

**Before the
Federal Communications Commission
Washington, D.C.**

In the Matter of)	
)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	
Petition for Declaratory Ruling of)	
United Healthcare Services, Inc.)	

COMMENTS OF THE AMERICAN BANKERS ASSOCIATION

The American Bankers Association (ABA) writes in support of the petition for expedited declaratory ruling filed by United Healthcare Services, Inc. (United Healthcare).¹ The Federal Communications Commission (Commission) should grant the petition and confirm that organizations are not liable under the Telephone Consumer Protection Act (TCPA)² and the Commission’s TCPA rules³ for informational, non-telemarketing autodialed and prerecorded calls to wireless numbers for which prior express consent has been obtained but which, unbeknownst to the calling party, have subsequently been reassigned from one wireless subscriber to another. ABA supports in full all of the legal and regulatory policy arguments made by United Healthcare in its petition.

¹ *Petition for Expedited Declaratory Ruling by United Healthcare Services, Inc.*, CG Docket No. 02-278 (filed January 16, 2014)(Petition); *see also* Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by United Healthcare Services, Inc., Public Notice, GC Docket. No. 02-278, DA 14-149 (February 6, 2014).

² 47 U.S.C. § 227.

³ 47 C.F.R. § 64.1200.

I. Background on the banking industry's use of informational, non-telemarketing calls.

ABA represents banks of all sizes and charters and is the voice for the nation's \$14 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than \$185 million in assets. As ABA has written on numerous occasions in comments filed in this docket, autodialed and prerecorded messages provide a critical channel for non-telemarketing communications between financial institutions and their customers. Fraud alerts, notices of address discrepancies, low balance alerts, data security breach notifications, delinquency notifications, loan modification outreach, and other time-critical, non-telemarketing communications must reach large numbers of customers promptly and at reasonable cost.⁴ Only automated calling – not manual dialing by live agents – can meet these requirements in a timely, efficient, and economical manner. And, as wireless service continues to replace the landline telephone as consumers' communication method of choice, an increasing percentage of those automated calls must be placed to mobile devices.

As technology and consumer preferences change, regulation must adjust. The Commission should seek to reduce rather than increase the burdens on automated customer communications. Accordingly, the Commission should confirm that organizations are not liable under the TCPA for autodialed informational, non-telemarketing calls to a wireless number as long as the caller previously obtained "prior express consent" to call that number.

⁴ See Comments of the American Bankers Association, the Financial Services Roundtable, and the Consumer Bankers Association, GC Docket No. 02-278 (May 21, 2010).

III. It is inconsistent with the letter and purpose of the TCPA to expose callers to the threat of TCPA class action litigation for placing an autodialed call to a number that has been reassigned without the caller's knowledge.

Banks exercise care to obtain “prior express consent” from their customers before calls are placed to wireless numbers using an automatic telephone dialing system or a prerecorded voice. Moreover, there is no need or incentive for a bank to place a non-telemarketing, informational call to anyone other than the intended recipient.

However, financial institutions – which place billions of autodialed informational calls annually – cannot completely avoid calling reassigned wireless telephone numbers. As United Healthcare states in its petition, telephone companies recycle as many as 37 million telephone numbers each year,⁵ and there is no public wireless telephone directory or tool available to identify numbers that have been reassigned.⁶ Consumers who change their wireless number *should* notify the businesses and organizations with whom they interact of the change; however, they often fail to do so. Thus, banks inevitably will call reassigned telephone numbers despite efforts to contact only consumers who provided “prior express consent” to be called on that wireless number.

The potential liability for calls made in good faith to parties who have consented to receive them, but whose telephone number has subsequently been reassigned without notice to the bank, threatens to curtail important and valued communications between a bank and its customers. As shown by the skyrocketing number of TCPA class action lawsuits, a single call recipient can seek to have a nationwide class certified,

⁵ United Healthcare Petition, *supra* at 5.

⁶ *Id.* at 3.

resulting in an exorbitant claim for damages. As the U. S. Chamber of Commerce explained recently in a filing in this docket:

[T]he combination of statutory damages (as in the TCPA) and the class-action device amounts to a ‘perfect storm.’ That ‘perfect storm’ allows for damage demands so high as to force defendants to ‘stake their companies on the outcome of a single jury trial, or be forced by the fear of the risk of bankruptcy to settle even though they have no legal liability.’ The fear of such ‘annihilating damages’ can deter companies from engaging with consumers.⁷

Imposing liability on callers that have properly obtained consent to call a number but inadvertently reached a consumer to whom the number was reassigned is unfair and inconsistent with the purpose of the TCPA. Moreover, as United Healthcare explains, “A statute intended to reduce unwanted contacts to consumers should not be read to require companies to repeatedly and frequently contact consumers to learn if their numbers have changed.”⁸

The TCPA is primarily a privacy statute, written to protect consumers from intrusive and unwanted telemarketing calls, but it also has other purposes. For example, the restrictions on automated calls to emergency and healthcare-related numbers were written to protect public safety as well as privacy. Similarly, the restrictions on automated calls to wireless numbers expressly were written, not only to protect privacy, but to control the shifting of telemarketers’ advertising costs to consumers. The Commission always has taken a common-sense approach to its interpretation. This is

⁷ See Comments of the U.S. Chamber of Commerce to the Professional Association for Customer Engagement (PACE) Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Dec. 19, 2013) at 3-4.

⁸ United Healthcare Petition, *supra* at 5 (“To avoid mistakenly reaching the wrong person, organizations could potentially need to reconfirm the subscriber for a particular telephone number before every single autodialed or pre-recorded call (e.g., by placing a live manually dialed call to that telephone number).”).

what the Commission did in 1992, when it decided that a customer’s decision to provide a wireless contact number to a business constituted consent to receive calls from that business at the number provided.⁹ That decision correctly balances the consumer cost and privacy interests Congress sought to promote.

More recently, the Commission recognized the public interest in receiving non-telemarketing, informational calls to wireless numbers, expressly noting that it does not want to “impede” or “unnecessarily” restrict informational calls, including for example, “bank account balance, credit card fraud alert, package delivery, and school closing information.”¹⁰

If the petition is not granted, banks will face a dilemma: expose the organization to potential class action litigation risk or curtail the use of informational calls to customers. The latter would negatively affect customers who increasingly rely on courtesy calls and text alerts from their bank to notify them of suspicious activity on an account or to remind them when account balances are low or payments are due so they can take timely action to avoid unnecessary fees and negative reports to credit bureaus.

IV. Conclusion

In its petition, United Healthcare describes three legal theories for granting relief to United Healthcare and similarly situated organizations: (1) clarifying that when a caller has obtained a consumer’s “prior express consent of the called party” to call a

⁹ Rules and Regulations Implementing the Telephone Consumer Protection Act, 18 FCC Rcd 14014 (“2003 TCPA Order”) ¶ 31.

¹⁰ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 27 FCC Rcd 1830 ¶ 21 (2012).

particular telephone number, that consent encompasses non-telemarketing, informational calls to the telephone number, until the caller learns that the number has been reassigned; (2) clarifying that the term “called party” encompasses both the consenting party and the new subscriber to a reassigned number, until the caller learns that the number has been reassigned; or (3) confirming that a good faith exception from TCPA liability exists for informational, non-telemarketing calls to telephone numbers that have been reassigned from a customer who provided prior express consent, until the caller learns that the number has been reassigned.

ABA supports each of the theories described above and respectfully requests the Commission to issue a declaratory ruling confirming that organizations are not liable under the TCPA for informational, non-telemarketing calls to telephone numbers that have been reassigned without the caller’s knowledge as long as the caller previously obtained consent to place calls to that number.

Respectfully submitted,

A handwritten signature in black ink that reads "Virginia O'Neill". The signature is written in a cursive, flowing style.

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