

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

In the Matter of)	
)	
Petition for Reconsideration of the American Bankers Association)	CG Docket No. 02-278
)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)	WC Docket No. 07-135
)	

**PETITION FOR RECONSIDERATION OF THE AMERICAN BANKERS
ASSOCIATION**

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SUMMARY

The American Bankers Association¹ (ABA) requests reconsideration and modification of the exemptions granted to financial institutions in the Commission’s Declaratory Ruling and Order adopted June 18, 2015.² Specifically, modification is necessary to ensure that the purpose of the exemptions—to allow ABA’s member banks and other financial institutions to provide time-sensitive messages to consumers—is not unintentionally thwarted by an unnecessary condition imposed on those exemptions.

Subject to specified conditions, the exemptions permit financial institutions to send automated, free-to-end-user calls and texts to mobile devices concerning potentially fraudulent transactions, breaches of the security of customers’ personal data, remediation measures needed to prevent identity theft, and notification of money transfers.³ In the Declaratory Ruling and Order, the Commission correctly concludes that the urgency and value of these communications justify exemption from the Telephone Consumer Protection Act (TCPA) requirement that the calling party obtain the recipient’s prior express consent to be called at a mobile number by automated means.⁴ However, the Declaratory Ruling and Order permits the exempted calls and texts to be sent only to “the wireless telephone number provided by the customer of the financial institution.”⁵

¹ The American Bankers Association is the voice of the nation’s \$15 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$11 trillion in deposits and extend more than \$8 trillion in loans.

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, American Bankers Association Petition for Exemption*, CG Docket No. 02-278, WC Docket No. 07-135 (Declaratory Ruling and Order released July 10, 2015) (*Order*).

³ *Order*, ¶¶ 127-139, 167.

⁴ *Order*, ¶ 132.

⁵ *Order*, ¶ 138(1). As further discussed in this Petition, the provided-number condition was not proposed by ABA or by any commenters in the public notice proceedings on

As explained more fully in this Petition, this condition will limit severely the ability of banks to send, and of customers to receive, the urgent calls and texts covered by the exemptions, with no offsetting benefit to customers and without advancing the privacy rights the TCPA is intended to serve. Moreover, by largely limiting exempted calls to those sent to customer-provided mobile contact numbers, this condition significantly reduces the exemptions' value to customers, who can already receive urgent messages covered by the exemptions, on a non-free-to-end-user basis, if prior express consent has been granted.

To ensure that the exemptions benefit consumers, ABA requests that the Commission reconsider the provided-number condition and adopt a condition stating that exempted calls and texts may be sent only to affected customers and money transfer recipients.⁶ Adoption of the proposed condition would restore the exemptions' benefits without increasing the risk that the exemptions will be abused.

ABA's Petition for Reconsideration. *See* p. 14, *infra*. Accordingly, "the facts or arguments relied on [in this Petition] were unknown to petitioner until after [its] last opportunity to present them to the Commission, and [ABA] could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity . . ." 47 C.F.R. § 1.429(b)(2). It is therefore appropriate for the Commission to consider the arguments presented in this Petition.

⁶ Petition for Exemption of the American Bankers Association, CG Docket No. 02-278 (Oct. 14, 2014), p. 17 (*Petition for Exemption*).

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In its Order adopted on June 18, 2015, the Commission granted the four exemptions to TCPA prior express consent requirements sought by ABA’s Petition for Exemption: to allow financial institutions to send automated, free-to-end-user time-sensitive fraud alerts, data breach notifications, breach remediation messages, and money transfer notifications to mobile devices. However, without discussion or explanation, the Order limited the exemptions to calls and texts that are sent, “if at all, only to the wireless telephone number *provided by* the customer of the financial institution.”⁷

This provided-number condition is substantially more restrictive than the limitation on the permissible recipients of exempted calls proposed in ABA’s Petition for Exemption:

In the case of fraud/identity theft, data security breach, and remediation messages, automated alert messages will be sent to the telephone numbers of financial institution customers whose accounts or

⁷ Order, ¶ 138(1) (*emphasis added*).

personal information is at risk. In the case of money transfer notices, messages will be sent only to the designated recipients of transferred funds.⁸

As further explained in this Petition, the substitution of the provided-number restriction for the condition proposed by ABA deprives the exemptions of much of their purpose and potential value. By requiring exempted calls and texts to be sent only to contact numbers that customers have provided to the caller, the condition would appear largely to limit those calls and texts to cases in which the TCPA's prior express consent requirement already is satisfied, inasmuch as the Commission has found that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."⁹ In effect, the Commission's condition on the exemption seems to be tantamount to saying that the caller in these exigent circumstances can avoid the requirement for prior express consent if prior express consent has already been given. That would appear to render the exemptions, which are intended to remove the prior express consent requirement, to a significant degree superfluous.

With regard to impact on customers, by preventing the use of customer numbers reliably obtained from non-customer sources, and by imposing a new and unnecessary record-keeping requirement, the condition severely restricts the universe of customers to which these time-sensitive messages will be sent. These adverse effects are not offset by any public-interest benefits, and the condition therefore should be removed.

⁸ *Petition for Exemption*, p. 17.

⁹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8769 (1992).

I. THE RESTRICTION UNDERMINES THE EXEMPTIONS' PURPOSE TO FACILITATE BROAD OUTREACH TO AFFECTED CONSUMERS

The provided-number condition prevents consumers from receiving time-sensitive information that could prevent considerable harms to the consumer or mitigate the extent of those harms. One large bank reports that the provided-number restriction would stop 75% of the calls and texts that it sends to alert customers to time-sensitive events like potential fraud on an account or a data breach.

The provided-number condition thus runs counter to the Order's recognition that financial institutions must quickly communicate with consumers when a circumstance covered by the exemptions is present. In the Order, the Commission found that fraud alerts, data security breach messages, and remediation notices "are all intended to address exigent circumstances in which a quick, timely communication with a consumer could prevent considerable consumer harms from occurring or, in the case of the remediation calls, could help quickly mitigate the extent of harm that will occur."¹⁰ Similarly, the Commission found that money transfers, which often are sent to persons with whom the sender does not have an existing relationship and from whom consent to receive a transfer notification cannot feasibly be obtained, "can be especially time-sensitive in emergency situations where consumers may need immediate notification that they have received money from another party."¹¹

Most perversely, the provided-number restriction substantially reduces the incentive for financial institutions to make use of the exemptions. If financial institutions can establish that the mobile numbers to which they place automated calls were provided

¹⁰ *Order*, ¶ 132.

¹¹ *Id.*, ¶ 133.

by the customers, the prior express requirement has been satisfied as to those calls in most instances.¹² Accordingly, financial institutions simply could bypass the exemptions and place fraud-related calls without incurring the cost of sending the calls on a free-to-end-user basis. This is the opposite of the result the Commission intended when it granted the exemptions.

The Commission rightly concluded that, under the circumstances covered by the exemptions, the FCC's regulations and orders should promote rapid outreach to as many affected consumers as possible. The Commission exempted these calls from the prior express consent requirement precisely because it interfered with that goal. The provided-number condition interferes with that goal too, and it should be removed.

A. FINANCIAL INSTITUTIONS MUST BE PERMITTED TO MAKE EXEMPTED CALLS TO NON-CUSTOMER PROVIDED NUMBERS

Fraud and identity theft prevention require rapid contact with as many affected consumers as possible, as the Commission concluded in its Order. Financial institutions do not wish to restrict their fraud prevention calls to customer contact numbers that can be proved to have been furnished directly by their customers. They prefer to use any contact numbers that they reasonably believe to be those of their customers, subject to internal controls that ensure the reliability of that information. There is no sound basis to prevent financial institutions from sending messages to these numbers.

Some non-customer provided numbers are obtained in the course of satisfying financial institutions' legal obligations. For example, the USA PATRIOT Act requires

¹² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8769 (1992).

these institutions to take reasonable measures to confirm their customers' identities.¹³

This process often includes checking customer-provided information against information from other sources, which might be used to correct erroneous or incomplete contact information provided by the customer. If the verification process results in a financial institution acquiring a mobile number that was not furnished by the customer, the institution may wish to use that number to contact the customer for any lawful purpose, including notification of fraud events.

Similarly, a longtime payment card customer might have furnished a contact number when the account was opened but which number no longer is valid. In this instance, the issuing financial institution might acquire a number from a third-party source that reliably can be used to contact the customer in the event of a possible fraud event.

Also, financial institutions often obtain customer contact numbers from other institutions, such as when financial institutions merge or are acquired, or when customer accounts are transferred from one institution to another at the customer's direction. In these instances, the customer's current financial institution may not have access to the documents establishing the account, where the origin of the customer's mobile number is most likely to be noted.

Finally, in the event of a data security breach that impacts the integrity of a financial institution's records, third-party sources might be the only feasible means of reconstituting customer contact information and facilitating critical communications with those customers.

¹³ See 31 C.F.R. § 103.121.

As discussed further below, financial institutions have strong incentives to ensure the reliability of these numbers before they are used. Accordingly, internal controls established by financial institutions maximize the likelihood that these contact numbers, although not acquired directly from the institutions' customers, are reliable. Although the TCPA may prevent mobile numbers obtained in these ways from being used for automated, non-exempted communications unless prior express consent can be obtained by other means, there is no reason why those numbers should not be used in exigent circumstances such as a notification of potential fraud or a breach in the security of the customer's personal information. The provided-number restriction undermines the ability of institutions to prevent or reduce harm to as many customers as possible.

B. THE PROVIDED-NUMBER CONDITION IS A RECORD-KEEPING REQUIREMENT THAT CONSTRAINS FINANCIAL INSTITUTIONS FROM ALERTING CONSUMERS QUICKLY TO TIME-SENSITIVE INFORMATION UNDER THE EXEMPTIONS

The provided-number condition imposes a *de facto* record-keeping requirement that can be difficult in many cases to meet, frustrating the exemptions' purpose of allowing financial institutions to provide time-sensitive fraud alerts, data breach notifications, breach remediation information, and money transfer notifications to all affected consumers.

Under the condition, before a financial institution may send a message to a customer, pursuant to the exemption, it must determine that it obtained the customer's mobile number directly from the customer and not from another source. This condition thus requires the financial institution not only to obtain the customer's mobile number from the customer but to *document* that action sufficiently, and perpetually to retain that

documentation to avoid being subject to a legal action challenging the institution's declaration that it obtained the number from the customer.

For example, the provided-number condition will discourage financial institutions from sending messages to mobile numbers that customers provided in the course of a telephone call or face-to-face conversation with an employee of the institution. Even if the financial institution memorialized the communication in writing, the absence of an audio recording could expose the financial institution to claims that the customer did not provide the number—and thus lead the financial institution not to make calls to numbers obtained orally.

The provided-number condition could also lead to liability for financial institutions that rely on the mobile number provided by a consumer with a joint account to call that consumer's spouse. For example, if the consumer's spouse subsequently obtained a separate account, the financial institution might be liable for calling the spouse using the number provided by the consumer in connection with the joint account.

Finally, as discussed earlier, contact numbers obtained from third-party sources, including other financial institutions, may not be supported by available records indicating how the numbers were acquired. Accordingly, even numbers that were acquired from customers might not be accompanied by documentation of that fact. The threat of litigation based upon calls placed to those numbers will mean that those numbers simply are not used and that customers are not notified of fraud and identity theft risks in timely fashion.

Because of these barriers, financial institutions will be inhibited, in many instances, from using their databases to place *any* exempted calls—even calls to numbers

provided by a customer—because of the difficulty of proving, in the event of a legal challenge, that those calls were placed to customer-provided numbers.

Perversely, the steps the financial institution must take under the provided-number condition—to obtain the number, document that action, and perpetually preserve that documentation—are akin to the TCPA’s prior express consent requirement, which allows a financial institution to contact a consumer’s mobile device by automated means if it has received the consumer’s prior express consent to make the contact. This result is inconsistent with the Commission’s expressed intent that the exemption *remove* the burden of the prior express consent requirement from senders of exempted communications.

II. THE PROVIDED-NUMBER CONDITION UNDERMINES THE PURPOSE OF THE ORDER

The provided-number restriction renders the exemptions granted by the Order in too many instances superfluous by imposing a requirement—*i.e.*, that the number be obtained from the customer—that if met would already satisfy the underlying requirement for prior express consent. Thus no exemption would be needed. As a result, the condition undermines the purpose of the Order and minimizes the exemption’s benefit to consumers.

ABA’s Petition for Exemption was brought under 47 U.S.C. § 227(b)(2)(C), which allows the Commission to exempt free-to-end-user calls from the TCPA’s prior express consent requirements, subject to such conditions as the Commission may prescribe as necessary to protect privacy rights.¹⁴ The entire purpose of this exemption

¹⁴ 47 U.S.C. § 227(b)(2)(C).

provision is to relieve callers of the burden of obtaining and proving prior express consent when that requirement does not serve the public interest, as long as exempted messages are sent without charge to the called party.

Consistent with the statutory purpose, the Commission’s Order confirms that the exigent circumstances of the exempted messages makes setting aside the prior express consent requirement acceptable. As the Order correctly puts it, “the requirement to obtain prior express consent could make it impossible for effective communications of this sort to take place.”¹⁵

Unfortunately, the provided-number condition operates effectively to reinstate the very requirement that the Order found it necessary to waive. The most common method of obtaining customers’ prior express consent to receive automated, informational messages at mobile numbers is to collect contact numbers from those customers, in keeping with the Commission’s finding that “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number with they have given, absent instructions to the contrary.”¹⁶

Although relevant constraints must continue to be observed when callers place automated calls to mobile numbers that are not exempted under section 227(b)(2)(C), the statute’s purpose—and that of the Commission when it granted the exemptions—is to remove those constraints when the section 227(b)(2)(C) requirements are satisfied. To impose a provided-number condition is to remove with one hand what was granted with

¹⁵ *Order*, ¶ 132.

¹⁶ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8769 (1992).

the other. As the preceding discussion shows, this is more than a logical error and will have adverse, real-world consequences for consumers.

III. THE PROVIDED-NUMBER RESTRICTION IS UNNECESSARY TO PROTECT CONSUMERS' PRIVACY

Because the provided-number condition was adopted without explanation and was not proposed or discussed in comments, ABA is at a disadvantage in attempting to identify and respond to any public-interest or consumer-protection concerns on which the Commission based the condition. ABA is confident, however, that the provided-number condition of the Order is not required to protect consumers' privacy or prevent their receiving anti-fraud-related messages that are not intended for them.

Importantly, the other conditions imposed on the exemptions ensure that exempted calls and texts are placed only to consumers affected by the threat of fraud or identify theft or to recipients of money transfers—and are not knowingly sent to persons other than those who need the information contained in these communications.

Most significantly, the conditions imposed on the exemptions include a requirement that recipients must have “an easy means to opt out of future such messages.”¹⁷ Any financial institution customer (or money transfer recipient) may avoid receiving such messages by simply opting-out of future messages.

The other conditions also provide robust protection to consumer privacy:

The requirement that exempted messages must be free to end users places the cost of those messages on the calling financial institution, thereby providing the institution with an incentive only to call mobile numbers of customers whose accounts may have

¹⁷ *Order*, ¶ 138(6).

been impacted by breach or fraud, or consumers who should be notified of a money transfer. In addition, the prohibition on including marketing or debt collections content in the messages prevents the financial institution from benefitting financially from sending misdirected messages.

A financial institution will have a reasonable basis to believe it is calling the party affected by a fraud or identity theft incident, or the intended money transfer recipient. For example, as discussed above, when a financial institution obtains customer information through a USA PATRIOT Act inquiry, it follows verification procedures required by that statute. Similarly, if a financial institution obtains a contact number from another institution that has a documented relationship with the customer, or through a telephone conversation or face-to-face contact between the customer and its own employee, it has a reasonable basis to believe that the contact number is that of the customer.¹⁸ In the rare case that a number is not that of the customer or money transfer recipient, future calls to that number can be readily prevented by the customer's use of the required opt-out option.¹⁹

¹⁸ A number of statutes and regulations recognize that customer information obtained from third-party sources can be as reliable as, or more reliable than, information furnished directly by customers. For example, besides the USA PATRIOT Act, already mentioned, the Red Flags regulations adopted by the Federal Trade Commission and federal financial regulators require financial institutions to consult third-party information sources as appropriate to authenticate information provided under circumstances that give rise to a risk of identity theft. *See* 16 C.F.R. §§ 681.1 *et seq.* Similarly, the Fair Credit Reporting Act requires consumer reporting agencies to take reasonable steps to ensure the accuracy of data on which they rely in preparing consumer reports. 15 U.S.C. § 1681 *et seq.* These statutes and regulations reflect a judgment that there is no reason to assume that information acquired from sources other than the customer is especially prone to error or abuse.

¹⁹ As noted earlier, even reliance upon customer-provided numbers cannot be entirely free of error, as when a longstanding customer's contact number goes out of date. In those

CONCLUSION

ABA and its members appreciate that the Commission granted limited exemptions from the prior express consent requirement for four categories of urgent informational messages, and we look forward to implementing those exemptions. The Commission's decision to grant this Petition for Reconsideration will ensure that the exemptions achieve the consumer protection goals they were intended to advance.

Because no commenter on ABA's Petition for Exemption advocated the replacement of the condition proffered in the Petition with the unexplained, provided-number limitation set out in the Order, this Petition is ABA's first opportunity to address the severely limiting impact of the condition. ABA will of course be pleased to answer any questions the Commission might have, and will provide any additional information the Commission needs in order to reach a prompt decision on this Petition.

Respectfully submitted,

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cases, numbers acquired from third-party sources can correct the problem and ensure that vital communications to the customer are not prevented.