

February 2, 2015

VIA ELECTRONIC FILING

Chairman Thomas Wheeler
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Commissioner Michael O’Rielly
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278*

Dear Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O’Rielly:

The undersigned trade associations and business groups, representing hundreds of thousands of U.S. companies and organizations from across the U.S. economy, strongly urge the Federal Communication Commission (“FCC” or “Commission”) to expeditiously address the issues raised in the numerous petitions that have been and continue to be filed with the Commission regarding the Telephone Consumer Protection Act (“TCPA”). Given that compliance-minded organizations in a variety of sectors are being dragged into court and strong-armed into large settlements on an almost daily basis under the TCPA, for actions that do not remotely threaten the privacy interests that the statute was intended to protect, regulatory relief by the Commission is desperately required. We ask for clarification from the FCC to help curb abusive lawsuits that likely harm consumers overall.

I. Consumer Use of Wireless Phones is Vastly Different Than When the TCPA Was Enacted Almost 25 Years Ago

In response to complaints about unwanted telemarketing telephone calls, especially during dinner time, Congress passed the TCPA in 1991. It includes a provision that prohibits the use of “automatic telephone dialing systems” (a term defined by Congress with specific elements) – instead of manual dialing – or an artificial or prerecorded voice under certain circumstances when calling a wireless telephone.

When the TCPA was enacted over two decades ago, wireless telephones were a luxury item, charges for receiving calls on a wireless telephone were prohibitively expensive, and the landline telephone was the dominant consumer telecommunications device. However, as the Commission itself has acknowledged, “wireless use has expanded tremendously since the passage of the TCPA in 1991.”¹ Today, 90 percent of Americans own wireless telephones² and

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd 1830, ¶ 29 (2012) (“2012 TCPA Order”).

58.8 percent of households are entirely or predominantly “wireless-only.”³ Moreover, the number of “wireless-only” households grew by 3 percent between the second half of 2013 and the first half of 2014, the largest 6-month increase since 2010, and there are five demographic groups in which the majority live in households with only wireless telephones.⁴ Certain parts of the country also have a particularly high number of wireless-only households.⁵ Furthermore, many consumers today have calling plans that provide unlimited minutes, making use of wireless telephones inexpensive as well as convenient for the general public.

Compared to 1991, organizations today—including many small businesses—use efficient, automated technologies to place a variety of time-sensitive, non-telemarketing calls. Unfortunately, due to a lack of clarity under the TCPA, these important communications are increasingly being chilled, organizations making the calls are increasingly being subjected to frivolous litigation, and consumers are increasingly missing important communications. This situation has a disproportionately negative impact on lower-income households, particular age groups, and residents located in certain parts of the United States.⁶

II. Regulatory Clarity Regarding the TCPA is Desperately Needed

While the wireless marketplace and consumer use of this technology have rapidly evolved, the TCPA has not changed and the FCC’s regulations have not kept pace. There is, unfortunately, a tsunami of class action TCPA lawsuits driven not by aggrieved consumers, but by opportunistic plaintiffs’ firms taking advantage of uncertainty in the law to rake in attorney fees. As the immense record before the Commission details, TCPA lawsuits against businesses and other entities are skyrocketing. TCPA litigation grew by 560% between 2010 and 2014.⁷

The law is being abused through litigation theories never intended by Congress. For example, some plaintiffs contend that any system (whether or not it is actually an “automatic telephone dialing system” as defined by the statute) triggers TCPA liability under the perplexing theory that *even a system that is not automatic could be modified to later become automatic*,

² Pew Internet Project, *Mobile Technology Fact Sheet*, Pew Research Center (2014), available at <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/>.

³ Stephen J. Blumberg & Julian V. Luke, Div. of Health Interview Statistics, Nat’l Ctr. for Health Statistics, Centers for Disease Control and Prevention, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2014*, at 1 (Dec. 16, 2014) (“*CDC Wireless Substitution Estimates*”), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201412.pdf>.

⁴ *Id.* at 2; those demographic groups are adults aged 18–44, adults living only with unrelated adult roommates, adults renting their home, adults living in poverty or near poverty, and Hispanic adults.

⁵ *Id.* at 7. See also, *Wireless-only Voice Households by State, 2012*, Wireless Competition Bureau, FCC (rel. Jan. 7, 2015), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0107/DOC-331388A1.pdf.

⁶ According to estimates from the CDC, 59.1 percent of individuals living in “Poor” households and 50.8 percent of individuals living in “Near-poor” households live in wireless-only households. Comparatively, only 40.8 percent of individuals living in “Not-poor” households live in wireless-only households. *CDC Wireless Substitution Estimates* at 6.

⁷ *Debt Collection Litigation & CFPB Complaint Statistics, December 2014 & Year in Review*, WebRecon LLC (Jan. 22, 2015), available at <http://dev.webrecon.com/debt-collection-litigation-cfpb-complaint-statistics-december-2014-and-year-in-review/>.

hypothetically sometime in the future. Others contend that a system need not even have the statutory elements of an “automatic telephone dialing system” to be an “automatic telephone dialing system” under the statute. This cannot be what Congress intended.

The defendants in these cases are no longer just the telemarketers that Congress targeted; they are businesses, big and small alike, forced to choose between settling the case or spending significant money defending an action where the alleged statutory damages may be in the millions, or even billions, of dollars. Further, many of these companies are being sued for reasons outside of their control, such as dialing a number provided by a customer that was later reassigned to another party.

The wide-spread litigation and the specter of devastating class action liability has or may spur some businesses and organizations to cease communicating important and time-sensitive non-telemarketing information via voice and text to the detriment of customers, clients, and members. Without FCC action, consumers may not, for example, be timely informed of options to avoid a foreclosure, going into collection, a bad credit rating, or confiscation of property; receive notice of payments due and other billing issues; receive basic requested information ranging from time-sensitive prescription refill reminders and other healthcare notifications to the details of a money transfer and other financial transactions; or receive information specifically requested by the consumer through an on demand text. The benefits of these services cannot be overstated—in the student loan market, it is estimated that 1 million or more borrowers each year will “time out” and default on their student loans, in large part because their servicers cannot efficiently reach them on their wireless devices.⁸ By helping to keep individuals current on their payments, or, at least, preventing their debt from spiraling out of control, these types of communications have the ability to lower costs for consumers.

The undersigned groups ask for clarification from the FCC so that the statute is applied in the manner that Congress intended, as expressed through the specific language Congress enacted. As reflected in the record before the FCC, the requested clarifications will neither “gut” the TCPA nor “open the floodgates” to abusive calls. The clarifications will, however, curb abusive lawsuits that ultimately are likely to harm consumers overall. We urge the Commission to modernize its TCPA implementation by providing commonsense clarifications and necessary reforms to facilitate the delivery of time-sensitive consumer information to mobile devices while continuing to protect consumers from unwanted telemarketing calls.⁹

⁸ Judy Xanthopoulos, *Modifying the TCPA to Improve Services to Student Loan Borrowers and Enhance Performance of Federal Loan Portfolios*, Quantria Strategies, LLC, 10 (Jul. 2013), available at <http://c.ymcdn.com/sites/www.ncher.us/resource/collection/A593D8BC-DA09-45BB-8A2D-EDD4E0889108/QuantriaStudyreTCPA-July2013.pdf>.

⁹ We recognize that the Commission has exempted certain categories of calls to wireless numbers that are “not charged to the called party.” See *Cargo Airline Association Petition for Expedited Declaratory Ruling, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 29 FCC Rcd 3432 ¶ 20 (2014). But “free to end user” is not the solution, particularly outside of the context of text notifications; no such program for uncharged voice calls to wireless phones exists now in the marketplace, and many communications (such as healthcare calls to elderly patients) can only be delivered by voice communications, not texts.

III. Conclusion

By addressing the important issues raised in the pending TCPA-related petitions, the Commission can help curtail abusive lawsuits that will likely lead to increased costs for consumers, provide American businesses with desperately needed certainty, and ensure that businesses maintain the ability to communicate in an efficient manner that best meets the demands of their customers, while at the same time preserving the important goals of the TCPA. The FCC, as an expert agency, must recognize that the world has changed significantly since 1991 and it is time for the FCC to clarify and modernize its TCPA rules to reflect the realities of today.

Sincerely,

American Association of Healthcare Administrative Management (AAHAM)

ACA International

American Council of Life Insurers (ACLI)

American Financial Services Association (AFSA)

American Insurance Association (AIA)

Child Support Enforcement Council (CSEC)

Coalition of Higher Education Assistance Organizations (COHEAO)

Computer & Communications Industry Association (CCIA)

Consumer Bankers Association (CBA)

DBA International

Education Finance Council (EFC)

Independent Bankers Association of Texas (IBAT)

Marketing Research Association (MRA)

Mobile Marketing Association (MMA)

National Association of Chain Drug Stores (NACDS)

National Association of College and University Business Officers (NACUBO)

National Association of Manufacturers

National Association of Mutual Insurance Companies (NAMIC)

National Association of Retail Collection Attorneys (NARCA)

National Association of Student Financial Aid Administrators (NASFAA)

National Cable & Telecommunications Association

National Council of Higher Education Resources (NCHER)

National Restaurant Association

National Retail Federation (NRF)

National Rural Electric Cooperative Association (NRECA)

Professional Association for Customer Engagement (PACE)

Retail Industry Leaders Association (RILA)

Satellite Broadcasting & Communications Association (SBCA)

Silver Users Association

State Creditor Bar Associations¹⁰

Student Loan Servicing Alliance (SLSA) & SLSA Private Loan Committee

Telecommunications Risk Management Association (TRMA)

U.S. Chamber of Commerce

U.S. Chamber Institute for Legal Reform

Virginia Small Business Partnership

¹⁰ Creditor's Attorney Association of Alabama; Alaska Creditor Bar; Arizona Creditor Bar Association, Inc.; Arkansas Creditors Bar Association, Inc.; California Creditors Bar Association; Colorado Creditor Bar Association, Inc.; Connecticut Creditor Bar Association; Florida Creditors Bar Association, Inc.; Collection Law Section of the Hawaii State Bar Association; Illinois Creditors Bar Association; Maryland-DC Creditors Bar Association; Minnesota Creditors Rights Association; Missouri Creditor Bar Inc.; New Jersey Creditors Bar Association; Consumer Credit Association of Metropolitan New York; Commercial Lawyers Conference of New York; The Creditor's Rights Attorneys Association of Nevada; North Carolina Creditors Bar Association; Pennsylvania Creditors' Bar Association; Tennessee Creditors Bar Association; Texas Creditor's Bar Association; Wisconsin Creditors' Rights Association, Inc.