

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

In the Matter of)	
)	
Petition for Declaratory Ruling)	
of the Consumer Bankers Association)	CG Docket No. ____
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	

**PETITION FOR DECLARATORY RULING OF THE
CONSUMER BANKERS ASSOCIATION**

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September 19, 2014

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EXECUTIVE SUMMARY

The Consumer Bankers Association (“CBA”)¹ respectfully asks the Federal Communications Commission (“FCC” or “Commission”) to declare that “called party,” for purposes of the Telephone Consumer Protection Act’s (“TCPA”)² restrictions on certain automated calls, including prerecorded voice and text messages, placed to mobile telephone numbers, refers only to the “intended recipient” of the call. By confirming that only intended recipients are called parties, the Commission will: 1) prevent potential chilling of beneficial consumer communications; 2) shield consumers from higher costs stemming from institutions’ increased litigation and compliance expenses; 3) quash frivolous litigation that is inundating courts and creating inconsistent law; and 4) allow small businesses to grow and nonprofits to reach their goals without the threat of litigation.

¹ The Consumer Bankers Association (CBA) is the only national financial trade group focused exclusively on retail banking and personal financial services — banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation’s largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

² *Codified as* 47 U.S.C. § 227.

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DISCUSSION

**I. “INTENDED RECIPIENT” IS THE MOST LOGICAL DEFINITION OF
“CALLED PARTY”**

As argued in previous filings with this Commission, the most common-sense solution to the TCPA reassigned number issue is to confirm that “called party” refers to the “intended recipient” of the call.³ Any other interpretation renders meaningless Congress’s decision to impose liability for certain automated calls only on callers who failed to obtain prior express consent before placing those calls. If a caller is liable for obtaining the consent of persons, such

³ See Letter from Monica S. Desai to Marlene H. Dortch (May 15, 2014) in CG Docket No. 02-278; Letter from Monica S. Desai to Marlene H. Dortch (July 21, 2014) in CG Docket No. 02-278. Other petitioners have suggested alternative Commission actions that might resolve the called party question. Rubio’s Restaurant, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Aug. 11, 2014); Petition for Expedited Declaratory Ruling of United Healthcare Services, Inc., CG Docket No. 02-278 (Jan. 16, 2014) (“*UHC Petition*”). CBA would welcome relief along the lines suggested by Rubio’s Restaurant and United Healthcare Services, but believes that the approach suggested in this petition is the most straightforward means of resolving the question and is fully supported by the language and intent of the statute.

as holders of reassigned numbers, whose identities cannot be ascertained before calls are placed, then complete compliance with the prior express consent requirement is impossible. This Commission is not required to interpret the TCPA in a manner that frustrates Congress's clear intent, and *may* not do so when the most plausible interpretation of the statute avoids that result.

The House Committee Report lends valuable insight into Congress's intention when enacting the TCPA. Notably, the Committee Report states that "[t]he restriction on calls to emergency lines, pagers, and the like does not apply when the *called party* has provided the telephone number of such a line to the caller for use in normal business communications. The Committee does not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their *customers*. For example, a retailer, insurer, banker or other creditor would not be prohibited from using an automatic dialer recorded message player to advise a *customer* (at the telephone number provided by the customer) that an ordered product had arrived, a service was scheduled or performed, or a bill had not been paid."⁴ Judging by this language, Congress appears to have considered "called party" to be synonymous with "customer" for purposes of the express consent preemption, which is in line with subsequent FCC interpretation.

Confirming that "called party" means the intended recipient would also be consistent with the Commission's longstanding practice of specifying the rights and obligations of callers under the prior express consent requirement. Beginning in 1992, the Commission stated that a person's act of providing a mobile contact number effectively conveyed prior express consent to

⁴ House Report, Energy and Commerce Committee, *Telephone Consumer Protection Act of 1991*, H.R. Rep. 102-317 at 17 (*emphasis added*).

be called at that number.⁵ Providing further clarification in 2012, the Commission detailed the circumstances under which prior express consent must be given in writing.⁶ As reassigned number litigation escalates, unreasonably affected parties and overburdened courts now need guidance to identify which party can properly provide prior express consent. This petition explores the evolving landscape that created this litigious environment and respectfully asks the expert agency empowered to interpret and enforce the TCPA to provide vital clarification that will largely remedy the reassigned number issue.

II. INFORMATIONAL COMMUNICATIONS BENEFIT CONSUMERS

CBA member institutions engage in a wide range of informational, non-marketing communications with their customers, serving various beneficial purposes from mitigating fraud to encouraging money management. In conformance with state and federal law, our members send data security breach notifications and place verification calls, including prerecorded voice and text messages, to consumers who have requested fraud alerts on their credit reports.⁷ Other communications, such as out-of-pattern account activity notices and transaction requests, are

⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8769 (1992).

⁶ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1992*, CG Docket No. 02-1278 (Report and Order rel. Feb. 15, 2012) (“2012 TCPA Order”).

⁷ Section 501(b) of the Gramm-Leach-Bliley Act requires financial institutions to notify customers of unauthorized access to customers’ personal information; and the laws of 47 states and the District of Columbia impose similar obligations on all businesses that store personal information. *See* Gramm-Leach-Bliley Financial Services Modernization Act of 1999, Pub. L. No. 106-102, 113 Stat. § 501(b); Cal. Civ. Code § 1798.29; Fla. Stat. § 817.5681; 815 ILCS § 530/10(a); NY CLS Gen. Bus. Code § 899aa; Rev. Code Wash. § 19.255.010. Although relatively few breaches of personal information involve data held by financial institutions, those institutions voluntarily notify their customers of breaches at other entities that affect those customers’ accounts. Financial institutions also are required, under the Fair Credit Reporting Act, to verify a customer’s identity before authorizing the establishment of any new credit plan or extension of credit where a fraud alert has been placed on the customer’s credit file. Fair Credit Reporting Act § 605A, 15 U.S.C. § 1681c-1.

instrumental in our members' efforts to combat fraud and identity theft. In an effort to maintain a high level of customer service, our members provide payment due date reminders and account balance notifications to protect customers from incurring avoidable fees, help customers manage finances, and otherwise improve the consumer experience.

Importantly, many of these communications are sent at the request of consumers and for their personal benefit. As pointed out in various petitions before the Commission,⁸ institutions are faced with the hard choice of potentially discontinuing these important and often requested services – a conundrum neither consumers nor businesses should have to face, and that expressly was not intended by Congress. Supporting its policy of the TCPA in ways that promote consumer preference, the FCC explained that its “goal is to make sure the TCPA is not interpreted to inhibit communications consumers may want and that do not implicate the harms TCPA was designed to prevent.”⁹

III. MANUAL DIALING IS IMPRACTICAL AS MOBILE USAGE BECOMES PERVASIVE

Over the years, large numbers of Americans have discontinued their landline service and chosen to rely solely on their mobile phones. When surveying U.S. households, CTIA – The Wireless Association® found that 39.4% are “wireless only,”¹⁰ and the Centers for Disease Control reported that 41% are “wireless only,” with that percentage rising to 65.7% for the 25

⁸ See GroupMe, Inc., Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (March 1, 2012); TextMe Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (March 18, 2014).

⁹ FCC Declaratory Ruling in the matter of GroupMe, Inc./Skype Communications (March 27, 2014) CG Docket No. 02-278.

¹⁰ CTIA Annual Wireless Industry Survey, available at www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey.

and 29 population.¹¹ With this proliferation of mobile devices, a large and growing percentage of communications are unsurprisingly sent to mobile telephone numbers.

In this digital age, manually placing non-telemarketing calls is not only inefficient, but unrealistic and prohibitively expensive – ultimately imposing greater financial strain on consumers. Automatically dialed, prerecorded calls and text messages can reach more customers in any given period of time than manually-dialed and/or live-agent calls. When our members need to contact a large number of consumers as quickly as possible – as when a merchant suffers a mass data breach, which has regrettably become a common occurrence – automated calls may be the only means of reaching consumers to take swift, effective action that prevents or mitigates losses from identity theft. After years of steady increase, escalating mobile phone usage does not appear to be slowing and will only amplify the potential for future TCPA litigation.

IV. BEST PRACTICES DO NOT SHIELD INSTITUTIONS FROM LIABILITY

To ensure TCPA compliance, many of our members have instituted stringent best practices and thorough procedures requiring customers’ prior express consent before placing automated calls. For example, a recent Wells Fargo *ex parte* filing identified compliance measures that include “applications, loan agreements, cardholder agreements, terms & conditions, and even online account disclosures to inform consumers and promptly obtain their consent to use mobile phone numbers.”¹² Moreover, CBA members fully adhere to the TCPA’s prior express consent requirement as interpreted by the Commission, which established that “persons who knowingly release their phone numbers have in effect given their permission to be

¹¹ Stephen J. Blumberg and Julian V. Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July — December 2013*, available at www.cdc.gov/nchs/nhis.htm.

¹² Letter from Monica S. Desai to Marlene H. Dortch (May 15, 2014), p. 3, in CG Docket No. 02-278.

called at the number they have given, absent instructions to the contrary.”¹³ Accordingly, our members’ procedures aim to ensure that informational, automated calls are placed only to customers that are the intended recipients of those calls.

However, as a number of filings with the Commission have illustrated, even the most stringent compliance program cannot guarantee that the intended recipient will always be the person who answers the call.¹⁴ For this reason, companies often employ expensive and ultimately inadequate measures to try to ascertain mobile telephone number reassignments.¹⁵ Even companies who can afford costly third party systems that purport to provide accurate data concerning reassigned numbers *still* cannot escape liability because the database is often incomplete and does not account for family plan holders.¹⁶ Number reassignment is not a new reality, but simply a shift from landlines to cell phones where compliance-minded, consumer-

¹³ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8769 (1992); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling*, 23 FCC Rcd 559, 564 (2008).

¹⁴ *UHC Petition, supra*; Comments of the American Bankers Association (March 10, 2014); Comments of ACA International (March 10, 2014); Comments of the American Financial Services Association (March 10, 2014); Comments of America’s Health Insurance Plans (March 10, 2014); Comments of the Coalition of Higher Education Assistance Organizations (March 10, 2014); Comments of Comcast Corporation (March 10, 2014); Comments of CTIA (March 10, 2014); Comments of DIRECTV (March 10, 2014); Comments of Dominion Enterprises of Virginia (March 10, 2014); Comments of Noble Systems Corporation (March 7, 2014); Comments of the Student Loan Servicing Alliance (March 10, 2014); Comments of Time Warner Cable Inc. (March 10, 2014); Comments of the U.S. Chamber of Commerce (March 10, 2014); Reply Comments of United Healthcare Services, Inc. (March 23, 2014); Letter from Monica S. Desai to Marlene H. Dortch (May 15, 2014); Letter from Monica S. Desai to Marlene H. Dortch (July 21, 2014); Letter from Mark W. Brennan to Marlene H. Dortch (July 28, 2014); all in CG Docket No. 02-278.

¹⁵ *See* Letter from Monica S. Desai to Marlene H. Dortch (May 15, 2014), p. 4, in CG Docket No. 02-278; Letter from Mark W. Brennan to Marlene H. Dortch (July 28, 2014), p. 5 in CG Docket No. 02-278. *See also* U.S. Chamber of Commerce Institute for Legal Reform, *The Juggernaut of TCPA Litigation* (October 2013).

¹⁶ *Id.*

centric companies find themselves defenseless against an opportunistic and aggressive plaintiff's bar.¹⁷

V. NEEDLESS TCPA LITIGATION BURDENS COURTS AND CREATES INCONSISTENT LAW

a. Litigation Drains Judicial Resources and Creates Excessive Expense

Despite the unavailability of placing calls to reassigned numbers, plaintiffs' attorneys demand extensive damages from institutions that have unknowingly called unintended persons. The inability of courts to establish a consistent definition for "called party" has opened the floodgates to frivolous lawsuits against well-meaning institutions that are merely attempting to contact customers who previously consented to be called by those institutions. As detailed in numerous petitions before the Commission, autodialer class action lawsuits have increased by more than 500% over the last few years, while predictive dialer lawsuits have risen by more than 800%.¹⁸

This surge in unnecessary litigation has drawn notice from Congress. On August 1, 2014, fifteen members of Congress sent a letter to the FCC asserting "the TCPA has turned a vehicle to protect consumers from unwanted random solicitations into a booming practice for opportunistic attorneys to take advantage of ambiguous rules and profit personally by receiving millions of dollars by suing businesses and overburdening the courts while providing only nominal relief to their clients."¹⁹ The lawmakers urged the Commission to enact "common-sense reforms to facilitate the delivery of time-sensitive consumer information to mobile devices while continuing

¹⁷ *UHC Petition* at 5 (Jan. 16, 2014), citing Alyssa Abkowitz, *Wrong Number? Blame Companies' Recycling*, WALL STREET JOURNAL (Dec. 1, 2011).

¹⁸ Petition for Declaratory Ruling of Communication Innovators, CG Docket No. 02-278 (Jun. 7, 2012) at 15; Petition for Declaratory Ruling of VoAPPs, Inc., CG Docket No. 02-278 (July 31, 2014) at 6.

¹⁹ Letter from Rep. Marsha Blackburn, *et al.* to the Hon. Tom Wheeler (Aug. 1, 2014). Text of letter available at <http://www.ballardspahr.com/~media/files/alerts/2014-08-07-letter1.pdf>

to protect consumers from unwanted telemarketing calls.”²⁰ As the letter aptly points out, TCPA litigation unnecessarily hinders the private and public sectors, while offering little relief to consumers – all of which further emphasizes the need for resolution. Inevitably, these compliance and litigation costs are ultimately passed to consumers, disproportionately affect smaller businesses, and hinder the outreach efforts of non-profit organizations.

b. Multiple Judicial Definitions Establish Inconsistent Law

In the absence of a clarified TCPA definition of “called party” and authoritative guidance from this Commission, courts have been forced to define the phrase, often leading to inconsistent interpretations and fragmented law. To increase their damages awards, plaintiffs urge courts to find that the person who answers a call is the “called party” for purposes of the TCPA’s prior express consent requirement. Under this statutory interpretation, an institution violates the prior express consent requirement when any person other than the consenting consumer answers an automated call, even if the number no longer belongs to the consumer or an unintended recipient happens to answer the call.

Some courts have correctly refused to uphold TCPA claims by plaintiffs who received automated calls intended for other persons. In *Leyse v. Bank of America*, plaintiff Mark Leyse alleged that a call placed by DialAmerica on behalf of the defendant Bank of America violated TCPA section 227(b)(1)(B), which prohibits any person from initiating a prerecorded voice call to a residential telephone line without the prior express consent of the called party.²¹

DialAmerica intended to call plaintiff’s roommate, “whose name was associated with the telephone number in DialAmerica’s records,” but Leyse rather than his roommate picked up the

²⁰ *Id.*

²¹ *See Leyse v. Bank of America*, No. 09-7654, 2010 WL 2382400 (S.D.N.Y. 2010)(slip op.)(“*Leyse I*”).

phone.²² Arguing that he was the “called party” for TCPA purposes, Leyse asserted that his prior express consent was needed before DialAmerica could place the prerecorded call intended for his roommate.²³

Leyse attempted this argument in two district courts, both of which rejected his claim. Judges in the Southern District of New York and the District of New Jersey held that the call’s intended recipient, Leyse’s roommate, was the party whose prior express consent was required, rather than Leyse, who the courts deemed merely “the *unintended and incidental recipient*.”²⁴ Highlighting the potential adverse effects of a contrary interpretation, both courts concluded that “[i]f any person who receives [a] fax or answers [a] telephone call has standing to sue, then businesses will never be certain when sending a fax or placing a call with a prerecorded message would be a violation of the TCPA.”²⁵

Perpetuating the confusion, other courts have used various definitions of “called party,” including the telephone subscriber,²⁶ regular user of the telephone that received the call,²⁷ and

²² *Id.*, slip op. at 2.

²³ *Id.*

²⁴ *Id.*, slip op. at 10 (*emphasis added*); *Leyse v. Bank of America, National Association*, Civ. Action No. 11-7128 (D.N.J. Sept. 8, 2014) (opinion designated as not for publication), slip op. at 10 (“*Leyse II*”).

²⁵ *Leyse I*, slip op. at 11; *Leyse II*, slip op. at 11. Other decisions finding that the intended recipient is the called party are *Cellco Partnership v. Dealers Warranty, LLC*, No. 09-814 (FLW), 2010 WL 3946713 (D. N.J. 2010), and *Kopff v. World Research Group, LLC*, 568 F.Supp.2d 39 (D.D.C. 2008).

²⁶ *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637 (7th Cir. 2012)(finding that a debt collector’s automated call to a telephone subscriber to whom the debtor’s mobile number had been reassigned was unlawful because the current subscriber had not given prior express consent to receive the call).

²⁷ *Manno v. Healthcare Revenue Recovery Group, LLC*, 289 F.R.D. 674 (S.D. Fla. 2013)(finding that a debt collector’s automated calls to plaintiff were made without prior express consent because the plaintiff was “the regular user of the phone” and was therefore the called party).

recipient of the call.²⁸ Not only do these definitions fail to adhere to the TCPA’s legislative intent, they also are inconsistent with settled principles of statutory interpretation. In the recent U.S. Supreme Court decision, *Utility Air Regulatory Group v. Environmental Protection Agency*, the Court reminded agencies that, when interpreting statutes, “the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”²⁹ As the Court pointed out, “the presumption of consistent usage ‘readily yields’ to context, and a statutory term—even one defined in the statute—‘may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.’”³⁰ As noted in a Wells Fargo *ex parte* filed with this Commission, interpreting “called party” to mean anything but “intended recipient” would defy the Court’s guidance for statutory interpretation by nullifying the statutory defense of prior express consent.³¹ Alternatively, none of the other judicial interpretations of “called party” – telephone subscriber, regular user of the telephone that received the call, or recipient of the call – would make sense in the context of the prior express consent exception because those parties were previously unknown to the caller institution and, therefore, could not have given their consent.

²⁸ *Meyer v. Portfolio Recovery Associates, LLC*, 707 F.3d 1036 (9th Cir. 2012)(finding that it is unlawful to call a cellular telephone number, using an automatic telephone dialing system, without the recipient’s prior express consent).

²⁹ *Utility Air Regulatory Group v. Environmental Protection Agency*, 573 U. S. _____, 15 (2014)(“*Utility Air*”)(citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000)).

³⁰ *Utility Air*, 573 U.S. at 15 (quoting *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007)).

³¹ Letter from Monica S. Desai to Marlene H. Dortch (July 21, 2014), p. 3, in CG Docket No. 02-278.

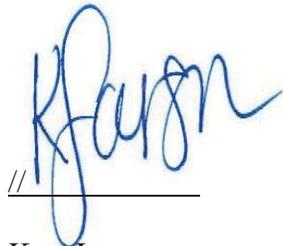
VI. CONSUMERS WILL CONTINUE TO HAVE A RIGHT OF ACTION FOR CALLS PLACED AFTER IDENTITY OF CALLED PARTY IS ASCERTAINED

Of paramount concern, CBA and its members remain dedicated to protecting consumer privacy. Accordingly, the relief requested by this petition would not permit institutions to continue calling a number once they are aware that it has been reassigned to someone other than the intended recipient. This petition only asks the Commission to recognize that callers are permitted to place non-emergency, informational, non-telemarketing calls to mobile telephone numbers, using an automatic telephone dialing system, an artificial or prerecorded voice, or text message based upon the prior express consent of the person the caller intends to reach. When the caller learns that a number no longer belongs to the intended recipient, further calls to the number will justifiably be subject to enforcement and private actions under the TCPA. As such, the consumer of right of action will appropriately remain intact.

CONCLUSION

The continued confusion over the meaning of “called party” under the TCPA prior express consent provision has created an environment of legal risk that prevents institutions from sending valuable non-telemarketing information to their customers by the most effective means. As the Commission has made clear, the TCPA is not intended to prevent or unduly restrict communications of this kind.³² We echo Commissioner O’Rielly’s assertion that the “FCC should also follow through on the pending TCPA petitions to make sure that good actors and innovators are not needlessly subjected to enforcement actions or lawsuits, which could discourage them from offering new consumer-friendly communications services.”³³ Accordingly, we urge the Commission to clarify that “called party” means the intended recipient of a call.

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³² 2012 TCPA Order, ¶ 3.

³³ Commissioner Michael O’Rielly, Official FCC Blog: *TCPA: It is Time to Provide Clarity* (March 25, 2014) <http://www.fcc.gov/blog/tcpa-it-time-provide-clarity>.