells Fargo asked that the Commission appreciate that the standards set today are out of date tomorrow, and that medium and smaller companies may be unduly burdened by arduous standards. The FCC can assist in the effort to stop unwanted calls by creating standards regarding cell phone turnover timelines and re-assignment timelines or the creation of a reassigned number database that can be accessed or bounced against.

Without additional clarifications or guidance from the FCC, and despite the numerous protocols that Wells Fargo implements to prevent unwanted calls, there is simply no way to completely avoid TCPA liability for reassigned number calls. Industry remains reliant on consumers for awareness as to cell phone ownership, but this comes with significant complications:

- Consumers often forward their calls from their originally provided numbers to other numbers that include cell phones or a third party’s cell phone;
- “Family” or “Business” plans often contain multiple cell phone numbers under a single subscriber, making specific phone number-to-person assignments difficult if not impossible;
- Vendor databases put forward by some commenters as a reassigned number solution are incomplete – they are often missing carrier data and have unacceptable false-positive identifications (this includes both assignment and disconnect databases);
- Consumer identification match keys (e.g. name, address) used by vendor databases to correlate cell phone ownership cause the data to be unreliable;

- Vendor databases suffer from timing delays and lack access to real-time mobile carrier data, which leaves unacceptable gaps in accuracy.

EXHIBIT 9

COMPARING THE “SAFE HARBOR” APPROACH PROPOSED BY ROBERT BIGGERSTAFF TO THE “INTENDED RECIPIENT” APPROACH ADVOCATED BY WELLS FARGO

Mr. Biggerstaff recommends to the Commission that four “foundational principles” should form the basis for a “safe harbor” for “wrong number” calls.⁴⁷ Mr. Biggerstaff’s recommendations, and Wells Fargo’s evaluation of those recommendations, are as follows:

1. *“Express consent for calls to a wireless phone number, once granted by a consumer, may be unilaterally revoked by the consumer at any time.”*

Wells Fargo agrees that the customer is not captive to prior consent, and that consent, once given, may be withdrawn by the customer. Wells Fargo previously discussed with the Commission that it endeavors to make it simple for the customer to edit and update contact information and to withdraw consent, and makes periodic updates to its internal processes to allow consumers to, for example, make updated online or via text message.⁴⁸

2. *“Reassigned number[s] are a fact of life. Consumers who receive a new wireless number should expect a few wrong number calls may come, but businesses relying on express consent to call wireless numbers must also expect they may reach some wrong numbers too, so training and procedures must properly anticipate and handle wrong number calls and effective policies to minimize such calls must be used.”*

Wells Fargo agrees that reassigned numbers are, indeed, a “fact of life.” Wells Fargo notes the importance of using consumer expectations as a guide for TCPA liability in regards to “wrong number” calls. Specifically, consumers who obtain a new cell phone number are likely to expect the receipt of a few stray calls intended for the previous owner of the cell phone. Recycled cell phone consumers, therefore, have a lowered expectation of privacy in the phone line than would a long-time user of a cell phone number. While unfortunate, the fact that obtaining a new wireless number may include a few nuisance phone calls intended for a previous subscriber is a “fact of life” that should not be used to deny American businesses the “express consent” defense Congress intended.

⁴⁷ Biggerstaff Comments at 2-3.

⁴⁸ See Wells Fargo Notice of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 10 (filed July 31, 2014) (“July 31 Ex Parte”).

Further, Wells Fargo agrees – and has previously discussed with the Commission – that policy, procedures, and training of employees can be valuable for updating customer demographics, including customer identity and wireless telephone accuracy, particularly when there is actual knowledge that a number has been reassigned.⁴⁹ And – the use of (or lack of) such policies, procedures and training can be useful indicia in a trial of whether the calling party was in fact trying to reach the “intended recipient.”⁵⁰

3. *“Recipients of wrong number calls have a right to expect businesses that are told they have called a wrong number, to efficiently and promptly stop future calls and texts, and for the business to properly identify itself so the recipient can accurately identify any subsequent calls from or on behalf of the same business.”*

Wells Fargo agrees that “wrong number” call recipients have a right to expect such calls to stop once the caller is informed of the number change. Wells Fargo has previously discussed with the Commission that interpreting “called party” to mean “intended recipient” does not give a caller a blank slate to call a number forever; rather, once a caller is aware that the number has changed hands its “express consent” defense all but evaporates.⁵¹

4. *“Consumers should have a right to not provide a phone number to a business for making automated or prerecorded calls and texts, and that a business cannot claim express consent was obtained to call or text any phone number that was not provided directly to the business by the consumer.”*

Wells Fargo agrees that the TCPA requires the prior express consent of the called party for calls made with an ATDS to a wireless phone, or for prerecorded/artificial voice

⁴⁹ July 31 Ex Parte at 10; *see also* [Exhibit 8](#).

⁵⁰ Once a caller is aware that a number has changed hands it will be left to the jury to determine whether or not the caller was actually still trying to reach its customer in good faith. When assessing subjective good faith, the jury may consider factors including: (i) was the caller informed the number had changed hands?; ii) when was the last time the caller reached the customer at that number?; iii) how many times did the caller call the number without a response?; and iv) what policies/training does the caller have in place to show diligence in attempting to reach only its customer? *See* Wells Fargo Notice of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 2 (filed Dec. 22, 2014) (“December 22 Ex Parte”)

⁵¹ December 22 Ex Parte at 2.

calls.⁵² The key issue, of course, is the meaning of “called party” in the context of this exemption.

Mr. Biggerstaff also recommends to the Commission nine elements for a “safe harbor” for “wrong number” calls.⁵³ Those recommendations, and Wells Fargo’s evaluation of those recommendations, are as follows:

1. *“Calls must be made to an intended recipient from whom the caller obtained valid express consent to make an autodialed call or deliver a message using an artificial or prerecorded voice.”*

- and -

2. *“Calls must be made to a number provided directly to the caller by the intended recipient of the call.”*

It is important to note that both of these elements presume that that “called party” means “intended recipient.” Wells Fargo agrees.⁵⁴

3. *“The caller must have obtained positive confirmation of express consent for that particular phone number as reaching that intended recipient when it obtained that number from the intended recipient.”*

- and -

4. *“The caller must use an approved service for identifying reassigned phone numbers at the time of the call, and the number called must not be identified by the approved service within the prior 7 days as having been reassigned subsequent to the date the caller obtained that number from the intended recipient.”*

⁵² 21 U.S.C. § 227(b)(1)(A)(iii). This provision holds that it “shall be unlawful for any person . . . 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 automated telephone dialing system or an artificial or prerecorded voice * * * to any telephone number assigned to a . . . cellular telephone service” (emphasis added).

⁵³ Biggerstaff Comments at 6-10.

⁵⁴ See CBA Petition at 3; Comments of Wells Fargo, *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, at 1 (filed Oct. 29, 2014) (“Wells Fargo Comments”).

Once again, these elements presume that “called party” means “intended recipient,” and Wells Fargo agrees. However, Wells Fargo strongly disagrees with the notion that callers should implement some sort of continual manual verification in conjunction with calls made through an ATDS. It is critically important for the Commission to understand that this is not a workable requirement. Industry-based solutions, including reassigned number databases, are currently inadequate for the purpose of avoiding TCPA liability for “wrong number” calls – a reality that Mr. Biggerstaff acknowledges as he admits that databases are not fully accurate.⁵⁵

5. *“Callers must respect any request, including one made verbally, for calls to be stopped. If the answering party indicates that the caller has reached a wrong number, that must be treated as revocation of consent for calls and messages to that number.”*

Wells Fargo agrees, and, as emphasized above, interpreting “called party” to mean “intended recipient” does not give the caller a blank slate to call a number indefinitely.⁵⁶

6. *“There must be an automated opt-out on all artificial or prerecorded voice calls and texts.”*

Wells Fargo agrees, noting that its outbound-voice-response and pre-recorded message broadcasts includes instructions to report a wrong number call. (See Exhibit 8).

7. *“There must be accurate identification of the caller, including accurate callerID.”*

Wells Fargo agrees, noting that its outbound-voice-response and pre-recorded message broadcasts make clear that the calling party is Wells Fargo and includes instructions to report a wrong number call. (See Exhibit 8).

8. *“Applies only for non-solicitation calls.”*

Wells Fargo takes no position on this element, but noted to the Commission that the requested clarification is intended to facilitate the provision of informational, non-marketing messages to customers who provide consent to receive such messages.

9. *“Applies only for [Free to End User or FTEU] calls.”*

Mr. Biggerstaff’s proposal that the “intended recipient” clarification apply only to FTEU services is not workable, primarily because not all carriers offer FTEU services.⁵⁷

⁵⁵ Biggerstaff Comments at 6, 11.

⁵⁶ December 22 Ex Parte at 2.

Indeed, as of 2012, the majority of carriers did not support FTEU messaging.⁵⁸ Limiting the clarification to FTEU services would deprive callers of the ability to contact consumers who use carriers that do not provide FTEU services, and would require an additional unsustainable hurdle to the use of automated technology—checking whether each number to be dialed is assigned to a FTEU compliant-carrier. While the unintended consequences of such a requirement are difficult to predict, the most likely outcome is that consenting consumers who use carriers that do not offer FTEU services will be deprived of expected, desired and appropriate contact.

In sum, although Mr. Biggerstaff's proposal diverges from CBA's proposed "intended recipient" in certain respects, the extensive commonalities between the two proposals – in particular, with regard to the core principle that "intended recipient" is a logical and necessary clarification of "called party" in the context of the "prior express written consent of the called party" statutory defense against TCPA liability – demonstrate the breadth of support for this much needed clarification.

⁵⁷ Mobile Marketing Association, *U.S. Consumer Best Practices for Messaging*, Version 7.0, at 42 (Oct. 16, 2012).

⁵⁸ SoundBite Communications Notice of Ex Parte, *SoundBite Communications, Inc. Petition for Declaratory Ruling*, CG Docket No. 02-278, at 4 (filed Jun. 8, 2012).