

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

In the Matter of

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

**COMMENTS OF THE DIRECT MARKETING ASSOCIATION
AND
THE NEWSPAPER ASSOCIATION OF AMERICA**

The Direct Marketing Association (“The DMA”) and the Newspaper Association of America (“NAA”) appreciate the opportunity to comment on the notice for a “wireless safe harbor.” We first thank the Federal Communications Commission (“FCC” or “Commission”) for its attention to this important issue and proceeding with our Petition for Declaratory Ruling, which we incorporate by reference into these brief comments (attached as Exhibit 1).

The Telephone Consumer Protection Act of 1991 (“TCPA”) prohibits the use of automated dialers to make commercial calls to a number for which the called party is charged. This includes wireless numbers. Until November 24, 2003, marketers using the telephone to advertise to consumers were able to avoid calling wireless or cellular telephones because the private sector, including The DMA, maintained lists of numbers assigned to wireless carriers that marketers were able to use to “scrub” wireless numbers from any telemarketing campaign. That workable and simple solution can no longer ensure that marketers avoid calling wireless numbers because consumers now have the freedom to “port” a wired number to a wireless carrier. No longer do lists of numbers assigned to wireless carriers represent the universe of wireless numbers.

In order for marketers to avoid violating the TCPA, they must (1) know what wired numbers have been ported to wireless carriers and (2) scrub those numbers from their telemarketing campaigns. The DMA and NAA have conducted lengthy and ongoing negotiations with NeuStar, Inc. (“NeuStar”) to obtain a list of wired numbers ported to wireless carriers. NeuStar has recently informed The DMA and NAA that it has obtained permission from the North American Portability Management LLC to provide private parties such a list. The DMA and NAA are hopeful that NeuStar is now in a position to make an offer for commercial access to the list. The DMA and NAA urge the FCC to remain supportive of their efforts to move forward with this project and keep it on an accelerated track.

Any list obtained from NeuStar will contain only the wired numbers that would have ALREADY been ported to wireless prior to creation of the list. Therefore, a safe harbor must be established. Of course, any rule should include specific prohibitions against use of this list for any purpose other than suppression of calls to wireless or cellular telephones. We would expect the FCC to vigorously “prosecute” violations of that prohibition. In addition, The DMA and NAA expect that NeuStar will limit, through contractual provisions, use of the list solely for scrubbing wireless numbers.

Once marketers can obtain the list, they will require time to scrub those numbers from their telemarketing campaigns and disseminate them to their telemarketing service bureaus. Until the marketer can scrub the list, it is possible that wireless numbers may be called. This places all telemarketers in a dilemma. They do not know what “wired” numbers have been ported. To avoid violation of the TCPA, they would have to cease making ALL calls. The TCPA and the FTC’s Telemarketing Sales Rule are intended to balance consumers’ preferences while allowing the \$106.6 billion consumer telephone marketing industry to continue a dialogue

with current and new customers. Without a rational fix of this porting problem, however, the purposes of the TCPA would be defeated.

A safe harbor for marketers which allows them time to scrub those ported numbers is the answer. It meets both the literal requirements and the spirit of the TCPA. As we stated in our petition, we believe that under *Chevron, U.S.A., Inc v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the FCC has the authority to fill in gaps left by the TCPA. The inability of marketers to comport with the wireless calling requirements of the TCPA clearly is a gap that has appeared in the statute as the result of technological advances that Congress could not have foreseen in 1991 that the FCC should fill. We believe that the FCC should fill the statutory gap with a wireless safe-harbor of at least 30 days. The period of at least 30 days matches the 30-day time period marketers are given to scrub the numbers of consumers requesting not to be called again from telemarketing campaigns (their in-house suppression list). The past 12 years show that the 30-day period is workable. A 30-day period also closely parallels the new Federal Trade Commission 31-day rule that was mandated by Congress for downloading the National Do-Not-Call Registry. Thus, we believe such a period is reasonable.

The wireless safe harbor would grant the marketer a period of at least 30 days during which the marketer would not be liable under the TCPA for erroneous call to wireless numbers newly ported from wired numbers. DMA and NAA members are not in the business of violating provisions of the TCPA, but without the safe harbor, they must either abandon a proven, effective marketing channel or face inadvertent violations. We want neither. The safe harbor makes sense: it will protect both consumers and marketers; it will not eliminate the channel; and it is within the FCC's power.

We respectfully request the Federal Communications Commission establish as part of the TCPA rules, *see Alaska Department of Environmental Conservation v. Environmental Protection Agency*, 540 U.S. ___, No. 02-685, Slip Op. at 21-22 (Jan. 21, 2004) (stating the rule that agency *regulations* and not other policy statements are afforded full “*Chevron*-style deference”), a 30-day wireless safe harbor for marketers calling wireless numbers newly ported from wired numbers.

Respectfully submitted,

H. Robert Wientzen
President and CEO
Gerald Cerasale
Senior Vice President, Government Affairs
The Direct Marketing Association, Inc.
1111 19th Street, N.W., Suite 1100
Washington, DC 20036
(202) 955-5030

John F. Sturm
President and CEO
Paul J. Boyle
Senior Vice President, Public Policy
Newspaper Association of America
1921 Gallows Road, Suite 600,
Vienna, VA 22182-3900

Ian D. Volner
Heather L. McDowell
Ronald M. Jacobs
Venable LLP
575 7th Street, NW
Washington, DC 20004-1601
(202) 344-4000

Counsel for The DMA

April 15, 2004

Exhibit 1

DMA and NAA Petition for Declaratory Ruling
January 29, 2004

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

In the Matter of

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

PETITION FOR DECLARATORY RULING

The Direct Marketing Association (“The DMA”)¹ and the Newspaper Association of America (“NAA”)² hereby petition the Federal Communications Commission (“FCC” or “the Commission”), pursuant to 47 C.F.R. § 1.2 to issue a declaratory ruling in the above-captioned docket³ to establish a “wireless safe harbor.” Such a safe harbor is within the Commission’s authority and is essential in an age of wireline numbers being ported to wireless numbers. This safe harbor would recognize the technological steps that industry has taken to avoid placing autodialer calls to wireless numbers while allowing marketers sufficient time to suppress wireless numbers that have been ported from wireline numbers without being penalized under the Telephone Consumer Protection Act of 1991 (“TCPA”).⁴ This petition does not address the separate question of what type of “consent” a marketer must have obtained to call a landline number that is subsequently ported to a wireless number. The safe harbor issue arises only if consent has not been obtained.

¹ The DMA is the leading trade association for businesses interested in interactive and database marketing, with nearly 4,700 member companies from the United States and 53 other nations. Founded in 1917, its members include direct marketers from every business segment as well as the nonprofit and electronic marketing sectors. Included are catalogers, Internet retailers and service providers, financial services providers, book and magazine publishers, book and music clubs, retail stores, industrial manufacturers and a host of other vertical segments, including the service industries that support them.

² NAA is a nonprofit organization representing the \$55 billion newspaper industry and more than 2,000 newspapers in the U.S. and Canada. Most NAA members are daily newspapers, accounting for nearly 90 percent of the U.S. daily circulation. More than 60 percent of NAA member newspapers have a circulation size of 25,000 or less.

³ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, CG Docket No. 02-278 (“Report and Order”).

⁴ *See id.* at ¶¶ 204-206.

There currently is no wireless safe harbor under either the TCPA or the Commission's recently released Memorandum Opinion and Order ("LNP Order") on telephone number portability leaving marketers virtually no way to make calls in compliance with the TCPA.⁵ Without a safe harbor, it will be impossible for marketers to honor the literal language of the TCPA because, even with access to information provided by NeuStar about wireline numbers that have been ported to wireless, marketers cannot instantaneously update their call lists. It is inevitable that somewhere between the time a number is ported and the time a marketer can update its calling lists a marketer will place an auto-dialed telemarketing call to the now-wireless number. This exposes well-intentioned marketers who are using every method short of manual dialing to avoid calls to wireless numbers to thousands of potential lawsuits, as well as state and federal enforcement.⁶

Thus, The DMA and NAA urge the FCC to create a "wireless safe harbor" that is modeled on the "Do-Not-Call" safe harbor provisions of the TCPA.⁷ Under the wireless safe harbor we propose, if a marketer adheres to procedures that are similar to the Do-Not-Call safe harbor, including subscribing to a wireless suppression service and using a version of the data that is no more than 30 days old, then a marketer will not be liable under the TCPA for erroneous calls to wireless numbers. This 30-day time period is much shorter than the three-month period for downloading updates to the National Do-Not-Call list and is consistent with the maximum time that is permitted to honor a company-specific do-not-call request.

The Commission has ample authority to establish a wireless safe harbor, particularly given the ambiguity in the TCPA with reference to "telephone number(s) *assigned to a . . .*

⁵ See Telephone Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, CC Docket 95-116 (Released Nov. 10, 2003)("LNP Order").

⁶ See Report and Order at ¶¶ 204-206; *see also* 47 U.S.C. §227(b)(3), (c)(5), (f) (2003).

cellular telephone service . . . or any service for which the called party is charged.” 47 U.S.C. § 227(b)(1)(A)(iii)(emphasis added). Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the commission is given deference to define ambiguous terms. Even if this phrase might have seemed clear at the time the TCPA was enacted, it is unquestionably ambiguous in this era of intermodal porting.

For the reasons stated below, The DMA and NAA request that the Commission to act quickly to address this problem by issuing a declaratory ruling that would protect both consumers and marketers.

DISCUSSION

I. The Wireless Safe Harbor is Necessary to Fully Comply with the TCPA

The TCPA generally prohibits the use of an autodialer to place telephone calls to a wireless number or numbers for which the called party is charged.⁸ Since the vast majority of telemarketing calls are placed using automated dialing technology, this means that the TCPA virtually prohibits all telemarketing calls to wireless phones.⁹ Following the release of the LNP Order in November 2003, consumers in the top 100 metropolitan statistical areas may now port their wireline telephone numbers to wireless telephones.¹⁰ Thus, literally overnight, a call that a marketer could lawfully make using an auto-dialer may become impermissible. Millions of consumers in these areas are expected to port their wireline numbers over the coming months.¹¹

⁷ See e.g., Report and Order, *supra* note 1, at ¶ 38.

⁸ See 47 U.S.C. § 227(b)(1)(A)(iii) (2003); see also In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, CC Docket 02-278 ¶ 165 (Released July 3, 2003) (“TCPA Order”).

⁹ See TCPA Order, *supra* note 1 at ¶ 165.

¹⁰ See generally, LNP Order, *supra* note 3.

¹¹ See e.g., Statement of Commissioner Kathleen Q. Abernathy, Re: Telephone Number Portability – Carrier Requests for Clarification on Wireless-Wireless Porting Issue, CC Docket 95-116 (released Oct. 7, 2003); see also Mary Greczyn, FCC Seeks Seamless Consumer Process for Wireless LNP, Comm. Daily, Sept. 12, 2003.

When porting becomes available to consumers throughout the rest of the country on May 24, 2004, millions more will be able to port their wireline numbers.¹²

The DMA and NAA have been working closely with NeuStar to find a solution to the problem of calling wireless numbers.¹³ For example, The DMA has already produced a database of thousands-block wireless numbers and, with the help of the Commission, is in the process of creating a ported number database. Unfortunately, even if a marketer uses both services, it is still likely that (1) autodialed calls will be made to wireless numbers by mistake and (2) calls will be made to recently ported numbers before the marketer is able to update its lists.

The FCC stated in its Report and Order amending the TCPA rules (“TCPA Order”), that porting will not “make it impossible for telemarketers to comply with the TCPA” because “information is available from a variety of sources to assist telemarketers in determining which numbers are assigned to wireless carriers.”¹⁴ As noted, we are working to facilitate marketer access to such data. Yet, it will still be impossible for marketers to update their call lists instantaneously when consumers port their wireline numbers. Moreover, inadvertent calls to wireless numbers are inevitable as erroneous calls to numbers on the National Do-Not-Call List. Even with a direct link to NeuStar’s database of wireline service numbers that have recently been ported from wireline service, there are time lags throughout the process: from the time a consumer requests to port a number, to the point NeuStar “activates”¹⁵ the ported number, to the time organizations like The DMA are able to access data information from NeuStar, to the time the marketer downloads the list, to the time that the marketer can update its call lists. During this process, a consumer who has just ported a wireline number to wireless service could receive a

¹² See generally, LNP Order, *supra* note 3 at ¶ 29.

¹³ See e.g., Letter from Ian D. Volner, Venable, LLP, Jerry Cerasale, The Direct Marketing Association, Mindy Ginsburg, NeuStar, Inc., E. Molly Helmsley, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 95-116, 02-278 (Dec. 17, 2003).

call from a marketer. The only ways to avoid placing a call to a ported number would be to dial every number by hand, or stop making calls altogether.

The Commission has acknowledged that “numbers previously used for wireline service could be ported to wireless service providers,” but that there are “various solutions that will enable telemarketers to identify wireless numbers.”¹⁶ The Commission declined “to mandate a specific solution, but rather [to] rely on the telemarketing industry to select a solution that best fits telemarketers’ needs.”¹⁷ Simply put, The DMA and NAA – with assistance from the Commission and in cooperation with NeuStar – have now created a solution that best fits the needs of marketers and that provides the protections that consumers receive under the TCPA. Without the corresponding regulatory provisions, however, the “solution” will be meaningless. The Do-Not-Call safe harbor is based on the concept that “[a] seller or telemarketer acting on behalf of the seller that has made a good faith effort to provide consumers with an opportunity to exercise their do-not-call rights should not be liable for violations that result from an error.”¹⁸ Similarly, when it imposed a time limit on the length of time that a marketer may take to add a person to its company-specific do-not-call list, the Commission concluded that a “reasonable time to honor [these requests] must not exceed 30 days.”¹⁹ It recognized that “some administrative time may be necessary to process such requests.” A wireless safe harbor that provides marketers with time to update their lists is essential for the same reasons.

II. The Proposed Wireless Safe Harbor

A. Suggested Provisions of the Wireless Safe Harbor

¹⁴ *Id.* at ¶ 170.

¹⁵ *See* Frequently Asked Questions, Wireless Number Portability (last visited Oct. 22, 2003).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

To enable marketers to comply with the TCPA, a wireless safe harbor is necessary. This safe harbor should be modeled on the concepts already present in the safe harbor with respect to the Do-Not-Call regulations.²⁰ The DMA and NAA thus suggest that the Commission modify 47 C.F.R. § 64.1200(a)(1)(iii) to read as follows:

(a) No person or entity may:

(1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice,

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call; provided that any person or entity using an automatic telephone dialing system to initiate telephone calls (or on whose behalf such telephone calls are made) will not be liable for violating this requirement if it can demonstrate that the violation is the result of error and that as part of its routine business practice, it meets the following standards:

- (A) Written procedures. It has established and implemented written procedures to comply with this restriction;
- (B) Training of personnel. It has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to this restriction;
- (C) Accessing a Wireless Suppression Data. It uses a process to prevent telephone calls made with an automatic telephone to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, employing a version of a database that contains a listing of all numbers assigned to such devices, including numbers ported from a wireline telephone to such a device (a “Wireless Suppression Service”) no more than thirty days prior to the date any call is made using an automatic telephone dialing system, and maintains records documenting this process; and
- (D) Use of Wireless Suppression Data. It uses a process to ensure that it does not sell, rent, lease, purchase or use the Wireless Suppression Service, or any part thereof, for any purpose except compliance with this section and any such state or federal law to prevent telephone calls made with an automatic telephone dialing system to telephone numbers assigned to such a service.

B. The Wireless Safe Harbor is Fully within the FCC’s Authority

²⁰ See e.g., Report and Order, *supra* note 1, at ¶ 38.

The Commission is clearly vested with the statutory authority to create rules implementing the TCPA and with rulemaking authority generally. Although the TCPA does not explicitly include a safe harbor for calls placed to wireless numbers, there is sufficient ambiguity in the statute to allow the FCC to use its rulemaking authority to create one. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

The TCPA provides that a marketer may not use an auto-dialer to place a call to any number “telephone number(s) assigned to a . . . cellular telephone service . . . or any service for which the called party is charged.” 47 U.S.C. § 227(b)(1)(A)(iii)(emphasis added). Nothing in the TCPA or the Communications Act defines a “number assigned to a cellular telephone service” or one that is “assigned to any service for which the called party is charged.” One interpretation would be that a number is “assigned” when it is first put into service. Another would be that a number that is ported is “assigned” once the porting process is finished. In 1991 Congress surely did not contemplate that a number would move into and out of this category. Thus, even if there was a common understanding of this phrase when the TCPA was enacted, they are not clear as applied to intermodal porting in 2004. Even if the “the legislative delegation to an agency on a particular question is implicit rather than explicit . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Chevron*, 467 U.S. at 844. Therefore, a court is likely to uphold the Commission’s decision to create such a safe harbor.²¹

²¹ It is important that the safe harbor be made a part of the TCPA rules. Otherwise, courts may not grant it the same level of deference as they would formal rules. See *Alaska Dep’t of Env. Conservation v. Environmental Protection Agency*, No. 02-685, Slip. Op. at 21-22 (Jan. 21, 2004).

CONCLUSION

In the Do Not Call context, Congress and this Commission have recognized that when a company must use a database to purge certain numbers, that company may nonetheless accidentally call them. The Commission should acknowledge that the same challenges arise in attempting to avoid autodialer calls to wireless numbers. Indeed, the TCPA limits on such calls are, in effect, a “do-not-call” limitation. Marketers that have taken reasonable, good-faith steps to comply with that limitation should not face liability for inadvertent calls. Thus, The DMA and NAA respectfully request that the Commission issue a declaratory ruling establishing a wireless safe harbor as outlined above.

Respectfully submitted,

H. Robert Wientzen
President & CEO
Gerald Cerasale
Senior Vice President, Government Affairs
The Direct Marketing Association, Inc.
1111 19th Street, N.W., Suite 1100
Washington, DC 20036
(202) 955-5030

Ian D. Volner
Heather L. McDowell
Ronald M. Jacobs
Tammy W. Klein
Venable LLP
575 7th Street, NW
Washington, DC 20004-1601
(202) 344-4000
Counsel for The DMA

John F. Sturm
President & CEO
Paul J. Boyle
Senior Vice President/Public Policy
Newspaper Association of America
529 14th Street, NW, Suite 440
Washington, DC 20045-1402
(202) 783-4697

January 29, 2003