



National Association of Consumer Advocates



Education and advocacy since 1971



Consumer Federation of America



December 19, 2014

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

Re: Comments on the Petition for a Declaratory Ruling by the American Bankers Association;
CG Docket No. 02-278

Dear Ms. Dortch:

Attached please find the comments of National Consumer Law Center on behalf of its low-income clients, and the National Association of Consumer Advocates, Consumer Action, Consumer Federation of America, Public Citizen and the U.S. Public Interest Research Group in response to the Commission's request for comments¹ on the Petition for Exemption filed by the American Bankers Association ("ABA"). We urge the FCC to continue to protect consumers and deny the CBA petition.

As we missed the deadline for submission of comments in this proceeding, we are filing these comments as an *ex parte* letter. If you have any questions, please contact me.

Thank you.

Sincerely,

s/

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¹ See <http://www.fcc.gov/document/cgb-seeks-comment-petition-exemption-filed-association>.

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 of the)
American Bankers Association)

Comments of the

**National Consumer Law Center
On Behalf of Its Low-Income Clients**

and the

National Association of Consumer Advocates

Americans for Financial Reform

Consumer Action

Consumer Federation of America

Public Citizen

U.S. Public Interest Research Group

filed December 19, 2014

The National Consumer Law Center,¹ on behalf of its low-income clients, along with the National Association of Consumer Advocates,² Consumer Action,³ Consumer Federation of

¹ The National Consumer Law Center (NCLC) is a non-profit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace. NCLC has expertise in protecting low-income customer access to telecommunications, energy and water services in proceedings at the FCC and state utility commission and publishes *Access to Utility Service* (5th edition, 2011) as well as NCLC's *Guide to the Rights of Utility Consumers* and *Guide to Surviving Debt*. Additionally, NCLC is an expert in financial credit matters, authoring numerous books on the subject, including *Consumer Banking and Payments Law* (5th edition, 2013). These comments are co-authored by NACA attorney Keith Keogh, of Keogh Law in Chicago, Illinois, and NCLC attorney Margot Saunders.

America,⁴ Public Citizen,⁵ and U.S. Public Interest Research Group,⁶ submit these comments in response to the Commission’s request for comments⁷ on the Petition for Exemption filed by the American Bankers Association (“ABA”). We urge the FCC to continue to protect consumers and deny the CBA petition.

The ABA seeks an exemption from the Telephone Consumer Protection Act’s (“TCPA”) restrictions on automated calls to wireless telephone numbers for certain categories of automated messages that it contends will not be charged to the called party.

Initially, the ABA has not shown that it is capable of sending automated messages to wireless telephone numbers that are not charged to the called party. It therefore does not qualify for an exemption pursuant to 47 U.S.C. § 227(b)(2)(C).

However, even if these automated messages could somehow be sent to consumers without charge to the called party, the Commission should not use its exemption authority to permit them. We disagree with the ABA’s contention that these automated messages are so important to consumer interests that consumers who have not provided consent should be the recipients of these messages.

Indeed, the prior express consent procedure is designed for just this type of situation. The banks can inform their customers of the availability of these services, and if the consumers agree that they desire these services they will consent to receive these messages. The fact that the messages may be valuable for consumers is a reason that they may wish to consent, not a reason to eliminate the consent requirement. If these messages are important and consumers have not consented to receive them, ABA’s members should take the time to pick up the phone and speak with affected consumers directly, or send an email or a letter. Moreover, ABA has not established that automated notifications serve consumer interests more than live operator phone calls, which

² The **National Association of Consumer Advocates (“NACA”)** is a non-profit association of consumer advocates and attorney members who represent hundreds of thousands of consumers victimized by fraudulent, abusive, and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA’s members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means. Many NACA members represent consumers who have been barraged by illegal robo-dialed and auto-dialed and artificial/prerecorded voice calls and as a result have a deep knowledge of the industry’s practices.

³ **Consumer Action** has been a champion of underrepresented consumers nationwide since 1971. Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change.

⁴ The **Consumer Federation of America** is an association of nearly 300 nonprofit consumer groups that was established in 1968 to advance the consumer interest through research, advocacy and education.

⁵ **Public Citizen** is a national non-profit organization with more than 300,000 members and supporters. We represent consumer interests through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues including consumer rights in the marketplace, product safety, financial regulation, worker safety, safe and affordable health care, campaign finance reform and government ethics, fair trade, climate change, and corporate and government accountability.

⁶ **U.S. Public Interest Research Group (U.S. PIRG)** serves as the Federation of State PIRGs, which are non-profit, non-partisan public interest advocacy organizations that take on powerful interests on behalf of their members. For years, U.S. PIRG’s consumer program has designated a fair financial marketplace as a priority. Our research and advocacy work has focused on issues including credit and debit cards, deposit accounts, payday lending and rent-to-own, credit reporting and credit scoring and opposition to preemption of strong state laws and enforcement.

⁷ See <http://www.fcc.gov/document/cgb-seeks-comment-petition-exemption-filed-association>.

would allow ABA's members to confirm customer identities while addressing these sensitive account related issues.

In any case, many of the concerns articulated by ABA are already addressed by the TCPA's provisions exempting calls made for emergency purposes or with prior express consent of the called party. There is thus no need for any special exemptions for bankers.

To the extent the Commission nevertheless grants these special exemptions in response to the ABA's petition, it should require that ABA's members include a notice of the right to opt-out of receipt of further messages, and should clarify that the exemption applies only to messages *actually* sent to the account holder, and not to messages that were merely *intended* to be sent to the account holder.

The ABA Has Not Identified any Means of Sending Free-To-End-User Messages

The ABA petition claims that it "will work with wireless carriers and third-party service providers to ensure that the recipients of notices under the requested exemption are not charged for those messages." But the petition does not identify any means by which this can be accomplished.

The Commission has repeatedly noted that the cost of incoming calls and messages to a wireless telephone number is charged to the recipient subscriber. *See In re Rules and Regulations Implementing the TCPA of 1991*, 18 FCC Rcd. 14014, 14115 (2003) ("The commission has long recognized, and the record in this proceeding supports the same conclusion, that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used."); *see also In re Rules Implementing the TCPA of 1991*, 23 FCC Rcd 559, 562 (2007).

This is true regardless of whether the subscribers is charged in advance for unlimited calls or after the fact for each call received. *Fini v. DISH Network*, 2013 U.S. Dist. LEXIS 101829, *23-24 (M.D. Fla. 2013)(“There is no dispute that Plaintiff and her husband paid *something* for her cell phone service. The Court finds the FCC's interpretation of when a customer is ‘charged’ to be highly persuasive, and therefore finds as a matter of law that Plaintiff was ‘charged’ for the calls.”)(emphasis in original); *Lee v. Credit Management*, 846 F. Supp. 2d 716, 729 (S.D. Tex. 2011) (“Defendant argues that the Act does not apply because Lee has produced no evidence that he was charged for the calls it made to his cellular phone. The Court disagrees. Lee has stated that he pays a third-party provider for cellular phone services. Normally, this is sufficient to show that an individual was charged for the calls.”)(citing 2007 FCC Order).

Wireless carriers set prices for incoming call and messaging services based, at least in part, on the costs of delivering those services to their subscribers. Even if the ABA's members somehow arranged with the carriers so that their automated messages would not result in any *additional* charges to wireless subscribers, those messages would still contribute to the carrier's overall cost of delivering incoming messages to its subscribers. Those costs are ultimately charged to subscribers.

The ABA has not shown that its member institutions are capable of sending automated messages to wireless subscribers without charge and therefore does not qualify for an exemption for any of the call categories addressed in its petition.

The FCC should decline to give a theoretical or hypothetical ruling on the ABA's request, but should address it only if and when the ABA provides a factual record demonstrating the existence of technology that will avoid any charge or reduction of airtime for consumers who receive calls. The ABA should be required to demonstrate that the technology actually exists; that it is reliable; that it works for all carriers, for all types of equipment, and in all parts of the country; and that it does not produce any unwanted negative effects. But even if the ABA provides a factual record on all of these issues, the FCC should still deny the petition for the other reasons discussed below.

The TCPA Already Exempts Calls Made with the Prior Express Consent of the Called Party

On its face, the TCPA's restriction of automated calls placed to wireless telephone numbers does not apply to calls made "with the prior express consent of the called party." 47 U.S.C. §227(b)(1)(A). The ABA's member institutions can obtain the necessary prior express consent from its customers for the calls in question by simply including an explicit consent provision encompassing those particular calls in the binding terms and conditions of its customer agreement. Alternatively, it can advertise the availability of these services and obtain consumer consent from consumers who affirmatively choose to receive these messages. These are common practices. Contracts routinely include consent to messages to cell numbers, and bankers routinely offer new services to consumers throughout their business relationship. In light of these simple solutions, the ABA has not and cannot establish that the procurement of prior express consent for calls to its customers is so difficult as to merit a special exemption.

Consumer consent is one of the fundamental principles of the TCPA. Cell phones would rapidly become useless if they became clogged with the trillions of messages that businesses would like to send to consumers. Consumers would find that the messages they wanted to receive or needed to receive were buried in a flood of other messages. Their cell phones would be constantly pinging. Whether the consumer is charged for the call is only part of the issue. The consent requirement gives consumers the ability to control the volume of messages they receive.

The consent requirement is particularly important for the banking information that would be the subject of the text messages at issue here. Some consumers may want to receive fraud alerts by text message, but others may not. Their cell phones may not be reliable ways for them to receive information, because they may live in or spend time traveling in an area with poor cell phone reception. They may keep their cell phones on while they are sleeping so they can be alerted to family emergencies, but may not desire that they be awakened in the middle of the night for a fraud alert from their bank. They may prefer a means of communication that is less vulnerable to phishing.

The ABA has provided no explanation as to why it cannot obtain its customers' consent to receive messages on their cell phones about security breaches and suspicious charges. Presumably, the ABA's members are asking their customers for their cell phone numbers, rather than obtaining this information through skip-tracing or third-party databases. (There would be serious additional concerns if the ABA were proposing that its members should be allowed to send text messages to numbers they obtain through skip-tracing or third-party databases). When the ABA's members obtain their customers' cell phone numbers, they can request consent to make these calls at the same time.

The TCPA Already Exempts Calls Made for Emergency Purposes

On its face, the TCPA's restriction of automated calls placed to wireless telephone numbers does not apply to calls made for emergency purposes. 47 U.S.C. §227(b)(1)(A). To the extent any of the call categories addressed in the ABA's petition are made for emergency purposes, as is implied, then they are already exempted from the TCPA's requirements and no special exemption is necessary here. To the extent the ABA is concerned that certain categories of calls might not qualify as emergencies, ABA's members can easily ensure that these calls are exempted as calls made with prior express consent as described above.

If the Commission Nevertheless Grants a Special Exemption, It Should Clarify that the Exemption Does Not Apply to “Wrong Number” Calls

To the extent the Commission nevertheless grants an exemption, it should clarify that the exemption will apply only to messages that are *in fact* sent to the account holder whose account is addressed in the exempted messages, rather than messages that are merely *intended* to be sent to the account holder. In other words, calls actually placed to uninterested third party telephone subscribers should not be exempted simply because the caller might have “thought” it was calling the account holder.

Although the ABA has vaguely proposed as a condition to the exemption that its automated messages will be sent “only to the telephone numbers of consumers to whom the alert is directed,” it argues at the same time that callers should not be liable for calls placed to reassigned telephone numbers. It is thus unclear what the ABA is proposing. The Commission should therefore clarify that the exemption will apply only to messages that are in fact sent to the appropriate account holder, and thus will not absolve ABA's member institutions of liability for so-called “wrong number” calls.

The vast majority of courts—including United States Courts of Appeal—have squarely rejected attempts to undermine the remedial purpose of the TCPA by permitting otherwise illegal calling practices simply because the caller “thought” it was calling someone other than an intended recipient. There are good reasons for this. Congress clearly intended for this statute to protect consumers from the detrimental impact of automated calls to their cell phones to which they had not consented.

The TCPA was enacted to protect recipients of unwanted calls. One of the most common consumer complaints about robocalls concerns calls made to the wrong party.⁸ Thus, “wrong number” call recipients are among the most important classes of persons that should be protected.

⁸ According to the National Association of Attorneys General, 30% of the complaints Indiana received about debt collectors in 2010 concerned autodialer calls to the wrong parties. *Exhibit 1*.

The Consumer Financial Protection Bureau's Annual Report for 2013 shows that 33% of debt collection complaints involved continued attempts to collect debts not owed, which include complaints that the debt does not belong to the person called.

http://files.consumerfinance.gov/f/201403_cfpb_consumer-response-annual-report-complaints.pdf

Similarly, a 2009 survey conducted by the Scripps Survey Research Center at Ohio University shows 30% of respondents were being called regarding debt that is not their debt. <http://www.creditcards.com/credit-card-news/debt-collectors-become-more-aggressive-break-law-1276.php>.

The fact that a prohibited call was sent to a “wrong number” is immaterial under the TCPA: The consumer still received an autodialed call to his or her cell phone without consent. It would be nonsensical, then, for this particular subset of consumers to be less protected than others whose privacy interests Congress intended to protect, just because businesses contend that compliance may be more difficult. As the Seventh Circuit opined about the possibility of Congress substituting “called party” with “intended recipient of the call[,]” ...

[t]hat substitution would expose new subscribers to unwanted calls and unjustified expense. Congress might have thought the current approach preferable, as a safeguard of persons assigned to recycled numbers, even though this protection comes at some cost to [the caller].⁹

“Wrong number” calls to reassigned numbers are largely the result of inadequate calling practices and a pervasive environment of industry indifference. Time and time again, NACA members and other attorneys who represent consumers confront companies that, despite espousing their consumer-friendly calling practices at the outset of litigation, ultimately turn out to have known that they were making prohibited calls. Frequently, automated calls fail to provide any mechanism to opt out or notify the caller that it is calling the wrong person.¹⁰ And frequently, consumers’ do-not-call requests and notifications that a wrong number is being called are completely ignored.

Even when steps are taken to ostensibly prevent calls to wrong numbers, these are often more for outward appearance than substantive compliance. For example, we have observed instances where the caller purportedly maintains a phone line for consumers to call if it reaches a wrong number or the consumer wants to make a do-not-call request, but then—apart from putting the onus on the consumer to take affirmative action to get the already prohibited calls to stop—fails to have an operating do-not-call mechanism when the consumer actually calls. Dialer records also routinely reveal that companies will continue to call the number affiliated with a particular “intended recipient,” even though the dialer recognizes a triple tone or other indication that the number is no longer in use. Should the number later happen to be reassigned, the new consumer will undoubtedly begin receiving wrong number calls.

Some companies even put the onus on the consumer to go out of his or her way to notify them of a wrong number—such as by identifying a phone number for the recipient to call to report that they received a wrong number call—without accounting for the fact that, even outside of the wrong number context, many consumers will obviously hang up without wasting additional time listening to the full, unwanted message from a party with whom they have no relationship, and may therefore not even be aware of the apparent opt-out mechanism or that the robocall was actually for someone else. Further, many consumers report being wary of calling unfamiliar numbers or pressing digits during a call to supposedly be removed from a call list, out of concern that the call may be malicious or that interacting with an unfamiliar caller will only result in more calls.

⁹ *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 642 (7th Cir. 2012).

¹⁰ Even here, the ABA makes the troubling argument that its exempted calls (save one category) should not have to include opt-out notices. If the ABA truly believes that consumers *want* to receive these automated messages even without express consent, then it should not object to notifying consumers of an opt-out procedure that would of course allow the ABA’s members to send these messages to the opt-outs through other means (e.g. emails and/or manual dialing).

Wrong number calls are a serious problem faced by consumers across the country, and consumers who receive them—even those made solely for “informational, non-telemarketing” purposes—are routinely left with no effective way to make the unwanted calls stop. It is thus of paramount importance that the Commission clarify that any exemption granted in response to the ABA’s petition will apply only to messages that are *in fact* sent to the appropriate account holder.

We appreciate that companies are not perfect, and that genuine mistakes may occur resulting in wrong number calls to consumer phones. However, this is no reason to effectively rewrite the TCPA to permit otherwise prohibited calls to wrong numbers. We firmly believe that companies, if they choose to, can comply with the TCPA. Some, unfortunately, choose not to do so.

The ABA’s member institutions are choosing to use automatic telephone dialing equipment but they do not have to do so. With respect to the identity theft notifications at issue, it seems that ABA’s member institutions would *want* to make live operator calls to affected account holders to ensure that they are reaching the correct person rather than the identity thief. The fact that the ABA wants to rely on automated notifications instead is troubling.

In any event, the ABA and any other company choosing to use automatic telephone dialing equipment can take reasonable steps to ensure that they are calling the correct persons. If a company is calling a consumer for the first time or after a period of no contact, it just makes sense to call the person manually to confirm his or her use of the number first, before using an autodialer. Businesses can also use reverse-lookup providers, such as Neustar, which, while not perfect, will further ensure that the correct person is being called. Companies can ensure that, if their dialers identify triple tones or other indications of an unused number, that the number is removed from the list to be called or simply verified manually, and not just continually robocalled until a new person to whom it is reassigned complains. Requiring companies that choose to use autodialer technology to take steps to ensure that they are not robocalling wrong numbers is not an unreasonable request, and has been the law for more than two decades. The Commission should clarify that any exemption granted to the ABA’s member will apply only to messages that are *in fact* sent to the appropriate account holder.

If the Commission Grants a Special Exemption, It Should Require Opt-Out Notices

Finally, to the extent the Commission grants any special exemption, it should require as a condition that ABA’s member institutions must a) include in each exempted messages information on how to opt-out of future automated messages and b) honor the opt-out requests.

The Commission recently imposed virtually identical conditions on an exemption for delivery notifications granted to the Cargo Airline Association, explicitly requiring that:

- (6) delivery companies relying on this exemption must offer parties the ability to opt out of receiving future delivery notification calls and messages and must honor the opt-out requests within a reasonable time from the date such request is made, not to exceed thirty days; and,
- (7) each notification must include information on how to opt out of future delivery notifications; voice call notifications that could be answered by a live person must include an automated, interactive voice- and/or key press-activated opt-out mechanism that enables the called person to make an opt-out request prior to

terminating the call; voice call notifications that could be answered by an answering machine or voice mail service must include a toll-free number that the consumer can call to opt out of future package delivery notifications; text notifications must include the ability for the recipient to opt out by replying “STOP.”¹¹

The ABA makes the troubling contention that it should not have to adhere to such an opt-out condition with respect to the bulk of its messages because “the result will be that the same messages will be sent through channels that are less efficient and less likely to permit timely remedial action. [The ABA] does not believe that this result is in the interest of consumers.”

It is hard to take this objection seriously. If the ABA is concerned about helping consumers to address potential issues of identity theft and wants to ensure timely remedial action, then it should place live operator calls to ensure that it is actually reaching the affected consumers, rather than relying on automated message notifications. If the ABA insists on using automated messages, it should at least be willing to honor consumers’ requests that bankers not send automated messages to their wireless telephones and instead communicate with them through less intrusive means. The ABA can still send its notification messages to consumers who opt-out through manual dialing, email, and other means.

The ABA has not established any justification to depart from the opt-out conditions the commission imposed on the exemption granted in the Cargo Airline Association Order.

Conclusion

For the reasons explained above, we respectfully request that the ABA’s petition be denied.

Respectfully submitted,

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¹¹ *In the Matter of Cargo Airline Association Petition for Expedited Declaratory Ruling*, 29 FCC Rcd 3432, 3438, ¶18 (2014).