

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY
DISSENTING IN PART AND APPROVING IN PART**

Re: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, WC Docket No. 07-135

Today's order has been hailed as "protecting" Americans from harassing robocalls and texts. That is a farce. Instead, the order penalizes businesses and institutions acting in good faith to reach their customers using modern technologies. I'm sure it will be said that we are approving half of the petitions before us. But, that is a completely misleading point, because many of the petitions were filed due to the belief that the Commission would not do anything to properly address the two big issues: reassigned numbers and autodialers.

I have made clear, on multiple occasions, that I do not condone abusive calling practices. In fact, I had been working for over a year in the hopes of advancing an item that would protect consumers from unwanted communications while enabling legitimate businesses to reach individuals that wish to be contacted. That is the balance that Congress struck when it enacted the Telephone Consumer Protection Act (TCPA) in 1991.

Unfortunately, that balance has been turned on its head by prior FCC decisions that expanded the scope of the TCPA, and through litigation across the country that, in many cases, has further increased liability for good actors. Indeed, it has been reported that over 2,000 TCPA class action lawsuits were filed in 2014 alone.¹ Far from protecting consumers, however, "[t]his current state of affairs, where companies must choose between potentially crushing damages under the TCPA or cease providing valuable communications specifically requested by consumers, contravenes Congress's intent for the statute not to interfere with normal, expected, and desired communications *that consumers have expressly consented to receive.*"² These include:³

- Alerts from a school that a child did not arrive at school, or that the building is on lockdown
- Product recall and safety notifications
- Notifications regarding storm alerts, utility outages, and service restoration
- Immunization reminders for underserved, low-income populations
- Announcements from employment agencies about job openings

¹ Comments of Twitter, Inc. in Support of Blackboard, Inc.'s Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 4 (filed Apr. 22, 2015) (Twitter Apr. 22, 2015 Comments). *See also, e.g.*, Letter from Monica S. Desai, Counsel to Wells Fargo, to Marlene H. Dortch, FCC, CG Docket No. 02-278, at Exh. 5-6 (filed Jan. 26, 2015) (Wells Fargo Jan. 26, 2015 *Ex Parte* Letter) (providing statistics on the breadth of TCPA litigation).

² Letter from Monica S. Desai, Counsel to Abercrombie & Fitch Co. and Hollister Co., to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 4 (filed May 13, 2015) (Abercrombie May 13, 2015 Comments) (emphasis added). *See also* Twitter Apr. 22, 2015 Comments at 12 ("In enacting the TCPA, Congress could not have intended for legitimate businesses...to choose between risking massive liability or denying consumers the chance to receive useful text messages that they expressly requested.").

³ *See, e.g.*, Letter from Mark W. Brennan, Counsel to United Healthcare Services, Inc., to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 2-3 (filed July 28, 2014) (United July 28, 2014 *Ex Parte* Letter); Letter from Monica S. Desai, Counsel to Genesys Telecommunications Laboratories, Inc., to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 2 (filed June 11, 2015) (Genesys June 11, 2015 *Ex Parte* Letter); Wells Fargo Jan. 26, 2015 *Ex Parte* Letter at Exh. 4; *Gragg v. Orange Cab Co., Inc.*, 995 F. Supp. 2d 1189 (W.D. Wash. 2014).

- Tweets (and other social media updates) and Instant Message notifications received by text
- Updates from airlines to let their customers know their flight has been delayed
- Financial alerts, including balance and overdraft information
- Text messages from taxi and ridesharing services to alert customers when their driver has arrived.

Moreover, this is despite evidence in the record of the benefits of informational calls and texts. For example:

- Health care: “[S]ignificantly more’ patients who received automated telephone messages regarding hypertension treatment achieved blood pressure control than patients who received ordinary care only.”⁴
- Financial Services: “Borrowers that we [loan servicers] are able to auto dial have delinquency rates less than half of those that we cannot auto dial (13% versus 29%). ... Borrowers that we [loan servicers] were able to auto dial in Q4 2014 had default rates 7 times lower than those we could not auto dial (0.6% versus 4.6% of dollar balance). ... On an annual basis, TCPA contributes up to \$2,261,900,761 in extra defaults.”⁵
- Disaster-Related Communications: When a typhoon hit the Philippines in November 2013, multiple wireless carriers offered free international calling and texting to and from the Philippines in order to allow customers to call their loved ones and to facilitate the coordination of the massive international relief effort.⁶ Without the use of automated text message technology, it would have been infeasible for these carriers to communicate this offer to their customers.⁷

Indeed, other federal agencies, including the Department of Health and Human Services, have been promoting text messaging as a way to benefit Americans.⁸ Some agencies even require companies to make a certain number of calls to consumers.⁹ Additionally, companies can be obligated under state law to contact their customers.¹⁰

⁴ Letter from Elizabeth P. Hall, Vice President, Office of Government Affairs, Anthem, Inc., to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 5 (filed Apr. 6, 2015) (Anthem Apr. 6, 2015 *Ex Parte* Letter) (citing Teresa N. Harrison, *A Randomized Controlled Trial of an Automated Intervention to Improve Blood Pressure Control*, 15(9) *J. Clinical Hypertension* 650 (Sept. 2013)).

⁵ Letter from Al Mottur, Counsel to Nelnet, to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 2 (filed Mar. 12, 2015).

⁶ Comments of CTIA – The Wireless Association, CG Docket No. 02-278, at 2 (filed Mar. 10, 2014).

⁷ *Id.*

⁸ See, e.g., Anthem Apr. 6, 2015 *Ex Parte* Letter at 4 (citing U.S. Department of Health and Human Services, Health Resources and Services Administration, *Using Health Text Messages to Improve Consumer Health. Knowledge, Behaviors, and Outcomes: An Environmental Scan*, at 27 (May 2014) (Noting that HHS had reviewed more than 100 studies on the use of text messaging and concluded: “The trends towards widespread ownership of cell phones and widespread text message use across virtually all segments of the U.S. population will continue to support the spread of health text messaging programs. This [review of studies] provides encouraging evidence related to the use of health text messaging to improve health promotion, disease prevention, and disease management.”)).

⁹ Comments of Student Loan Servicing Alliance, CG Docket No. 02-278, at 5 (filed Mar. 16, 2015) (“Federal student loan servicers are required to make repeated attempts to contact delinquent borrowers to see if there are ways that the servicer can assist the borrower in avoiding delinquency and default – Is the borrower entitled to a deferment? Is there a new repayment plan that would help the borrower meet his/her obligation to repay? Would a temporary forbearance help the borrower through a difficult period?”) (citing 34 C.F.R. § 682.411, which requires lenders in the federal student loan programs to make a certain number of phone calls to delinquent borrowers at various phases of delinquency); Wells Fargo Jan. 26, 2015 *Ex Parte* Letter at Exh. 3. See also Comments of Citizens Bank, N.A., CG Docket No. 02-278, at 11 (filed Mar. 12, 2015) (noting that President Obama’s FY 2016 Budget Proposal proposed to clarify that the use of ATDS and prerecorded voice messages is allowed when

(continued....)

The record also shows that these types of services are popular with consumers, as long as they provide *timely and relevant* information:

- Health Care: “One survey of users of a ‘safety net’ hospital’s emergency room showed that patients preferred text messaging over other forms of communication, and only 15 percent did not want appointment reminders and notifications of expiring insurance.”¹¹ “This consumer receptiveness is confirmed by Anthem’s own experiences. Anthem collects ‘opt-out’ requests by members who do not desire to receive health-care messages. Anthem is receiving an opt-out rate for non-telemarketing calls of approximately .35 percent.”¹²
- Energy: “Southern Company surveys indicate that customers would like outage and restoration notifications, and prefer communications via text message or telephone call, with email being the least requested method of contact.”¹³ “In fact, some utilities report that they more frequently receive complaints from customers when they have not been proactively notified of service interruptions than about having received a notification.”¹⁴
- Education: “[A]t the beginning of each academic year, [Fairfax County Public Schools (FCPS)] requires potential message recipients to provide their telephone numbers and email addresses for contact purposes, as well as additional emergency contacts. . . . In many cases, the preferred method of contact is via the recipient’s wireless telephone number, either as a telephone call or a text message (or both). This reflects the increasing number of students, parents, and others who rely on wireless devices to obtain information.”¹⁵ “The number of individuals requesting to have phone contacts removed from the FCPS database has been very small. Since July 1, 2014, FCPS sent 53,342 automated messages with 2,711,387 phone calls placed, drawn from a phone contact population of 449,909. Of that population, FCPS processed 634 requests to remove phone contacts from receiving future messages (0.14% of the total phone contact population).”¹⁶

The Commission’s unfathomable action today further expands the scope of the TCPA and sweeps in a variety of communications either by denying relief outright or by penalizing companies that dial a number that, unbeknownst to them, has been reassigned to someone else. Indeed, the order paints companies from virtually every sector of the economy as bad actors, even when they are acting in good (…continued from previous page)_____ contacting wireless phones in the collection of debt owed to or granted by the United States – to ensure that debt owed is collected as quickly and efficiently as possible) (citations omitted).

¹⁰ Reply Comments of Edison Electric Institute & American Gas Association in Support of Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 7 (filed Apr. 10, 2015) (Edison Electric Apr. 10, 2015 Reply Comments) (“The comments demonstrate that many state regulators either mandate or strongly encourage customer notifications regarding storm alerts, outage notifications, and service restoration.”).

¹¹ Anthem Apr. 6, 2015 *Ex Parte* Letter at 6 (citing Leah Zallman, et al., *Access to and Preferences for Text Messaging for medical and Insurance Reminders in a Safety Net Population*, Cambridge Health Alliance, Department of Medicine et al., available at <http://chiamass.gov/assets/docs/r/pubs/14/text-sgim-final.pdf> (last visited April 1, 2015)).

¹² *Id.* at 7.

¹³ Edison Electric Apr. 10, 2015 Reply Comments at 3 (citing Comments of Southern Company on the Edison Electric Institute and American Gas Association Petition for Declaratory Ruling at 4, CG Docket No. 02-278 (filed Mar. 26, 2015)).

¹⁴ *Id.* at 4.

¹⁵ Fairfax County Comments on Blackboard, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 5 (filed Apr. 15, 2015) (FCPS Apr. 15, 2015 Comments).

¹⁶ Declaration of Maribeth Luftglass, Assistant Superintendent and Chief Information Officer, Fairfax County Public Schools, in Support of Reply Comments of Blackboard Inc., CG Docket No. 02-278, at 2 (dated May 7, 2015) (FCPS Declaration) (attached to Reply Comments of Blackboard Inc., CG Docket No. 02-278 (filed May 7, 2015)).

faith to reach their customers. Incredibly, it even concludes that consumers experience a real and cognizable harm—an intrusion of privacy—by receiving as few as two stray calls or texts.

In a quest to protect consumers against abusive debt collection calls—that are already barred by other federal laws¹⁷—the order will force companies acting in good faith to discontinue valuable services altogether.¹⁸ In fact, this is happening already.¹⁹ We cannot hold millions of legitimate businesses hostage to a few bad actors that will disregard the law, no matter which agency or statute is involved.

To be sure, the FCC narrowly selects certain calls and texts *it* thinks consumers should receive and allows them under very limited circumstances. I approve of any relief contained in the item to the extent it is granted, but caution that it may not be as helpful as some would claim. I’m not even sure it is workable. Otherwise, the decisions today will make it much harder for consumers to receive information that they want and need, and will discourage companies from pursuing services that consumers might find beneficial. Therefore, I strongly dissent from the remainder of the order.

Scope of the TCPA

Starting with a threshold issue, I disagree with the premise that the TCPA applies to text messages. The TCPA was enacted in 1991 – before the first text message was ever sent. The Commission should have had gone back to Congress for clear guidance on the issue rather than shoehorn a broken regime on a completely different technology.

Definition of Autodialers

The order also impermissibly expands the statutory definition of an “automatic telephone dialing system” (also known as an autodialer or ATDS) far beyond what the TCPA contemplated. There are several problems with the new definition, which stem from FCC’s refusal to acknowledge a simple fact: to meet the definition of an autodialer, all of the statutory elements must be present.²⁰

First, the TCPA defines an autodialer as equipment that “has the capacity” to perform specific functions. Therefore, it seems obvious that the equipment must have the capacity to function as an

¹⁷ See, e.g., Wells Fargo Jan. 26, 2015 *Ex Parte* Letter at Exh. 3 (listing a variety of statutes that govern collection practices).

¹⁸ See, e.g., Twitter Apr. 22, 2015 Comments at 12 (“In truth, the only way that Twitter can realistically avoid making “calls” to recycled cell phone numbers is simply to stop sending texts altogether. That outcome is bad for both Twitter and its users. Twitter can only imagine the backlash if it announced it was terminating the delivery of Tweets by text to users who asked to receive them that way.”).

¹⁹ See, e.g., Abercrombie May 13, 2015 Comments at 3-4 (“Indeed, Abercrombie has eliminated the distribution of text messages to particular customers based solely on their carriers.”); Letter from Harold Kim, U.S. Chamber Institute for Legal Reform and William Kovacs, U.S. Chamber of Commerce to Marlene H. Dortch, FCC, CG Docket No. 02-278 at 4 (filed Apr. 23, 2015). (“Concern over TCPA liability already has led some businesses to cease communicating important and time-sensitive information via voice and text to consumers.”).

²⁰ See, e.g., Letter from Monica Desai, Counsel to ACA International, to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 3-4 (filed Jan. 20, 2015) (noting that “in order for any equipment to be an ATDS under the TCPA, it must meet the statutory definition given by Congress” and that the FCC cannot “nullify or alter the statutory definition”). Indeed, 35 trade associations and business groups, representing hundreds of thousands of U.S. companies and organizations from across the U.S. economy, noted that Congress cannot have intended these expansive readings of the TCPA, and that applying the statute in the manner that Congress intended, as expressed through the specific language Congress enacted, would “neither ‘gut’ the TCPA nor ‘open the floodgates’ to abusive calls.” Letter from 35 Associations to Chairman Wheeler, FCC, CG Docket No. 02-278, at 2-3 (filed Feb. 2, 2105).

autodialer *when the call is made* not at some undefined future point in time.²¹ Moreover, the TCPA bars companies from using autodialers to “make any call” subject to certain exceptions. This indicates that the equipment must, in fact, be used *as an autodialer* to make the calls.²²

Not so according to the order. Equipment that could conceivably function as an autodialer *in the future* counts as an autodialer *today*. Indeed, the new definition is so expansive that the FCC has to use a rotary phone as an example of a technology that would not be covered because the modifications needed to make it an autodialer would be too extensive. That is like the FAA regulating vehicles because with enough modifications cars and trucks could fly, and then using a skateboard as an example of a vehicle that does not meet the definition.

Multiple courts have rejected this overly expansive interpretation; for example:

The Court declines to expand the definition of an ATDS to cover equipment that merely has the potential to store or produce telephone numbers using a random or sequential number generator or to dial telephone numbers from a list without human intervention. Equipment that requires alteration to perform those functions may in the future be capable, but it does not currently have that capacity.... The mere fact that defendants' modem could, if paired with different software, develop the requisite capability is not enough under the TCPA To hold otherwise would subject almost all sophisticated computers and cell phones to TCPA liability, a result Congress surely did not intend.²³

What is the FCC's response? That smartphones don't appear to be autodialers at this time, but the FCC will continue to monitor complaints and litigation “regarding atypical uses of smartphones”.²⁴ That should not provide any comfort to anyone.²⁵

²¹ See, e.g., Wells Fargo June 5, 2015 *Ex Parte* Letter at 10 (clarifying that “capacity” must mean current ability – not hypothetical future ability – is consistent with the plain language of the statute (which is written in the present tense: “has” the capacity, not “could have” the capacity)). “Otherwise, the TCPA may become vulnerable to the argument that it is constitutionally overbroad.” *Id.* (citing *Aja de Los Santos v. Millward Brown, Inc.*, United States’ Memorandum in Support of the Constitutionality of the Telephone Consumer Protection Act, 2014 U.S. Dist. Ct. Pleadings LEXIS 3897 (S.D. Fl. Jan. 31, 2014); *Aja de los Santos v. Millward Brown, Inc.*, Order Denying Defendant’s Motion to Dismiss Plaintiff’s Second Amended Complaint, 2014 U.S. Dist. LEXIS 88711 (S.D. Fl. June 29, 2014)).

²² Thus, if the equipment was not used as an autodialer—for example, because the equipment lacked the present capacity or because calls were made with the aid of human intervention—then it would not meet the statutory test. See Letter from Steven A. Augustino, Counsel to Five9, to Marlene H. Dortch, FCC, CG Docket No. 02-278 (filed June 11, 2015) (Five9 June 11, 2015 *Ex Parte* Letter).

²³ *Gragg v. Orange Cab Co., Inc.*, 995 F. Supp. 2d 1189, 1196 (W.D. Wash. 2014). See also *Marks v. Crunch San Diego, LLC*, 55 F.Supp.3d 1288, 1291-1292 (S.D. Cal. Oct. 23, 2014); *Glauser v. GroupMe, Inc.*, 2015 WL 475111 *3-4 (N.D. Cal. Feb. 4, 2015);

²⁴ *Supra* para. 21.

²⁵ It is also troubling that the order could sweep in other sophisticated non-ATDS equipment with beneficial features including: helping companies honor consumer preferences for receiving calls, including times of day, specific dates, and which number(s); improving the ability of callers to honor “do not call” requests; and helping govern the frequency of call attempts. See, e.g., Letter from Monica S. Desai, Counsel to Wells Fargo, to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 10 (filed June 5, 2015); Comments of American Financial Services Association, CG Docket No. 02-278, at 4 (filed Dec. 2, 2013) (using a predictive dialer substantially reduces the likelihood of human error); Comments of Dial America Marketing, Inc., CG Docket No. 02-278, at 4-5 (filed Dec. 13, 2013) (computer call management equipment enables companies to ensure that numbers are dialed in an appropriate time period, to regulate the number of times the phone will ring before disconnection and to enable the tracking of call details useful in future disputes). See also Five9 June 11, 2015 *Ex Parte* Letter (“Interpreting an ATDS to encompass systems with the future capacity, after modification, to store or produce random or sequential numbers

(continued...)

The real concern seems to be that, if capacity means “present capacity” or “current capacity”, companies would game the system. Specifically, they might claim that they aren’t using the equipment as an autodialer, but are secretly flipping a switch to convert it into one for purposes of making the calls. I don’t think we should start with a presumption that companies are intentionally breaking the law. But it seems that this could be handled as an evidentiary matter. If a company can provide evidence that the equipment was not functioning as an autodialer at the time a call was made, then that should end the matter. For example, a company could show that the equipment was not configured as an autodialer, that any autodialer components were independent or physically separate, that use as an autodialer would require a separate log in, or that the equipment was not otherwise used in an autodialer mode.²⁶

Second, the order misreads the statute by including equipment that merely has the capacity to dial from a list of numbers. That’s not what the TCPA says. It makes clear that the telephone numbers must be stored or produced “using a random or sequential number generator”. Therefore, calling off a contact list or from a database of customers, for example, does not fit the definition. As one court put it:

“Random or sequential number generator” cannot reasonably refer broadly to any list of numbers dialed in random or sequential order, as this would effectively nullify the entire clause. If the statute meant to only require that an ATDS include any list or database of numbers, it would simply define an ATDS as a system with “the capacity to store or produce numbers to be called”; “random or sequential number generator” would be rendered superfluous. This phrase’s inclusion requires it to have some limiting effect. When a court construes a statute it should, if possible, do so as to prevent any clause, sentence, or word, from being superfluous or insignificant. It therefore naturally follows that “random or sequential number generator” refers to the genesis of the list of numbers, not to an interpretation that renders “number generator” synonymous with “order to be called.”²⁷

Moreover, the fact that the FCC previously stated that dialing from a list is sufficient is unavailing because “[t]he [FCC] does not have the statutory authority to change the TCPA’s definition of an ATDS.”²⁸

Third, the Commission previously clarified that to be considered “automatic”, an autodialer must function “without human intervention”.²⁹ Therefore, it should be clear that non-de minimis human intervention would disqualify it from being an autodialer.³⁰ This is important because there is litigation

(...continued from previous page)_____

not only would contradict the plain language of the statute, it would deprive consumers of the benefits of call management technology.”)

²⁶ See, e.g., *Modica v. Green Tree Servicing, LLC*, 2015 WL 1943222 *3 (N.D. Ill Apr. 29, 2015).

²⁷ *Marks*, 55 F.Supp.3d at 1292. See also *Griffith v. Consumer Portfolio Serv., Inc.*, 838 F.Supp.2d 723, 725 (N.D. Ill. 2011) (“‘Random number generation’ means random sequences of 10 digits, and ‘sequential number generation’ means (for example) (111) 111-1111, (111) 111-1112, and so on.”); *Dominguez v. Yahoo!, Inc.*, 8 F. Supp. 3d 637, 643 (E.D. Pa. 2014) (“[Plaintiff’s] definition of the term ‘sequence’ or ‘sequential’ fails to raise a material dispute of fact, since it focuses on the manner in which text messages are sent, not the way in which the numbers are generated.”).

²⁸ *Marks*, 55 F.Supp.3d at 1292.

²⁹ See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, para 132 (2003) (clarifying that the “basic function” of an ATDS is to dial numbers “without human intervention”).

³⁰ *Gragg*, 995 F. Supp. 2d at 1194 (concluding that, if “human intervention is essential” to a system, then that system is not an autodialer). “Commenters have noted that preview dialers, ‘click to call’ systems and other technologies requiring a user to select the number to be dialed.” Five9 June 11, 2015 *Ex Parte* Letter (citing Comments of Sirius

around the country regarding the level of human intervention. Yet the order refuses to provide any additional clarity, claiming that this must be done through a case-by-case determination. In fact, the order increases confusion by implying that calls that are manually dialed from equipment that could be used as an autodialer would still count as autodialed calls because the equipment has the potential to be an autodialer—even though the calls would not have been made absent that human intervention (i.e., the manual dialing).³¹

Fourth, the distinction drawn between different types of apps is without merit. While it is true that different apps may require different levels of engagement by the user before sending messages to the user's contacts, no messages would be sent at all but for the user signing up for the service. It is important that the user be aware that all contacts will receive a message. But assuming that is true, it is the user that should be deemed to initiate the call, not the app, as these type of messages would not be made but for the human intervention of the user. If certain recipients do not want to receive messages, it is not unreasonable to expect them to take that up with the user, not the app provider.

Reassigned Numbers

Every day, an estimated 100,000 cell phone numbers are reassigned to new users.³² As a result, numerous companies, acting in good faith to contact consumers that have consented to receive calls or texts, are exposed to liability when it turns out that numbers have been reassigned without their knowledge.

Today's order offers companies fake relief instead of a solution: one free pass. That is, if a company makes a single call or text to a number that has been reassigned, the company will not be liable for that single contact. But that construct assumes that the recipient picks up the phone or responds to the text. In many cases, that won't happen, subjecting the company to liability for any subsequent calls or texts. All we've done is moved the point of liability for reassigned number situations from call one to call two. And if a call is made to a wrong number (i.e., misdialed) there's no free pass at all.

Companies have pointed out that a one free pass rule can make things worse for them and for their customers.³³ If that one call goes to voicemail and the message doesn't state who is at the number, or if a call is answered but dropped before the recipient's identity is revealed, they have no choice but to refrain from contacting that number in the future.³⁴ In fact, these rules even apply to calls that are not

(...continued from previous page)_____

XM Radio Inc., CG Docket No. 02-278, at 15 (filed May 18, 2015) (preview dialing is the functional equivalent of manual dialing); Comments of the U.S. Chamber of Commerce, CG Docket No. 02-278, at 4 (filed Dec. 19, 2013) (“human intervention is the key factor;” manually entering all digits and “oneclick” dialing are equivalent processes)).

³¹ The order states that nothing in the TCPA prevents callers from manually dialing; for example, to discover reassigned numbers. However, the order also implies that calls that are manually dialed from equipment that could be used as an autodialer would still count as autodialed calls. Therefore, manual dialing may not actually be a viable option for those seeking to avoid liability.

³² Twitter Apr. 22, 2015 Comments at 3; Stage Stores, Inc. Petition for Expedited Declaratory Ruling and Clarifications, CG Docket No. 02-278, at 3 (filed June 3, 2014).

³³ See, e.g., Wells Fargo June 5 *Ex Parte* Letter at 3-6.

³⁴ See, e.g., Genesys June 11, 2015 *Ex Parte* Letter at 1-2 (“The ‘one call attempt’ standard will force companies to take customers off of calling lists, or off of texting lists, for not responding to a text or not answering a phone call. This will result in the unintended consequence of companies having to stop numerous consumer beneficial, normal and expected communications, or risk being faced with potentially catastrophic TCPA liability.”).

connected. That is inconsistent with the statute.³⁵ But, moreover, what is the harm in seeing a missed call on your smartphone screen?

Indeed, we may have provided a new way for consumers acting in bad faith to entrap legitimate companies. A person could take a call, never let on that it's the wrong person, and receive subsequent calls solely to trip the liability trap. After all, the order is very clear that there is absolutely no duty imposed on consumers to let companies know they have reached the wrong person. In fact, the order expressly rejects a bad faith defense against call and text message recipients that intentionally deceive the caller or sender in order to induce more liability. Therefore, it won't be long before the apps or websites that help consumers manufacture TCPA lawsuits include this as the latest example.³⁶

The record shows that one free pass is particularly problematic for informational texts, such as reminders, where no response is expected or routinely provided.³⁷ In those cases, companies will use up the free pass and still have zero indication as to whether they reached the right number. Some may have no choice but to discontinue the texts. That risks angering consumers that had specifically requested texts, for example, to remind them to pay a monthly bill, but then miss a payment because they didn't get a reminder.

Moreover, the idea that, after one call, a caller would have “constructive knowledge” that a number has been reassigned—even if there was no response—is absolutely ludicrous. The FCC expects callers to divine from mere silence the current status of a telephone number. In doing so, it reads the statute to “demand[] the impossible.”³⁸ Think about this in the context of Twitter, which consumers can set to text if anything happens involving them. Before Twitter can even realize the number has been reassigned, they are already liable for hundreds or perhaps thousands of “violations”. The only solution is to stop the practice in its entirety.

The FCC points to a list of suggestions in the record to help callers determine whether a number has been reassigned, such as checking a numbering database. But then the item does not provide any relief or a safe harbor for employing these suggestions.

³⁵ See, e.g., Wells Fargo June 5 *Ex Parte* Letter at 2 (“Congress used two different phrases in two distinct sections of the TCPA to create two distinct triggers for liability. Under the statute, it is unlawful to ‘make’ a call – not merely to ‘attempt’ a call – to a cell phone using an automatic telephone dialing system (ATDS) without prior express consent... By contrast, Congress determined that call ‘initiation’ triggers liability in the context of pre-recorded voice messages to landlines even if the call is not placed through an ATDS.”) (citing *Save Our Valley v. Sound Transit*, 335 F. 3d 932, 960 (9th Cir. 2003) (“We generally assume that when Congress uses different words in a statute, it intends them to have different meanings.”)).

³⁶ For example, one Android App called “Block Calls Get Cash” – marketed by a self-described consumer protection law firm – purports to help those who download it determine whether they have a claim under the TCPA. The app’s website states that “with no out-of-pocket cost for the app or legal fees, its users will ‘laugh all the way to the bank.’” Reply Comments of the U.S. Chamber of Commerce, CG Docket 02-278, at 4 (filed Dec. 1, 2014) (citing *Lawsuit Abuse? There’s an App for That*, U.S. Chamber Institute for Legal Reform (Oct. 29, 2014), <http://www.instituteforlegalreform.com/resource/lawsuit-abuse-theres-an-app-for-that/>).

³⁷ See, e.g., Genesys June 11, 2015 *Ex Parte* Letter at 2 (“It does not benefit consumers to force callers to freeze such communications simply because a consumer did not pick up a call or respond to a text. Indeed, there is no expectation by consumers that they should have to respond to texts providing information such as power outage notifications or product recalls.”).

³⁸ *Rules and Regulations Implementing the TCPA*, CG Docket No. 02-278, Order, 19 FCC Rcd 19215, 19219 (2004) (quoting *McNeil v. Time Ins. Co.*, 205 F.3d 179, 187 (5th Cir. 2000)).

Many of these suggestions are good practices that a number of parties routinely employ to minimize the risk of litigation over reassigned numbers.³⁹ But they are not foolproof, either individually or collectively, so without a safe harbor there is still substantial litigation risk.⁴⁰ For example, the database contains at best 80 percent of wireless numbers and is not updated in real time.⁴¹

Many commenters noted the impracticability of determining whether a number has been reassigned before calling or texting. For example:

- Fairfax County Public Schools: “The messages FCPS sends are critical to and expected to be received by FCPS’s school community, especially in a threat or emergency situation.”⁴² “It would be impossible for FCPS to confirm whether a wireless telephone number is being used by the same recipient that gave FCPS consent before sending each automated message. The biggest advantage in using automated messages - reaching a large number of people as quickly as possible - would be lost if FCPS were required to make such a verification every time it sends an education-related message to a wireless telephone number.”⁴³
- Abercrombie: “Because there is no comprehensive database of reassigned numbers, the only way to avoid TCPA liability altogether for calls or texts related to reassigned numbers is to cease

³⁹ See, e.g., Wells Fargo Jan. 26, 2015 *Ex Parte* Letter at Exh. 8. See also Petition for Declaratory Ruling of Consumer Bankers Associations, CG Docket No. 02-278 (filed Sept. 19, 2014) (CBA Petition) (“[C]ompanies often employ expensive and ultimately inadequate measures to try to ascertain mobile telephone number reassignments.”) (citing Letter from Monica S. Desai, Counsel to Wells Fargo to Marlene H. Dortch, CG Docket No. 02-278, at 4 (filed May 15, 2014) (Wells Fargo May 15, 2014 *Ex Parte* Letter); United July 28, 2014 *Ex Parte* Letter at 5; U.S. Chamber of Commerce Institute for Legal Reform, *The Juggernaut of TCPA Litigation* (October 2013)).

⁴⁰ See, e.g., Wells Fargo Jan. 26, 2015 *Ex Parte* Letter at 5-6; CBA Petition at 9 (“[E]ven the most stringent compliance program cannot guarantee that the intended recipient will always be the person who answers the call.”) (citing Petition for Expedited Declaratory Ruling of United Healthcare Services, Inc., CG Docket No. 02-278 (filed Jan. 16, 2014); Comments of the American Bankers Association, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of ACA International, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of the American Financial Services Association, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of America’s Health Insurance Plans, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of the Coalition of Higher Education Assistance Organizations, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of Comcast Corporation, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of CTIA, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of DIRECTV, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of Dominion Enterprises of Virginia, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of Noble Systems Corporation, CG Docket No. 02-278 (filed Mar. 7, 2014); Comments of the Student Loan Servicing Alliance, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of Time Warner Cable Inc., CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of the U.S. Chamber of Commerce, CG Docket No. 02-278 (filed Mar. 10, 2014); Reply Comments of United Healthcare Services, Inc., CG Docket No. 02-278 (filed Mar. 23, 2014); Wells Fargo May 15, 2014 *Ex Parte* Letter; Letter from Monica S. Desai to Marlene H. Dortch, CG Docket No. 02-278 (filed July 21, 2014); United July 28, 2014 *Ex Parte* Letter).

⁴¹ *Supra* note 301. See also United July 28, 2014 *Ex Parte* Letter at 5 (These databases: provide only a confidence score; often associate incorrect names or nicknames with numbers; do not associate any name with 27% of wireless numbers; and present additional challenges when a family plan lists a single individual as the “subscriber”. Moreover, subscriptions to these services are likely cost-prohibitive for small business, non-profit organizations, and other small entities); CBA Petition at 9 (“Even companies who can afford costly third party systems that purport to provide accurate data concerning reassigned numbers still cannot escape liability because the database is often incomplete and does not account for family plan holders.”) (citing Wells Fargo May 15, 2014 *Ex Parte* Letter at 4; United July 28, 2014 *Ex Parte* Letter at 5; U.S. Chamber of Commerce Institute for Legal Reform, *The Juggernaut of TCPA Litigation* (October 2013)).

⁴² FCPS Apr. 15, 2015 Comments at 1-2.

⁴³ *Id.* at n. 13. The FCPS also expressed concern that “FCPS operations are government-funded. Any expense to defend against TCPA claims would expend funds that are designated to and essential for the education of America’s school children.” FCPS Declaration at 3.

communicating. . . . Indeed, Abercrombie has [already] eliminated the distribution of text messages to particular customers based on their carriers.”⁴⁴

Alternatively, the FCC notes that companies can manually dial numbers. This is not a realistic solution for most, if not all, of today’s businesses and institutions. For example:

- Twitter: “To implement this approach, a Twitter employee would need to *manually* call or text each user and verify his or her identity before *each* Tweet was automatically sent. Such a verification process would be prohibitively expensive for Twitter, and annoying and an invasion of privacy for Twitter users. Given that Twitter users can follow an unlimited number of other Twitter users and receive all of their Tweets—often dozens or more on a daily basis—Twitter could not possible implement this suggestion.”⁴⁵
- National Council of Higher Education Resources: “On average, one of the four major federal loan servicers was able to contact only 1,130 borrowers by dialing manually – but reached 13,675 delinquent borrowers per week using automated dialing technology.”⁴⁶ For these companies, being forced to manually dial each call will “increase costs, place unnecessary restraints on finite resources, and, most importantly, [it would reduce] the number of consumers that can be reached and informed in a timely manner about ways to avoid default or options to resolve their default.”⁴⁷
- Marketing Research Association: “The increased time involved in cell phone research can be even more of a problem than cost. Time-sensitive studies, including most political and public opinion polling, are constantly imperiled. In situations where timely data is as critical as accurate data, information is not readily deliverable to companies, governments, and other entities that need to make swift decisions.”⁴⁸

There is simply no realistic way for a company to comprehensively determine whether a number has been reassigned.⁴⁹

Moreover, some of the alternatives that the FCC suggests go so far as to be *anti-consumer*. For example, the FCC notes that companies could periodically email or mail requests that consumers update their contact information. But consumers also complain about getting unwanted email and mail. This just shifts the potential annoyance from one mode of communication to another and is also not foolproof because numbers could be reassigned in the interim. Furthermore, if companies actually emailed their customers enough to avoid TCPA liability (at least every day), these emails would get ignored or the recipient would unsubscribe. These alternatives may be a convenient dodge for the FCC, but they are not practical or desirable for businesses or consumers.⁵⁰

⁴⁴ Abercrombie May 13, 2015 Comments at 3-4.

⁴⁵ Twitter Apr. 22, 2015 Comments at 10-11.

⁴⁶ Comments of National Council of Higher Education Resources, CG Docket No. 02-278, at 3 (filed June 5, 2015).

⁴⁷ *Id.* at 5-6.

⁴⁸ Comments of Marketing Research Association, CG Docket No. 02-278, at 6 (filed Dec. 23, 2014).

⁴⁹ See Wells Fargo Jan. 26, 2015 *Ex Parte* Letter at Exh. 2 (noting that it is a “myth” that “[a] compliance-minded business can avoid liability for calls to recycled cell phones by using databases, or through manual calling.”)

⁵⁰ In addition, to the extent the Commission suggests shifting communications to landline calls or mail, the Department of Education has pointed at that these methods of communication are particularly ineffective when trying to communicate with 18-24 year olds, as 32% of 18-24 year olds do not have a landline and students are very mobile while in college and can change addresses multiple times. Letter from Vanessa A. Burton, Office of General Counsel, U.S. Department of Education, to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 3 (filed May 21, 2010).

Additionally, the FCC notes that companies could require consumers that give consent to notify those companies when they relinquish their numbers. If they do not, the FCC observes that “the caller may wish to seek legal remedies for violation of the agreement.”⁵¹ In other words, the FCC thinks it’s reasonable *to have companies sue their own customers*.

Sadly, there were reasonable options that the Commission rejected. In particular, a number of petitioners and commenters asked the FCC to interpret “called party” to mean the “intended recipient”.⁵² This commonsense approach would have allowed a company to reasonably rely on consent obtained for a particular number. Otherwise, “[i]f consent is lost through events about which the caller is totally unaware and has no control, every call carries a \$500 price tag and the consent exception becomes illusory, contrary to the intent of Congress.”⁵³

The real concern with this obvious solution seems to be that companies would continue to make calls even after they have been informed that they’ve reached the wrong person. Here again, I don’t think we should start from the presumption that the vast majority of businesses are bad actors. In fact, parties made clear in the record that there could be liability for subsequent calls made to a wrong number after actual knowledge was obtained and a reasonable time to remove the number had passed.⁵⁴ It makes no sense that legitimate businesses would knowingly waste time calling people that aren’t their customers, at least with respect to informational calls or texts.

Moreover, the idea that a recipient should have no responsibility whatsoever to notify a company that they reached the wrong person or even to be truthful and act in good faith is preposterous. I was shocked to read one cautionary tale:

By the time Rubio’s was aware of the problem [that a number provided by an employee had been reassigned], hundreds of Remote Messaging alerts were received by the wireless subscriber with the reassigned number. Further, the subscriber with the reassigned number advised Rubio’s that he has solved the problem by blocking the number assigned to the Remote Messaging system—and, therefore, no corrective action was needed. All the while, the subscriber with the reassigned number waited until he received approximately 876 alerts before filing suit against Rubio’s, thereby increasing his statutory damages against Rubio’s.⁵⁵

⁵¹ *Supra* note 302.

⁵² *See, e.g.*, Wells Fargo June 5, 2015 *Ex Parte* Letter at 7 (supporting such an interpretation and citing other commenters that agree).

⁵³ Twitter Apr. 22, 2015 Comments at 14 (citing H.R. Rep. No. 102-317 at 17 (1991) (explaining that the exception was designed to allow companies to send “expected or desired” messages, such as those that “advise a customer (at the telephone number provided by the customer) that an ordered product had arrived, a service was scheduled or preformed, or a bill had not been paid”).

⁵⁴ *See, e.g.*, CBA Petition at 14 (“When the caller learns that a number no longer belongs to the intended recipient, further calls to the number will justifiably be subject to enforcement and private actions under the TCPA. As such, the consumer of right of action will appropriately remain intact.”); Wells Fargo June 5, 2015 *Ex Parte* Letter at 7; Letter from Harold Kim, Executive Vice President, U.S. Chamber Institute for Legal Reform, to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 3-4 (filed June 11, 2015).

⁵⁵ Rubio’s Restaurant, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 3 (filed Aug. 11, 2015) (Rubio’s Restaurant Aug. 11, 2015 Petition). Yet, the order rejects Rubio’s request for an affirmative, bad-faith defense.

It is not unreasonable to expect a recipient to contact the company to inform them of the error. This could be done through the simple opt-out mechanism that the FCC points to as an example of a best practice for limiting calls to reassigned numbers—except that it should serve as a safe harbor for companies that use it. Then, once a consumer had availed itself of this option, the company would be on notice and could be liable for any subsequent communications. I fail to see how encouraging lawsuits against consumers is a better outcome than expecting consumers that receive some unintended calls or texts to take some small step to correct an inadvertent error.

Revocation of Consent for Non-telemarketing Calls

The order also decides that the TCPA includes a right to revoke consent to receive non-telemarketing calls. But this right appears nowhere in the statute. Instead, the order turns to common law tort principles to read into the statute a right to revoke consent. Talk about bureaucratic activism.

As a longtime Congressional staffer, I was stunned by this analysis. Usually, we start with the premise that a statute says what it means and means what it says.⁵⁶ If Congress did not address an issue, then the FCC should not presume to act in its stead. That is especially true when the structure of a statute and related provisions indicate that the silence was intentional. Congress amended the TCPA in 2005 to provide a right to revoke consent to receive unsolicited fax advertisements.⁵⁷ Therefore, the absence of a revocation provision for non-telemarketing calls should signal to the FCC that Congress intended no such right.

I certainly do not understand why the FCC would resort to common law principles before turning to Congress for guidance or to request a statutory fix. Clearly, this is an area where Congress has been active—not just on TCPA generally, but also on the very issue of revocation of consent. And I am particularly wary of placing a thumb on the scale here because it is evident from the legislative history that, in creating an exception for calls made with “prior express consent”, Congress struck a careful balance between the privacy interests of consumers and the interests of legitimate businesses in communicating with their customers.⁵⁸

Nevertheless, I would be remiss if I did not express concern about the way in which the Commission proceeds. Specifically, the order allows consumers to choose any reasonable means to revoke consent, which can include oral revocation, rather than permitting businesses to designate a reasonable method, such as an interactive opt-out mechanism. While verbal revocation isn’t unreasonable *per se*, there have been instances where a consumer claims, often during the course of litigation, that consent was orally revoked. If the claim is not truthful, the company will have no record that consent was revoked. Indeed, asking it to prove that consent was not withdrawn puts the company in the untenable position of having to prove a negative. In addition, some commenters raised concerns about the prospect of consumers using non-standard responses to opt-out of texts (such as “decline” or “no thanks”) that won’t be recognized by their systems, which are programmed to recognize certain words that are standard in the industry (such as “STOP”).⁵⁹

⁵⁶ *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (“In answering this question, we begin with the understanding that Congress “says in a statute what it means and means in a statute what it says there.”)).

⁵⁷ Junk Fax Prevention Act of 2005, Pub. L. 109-21, 119 Stat. 359 (codified at 47 U.S.C. § 227(b)(1)(C)).

⁵⁸ Santander Consumer USA, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 2-4 (filed July 10, 2014) (Santander July 10, 2015 Petition); H.R. Rep. No. 102-317 at 10, 17.

⁵⁹ See Letter from Jennifer Bagg, Counsel to Vibes Media LLC, to Marlene H. Dortch, FCC, CG Docket No. 02-278 (filed June 11, 2015) (“The systems used for mobile marketing must be pre-programmed to recognize certain words as an opt-out request. In reflection of this technological requirement, the industry standards contain a specific list of keywords that mobile marketers must recognize as a subscriber opt-out request. Specifically, mobile marketing

Notably, other pro-consumer statutes contain provisions that require any revocation of consent be made in writing or through other methods designated by the business.⁶⁰ Instead, the order uses those provisions as evidence that, when Congress intends to specify the means of opt-ing out, it does so. This is maddening. As discussed above, the TCPA doesn't contain a revocation provision, *so of course it did not specify how to exercise a non-existent right*. Rather, the point that some commenters have made is that if the FCC decides to read revocation into the TCPA at all, then it should at least read in a written revocation requirement or allow businesses to designate a reasonable method for revocation, consistent with other statutes that expressly address this issue.⁶¹

Or, one need look no further than the TCPA itself, where Congress provided that recipients must submit a request to opt-out of future unsolicited fax advertisements. Specifically, the statute and implementing rules provide that a request is effective only if it: (a) identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates; (b) is made to the telephone number, facsimile number, Web site address or e-mail address identified in the sender's facsimile advertisement; and (c) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.⁶²

If Congress and the Commission did not find such a procedure to be too burdensome for fax recipients, I fail to see how it or something similar would be too burdensome for call or text recipients. For example, one petitioner noted that this could be done (1) in writing at the mailing address designated by the caller; (2) by email to the email address designated by the caller; (3) by text message sent to the telephone number designated by the caller; (4) by facsimile to the telephone number designated by the caller and/or (5) as prescribed by the Commission hereafter as needed to address emerging technology.⁶³

(...continued from previous page)—————

systems must recognize the keywords STOP, CANCEL, UNSUBSCRIBE, QUIT, END, and STOPALL as a request by subscribers to opt-out of a mobile campaign. This is a widely recognized and published set of opt-out keywords that are used across the industry in calls to actions and terms and conditions.”) (citations omitted).

⁶⁰ See, e.g., Letter from Burton D. Brillhart, Counsel to Santander Consumer USA, to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 3 (filed Feb. 13, 2015) (noting that the Real Estate Settlement Procedures Act requires inquiries to be made in writing, which the Consumer Financial Protection Bureau concluded “strikes the appropriate balance between ensuring responsiveness’ to consumer requests and complaints and mitigating the burden on servicers of following and demonstrating compliance with specific procedures with respect to oral notices of error.”); Letter from Burton D. Brillhart, Counsel to Santander Consumer USA, to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 3 (filed Aug. 11, 2014) (pointing to statutes that provide for revocation through a designated method, often in writing, including the Servicemembers Civil Relief Act (SCRA), the Fair Credit Reporting Act (FCRA), the Health Insurance Portability and Accountability Act (HIPAA), Fair Debt Collection Practices Act (FDCPA)).

⁶¹ Commenters also noted the practical problems with allowing consumers to use any reasonable method. See, e.g., Letter from Harold Kim, U.S. Chamber Institute for Legal Reform and William Kovacs, U.S. Chamber of Commerce to Marlene H. Dortch, FCC, CG Docket No. 02-278 at 5 (filed June 11, 2015) (“Many American companies are large entities with hundreds or thousands of employees and multiple offices, with multiple phone numbers. Is someone permitted to call any company phone number, or send a letter to any company address, or send an email to any company email address, or talk to some affiliated entity, and revoke his or her prior consent? In the middle of a technical support call, can the consumer throw in ‘I revoke my consent for pre-recorded messages’ in the middle of a help call, when the technical help line would have no idea what to do with such a statement? It would be impossible for a company to monitor all possible means of communications for such revocations, particularly oral ones, and so the Commission should rethink adopting a position that consumers can revoke prior consent by any means they wish.”).

⁶² 47 U.S.C. § 227(b)(2)(E); 47 C.F.R. § 64.1200(a)(4)(v).

⁶³ Santander July 10, 2015 Petition at 9-10.

Or, the FCC could provide a safe harbor for companies that use the interactive opt-out mechanism that it champions as a way to discover reassigned numbers.

Limited Relief for Certain Petitioners

The order does grant slight relief in a few limited circumstances and very narrowly; including to enable consumers to receive fraud alerts, data breach information, money transfer information, medical appointment and refill reminders, hospital registration and discharge information, and home healthcare instructions. I support the relief to the extent it is provided but would have gone further.

By exempting certain uses, the FCC implicitly concedes that dialing and messaging technologies can be used to create important and popular services. However, this order fails to exempt many other beneficial uses, thereby dampening incentives to create other innovative and useful messaging services.

Moreover, the order does not address a number of situations raised in the record; for example, immunization reminders, utility outage notifications, emergency alerts from schools, and countless other categories. Some of these uses could be addressed in a future item, and could eventually be deemed permissible. However, that does not provide much needed certainty or reduce litigation exposure in the meantime.

Instead, this fact-specific approach means that companies that have not yet filed petitions but need certainty will have to undertake the expense to file and pursue a petition.⁶⁴ I imagine it will be too risky for others to guess whether their circumstances are close enough, particularly given that the order engages in very granular—and, in my view arbitrary—line drawing. In many cases, they may simply discontinue beneficial services altogether.

Furthermore, even the relief granted is limited and potentially unworkable. For example, the order limits exempted calls made by financial institutions to three per event over a three day period. But I can envision a scenario where, a week later, the institution determines that the event was broader in scope than initially anticipated and the institution needs to provide updated information to its customers; for example, about additional information that was compromised. In fact, this just happened with the breach of federal government personnel information.

In addition, the relief appears to assume that the right people are contacted. If numbers are entered into a system incorrectly, for example, then we are back at square one and institutions could be liable. So a financial institution that sends three texts in a day, as permitted in the order, could still be sued for the texts. Multiply that by the number of people that may be affected by a data breach and the risk may be unacceptably high. Therefore, I question whether institutions will even avail themselves of the supposed exception.

It may be that the FCC was hesitant to grant more meaningful relief due to resistance from some consumer groups. Honestly, I have to question whether these groups truly represented consumers at large on these issues. I was struck, for example, by a consumer group letter that pushed back against relief for data breach notifications because “[a]fter a data breach there is little a consumer can do about it, other than keep an eye on her accounts and her credit.”⁶⁵ Thus, a “letter [notice] generally suffices.”⁶⁶ That

⁶⁴ Indeed, the fact that similar services were addressed and exempted in the record increases uncertainty for those services that were raised but weren’t granted an exemption and likely will increase these entities’ litigation exposure if they even choose to continue these services at all.

⁶⁵ Letter from Margot Saunders, Counsel, National Consumer Law Center to Marlene Dortch, Secretary, Federal Communications Commission, CG Docket No. 02-278, at 4 (Apr. 28, 2015) (representing NCLC and other organizations)).

position seems to be completely out-of-touch with the views of ordinary consumers, and I do not find it to be credible or useful.

* * *

In sum, I am beyond incredibly disappointed in the outcome today. It will lead to more litigation and burdens on legitimate businesses without actually protecting consumers from abusive robocalls made by bad actors. I dissent in part and approve in part for the reasons already discussed.