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Via electronic submission

June 7, 2018

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

Re: Second Further Notice of Proposed Rulemaking, Advanced Methods to Target and Eliminate Unlawful Robocalls [CG Docket No. 17-59; FCC 18-31]

Dear Ms. Dortch:

The Independent Community Bankers of America (“ICBA”)¹ welcomes this opportunity to provide comment on the Federal Communication Commission’s (“FCC” or “Commission”) proposal to facilitate the creation of a reassigned numbers database (“Database”) that could aid community banks in their attempts to contact customers with important information. The ideas espoused in the proposed rule will benefit consumers and the community banks that serve them.

Background

With some exceptions, the Telephone Consumer Protection Act (“TCPA” or “Act”) prohibits telephone calls made using an automatic telephone dialing system (“ATDS”) unless the caller has the prior consent of the called party. However, the Act contains vague terminology that has resulted in years of litigation and split court decisions.

In an attempt to resolve the uncertainty, the FCC issued a Declaratory Ruling and Order (“Order”) in 2015. The Order made clear that callers are subject to liability for calls to a number

¹ The Independent Community Bankers of America®, the nation’s voice for nearly 5,700 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services. With nearly 52,000 locations nationwide, community banks employ 760,000 Americans, hold \$4.9 trillion in assets, \$3.9 trillion in deposits, and \$3.3 trillion in loans to consumers, small businesses, and the agricultural community. For more information, visit ICBA’s website at www.icba.org.

for which consent is obtained but has since been reassigned. Essentially, the reassignment of a number extinguishes any consent given by the number's previous holder and exposes the caller to liability for reaching the new subscriber.

The 2015 Order does provide callers with a limited safe harbor from liability. A caller who lacks knowledge of the reassigned number can avoid liability for the first call to a number following reassignment. For that first call, the caller can reasonably rely on the consent given by the previous subscriber. That reasonable reliance is limited to only "one call." The 2015 Order found that "one call represents an appropriate balance between a caller's opportunity to learn of the reassignment and the privacy interests of the new subscriber,"² regardless of whether the caller had any indicia of the reassignment.

In recognition of the fact that community banks and other good actors might inadvertently call a reassigned number and be liable for potential damages under TCPA, the FCC is now proposing to establish a Database that a caller can reference. The FCC is considering whether to provide a safe harbor from litigation for callers that rely on the Database before placing a call to a reassigned number. Finally, the FCC seeks comment on the specific information that callers need from a Database and the best way to make that information available.

ICBA Comments

Executive Summary

The "one call" safe harbor is too limited, leaving good actors with little room for error. As the proposal highlights, when a consumer disconnects his or her telephone number, that consumer may not inform all necessary parties of the disconnection, including parties that received prior express consent from the consumer to be called.³ Currently, there is no easy, simple, and cost-effective way for community banks to determine whether a phone number has been reassigned.

Despite a bank's vigilance, it might take a caller several attempts to learn of a reassignment. It is rare that a bank will learn of a reassigned number after just one call, yet each attempt beyond the first subjects the bank to liability.

² 30 FCC Rcd. at 8009 ¶ 90.

³ 83 Fed. Reg. 17631, 17632 (April 23, 2018).

A more practical approach beyond the “one call” safe harbor is needed to provide community banks with certainty and relief from predatory lawsuits. The proposed Database could help address these issues. ICBA is supportive of the Commission’s proposal, so long as use of the Database is (1) optional and (2) provides a safe harbor from TCPA liability. Additionally, ICBA offers the following comments in response to questions raised in the notice of the proposed rulemaking.

- A Database would benefit both consumers and banks.
- The Commission has the requisite authority to establish a safe harbor.
- Banks using the Database could achieve a more practical safe harbor; however, Database usage should not be required but instead serve as presumptive evidence of compliance.
- Routinely referencing the Database on a quarterly basis should be sufficient to demonstrate compliance with TCPA requirements.
- Information contained in the Database should be reliable. This is best achieved through the creation of one, centralized Database containing data from all providers and monitored by the FCC.
- Banks should not be held liable for deficiencies in the Database, and the affirmative defense should not be rebutted due to errors outside the bank’s control.
- The Database should contain the date a number was reassigned.
- The FCC should define “reassigned numbers” as those that are permanently disconnected.
- A comprehensive reinterpretation of the Act is needed.

A Reassigned Numbers Database Would Benefit both Consumers and Banks

Community banks currently lack the means and ability to discover reassigned numbers in a timely manner. A comprehensive and timely Database that facilitates the identification of reassigned numbers before placement of the call would help banks avoid calling the wrong number, saving time and expense.

In addition to benefiting banks and other callers, the Database would also benefit consumers by reducing the number of calls intended for the previous subscriber. A Database could also alert the bank when a customer deactivates his or her telephone number, triggering an attempt by the bank to reestablish contact so the intended recipient can continue receiving information.

A Database Could Facilitate the Creation of a More Practical Safe Harbor

In addition to using the Database to save time and provide important information to those who need it, the Commission seeks comment on whether it has statutory authority to provide safe harbor from TCPA liability to callers that check the Database, and if so, how frequent must the Database be referenced in order to obtain safe harbor.

First, ICBA believes that the Act, and all interpretations of the Act, indicates that the Commission has the requisite authority to establish a safe harbor. Indeed, the Commission already set the precedent of a safe harbor when its 2015 Order established the “one call” provision. The Commission found its statutory authority to establish a safe harbor by interpreting a caller’s ability under the statute to rely on a recipient’s “prior express consent” to mean “reasonable reliance.” When a caller has no knowledge of a reassignment, the caller’s continued reliance on the consent is “reasonable,” and thus, no violation of TCPA.

Supporting this authority, the D.C. Circuit Court found other instances of the Commission adopting a “reasonable reliance” approach when interpreting TCPA, so it found no fault in the Commission’s adoption of a reasonable reliance standard when interpreting “prior express consent.”

Neither consumer advocates nor industry groups challenged that authority. There was no question as to whether the Commission had that authority; it does. The only relevant question was whether the Commission applied it too narrowly; it did. The court found that the Commission’s interpretation of “reasonable reliance” being pierced after only “one call” was arbitrary and capricious. The Commission now has the opportunity to remedy that deficient interpretation, which it has proposed doing in a separate Public Notice.

ICBA stresses, though, that while the Commission has the authority to establish a safe harbor, the use of it should not be required. The FCC should simply affirm that evidence of its use would serve as a rebuttable presumption of compliance with TCPA.

Regarding the frequency of referencing the Database, the Commission would like feedback on whether callers need to check the Database before every attempted call or whether a periodic check would be sufficient. ICBA understands that a reasonable standard for periodic checks will depend on the cost and ease of using the Database. These constraints are not yet known, and as such, are difficult to comment upon. However, as the Commission evaluates comments and projects the potential costs of the Database, ICBA believes that requiring an inquiry before every placed call would be unduly burdensome and provide minimal benefit. Whatever the final costs and processes are, ICBA believes that a caller should not be required to check the Database more than 30 days before the attempted call.

A better standard would be a quarterly check, which provides sufficient time for a telephone provider to disconnect the line, age the number, and reassign it. Additional time would also be needed to allow the Database to recognize the reassignment and for the bank to process the change and update its records. Ideally, this would all be accomplished over the course of three months.

Information Contained in the Database Should be Reliable

ICBA supports the creation of one, centralized Database monitored by the FCC. This would facilitate the accuracy that community banks need to rely on the Database. The information in the Database should contain both comprehensive and timely data for callers to discover potential reassignments before they occur. If the Commission adopts and aggregates multiple Databases, ICBA is concerned that callers might have to check multiple sources to be assured of their affirmative defense. Also, of note, multiple Databases or sources create the potential for redundancies or gaps in listings, i.e., false positives and negatives.

The FCC also seeks comment on whether data from only certain types of providers is necessary, or whether data from all providers, including wireline, wireless, interconnected VoIP, etc, are necessary. ICBA is of the opinion that a Database is only as reliable as the totality of information it contains. If certain service providers are excluded, then banks will have doubts about the veracity of the Database, and it is likely that it will atrophy from disuse.

Banks Should Not be Held Liable for Deficiencies in the Database

As the proposed rulemaking notes, the Database might not contain numbers that were reassigned before its creation. In such cases, ICBA advocates that the affirmative defense against liability should still be available so long as the bank checked the called number against the Database.

In addition, ICBA recommends that the Database list the date on which the number was reassigned. ICBA agrees with the Commission that the information contained in the Database should indicate an affirmative or negative response to a query as to whether a number has been reassigned since a given date. There could be instances where an entry is “stale.” Without the date of reassignment, it would be difficult to determine whether the current bank customer terminated his or her number, or if the listing is from a previous subscriber. If a bank checks the Database, the bank should be able to determine whether the latest entry on the list is from their customer.

Define a “Reassigned Number” as the Instance when a Number is Permanently Disconnected

The Commission also seeks comment on how it should determine when a number has been reassigned. Rather than focus on whether or not the number has been reassigned, or who it has been reassigned to, community banks are focused on whether they are able to reach the individual they intend to reach. When an individual disconnects his or her telephone number, it is at that moment that the calling bank can no longer reach the individual and convey important information. Accordingly, ICBA recommends that a number be listed in the Database when the number is permanently disconnected.

In determining which numbers to list in the Database, the Commission proffers that temporary disconnections not be listed in the Database, as these numbers have not been “reassigned,” but have been made inactive, pending repayment of some other condition. ICBA believes that this approach is appropriate. “Temporarily disconnected” does not necessarily indicate reassignments and should not be listed or added to the Database. To do otherwise would create false positives.

A Comprehensive Reinterpretation of the Act is Needed

The creation of any Database must be contemplated in connection with the Commission’s pending reassessment of its 2015 Declaratory Ruling and Order. A more reasonable interpretation of “constructive knowledge” of a reassigned number would complement the utilization of the Database. ICBA looks forward to providing further comment in response to the Commission’s Public Bulletin, on how the FCC should reinterpret TCPA in light of the recent ruling from the D.C. Circuit Court.

In summation, ICBA’s letter will advocate for a revised interpretation of ATDS. That interpretation should acknowledge that an ATDS is comprised of equipment that uses a random or sequential number generator to store or produce numbers and dial those numbers without human intervention, and that those functions be present in any equipment. ICBA will also advocate for a revised interpretation of “called party” to be more inline with common usage of such term, i.e., the person the caller expected to reach. Finally, ICBA’s letter will urge the Commission to allow parties to stipulate the means and channels by which consent can be reasonably revoked.

Conclusion

Community banks depend on their relationships with customers and their ability to communicate with them when situations warrant it. Predatory lawsuits against responsible firms, such as community banks, have hindered the dissemination of these important communications. ICBA greatly appreciates the Commission's recognition of this fact, and we look forward to seeing a more reasonable approach to determining liability when unknowingly calling reassigned numbers. Should you have any questions or would like to discuss anything further, please do not hesitate to contact me at michael.emancipator@icba.org or at 202-659-8111.

Sincerely,

/s/

Michael Emancipator
Assistant Vice President and Regulatory Counsel