

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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

**Comments of the National Consumer Law Center  
On behalf of its low-income clients and the  
National Association of Consumer Advocates**

*filed September 26, 2014*

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These comments are submitted by the National Consumer Law Center,<sup>1</sup> on behalf of its low-income clients, and the National Association of Consumer Advocates.<sup>2</sup> These comments are in response to the Commission’s request for comments<sup>3</sup> on the Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking filed by Rubio’s Restaurant, Inc. (“Rubio”).

Rubio seeks a ruling to 1) allow it to call reassigned numbers if it previously had consent to call those numbers from its employees, 2) allow a bad faith defense where the caller is not liable if a called party waited too long to notify it of the calls to the reassigned number and 3) a finding that the TCPA does not apply to intra-company messaging systems.

As an initial matter, Rubio contends that many of its messages are for emergency purposes. If that is true, Rubio’s petition is not needed as the TCPA already exempts calls made for an emergency purpose.

If the calls at issue are not emergency texts as asserted, then Rubio as the employer is in the best position to insure that it has up to date and accurate telephone numbers from its employees.

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<sup>1</sup> 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* (5<sup>th</sup> edition, 2011) as well as NCLC’s *Guide to the Rights of Utility Consumers* and *Guide to Surviving Debt*. For questions about these comments, please contact NCLC attorney Margot Saunders, [msaunders@nclc.org](mailto:msaunders@nclc.org).

<sup>2</sup> 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.

<sup>3</sup> See <http://www.fcc.gov/document/cgb-seeks-comment-petition-expedited-rulemaking-pace>.

## **There is No Authority to Modify Statutory Damages Or Impose a Statute of Repose**

Section 227(b)(2)(C) applies to the FCC's exemption powers related to cell numbers. Section 227(b)(2)(C) specifically limits the Commission's authority to exempt from the prohibition on autodialed or prerecorded message calls to only those "calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights the provision is intended to protect."

There is no authority for the FCC to modify the statutory damages either to remove the penalty for each violation, or to say that there is no violation if the called party waits too long to contact a caller. Not only would such a finding modify the private right of action provision, but it would also impose a statute of repose that does not appear anywhere in the TCPA. Both determinations would undermine the privacy rights of the called party.

## **Calls to Cell Phones Are Not an Intra-Company Messaging Systems**

A system that relies on messages to employees' personal cell phones is not an intra-company messaging system. It seems that rather than maintain the costs of utilizing an intra-company messaging system, Rubio wants to push the nominal compliance costs of maintaining up-to-date records on to the public, especially when it can easily utilize a true inter office messaging system like e-mail or company owned and maintained telephones that would stay with the employer after an employee leaves employment.

If Rubio does not want to rely on e-mail or company telephones, it can require that employees regularly verify their current cell numbers. Rubio can also scrub the numbers prior to calling. As the undersigned asserted in response to the United Healthcare petition, Rubio can take simple and cost effective steps to avoid making calls to cellular telephone numbers that have been reassigned. As recognized by the FCC in 2004<sup>4</sup> and the Seventh Circuit in 2012,<sup>5</sup> a caller can use a reverse-look up service to verify that the cellular telephone numbers it robocalls actually do belong to its customers. Rather than repeat the comments submitted in response to United Health Care's petition, the undersigned incorporate them herein.

## **Conclusion**

For the reasons explained above, we respectfully request that Rubio's petition be denied.

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<sup>4</sup> The Commission previously rejected this same proposal to create a good faith exception for inadvertent calls to wireless numbers finding that there are adequate solutions in the marketplace to allow business to identify reassigned wireless numbers. 2004 Safe Harbor Order, 19 FCC Rcd. 19215 at 4 (citing 2003 TCPA Order, 18 FCC Rcd at 14117-18, at 172).

<sup>5</sup> *Soppet v. Enhanced Recovery Company, LLC.*, 679 F.3d 637 (7<sup>th</sup> Cir. 2012) (explaining that bill collectors can "use a reverse lookup to identify the current subscriber to Cell Number").

Respectfully submitted, September 26, 2014

Margot Saunders  
Counsel  
Margot Saunders  
National Consumer Law Center  
1001 Connecticut Avenue, NW  
Washington, D.C. 20036  
[www.consumerlaw.org](http://www.consumerlaw.org)  
[msaunders@nclc.org](mailto:msaunders@nclc.org)  
202 452-6252 extension 104  
202 595-7844 - direct line