



U.S. CHAMBER

Institute for Legal Reform

U.S. CHAMBER OF COMMERCE

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December 22, 2014

VIA ELECTRONIC FILING

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

Re: *In the Matter of Application of Rules and Regulations Implementing the Telephone Consumer Protection Act: Petition for Exemption of the American Bankers Association; CG Docket No. 02-278*

Dear Ms. Dortch:

On behalf of the U.S. Chamber of Commerce¹ and the U.S. Chamber Institute for Legal Reform² (collectively referred to as “Chamber”), we respectfully submit these reply comments to the Federal Communications Commission (“Commission”) in response to its Public Notice³ requesting comment on the Petition for Exemption filed by the American Bankers Association (“ABA Petition”) in the above-referenced docket.

The Chamber strongly supports the ABA’s request for Commission action to exempt from the Telephone Consumer Protection Act (TCPA)⁴ certain automated calls and text message alerts to wireless telephone numbers, placed without charge to the called parties, concerning: (1) transactions and events that suggest a risk of fraud or identity theft;⁵ (2) possible breaches of the

¹ The U.S. Chamber of Commerce is the world’s largest business federation, representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America’s free enterprise system.

² The U.S. Chamber Institute for Legal Reform seeks to promote civil justice reform through legislative, political, judicial, and educational activities at the global, national, state, and local levels.

³ Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling Filed by American Bankers Association*, CG Docket No. 02-278, DA 14-1614 (rel. Nov. 6., 2014), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-14-1614A1.pdf.

⁴ The Telephone Consumer Protection Act (TCPA) is codified as 47 U.S.C. § 227. The Commission’s implementing rules are codified as 47 C.F.R. § 64.1200.

⁵ *Petition for Exemption of the American Bankers Association*, CG Docket No. 02-278 (filed Oct. 14, 2014), at 3, 9-12, available at <http://apps.fcc.gov/ecfs/document/view?id=60000973094>. (“ABA Petition”).

security of customers' personal information;⁶ (3) steps consumers can take to prevent or remedy harm caused by data security breaches (collectively referred to as remediation messages);⁷ and (4) money transfer notifications and notifications of actions needed to arrange for receipt of pending money transfers.⁸

If exempted, these calls and text message alerts would be subject to certain conditions proposed in the ABA Petition designed to protect consumers' privacy rights under the TCPA. These conditions include, among things, not including any telemarketing, solicitation or advertising content and that financial institutions will not send more automated messages than are required to complete the communications' intended purpose.⁹

I. Consumer Use of Wireless Phones is Vastly Different Than When the TCPA Was Enacted in 1991

When Congress enacted the TCPA in 1991, wireless phones were a luxury item and the landline was the dominant consumer telecommunications device. Thus, certain restrictions in the TCPA are only applicable to calls made to cell phones. However, as the Commission itself has acknowledged, "wireless use has expanded tremendously since passage of the TCPA in 1991."¹⁰ The number of "wireless-only" households increased to 41.0% during the second half of 2013 from 39.4% during the first half of 2013.¹¹ An additional 16.1% of U.S. households were "wireless-mostly" (i.e., the household has a landline but receives all or most calls on a wireless phone).¹² Thus, 57.1% of U.S. households rely either exclusively or predominantly on wireless telephone service. According to a March 2014 study by the Board of Governors of the Federal Reserve System regarding consumers and mobile financial services, 87% of the U.S. population has a mobile phone and 61% of those phones are smartphones.¹³

No matter where they are at the moment, consumers want to be connected. Consumers use their phones to communicate in the manner (e.g., voice calls, text messaging, e-mail, video chat, social media, gaming, etc.) that best meets their needs at the time.

⁶ *Id.* at 3, 12-14.

⁷ *Id.* at 3, 14-15.

⁸ *Id.* at 3, 15-16.

⁹ *Id.* at 3, 9, 16-21.

¹⁰ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* ("2012 TCPA Order"), 55 Communications Reg. (P&F) 356, ¶ 29 (2012).

¹¹ 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, July–December 2013*, at 1 (July 2014), available at

<http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201407.pdf>.

¹² *Id.* at 4.

¹³ *Consumers and Mobile Financial Services 2014*, Board of Governors of the Federal Reserve System, Mar. 2014, at 4, available at <http://www.federalreserve.gov/econresdata/consumers-and-mobile-financial-services-report-201403.pdf>.

II. The Commission Should Grant the ABA Petition to Ensure the Ability of Consumers to Receive Time-Sensitive Fraud and Identity Theft Alerts, Data Breach Notifications, and Data Breach Remediation Messages

Ensuring that businesses and other organizations can timely and efficiently alert their customers that they are or could be victims of identity theft, fraud, or a data breach is clearly pro-consumer as is notifying those customers of any remedial steps that should be taken. The number of identity fraud victims jumped to 13.1 million in 2013, an increase from 12.6 million in 2012, according to a report released earlier this year.¹⁴ 744 data breaches have been reported in 2014 (as of December 16), according to the Identity Theft Resource Center.¹⁵ The ABA Petition notes that 47% of U.S. adults “had their personal information exposed by hackers between August 2013 and August 2014, and 41% of adult Americans have had to replace at least one credit card for fraud prevention reasons so far in 2014.”¹⁶

In many situations, text messages are the best option to ensure that consumers receive alerts about these matters in a timely manner. Consumers in the United States open 98% of their text messages,¹⁷ read 90% of those messages within three minutes,¹⁸ and respond, if needed, in about 90 seconds.¹⁹ In comparison, e-mails have an average open rate of 22% with the typical user responding in about 90 minutes.²⁰ This year marked the first time that more U.S. customers (35%) used their mobile devices—rather than other means (e.g., ATM or branch visits)—to interact with their banks, according to a recent study.²¹ Regarding notification of potentially fraudulent activity, a 2010 survey commissioned by SoundBite Communications Inc. found that nearly 60% of consumers preferred to be contacted on their mobile phones.²² According to the same survey, 35% of all consumers and 51% of those aged 18 to 34 indicated a text message was one of their preferred ways of being contacted about fraud.²³

¹⁴ Press Release, *A New Identity Fraud Victim Every Two Seconds in 2013 According to Latest Javelin Strategy & Research Study*, Javelin Strategy & Research, Feb. 5, 2014, available at <https://www.javelinstrategy.com/news/1467/92/A-New-Identity-Fraud-Victim-Every-Two-Seconds-in-2013-According-to-Latest-Javelin-Strategy-Research-Study/d.pressRoomDetail>.

¹⁵ *Data Breach Reports*, Identity Theft Resource Center, Dec. 16, 2014, available at http://www.idtheftcenter.org/images/breach/DataBreachReports_2014.pdf (last accessed Dec. 22, 2014).

¹⁶ ABA Petition at 12-13 (citing Jose Pagliery, *Welcome to the Age of Hacks*, CNN Money (Sept. 4, 2014), available at <http://money.cnn.com/2014/09/04/technology/security/age-of-the-hack/index.html>).

¹⁷ Armando Roggio, “Text Messaging Effective for Retailers,” *PracticalECommerce.com*, Aug. 9, 2013, available at <http://www.practicalecommerce.com/articles/4139-Text-Messaging-Effective-for-Retailers->.

¹⁸ Chery Conner, “Fifty Essential Mobile Marketing Facts,” *Forbes.com*, Nov. 12, 2013, available at <http://www.forbes.com/sites/cherylconnor/2013/11/12/fifty-essential-mobile-marketing-facts/>.

¹⁹ Roggio, “Text Messaging Effective for Retailers.”

²⁰ *Id.*

²¹ Daniel Huang, “Mobile’s Rise Poses a Riddle for Banks,” *The Wall Street Journal*, Dec. 18, 2014, available at <http://www.wsj.com/articles/mobiles-rise-poses-a-riddle-for-banks-1418945162>.

²² Press Release, *A Phone Call Isn’t Enough: New Survey Shows 89 Percent of Consumers Want Fraud Notification via Multiple Channels*, SoundBite Communications Inc., Apr. 5, 2010, available at <http://globenewswire.com/news-release/2010/04/05/417614/187982/en/Photo-Release-A-Phone-Call-Isn-t-Enough-New-Survey-Shows-89-Percent-of-Consumers-Want-Fraud-Notification-via-Multiple-Channels.html>.

²³ *Id.*

If a financial institution can send a real-time (or near real-time) communication regarding suspected fraud to the customer, then the customer can confirm whether or not the transaction was fraudulent and take corresponding steps to authorize the transaction if legitimate or block that transaction (and future ones, if necessary, as well) if fraudulent.²⁴ Depending on the type of entity that has suffered a data breach, various federal and state laws apply that require notifying customers that they could be potential victims of the breach. Therefore, it is critical that companies be able to utilize the communications method best suited to notify their customers and comply with the law.

Similarly, remediation messages are “notices sent to customers concerning measures they may take to prevent identity theft resulting from a breach, such as placing fraud alerts on their credit reports and subscribing to credit monitoring services.”²⁵ Such messages may also contain information about being sent “new payment cards, how to activate those cards, and how to take other steps that will ensure the availability of secure card transactions.”²⁶

Sending automated messages to customers’ mobile phones is the fastest and most cost-efficient means to communicate time-sensitive information.²⁷ “Only automated dialing—not manual dialing by live agents—provides the scale and speed necessary to reach...customers in a timely, efficient, and economical manner,” according to the Financial Services Roundtable.²⁸ Specifically, in the case of a data breach event, the need to quickly contact hundreds of thousands or even millions of potentially affected customers clearly shows that manual dialing is not a practical or reasonable option.²⁹

Manually-dialing phone numbers would actually reduce consumer privacy because of the greater likelihood that misdialed calls will result in a higher rate of calls placed to unintended recipients which would be counter to the aim of the TCPA.³⁰ Moreover, a manually-dialed call that is misdialed raises potential security concerns because of the chance that “personal information may be inadvertently revealed to an individual other than the consumer to whom the information belongs.”³¹

Thus, the Chamber strongly supports the ABA Petition and also agrees with commenters that argued that consumers would be well-served by extending this requested exemption to all companies seeking to provide—via call or text—fraud and identity theft alerts, data breach notifications, and data breach remediation messages to their customers.³²

²⁴ See MasterCard Incorporated Comments at 4 (filed Dec. 8, 2014).

²⁵ ABA Petition at 14.

²⁶ ABA Petition at 14, 15.

²⁷ See Financial Services Roundtable Comments at 1 (filed Dec. 8, 2014).

²⁸ *Id.* at 2.

²⁹ See MasterCard Comments at 5.

³⁰ See International Bancshares Corporation Comments at 6 (filed Dec. 8, 2014).

³¹ *Id.*

³² See The Internet Association Comments (filed Dec. 8, 2014) at 5-7.

III. The Commission Should Grant the ABA Petition Because Exempting Money Transfer Notifications from the TCPA is Commonsense and Pro-Consumer

Mobile devices are increasingly used in the transfer of money from the account of a customer to an account of another individual. Given the efficiency and rapid open rate of text messages, customers initiating the money transfer often prefer that the financial institution send a text to the recipient to alert the individual that the money has been transferred and to provide notification of any steps that need to be taken to obtain the transferred funds.³³ Especially, in emergencies, knowing that money has been sent can be critical.³⁴

Receiving a text that someone has sent them money is likely to be received as welcomed news by an individual. However, such a text (or call) raises TCPA liability risks concerns because the recipient may “not have an ongoing relationship with the sending institution and, therefore, have not consented to receive automated calls from that institution.”³⁵ Given that “obtaining consent from recipients in these circumstances would be impractical and burdensome and would not serve consumers’ interests,” the Chamber strongly supports the ABA Petition and also agrees with commenters that argued that consumers would be well-served by extending this requested exemption to all companies seeking to provide these types of money transfer notifications to individuals.³⁶

IV. Regulatory Clarity Regarding the TCPA is Desperately Needed

The Chamber and many others from a variety of industry sectors have previously and frequently highlighted TCPA litigation abuses that could be ameliorated by Commission action. Concern over TCPA liability for calls or texts made has or may cause some financial institutions and other organizations to cease using automated technologies to efficiently send time-sensitive fraud and identity theft alerts, data breach notifications, and data breach remediation messages to their customers.³⁷

There is, unfortunately, a tsunami of class action TCPA lawsuits driven not by aggrieved consumers, but by opportunist plaintiffs’ firms taking advantage of uncertainty in the law to rake in attorney fees. TCPA lawsuits against businesses are skyrocketing. 2,069 TCPA lawsuits have been filed in 2014 (as of 10/31), an increase of 27.9% over the same period last year.³⁸ Even when a customer has provided a mobile phone number to the caller, plaintiffs’ attorneys may claim that the customer did not specifically consent to receive the informational call at issue.

³³ ABA Petition at 15.

³⁴ See Visa Inc. Comments at 2 (filed Dec. 8, 2014).

³⁵ *Id.*

³⁶ See The Internet Association Comments at 7-8.

³⁷ See IBC Comments at 4.

³⁸ *Debt Collection Litigation & CFPB Complaint Statistics, October 2014*, WebRecon, Nov. 21, 2014, available at <http://dev.webrecon.com/debt-collection-litigation-cfpb-complaint-statistics-october-2014/>.

Even a recipient of a single call can seek to have a nationwide class certified that covers other call recipients. The significant and growing litigation risk from such calls made in good faith exposes businesses to potentially annihilating “class actions lawsuits for technical violations that cause no actual injury or harm to any consumer.”³⁹ Therefore, guidance from the Commission on this issue would provide regulatory certainty.

At the time the TCPA was created, the bill’s sponsor, Senator Ernest “Fritz” Hollings (D-SC), explained the law was intended to facilitate actions in state small claims courts, which involve smaller sums and do not require (or even allow) the participation of attorneys.⁴⁰ However, today, TCPA cases are anything but small. Trial lawyers have used the law to file large class action lawsuits. The defendants in these cases are no longer just abusive telemarketers. They are businesses, big and small alike, forced to decide whether to reach a settlement with the plaintiff’s counsel or to accept the risk and spend significant resources defending itself against an action where the alleged statutory damages may be in the millions or even billions of dollars.

To make matters worse, TCPA litigation is now accompanied by abusive tactics pursued by certain members of the trial bar. “Block Calls Get Cash” is an Android app being marketed by Lemberg Law, a self-described consumer protection law firm.⁴¹ The firm says the app can help those who download it determine whether they have a claim under the TCPA, in which case they could win up to \$1,500 per robodial or debt collection call. The app’s Web site boasts that with no out-of-pocket cost for the app or legal fees, its users will “laugh all the way to bank.”⁴²

V. Conclusion

The Chamber urges the Commission to grant the ABA Petition to help protect consumers; reduce the risk of losses from fraud, identity theft, and data breaches; and to facilitate commonsense notifications regarding money transfers. By taking this action, the Commission can help curtail abusive lawsuits, provide American businesses with desperately needed certainty, and ensure that businesses maintain the ability to communicate in the manner that best meets the demands of their customers.

³⁹ Becca J. Wahlquist, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages* (prepared for the U.S. Chamber Institute for Legal Reform) at 1, (Oct. 2013), available at http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF.

⁴⁰ 137 Cong. Rec. 30821-30822 (1991).

⁴¹ See, *Lawsuit Abuse? There's an App for That*, U.S. Chamber Institute for Legal Reform, Oct. 29, 2014, available at <http://www.instituteforlegalreform.com/resource/lawsuit-abuse-theres-an-app-for-that>.

⁴² See, *Block Calls Get Cash*, Lemberg Law, <http://www.blockcallsgetcash.com/>.

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Respectfully Submitted,



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