

January __, 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 legitimate and 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, regulatory relief by the Commission is desperately required.

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 – under certain circumstances when calling a wireless telephone.

When the TCPA was enacted over two decades ago, wireless telephones were a luxury item 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

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.

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 over 400% between 2010 and 2013.⁶ Continuing this trend, 2,164 TCPA lawsuits were filed in 2014 (as of 11/30), an increase of 21.6 percent over the same period last year.⁷

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), 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 *Debt Collection Litigation & CFPB Complaint Statistics, December 2013 & Year in Review*, WebRecon LLC, Jan. 22, 2014, available at <http://dev.webrecon.com/debt-collection-litigation-cfpb-complaint-statistics-december-2013-year-in-review/>.

⁷ WebRecon, *Debt Collection Litigation & CFPB Complaint Statistics, November 2014*, (Dec. 24, 2014), available at <http://dev.webrecon.com/debt-collection-litigation-cfpb-complaint-statistics-november-2014/>.

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, 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, a bad credit rating, or confiscation of property; receive basic requested information ranging from 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 understated—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 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.

III. Conclusion

By addressing the important issues raised in the pending TCPA-related petitions, the Commission can help curtail abusive lawsuits that ultimately increase costs for consumers, provide American businesses with desperately needed certainty, and ensure that businesses

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>.

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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,

[List of associations, companies, and other organizations]