



April 2, 2009

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-B204
Washington, DC 20554

RE: CG Docket No. 02-278 (Paul D. S. Edwards's Petition for an Expedited Clarification and Declaratory Ruling Concerning the Telephone Consumer Protection Act Rules)

Dear Ms. Dortch:

The American Financial Services Association (“AFSA”) is grateful for the opportunity to comment on Paul D. S. Edwards’s Petition for an Expedited Clarification and Declaratory Ruling Concerning the Telephone Consumer Protection Act (“TCPA”) Rules. AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, credit card issuers, industrial banks and industry suppliers.

AFSA strongly believes the TCPA permits a creditor to place autodialed or prerecorded message calls to a telephone number associated with wireless service that was provided to the creditor initially as a telephone number associated with landline service. A creditor has “prior express consent” (from section 227(b)(1)(A)(iii) of the TCPA) to contact a consumer at a wireless number when the creditor is initially provided a “landline” telephone number by the consumer, and subsequently the consumer ports that landline number to a wireless number. Compliance with the TCPA does not require that the consumer must have originally provided the creditor a telephone number assigned to a wireless service in order for calls to the wireless number to be permissible, nor does it require the creditor to employ additional means to ascertain whether the number provided as a landline number was ported to a wireless number. In view of the overwhelming evidence indicating the explosion of the use of cellular telephones as the primary – if not sole – means of telephonic communication today, a failure to clarify the TCPA in this manner will result in both significant commercial harm without yielding any significant benefits for consumers and undercutting the existing parameters built (and reaffirmed) by the Federal Communications Commission (“FCC”) within the regulation.

I. Consumers Consent to Calls When Their “Landline” Number is Ported to a Wireless Number

An increasing number of consumers are opting to port their landline numbers to wireless numbers. Consumers take this step for a number of reasons. They may find landline service redundant and want to save money. They may also want to simplify their lives by taking advantage of greater flexibility and an increased level of consolidation. What consumers are not doing by porting their landline numbers to wireless numbers is trying to avoid calls. If a consumer did not want to receive calls on her cellular telephone that previously went to a landline, the consumer would not port the landline number to a wireless number.

When a consumer provides a number to a creditor, whether through the credit application or otherwise, there can be no debate that the creditor should be able to rely on that provision as an indication of “prior express consent” to contact that consumer using an autodialer or prerecorded messages for account servicing purposes. Moreover, many creditors have incorporated specific consent language into their credit applications for purposes of obtaining express authorization from consumers to be contacted at any number provided through any means (e.g., manual, autodialer, prerecorded messaging, etc.). That express consent cannot be undone or somehow terminated simply because the consumer makes the decision during the course of the existing business relationship to port the number from a landline to a wireless number. It is simply not reasonable to expect a creditor to take extraordinary and costly measures to determine when such an occurrence has taken place and then to discontinue telephonic communications with a consumer in the manner previously expressly authorized by the consumer. By porting the number, the consumer is taking affirmative action to receive calls on her cell phone. That affirmative action on her part does not remove the consent that she has previously given to the creditor. When the consumer ports a landline number to a wireless number, the consumer expects that calls that went to the landline will now go to the wireless number. It is completely reasonable for a creditor to rely on the prior express consent provided when the consumer initially provided the number to contact her at the ported wireless number through use of an autodialer or prerecorded messages. In short, the permission previously granted for the creditor to call the number is still valid.

Mr. Edwards’ argument that the wording in the FCC’s January 2008 Declaratory Ruling, Docket No. 02-278 (“Ruling”) is “self-evident” is, at best, weak. In fact, in its Ruling, the Commission concluded that “the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences ‘prior express consent’ by the cell phone subscriber to be contacted at that number regarding the debt.” The Ruling went on to state, “In the *1992 TCPA Order*, the Commission determined that ‘persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given...’” Additionally, the Commission noted that the legislative history in the TCPA provided support for that interpretation. Thus, it is clear that the FCC intended its interpretation to apply to all numbers provided by the consumer to a creditor. Accordingly, when a consumer gives her phone number to a creditor, that action constitutes “prior express consent” whether or

not the number was in the first instance a landline number that was ported to a wireless number.

II. Consumers Would Be Harmed if a Creditor Could Not Use an Autodialer or Prerecorded Message Call to Contact a Consumer on a Number That Was Ported to a Wireless Number

If a creditor were not able to make calls using an autodialer or prerecorded message to a landline number that is ported to a wireless number, the result would be harmful to consumers as well as to the creditor. First, important account information may not reach consumers in a timely manner. Second, creditors may not be able to reach consumers to discuss opportunities to implement changes to a loan that might be advantageous to such consumers. Third, the costs and practicalities of introducing operational changes that would be required of creditors to monitor and determine the point in which a landline number has been ported to a wireless number and the process of securing additional consent from consumers to call a number that the creditor already has been validly using to contact the consumer would be unreasonable, difficult and cause the creditor to incur an expense that would likely be passed on to the consumers at a time when they can least afford more costly credit.

It is necessary to remember that this rule would negatively affect account-servicing in a variety of ways. For example, a financial services company may need to call a customer when it suspects fraudulent use of an account, when periodic statements (or similar mail) are returned as undeliverable, to respond to the customer's assertion of a billing error, or when the customer has not responded to late payment notifications.¹ If creditors could not use an autodialer or prerecorded message to call consumers because their landline numbers were ported to wireless numbers, consumers could not receive important information in a timely manner that could potentially lead to significant, avoidable harm.

The ability to use an autodialer or prerecorded message to call customers is also vital to making loan modifications. The economy is in a critical state. If the ability to use an autodialer or prerecorded message to call customers is not available, creditors may not be able to reach consumers to engage in meaningful loss mitigation efforts, including loan modifications and community outreach programs. The ability to maintain contact with a borrower is an important element of home ownership preservation and is critically important in the current economic state; as such contact may help to avoid a foreclosure. The Obama administration, Congress and financial services regulators are all stressing the importance of loan modifications. Loan modifications are key to the Obama Administration's Making Home Affordable program. Congress has passed legislation with the goal of increasing loan modifications and regulators have repeatedly stressed the

¹ Similarly, creditors may need to call customers with secured loan products to address an equally broad range of issues (*e.g.*, to confirm mandatory insurance requirements or to clarify escrow practices). Deposit account-servicing also presents similar communication needs (*e.g.*, to solicit instructions from a customer whose certificate of deposit is expiring).

importance of work-outs to the entities that they regulate. However, if the creditor cannot reach the consumer quickly and efficiently, the creditor cannot work with the consumer to modify the loan and the consumer could unnecessarily lose her house or their car. Autodialers and prerecorded messages are needed to reach the maximum number of consumers quickly and efficiently. It is in everyone's interest to make the communication between creditor and borrower as easy as possible.

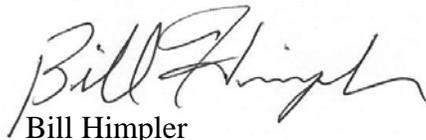
Securing additional consent from consumers to use an autodialer or prerecorded message to call a number that the creditor has already been using as a result of receiving prior express consent would be difficult. The consumer may have changed addresses and not notified the creditor, so the only way the creditor could contact the consumer would be via phone. Obtaining additional consent and identifying which numbers have been ported would also be costly and logistically difficult for creditors that could result in increased cost for consumers. Given the sheer magnitude of the consumer portfolios of many creditors, developing and implementing an unnecessary process to determine which numbers have been ported on what would need to be done on a rather frequent basis because of potential litigation exposure would be expensive. Regarding this exposure, if calls from a company to a consumer by way of an autodialer or prerecorded message that the consumer ports to a wireless number are not presumed to be expressly consented to, litigious consumers will be presented with a ready made opportunity to force a creditor to violate the TCPA when there is no intent by the company to violate the statute.

III. Conclusion

AFSA strongly believes it is eminently sound, reasonable and consistent with the spirit and letter of the TCPA and the FCC's interpretation of the regulation that when the creditor is initially provided a landline telephone number, and subsequently that landline number is ported to a wireless number, the "prior express consent" previously provided remains. Ultimately, if a creditor could not rely on this consent for purposes of continuing to contact a consumer on a number previously provided by the consumer and subsequently ported to a wireless number, both the consumer and the creditor would be harmed, not helped.

Please feel free to contact me with any questions at 202-296-5544, ext. 616 or bhimpler@afsamail.org.

Respectfully submitted,



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