

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20054**

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	CG Docket No. 02278
	)	
Paul D.S. Edwards Petition for Declaratory	)	
Ruling and Expedited Clarification	)	

**COMMENTS OF THE AMERICAN BANKERS ASSOCIATION  
IN OPPOSITION TO PAUL D. S. EDWARDS REQUEST FOR  
DECLARATORY RULING AND EXPEDITED CLARIFICATION  
CONCERNING THE TELEPHONE CONSUMER PROTECTION ACT**

**I. Introduction**

The American Bankers Association (ABA)<sup>1</sup> submits the following comment in response to the Federal Communications Commission’s request for comments regarding Paul D. S. Edwards’ (the Petitioner) Petition for a Declaratory Ruling and Expedited Request for Clarification<sup>2</sup>. The Petition requests the Commission to clarify whether under the Telephone Consumer Protection Act (TCPA)<sup>3</sup> and the Commission’s implementing regulations a creditor may place autodialed or prerecorded message calls to a telephone number initially assigned to a residential, or “landline,” telephone that is voluntarily transferred, or “ported,” by the consumer to a wireless telephone service. The Petitioner asserts that when a consumer provides a landline number to a creditor pursuant to a credit transaction, the consumer should not be understood to

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<sup>1</sup> The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America’s economy and communities. Its members – the majority of which are banks with less than \$125 million in assets – represent over 95 percent of the industry’s \$13.6 trillion in assets and employ over 2 million men and women.

<sup>2</sup> Petition for Declaratory Ruling and Expedited Request for Clarification, filed by Paul D. S. Edwards, January 12, 2009.

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

have provided express consent to call the number when the consumer later voluntarily ports the number to a wireless phone.

ABA disagrees and urges the Commission to reject the Petition as contrary to the TCPA, the Commission's prior interpretations of the law, as well as the public interest and consumer expectations. A consumer's decision to provide a number to a creditor constitutes consent to call that number without regard to the character of the service associated with that number. That the consumer might thereafter decide to port that residential number to a wireless carrier does not destroy or limit the expression of consent to be called on that line. Therefore, ABA respectfully requests that the Commission reject the Petition and clarify that consent logically attaches to the number and is not revoked when the consumer subsequently ports that number to a wireless device absent an affirmative act by the consumer to inform the creditor that the consent has been revoked.

## **II. Statutory and Regulatory Background**

In 1991 when Congress enacted the TCPA, it sought to address the growing number of telephone marketing calls and certain telemarketing practices Congress found to be invasive of privacy rights. Congress, however, clearly recognized the delicate balance required to protect individual privacy rights without interfering with commercial relationships between consumers and businesses. In addition, Congress considered the high cost of wireless telephone service at the time which made cost-shifting to consumers especially burdensome.<sup>4</sup> In the end, Congress established a statutory framework that regulates the use of automated telephone equipment for two classes of calls—calls made to residences and calls made to wireless phones—and authorized the Commission to enact exceptions to the ban on the use of automatic dialing systems or prerecorded voice messages for calls that do not invade privacy rights.

The Commission first adopted rules implementing the TCPA in 1992, announcing that an express exemption for prerecorded debt collection calls to residences was unnecessary as such calls fall within the exemptions adopted for commercial calls that do not transmit an unsolicited

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<sup>4</sup> The fact that the restrictions on calls to wireless numbers were based upon cost considerations is demonstrated by the discretion Congress gave the Commission to except calls to wireless services for which the called party does not pay for the call. *Id.* § 227(b)(2)(C).

advertisement and for established business relationships.<sup>5</sup> In addition, the Commission adopted rules prohibiting the use of autodialed and prerecorded message calls to wireless phone numbers that virtually incorporated verbatim the language of the TCPA.

Thus, both the TCPA and the Commission’s implementing regulations make it unlawful “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 . . . to any telephone number assigned to a . . . cellular telephone service . . . or any service for which the called party is charged for the call.”<sup>6</sup>

The Commission addressed what constitutes “prior express consent” on January 8, 2008, when it issued a Declaratory Ruling (the 2008 Order) which provides:

Because we find that autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the “prior express consent” of the called party, we clarify that such calls are permissible. We conclude that the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.<sup>7</sup>

Moreover, citing its 1992 TCPA ruling, the Commission emphasized the fact 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.”<sup>8</sup>

The meaning of these statements is clear and unqualified—if an individual provides his residential phone number to a creditor, that person has granted permission to the creditor to contact him using the number provided. The Petitioner, however, asks the Commission to conclude that the prior express consent of the consumer attaches to the telephone *service* associated with a number, as opposed to the *number* itself. In essence, the Petitioner urges the Commission to adopt a narrow interpretation of its prior rulings that is inconsistent with the

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<sup>5</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752 (1992).

<sup>6</sup> 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(iii).

<sup>7</sup> See ACA International, 23 FCC Rcd 559 (January 8, 2008), ¶ 9.

<sup>8</sup> *Id.*; See also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, *supra*, at 8769 (“Many commenters express the view that any telephone subscriber that provides his or her telephone number to a business does so with the expectation that the party to whom the number was given will return the call. Hence, any telephone subscriber who releases his or her telephone has, in effect, given prior express consent to be called by the entity to which the number was released.”).

public interest and consumer expectation. ABA urges the Commission to reject this argument and deny the petition.

### III. Response to Request for Comment

Although the Commission's 2008 Order does not expressly address the fact situation described in the Petition, the Commission's prior analysis of prior express consent clearly applies here, and compels the conclusion that consent exists. In the fact situation presented by the Petition, it is undisputed that the customer had given prior express consent to be called at a specific telephone number, his residential phone. Subsequently, the consumer voluntarily elected to receive residential service by using a wireless carrier and transferring his existing number to the new carrier to maintain the convenience of his established residential telephone.

Porting a residential telephone number from a landline to a wireless service, or from one wireless service to another, allows a consumer to avoid the difficulties and inconveniences associated with changing telephone numbers. By taking the extra steps needed to port the number, the consumer is affirmatively demonstrating the desire that those calls come to the established residential number via wireless carrier.<sup>9</sup> In other words, **porting is a modern manifestation of express consent** to continue the permissions that already existed for callers to contact the individual using the old number delivered over the new service.

People consciously choose to maintain their ability to be reached on their existing residential number by family, friends, and those with whom they have established business relationships. They do not pick and choose. Whether it is the doctor, the pharmacist, the dry cleaner, the day care center, the school, the van pool, the car mechanic, or any of the other countless business relationships consumers deal with regularly, the benefit of keeping the same phone number and porting it to a wireless carrier is a decision that consumers make with a full appreciation of the balance between cost and benefit.

Today's mobile citizenry finds value in having wireless connectivity—the ability to bring home with them in pocket or purse. Cell phones are not just for soccer moms; they are increasingly serving as essential means for people to manage life in the 21<sup>st</sup> Century. Indeed, one ABA member bank that has a significant number of military families as customers reports

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<sup>9</sup> If a consumer does not want calls previously made to the landline number to follow to the cell phone, he or she can achieve that result by simply not taking the additional steps to port the former landline number.

that among families with one spouse deployed overseas, there is a significant increase in the incidence of porting a residential phone to a wireless carrier. According to anecdotal reports from these customers, porting the residential phone number to a wireless carrier is the only way the remaining spouse can keep up with the demands of family and home.

An important entity with which consumers want and need to stay connected is their bank. There are many reasons consumers value being contacted by their bank, including calls to notify them of potential fraud or identity theft, security breaches, and missed payments. The use of automatic telephone dialing systems permits financial institutions to efficiently and economically contact large numbers of customers to provide this important information.

Financial institutions use automatic telephone dialing systems to contact customers to provide identity theft and fraud alerts. If a customer who has been mailed a debit or credit card has not activated the card within a certain period of time, the issuing bank will often contact the customer to confirm that the card was not lost or stolen. Financial institutions also call customers to report unusual activity on a debit or credit card account. If fraud is occurring, prompt notification can lead to quicker remedial action; if fraud is not occurring, prompt communication with the customer spares the individual the embarrassment and inconvenience of having the transaction denied.

In a related vein, banks use autodialers and prerecorded messages to inform consumers of security breaches. The technology permits the bank to quickly contact large numbers of customers to alert them to the breach and to enable customers to monitor their accounts and to take appropriate defensive action.

Financial institutions also use telephone communications to protect customers' credit and to help them avoid fees. Financial institutions often call customers whose credit card payments are a few days late, so that the customer can be reminded to pay before the delinquency is reported to a credit bureau or additional late fees accrue. Again, a prerecorded message is the most efficient method of communication. It is the quickest and most cost-effective way for these courtesy calls to be made, providing an opportunity for the customer to take timely corrective action. These calls will not be able to be made to consumers who have ported a residential phone number to a wireless carrier if the Commission adopts the interpretation suggested by the Petitioner.

Even greater potential harm to consumers and the economy will result if barriers are erected with respect to financial institution efforts to contact customers whose mortgage or credit card payments are seriously delinquent. ABA member banks report that they are increasingly using autodialed and prerecorded messages to reach out to consumers experiencing financial hardship. Their goal is to initiate early conversations with these individuals to inform them of alternative payment arrangements that the bank can offer.

Autodialers and prerecorded messages permit large numbers of calls to be placed, freeing customer service representatives and workout specialists to dedicate their time to working with individual borrowers. With respect to consumers behind on their mortgage payments, these calls will advance Congress and the Administration's goal of helping consumers avoid foreclosure. In the case of consumers with past due credit card accounts, banks hope their efforts to work with consumers will prevent them from falling prey to for-profit debt settlement companies. If the Commission adopts the interpretation suggested by the Petitioner, however, individuals who have ported their established number from a residential to a wireless service will be barred from receiving these calls.<sup>10</sup>

ABA urges the Commission to weigh the potentially significant cost to consumers and the economy as it considers the Petitioner's request. The importance of the Commission's decision for the financial services industry and its customers cannot be underestimated. According to a March 11, 2009, study published by the U.S Department of Health and Human Services, the prevalence of wireless-only households has increased from 13.6 % in 2007 to 16.1 % in the first half of 2008. Moreover, the report identified 10 states (and the District of Columbia) in which the number of cell phone-only households exceeded 20% in 2007.<sup>11</sup> There is nothing to suggest that this trend will not continue, particularly in this era of cost

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<sup>10</sup> Concerns about cost-shifting are exaggerated. Conditions have changed dramatically since 1991, the year Congress enacted the TCPA. In that year, the number of wireless telephone subscribers in the United States was 7,557,148, with an average monthly bill of \$72.74. As of 2008, there were 262,700,000 wireless telephone subscribers in the U.S., with an average monthly bill of \$ 48.54. See [http://ctia.org/media/industry\\_info/index.cfm/AID/10323](http://ctia.org/media/industry_info/index.cfm/AID/10323). Moreover, if an individual does not want to pay for debt collection calls to a wireless phone, the Fair Debt Collection Practices Act permits the consumer to send a written request for the debt collector to cease communications. 15 U.S.C. §1692c. Although not bound by the FDPCA, ABA member banks report that they honor written cease communication requests.

<sup>11</sup> U.S. Department of Health & Human Services, *Wireless substitution: State Level Estimates from the National Health Interview Survey*, No. 14 (March 11, 2009).

consciousness in which consumers are being advised by consumer advisors and reporters to discontinue their landlines as a way to save money.

Against this background, Congress' assumptions concerning the interests and expectations of wireless telephone subscribers, however legitimate they may have been in 1991, have little application. This fact does not, of course, give the Commission discretion to ignore the TCPA's plain language; it does, however, mean that the Commission's interpretation of the law should be consistent with the public interest and consumers' expectations. Thus, ABA respectfully requests that the Commission reject the Petition and clarify that consent logically attaches to the number and is not revoked when the consumer subsequently ports that number to a wireless carrier absent an affirmative act by the consumer to inform the creditor that the consent has been revoked.

#### **IV. Conclusion**

For all of the reasons stated above, ABA respectfully requests that the Petition be denied. In addition, ABA notes that the Petition asks a narrow question that calls for a narrow response. It does not call into question the underlying rationale of the 2008 Order, nor has the FCC requested comment on it. Any retreat from the 2008 Order will invariably hamper creditors from staying connected to their customer base with negative connotations for both the industry and consumers. Therefore, ABA respectfully requests that if the FCC intends to re-consider its 2008 Order in any capacity outside the scope of the Petition, it publish a specific notice and request for comments to that effect.

Respectfully submitted,



Virginia E. O'Neill  
American Bankers Association  
1120 Connecticut Avenue, NW  
Washington, DC 20036  
(202) 663-5073  
[voneill@aba.com](mailto:voneill@aba.com)

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