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MORTGAGE BANKERS ASSOCIATION

June 27, 2018

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

Re: Comments on FCC TCPA Rulemaking, CG 02-278

The Mortgage Bankers Associations appreciates the opportunity to offer comments on how the Federal Communications Commission ("FCC" or "Commission") should promulgate appropriate regulations under the Telephone Consumer ("TCPA"). We file these reply comments in support of the comment letter filed by Quicken Loans calling for TCPA regulatory reform as well as to emphasize the points below.

The TCPA was enacted by Congress to combat an abusive form of cold-call telemarketing and fax-blast spamming.[1] As Chairman Ajit Pai has observed in the past, "Congress passed the [TCPA] to crack down on intrusive telemarketers and over-the-phone scam artists."[2] The TCPA should not expose legitimate businesses to unquantifiable uncertainty and the threat of costly liability for placing legitimate informational and other non-telemarketing calls to their customers. Unfortunately, recent FCC rulings had led to this very situation.[3]

This state of affairs was recognized by the D.C. Circuit's recent *ACA Int'l v. FCC* decision[4] that invalidated key portions of the Federal Communications Commission's (FCC) *2015 Declaratory Ruling*.[5] This decision has lifted the cloud of pending litigation over the Commission's previous rules, giving the FCC the ability to address the decision and providing the public a much-needed opportunity to comment on the appropriate interpretations of the TCPA.

The need for change in TCPA regulations is underlined by the increasing reach of the statute and its associated regulations in light of changes in consumer communication methods. The rates of cellphone adoption in the United States has been staggering. In 2010, nearly twenty years after the TCPA's passage,

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[1] *See* S. Rep. 102-178 at 1-2 (1991) (stating that the purpose of the TCPA is to "plac[e] restrictions on unsolicited, automated telephone calls to the home" and noting complaints regarding telemarketing calls); H.R. Rep. No. 102-317 at 6-7 (1991) (citing telemarketing abuse as the primary motivator for legislative action leading to the TCPA).

[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8072 (2015 Declaratory Ruling) (Dissenting Statement of then-Commissioner Ajit Pai) (Pai Dissent)

[3] *See TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits*, U.S. Chamber Institute for Legal Reform (August 2017), http://www.instituteforlegalreform.com/research/tcpa-litigation-sprawl-a-study-of-the-sources-and-targets-of-recent-tcpa-lawsuits. (Under this analysis, the number of TCPA lawsuits increased from 2,127 in the 17 months prior to the FCC's *2015 Declaratory Ruling* to 3,121 in the 17 months after the *Declaratory Ruling*.)

[4] *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687 (D.C. Cir. 2018).

[5] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (*2015 Declaratory Ruling*).

62% of Americans owned a cellphone. By 2018 that number has risen to 95%.[6] Since the TCPA's passage, mobile phones have evolved from an expensive luxury item to a necessity and the *primary* means of communications for many in this country.

This dynamic is demonstrated by the growing numbers of people that rely solely on their cell phone for telephone communication. This population has expanded from a tiny minority to a majority of the population. As of 2018, 53.9% of all households did not have a landline telephone but did have at least one wireless telephone.[7] This includes approximately 132 million adults and nearly 46 million children—and that trend has been steadily increasing.[8]

Wireless dependence is likely to continue, as 75.6% of adults aged 25-29 and 73.3% of adults aged 30-34 are in households with wireless telephones only.[9] This population will likely continue to rely on their mobile phone as their primary method of communication with the businesses which they interact with. Additionally, the adoption of smartphones by Americans 65 and older has increased dramatically. In the last five years, the percentage of seniors using a smartphone nearly quadrupled, from 11% in 2011 to 42% in 2016.[10] Older generations have generally maintained similar adoption rates of technology, when compared to younger generations.[11] Unfortunately, the TCPA regulations have not kept pace with this technological and societal transition.

The D.C. Circuit decision and following Commission NPR thus provide an ideal opportunity to create regulations that respect Congress's statutory design and the important associated privacy considerations. Such rules can also offer businesses clarity around their statutory obligations and certainty that they are in compliance. To that end, MBA offers comments in the following three areas: (1) the appropriate definition of "automated telephone dialing system"; (2) how the TCPA should treat reassigned numbers; and (3) the need for defined and clear channels for revocation of consent. Finally, (4) outlines how the TCPA should be understood in relation to other federal statutes that already provide important protections to consumers from harassment and abuse.

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[6] Pew Charitable Trust. Demographics of Mobile Device Ownership and Adoption in the United States, January 12, 2017. See http://www.pewinternet.org/fact-sheet/mobile/

[7] Centers for Disease Control and Prevention, National Center for Health Statistics. Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July–December 2017, June 2018. Available at https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201806.pdf.

[8] *Id.*

[9] *Id.*

[10] Pew Research Center. "Tech Adoption Climbs Among Older Adults." Survey conducted Sept.29-Nov.6, 2016. Available at http://www.pewinternet.org/2017/05/17/tech-adoption-climbs-among-older-adults/pi_2017-05-17_older-americans-tech_0-01/.

[11] Pew Research Center. "Millenials stand out for their technology use, but older generations also embrace digital life." Survey conducted Jan.3-10, 2018. Available at http://www.pewresearch.org/fact-tank/2018/05/02/millenials-stand-out-for-their-technology-use-but-older-generations-also-embrace-digital-life/ft_18-04-24_generationtechuse_three/.

1. Defining an Automatic Telephone Dialing System (ATDS)

a. *MBA supports the position on ATDS outlined in our petition.*

MBA writes in support of Quicken Loans' Comment and in support of our petition, with other trade groups, urging the FCC to define autodialer reasonably and as intended by Congress in drafting the statute. While we have included the petition as an appendix to this comment, a brief summary of the argument follows. The petition calls on the FCC to clarify that in order to be an ATDS subject to Section 227(b)'s restrictions,[12] dialing equipment must possess the functions referred to in the statutory definition.[13]

The TCPA defines an ATDS as a device that has the capacity to "store or produce telephone numbers to be called, using a random or sequential number generator' and to dial such numbers."[14] Thus, a plain reading of the statute suggests the following must be satisfied for a device to be deemed an ATDS:

1. A device must be able to generate numbers in either random order or in sequential order to satisfy this definition.
2. A device must be able to store or produce those numbers called using that random or sequential number generator.
3. The device must be able to dial those numbers.

The Commission should not deviate from this straightforward language. Devices that cannot perform *all three of these functions* cannot meet the statutory definition of an ATDS.

b. *The FCC should confirm that an ATDS must have actual (present) capacity.*

The statute's focus on the recipient of the call rather than possession of an ATDS suggests that these functions must be *actually*—not theoretically—present and activated in a device at the time the call is made. The statutory text uses present tense to limit the use of equipment that "has the capacity" to perform the ATDS function and makes no reference to potential or theoretical capabilities."[15] Additionally, the D.C. Circuit's recent decision compels focusing on the statutory text. Indeed, "[h]ad Congress wanted to define automatic telephone dialing system more broadly it could have done so by adding tenses and moods, defining it as 'equipment which has, has had, or could have the capacity.' But it didn't."[16] The D.C. Circuit concurs that the FCC lacks the authority to go beyond the requirements of the clear statutory language, overturning the previous definition of ATDS and noting that "[t]he Commission's capacious understanding of a device's 'capacity' lies considerably beyond the agency's zone of delegated authority for purposes of the *Chevron* framework."[17] Similar concerns were analyzed by the Third Circuit, wherein the Court of Appeals stated that, "the key factual question actually at issue in this case—whether the Email SMS System

[12] The TCPA prohibits "mak[ing] any call . . . using an [ATDS]" to certain telephone numbers, including those assigned to wireless telephone services, absent an exception, such as prior express consent. 47 U.S.C. § 227(b)(1)(A).
[13] 47 U.S.C. § 227(a)(1).
[14] 47 U.S.C. § 227(a)(1)(A)-(B).
[15] 47 U.S.C. § 227(a)(1).
[16] *2015 Declaratory Ruling* (Dissenting Statement of then-Commissioner Ajit Pai).
[17] *ACA Int'l*, 885 F.3d at 698.

functioned as an autodialer by randomly or sequentially generating telephone numbers, and dialing those numbers…"[18]

In light of this, the FCC should comport with the statutory language and define capacity to cover devices where the functionality is currently present within the device for it to satisfy the requirements for an ATDS. Conversely, devices that require alteration to add autodialing capability are not an ATDS, but may become an ATDS if and when the modifications necessary have been made.

c. *The FCC should adhere to the plain meaning of "automatic."*

The FCC should also honor the "automatic" requirement by requiring that the ATDS dial the numbers absent human intervention. This comports with the plain meaning of the statute and such a definition is vital to offering businesses certainty by specifying exactly the conduct that the TCPA is intended to regulate. Importantly, it creates a clear rule for businesses to follow and courts to enforce, rather than a vague case-by-case analysis of each piece of equipment.

Such clarity is particularly welcome as this is an area where the FCC has not been consistent. The basic function of an ATDS is to dial numbers without human intervention,[19] but the FCC previously believed that a device might qualify as an ATDS even if it cannot dial numbers without human intervention.[20] Returning to a commonsense understanding of the word "automatic" is necessary, and appropriate in light of the D.C. Circuit's suggestion that the absence of human intervention is the logical reading of the statute.[21]

d. *The FCC should confirm that calls must be made with ATDS capabilities to be subject to the TCPA.*

Finally, the FCC should confirm that only calls made using actual ATDS capabilities discussed above are subject to the TCPA's restrictions. This is the appropriate interpretation of the statute, as made clear by the D.C. Circuit decision striking down the notion that the TCPA's prohibitions apply to any call using a device that *could* be an ATDS, regardless of whether the call was made using ATDS capabilities.[22] The judges found that the TCPA's text requires a caller to use the statutorily defined functions of an ATDS to make a call for liability to attach.[23] The FCC should follow the court's reading of the statute to clarify that the TCPA is only implicated by the *use* of actual ATDS capabilities in making calls.

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[18] *Dominguez on Behalf of Himself v. Yahoo, Inc.*, No. 17-1243, 2018 WL 3118056, at *3 (3d Cir. June 26, 2018). At issue in this case was Yahoo's Email SMS Service, which would send text messages to a cell phone number upon receipt of an e-mail. The cell phone number was subsequently reassigned to the Plaintiff who received approximately 27,800 text messages from Yahoo over the course of 17 months, which were originally intended for the previous subscriber. The Third Circuit took notice of *ACA Int'l* and focused the question on whether the Service had the requisite present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers. Finding that the Service only sent messages to numbers that were individually and manually inputted, the Court of Appeals affirmed the District Court's orders granting summary judgment in favor of Yahoo.

[19] *2003 TCPA Order* ¶ 132; *2008 Declaratory Ruling*, ¶ 13.

[20] *2015 Declaratory Ruling*, ¶ 17.

[21] *ACA Int'l*, 885 F.3d at 703 (citation omitted) ("For instance, the ruling states that the 'basic function' of an autodialer is the ability to 'dial numbers without human intervention.' [] Prior orders had said the same. [] That makes sense given that 'auto' in autodialer—or, equivalently, 'automatic' in 'automatic telephone dialing system,' []—would seem to envision non-manual dialing of telephone numbers." internal citations omitted).

[22] *2015 Declaratory Ruling*, ¶ 19 n. 70.

[23] *ACA Int'l*, 885 F.3d at 704.

2. REASSIGNED NUMBERS

As it relates to treating reassigned wireless numbers under the TCPA, the comment submitted by Quicken is correct as to the practical implications of wireless numbers being reassigned. Approximately 35 million phone numbers are reassigned each year.[24] Simply, with such volume of reassigned numbers, the 2015 Declaratory Ruling did little to help callers navigate the minefield of potential TCPA violations attendant to a call made to a number that has been reassigned.

a. *The Definition of "Called Party."*

The statutory language renders it unlawful "to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing equipment or prerecorded voice."[25] While the TCPA is, as a whole, designed to protect consumer privacy, the purpose of this portion of the statute is to provide a ready defense to callers attempting to reach customers and others at numbers they have been provided by the person they are trying to reach.

The phrase "called party" is vague and subject to several permissible readings. Only one definition of the phrase is consistent with the purpose of providing a steady defense to a caller: "expected recipient."[26] This definition is also consistent with the Commission's application of the "reasonable reliance" approach to express consent[27] which was expressly adopted by the D.C. Circuit Court of Appeals in *ACA, Int'l.*

First, defining the phrase "called party" to mean the "subscriber" to the phone line—as the Eleventh and Seventh Circuit Courts of Appeal have done[28]— causes a great deal of confusion in the context of recycled numbers and beyond. While that reading is technically permissible based upon a sterile reading of the statute, it serves limited practical application in an environment where callers are not always dealing with the subscriber to cell numbers. A substantial amount of Americans subscribe to family, employee, or group cellular plans and use cell phone numbers they do not pay for. It would be a poor bet, therefore, for a caller to assume that every individual providing their phone number is the subscriber to that line. That leaves businesses with a trio of unpleasant options: i) do not call customers on cell phones using automated technology (whatever that may mean) at all; ii) seek confirmation from customers that they are actually the subscriber when the number is provided or otherwise get permission if they are not; or iii) run the risk of violating the TCPA by calling customers on numbers they have provided, even if they are not the subscriber to that number.

Consumer groups emphasize that businesses remain "free" to call all of their customers manually. This is an argument designed to diminish the importance of the "called party" definition, which simply highlights how essential the phrase is in balancing the needs of businesses against the privacy rights of consumers as free will on the part of businesses is just an illusion in this context. On the one hand, as discussed above, businesses still do not know what an ATDS is and thus, safely calling customers in "manual" fashion

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[24] *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Second Notice of Inquiry, 32 FCC Red 6007, 6009, para. 5 (2017); North American Numbering Plan Administrator Number Resource Utilization/Forecast Reports (average of aggregate numbers for the time period January 1, 2013 through December 31, 2016).
[25] 47 U.S.C. § 227(b)(1)(A).
[26] *2015 Declaratory Ruling*, 30 FCC Rcd. at 8078.
[27] *ACA Int'l*, 885 F.3d at 707.
[28] *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 638-642 (7th Cir. 2012); *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1250-1252 (11th Cir. 2014).

remains elusive. On the other hand, and of even greater import, MBA's members must leverage efficient and accurate dialing technology to achieve their customer outreach objectives and assure proper oversight and transactional monitoring. Consumers must be provided with the information they require, expect, and deserve. Indeed, in some cases, as detailed below, such outreach and outbound calls are a federal regulatory requirement. It is simply not possible for a large servicer to hire, equip, and train the staff necessary to place the needed millions of servicing calls to provide consumers timely and accurate information on their accounts in a manual yet cost effective manner.

Moreover, even if abandoning dialing technology were a real option—and it isn't— imposing such a result on callers is plainly inconsistent with the need for balance between "the privacy concerns which the TCPA seeks to protect, and the continued viability of beneficial and useful business services."[29] Additionally, increased reliance on manual calling only tends to create more wrong number calls—humans make dialing mistakes that machines do not. Reverting to a full manual paradigm is not a solution on recycled numbers, and any definition of "called party" that forces businesses to abandon broadly defined dialer technologies completely for want of a surefire defense to TCPA suits must be rejected.

Importantly, defining "called party" to mean the "current subscriber" to the phone number being dialed creates millions of TCPA violators in waiting even outside the context of "recycled" phone numbers — it is the shared or family plans that cause this problem. If a customer is not actually the subscriber to his or her phone number then they are not the "called party" whose consent is required. They may have the consent of the subscriber to pass the number on to the caller, but they might not, which will prompt careful businesses to ask possibly invasive questions that, frankly, they should not have to ask and that customers should not have to answer. Any business failing to ask these questions, however, *will* face very large exposure for calls made to numbers provided by these customers since any number of them will not be subscribers. So again, the "subscriber" approach is not viable in the real world.

The Commission recognized that the "subscriber" approach does not work and departed from it in the Omnibus. There it defined the phrase "called party" to include both the current subscriber and the "customary user" of the cellular phone.[30] That was a creative fix to the problems created by shared or family plans, but it did not address recycled numbers or wrong numbers provided by customers. It was also inconsistent with the "reasonable reliance" approach to consent—the consent that the caller was relying upon was the consent of the customer (i.e. the expected recipient), not the "subscriber" or "customary user" of the number that the caller had never interacted with previously.

To ameliorate the harshness of its "called party" definition, the FCC afforded a one call (really a one "attempt") safe harbor, purporting—without a supporting record—that such call was likely to afford actual or constructive notice to the caller.[31] The D.C. Circuit Court of Appeals determined that this one call safe harbor was arbitrary and capricious because it was inconsistent with the very principles of "reasonable reliance" that the FCC had professed justified the safe harbor to begin with.[32] Thus, in order for the FCC to retain its current "called party" definition the Commission *must* reassess its safe harbor to afford broader protections consistent with the "reasonable reliance" approach adopted and secured by *ACA, Int'l.*[33]

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[29] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd., para. 5 (1992).
[30] *2015 Declaratory Ruling*, 30 FCC Rcd. at 7999-8001 ¶ 72-73.
[31] *Id*. at ¶ 72.
[32] *ACA Int'l*, 885 F.3d at 707-708.
[33] And yes, of course, the FCC should "maintain" its reasonable reliance approach to "express consent." The D.C. Circuit Court of Appeal firmly approved of that portion of the Omnibus. *Id*. at 707-709. Maintaining a

However, the Commission has not sought comment on what a broader safe harbor might look like, therefore the present "called party" definition must be abandoned in favor of a better choice.

There is only one solution to the "called party" problem—the phrase means "expected recipient." Defining "called party" as "expected recipient" assures that callers have a stout defense—as the statute intends—anytime they are calling a number provided by the customer without knowledge that the number is inaccurate or has changed hands. This also protects consumers; often times when a caller is informed the number is a "wrong number" or has changed hands the caller no longer has a reasonable basis to "expect" to reach the customer at that number. Calls must cease or liability may be imposed.

Consumer advocates have often argued that the "expected recipient" approach creates some form of irrevocable easement on a phone number that allows a caller to plague a new cell phone owner forever based upon consent provided by a previous subscriber. This is wholly inaccurate. A caller may only call a number so long as they believe, in good faith, that they can reach the customer on that number—and only so long as there is a reasonable basis for that belief. Thus a call recipient who is not a "called party"[34] may state a viable TCPA claim against a caller if *either* a caller lacks subjective good faith, or objective reasonableness, in making calls to a phone number provided by a (perhaps previously) expected recipient.

Defining the phrase "called party" to mean "expected recipient" solves problems associated with calls to wrong numbers—callers may call the new number until they are informed not to, and new cell phone users will not need to live with calls intended for third-parties very long. True new subscribers to cell phone numbers will receive some unwanted calls intended for previous cell phone owners *but that will happen either way*. The issue in defining "called party" is not ultimately about preventing calls to recycled numbers—only a recycled number database can do that—it's about preventing unjust liability for inadvertent calls to recycled numbers made in "reasonable reliance" on consent provided by the customer.

And, notably, receiving a few calls intended for someone else when you obtain a new phone is simply a small nuisance that is part of life in modern society. Like all new relationships, acquiring a new phone number requires dealing with a little history. But, again, the new cell phone user is well-empowered to cease these unwanted calls with very little effort, such as "stop calling, this is a wrong number," is all that is required in many instances.

Recycled numbers are not the only challenge solved by defining "called party" to mean "expected recipient." Consent raises a myriad of swirling issues. In one recent case, for example, a defendant was denied summary judgment when it was calling a number that was provided by its customer and the number had not changed hands. It turned out that the customer had provided the phone number of his nanny and the nanny claimed that the customer only had permission to provide the number for troubleshooting purposes but not for debt collection.[35] But how is the caller supposed to know that a number provided by the customer does not actually belong to him or her? Or, worse yet, how is the caller supposed to know what secret limitations the third-party may have imposed on the number being called? Defining "called party" to mean 'expected recipient" solves this problem—the Defendant could safely and properly call the

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"reasonableness" approach to express consent is also consistent with the "reasonableness" approach to revocation. *Id.* at 709-710.

[34] Crucially, courts are in agreement that a person does not need to be a "called party" in order to have standing to sue. See *Leyse v. Bank of America Nat. Ass'n*, 804 F.3d 316, 323, fn. 9 (3rd Cir. 2015); *Page v. Regions Bank*, 917 F.Supp.2d 1214, 1216-1217 (N.D. Ala. 2012); *Greenley v. Laborers' International Union of North America*, 271 F.Supp.3d 1128, 1139-1141 (D. Minn 2017).

[35] See *Benedetti v. Charter Communications, Inc.*, No. 1:16-CV-2083 RLM-DLP, 2018 WL 2970998 (S.D. Ind. June 13, 2018).

number provided by the customer unless and until it was informed that it could not reach the customer on that number, either at all or for the purpose about which the call was being made.

Finally, defining "called party" as "expected recipient" is the *only* definition of "called party" that is consistent with the "reasonable reliance" approach. That is to say, the reliance a caller is making will *always* be in the individual who provided the phone number, not in any unspecified or unknown subscriber, user or call recipient. To say that a caller is entitled to "reasonably rely" for purposes of express consent, therefore, is to say that the caller may reasonable rely on the consent of the "expected recipient."

b. *A Recycled-Number Database.*

MBA supports the creation of a free and easy-to-use recycled number database. If the ultimate goal of the FCC is to prevent or limit wrong number calls there is only one solution—the creation of a database of numbers that have changed hands so that callers cease calling them.

A safe harbor attendant to the use of the database is not strictly necessary if the definition of "called party" is changed to "expected recipient," although affording such an additional measure of protection to users of the database will assure that compliance-minded institutions leveraging the database receive the highest degree of protection possible.

In the creation of that database, MBA urges that it be one of recycled numbers, not subscribers. The "subscriber" of a number, perhaps a spouse, parent, or employer, may often not be the actual customer a business is trying to reach.[36] Therefore, maintaining a database of "subscribers" is not directly on point to help avoid liability for callers relating to reassigned numbers. Having a database of the actual recycled numbers, however, and when each number was recycled, would aid in that avoidance, and directly contribute to the database's utility in the implementation of the "expected recipient" definition. If a caller checks the database prior to calling, they may then automatically call the number, provided the number they are calling is not listed and they had "prior express consent." If the number is listed, then of course the caller's reliance on the previous subscriber's consent may not be as reasonable.

3. There should be a defined channel for revocation.

The FCC should revisit its decision to allow revocation by "any reasonable means" and allow business the ability to delegate clear and easy-to-use channels to accept consumer revocations. The inability to utilize a defined channel for revocation increases litigation risk for businesses without adding meaningful consumer benefits. All of the substantive protections afforded consumers under the TCPA would still be available if businesses were allowed to designate a clear and conspicuously disclosed channel for revocation of consent under the TCPA.

As a starting point, the regulations have previously noted that persons who knowingly release their phone numbers have "given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."[37] This was reiterated when the Commission issued a Declaratory Ruling in 2008, confirming that calls made using an ATDS or an artificial or prerecorded message to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are

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[36] *Id*.

[37] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd. 8752, 8769 para. 31 (1992). Congress did not define "prior express consent" but authorized the FCC to interpret the provisions of the TCPA. The Commission first defined "prior express consent" in its 1992 Report and Order, stating: "[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."

permissible as calls made with the "prior express consent" of the called party.[38] Based on this guidance, creditors have been providing clear disclosure to credit applicants and borrowers that provision of a telephone number to the creditor or servicer authorizes the creditor or servicer to contact the borrower at any number the borrower provides.[39]

While well-intentioned, allowing an "any reasonable means" revocation standard unnecessarily exposes good faith callers to liability and provides strong incentives to consumers to allege revocation without any factual basis for that claim. This risk is not hypothetical. Businesses are currently subject to staggering liability for calls placed to existing customers who have provided "prior express consent" to be contacted at their respective telephone numbers based on the customer's unsupported assertion that he or she "verbally revoked" their consent at some point prior to the call.[40]. Though some of these lawsuits have been dismissed, they are prohibitively expensive to defend (with some of members spending on average $50,000 to defend a single action).

Further, the lack of any formality or required language and the unreasonable prohibition against identifying a clear channel or method for revocation (whether by mail, a specific telephone number, website or otherwise) exacerbates the difficulty to develop meaningful methods for compliance. Expecting a call center agent to monitor every possible expression of dissatisfaction through the lens of a possible future allegation is inefficient and detracts from the ability to engage constructively. The only stated justification for requiring these extreme efforts to detect possible revocation and to track all consumer contact with an institution is to protect privacy. While this goal is laudable, such a goal could be reasonably accomplished by requiring a clear and conspicuous disclosure of an easily accessible channel for revocation.

Such a defined channel for revocation is entirely consistent with other consumer protection laws. For instance, the mortgage servicing rules promulgated by the CFPB "allow mortgage servicers to establish an address that a borrower must use to submit a written notice of error, request for information or qualified written request."[41] Additionally, other laws such as the Servicemembers Civil Relief Act, Gramm-Leach-

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[38] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Request of ACA International for Clarification and Declaratory Ruling, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd. 559, 567-68, para. 16-17 (2008).

[39] Obviously there is a different and higher standard of consent for explicit telemarketing messages.

[40] Each telephone calls made without "prior express consent" is a separate violation of the TCPA and subjects companies to a penalty of $500 for a negligent violation, or $1,500 for a knowing or willful violation. 47 U.S.C. § 227. Given the volume of calls companies make, the potential exposure could be devastating to these businesses. Settlements of these claims have resulted in staggering amounts paid in the millions of dollars. *See e.g. In re Rose v. Bank of America Corp.*, No. 5:11-cv-02390-EJD (N.D. Cal. 2013) (agreeing to settle several class action lawsuits that accuse the bank of using automated dialing systems to send phone calls and text messages without prior express consent for $32 million); *Jiffy Lube Int'l Inc. Text Spam Litigation*, No. 11-MD-2261-JM-JMA, Dkt. No. 97 (S.D. Cal. 2012) (obtaining final approval of $35 million settlement for TCPA claims based on marketing text messages allegedly sent without prior express consent); *Arthur v. Sallie Mae, Inc.*, No. 2:10-cv-00198 (W.D. Wash. 2012) (settling for $24.15 million claims that Sallie Mae knowingly made nonemergency automated calls to their cellphones seeking to collect debt payments without their express consent); *Malta v. Wells Fargo*, No. 10-cv-01290 (S.D. Cal. 2012) (agreeing to a $17 million settlement to resolve the action claiming that account-holder customers were contacted on their cellphones without prior express consent using an automatic telephone dialing systems and a prerecorded voice to provide account services for its home mortgages and auto loans); *Adams v. AllianceOne, Receivables Management, Inc.*, No. 3:08-cv-00248 (S.D. Cal. 2012) (obtaining approval of a $9 million settlement of claims alleging that the company placed telephone calls to the plaintiffs' cellphones without prior express consent using an automatic telephone dialing system).

[41] *Id.*

Bliley Act, Electronic Fund Transfer Act, Truth in Lending Act, Fair Credit Reporting Act and the Fair Debt Collection Practices Act and their implementing regulations require consumers to exercise rights only in writing and/or through methods designated by the creditor.[42] As these strong consumer protection statutes and regulations demonstrate, providing businesses with a meaningful opportunity to comply with the consumer's request strikes the appropriate balance and protects the interests of consumers.

4. The TCPA must be understood as a part of an extensive federal regulatory regime.

In its comment letter to the FCC's public notice on the TCPA, Consumer Action insists that the TCPA should be interpreted to "encompass *any* device that dials numbers from a stored list, regardless of the sequence of numbers it dials and regardless of whether or not it generates those numbers."[43] This comment ignores both the recent D.C. Circuit decision counseling fidelity to the statute as well as the extensive Federal regulatory regime that has sought to provide balance to technology, its uses, and consumer concerns. The FCC should place the TCPA in the context of the many federal and state statutes that govern how businesses interact with their customers when it considers this and other comments on the appropriate definition of ATDS, how to treat reassigned numbers and revocation of consent.

For instance, the Telemarketing and Consumer Fraud and Abusive Prevention Act (TCFAPA) was passed to prohibit telemarketing abuses, with a strong focus on consumer privacy and distinct time restrictions on calls.[44] The Federal Fair Debt Collections Practices Act (FDCPA)[45] and numerous state laws[46] forbid abusive conduct by debt collectors, including intrusive or harassing phone calls. Finally, the Bureau of Consumer Financial Protection's (BCFP) general Unfair, Deceptive and Abusive Acts or Practices authority[47] allows the Bureau broad latitude to punish conduct that harms consumers.

It is equally important to understand that federal requirements can *require* contact with customers. Past FCC interpretations of the TCPA arguably placed these businesses between competing federal mandates

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[42] 50 USC Appx. § 527(b) (requiring servicemembers to provide to the creditor ***written notice*** and a copy of the military orders in invoke certain protections of the Act); 12 C.F.R. § 1016.7(a)(1); 15 U.S.C. § 1693e(a); 12 C.F.R. §1005.10(c); 12 C.F.R. §§ 1026.15(a)(2); 1026.23(a)(2); 12 C.F.R. § 1026.13(b); 12 C.F.R. §1026.56(c); 12 C.F.R. § 1026.48(c)(1); 12 C.F.R. § 1026.48(d); 15 U.S.C. § 1692c(c) ("If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except— (1) to advise the consumer that the debt collector's further efforts are being terminated; (2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or (3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy. If such notice from the consumer is made by mail, notification shall be complete upon receipt."); 15 U.S.C. § 1681s-2(a)(8)(D) ("A consumer who seeks to dispute the accuracy of information shall provide a dispute notice directly to such person at the address specified by the person for such notices that (i) identifies the specific information that is being disputed; (ii) explains the basis for the dispute; and (iii) includes all supporting documentation required by the furnisher to substantiate the basis of the dispute.").

[43] *See,* Consumer Action Comments on *Interpretation of the Telephone Consumer Protection Act in Life of DC Circuit's ACA International Decision*, CG Docket No. 18-152 (filed June 11, 2018).

[44] 15 U.S.C. § 6101 *et seq*.

[45] 15 U.S.C. § 1692 *et seq*.

[46] New York Debt Collection by Third-Party Debt Collectors and Debt Buyers, 23 NYCRR 1; California Fair Debt Collection Practices Act-Rosenthal, California Civil Code CIV § 1788; Illinois Fair Debt Collection Practices Act, 225 ILCS § 425/1.

[47] 12 U.S.C. § 5531(a).

— or worse, discouraged communication that would otherwise be beneficial to the consumer.[48] While there are many worthy purposes behind these varied regulations, MBA is most familiar with these requirements in the mortgage servicing context.

The mortgage market is the single largest market for consumer financial products and services in the United States.[49] The BCFP, an agency Congress specially created to protect consumers, has acknowledged mortgage servicers "play a vital role within the broader market by undertaking the day-to-day management of mortgage loans on behalf of lenders who hold the loans in their portfolios or (where a loan has been securitized) investors who are entitled to the loan proceeds."[50] These day-to-day management responsibilities include billing borrowers for amounts due, collecting and allocating payments, maintaining and disbursing funds from escrow accounts, reporting to creditors or investors, and contacting borrowers to pursue collection and loss mitigation activities (including foreclosures and loan modifications) with respect to delinquent borrowers.[51]

Mortgage servicers have a "direct and profound impact on borrowers"[52] because they are the personal interface between borrowers and the owners of their loans. To fulfill their duties, mortgage servicers answer calls from borrowers and place outbound calls. These outbound mortgage servicing calls include calls to inform consumers about mortgage servicing transfers, options in the event of damage to the property (whether by fire, flood, earthquake, hurricane or other loss event), and options in the event of a default.

While all of these communications are important, mortgage servicers must be able to speak to a delinquent borrower as early as possible after a payment default to explain available options. Effectively communicating with borrowers who are delinquent on their payment obligations is critical to keeping borrowers in their homes and protecting their credit histories. The benefits of proactive and successful loss mitigation strategies go beyond the borrower to avoid blight in neighborhoods and communities, maintain

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[48] Indeed, such concerns motivated MBA to file its petition for exemption and subsequent application for review before the Commission. *See* Mortgage Bankers Association, *Petition for Exemption*, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 791 (2015).

[49] *Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X); Final Rule*, Bureau of Consumer Financial Protection, 78 Fed. Reg. 10696, at 10699 (Feb. 14, 2013) (to be codified at 12 C.F.R. Part 1024).

[50] *Id.* ("As of June 2012, approximately 36 percent of outstanding mortgage loans were held in portfolio; 54 percent of mortgage loans were owned through mortgage-backed securities issued by Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), together referred to as the government-sponsored enterprises (GSEs), as well as securities issued by the Government National Mortgage Association (Ginnie Mae); and 10 percent of loans were owned through private label mortgage-backed securities. *Strengthening the Housing Market and Minimizing Losses to Taxpayers*, Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs SubComm. on Housing, Transp., and Cmty. Dev., (Mar. 15, 2012, 2:30 PM)(Testimony of Laurie Goodman, Amherst Securities), http://www.banking.senate.gov/public/index.cfm/hearings?ID=53BDA60F-64C1-43D8-9ADF-A693C31EB56B. A securitization results in the economic separation of the legal title to the mortgage loan and a beneficial interest in the mortgage loan obligation. In a securitization transaction, a securitization trust is the owner or assignee of a mortgage loan. An investor is a creditor of the trust and is entitled to cash flows that are derived from the proceeds of the mortgage loans. In general, certain investors (or an insurer entitled to act on behalf of the investors) may direct the trust to take action as the owner or assignee of the mortgage loans for the benefit of the investors or insurers. *See, e.g.*, Adam Levitin & Tara Twomey, Mortgage Servicing, 28 Yale J. on Reg. 1, 11 (2011).")

[51] *Id.*

[52] *Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X); Final Rule*, Bureau of Consumer Financial Protection, 78 Fed. Reg. 10696, at 10699 (Feb. 14, 2013) (to be codified at 12 C.F.R. Part 1024).

home values and protect our economy. The consequences of foreclosure are profoundly negative for homeowners, and our current housing market regulation encourages or requires outbound calls designed to ensure that borrowers are aware of their options to possibly avoid it.[53]

The sort of timely, real-time interaction that occurs on a telephone call is particularly important. Length of delinquency is the second-most significant factor that drives the performance of the loan modifications necessary to keep a consumer in his or her home.[54] In fact, one mortgage servicer's internal review noted a 50% increase in borrowers who became current on their loan when the servicer made up to five calls in the two weeks prior to the customer becoming 60 days delinquent, compared to those customers who were not called during the same time period.[55] Time is of the essence in loss mitigation efforts, and discouraging telephone contact creates obstacles to a borrower getting a modification or keeping his or her home.

In the wake of the most recent housing crisis, Treasury highlighted the benefits of mortgage servicing calls: "The issue of how well mortgage servicers communicate with homeowners has been fundamental to our nation's ability to address the housing crisis. The reason is simple: unless mortgage servicers communicate successfully with at-risk homeowners, there can be no modification of a mortgage and no path to avoiding a foreclosure."[56] Consistent with Treasury's experience during the housing crisis and given the effectiveness of these calls, various federal agencies and state governments now require outbound mortgage servicing calls.

The following chart provides examples of these requirements:

Federal Agency / State Government	**Required Contact**
CFPB Mortgage Servicing Rules	Telephone or in-person contact by the 36th day of delinquency[57]

[53] "The financial losses associated with foreclosure are substantial. For homeowners, credit ratings are damaged, which affects their ability to move on to a new home and lessens their ability to get loans for other purchases. Poor credit ratings may also negatively influence terms and prices for services such as insurance and may impede efforts to get jobs, because some employers access credit ratings for new hires. The net worth for homeowners in foreclosure decreases, since they lose their home as an asset along with any accumulated equity and the tax advantages of homeownership. In the mid-1990s, the Family Housing Fund in Minneapolis estimated the average family lost $7,200 through foreclosure. Current estimates are most likely higher, as figures are adjusted for inflation and recent decreases in housing values further erode equity and negate previous financial investments in the foreclosed home. One observer noted, 'foreclosure can wipe out the homeowners' savings and leave them owing debt on homes they no longer own.'" G. Thomas Kingsley, Robin Smith, and David Price, Urban Institute, "The Impact of Foreclosures on Families and Communities." May 2009, pg. 14 (citations omitted).

[54] Only the amount of payment reduction provided by the modification was more significant the length of the pre-modification delinquency. Scott, Walter. "Treatment Effects of Subprime Mortgage Modifications Under the Home Affordable Modification Program." Page 28, March 2015

[55] Comments of Quicken Loans Inc. to the Commission's Notice of Proposed Rulemaking on the TCPA's Budget Act Amendment, CG Docket No. 02-278 (filed June 6, 2016), at page 3.

[56] U.S. Dep't of the Treasury, *Making Contact: The Path to Improving Mortgage Industry Communication with Homeowners, A Report on the U.S. Department of the Treasury's Guidance on Homeowner Single Point of Contact*, (Nov. 14, 2012), https://www.treasury.gov/initiatives/financial-stability/reports/Documents/SPOC%20Special%20Report_Final.pdf.

[57] 12 C.F.R. § 1024.39(a).

Federal Agency / State Government	**Required Contact**
Federal Housing Administration ("FHA")	Telephone contact within 20th day of delinquency; at least 2 times per week until contact established or determine property is vacant or abandoned[58]
Fannie Mae and Freddie Mac	Outbound contact attempts, including text and telephone, by the 36th day of delinquency; every 5 days until contact made, delinquency resolved or certain other events occur[59]
Treasury – Home Affordable Modification Program (HAMP)	Minimum of 4 telephone calls to the last known phone numbers of record, at different times of the day, within 30 day period[60]
VA Mortgage Servicing Rules	Telephone contact no later than the 20th day of delinquency[61]
United States Department of Agriculture and Rural Development ("USDA")	Attempt telephone or written contact before the account becomes 20 days past due; USDA recommends making personal contact with a delinquent borrower until the delinquency is cured[62]
California, Nevada, and Washington State Pre-Foreclosure Rules	Telephone and / or in-person "initial contact" or due diligence required before issuing or recording a Notice of Default.[63]

[58] Federal Housing Administration ("FHA") Single Family Housing Policy Handbook, 4000.1(III)(A)(2)(h). FHA's programs are designed to extend credit to lower/middle class Americans and first time home buyers, and in many cases, those who would find it difficult to find an alternative means of purchasing a home.
[59] Fannie Mae Servicing Guide, D2-2-02 (12/16/2015); Freddie Mac Servicing Guide, 9101.2 (3/2/2016).
[60] HAMP Handbook, 2.2.1 (01/06/16).
[61] 38 C.F.R. § 36.4278(g).
[62] USDA Single Family Housing Guaranteed Loan Program Technical Handbook at § 18.3.
[63] Cal. Civ. Code § 2923.5(a)(1)(A), (a)(2); Nev. Rev. Stat. § 107.510(1)(b), (2); Wash. Rev. Code § 61.24.031(1)(a)(i-ii), (1)(b). Washington State requires "initial contact" by both telephone and letter. Further, although the Nevada statutes do not explicitly use the phrase "due diligence," the outbound telephone call requirements are the same.

Federal Agency / State Government	**Required Contact**
	Due diligence requires telephone contact at the primary telephone number on file at least three times at different hours and on different days.[64]

In fact, when promulgating its mortgage servicing rule, the CFPB noted that "[c]onsumer advocacy groups were uniformly in favor of both an oral and written notice requirement."[65] The CFPB also cited a joint comment letter from the Center for Responsible Lending, Consumer Federation of America, and Center for American Progress supporting the CFPB's mortgage servicing rule's early intervention requirements, including outbound calls with delinquent borrowers, because research shows that borrowers have a lower re-default rate the earlier they are reached in delinquency.[66]

The CFPB further explained that "delinquent borrowers may not make contact with servicers to discuss their options because they may be unaware that they have options or that their servicer is able to assist them. There is a risk to borrowers who do not make contact with servicers and remain delinquent; the longer a borrower remains delinquent, the more difficult it can be to avoid foreclosure."[67] These are calls that delinquent borrowers welcome and need to possibly save their homes. Unclear or vague TCPA's regulation should not inhibit servicers from making these nor chill creativity in developing methods of outreach to accomplish this goal. Thus, as the FCC considers how to interpret the TCPA going forward, it should carefully consider outbound calling requirements required by other federal agencies or prudent public policy.

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MBA appreciates the FCC's consideration of these comments and the Consumer and Governmental Affairs Bureau's willingness to engage with stakeholders and members of the public on this important issue. For the reasons outlined above and in our petition, MBA urges the Commission to adhere to the statutory text of TCPA and propose rules that retain consumer protections while creating clear paths to compliance for businesses. Should you have any questions or wish to discuss any aspects of these comments, please contact

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[64] Cal. Civ. Code § 2923.5(e)(2)(A); Nev. Rev. Stat. § 107.510(5)(b); Wash. Rev. Code § 61.24.031(5)(b)(i). Washington State requires telephone calls to both the primary and secondary telephone numbers on file. Other states require telephone or in-person contact prior to foreclosure. *See, e.g.*, Conn. Gen. Stat. § 8-265ee(a); D.C. Mun. Regs. Tit. 26-C § 2710.18; Idaho Code § 45-1506C(4)(a); R.I. Gen. Laws § 34-27-3.2(f).

[65] 78 Fed. Reg. 10696, at 10788.

[66] *Id.* (citing Goodman, Yang, Ashworth, and Landy, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications*, Submitted to the Pew Charitable Trusts Conference on Strategies for Revitalizing the Housing Market (May 30, 2012)).

[67] *Id.* (citing, e.g., John C. Dugan, Comptroller, Office of the Comptroller of the Currency, *Remarks Before the NeighborWorks America Symposium on Promoting Foreclosure Solutions* (June 25, 2007), *http://www.occ.gov/news-issuances/speeches/2007/pub-speech-2007-61.pdf*; Laurie S. Goodman et al., Amherst Securities Group LP, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications* (June 19, 2012), at 5-6; Michael A. Stegman et al., *Preventative Servicing*, 18 Hous. Policy Debate 245 (2007); Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs* 11-12 (Freddie Mac, Working Paper No. 08-01, 2008)).

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Sincerely,

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Senior Vice President
Residential Policy
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Appendix A: Petition for Declaratory Ruling

Stamp and Return

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

PETITION FOR DECLARATORY RULING

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May 3, 2018

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SUMMARY

The U.S. Chamber of Commerce, the U.S. Chamber Institute for Legal Reform, and the U.S. Chamber Technology Engagement Center (collectively "the Chamber"), ACA International, American Association of Healthcare Administrative Management, American Bankers Association, American Financial Services Association, Consumer Bankers Association, Consumer Mortgage Coalition, Credit Union National Association, Edison Electric Institute, Electronic Transactions Association, Financial Services Roundtable, Insights Association, Mortgage Bankers Association, National Association of Federally-Insured Credit Unions, National Association of Mutual Insurance Companies, Restaurant Law Center, and Student Loan Servicing Alliance request that the Commission expeditiously issue a declaratory ruling to clarify the Telephone Consumer Protection Act's ("TCPA") definition of automatic telephone dialing system ("ATDS"). In light of the D.C. Circuit's decision on the FCC's interpretation of ATDS, Petitioners ask that the Commission (1) confirm that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention, and (2) find that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions.

The TCPA landscape is dysfunctional and in need of clarity from the FCC. The statute, originally intended to target a specific abusive telemarketing practice, has been expanded by courts and the FCC, turning it into a breeding ground for frivolous

lawsuits against legitimate businesses trying to communicate with their customers. As a result, TCPA litigation has skyrocketed, harming businesses large and small, with no clear benefit to consumers. Recent regulatory efforts, like the 2015 *Omnibus Order*, have not helped—they made matters worse. That *Order* distorted the TCPA's plain meaning and clear definition of "ATDS," expanding it to potentially include devices such as smartphones and tablets.

The D.C. Circuit recognized the serious flaws in the 2015 *Omnibus Order* and recently vacated its ATDS interpretation as unreasonable, arbitrary and capricious. In that opinion, the court provided a logical roadmap for how the Commission should interpret ATDS. The Commission should follow the court's guidance in interpreting that phrase.

First, the Commission should confirm that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention. This straightforward interpretation flows from the functions of an ATDS outlined in the TCPA. The Commission should also make clear that these functions must be actually—not theoretically—present and active in a device at the time the call is made. The FCC should also clarify that if human intervention is required in generating a list of numbers to call or in making a call, then the equipment in use is not automatic and therefore not an ATDS. Adopting this interpretation follows the statutory text and would provide clarity to businesses seeking to reach their customers.

Next, the Commission should find that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions. The D.C. Circuit noted that the FCC's expansive interpretation of ATDS could be addressed by reinterpreting the statutory phrase "make any call . . . using [an ATDS]," to mean that a device's ATDS capabilities must actually be used to place a call for TCPA's restrictions to attach. This interpretation, first espoused by Commissioner O'Rielly, would diminish the significance of the Commission's expansive understanding of capacity, comport with the ordinary meaning of the statute, and limit TCPA liability.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

PETITION FOR DECLARATORY RULING

Pursuant to 47 C.F.R. § 1.2, the U.S. Chamber of Commerce, the U.S. Chamber Institute for Legal Reform, and the U.S. Chamber Technology Engagement Center (collectively "the Chamber"), ACA International, American Association of Healthcare Administrative Management, American Bankers Association, American Financial Services Association, Consumer Bankers Association, Consumer Mortgage Coalition, Credit Union National Association, Edison Electric Institute, Electronic Transactions Association, Financial Services Roundtable, Insights Association, Mortgage Bankers Association, National Association of Federally-Insured Credit Unions, National Association of Mutual Insurance Companies, Restaurant Law Center, and Student Loan Servicing Alliance respectfully request that the Federal Communications Commission ("FCC" or "the Commission") expeditiously issue a declaratory ruling to clarify the Telephone Consumer Protection Act's[1] ("TCPA" or "the Act") definition of automatic telephone dialing system ("ATDS") in light of the

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[1] 47 U.S.C. § 227.

D.C. Circuit's guidance in its recent *ACA Int'l. v. FCC* decision.[2] Specifically, Petitioners request that the Commission promptly: (1) confirm that to be an automatic telephone dialing system ("ATDS"), equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention, and (2) find that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions.

The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses of all sizes and sectors, as well as state and local chambers and industry associations. The U.S. Chamber Technology Engagement Center ("C_TEC") promotes the role of technology in our economy and advocates for rational policy solutions that drive economic growth, spur innovation, and create jobs. The U.S. Chamber Institute for Legal Reform ("ILR") is an affiliate of the Chamber that promotes civil justice reform through regulatory, legislative, judicial, and educational activities at the global, national, state, and local levels. ILR has long been involved in issues involving the TCPA, which imposes substantial compliance burdens on American business and generates enormous litigation risk and expense. Over many years, ILR has engaged in research and published papers analyzing the TCPA, concluding that the TCPA has

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[2] *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687 (D.C. Cir. 2018).

become a major impediment to commerce, burdening how businesses communicate with their customers and generating thousands of lawsuits.

ACA International ("ACA") is an international trade organization of credit and collection professionals that provides a wide variety of accounts receivable management services. With offices in Washington, DC and Minneapolis, MN, ACA represents approximately 3,000 members ranging from third-party debt collectors, debt purchasers, attorneys, credit grantors, and vendor affiliates who employ more than 230,000 employees worldwide. ACA members contact consumers exclusively for *non-telemarketing* reasons to facilitate the recovery of payment for services that have already been rendered, goods that have already been received, or loans that have already been provided. Debt collection companies play an important role in the U.S. economy by returning funds owed to both businesses and public-sector entities as well, including federal, state, and local governments. The use of modern technology is critical for facilitating compliance with the myriad federal, state, and local laws that govern all aspects of communications between ACA member companies and consumers. In particular, the TCPA has a significant impact on the ability of debt collectors to lawfully contact consumers. Given the importance of effective communication to successful debt recovery, ACA has consistently led advocacy efforts to modernize the TCPA to better balance consumer privacy with legitimate business communications.

The American Association of Healthcare Administrative Management ("AAHAM") is the premier professional organization in healthcare administrative management focused on education and advocacy in the areas of reimbursement, admitting and registration, data management, medical records, and patient relations. AAHAM was founded in 1968 as the American Guild of Patient Account Management. Initially formed to serve the interests of hospital patient account managers, AAHAM has evolved into a national membership association that represents a broad-based constituency of healthcare professionals. Professional development of its members is one of the primary goals of the association. Publications, conferences and seminars, benchmarking, professional certification and networking offer numerous opportunities for increasing the skills and knowledge that are necessary to function effectively in today's health care environment. AAHAM actively represents the interests of healthcare administrative management professionals through a comprehensive program of legislative and regulatory monitoring and its participation in industry groups such as ANSI, DISA and NUBC. AAHAM is a major force in shaping the future of health care administrative management. One of AAHAM's main focuses has been on efforts to change the TCPA for the healthcare profession. Today's TCPA is outdated and limits our ability meet all the regulatory requirements placed on the healthcare industry through the Affordable Care Act. Healthcare has changed and how we reach patients and

consumers has changed. This is why AAHAM continues to be engaged in an effort to modernize the TCPA to fit today's healthcare environment.

The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits, and extend more than $9 trillion in loans.

Founded in 1916, the American Financial Services Association ("AFSA") is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

The Consumer Bankers Association is the only national trade focused exclusively on retail banking. Established in 1919, the association is now a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly $3 trillion in consumer loans, and provide $270 billion in small business loans. Our members greatly value the important communications their customers consent to, including notifications such as low-balance alerts, due-date reminders, and account milestone notices. Our members strive to provide the best customer experience possible, and effective means of communication is a key aspect of that relationship.

The Consumer Mortgage Coalition is a mortgage industry trade association committed to streamlining and simplifying the rules and regulations governing the industry so that they can best serve consumers.

The Credit Union National Association ("CUNA") represents America's credit unions and their 110 million members. Credit union members are being harmed by unclear guidance about how they can receive communications such as text messages about vitally important financial information, including ways they can improve and protect their own finances. The Bureau of Consumer Financial Protection has recognized that protecting consumers includes the ability to be in timely communication with them, and the FCC should do the same. CUNA further believes wireless informational calls to credit union member-owners with whom the credit union has an established business relationship, or where such call or text message is free, should be exempt from the TCPA's prior express consent requirement for autodialed and artificial or prerecorded voice calls.

Edison Electric Institute ("EEI") is the trade association that represents all U.S. investor-owned electric companies. Our members provide electricity for 220 million Americans, and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports over seven million jobs in communities across the United States. In addition to our U.S. members, EEI has more than 60 international electric companies, with operations in more than 90 countries, as International Members, and hundreds of industry suppliers and related organizations as Associate

Members. Organized in 1933, EEI provides public policy leadership, strategic business intelligence, and essential conferences and forums. EEI's members are major users of telecommunications systems to support the goals of clean power, grid modernization, and providing customer solutions. On behalf of the owners and operators of a significant portion of the U.S. electricity grid, EEI has filed comments before the Commission in various proceedings affecting the telecommunications' rights and obligations of its members who are impacted by the FCC's rules and policies.

The Electronic Transactions Association ("ETA") is the global trade association representing more than 500 payments and technology companies. ETA members make commerce possible by processing more than $4.5 trillion in purchases in the U.S. and deploying payments innovations to merchants and consumers.

Representing more than 4,000 members across the United States, the Insights Association is the leading nonprofit trade association for the market research and data analytics industry, and the leader in establishing industry best practices and enforcing professional standards. The Insights Association's membership includes both research and analytics companies and organizations, as well as the researchers and analytics professionals and research and analytics departments inside of non-research companies and organizations. Marketing researchers are an essential link between businesses and consumers, and between political leaders and constituents; they provide important insights about consumer and constituent preferences through

surveys, analytics, and other qualitative and quantitative research. On behalf of their clients—including the government, media, political campaigns, and commercial and non-profit entities—researchers design studies and collect and analyze data from small but statistically-balanced samples of the public. Researchers seek to determine the public's opinion and behavior regarding products, services, issues, candidates, and other topics in order to help develop new products, improve services, and inform public policy. The TCPA makes it exceptionally challenging, and legally hazardous, for telephone survey researchers to connect with the 67.6 percent of American households who are essentially only reachable on their wireless phones, which is why we intervened in the court challenge to the 2015 FCC rules.

The Financial Services Roundtable ("FSR") is the leading advocacy organization for America's financial services industry. With a 100- year tradition of service and accomplishment, FSR is a dynamic, forward-looking association advocating for the top financial services companies, keeping them informed on the vital policy and regulatory matters that impact their business. FSR member banks frequently face compliance challenges with TCPA in a variety of contexts, particularly relating to banks' ability to fight fraud.

The Mortgage Bankers Association ("MBA") is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, DC, the association works to ensure the continued strength of the

nation's residential and commercial real estate markets; to expand homeownership; and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage-lending field.

The National Association of Federally-Insured Credit Unions ("NAFCU") is the only national trade association focusing exclusively on federal issues affecting the nation's federally-insured credit unions. NAFCU provides its members with advocacy, education, and compliance assistance to meet the ongoing challenges that cooperative, community-based financial institutions face in today's economic and regulatory environment. The association proudly represents many smaller credit unions with relatively limited operations, as well as many of the largest, most sophisticated credit unions in the country. Currently, NAFCU represents 70 percent of total federal credit union assets and 46 percent of all federally-insured credit union assets.

For more than 120 years, the National Association of Mutual Insurance Companies ("NAMIC") has been serving in the best interests of mutual insurance companies—large and small—across the United States, as well as Canada. NAMIC is

the largest property/casualty insurance trade association with more than 1,400 member companies serving more than 170 million auto, home, and business policyholders. NAMIC member companies write nearly $230 billion in annual premiums, and have 54 percent of homeowners, 43 percent of automobile, and 32 percent of the business insurance markets. Insurance companies rely upon systems that require the combination of human interaction with automation, ranging from notifying claimants of completion of repairs to the lateness of a payment. Such customer services are essential to the transactions.

The Restaurant Law Center ("Law Center") is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. Nationally, the industry is made up of one million restaurant and foodservice outlets employing over 14 million people—about ten percent of the American workforce. Restaurants and other foodservice providers are the nation's second-largest private-sector employers. The Law Center provides courts with the industry's perspective on legal issues significantly impacting it. Many restaurants and other foodservice outlets communicate with their customers and employees by phone and by text messages, and many have been defendants in suits filed under the Telephone Consumer Protection Act, Pub. L. No. 102-243, 105 Stat. 2394, codified at 47 U.S.C. § 227 ("TCPA"), based on such communications. The Law Center, therefore, has a strong interest in the proper interpretation and application of the statute.

The Student Loan Servicing Alliance ("SLSA") is a nonprofit trade association made up of approximately 20 federal student loan servicers that collectively service over 95 percent of the outstanding student loans in the two chief federal student loan programs, the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan Program. SLSA members also service the vast majority of private education loans. There are over 40 million borrowers with almost $1.5 trillion in outstanding student loans, and servicing this massive loan portfolio requires substantial communications to assist borrowers. Servicers call borrowers to educate them on and facilitate the use of myriad repayment options, and federal loan servicers are required by regulation and contract to make calls to delinquent borrowers. The majority of student loan borrowers have only a cell phone, and thus the ability to reach borrowers to help them avoid delinquency and default hinges on the ability to contact them effectively and efficiently by cell phone.

The Petitioners represent legitimate businesses and organizations, large and small, covering nearly every aspect of the economy. They seek to send time-critical, communications to their customers and members promptly and efficiently. Moreover, the Petitioners' members are operating in good-faith when trying to contact consumers but have been subject to abusive class action litigation by plaintiffs' attorneys asserting an unreasonably expansive interpretation of ATDS. Ultimately, these lawsuits are harming consumers and the public at large. They are chilling helpful, time-sensitive communications with customers, while leaving fewer

resources for businesses to innovate and create jobs. We have consistently urged the FCC to rationalize the dysfunctional TCPA regime,[3] which no longer reflects the statute's purpose or text. We urge the FCC to take prompt action on the ATDS issue in light of the D.C. Circuit's recent opinion vacating the 2015 *Omnibus Order*'s treatment of the issue, and adopt the court's roadmap for interpreting this issue.

I. THE TCPA LANDSCAPE IS DYSFUNCTIONAL AND IN NEED OF CLARITY FROM THE FCC.

A. In the TCPA, Congress targeted specific telemarketing practices and spam activities but the statute's reach has been improperly expanded many times.

Congress enacted the TCPA in 1991 to stop an abusive form of cold-call telemarketing and fax-blast spamming: dialing random or sequential numbers.[4] In promulgating its initial rules implementing the Act, the Commission acknowledged the TCPA's goal of "restrict[ing] the most abusive telemarketing practices."[5] As then-

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[3] *See, e.g.*, U.S. Chamber Reply Comments on Petition for Clarification or Declaratory Ruling filed by ContextMedia, Inc. d/b/a Outcome Health, CG Docket No. 02-278 (filed Dec. 12, 2017); U.S. Chamber Comments on Advance Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59 (filed Aug. 28, 2017); U.S. Chamber Comments on Petition for Declaratory Ruling filed by All About the Message, LLC, CG Docket No. 02-278 (filed May 18, 2017); U.S. Chamber Comments on Petition for Rulemaking and Declaratory Ruling filed by Craig Cunningham and Craig Moskowitz, CG Docket No. 02-278; CG Docket No. 05-338 (filed Mar. 10, 2017).

[4] *See* S. Rep. 102-178 at 1-2 (1991) (stating that the purpose of the TCPA is to "plac[e] restrictions on unsolicited, automated telephone calls to the home" and noting complaints regarding telemarketing calls); H.R. Rep. No. 102–317 at 6-7 (1991) (citing telemarketing abuse as the primary motivator for legislative action leading to the TCPA). *See also* Comments of the U.S. Chamber and ILR, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 2-3 (filed Mar. 10, 2017).

[5] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Report and Order, 7 FCC Rcd. 8752, n.24 (Oct. 16, 1992) *("1992 Report and Order").*

Commissioner Pai observed, "Congress passed the [TCPA] to crack down on intrusive telemarketers and over-the-phone scam artists."[6] The TCPA was intended to target nuisance calls using a specific technology, not legitimate business calls consumers desire that are placed to telephone numbers belonging to those consumers. Indeed, in the Preamble, Congress cited to the "proliferation of *intrusive, nuisance calls* to [consumers'] homes from telemarketers" as a reason for enacting the legislation.[7] The Supreme Court recognized that "Congress determined that federal legislation was needed because *telemarketers*, by operating interstate, were escaping state-law prohibitions on *intrusive nuisance calls*."[8] The D.C. Circuit recently described the TCPA as "a statute grounded in concerns about hundreds of thousands of 'solicitors' making 'telemarketing' calls on behalf of tens of thousands of 'businesses.'"[9] At the same time, the Commission has recognized repeatedly that the

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[6] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8072 *("Omnibus Order")* (Dissenting Statement of then-Commissioner Ajit Pai) ("Pai Dissent").

[7] Telephone Consumer Protection Act of 1991, PL 102-243, 105 Stat. 2394, § 2 (Dec. 20, 1991) (emphasis added).

[8] *Mims v. Arrow Financial Services, LLC*, 565 U.S. 368, 370 (2012) (also citing the Preamble of the TCPA) (emphasis added); *see also Emanuel v. Los Angeles Lakers, Inc.,* 2013 WL 1719035, at *3 (Courts "broadly recognize that not every text message or call constitutes an actionable offense; rather, the TCPA targets and seeks to prevent the proliferation of intrusive, nuisance calls.") (internal quotations omitted).

[9] *ACA Int'l*, 885 F.3d at 698.

TCPA should accommodate businesses' legitimate interests in communicating with consumers.[10]

Unfortunately, the Commission's implementation of the Act and numerous court decisions over the years have fostered a whirlwind of litigation not against abusive callers and scammers, but against legitimate businesses attempting to lawfully communicate with their customers. Interpretations by the courts and the FCC have strayed far from the statute's text, Congressional intent, and common sense. The TCPA has turned into a breeding ground for frivolous lawsuits brought by serial plaintiffs and their lawyers who have made lucrative businesses out of targeting legitimate U.S. companies.[11] The focus of these lawsuits often is not on unscrupulous

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[10] *See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 1830, ¶ 21 (2012). In a 1992 rulemaking action implementing the TCPA, the FCC ruled that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary," *1992 Report and Order*, ¶ 31 (citing H.R. Rep No. 102–317, at 13 (1991) ("[T]he called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications.")). Then, in its 2008 ruling, the FCC "clarif[ied] that autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with the 'prior express consent' of the called party." *Rules & Reg's Implementing the Tel. Consumer Prot. Act of 1991*, Declaratory Ruling, 23 FCC Rcd. 559, ¶ 1 (2008) ("2008 Declaratory Ruling") (quoting 47 U.S.C. § 227(b)(1)(A)). The 2008 Declaratory Ruling reasoned that "the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt." *2008 Declaratory Ruling*, ¶ 9. The FCC regulations that took effect on October 16, 2013, recognized that business/transactional calls are different, and carved out *telemarketing* calls to cellular telephones from the general paradigm wherein providing a phone number constituted implied consent to receive closely related calls, requiring instead prior express *written* consent for ATDS calls that constituted telemarketing. *See* 47 C.F.R. § 64.1200(a)(2).

[11] *See* Letter from ACA International et al to the Members of the U.S. House of Representatives, (Mar. 8, 2017), http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Coalition_Letter_FICALA_to_House.pdf. *See also* Pai Dissent ("The TCPA's private right of action and $500 statutory penalty could incentivize plaintiffs to go after the illegal telemarketers, the over-the-phone scam artists,

scam telemarketers. Instead, plaintiffs pursue marginal or technical violations in the hope of large judgments. For example, a group of fans sued the Los Angeles Lakers for sending text messages confirming receipt of fan-originated texts.[12] Similarly, a ride-sharing service was sued for texts confirming receipt of ride requests.[13] And Mammoth Mountain Ski Area was sued for calling a group of litigants who had previously provided consent.[14] The TCPA has become a major obstacle for American businesses seeking to communicate with consumers.[15] Ultimately, consumers are hurt the most, as the costs of these lawsuits lead to increased prices for goods and services.

The amount of TCPA litigation has exploded. Under one analysis, the number of TCPA lawsuits increased from 2,127 in the 17 months prior to the FCC's 2015 *Omnibus Order* to 3,121 in the 17 months after the *Order*.[16] Making matters worse, statutory damages unrelated to actual harm can add up to staggering amounts.[17] The

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and the foreign fraudsters. But trial lawyers have found legitimate, domestic businesses a much more profitable target.").

12 *Emanuel,* 2013 WL 1719035.

13 *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1193 (W.D. Wash. 2014).

14 *Story v. Mammoth Mountain Ski Area, LLC*, No. 2:14-cv-02422-JAM, 2015 WL 2339437 (E.D. Cal. May 13, 2015).

15 *See The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages*, U.S. Chamber Institute for Legal Reform at 12 (October 2013), http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF ("What is clear is that the TCPA's uncapped statutory damages pose a real threat to large and small well-intentioned American companies who have potentially millions of customers and who often need to communicate with those consumers.").

16 *See TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits,* U.S. Chamber Institute for Legal Reform (August 2017), http://www.instituteforlegalreform.com/research/tcpa-litigation-sprawl-a-study-of-the-sources-and-targets-of-recent-tcpa-lawsuits.

17 For example, Capital One settled a TCPA lawsuit for $75 million in 2014. One New Jersey women received $229,500 against her cable provider in July 2015. *King v. Time Warner Cable*, 113 F.

scope of the law has expanded, greatly increasing compliance costs[18] and reaching technologies that were not commercially deployed in 1991, such as text messages. And even if these lawsuits are frivolous, they still take time and money to defend. More litigation means more resources a company must divert from its core functions. Further, for small businesses the threat of a TCPA lawsuit with its uncapped statutory damages can spur questions of bankruptcy and place crippling distress on an owner. The result has been a boondoggle for plaintiffs' lawyers.[19]

Regulatory uncertainty and enormous settlements that benefit plaintiffs' lawyers do nothing to aid consumers and the economy. Needless "enforcement actions or lawsuits" chill efforts by "good actors and innovators" to develop "new consumer-friendly communications services."[20] The status quo is not in the public interest, and it undermines the rule of law.

Supp. 3d 718 (S.D.N.Y. 2015). And one Wisconsin woman received $571,000 in 2013 against the finance company calling her husband's phone after she defaulted on car payments. *Nelson v. Santander Consumer USA, Inc.*, 2013 WL 1141009 (W.D. Wisc., March 8, 2013), a decision later vacated by agreement of the parties as part of a confidential settlement. *See also Bull v. US Coachways, Inc.*, No. 1:14-cv-05789 (N.D. Ill. 2014) (settling for $49.9 million).

[18] For example, requiring prior express written consent for certain calls, or requiring businesses to keep millions of recordings solely because potential TCPA challenges might arise years after a transaction regarding prior consent.

[19] *Engineered Liability: The Plaintiffs' Bar's Campaign to Expand Data Privacy and Security Litigation*, U.S. Chamber Institute for Legal Reform, at 5 (Apr. 2017). *See also, generally,* Statement of the U.S. Chamber Institute for Legal Reform and U.S. Chamber of Commerce on the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, to the Senate Committee on Commerce, Science, and Transportation, available at http://www.instituteforlegalreform.com/uploads.

[20] Commissioner O'Rielly, *TCPA: It is Time to Provide Clarity*, FCC Blog (Mar. 25, 2014, 2:10 PM), https://www.fcc.gov/news-events/blog/2014/03/25/tcpa-it-time-provide-clarity.

B. The *Omnibus Order* distorted the TCPA's plain meaning and clear definition of "ATDS."

Confusion over what constitutes an ATDS generated litigation over calls placed to customer-provided numbers. Seeking to limit such lawsuits, multiple petitioners asked the FCC to provide common sense guidance on modern technologies and their distinction from the kind of random/sequential number generating systems targeted by the TCPA. In addition, a number of courts encouraged the Commission to address the issue.[21] But despite the pleas for clarity,[22] the *Omnibus Order* made matters worse by expanding the Commission's interpretation of what constitutes an ATDS.

The FCC adopted an extremely broad interpretation of the term "capacity" as used in the Act's definition of ATDS.[23] The unreasonably expansive reading included not only devices that can generate random or sequential numbers but also those that cannot. For example, it swept in devices that, though they do not currently autodial,

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[21] *See, e.g., Freeman v. Specialty Retailers Inc.*, No. CV H-14-2691, 2015 WL 12804530 (S.D. Tex. Jan. 20, 2015); *Barrera v. Comcast Holdings Corp.*, No. 14–cv–00343–TEH, 2014 WL 1942829 (N.D.Cal. May 12, 2014); *Matlock v. United Healthcare Servs., Inc.*, No. 2:13-CV-02206-MCE-EF, 2014 WL 1155541 (E.D. Cal. Mar. 20, 2014); *but see Jordan v. Nationstar Mortg. LLC*, No. 14-CV-00787-WHO, 2014 WL 5359000, at *11 (N.D. Cal. Oct. 20, 2014); *Prater v. Medicredit Inc.*, 45 F. Supp. 3d 1038, 1043 (E.D. Mo. 2014).

[22] *See, e.g., ACA International*, Petition for Rulemaking, RM No. 11712 (filed Feb.11, 2014); *Glide Talk, Ltd.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Oct. 28, 2013); *YouMail, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed April 19, 2013 (YouMail Petition).

[23] *Omnibus Order*, ¶ 15. *See also* 47 U.S.C. § 227(a)(1) (defining ATDS to mean "equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers").

could be modified to do so in the future.[24] Numerous commenters advocated a more reasonable approach.[25] According to then-Commissioner Pai, the FCC's interpretation was not only bad policy, it was "flatly inconsistent with the TCPA."[26] As he observed, "[t]he statute lays out two things that an automatic telephone dialing system must be able to do or, to use the statutory term, must have the 'capacity' to do. If a piece of equipment cannot do those two things—if it cannot store or produce telephone numbers to be called using a random or sequential number generator and if it cannot dial such numbers—then *how can it possibly meet the statutory definition.*"[27]

The *Omnibus Order*'s distortion of the statute subjected vast swaths of communications to potential liability, despite the fact that in 1991, "lawmakers did not intend to interfere with 'expected or desired communications between businesses and their customers.'"[28] Not surprisingly, with vastly expanded potential liability, TCPA

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[24] *Omnibus Order*, ¶¶ 10-14.

[25] *See, e.g.,* Glide Reply Comments on Glide Petition, CG Docket No. 02-278 at 5-6 (filed Jan. 22, 2014); GroupMe, Inc.'s Comments on Glide Petition, CG Docket No. 02-278 at 6-7 (filed Jan. 3, 2014); Comments of Twilio, Inc. in Support of Petitions for Expedited Declaratory Ruling, CG Docket No. 02-278 at 13 (Dec. 19, 2013); Communication Innovators' Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Jun. 7, 2012).

[26] Pai Dissent.

[27] *Id.* (emphasis added). *See also id.*, Pai Dissent ("That position is flatly inconsistent with the TCPA. . . .To use an analogy, does a one-gallon bucket have the capacity to hold two gallons of water? Of course not."); *see also id.*, O'Rielly Dissent.

[28] *Id.* (quoting Report of the Energy and Commerce Committee of the U.S. House of Representatives, H.R. Rep. 102-317, at 17 (1991)).

litigation increased 46 percent after the *Omnibus Order*, with class actions comprising approximately one-third of those filings.[29]

C. The D.C. Circuit vacated the *Omnibus Order's* ATDS interpretation as unreasonable, arbitrary and capricious.

Numerous petitioners sought judicial review of the *Omnibus Order*'s unjustifiable expansion of the TCPA, arguing that the regime was unreasonable, impractical, and inconsistent with the statute's text. The D.C. Circuit vacated portions of the *Omnibus Order* in *ACA Int'l v. FCC*, including the Commission's interpretation of ATDS, holding that the interpretation of capacity was "utterly unreasonable," "incompatible with" the statute's goals, and "impermissibly" expansive.[30] The court held that FCC's interpretation that a device's capacity could include "features that can be added to the equipment's overall functionality through software changes or updates" had "the apparent effect of embracing any and all smartphones."[31] The court found that such an interpretation was so unreasonable that it was "considerably beyond the agency's zone of delegated authority."[32] It also found that the Commission had offered an

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29 *See TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits*, U.S. Chamber Institute for Legal Reform at 2, 4 (Aug. 2017), http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf.

30 *ACA Int'l*, 885 F.3d at 699-700.

31 *Id.* at 695-96.

32 *Id.* at 698.

inconsistent and "inadequa[te]" explanation of what features constitute an ATDS,[33] "fall[ing] short of reasoned decisionmaking."[34]

The Chamber, ACA, and Consumer Bankers Association participated in the litigation and applaud the D.C. Circuit's determination that the FCC had exceeded its authority in expanding the definition of ATDS. Petitioners urge the Commission to use the D.C. Circuit's decision as an opportunity to rationalize the dysfunctional TCPA landscape. The FCC should expeditiously resolve legal uncertainty and bring common sense back to the statute by adopting a construction of what constitutes an ATDS that conforms to the statutory language and congressional intent. Petitioners urge the Commission to promptly: (1) confirm that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention, and (2) find that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions.

There will no doubt be additional issues that the FCC is called on to address, but this critical issue merits speedy resolution, and is a critical first step to restoring a common-sense approach to the TCPA. This will provide businesses with certainty about the equipment they may use to communicate with customers and curtail frivolous TCPA litigation. Further, holding that dialing equipment subject to the

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33 *Id.* at 702-03.

34 *Id.* at 701

TCPA is limited as specified by Congress in the statute would "respect the precise contours of the statute that Congress enacted."[35]

II. THE COMMISSION SHOULD CONFIRM THAT TO BE AN ATDS, EQUIPMENT MUST USE A RANDOM OR SEQUENTIAL NUMBER GENERATOR TO STORE OR PRODUCE NUMBERS AND DIAL THOSE NUMBERS WITHOUT HUMAN INTERVENTION.

The FCC should immediately clarify that in order to be an ATDS subject to Section 227(b)'s restrictions,[36] dialing equipment must possess the functions referred to in the statutory definition: storing or producing numbers to be called, using a random or sequential number generator, and dialing those numbers.[37]

The TCPA defines an ATDS as a device that has the capacity to "store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers."[38] A device must be able to generate numbers in either random order or in sequential order to satisfy the definition. Otherwise, the device cannot do anything "using a random or sequential number generator."[39] Next, it must be able to store or produce those numbers called using that random or sequential number generator. This ability to store or produce telephone numbers to

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35 *See* Pai Dissent.

36 The TCPA prohibits "mak[ing] any call . . . using an [ATDS]" to certain telephone numbers, including those assigned to wireless telephone services, absent an exception, such as prior express consent. 47 U.S.C. § 227(b)(1)(A).

37 47 U.S.C. § 227(a)(1).

38 47 U.S.C. § 227(a)(1)(A)-(B) (emphasis added).

39 47 U.S.C. § 227(a)(1)(A).

be called, alone, is insufficient; the clause "using a random or sequential number generator" modifies this phrase, requiring that the phone numbers stored or produced be generated using a random or sequential number generator. Finally, the device must be able to dial those numbers.

The Commission should not deviate from this straightforward language. Devices that cannot perform these functions cannot meet the statutory definition of an ATDS. Clarifying this definition (and rejecting earlier expansions that sweep all predictive dialers into the category of "ATDS")[40] is critical to restoring Congress' intent for what constitutes an ATDS. Such a clarification would help businesses and other legitimate callers by confirming that both elements must be satisfied for a device to constitute an ATDS.

To further remove any confusion, the Commission should also make clear that both functions must be actually—not theoretically—present and active in a device at the time the call is made. The statute uses the present tense to limit the use of equipment that "has the capacity" to perform the ATDS function and makes no reference to potential or theoretical capabilities.[41] Chairman Pai found this "present capacity" or "present ability" approach was compelled by the text and purpose of the

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[40] In its 2003 TCPA Order, the Commission had determined that, while some predictive dialers cannot be programmed to generate random or sequential phone numbers, they still satisfy the statutory definition of an ATDS. 2003 Order, 18 FCC Rcd. at 14,091, ¶ 131 n.432; id. at 14,093 ¶ 133. But as the D.C. Circuit recognized, "at least some predictive dialers, as explained, have no capacity to generate random or sequential numbers." *ACA Int'l*, 885 F.3d at 703.

[41] 47 U.S.C. § 227(a)(1).

statute, the Commission's earlier approaches to the TCPA, as well as common sense.[42] This approach provides a clear, bright-line rule for callers. Callers do not need to worry about whether their calling equipment *could perhaps* one day be used as an ATDS. Instead, they can focus on what their devices *currently* do.

The FCC lacks the authority to go beyond the requirements of the clear statutory language. As Chairman Pai noted, the TCPA's restrictions are limited in their applicability to specific equipment; "if the FCC wishes to take action against newer technologies beyond the TCPA's bailiwick, it must get express authorization from Congress—not make up the law as it goes along."[43] Thus, as the D.C. Circuit noted, "[t]he Commission's capacious understanding of a device's 'capacity' lies considerably beyond the agency's zone of delegated authority for purposes of the *Chevron* framework."[44]

In clarifying which devices qualify as an ATDS, the Commission should hold that devices that require alteration to add autodialing capability are not ATDS. Rather, the capability must be inherent or built into the device for it to constitute an ATDS. To illustrate, smartphones require downloading an app or changing software code to gain autodialing capabilities. Those capabilities are not built in. By contrast,

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42 *See, e.g,* Pai Dissent ("Had Congress wanted to define automatic telephone dialing system more broadly it could have done so by adding tenses and moods, defining it as 'equipment which has, has had, or could have the capacity.' But it didn't.")

43 Pai Dissent.

44 *ACA Int'l*, 885 F.3d at 698.

other calling equipment can become an autodialer simply by clicking a button on a drop-down menu. That function is already part of the device and requires a simple change in setting rather an alteration of the device. Devices with these inherent capabilities are an ATDS when these capabilities are in use. Adopting this distinction would significantly narrow the range of devices considered ATDS, excluding smartphones, and comport with the statutory language.

The FCC can take this opportunity to clarify that the absence of human intervention is what makes an *automatic* telephone dialing system automatic. This would clarify an issue on which the Commission has not been consistent. The Commission has stated that the basic function of an ATDS is to dial numbers without human intervention,[45] but later acknowledged that a device might qualify as an ATDS even if it cannot dial numbers without human intervention.[46] The Commission has stated that the impact of human intervention is a "case-by-case determination" based on "how the equipment functions and depends on human intervention."[47] The FCC declined to provide additional clarity,[48] leaving callers without guidance.

The FCC should make clear that if human intervention is required in generating the list of numbers to call or in making the call, then the equipment in use is not an

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45 *2003 TCPA Order* ¶ 132; *2008 Declaratory Ruling*, ¶ 13.

46 *Omnibus Order* ¶ 17.

47 *Id.*

48 *Id.* ¶ 20.

ATDS. This comports with the commonsense understanding of the word "automatic," and the FCC's original understanding of that word.[49] It also heeds the D.C. Circuit's suggestion that the absence of human intervention is important; a logical conclusion, it found, "given that 'auto' in autodialer—or equivalently, 'automatic' in 'automatic telephone dialing system'—would seem to envision non-manual dialing of telephone numbers."'[50] Importantly, it creates a clear rule for businesses to follow and courts to enforce, instead of a vague, case-by-case analysis of each piece of dialing equipment.

III. THE COMMISSION SHOULD FIND THAT ONLY CALLS MADE USING ACTUAL ATDS CAPABILITIES ARE SUBJECT TO THE TCPA'S RESTRICTIONS.

In the *Omnibus Order*, the FCC applied the TCPA's prohibitions to any call using a device that *could be* an ATDS, regardless of whether the call was made using ATDS capabilities.[51] In striking down this interpretation, the D.C. Circuit outlined an alternative approach, first raised by Commissioner O'Rielly in his *Omnibus Order* dissent, that was not raised by the petitioners: reinterpreting the phrase "make any call . . . using [an ATDS]" as used in the statute.[52] The court suggested that the TCPA's

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[49] *2003 TCPA Order*, ¶ 132 ("The basic function of such equipment, however, has not changed–the *capacity* to dial numbers without human intervention.").

[50] *ACA Int'l*, 885 F.3d at 703 (citation omitted).

[51] *Omnibus Order*, ¶ 19 n.70.

[52] *Id.* at 703-04; *see also* 47 U.S.C. § 227(b)(1)(A) ("It shall be unlawful . . . to make any call . . . using any automatic telephone dialing system . . . .").

text requires a caller to use the statutorily defined functions of an ATDS to make a call for liability to attach.[53] It also noted that adopting this construction would "substantially diminish the practical significance of the Commission's expansive understanding of 'capacity' in the autodialer definition"[54] Indeed, a device's potential capabilities would not be relevant to determining whether it is an ATDS, because the inquiry will focus only on the functions actually used to make the call or calls in question. This interpretation would ensure that devices that are capable of gaining autodialer functions, such as smartphones, are only subject to the TCPA when used as autodialers.

The FCC should adopt the D.C. Circuit's roadmap and clarify that the TCPA is only implicated by *the use of actual ATDS capabilities in making calls.* As the court suggested, the TCPA's prohibitions should apply only to calls *using ATDS capabilities.*[55] Here, a proper interpretation of the TCPA requires the calling equipment "use" ATDS capabilities to make the call. Otherwise, the meaning of "using" would be vastly expanded and untethered from Congress' goals.

Adopting this straightforward reading would ensure that liability attaches only when ATDS capabilities are used to make a call, rather than sweeping in calls made

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53 *ACA Int'l*, 885 F.3d at 704.

54 *Id.*

55 *Id.* at 703-04. *See also* 47 U.S.C. § 227(b)(1)(A) ("It shall be unlawful . . . to make any call . . . using any automatic telephone dialing system . . . .").

using smartphones, tablets, and other devices that conceivably *could* be modified to support autodialing via an ATDS. Businesses need this clear guidance, and it would help them avoid unnecessary litigation over whether they used an ATDS when placing calls to their customers. Consistent with the Court's suggestion and the plain text of the statute, the Commission should adopt this interpretation.

IV. CONCLUSION

Petitioners respectfully request that, in light of the D.C. Circuit's decision and roadmap, the Commission expeditiously issue a declaratory ruling clarifying the meaning of "automatic telephone dialing system" as used in the TCPA. Such a declaratory ruling should (1) make clear that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention, and (2) find that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions.

As the dissenters to the *Omnibus Order* recognized, and as the D.C. Circuit held, the Commission's previous interpretations of "ATDS" have created confusion and uncertainty and have expanded that term well beyond Congress' intent. As a result, businesses and other organizations are limiting the consumer-benefitting communications they send, while TCPA litigation has exploded, benefiting serial plaintiffs and lawyers at the expense of American businesses and consumers. The D.C. Circuit's vacatur of the *Omnibus Order*'s treatment of ATDS presents an opportunity to restore rationality to this aspect of the TCPA. Defining the elements

of an ATDS in accordance with the statute's clear definition is an important first step in this effort, and would ensure that legitimate businesses can contact their consumers without fearing a lawsuit under Section 227(b) of the TCPA.

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