

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	

**REPLY COMMENTS OF THE AMERICAN BANKERS ASSOCIATION
AND THE CONSUMER BANKERS ASSOCIATION IN SUPPORT OF THE
REVISED TCPA EXEMPTION PROPOSAL FROM THE CARGO AIRLINE
ASSOCIATION**

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EXECUTIVE SUMMARY

The American Bankers Association and the Consumer Bankers Association support the revised exemption proposal of the Cargo Airline Association, which would permit its members to send non-telemarketing package delivery notifications to mobile devices on a free-to-end-user basis without first obtaining the prior express consent of the recipients. Package delivery notifications are one of many categories of consumer-friendly informational communications that now are inhibited by the threat of massive class-action lawsuits based upon purported violations of the automated dialing provisions of the Telephone Consumer Protection Act. The grounds for exemption from those provisions suggested by the Cargo Airline Association - that package delivery messages not charged to the called party are consistent with the privacy interests the Telephone Consumer Protection Act is intended to protect - apply equally to free-to-end-user money transfer notifications, fraud alerts and other informational messages that financial institutions send to their customers and others. Accordingly, the American Bankers Association and Consumer Bankers Association are pleased that the Commission has asked for public comment on the Cargo Airline Association proposal, and urge that it be granted as promptly as possible.

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The American Bankers Association (“ABA”)¹ and Consumer Bankers Association (“CBA”)² hereby file these reply comments in support of the revised exemption proposal of the Cargo Airline Association (“CAA”).³

**I. THE CARGO AIRLINE ASSOCIATION’S PROPOSAL IS LEGALLY
SOUND AND IN THE PUBLIC INTEREST**

CAA’s members wish to use the most efficient possible means to give notice of package deliveries. In the mobile age, this means messaging to package recipients⁷

¹ The American Bankers Association (“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.

² The Consumer Bankers Association (“CBA”) is the trade association for today’s leaders in retail banking – banking services geared toward consumers and small businesses. The nation’s largest financial institutions, as well as many regional banks, are CBA members, collectively holding two-thirds of the industry’s total assets. CBA’s mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

³ Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Revised TCPA Exemption Proposal from the Cargo Airline Association (DA 13-2312, Dec. 3, 2013).

mobile devices. As CAA points out, “delivery notifications to wireless telephone numbers would maximize convenience for consumers, facilitate the timely delivery of packages (including gifts and other packages from third parties), and reduce the serious problem of package theft.”⁴

Unfortunately, mobile package delivery notices are discouraged by the same threat that inhibits many other useful mobile communications: class-action lawsuits brought under the TCPA’s “autodialer rule,” seeking uncapped statutory damages that can run into billions of dollars, that punish responsible businesses without providing any benefit to consumers.⁵

As ABA, CBA and other parties have stated during the long course of this docket, the Commission can best resolve the hazards and uncertainties of the TCPA legal environment by confirming – as one court recently has done – that the autodialer rule applies only to calls placed to mobile devices by equipment that has the *present capacity* to “store or produce telephone numbers to be called, using a random or sequential number generator . . . and . . . to dial such numbers.”⁶ Simply by adopting this common-sense interpretation of the statutory definition of an automatic telephone dialing system,

⁴ Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Mark W. Brennan, counsel to the Cargo Airline Association (Nov. 19, 2013) (“CAA *Ex Parte Notice*”).

⁵ See “The Juggernaut of TCPA Litigation: the Problems with Uncapped Statutory Damages” (U.S. Chamber Institute for Legal Reform, 2013).

⁶ 47 U.S.C. § 227(a)(1); *Hunt v. 21st Century Mortgage Corp.*, Civil Action No. 2:12-CV-2697-WMA (N.D. Ala. 2013) (finding that in order for a system’s use to subject a caller to the autodialer rule, that system “must have a present capacity to store or produce and call numbers from a number generator;” and that the requirement is not satisfied if “substantial modification or alteration of the system would be required to achieve that capability”).

the Commission could provide long-needed guidance to the courts and confine TCPA litigation within its proper legal limits.

In the absence of such broad guidance, CAA has asked the Commission to grant more limited relief under an exemption provision of the TCPA. The exemption provision states that the Commission “may, by rule or order, exempt from the requirements of [the autodialer rule] calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect.”⁷

CAA’s request fully satisfies the requirements of this TCPA exemption provision. The *CAA Ex Parte Notice* points out that “third-party solutions providers offer companies, for a fee, the ability to send FTEU [‘free-to-end-user’] text messages to subscribers of all four national U.S. wireless carriers,” representing “approximately 88% of the wireless telephone numbers that are provided today as contact information for residential package deliveries.”⁸ CAA requests an exemption only as to autodialed calls that can be provided through these FTEU services, or that can be developed through consultation with carriers and FTEU providers.⁹

CAA also proposes conditions that ensure the consistency of its exemption with “the privacy rights [the autodialer restriction] is intended to protect.”¹⁰ Among other

⁷ 47 U.S.C. § 227(b)(2)(C).

⁸ *CAA Ex Parte Notice* p. 2.

⁹ *Id.*

¹⁰ 47 U.S.C. § 227(b)(2)(C).

conditions, CAA proposes that its exemption for package delivery notices will not extend to any telemarketing content, and that each message will include information on how to opt out of future delivery notifications. Taken together, the conditions proposed by CAA ensure that the exemption it requests will not be abused.

The granting of CAA's request also will be consistent with past Commission treatment of FTEU communications. Notably, in its 1992 Order implementing the TCPA, the Commission determined that automated communications from mobile carriers to their customers, sent on an FTEU basis, could be sent without obtaining the recipients' prior express consent.¹¹ The carrier exemption was granted at a time when FTEU calling capability was generally unavailable to non-carriers. Now that FTEU capability is available to other callers, the exemption should be applied whenever, as in the case of CAA's request, such relief is consistent with the privacy interests the autodialer rule is intended to protect.

II. INITIAL COMMENTS FILED IN RESPONSE TO THE PUBLIC NOTICE DO NOT SUPPORT DENIAL OF CAA'S PROPOSAL

Two parties filed comments on the CAA proposal: Joe Shields, Texas Government and Public Relations Spokesman for Public Citizen Inc.; and GroupMe, Inc.¹² Neither of those comments justifies denial of the CAA proposal.

¹¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8775 (1992). The Commission confirmed the carrier exemption in its 2012 Order adopting new TCPA regulations. *Rules and Regulations Implementing the Telecommunications Act of 1991*, CG Docket No. 02-278 (Report and Order rel. Feb. 15, 2012) ¶ 10.

¹² Joe Shields Comments on the Revised Exemption Proposal of the Cargo Airline Association (CG Docket No. 02-278, Dec. 17, 2013) ("*Shields Comments*"); GroupMe, Inc.'s Comments (CG Docket No. 02-278, Dec. 17, 2013) ("*GroupMe Comments*").

Mr. Shields opposes the CAA proposal on two grounds: (1) that the proposal requests a “blanket exemption from prior express consent of the called party for all automatically dialed calls to cell numbers where the called party is not charged for the call”; and (2) that package delivery companies already have adequate means of obtaining prior express consent from recipients.¹³

Mr. Shields’s first argument mischaracterizes the CAA request. Far from seeking a blanket exemption for all FTEU autodialed calls, CAA has requested relief as to a specified category of messages, subject to several conditions designed to protect the privacy interests of consumers. The proposed exemption would create no new rights to send other FTEU autodialed messages not covered by the CAA request.¹⁴

Mr. Shields also is incorrect in claiming that existing opt-in opportunities offered to package recipients by some delivery companies obviate the need for the FTEU exemption. Although most, if not all, consumers would welcome package delivery notifications, it is unlikely that they will seek out, find and use consent options provided by every delivery company that might, at some point, have a package to deliver to them. The alternative suggested by Mr. Shields would burden consumers more than it would protect them.

¹³ *Shields Comments* pp. 1-2.

¹⁴ As ABA and CBA point out below, exemptions for other categories of informational FTEU messages could be justified as in the public interest and consistent with the TCPA. However, parties seeking those exemptions could not simply rely on the relief granted to CAA, but would be required to demonstrate to the Commission that such exemptions meet the requirements of section 227(b)(2)(C) of the TCPA.

GroupMe, Inc. also has not offered any argument that justifies denial of the CAA request. GroupMe correctly states that even if the CAA request is granted, broader relief for senders of informational messages will continue to be appropriate.¹⁵ ABA and CBA agree that granting of the CAA request is no substitute for broader FCC guidance that will reduce the regulatory burden and litigation risk associated with informational calls. However, the relief requested by CAA, although limited, is solidly based in law and policy and should be granted.

III. THE COMMISSION SHOULD APPLY THE FREE-TO-END-USER EXEMPTION TO OTHER INFORMATIONAL MESSAGES THAT SERVE THE PUBLIC INTEREST

As ABA and the CBA have pointed out in previous comments filed in this docket, autodialed messages have become a critical channel for non-telemarketing communications between financial services institutions and consumers.¹⁶ The purposes served by these calls can include notice to recipients of money transfers, fraud prevention and protection, responses to service inquiries, prevention of lapses in insurance coverage, and protection from life-threatening disasters.¹⁷ As our past comments also have explained, calls to wireless numbers account for a rapidly increasing percentage of these vital communications as more and more consumers are part of “wireless-only” households.¹⁸

¹⁵ *GroupMe Comments* pp. 2-5.

¹⁶ Comments of the Financial Services Roundtable, the American Bankers Association, and the Consumer Bankers Association (CG Docket No. 02-278, May 21, 2010).

¹⁷ *Id.* pp. 4-10.

¹⁸ *Id.* pp. 11-12.

The beneficial, pivotal role that automated wireless communication – both vocal and text – plays in the consumer financial services market was confirmed and reinforced in the Reply Comments of the Board of Governors of the Federal Reserve staff filed on June 8, 2010. The Board staff explained, at length, its concern that the FCC’s regulations should not “restrict a financial institution’s ability to contact the consumer in circumstances which may benefit, the consumer, such as to prevent fraud or identity theft or to comply with other legal requirements.”¹⁹

Although ABA and CBA continue to advocate an FCC order that would clarify the TCPA’s definition of an automatic telephone dialing system in a way that facilitates calling through devices that were not contemplated when Congress enacted the statute, we are pleased that the Commission has asked for comment on CAA’s proposal that a narrower, FTEU-based exemption should apply to a specific category of customer communication that serves the public interest. Without requesting exemptions as to particular types of calls at this time, ABA and CBA look forward to the opportunity, after the relief requested by CAA is granted, to apply for similar exemptions for informational calls from financial institutions, based upon individualized demonstrations that such calls serve the public and the privacy interests that the TCPA is designed to protect.

¹⁹ Reply Comments of Staff of Board of Governors of Federal Reserve System (“Federal Reserve Staff Comments”)(CG Docket No. 02-278, June 8, 2010) pp. 1-2.

CONCLUSION

The Commission's request for comment on the CAA proposal is, potentially, a significant step forward in the effort to bring the TCPA and its enforcement into a new century. ABA and CBA look forward to working with the Commission to further this effort.

Respectfully submitted,

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