

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of

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

PETITION FOR EXPEDITED DECLARATORY RULING

Joseph L. Oliva, SBN 113889
OLIVA & ASSOCIATES, ALC
11770 Bernardo Plaza Court, Suite 350
San Diego, California 92128
Telephone: (858) 385-0491
Facsimile: (858) 385-0499
Joliva@olivalaw.com

Counsel to Rubio's Restaurant, Inc.

August 11, 2014

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY	1
II. THE COMMISSION SHOULD CONFIRM THAT THE TCPA LIABILITY DOES NOT EXTEND TO PARTIES WHEN THEY TAKE STEPS TO OBTAIN “PRIOR EXPRESS CONSENT” FROM THEIR EMPLOYEES AND AN EMPLOYEE’S NUMBER IS REASSIGNED WITHOUT THE EMPLOYER’S KNOWLEDGE.	4
a. Regulatory clarification from the Commission regarding reassigned numbers is urgently needed.	5
b. The Commission has broad authority to issue a declaratory ruling confirming that there is no TCPA liability for calls to reassigned numbers.	6
c. There are multiple solutions available to the Commission to address this issue.	6
II. THE COMMISSION SHOULD CLARIFY THAT TCPA LIABILITY DOES NOT APPLY TO INTRA-COMPANY, NON-MARKETING COMMUNICATIONS THAT INADVERTENTLY REACHED A MEMBER OF THE PUBLIC.	7
a. This declaratory ruling would be consistent with the TCPA’s legislative history, which reveals the TCPA was intended to regulate advertising, telemarketing, and solicitation by phone, not intra-company messaging systems.	8
b. This declaratory ruling would be consistent with the Commission’s existing rules.	10
c. The Commission’s guidance would clarify deficiencies of existing case law.	11
III. CONCLUSION.....	12

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of

02-278

Rubio’s Restaurant, Inc. Petition for
Expedited Declaratory Ruling

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

PETITION FOR EXPEDITED DECLARATORY RULING

I. INTRODUCTION AND SUMMARY

Pursuant to Section 1.2 of the Federal Communication Commission’s (“the Commission”) rules,”¹ Rubio’s Restaurant, Inc. (“Rubio’s”) respectfully submits this Petition for Expedited Declaratory Ruling (the “Petition”) to clarify the applicability of the Telephone Consumer Protection Act² (“TCPA”) and the Commission’s rules³ as they pertain to certain dissemination of certain non-marketing information to the wireless numbers of a company’s employees that are never intended to reach the general public and for which valid “prior express consent” has been obtained from its employees, but have subsequently been reassigned (without the knowledge of the calling party) to another cellular phone subscriber.

To promptly respond to health and safety issues affecting the over 190 of Rubio’s restaurant locations throughout California, Arizona, Nevada, Utah and Colorado, Rubio’s provides a “Remote Messaging” service that only disseminates alerts to the telephone numbers of Quality

¹ 47 C.F.R. § 1.2.

² 47 U.S.C. § 227.

³ 47 C.F.R. § 64.1200.

Assistance (“QA”) Staff” who are all employees of Rubio’s. The “QA Hotline” provides a centralized telephone number for Rubio’s employees to call in and report various food-safety related issues affecting a particular Rubio’s Restaurant. The telephone numbers of the “QA Staff” are programmed into the telephone system in use at Rubio’s after Rubio’s has obtained “prior express consent” to send Remote Messaging notifications. Once a Rubio’s employee leaves a voicemail on the QA Hotline, the Remote Messaging feature, when enabled, immediately sends an alert to the QA Staffs’ telephone number(s) programmed into the system. The Remote Messaging alert notifies the QA Staff immediately upon receipt of a voicemail on the QA Hotline and allows the QA Staff to directly access the QA Hotline Voicemail after entering a password.

This innovative Remote Messaging system is a key component of the food and safety program implemented by Rubio’s and it is used exclusively to report food safety-related issues, including, but not limited to, alleged foodborne illnesses, alleged foreign objects found in food, or suspicions of a team member having a disease transmittable through food. The function and purpose of the Rubio’s QA Hotline is to allow QA Managers to provide an immediate response to any health and safety issue affecting a Rubio’s restaurant. The Remote Messaging system shortens response times by notifying the available QA Staff of time-sensitive health and safety issues. Further, the Remote Messaging System save Rubio’s employees’ valuable time from manually dialing individual QA Staff members until they reach an available QA Staff member.

Like other companies who have submitted similar petitions and/or comments to the Commission,⁴ Rubio’s has been named a defendant in TCPA litigation in a manner Congress did not foresee when enacting the statute. Rubio’s now faces up to approximately \$500,000 in

⁴ See United Healthcare Services, Inc., *Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Jan. 16, 2014) (“United Petition”); ACA International, *Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (filed Jan. 31, 2014) (“ACA Petition”).

damages (exclusive of treble damages) arising from Remote Messaging alerts sent to a cellphone number previously assigned to a Rubio's QA Staff member who subsequently lost his phone. The wireless carrier released his number and reassigned it to a third-party without notice to Rubio's. By the time Rubio's was aware of the problem, hundreds of Remote Messaging alerts were received by the wireless subscriber with the reassigned number. Further, the subscriber with the reassigned number advised Rubio's that he has solved the problem by blocking the number assigned to the Remote Messaging system—and, therefore, no corrective action was needed. All the while, the subscriber with the reassigned number waited until he received approximately 876 alerts before filing suit against Rubio's, thereby increasing his statutory damages against Rubio's.

Updates, clarification, and revisions to the Commission's rules under the TCPA are required in order to provide companies with clear, fair, and consistent guidance when they are disseminating non-marketing information to its employees regarding issues of health and safety so as to avoid misapplication of the TCPA that is outside the scope of Congressional intent. Unless the Commission provides clarification on these issues, a company like Rubio's would face grave liability for intra-company communications merely because they are neither timely informed of the reassignment of a cellular phone number until well after the reassignment of an employee's telephone number took place, nor informed of the ongoing nature of the problem. In filing this Petition, Rubio's respectfully requests that the Commission address two significant issues related to the TCPA in light of new technology utilized by companies to disseminate non-marketing information to its employees. Specifically, Rubio's respectfully requests the Commission to: (1) confirm "callers" who obtain "prior express consent" from a "called party" are not liable under the TCPA for dissemination of informational, non-telemarketing alerts, to telephone numbers that have been reassigned without the caller's knowledge and (2) confirm that the TCPA does not apply

to intra-company messaging systems which are not aimed at consumers and never intended to reach the public.

II. THE COMMISSION SHOULD CONFIRM THAT THE TCPA LIABILITY DOES NOT EXTEND TO PARTIES WHEN THEY TAKE STEPS TO OBTAIN “PRIOR EXPRESS CONSENT” FROM THEIR EMPLOYEES AND AN EMPLOYEE’S NUMBER IS REASSIGNED WITHOUT THE EMPLOYER’S KNOWLEDGE.

Many companies, including Rubio’s, disseminate important, non-telemarketing information via telephone alerts to its employees. An undeniable reality of corporate culture is that employees are expected be available around-the-clock to respond to crises, big and small. This need for connectivity is amplified when the information being disseminated involves and health and safety concerns to the public. Cellular phones are a key to this necessity for constant, corporate connection.⁵

However, employees’ cellular phone number sometimes can and have been released to the service provider and subsequently reassigned to a third-party not affiliated with the employer and without the employers’ knowledge. Some estimates put the number of reassigned numbers close to 37 million.⁶ Individual-employees may and do not always notify their employers immediately that phone numbers change for a myriad of reasons. Cellular phone numbers are routinely recycled and reassigned without any notice to the general public. While the United States Postal Service offers a “change of address” service that automatically forwards an individual’s mail when he or she moves, no comparable service exists for individuals who change their cellular phone numbers.⁷ Furthermore, there is no available third-party service that reflects all reassigned number changes.

⁵ Forbes, Drew Hendricks, *7 Ways Mobile Will Change Business In 2014*, available at <http://www.forbes.com/sites/drewhendricks/2013/10/29/7-ways-mobile-will-change-business-in-2014/>.

⁶ United Healthcare Petition at 5 (citing Alyssa Abkowitz, *Wrong Number? Blame Companies' Recycling*, WALL STREET J. (Dec. 1, 20 11).

⁷ USPS, Forward Mail: Change of Address, available at <https://www.usps.com/manage/forward-mail.htm>.

Neustar, one of the largest database of cellular numbers, only contains about 100 million self-reported wireless numbers, but there were an estimated 327 million cell phones in the United States.⁸

a. Regulatory clarification from the Commission regarding reassigned numbers is urgently needed.

Allowing liability under the TCPA for reassigned numbers, even if the caller had “prior express consent” and otherwise complies with the TCPA, would significantly increase protracted, class-action litigation. TCPA litigation abuses are frequent and increasing. The threat of devastating TCPA class action damage awards chills legitimate organizations that are not engaged in contacting consumers and/or the general public and have attempted to avoid liability under the TCPA. An ever-increasing number of opportunist plaintiffs’ attorneys have been taking advantage of uncertainty in the legal landscape to pay their own salary through large recoveries of attorney fees, thereby perverting the very public interest the TCPA was intended to protect. As of January 2014, TCPA lawsuits had increased by of thirty (30) percent in just one year.⁹

Further, some plaintiffs’ attorneys and their clients are incentivized by the \$500 penalty per violation proscribed by the TCPA to prolong the misdirected calls after a number has been reassigned. This provides a windfall to individuals who wait, in bad faith, as long as possible before notifying the calling company that the number has been reassigned and to formally withdraw the preexisting express consent granted by the previous number holder.

⁸ See Neustar, Resources and Tools, *available at* http://www.neustar.biz/resources/productliterature/enhanced-wireless- file#.U-FK3_ldWao.

⁹ 8 Jack Gordon, Debt Collection Litigation & CFPB Complaint Statistics, January 2014, Interactivecredit.com, Feb. 24, 2014, *available at* <http://interactivecredit.com/?p=2110>.

b. The Commission has broad authority to issue a declaratory ruling confirming that there is no TCPA liability for calls to reassigned numbers.

The Commission can issue a declaratory ruling to resolve an existing controversy or uncertainty.¹⁰ Further, the commission’s declaratory ruling would provide meaningful guidance to courts which are split on this issue of whether TCPA applies to calls to reassigned cell phone numbers where the caller had “prior express consent.” Many courts have agreed that callers should not be liable under the TCPA when their call was directed toward an intended recipient which previously provided consent, but a non-consenting party actually answers the telephone.¹¹ However, some courts have disagreed concluding that, whenever a call is answered by someone who informs the caller that the intended recipient can no longer be reached at that number, a TCPA violation has occurred.¹² Guidance from the Commission regarding the status of calls to reassigned numbers would provide direction for potential and actual defendants to TCPA litigation because plaintiffs’ lawyers relentlessly invoke this theory of liability.

c. There are multiple solutions available to the Commission to address this issue.

The United Petition amply outlined the various methods in which the Commission could address this issue, which include:¹³

- Suspending liability for calls to a reassigned number, for which the company originally had “prior express consent” until the caller learns that the telephone number has been reassigned;

¹⁰ 12 47 C.F.R. § 1.2.

¹¹ See, e.g., *Leyse v. Bank of Am.*, No. 09–7654 (JGK), 2010 WL 2382400, at *4 (S.D.N.Y. June 14, 2010) (holding that only the intended recipient of a telemarketing call could pursue TCPA claim); *Cellco Partnership d/b/a Verizon Wireless v. Dealers Warranty, LLC*, No. 09–1814 (FLW), 2010 WL 3946713 (D.N.J. Oct. 5, 2010); *Kopff v. World Research Grp., LLC*, 568 F. Supp. 2d 39, 40–42 (D.D.C. 2008).

¹² See, e.g., *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 641-43 (7th Cir. 2012).

¹³ See United Petition at 10–11.

- Expanding the definition of “called party” to include both a consenting party and the new subscriber to a reassigned number, until the caller learns that the two parties are not the same; and/or
- Carving out a good faith exception from TCPA liability for informational, non-marketing calls to telephone numbers that have been reassigned to a new wireless subscriber from a “prior express consenting” party.

Any of these options would alleviate liability and provide insights to companies attempting to comply with the TCPA while still conducting their required business operations. Further, the Commission should consider adding an affirmative, bad-faith defense that vitiates liability upon a showing that the called party purposefully and unreasonably waited to notify the calling-party of the reassignment in order to accrue statutory penalties. For example, a subscriber of the reassigned number advised Rubio’s that he had solved the problem of the alerts from the Remote Messaging system by blocking the alerts on his phone. Rubio’s reasonably relied upon this assurance that no corrective action was needed. The subscriber of the reassigned number then reversed his position and now alleges approximately \$500,000 in statutory damages (exclusive of treble damages).

III. THE COMMISSION SHOULD CLARIFY THAT TCPA LIABILITY DOES NOT APPLY TO INTRA-COMPANY, NON-MARKETING COMMUNICATIONS THAT INADVERTENTLY REACHED A MEMBER OF THE PUBLIC.

Unless the Commission clarifies whether the TCPA applies to intra-office messaging systems, the need for streamlined dissemination of non-marketing information to employees and prevalence of cellular phones in the workplace creates a ticking-time-bomb of TCPA liability for many corporate-employers. Indeed, many employers provide discounts or subsidies to their employees for their cellular phone plan in exchange for around-the clock accessibility. An employer should not be held liable under TCPA for an intra-company Remote Messaging Service

that inadvertently reaches a member of the public because of the telephone number of its employee has been reassigned without their knowledge. Good faith errors can occur. Employees, like all cellular telephone consumers, change their cellular phone numbers. Employees, do not always inform their employer of their updated contact information.

Unlike other companies that have submitted petitions,¹⁴ Rubio's Remote Messaging system does not target consumers and is only intended to reach Rubio's employees as a system of intra-company communication. The alerts sent by the Remote Messaging system are intended only to reach the specific phones belonging to Rubio's QA Managers. Rubio's operates the Remote Messaging system to protect the public, never intending to communicate with any member of the public for telemarketing, customer surveys, or solicitation of any kind. Rubio's does not benefit from reaching the general public through its Remote Messaging system. Indeed, only employees with valid passwords can access the QA hotline.

- a. This declaratory ruling would be consistent with the TCPA's legislative history, which reveals the TCPA was intended to regulate advertising, telemarketing, and solicitation by phone, not intra-company messaging systems.**

Granting the Petition is consistent with Congress's intent. The TCPA's legislative history emphasizes the statute's intended purpose was to prevent unsolicited automated telemarketing and bulk communications.¹⁵ The express Congressional intent in passing the TCPA was to "protect the privacy interests of residential telephone subscribers" by placing certain restrictions on the use of unsolicited, automated phone calls made by telemarketers who were blasting out advertising by the use of both facsimile machines and automatic dialers.¹⁶ The Legislative history reflects the

¹⁴ See United Petition; ACA Petition.

¹⁵ See, e.g. S. Rep. 102-178, at 4-5 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 1968, 1972.

¹⁶ See, e.g. S. Rep. No. 102-178, October 8, 1991, *reprinted in* 1991 U.S.C.C.A.N. 1968

intent to respond to the “increasing number of consumer complaints” regarding “telemarketing calls.”¹⁷

Senator Ernest “Fritz” Hollings, the original sponsor of the TCPA, remarked that indiscriminate telemarketing calls “are the scourge of modern civilization.”¹⁸ Senator Hollings stressed “[t]his bill is purely targeted at those calls that are the source of the tremendous amount of consumer complaints at the FCC and at the State commissions around the country—the telemarketing calls placed to the home.”¹⁹ In passing the TCPA, Congress relied on surveys wherein consumers responded that the two most annoying things were (1) “phone calls from people selling things” and (2) “phone calls from computers trying to sell something.”²⁰ Certainty courts have recognized the TCPA’s intent to regulate unsolicited telemarketing calls and should give great deference to that intent.²¹

The Remote Messaging alerts are not the type of “calls” Congress intended to deter in enacting the TCPA. A call intended for a specific employee regarding internal health and safety issues does not constitute “solicitation” as that term is defined in the TCPA. Intra-office communications, such as the Remote Messaging system utilized by Rubio’s, do not involve solicitation or advertising and do not even target any consumer. The Remote Messaging alerts are only ever intended to reach Rubio’s QA Staff members. Indeed, if such communications ever reach the general public, there has been a good-faith mistake.

¹⁷ *Id.* at 1969.

¹⁸ 137 Cong. Rec. S9874, (daily ed. July 11, 1991) (statement of Sen. Hollings)

¹⁹ *Id.*

²⁰ H.R. Rep. No. 102-317, November 15, 1991, at p. 9.

²¹ *Moser v. FCC*, 46 F.3d 970, 972 (9th Cir. 1994) (“Congress held extensive hearings on telemarketing in 1991. Based upon these hearings, it concluded that telemarketing calls to homes constituted an unwarranted intrusion upon privacy.”).

b. This declaratory ruling would be consistent with the Commission’s existing rules.

In addition to the legislative intent of the TCPA, the Commission has already recognized that many wireless consumers rely extensively on important informational messages and that the Commission does not want to “impede” or “unnecessarily restrict” purely informational calls to wireless telephone numbers.²² The Commission has consistently limited its interpretation and implementation of the TCPA to circumstances involving communications made for the purposes of telemarketing, solicitation, advertising, or non-telemarketing informational calls. The Commission has already made clear: “**The overall intent of Section 227 is to protect consumers from unrestricted telemarketing**, which can be an intrusive invasion of privacy.”²³

Furthermore, the Commission has expressly denounced litigation that aims to chill “innovative services and applications” that could discourage beneficial communications—such as, information that impacts the health and safety of the general public.²⁴ The Remote Messaging service is used exclusively to report food safety-related issues, including, but not limited to, alleged foodborne illnesses, alleged foreign objects found in food, or suspicions of a team member having a disease transmittable through food. The QA Hotline along with the Remote Messaging system enables Rubio’s to provide an immediate response to any health and safety issue affecting a Rubio’s restaurant, including allegations of a foodborne illness, reports of harm from foreign objects in food, and suspicions of an employee having a disease transmittable via food.

²² See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830 ¶ 21 (2012) (stating that the Commission does not want to “unnecessarily impede” informational calls including, for example, “bank account balance, credit card fraud alert, package delivery, and school closing information”).

²³ Notice of Proposed Rulemaking in the Matter of the Telephone Consumer Protection Act of 1991, 7 FCC Rcd 2736, at ¶ 9

²⁴ FCC, Michael O’Rielly, *TCPA: It is Time to Provide Clarity*, available at <http://www.fcc.gov/blog/tcpa-it-time-provide-clarity>.

c. The Commission’s guidance would clarify deficiencies of existing case law.

The Commission should clarify that the TCPA was never intended to apply to intra-company, informational communications that are never intended for consumers nor the general public. Courts have never considered the application of the TCPA to non-marketing, informational intra-company communications. Each case considered to date focuses on communications to consumers made in an effort to either collect debts (which is a form of solicitation and has been determined by the Commission to specifically fall within the scope of the TCPA), to engage in telemarketing, to solicit business from those consumers, or to convey advertisements.²⁵

Withholding a declaratory ruling would allow plaintiffs to continue to expand the purpose of the TCPA from that intended by Congress, which was a prohibition on telemarketing through the use of automatic telephone dialing systems. The Commission should clarify that intra-company communications systems, like the “Remote Messaging” system utilized by Rubio’s, do not fall within the purview of the TCPA because they are not aimed at consumers at all, but only

²⁵ *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009) (receiving a text message advertising publication of a novel by Stephen King and soliciting consumers to “[j]oin the Stephen King VIP Mobile Club”); *Gager v. Dell Financial Services, LLC*, 727 F.3d 265 (3d Cir. 2013) (calling plaintiff’s cell phone to collect on defaulted debt after plaintiff revoked prior consent to be contacted); *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637 (7th Cir. 2012) (calling cellular phone subscribers who were assigned numbers formerly belonging to debtors in an effort to collect on debts); *Lemieux v. Schwan’s Home Serv.*, 2013 U.S. Dist. LEXIS 127032 (S.D. Cal. 2013) (a defendant in the business of selling certain food and weight-loss products used a prerecorded voice to call consumers); *Robbins v. Coca-Cola-Co.*, 2013 U.S. Dist. LEXIS 72725 (S.D. Cal. 2013) (receiving text messages promoting Coca-Cola products); *Vaccaro v. CVS Pharm., Inc.*, 2013 U.S. Dist. LEXIS 99991 (S.D. Cal. 2013) (calling to solicit consumer regarding “Defendant’s prescription services.”); *Iniguez v. The CBE Group*, 969 F.Supp.2d 1241 (E.D. Cal. 2013) (placing to debtor’s cellular phone to collect a debt owed by a third party); *Nelson v. Santander Consumer USA, Inc.*, 931 F.Supp.2d 919 (W.D. Wis. 2013) (calling a cell phone to attempt to collect on a debt on two vehicles plaintiff had financed); *Smith v. Microsoft Corp.*, 2012 U.S. Dist. LEXIS 101197 (S.D. Cal. 2012) (texting consumers advertisements from Microsoft promoting its new video game console by offering “FREE XBOX GAMES CONTENT!”); *Gutierrez v. Barclays Group*, 2011 WL 579238 (S.D. Cal. 2011) (making collection calls and sent text messages to plaintiff after plaintiff failed to make timely payments on his account); *Robinson v. Midland Funding, LLC*, 2011 WL 1434919 (S.D. Cal. 2011); (receiving calls from a debt collector regarding delinquent accounts); *Vance v. Bureau of Collection Recovery LLC*, 2011 U.S. Dist. LEXIS 24908 (N.D. Ill. 2011) (receiving calls from collection agency engaged in the business of recovering debts for its clients regarding a bill); *Melingonis v. Network Communications Intern. Corp.*, 2010 WL 4918979 (S.D. Cal. 2010) (receiving calls from a collect call operator who was in the business of providing the service of connecting the receiving party to the party who initially contacted the operating service for profit); *Fillichio v. M.R.S. Associates, Inc.*, 2010 WL 4261442 (S.D. Fla. 2010) (calling plaintiff’s home and cellular phone to collect plaintiff’s past due credit card bill).

specific employees within the company. Further, the Commission's declaratory ruling would not permit any new telemarketing calls. This Petition seeks only a narrow clarification of the Commission's rules to prevent an unintended stream of TCPA liability for organizations using intra-company communications systems to disseminate non-telemarketing information regarding health and safety.

IV. CONCLUSION

For the foregoing reasons, the Commission should issue a declaratory ruling (1) confirming callers who obtain "prior express consent" from their employees are not liable under the TCPA for disseminating informational, non-telemarketing alerts, to telephone numbers that have been reassigned without the caller's knowledge and (2) confirming that the TCPA does not apply to intra-company messaging systems which are never aimed at consumers and never intended to reach the public.

Respectfully submitted,

/s/ Joseph L. Oliva
Joseph L. Oliva, SBN 113889
OLIVA & ASSOCIATES, ALC
11770 Bernardo Plaza Court, Suite 350
San Diego, California 92128
Telephone: (858) 385-0491
Facsimile: (858) 385-0499
Joliva@olivalaw.com

Counsel to Rubio's Restaurant, Inc.

August 11, 2014