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

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| In the Matter of | ) | |
| | ) | |
| Advanced Methods to Target | ) | CG Docket No. 17-59 |
| and Eliminate Unlawful Robocalls | ) | |

# COMMENTS OF THE RETAIL INDUSTRY LEADERS ASSOCIATION


Kathleen McGuigan
Nicholas R. Ahrens
**RETAIL INDUSTRY LEADERS ASSOCIATION**
1700 N. Moore Street. Ste. 2250
Arlington, VA 22209
Phone: (703) 841-2300

Laura H. Phillips
Anthony D. Glosson
**DRINKER BIDDLE & REATH LLP**
1500 K Street, N.W., Ste. 1100
Washington, DC 20005-1209
Phone: (202) 842-8800

Michael P. Daly
Meredith C. Slawe
Katie B. Garayoa
**DRINKER BIDDLE & REATH LLP**
One Logan Square, Ste. 2000
Philadelphia, PA 19103-6996
Phone: (215) 988-2700

*Counsel to the Retail Industry Leaders Association*


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## EXECUTIVE SUMMARY

The Retail Industry Leaders Association ("RILA") respectfully submits these Comments in response to the Commission's Second Notice of Inquiry on Methods to Target and Eliminate Unlawful Robocalls (the "Notice of Inquiry"). RILA's members include retail companies that engage in consumer outreach and endeavor to honor consumers' expectations regarding such communications. However, as the Notice of Inquiry acknowledges, consumers' expectations and callers' compliance efforts can be frustrated if a telephone number has been reassigned from one consumer to another without the caller's knowledge. The Notice of Inquiry seeks comment on ways to reduce the number of calls to reassigned numbers—and by extension the number of abusive lawsuits that result from such calls—by making better use of carriers' reassignment data. RILA applauds the Commission's renewed attention to the problem of reassigned numbers, which put callers in the untenable position of having to choose between risking unavoidable liability from calls to numbers that they did not know had been reassigned, or refraining from communicating with consumers altogether. Rather than chill speech and demand the impossible, the Commission should facilitate useful and desirable communications by establishing a comprehensive database of reassigned numbers coupled with a safe harbor that would encourage callers to use it. Doing so would help to ensure not only that consumers continue to receive important information but also that callers do not continue to be threatened with liability for inadvertently calling numbers that they did not know had been reassigned.

## TABLE OF CONTENTS

**Before the**
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| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
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## COMMENTS OF THE RETAIL INDUSTRY LEADERS ASSOCIATION

The Retail Industry Leaders Association ("RILA") submits the following Comments in response to the Commission's Second Notice of Inquiry on Methods to Target and Eliminate Unlawful Robocalls.[1] The Notice of Inquiry focuses on ways to minimize telephone calls to reassigned numbers, which have become a significant source of abusive litigation under the Telephone Consumer Protection Act ("TCPA").[2] RILA strongly supports the proposed creation of a database of reassigned numbers and a safe harbor that would encourage callers to consult it. Doing so would promote the important communications that consumers desire and prevent the predatory litigation that often arises from inadvertent calls to reassigned numbers.

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1 *In re Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17–59, Second Notice of Inquiry (July 13, 2017) (the "Notice of Inquiry").

2 47 U.S.C. § 227. Such lawsuits invoke the Commission's interpretation of the term "called party." The majority of the holdover Commissioners did not support this interpretation, which is now the subject of a Hobbs Act appeal. *See ACA International v. FCC*, No. 15-1211 (D.C. Cir.). Although RILA respectfully disagrees with the then-majority's ruling, it applauds the Commission's attention to this issue and appreciates the opportunity to submit these Comments, which focus solely on the proposed database and related safe harbor.

## I. RILA AND ITS MEMBERS

RILA is the trade association of the world's largest and most innovative retail companies. Its more than 200 members include retailers, product manufacturers, and service suppliers that collectively account for more than $1.5 trillion in annual sales, millions of American jobs, and more than 100,000 stores, manufacturing facilities, and distribution centers around the world.

Consumers are driving change in retail at an unprecedented rate. Ubiquitous internet access and changing consumer values, preferences, and lifestyles have led to disruption in virtually every industry—in retail perhaps more than in any other. This digital revolution continues to transform the way consumers buy products and interact with retailers. The pace and depth of these changes is both unprecedented and accelerating. Retailers are adapting to this new consumer landscape through the pursuit of transformative innovation. The convergence of retail and technology ("(R)Tech") means that the retail business model has fundamentally changed, resulting in a business imperative to delight profoundly empowered consumers. To thrive in this era of (R)Tech, retailers must maintain and deepen their relationships with consumers through the careful delivery of useful communications.[3]

To that end, many RILA members engage in valuable and desirable consumer outreach, including customer satisfaction surveys, order confirmations, shipping and delivery notifications, prescription refill reminders, fraud alerts, and information about sales, products, and services.

[3] Honoring consumers' expectations regarding communications is a key tenet of RILA's R(Tech) Center for Innovation, which assists retailers in navigating this constantly evolving industry. Retail Industry Leaders Association, (R)Tech Center for Innovation, http://rtech.org/ (last visited Aug. 28, 2017).

These RILA members have met consumers' expectations by building robust compliance regimes that rely on the Commission's conclusion that, absent clear instruction to the contrary, a consumer's provision of a telephone number to a business constitutes prior express consent to receive informational communications from or on behalf of that business to that phone number. Many RILA members also engage in commercial communications and use best practices to ensure that they reach only those consumers who have consented to such communications.

As the Commission has recognized, however, consumers' expectations can be upset when, unbeknownst to a caller, a number is reassigned from a consumer who consented to such calls to a consumer who did not. Establishing a database of reassigned numbers and a related safe harbor for callers that use it would be of great benefit to callers and consumers alike, as it would help ensure that useful communications continue to be delivered to the consumers who desire them, and that callers do not continue to be threatened with potentially devastating aggregate liability for inadvertently calling consumers who may not.

## II. DISCUSSION

### A. The Commission Could Establish the Proposed Database and Safe Harbor.

While the Notice of Inquiry seeks comment on the scope of the Commission's authority to make use of North American Numbering Plan ("NANP") numbering resources to reduce the number of calls to reassigned numbers, there should be no question that the Commission could establish a database for reassigned numbers and a safe harbor for callers that choose to use it. The authority over NANP numbering resources granted by Section 251(e) of the

Communications Act is more than sufficient to allow the Commission to require entities that receive such resources—which the Notice of Inquiry calls Voice Service Providers ("VSPs")—to report information about reassignments of those numbers. In fact, many of these entities already do report numbering utilization and other information that supports U.S. national numbering administration and number portability.[4] Thus, there is no legal impediment to the creation of rules and processes that would enable businesses to identify reassigned numbers and ensure that calls will stop once a business learns that the number has been reassigned.

### B. The Commission Should Establish the Proposed Database and Safe Harbor.

Although the TCPA was intended to be wielded by individual consumers in small claims court without attorneys,[5] it has morphed into the quintessential "poster child for lawsuit abuse,"[6] with many plaintiffs and lawyers going to "ridiculous lengths" to exploit the statute in general and the problem of reassigned numbers in particular.[7] Indeed, 2016 alone saw nearly 5,000 new

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[4] Current numbering reporting requirements are contained in 47 CFR § 52.15.

[5] *See* 137 Cong. Rec. S16204-01, S16205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) ("[I]t is my hope that States will make it as easy as possible for consumers to bring such actions, *preferably in small claims court . . . . Small claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer.* However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages." (emphasis added)).

[6] *In re rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order ("2015 Omnibus Order"), 30 FCC Rcd 7961, 8073 (Pai, dissenting).

[7] *Id.* at 8073 (Pai, dissenting). For example, one serial plaintiff has purchased numerous cell phones with numbers that were reassigned from economically depressed areas in the hope of receiving a debt collection call intended for someone else. *See Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 798-99, 801 (W.D. Pa. 2016). Other plaintiffs have found myriad ways to exploit the TCPA. *See, e.g.*, *Epps v. Earth Fare Inc.*, No. 16-8221, 2017 WL 1424637 (C.D. Cal. Feb. 27, 2017) (dismissing claim of serial plaintiff who purported to revoke consent not by texting "STOP," but by texting long sentences that were designed to frustrate the

TCPA complaints and an untold number of demand letters threatening classwide litigation in the absence of quick individual settlements.[8] Filings have shown no sign of slowing in 2017.[9] In light of this litigation climate, Chairman Pai and Commissioner O'Rielly have recognized that the Commission should "shut[] down the abusive lawsuits by closing the legal loopholes that trial lawyers have exploited to target legitimate communications"[10] and "make sure that good actors and innovators are not needlessly subjected to [TCPA] enforcement actions or lawsuits, which could discourage them from offering new consumer-friendly communications services."[11] Creating a database of reassigned numbers and a safe harbor to encourage callers to use it would further these objectives.

A safe harbor would be a critical component of any proposed reassigned number database, as it would encourage compliance and participation. *See generally* Peter P. Swire, Safe Harbors and a Proposal to Improve the Community Reinvestment Act, 79 Va. L. Rev. 349, 370 (1993) ("In terms of the metaphor, the regulated entity faces a threatening storm of regulatory action. It can take its chances on the trackless deeps of the ocean, or seek shelter instead in the

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defendant's automated recognition system, such as "I would appreciate [it] if we discontinue any further texts" or "I would like the text messages to stop can we make this happen.").

[8] WebRecon LLC, *2016 Year in Review: FDCPA Down, FCRA & TCPA Up*, available at https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up; Petition of SUMOTEXT Corp. for Expedited Clarification or, in the Alternative, Declaratory Ruling, CG Docket No. 02-278, at 4–6 (Sept. 3, 2015), available at https://ecfsapi.fcc.gov/file/60001323521.pdf.

[9] WebRecon LLC, *WebRecon Stats for Jan 2017: Happy New Year… for Plaintiffs*, available at https://webrecon.com/webrecon-stats-for-jan-2017-happy-new-year-for-plaintiffs.

[10] 2015 Omnibus Order, 30 FCC Rcd at 8073 (Pai, dissenting).

[11] Commissioner Michael O'Rielly, *TCPA: It Is Time to Provide Clarity*, FCC, https://www.fcc.gov/news-events/blog/2014/03/25/tcpa-it-time-provide-clarity (Mar. 25, 2014).

certainty of a safe harbor."). Indeed, there are several other TCPA safe harbors, including those related to ported numbers and the national Do Not Call Registry.[12] In creating those safe harbors, the Commission emphasized that callers who make "a good faith effort" to comply with the TCPA "should not be liable for violations that result from an error."[13] In situations where "the record is clear that it is impossible for telemarketers" to immediately comply with the TCPA when the characteristics of a telephone number change—*e.g.*, it is ported from a wireline service to wireless service, it is added to the national Do Not Call registry or a business's internal do not call list, or it is reassigned to a new user—a "limited safe harbor period" is not an "exemption" but rather "a time period *necessary* to allow callers to come into compliance with the rules."[14]

While the Commission currently provides a "one-call" safe harbor for inadvertent calls to reassigned numbers, that does not provide the time or resources that are needed to comply, and it also assumes that a caller will necessarily learn of a reassignment from the first call, regardless of whether the call is answered or the recipient is forthcoming.[15] By comparison, there would be

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[12] *See infra* n. 19 & 20. The Commission recently also discussed the value of a potential TCPA safe harbor related to blocking spoofed calls. *See* 2015 Omnibus Order, 30 FCC Rcd at 8073 (Pai, dissenting).

[13] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 18 FCC Rcd 14014, 14040 (2003) ("2003 Order").

[14] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 19215, 19218-19 (2004) ("2004 Order") (emphasis added).

[15] 2015 Omnibus Order, 30 FCC Rcd at 8081 (Pai, dissenting) ("The Order . . . imposes liability on callers even if the new subscriber does not tell them that the number has been reassigned. The Order . . . ignores the fact that good actors cannot implement a one-call standard while bad actors won't honor that standard anyway." (citations omitted)); *id.* at 8090-91 (O'Rielly, dissenting) ("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. . . . If that one call goes to voicemail and

many advantages to providing for a broader safe harbor in connection with the creation of a reassigned number database. For example, because callers will not control database content or be in a position to confirm its accuracy or completeness, if the database is inaccurate, calls to reassigned numbers could occur through no fault of the caller.[16] A safe harbor would protect good-faith actors and promote use of an authoritative database. Increased use of the database would result in decreased calls to reassigned numbers and would "ensure that all consumers are able to get relevant and timely information" by identifying instances in which callers may no longer have the contact information necessary to deliver such communications.[17] Finally, as

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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. In fact, these rules even apply to calls that are not connected. That is inconsistent with the statute. . . . The record shows that one free pass is particularly problematic for informational texts, such as reminders, where no response is expected or routinely provided. 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. . . . [T]he 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.'" (citations omitted)).

[16] Thus, callers may not, as some have suggested, avoid reassigned-number litigation entirely through use of the database. *See* Ltr. from Margot Saunders, Senior Counsel, National Consumer Law Center, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 17-59, at 1–2 (July 6, 2017); *see also* 2015 Omnibus Order, 30 FCC Rcd at 8092 (O'Rielly, dissenting) ("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. Many of these suggestions are good practices that a number of parties routinely employ to minimize the risk of litigation over reassigned numbers. *But they are not foolproof,* either individually or collectively, *so without a safe harbor there is still substantial litigation risk*." (emphasis added) (citations omitted)).

[17] Commissioner Michael O'Rielly, Remarks – ACA Int'l Washington Insights Conference at 2, available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-344718A1.pdf (May 4, 2017) ("O'Rielly Remarks") ("For example, companies that follow industry practices to limit stray calls should be able [to] contact a person until they have *actual* knowledge that a number has been reassigned. To help facilitate this, I urge the Commission to promptly take up an idea I advocated that we use our existing numbering databases to help inform parties which numbers have been reassigned. Coupled with an appropriate safe harbor, we could minimize unwanted calls and remove unnecessary liability exposure at the same time." (emphasis in original)).

Chairman Pai and Commissioner O'Rielly have recognized, a true safe harbor would discourage entrepreneurial plaintiffs[18] from threatening liability against "well-intentioned and well-informed businesses" that inadvertently call a reassigned number.[19]

In establishing the parameters of a safe harbor provision, the Commission could look to its safe harbors related to ported numbers[20] and the national Do Not Call Registry[21] as models. These rules provide a 15- and 31-day period, respectively, for callers to come into compliance with the Commission's rules after consulting the relevant database. The Commission has explained that such time periods "provide a reasonable opportunity for persons, including small

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[18] 2015 Omnibus Order, 30 FCC Rcd at 8091 (O'Rielly, dissenting) (rejecting the one-call exemption as "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.").

[19] O'Rielly Remarks at 1 ("As the scope of [the] TCPA has increased, so too has TCPA litigation. Thousands of lawsuits are filed each year against businesses who thought they were taking the right precautions to stay within the law."); 2015 Omnibus Order, 30 FCC Rcd at 8077–78 (Pai, dissenting) ("[C]onsumers don't preemptively contact every business to which they have given their number to inform them of the change. So even the most well-intentioned and well-informed business will sometimes call a number that's been reassigned to a new person. After all, over 37 million telephone numbers are reassigned each year. And no authoritative database—certainly not one maintained or overseen by the FCC, which has plenary authority over phone numbers—exists to 'track all disconnected or reassigned telephone numbers' or 'link[] all consumer names with their telephone numbers.' . . . [T]rial lawyers have sought to apply a strict liability standard on good-faith actors—so even if a company has no reason to know that it's calling a wrong number, it'll be liable.").

[20] 47 CFR § 64.1200(a)(1)(iv) (no liability for voice call not knowingly made to wireless number if made within 15 days of number being ported from wireline to wireless service, provided the number is not already on the national or caller-specific Do Not Call list).

[21] 47 C.F.R. § 64.1200(c)(2) (no liability for calling number listed on the national Do Not Call registry if caller "can demonstrate that the violation is the result of error and that as part of its routine business practice" it meets certain criteria, including having accessed the national Do Not Call database no more than 31 days prior to the date of the call).

businesses, to identify numbers that [may be restricted] and, therefore, allow callers to comply with [its] rules."[22] The Commission has further found that safe harbors of such durations do not "unduly infringe consumer privacy interests" and are "consistent with congressional intent."[23]

### C. The Proposed Database Should Be Designed to Be Useful and Reliable.

#### 1. *Any Database Should Be Centralized.*

RILA favors the creation of a single database that would be administered by the Commission and contain up-to-date information from all VSPs. Companies wanting to have the benefit of a safe harbor could compare their calling lists against this new database and cull out reassigned numbers so that they are no longer associated with the consumer who consented to be called. In this manner, this database would function similarly to the Do Not Call Registry.[24]

There are significant efficiency benefits to having a single database. As an initial matter, having a single database of record—and well-articulated, standardized reporting conventions—would largely eliminate the risk of conflicting data being reported by multiple sources. Moreover, accessing a single database would be more effective and cost-efficient than checking and cross-checking multiple sources. In short, the ideal solution would establish a single, centralized database that would be considered the "authoritative source" on reassigned numbers.

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22 2004 Order, 19 FCC Rcd at 19218.

23 *Id.*; *see also id.* at 19220.

24 Historically, the Commission has not treated consumer names and assigned phone numbers as Customer Proprietary Network Information ("CPNI"); thus, reporting reassigned numbers to a centralized database should not create new or controversial privacy issues.

While the Notice of Inquiry notes that there may be other options that would meet the Commission's goals of honoring consumer preferences and limiting abusive litigation arising from unintentional calls, each would be less accurate and potentially more cumbersome and costly to administer and use. For example, the option of having VSPs report directly to callers through their own databases would require numerous points of contact but no single "owner" to be responsible for administration and reporting. Implementation of this alternative approach would be considerably more complex and less manageable. Other carrier-specific options have similar problems, as each VSP might use differing reporting protocols, making interfaces idiosyncratic and inefficient. As a result, having callers/aggregators query each VSP for reassignment information, or having VSPs make reassigned-number data available to the public, would require callers to contract with every VSP nationwide or potentially risk a failure within the TCPA compliance ecosystem. These approaches are overly complicated and would not provide any stakeholders with the same level of confidence that would be provided by a single, centralized, comprehensive database with standard reporting conventions and a safe-harbor for callers that consult the database.

**2.** ***Any Required Data Should Be Actionable.***

The Notice of Inquiry asks what information should be reported and who should be responsible for reporting it. As a threshold matter, any reassigned-number database that emerges from this process must function as an authoritative record of number reassignments. As such, the database would need to have several essential elements, including that it be searchable and

that it identify if and when numbers were reassigned.[25] In developing its contours, the Commission must balance the benefits of having authoritative, actionable information against the costs of contributing to and using the database.

The Notice of Inquiry asks about several options for information that might be reported: Aging Numbers, Available Numbers, and Assigned Numbers.[26] Although there are reasons each category might be valuable for certain callers, RILA urges the Commission to focus on data that presents the plainest objective indicator that a number has been reassigned: the subset of disconnected Aging Numbers that are "reassigned numbers."

While information about Available Numbers could also be provided, this data would not be actionable in the normal course. By the same token, using pure disconnection information may lead to a wrong assumption as a disconnection may also simply be temporary, as it could

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[25] While it could be desirable in the normal course for the database to include former subscribers' names and zip codes, RILA recognizes that that would represent an expansion beyond the information that is provided and shared in other FCC-administered numbering databases and one that could add to the reporting burden on VSPs.

[26] These terms have specific meanings under the Commission's Rules. *See* 47 CFR § 52.15(f)(ii) ("Aging numbers are disconnected numbers that are not available for assignment to another end user or customer for a specified period of time. . . ."). Further, "[a] number is disconnected when it is no longer used to route calls to equipment owned or leased by the disconnecting subscriber of record." *In the Matter of Numbering Resource Optimization*, CC Docket No. 99-200, Notice of Proposed Rulemaking, 14 FCC Rcd 10322, 10342-43, ¶ 42 (June 2, 1999); *see also* 47 CFR § 52.15(f)(iii) ("Assigned numbers are numbers working in the Public Switched Telephone Network under an agreement such as a contract or tariff at the request of specific end users or customers for their use, or numbers not yet working but having a customer service order pending."); *id*. § 52.15(f)(iv)("Available numbers are numbers that are available for assignment to subscriber access lines, or their equivalents, within a switching entity or point of interconnection and are not classified as assigned, intermediate, administrative, aging, or reserved."). Current data available through the combination of aging, available, and assigned numbers may not provide a fully accurate picture of whether a particular number has been reassigned at the moment a database is queried. Thus, the Commission might consider designating a new reporting category for numbers that makes use of the LNP information to avoid false identifications of ported numbers as disconnected numbers.

occur in a late payment situation.[27] While some temporary disconnections will become permanent and the number in question will age to the point of becoming eligible for reassignment and then be listed as an Available Number, there is still the possibility of eventual reactivation if a bill is paid. In that case, the holder of the number and the assigned carrier for the phone number does not change. Thus, reporting of these types of disconnections would not provide a clear indication that a phone number is no longer associated with a particular person.

Given the available options, Aging Numbers—which, by definition, are disconnected numbers—are the best current indicator of numbers that have been disconnected and may be available to be reassigned but still are not fully reliable as an accurate list of reassigned numbers.[28] For that reason, the Commission should consider how best to use currently collected information from VSPs to identify what numbers have been reassigned.

Other information that would be helpful for TCPA compliance purposes would be relevant dates of standardized actions that are taken by VSPs, such as the deactivation date, the subsequent date when that number is reassigned to a new user, or the effective date of reassignment, if it is different. These dates would give callers confidence that they have consent from the current user of the number such that they can continue calling it. In this same vein,

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[27] Also, in a number-porting situation, typically a number is both disconnected and reassigned on the same day. Focusing on the reassignment as opposed to the disconnection would avoid false conclusions from accurate but ambiguous data, as disconnect reports convey that numbers have been disconnected but do not convey that numbers have also been reassigned.

[28] If aging number information were reported by length of aging to a centralized database, it would afford those interested in scrubbing against it a way to identify numbers that are likely to be reassigned to a new end user. Depending upon the development timeframe of large-scale marketing or other calling campaigns, knowing which numbers are within the aging category could be very useful, as it would allow them to be pulled out of the calling lists as a precaution.

having reported information that identifies the deactivating carrier, the deactivating line type as wireless or landline or VoIP, as well as activating carrier, date of activation, and activating line type would allow callers to ensure that they have the appropriate consents in place to continue calling the phone number. Likewise, knowing that a number was ported, as opposed to reverting to the reporting carrier to become an Aging Number, would assist callers in confirming that they still have the appropriate consents in place. However, subject to comments from carriers and others, it appears that there is no perfect proxy within the current numbering regime to identify accurately at a given moment what is a "reassigned number." RILA urges the Commission either to develop a new reporting category or, if the Commission deems it justified after review of the record, establish a safe harbor based on a combination of data points or use factors.

### 3. *Any Database Should Be Authoritative.*

The Notice of Inquiry seeks comment on how broadly any reporting requirements should apply to entities that assign or reassign numbers.[29] In particular, it asks whether only carriers or only entities that assign numbering resources directly should have reporting obligations.

If the purpose of the database is to be a repository of all reassigned numbers, then every entity that uses and reuses numbering resources to serve end user consumers should participate. Without the full participation of all entities that assign numbers—all of which presumably maintain records of assignments, disconnections, aging numbers, and available numbers—there is no compelling reason to move forward with creating a database because it would not be

[29] Notice of Inquiry ¶ 12.

comprehensive. The Commission in its Omnibus TCPA Order noted that it was a harsh and potentially unjustifiable result to hold businesses to a strict liability standard for possibly sending messages to reassigned phone numbers when there was no practical way that a caller could have known that a particular number had been reassigned.[30] Only when all carriers or VSPs that receive direct number assignments are obligated to report reassignments will there be a reliable means of sharing this information to ensure that there is a system in which necessary information is collected and can be accessed to prevent mistaken calls.[31] To be successful, it is critical that all entities that assign or administer numbering resources provide timely data to the Commission or its designee that ultimately will administer the database.

While a reassigned-number database may give rise to new reporting obligations, if the process were standardized and centralized, the burden of reporting could be mitigated. Therefore, RILA urges that well-known, standard reporting formats be used in any database. While different callers may sort and use the reported data differently depending upon their own operations, whatever standardized format for VSP reporting of reassigned numbers is selected, it must include the ability for electronic files to be downloaded and sorted so that data use can be

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[30] 2015 Omnibus Order, 30 FCC Rcd at 8006–07 ("[W]e agree with commenters who argue that callers lack guaranteed methods to discover all reassignments immediately after they occur. The record indicates that tools help callers determine whether a number has been reassigned, but that they will not in every case identify numbers that have been reassigned. Even where the caller is taking ongoing steps reasonably designed to discover reassignments and to cease calls, we recognize that these steps may not solve the problem in its entirety.").

[31] RILA appreciates that some VoIP providers do not get direct number assignments, but work indirectly with other entities that do. In those cases, the Commission may consider which entity is in the best position to perform the reassigned-number reporting function or whether these entities can make arrangements among themselves about which entity reports.

optimized and efficient. Thus, the Commission should avoid prescribing the use of any text document as the reporting standard. For example, PDF data is difficult to digest electronically and would require optical character recognition or some other method to convert text to data that can be processed electronically. Both CSV and XML electronic formats are commonly used by many data companies and either one could be acceptable as a standard, in that each can be searched electronically. If the record reveals that VSPs predominately use a particular format, then utilizing that format may not add significantly to the burden of reporting. In making its decision on specific file format to be required, the Commission should balance current usage, utility, and functionality of various formats while not foreclosing future innovation.[32]

To be useful, any database should take into consideration the appropriate response time for queries and should be able to process data requests quickly and effectively. Flexible functionality and prompt dissemination of needed information will be key to having a database that reflects the needs of all stakeholders and that advances the Commission's stated goals. Other technical criteria that the Commission should address include the capability of performing bulk downloads or query-based data retrieval. No matter what the form of reporting, the information that is returned to the querying party must be sortable. Database users must also be

[32] For example, JSON is a newer file format with increased functionality that is starting to be used by industry. While at its current level of usage, it may not be the obvious choice as the standardized reporting format for the initial launch of the new database, the Commission should be careful not to lock out future innovation and seek to avoid designating any specific file format that could become archaic in the future.

able to query the database for a particular telephone number in many if not all use cases, through a real-time Application Programming Interface ("API").

Many RILA members do a scrub check of their call or text lists for TCPA issues before every contact. Others have vendors perform a sweep or update check on a daily basis so that contact or subscription lists can be updated. The frequency with which updates to relevant information should be reported by VSPs should be informed by the fact that millions of numbers are reassigned over the course of a month. Daily reporting, with batch downloads, would have the benefit of allowing a day's porting information to net out. Typically, if an individual is porting her telephone number from Carrier A to Carrier B, the disconnect report from Carrier A and the activate report from Carrier B will both be reported in a single day and these two reports represent two portions of a single porting event.[33] Daily reporting could allow the would-be caller to discover that, although a particular number has ported, it was not disconnected to be reassigned, but rather is still associated with the person who originally provided consent. Thus, on balance, daily reporting by VSPs would provide the timeliest actionable information. Although some may benefit from real-time updates as new information becomes available, the feasibility and costs of such a system would need to be further explored in this proceeding.

[33] The Commission requires that porting be completed within one business day, although it is often accomplished within fifteen minutes. *See* ATIS 1000003, *Number Portability – Database and Global Title Translation* at 60 ("It is a goal that updates should be active in the network within 15 minutes of being downloaded by the NPAC."); *see also* 47 C.F.R. § 52.35(a) ("All telecommunications carriers required by the Commission to port telephone numbers must complete a simple wireline-to-wireline or simple intermodal port request within one business day unless a longer period is requested by the new provider or by the customer.").

The Notice of Inquiry also seeks comment on whether the Commission should establish eligibility criteria for VSPs to report reassignment information and for users such as robocallers and reassigned-number data aggregators. As for VSPs, there is little point in establishing entry or access eligibility criteria for them, as they already have numbering resource responsibilities under the Commission's rules and should all be part of the reporting ecosystem so that it is complete and comprehensive.[34] Moreover, because VSPs are already regulated to one degree or another by the Commission, there does not appear to be any policy purpose that would be served by creating eligibility requirements for them. Accordingly, nothing more should be required, beyond ensuring that cost recovery is not excessive and that actionable data is reported.

However, because the information to be shared in a centralized database has the potential to be misused, there is a need for some criteria or certification by those who might access it. Entities that would want to consult with the database for purposes of TCPA compliance should not object to reasonable conditions for accessing it, for example a summary demonstration that the entity maintains reasonable business practices, data security standards and privacy protections. The entire purpose of any eligibility showing or criteria would be to screen for parties that might not have a legitimate need for access or who might be likely to compromise or misuse the data that they access.

[34] Of course, there may need to be standard security criteria so that the VSP that shares information to the database is properly validated before it can add or modify information.

To enhance database integrity and security, any reassigned-number database should track relevant information about those who access it. A system that could record accessing entity, access time and date, and accessed numbering records would help to ensure the integrity of the database and its users. To assist in this, RILA suggests that callers could be required to set up an account prior to database access that identifies the party obtaining the information and its interactions with the database. Further, a precondition of access and use of the database ought to be a certification that the reason for and use of the database is to enhance TCPA compliance, which would minimize the possibility of misuse of the database or of any information within it.[35] Moreover, so long as the rules for and restrictions on acceptable use are spelled out in advance, RILA agrees that it would be prudent to have users certify and acknowledge that unacceptable uses of database information could result in penalties such as citations and forfeitures.

[35] A certification requirement would eliminate attempts to use a database for marketing purposes exclusively. For example, the Military Lending Act ("MLA") provides an optional safe harbor to creditors in connection with identification of covered borrowers. The MLA Website Users Guide makes clear that, "[i]nformation provided by MLA is only for the purpose of verifying an individual's active duty status for a given date to determine if they are eligible for protection under the [MLA]." Military Lending Act (MLA) Website, *Users Guide* at 41 (Mar. 1, 2017 v.4.0), https://mla.dmdc.osd.mil/mla/services/content/documents/userGuide. Indeed, the Commission has recognized that limiting access to numbering databases on a "need to know" basis is appropriate. For example, in the case of the Number Portability Administration Center's Local Number Portability database, NPAC's website makes clear that "[g]iven the critical and sensitive nature of this data entrusted to the NPAC by competitors working together to make LNP work, access to the NPAC and usage of NPAC data is strictly defined and limited to specific, permitted uses." *See* NPAC, Access the NPAC, https://www.npac.com/the-npac/access.

#### 4. *Any Recoverable Costs Should Be Reasonable.*

There is an obvious public benefit from having a centralized, standardized database that can function as the authoritative source of reassigned-number information. Indeed, callers and consumers alike would benefit from minimizing inadvertent calls to numbers that are no longer associated with individuals who have provided their consent.

VSPs and other reporting entities may face additional costs reporting reassigned number information to a new centralized database. However, as many if not all of these entities already have number reporting obligations and are maintaining the records proposed to be shared, RILA believes that it would be prudent to either assume that the costs are *de minimis* or, alternatively, to require that the costs of sharing repurposed existing information be demonstrated. Carrier participation in receipt and use of numbering resources to provide commercial service carries with it some administrative costs; the increase caused by sharing information that is already available should be, at most, an incremental one. If carriers and providers seek to recover any costs due to any mandatory participation in providing reassigned-number information, they should be required to document added costs and have those costs reviewed for reasonableness.

Given the significant benefits of a centralized comprehensive database with a safe harbor, RILA members would not object to there being a reasonable fee for access to the database. Given the large number of accessing parties to cover any costs of the database, any fee should be minimal. One suggestion is to establish a reasonable annual subscription fee, which allows accessing parties unlimited access to the database on a yearly basis. By way of example,

Neustar, in subscriptions to its Intermodal Ported TN Identification Service Agreement, appears to charge an annual flat Direct Subscription Fee of $1,185 a year, with resellers paying slightly more for access to its TCPA compliance product.[36] This is in line with what should be expected, as compared to charges for access to the Federal Do Not Call registry, which is an entirely different type of database that processes opt-out requests from individuals. RILA does not support the Do Not Call cost-plus recovery model, which charges thousands of dollars a year for access to a subset of area codes for a single region.[37]

At a minimum, any costs of sharing data or administering a database must be demonstrated and transparent so that costs remain reasonable and access is encouraged. To the extent that adjustments in charges are necessary over time, there should be an open process of review before any adjustment of user fees.

[36] Neustar, Inc., TCPA Services Frequently Asked Questions (last visited Aug. 15, 2017), available at https://cte-tcpacompliance.neustar.biz/content/tcpa_faq.jsp.

[37] *See* 16 C.F.R. § 310.8(c).

## III. CONCLUSION

For the foregoing reasons, RILA strongly supports the Commission's establishment of a centralized database of reassigned numbers and an associated safe harbor for callers that use it.

Respectfully Submitted,

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/s/ Laura H. Phillips

Laura H. Phillips
Anthony D. Glosson
**DRINKER BIDDLE & REATH LLP**
1500 K Street, N.W., Ste. 1100
Washington, DC 20005-1209
Phone: (202) 842-8800

Kathleen McGuigan
Nicholas R. Ahrens
**RETAIL INDUSTRY LEADERS ASSOCIATION**
1700 N. Moore Street, Ste. 2250
Arlington, Virginia 22209
Phone: (703) 841-2300

Michael P. Daly
Meredith C. Slawe
Katie B. Garayoa
**DRINKER BIDDLE & REATH LLP**
One Logan Square, Ste. 2000
Philadelphia, PA 19103-6996
Phone: (215) 988-2700

*Counsel to the Retail Industry Leaders Association*