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U.S. CHAMBER OF COMMERCE

1615 H Street, NW
Washington, DC 20062-2000
www.uschamber.com

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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 U.S. Chamber of Commerce[1] in conjunction with the U.S. Chamber Institute for Legal Reform[2] (collectively referred to as "Chamber") respectfully submits this *ex parte* letter in response to the announcement from Chairman Wheeler of his proposed Declaratory Ruling and Order ("Declaratory Ruling"), which is intended to respond to more than 20 pending petitions related to the Telephone Consumer Protection Act ("TCPA").

The Chamber and its members understand and share the Chairman's goal that consumers not be barraged with unwanted calls. However, the Chamber is concerned that in addressing over 20 pending TCPA petitions in one omnibus ruling that appears focused on "protecting" consumers at all costs, the proposed ruling has not taken a balanced approach to the petitions. The goal should be not only to safeguard consumers, but also to protect businesses against abusive litigation filed under a statute that, when passed by Congress in 1991, was not intended to be enforced in such a manner against businesses calling their own customers.

[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 size, 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.

Indeed, from the Chairman's description of his proposed omnibus Declaratory Ruling, it does not seem that any distinction is to be made between abusive telemarketers (who are the intended target of the TCPA's autodialer restrictions) and the legitimate businesses who make targeted communications to their customers at customer-provided numbers (and who would not, and do not, randomly or sequentially reach out to the general public). This failure to differentiate businesses contacting their own customers from cold-call telemarketers who send spam calls and text messages results in a false dichotomy in which consumers are painted as "victims" and American businesses as aggressive phone-bullies. But the reality is that the large and small businesses that turned to the Commission with petitions involving the TCPA are well-intentioned companies that have no desire to bombard the public with illegal or unwanted calls.

As the Chamber has noted in several earlier filings, American businesses are besieged with lawsuits brought under the TCPA, with many attorneys and individual consumers making their livings through suing companies for any text, call, or facsimile placed to numbers that had been provided to those companies for such communication purposes. Indeed, it is not rare for alleged statutory damages for putative class actions brought under the TCPA to be **billions** of dollars, when large companies with millions of customers are sued. Small businesses, too, are finding their very existence threatened by TCPA lawsuits. Now it seems from the Chairman's description that these petitioners (businesses both big and small) are to be lumped in together with the abusive spam telemarketers that Section 227(b) of the TCPA was designed, in a much different technological age, to regulate.[3]

The Chairman's description of the proposed ruling, and the accompanying "Fact Sheet," raise several points that cause particular concern. The Chamber thus asks the Commission to consider the issues raised below when assessing that proposal.

I. Concerns Regarding Reassigned Numbers

As the Chamber has explained in many of its comments to the Commission, there is no fool-proof solution for a business to adequately verify whether a customer's number is still assigned to the consenting individual. A business in good faith thus may reach out to its customer at the provided number and instead contact someone else, without any knowledge that it is calling a wrong number. And in a growing number of instances, persons who make a living from TCPA demands and lawsuits take advantage of this situation by acquiring new telephone numbers in the hopes of receiving a telephone call or text from a deep-pocket company trying to reach a customer at the customer-provided number. Such persons then sit back and let calls accumulate before notifying the caller (via a demand letter, or a lawsuit) that the phone number did not, in fact, belong to the intended recipient.

[3] Interestingly, petitions rarely ask about violations of Section 227(c)—the Do Not Call portion of the TCPA—as that portion of the TCPA, which Congress knew could apply to legitimate businesses conducting telemarketing, contains affirmative defenses and does not provide a private right of action for a single violation in a twelve-month period. It is Section 227(b), which clearly meant to apply to certain kinds of technologies existing in 1991, that has spurred confusion in context of new technologies and the advances in cellular telephones, and that is the subject of the petitions.

According to the fact sheet released by the Commission, "[i]f a phone number has been reassigned, callers must stop calling the number after one call." It does seem from this statement that the Commission intends to put some sort of "safe harbor" in place for a company unknowingly calling a reassigned number, but the Chamber is concerned that such a "safe harbor" will be illusory without certain clarifications. Three primary questions emerge from the Chairman's Fact Sheet statement on reassigned numbers.

First, what is meant by the requirement of stopping "after one call"? Presumably, the "one call" would be one in which the new owner of the telephone number picks up the phone and clearly informs the caller that the number has been reassigned, or perhaps it means a return call to the number in the caller ID field, to explain that the call is not reaching the intended recipient. In either case, the Commission should clarify that absent any such information from the recipient that a customer-provided number has been reassigned, there is no violation of the TCPA based on lack of consent when a business calls a customer-provided number, since the previously-provided consent for the telephone number may be presumed valid until after a company receives notice otherwise and has a reasonable opportunity to update its records.

Second, in considering that reasonable opportunity to update records, what is to be the time frame for when a caller "must stop calling"? In other regulations promulgated by the Commission, telemarketers are given 30 days to implement a Do Not Call request, and 15 days to recognize that a land line number has been ported to a cellular telephone. It cannot be that the Commission would treat businesses more harshly by requiring some sort of immediate cessation of phone calls upon any form of notice; companies must be given a reasonable time to gather the information about the reassigned number and make adjustment to their customer records. Thus, a reasonable time should be allowed to record and process the information, which may well have been given to a different company that would need to transfer the information. (For example, if a third-party company monitors and handles calls placed by consumers to another business's inbound toll-free number, and receives a call from someone providing notice that he or she is receiving calls intended for someone else, there needs to be time for that third-party company to record the information in some manner and transmit the information, and then time for the business to access and process that information and make changes to its customer records.)

Third, must the number be "reassigned" to have a safe harbor? As several commentators pointed out in support of some of the pending petitions, companies face the same problem of not reaching the intended recipient when a telephone number was wrongly-provided at the very start by the original customer. Perhaps the customer just made up a telephone number because he or she did not want to provide a real number; perhaps the customer transposed a digit by accident; perhaps the customer provided a friend or family member's telephone number instead of his or her own, thinking that was the best way (at the time) to reach the customer. In such circumstances, when placing a call to the intended recipient, a caller reaches someone else – even though the telephone number was not reassigned. (Further, the Chamber notes it has heard from several members that lawsuits are now being brought where a wrong number appears to have been purposefully provided by a new customer, in order to generate calls to a non-customer friend or family member who then brings a TCPA action against the company.) For this reason, any "safe harbor" for calls to **reassigned numbers** made in good faith by a company reaching

out to customer-provided numbers should also apply to calls made to numbers that were **wrong when first provided** to the company.

In sum, while it appears that the Commission agrees that a business reaching out to a customer-provided number can presume the number is accurate until being informed otherwise by the recipient, it is important that any "safe harbor" include the points raised above.

II. Issues With Defining Autodialers Based On "Potential"

The Chairman's statement about the proposed omnibus Declaratory Ruling states that the definition of "autodialers" is to be clarified in that ruling "to include any technology with the potential to dial random or sequential numbers." The statement further opines that such a definition would "ensure that robocallers cannot skirt consent requirements through changes in technology design."

The proposed new interpretation runs contrary to the plain reading of the statute (e.g., "has the capacity") and ignores commonsense interpretations from various federal district courts. The Commission should not be allowed to, in effect, change the statutory definition of an "autodialer." The TCPA defines an "autodialer" as something that "has the capacity" to randomly or sequentially generate numbers and dial those numbers; it seems from the Chairman's statement that the proposed ruling intends to change out the word "capacity" with the word "potential", suggesting that a system need not actually be used to randomly/sequentially generate or dial numbers in order to be deemed an "autodialer."

For example, if a live representative initiates a call and is on the line for the entire call (the rings, and the answer or non-answer), that is not a "robocall", regardless of what the "potential" is of the system to be reconfigured in the future to act differently. Sweeping all advanced technologies that ensure efficiency and accuracy into the "autodialer" label (because of arguments that the system could hypothetically be changed to randomly/sequentially dial) would lead to a perverse result, as encouraging companies to revert to old-school rotary phones with a manual dial would certainly lead to misdialed numbers and resulting consumer annoyance.

III. Problems With Revocation of Prior Consent

In describing another aspect of the proposed ruling, Chairman Wheeler states that the FCC ruling will "empower consumers to say 'stop'" by giving them "the right to revoke their consent to receive robocalls and robotexts in any reasonable way at any time." It seems that the proposed order would apply this "any time, any way" rule to any kind of call or text, even though for collections calls, the federal Fair Debt Collection Practices Act (FDCPA) expressly requires written revocation. The Chamber notes that because collections calls have a specific statute governing revocation, those calls should not be treated differently via the TCPA. Creating such a distinction would be contrary to the FDCPA, inconsistent with Congressional intent, and beyond the statutory authority of the Commission. This is just one example of a situation where the TCPA is putting companies in the untenable situation of where following and complying with one federal statute places them at risk for TCPA liability.

As for revocation of consent for other types of calls, the Chairman's statement about revocation raises many of the same concerns for businesses that were addressed above for recycled numbers—with a few extra wrinkles.

First, many companies who need to stay in touch with their customers have contractual provisions requiring the customer (if he or she wants to do business with the company) to keep a valid telephone number on file. And yet it seems that the proposed omnibus ruling will propose to overwrite all those valid contractual provisions. This is not something the FCC can do. Thus, the Commission should clarify that if a customer's consent to receive specified calls is part of that customer's agreement with a company, the Commission's declaratory ruling does not intrude on those private contractual agreements.

Second, the statement that consent can be withdrawn "any time, any reasonable way" does not address what would constitute a "reasonable way". Many American companies are large entities with hundreds or thousands of employees and multiple offices, with multiple phone numbers. Is someone permitted to call any company phone number, or send a letter to any company address, or send an email to any company email address, or talk to some affiliated entity, and revoke his or her prior consent? In the middle of a technical support call, can the consumer throw in "I revoke my consent for pre-recorded messages" in the middle of a help call, when the technical help line would have no idea what to do with such a statement? It would be impossible for a company to monitor all possible means of communications for such revocations, particularly oral ones, and so the Commission should rethink adopting a position that consumers can revoke prior consent by any means they wish.

Third, there needs to be a reasonable time for a company to register and implement any valid revocation of prior consent notification that it receives. The time-frame for a company to register and act on such a no-longer-call notification should be in line with the time frame for registering a Do Not Call Request: 30 days.

IV. Concerns Over The Format Of An Omnibus Declaratory Ruling

Based on the Chairman's blog post and associated fact sheet, which outline what appears to be several new regulations that will be put into effect (i.e., registering revocation of consent), the Chamber notes that a declaratory ruling is not the proper format for such alterations to the TCPA. A proposed rulemaking would be more appropriate, given the many alterations to businesses' calling practices that the omnibus Declaratory Ruling seems to entail.

The primary danger in issuing directives in a declaratory ruling (i.e., companies must do this with reassigned number notifications, and do that with revocation notifications) is that the very active TCPA Plaintiffs' bar is likely to argue that anything in that ruling merely clarifies what was always true for the TCPA, so that any deviation from what is set forth in the declaratory ruling **in the past four years** would form the basis of new litigation. Indeed, the Chamber is concerned that the onslaught of TCPA litigation in recent years will be eclipsed by new litigations brought with arguments that a company did not comply with requirements "made clear" by this declaratory ruling.

While the Commission is right to be concerned about consumers and their privacy rights, there also needs to be concern for legitimate businesses whose communications with customers will be altered by the Commission's rulings on various TCPA-related petitions. Businesses need time to implement the changes the proposed omnibus order would entail, and they should not be held liable for not having those new procedures all along. Therefore, the Commission should grant a blanket exemption for prior non-conformance with the requirements laid out in the new ruling for handling consumer requests and notifications, and should specify that no action can be brought for non-conformance until six months after the issuance of the Declaratory Ruling.

V. Conclusion

The Chamber is concerned that in focusing on "empowering and protecting" consumers, the Commission has forgotten about the well-intentioned and conscientious businesses that have been caught up in the maelstrom of TCPA litigation. Indeed, after reading the summary of the goals of the proposed ruling, the Chamber fears that the persons who will be most empowered will be professional TCPA plaintiffs and their attorneys. Thus, we urge the Commission to consider the points we raise above, and we would appreciate any opportunity to speak further with the Commission about any of these issues.

Respectfully Submitted,

Harold Kim
Executive Vice President
U.S. Chamber Institute for Legal Reform

William Kovacs
Senior Vice President
Environment, Technology & Regulatory Affairs
U.S. Chamber of Commerce