

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Consumer & Governmental Affairs Bureau)	CG Docket No. 02-278
Seeks Comment on Petition for Expedited)	
Declaratory Ruling from the Cargo Airline)	
Association)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	

REPLY COMMENTS OF THE CARGO AIRLINE ASSOCIATION

Stephen A. Alterman
President
Cargo Airline Association
1620 L Street, NW
Suite 610
Washington, D.C. 20036
202-293-1030
salterman@cargoair.org

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REPLY COMMENTS OF THE CARGO AIRLINE ASSOCIATION

The Cargo Airline Association (“CAA”)¹ respectfully submits these reply comments in response to the October 16, 2012 Public Notice released by the Consumer and Governmental Affairs Bureau (“Bureau”) in the above-captioned proceeding,² in which the Bureau seeks comment on a narrow Petition for Expedited Declaratory Ruling (“Petition”) filed by CAA³ regarding the Telephone Consumer Protection Act (“TCPA”)⁴ and the Commission’s TCPA rules.⁵ In the Petition, CAA asked the Federal Communications Commission (“Commission”) to confirm that the provision of a package recipient’s wireless telephone number by a package sender constitutes “prior express consent” for delivery companies to send autodialed and

¹ CAA is the nationwide trade organization representing the interests of the United States all-cargo air transportation industry. CAA members include ABX Air, Atlas Air, Capital Cargo, DHL, FedEx Express, Kalitta Air and UPS Airlines.

² *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from the Cargo Airline Association*, CG Docket No. 02-278, Public Notice, DA 12-1652 (rel. Oct. 16, 2012).

³ See Cargo Airline Association, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Aug. 17, 2012) (“Petition”).

⁴ 47 U.S.C. § 227.

⁵ 47 C.F.R. § 64.1200 *et seq.*

prerecorded, non-telemarketing customer service notifications related to that package.⁶ CAA also asked the Commission, in the alternative, to declare that package delivery notifications are exempt from the TCPA’s restriction on autodialed and prerecorded calls and messages to wireless telephone numbers.

Many commenters in a variety of industry sectors agree that the Commission should grant the Petition. As discussed below, time-sensitive, non-telemarketing package delivery notifications provide a number of significant benefits to consumers, such as maximizing convenience for package recipients and reducing the potential for missed deliveries. They also advance the goals of the TCPA, including by enhancing consumer privacy, without imposing any new costs on package recipients. Therefore, the Commission should confirm that “prior express consent” for non-telemarketing package delivery notifications can be provided through an intermediary or associated third party, and that delivery companies can rely on representations from package senders to demonstrate “prior express consent.” It should also reject alternate proposals from a few individuals who have filed TCPA class action law suits (hereinafter the “TCPA plaintiffs”) because the proposals fail to address the problem of countless missed package deliveries, encourage further TCPA litigation, and ultimately reinforce the need for the Commission to grant the Petition.

⁶ The TCPA requires parties to obtain “prior express consent” from the called party to place non-emergency calls using automatic telephone dialing systems (“autodialers”) or artificial or prerecorded voice messages to, *inter alia*, wireless telephone numbers. 47 U.S.C. § 227(b)(1)(A); *see also* 47 C.F.R. § 64.1200(a)(1). The Commission has held that short message service (“SMS”) text messages are “calls” under the TCPA. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 165 (2003).

I. TIME-SENSITIVE PACKAGE DELIVERY NOTIFICATIONS PROVIDE A NUMBER OF BENEFITS TO CONSUMERS.

CAA's narrow request is limited to confirming CAA members' ability to send consumer-friendly, non-telemarketing package delivery notifications. As CAA explained in the Petition, its members need to notify package recipients of the shipment, arrival, or scheduled delivery date of a package; failed attempts to deliver specific packages; or that a package is available for pickup at a specific carrier location.⁷ The notifications are sent only when a package is being delivered, and only to the intended package recipient.⁸ They do not involve any telemarketing, solicitation, or advertising. In addition, CAA members' prerecorded message notifications are typically less than a minute long. Moreover, CAA members typically enable package recipients that do not want to receive delivery notifications to opt out of receiving further calls and messages,⁹ and CAA would not object if the Commission required CAA members to include an opt-out mechanism as a condition of granting the Petition.

Package delivery notifications maximize convenience for package recipients, facilitate the timely delivery of packages and reduce delivery delays, and allow CAA members to provide delivery services in an efficient, cost-effective manner. They can also significantly reduce the potential for package theft from front porches, building lobbies, and other locations, which remains a nationwide problem¹⁰ that is expected to grow as consumers shift more of their

⁷ Petition at 2.

⁸ Although CAA members often provide package delivery notifications to wireline telephone numbers, they currently provide only a limited number of such notifications to wireless telephone numbers. For example, some consumers have provided their wireless telephone number to a CAA member as part of an account with that member. *Id.* at 3.

⁹ If the package recipient prefers, he or she can also register to receive text or email notifications instead of prerecorded voice calls.

¹⁰ *Id.* at 2-3; *see also, e.g., Prince George's County Neighborhood Fights Holiday Package Thefts*, NBC4 Washington (Nov. 20, 2012, 9:25 p.m.), *available at*

spending online.¹¹ For example, delivery notifications allow package recipients to arrange for someone to be home and receive the package or make other arrangements with the package delivery company. They also help consumers avoid having to travel to a distribution center to pick up a package (or risk missing the package entirely).

II. MANY COMMENTERS AGREE: THE COMMISSION SHOULD CONFIRM THAT “PRIOR EXPRESS CONSENT” FOR NON-TELEMARKETING PACKAGE DELIVERY NOTIFICATIONS CAN BE PROVIDED THROUGH AN INTERMEDIARY OR ASSOCIATED THIRD PARTY.

Commenters from a number of diverse industry sectors support the Petition and a clarification that “prior express consent” under the TCPA for non-telemarketing package delivery notifications can be provided by an intermediary or an associated third party. For example, the U.S. Chamber of Commerce explains that “prior express consent” through intermediaries is important for delivery notification services,¹² while the American Bankers Association and Consumer Bankers Association also noted that package delivery notifications warrant consent through intermediaries.¹³ The delivery notifications, as GroupMe explains, are “messages that the TCPA and the Commission’s rules were never intended to prohibit.”¹⁴ Other commenters also recognize that delivery notifications “provide essential information to consumers[] and are not telemarketing messages within the purview of the TCPA.”¹⁵ Indeed, the

<http://www.nbcwashington.com/news/local/Prince-Georges-County-Neighborhood-Fights-Holiday-Package-Thefts-180271081.html>.

¹¹ See, e.g., Daniel Bukszpan, *Avoiding Holiday Package Theft*, CNBC (Nov. 16, 2012, 4:51 p.m.), available at <http://www.cnbc.com/id/49859299>.

¹² Comments of U.S. Chamber of Commerce, CG Docket No. 02-278 at 13 (Aug. 30, 2012) (“Chamber Comments”).

¹³ Reply Comments of American Bankers Association and Consumer Bankers Association, CG Docket No. 02-278 at 2 (Sept. 10, 2012).

¹⁴ Comments of GroupMe, Inc., CG Docket No. 02-278 at 4 (Nov. 15, 2012).

¹⁵ Comments of Global Tel*Link Corporation, CG Docket No. 02-278 at 3 (Nov. 15, 2012).

record is replete with additional commenters who support the limited ability of parties to obtain “prior express consent” through intermediaries or associated third parties.¹⁶ Consistent with these comments, the Commission should confirm that delivery companies can rely on representations from package senders to establish “prior express consent” under the TCPA. Specifically, the provision of a package recipient’s wireless telephone number by a package sender should establish “prior express consent” for shipping companies to send delivery notifications related to that package.

As CAA explained, granting the Petition would be consistent with the TCPA and Commission precedent because package delivery companies have “prior express consent” from “the called party” when sending delivery notifications.¹⁷ A package sender initiates a shipment and provides all of the necessary information – including the recipient’s address and contact information – to the delivery company. By providing the sender with a contact telephone number, the recipient has authorized calls to that number regarding the delivery, whether by the delivery company or by any other member of the supply chain that facilitates delivery. Because there is no public directory of wireless telephone numbers, the package sender must have obtained the telephone number from the recipient,¹⁸ and the Commission has already confirmed that the provision of a wireless telephone number by the recipient is sufficient to establish “prior

¹⁶ See, e.g., Comments of Twilio Inc., CG Docket No. 02-278 at 15-17 (Aug. 30, 2012); Reply Comments of Nicor Energy Services Company, CG Docket No. 02-278 at 7 (Sept. 10, 2012).

¹⁷ See 47 U.S.C. § 227(b)(1)(A); Petition at 4-6.

¹⁸ See Comments of AT&T Corporation, CG Docket 02-278 at 5 (Nov. 21, 2012) (explaining that an individual who has another person’s number has consent to call because there is no public directory of wireless telephone numbers).

express consent.”¹⁹ The Commission has also recognized that a party that obtains consent or other authority to make an automated call can transfer that consent to an associated party.²⁰

Granting the Petition would also be consistent with the legislative history of the TCPA. The statute was not intended to restrict pro-consumer, non-telemarketing delivery notifications. Congress was focused, rather, on curbing the flood of telemarketing calls enabled by automated technology. As the TCPA legislative history shows, “[t]he use of automated equipment to engage in telemarketing [wa]s generating an increasing number of consumer complaints.”²¹ Congress intended to “target . . . the source of the[se] . . . complaints – telemarketing calls placed to the home.”²² These telemarketing calls were “generic, one-way, commercial speech that w[ere] sent *en masse* to consumers by merchants that usually had no relationship with the recipient.”²³ Such calls are very different from delivery notifications which are directed to individual package recipients. In addition, CAA member companies have not received any

¹⁹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, Declaratory Ruling, 23 FCC Rcd 559 ¶ 9 (2008), citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 ¶ 31 (1992) (“[P]ersons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.”).

²⁰ See *id.*; see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of State Farm Mutual Automobile Insurance Company for Clarification and Declaratory Ruling*, Declaratory Ruling, 20 FCC Rcd 13664 (2005). By providing the recipient’s wireless number to a delivery company, the sender is merely transferring the recipient’s consent to receive package updates; there is no “delegation” of responsibility between parties. *Contra* Comments of Joe Shields, CG Docket No. 02-278 at 2 (Sept. 15, 2012) (“Shields Comments”).

²¹ See, e.g., Sen. Rep. No. 102-178, at 1 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1969; 137 Cong. Rec. 35302 (1991) (“The compromise gives the public a fighting chance to start to curtail unwanted telemarketing practices.”).

²² 137 Cong. Rec. 18123 (daily ed. July 11, 1991) (statement of Sen. Hollings).

²³ GroupMe Comments at 6.

complaints for delivery notifications calls.²⁴ Congress also did “not intend” for the TCPA to “be a barrier to the normal, expected or desired communications between businesses and their customers.”²⁵ Indeed, Congress recognized that calls such as non-telemarketing delivery notifications are pro-consumer services and should not be prohibited by the Act.²⁶

Package delivery notifications also advance the TCPA’s consumer protection goals, including by enhancing consumer privacy. In addition to reducing package theft, delivery notifications make it easier for the intended package recipient to receive the package (instead of a family member, roommate, house guest, front desk clerk, or other party). Because the notifications are directly connected to packages already being delivered to a recipient’s home or other designated address, there is no invasion of privacy related to the notification. Moreover, prerecorded message and text message delivery notifications are no more intrusive than live voice calls (which, as discussed below, are not restricted under the TCPA), and text messages even enable the recipient to “time-shift” when they read the message. Notifications are also especially helpful to consumers in the context of an unwanted package because they can aid the recipient in preventing the unwanted package from arriving at his or her home. Finally, delivery notifications do not trigger other concerns that Congress was attempting to address through the TCPA, such as dialing random or sequential telephone numbers and endangering public safety by tying up blocks of telephone lines.²⁷

²⁴ As mentioned above, such calls are placed to wireline telephone numbers and to a limited number of wireless telephone numbers.

²⁵ H.R. Rep. 102-317 (Nov. 15, 1991).

²⁶ See GroupMe Comments at 6 (“[T]he legislative record also demonstrates that non-commercial communications constituted information that recipients wanted to receive.”).

²⁷ See, e.g., S. Rep. No. 102-178, at 1-2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969; H.R. Rep. No. 102-317, at 10 (1991); 137 Cong. Rec 35303 (1991); 137 Cong. Rec. 30821 (1991).

In addition, package delivery notifications impose no new charges on package recipients or other consumers.²⁸ In fact, they could ultimately lower costs for consumers – and save them time. The TCPA allows delivery companies to provide non-telemarketing delivery notifications (e.g., using a live representative), and placing the notification with an autodialed or prerecorded message imposes no additional charges on consumers. Furthermore, if the Commission grants the Petition and facilitates delivery notifications to wireless telephone numbers, consumers will no longer have to call or search a delivery company’s website to obtain delivery or distribution center information, activities that not only take time but can also use up voice plan minutes or available data from a service plan with a mobile data limit. However, the volume of daily calls that would be required to provide time-sensitive package notifications using live representatives would make it too costly for CAA members to provide the service.

Granting the Petition also would not create any risk of new unwanted calls or abusive practices. CAA members have no incentive to place unnecessary calls and messages because they would incur significant expenses to provide such notifications, far greater on a per-notification basis than any per-text message or per-call amount paid by a consumer (especially considering that, as the Commission has recognized, many consumers now have unlimited calling or texting plans²⁹). As GroupMe recognizes, the notifications “do not serve the pecuniary interest of the party sending” them, so “there is no incentive for the sender to harass the

²⁸ The TCPA authorizes the Commission to exempt, from the restriction on autodialed and prerecorded calls and messages, such calls and messages to wireless telephone numbers “that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights the provision is intended to protect.” 47 U.S.C. § 227(b)(2)(C) (stating that the Commission may make such exemption “by rule or Order”).

²⁹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling, FCC 12-143 ¶ (rel. Nov. 29, 2012).

recipient.”³⁰ Delivery companies would also endeavor to avoid dialing the wrong telephone number because such calls would do nothing to assist with missed deliveries while still creating expenses for CAA members. And package senders should have no incentive to misrepresent the package recipient’s consent.³¹

III. THE TCPA PLAINTIFFS’ ARGUMENTS ARE MISPLACED AND ACTUALLY REINFORCE THE NEED FOR THE COMMISSION TO GRANT THE CAA PETITION.

Although a few individual commenters (most of whom happen to be TCPA plaintiffs³²) oppose the Petition, their proposed alternative “solutions” are entirely unworkable and ultimately reinforce the need for the Commission to grant the Petition.

An indemnification approach provides no protection against frivolous TCPA litigation.

A few commenters naively suggest that CAA members should require package senders to indemnify them in the event a package recipient sues a CAA member after receiving a delivery notification (*e.g.*, if the package recipient claims not to have provided prior express consent to the package sender).³³ Such an approach would effectively provide no relief at all in the package delivery context. First, relying on indemnification provisions would be cost-prohibitive because CAA members would have to enforce the provisions against package senders on an individual

³⁰ Reply Comments of GroupMe, CG Docket No. 02-278 at 19 (Sept. 10, 2012).

³¹ Chamber Comments at 11-13 (“[T]here is little incentive for an individual to forge another’s consent to receive these calls, because, as nontelemarketing informational calls, the opportunity for monetary gain is limited.”).

³² See Comments of Robert Biggerstaff, CG Docket No. 02-278 at 1 (Nov. 15, 2012) (“Biggerstaff Comments”); Comments of Gerald Roylance (“Roylance Comments”), CG Docket No. 02-278 (Nov. 15, 2012); Shields Comments. For an example of TCPA lawsuits filed by these commenters, *see, e.g., Joe Shields v. Americor Lending Group, Inc. et al.*, NO. 01-06-00475-CV (Tex. App.); *Gerald Roylance v. ADT Security Services, Inc. et al.*, No. 5:08-cv-01101-JF (N.D. Ca.); *Robert Biggerstaff v. Low Country Drug Screening*, No. 99-SC-86-5519 (Magis. Ct. S.C.).

³³ Biggerstaff Comments at 1; Roylance Comments at 2; Comments of Stewart Abramson, CG Docket No. 02-278 at 2 (Nov. 20, 2012).

basis (even though CAA members would be subject to TCPA class action litigation that allows package recipients to share litigation expenses). Second, as a practical matter, it would not be feasible to track down all such package senders, nor would such actions be consistent with good customer service policies. Moreover, adopting an approach that encourages litigation against consumers undermines the Commission's and the TCPA's consumer protection goals.

Combined, these challenges would further deter CAA members from placing consumer-friendly, non-telemarketing delivery notifications and increase the potential for package theft.

Fortunately, an indemnification approach is unnecessary – the Commission can instead grant the Petition and confirm that package senders have prior express consent from the called party and transfer that consent to delivery companies when they provide a package recipient's wireless telephone number.

Relying on a direct opt-in approach also provides no solution for countless missed package deliveries. As explained above, the Commission should confirm that package senders have prior express consent and can transfer that consent. A direct opt-in system, as proposed by several commenters,³⁴ would require *each* delivery company to collect and maintain opt-in information from essentially every individual that relies on a wireless telephone number, even though delivery companies typically do not communicate directly with package recipients until, at the earliest, a delivery is in progress. Given the lead time that would be needed to develop and implement such a system and obtain direct opt-in consent on an individualized package recipient basis, countless missed deliveries would continue to occur. Moreover, the direct opt-in approach would also cause significant confusion for consumers, who must keep track of the delivery

³⁴ Roylance Comments at 3; Shields Comments at 2.

companies to which they have provided a direct express opt-in and who risk not receiving a desired notification (and missing a package) from a particular delivery company.

Prerecorded call and text message delivery notifications are the only viable alternative for CAA members to contact package delivery recipients and help reduce the potential for package theft and failed delivery attempts. For example, sending an e-mail to the package recipient is not a sufficiently timely solution. Even though e-mails are delivered rapidly, some consumers do not check their e-mail for several days. CAA members already offer package senders the option of e-mailing tracking updates to recipients, but package senders do not necessarily have email addresses for the recipients. Leaving a paper notice at the address with directions to the package center is also undesirable, as it is often inconvenient for consumers to travel to the package distribution center to pick up a package. Moreover, as explained in the Petition, it would be impossible for delivery companies to provide millions of package notifications each day if they first had to obtain consent independently and directly from each package recipient. They have no alternative but to rely on the information provided by the package sender, and the volume of packages delivered each day requires the use of autodialed or prerecorded calls and messages.

IV. CONCLUSION

For the foregoing reasons, the Commission should grant the Petition and confirm that delivery companies can rely on representations from package senders that a package recipient consents to receiving autodialed and prerecorded customer service notifications regarding the shipment. Alternatively, the Commission should declare that package delivery notifications are

exempt from the TCPA's restriction on autodialed and prerecorded calls and messages to wireless telephone numbers.

Respectfully submitted,

A handwritten signature in black ink that reads "Stephen A. Alterman". The signature is written in a cursive style with a long horizontal flourish at the end.

Stephen A. Alterman
President
Cargo Airline Association
1620 L Street, NW
Suite 610
Washington, D.C. 20036
202-293-1030
salterman@cargoair.org

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