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June 13, 2018

VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C., 20554

Re: CG Docket Nos.: 18-152, 02-278; Comments in Response to Notice Seeking Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision

The Electronic Transactions Association ("ETA") submits these comments in response to the Federal Communications Commission's ("FCC" or "Commission") Consumer and Governmental Affairs Bureau's May 14, 2018 Notice seeking Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's *ACA International* Decision, CG Docket Nos. 18-152, 02-578 ("Notice") and in further support of the May 3, 2018 Petition for Declaratory Ruling filed by ETA and various other entities in CG Docket No. 02-578.

I. The ETA and Its Member Companies

ETA is the leading trade association for the payments industry. Its membership spans the breadth of that industry to include independent sales organizations, payments networks, financial institutions, transaction processors, mobile payments products and services, payments technologies, equipment suppliers, and online small business lenders. ETA's comments are intended to assist the Commission in its evaluation of common sense approaches to interpreting the Telephone Consumer Protection Act ("TCPA") to protect communications between legitimate companies and their customers while at the same time achieving the original goal of the TCPA: to combat unlawful and intrusive telemarketing calls. The two goals go hand-in-hand, especially given the widespread litigation abuse that continues under the TCPA, and the impact it is having and will continue to have on business-customer relationships absent common sense interpretations and common sense enforcement of the statute.

Importantly, ETA members are not telemarketers. They are financial services companies who have a business relationship with their customers. Protecting their customers' personal data and financial information is paramount. However, because of the historical lack of clarity in the Commission's interpretation of the TCPA, oftentimes ETA member companies are faced with an unfortunate choice: either contact their existing customers with critical, time-sensitive account information and potentially be sued for alleged violations of the TCPA, or simply forgo communication with their customers altogether to ensure they are not found in violation of the law.

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Over the last several years, private TCPA litigation has skyrocketed. In 2016, there were 4,840 new cases, which was approximately 25% more than in 2015.[1] In 2017, there were 4,392 new cases filed.[2] With a statutory penalty floor of $500 per call, and the possibility of treble damages reaching $1,500 per call, businesses face an increased risk when attempting to contact their customers with vital information. The plaintiffs' bar uses this threat of massive exposure to leverage large dollar settlements for their own benefit, as Chairman Pai previously noted during his tenure as Commissioner:[3]

> 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, and the foreign fraudsters. But trial lawyers have found legitimate, domestic businesses a much more profitable target. As Adonis Hoffman, former Chief of Staff to Commissioner Clyburn, recently wrote in *The Wall Street Journal*, a trial lawyer can collect about $2.4 million per suit by targeting American companies. So it's no surprise the TCPA has become the poster child for lawsuit abuse, with the number of TCPA cases filed each year skyrocketing from 14 in 2008 to 1,908 in the first nine months of 2014.[4]

Indeed, according to one study, the very consumers that the law was designed to protect have, on average, only received between $4.12 and $9.53 in private litigations that were settled, while the plaintiffs' attorneys are averaging exorbitant multi-million dollar payouts.[5] This is clear evidence of litigation abuse against legitimate companies under an outdated statute.

A study conducted by the U.S. Chamber of Commerce confirms that the primary target of TCPA lawsuits since the Commission's *2015 Omnibus Order* are not the "spam telemarketers/texters or blast faxers that reach out to millions of unknown persons in an attempt to get someone to engage with them" but, rather, "legitimate American companies not engaged in the kinds of cold-call

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1 *See* WebRecon Stats for Dec. 2017 & Year in Review, available at https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review/ (last accessed June 12, 2018).

2 *See id.*

3 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8072-73 ("*2015 Omnibus Order*") (Dissenting Statement of then-Commissioner Ajit Pai).

4 Courts have also recognized the widespread litigation abuse under the TCPA. *See, e.g., Morris v. Unitedhealthcare Ins. Co., Inc.*, No. 4:15-cv-00638-ALM-CAN, 2016 WL 7115973, at *6 (E.D. Tex. Nov. 9, 2016) ("TCPA suits have, in many instances, been abused by serial litigants[.]").

5 *See* Wells Fargo Ex Parte Notice, filed Jan. 16, 2015, in CG Docket No. 02-278, p. 19, available at http://apps.fcc.gov/ecfs/document/view?id=60001016697 (last accessed June 12, 2018).

telemarketing the TCPA was designed to limit."[6] The financial industry, which includes ETA's members, is by far the most severely impacted by this uncontrolled litigation wave. Of the 3,121 cases examined in the study that were filed between August 2015 and December 2016, 36% of them were filed against banks and other financial entities, with cases filed against collection-related entities coming in a distant second at half of that rate (18%).[7]

Additionally, there are many cases where federal regulations contradict themselves – under some federal laws, financial institutions are required to contact their customers under a particular set of conditions on the one hand, and on the other hand, those same conditions may violate the TCPA.

II. Put Simply, It is Time for the Commission to Take a Common Sense Approach to the TCPA and Adopt Clear, Brightline Rules that Further the Statute's Original Purpose and Protects Communications Between Legitimate Businesses and Their Customers

The TCPA was enacted by Congress in 1991 as a way to combat harassing, illegal, and unsolicited telemarketing calls to residential lines. Fast-forward 27 years, and now the outdated and broad-sweeping law – at least as it was previously interpreted by the Commission – has put legitimate businesses at risk from the simple act of contacting their own customers, due in large part to historic ambiguities in the law and the threat of high-dollar litigation.

Indeed, dramatic advancements in technology have changed how businesses communicate with customers and how most customers – save for opportunistic TCPA plaintiffs – expect to communicate with the businesses with whom they have chosen to engage. For example, more Americans have smartphones now than they do landlines, and more Americans are conducting their banking and commerce using those smartphones than ever before. In parallel, the technology that is available today allows legitimate companies – like ETA's members – to contact their customers on their smartphones with vital and oftentimes time-sensitive information about their accounts without invading the privacy interest that the TCPA was designed to protect, *i.e.*, the receipt of unwanted telemarketing calls.

The D.C. Circuit's ruling in *ACA Int'l v. FCC*[8] brings a welcomed opportunity for the FCC to adopt straight-forward, statutorily-faithful, and common sense interpretations of the TCPA to achieve the dual goals of combatting unlawful telemarketing and protecting communications between legitimate businesses and their customers.

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6 *TCPA Litigation Sprawl, A Study of the Sources and Targets of Recent TCPA Lawsuits*, U.S. Chamber of Commerce Institute for Legal Reform (August 2017), at 3, available at http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf (last accessed June 12, 2018).

7 *See id.* at 3, 7.

8 885 F.3d 687 (D.C. Cir. 2018).

III. The Commission Should Adopt a Common Sense and Statutorily-Faithful Interpretation of "Automatic Telephone Dialing System"

In *ACA Int'l,* the D.C. Circuit held that technological advancements rendered the Commission's interpretations of the TCPA overbroad. Specifically, the court set aside the FCC's definition of "automatic telephone dialing system" ("ATDS") as arbitrary and capricious because it encompassed telephone calls made by consumers from their iPhones and other smartphones.[9] The court recognized that "[a] 'significant majority of American adults' owned a smartphone even by 2013" and, "as of the end of 2016, nearly 80% of American adults had become smartphone owners."[10] This "figure will only continue to grow, and increasingly, individuals own no phone equipment other than a smartphone."[11] The court held that it was "untenable" for the FCC to define ATDS "in a manner that brings within the definition's fold the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country."[12] "It cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact."[13]

The court also recognized that the FCC's definition of ATDS was internally inconsistent because, under it, a device could qualify as an ATDS "only if it can generate random or sequential numbers to be dialed," but a device could also qualify as an ATDS if it lacked that capacity.[14] Moreover, while the FCC indicated "that the 'basic function' of an autodialer is the ability to 'dial numbers without human intervention[,]'" the agency "declined a request to 'clarify[] that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention.'"[15]

In the Notice, the Commission seeks comment on, among other things, how it should interpret the term "capacity" in the definition of "automatic telephone dialing system" in the TCPA, as well as "on the functions a device must be able to perform to qualify as an automatic telephone dialing system."[16]

ETA's position on how the Commission should interpret the definition of "automatic telephone dialing system" is set forth in the Petition for Declaratory Ruling, CG Docket No. 02-278, filed on May 3, 2018 by ETA and several other entities. ETA incorporates the Petition in full herein.

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9 *Id.* at 697-98.

10 *Id.* at 697.

11 *Id.* at 698.

12 *Id.*

13 *Id.*

14 *Id.* at 702-03.

15 *Id.* at 703.

16 *See* Notice, at 2.

In summary, the Commission should clarify that, in order to be an ATDS that is subject to the restrictions of 47 U.S.C. § 227(b), dialing equipment must currently – not theoretically – possess the functions set forth in the statutory definition: storing or producing numbers to be called, using a random or sequential number generator, and dialing those numbers.[17] The FCC also should clarify that the absence of human intervention is what makes an automatic telephone dialing system "automatic" under the TCPA. Specifically, the FCC should make it clear that if human intervention is required in generating the list of numbers to call or in making the calls, then the equipment is not an ATDS. This is the common sense understanding of the word "automatic."[18] It also comports with the FCC's original understanding of that word[19] and the D.C. Circuit's logical conclusion that "'auto' in autodialer–or, equivalently, 'automatic' in 'automatic telephone dialing system,' 47 U.S.C. § 227(a)(1)–would seem to envision non-manual dialing of telephone numbers."[20] Finally, the Commission should make clear that the TCPA is only implicated by the use of the actual ATDS functions in making calls, as is compelled by the statutory language itself.[21]

The Notice also seeks comment on "what kinds (and how broad a swath) of telephone equipment might then be deemed to qualify as an automatic telephone dialing system?"[22] ETA notes that, while the FCC previously had held that all predictive dialers constituted "automatic telephone dialing systems" under the TCPA, the D.C. Circuit noted that several predictive dialers do not so

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17 *See* 47 U.S.C. § 227(a)(1).

18 It is also consistent with how certain courts have interpreted the term "autodialer." *See, e.g., Luna v. Shac, LLC,* 122 F. Supp. 3d 936 (N.D. Cal. 2015); *Jenkins v. mGage, LLC,* Civ. No. 1:14-cv-2791, 2016 WL 4263937 (N.D. Ga. Aug. 12, 2016); *Herrick v. GoDaddy.com LLC,* --- F. Supp. 3d ---, Civ. No. CV-16-00254, 2018 WL 2229131 (D. Ariz. May 14, 2018). Indeed, the courts in both *Shac* and *mGage* held that texting platforms that were capable of sending out large volumes of texts were not autodialers under the TCPA because human intervention was required to send the texts: (i) employees were required to log into the platforms and input telephone numbers manually, or upload or cut and paste existing lists of phone numbers; (ii) employees were required to draft the message content; (iii) employees were required to designate specific phone numbers to which the messages would be sent; and (iv) finally, the employees had to click "send" to transmit the messages (which could have been transmitted in real time or as prescheduled messages sent at a future date). *Shac,* 122 F. Supp. 3d at 940-41; *mGage,* 2016 WL 4263937, at *5-*7. The court in *Herrick* held that the texting platform at issue therein was not an ATDS because the same steps of human intervention were required to send text messages, with the employee also being required to enter a "captcha" before being permitted to click "send." *See Herrick,* --- F. Supp. 3d ---, 2018 WL 2229131, at *9-*10.

19 *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Report and Order, 18 FCC Rcd. 14014, 14092 ¶ 132 ("*2003 Order*") ("The basic function of such equipment, however, has not changed – the *capacity* to dial numbers without human intervention.") (emphasis original).

20 *ACA Int'l,* 885 F.3d at 703.

21 47 U.S.C. § 227(b)(1)(A) ("It shall be unlawful . . . to make any call . . . using any automatic telephone dialing system . . . .").

22 *See* Notice, at 2.

qualify.[23] Since the D.C. Circuit's decision, the courts are split on whether the FCC's 2003 and 2008[24] predictive dialer rulings were, in effect, vacated by the D.C. Circuit. For example, in *Herrick v. GoDaddy.com*, the District of Arizona stated that[25]

> [a]s a result of the D.C. Circuit's holding on th[e] issue [that the FCC has failed to clarify whether dialing from a list meets the 'ability to generate random or sequential numbers to be dialed'], this Court will not defer to any of the FCC's 'pertinent pronouncements' [– including the 2003 and 2008 orders –] regarding the first required function of an ATDS, i.e., whether a device that has the capacity to store or produce telephone numbers 'using a random or sequential number generator.'

However, in *Reyes v. BCA Fin. Services, Inc.*, the Southern District of Florida found that *ACA Int'l* did not vacate those orders, but recognized that the FCC's position is not clear and that either interpretation of ATDS by the FCC may be permissible.[26] Nevertheless, the *Reyes* court went on to note that *ACA Int'l* gave it "considerable pause" with respect to whether predictive dialers are automatic telephone dialing systems under the TCPA.[27] *Swaney v. Regions Bank* reached a similar conclusion as *Reyes*[28] and *Maddox v. CBE Group, Inc.* applied the 2003 Order.[29] The *Marshall v. CBE Group* court cast doubt that the *2003 Order* (and others) remained binding after *ACA Int'l*.[30] The fact that there is so much confusion within the courts as to whether predictive dialers come within the ATDS definition is further reason for the FCC to issue a decisive ruling.

Specifically, the Commission should adopt the interpretation of ATDS set forth above and hold that only if a specific predictive dialer system satisfies that definition and is actually used to automatically dial numbers that are randomly or sequentially generated should it be held to constitute an "automatic telephone dialing system."

IV. The Commission Should Define the "Called Party" as the Intended Recipient for the Purpose of Re-assigned and Wrong Number Cases

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23 *See ACA Int'l,* 885 F.3d at 703 ("And at least some predictive dialers, as explained, have no capacity to generate random or sequential numbers.").

24 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 23 FCC Rcd. 559 (2008).

25 --- F. Supp. 3d ---, 2018 WL 2229131, at *7.

26 Civ. No. 16-24077, 2018 WL 2220417, at *9 (S.D. Fla. May 14, 2018).

27 *Id.* at *11.

28 Civ. No. 2:13-cv-00544, 2018 WL 2316452, at *1-*2 (N.D. Ala. May 22, 2018).

29 Civ. No. 1:17-cv-1909, 2018 WL 2327037, at *4-*5 (N.D. Ga. May 22, 2018).

30 Civ. No. 2:16-cv-02406, 2018 WL 1567852, at *4-*5 (D. Nev. Mar. 30, 2018).

The D.C. Circuit set aside the FCC's "treatment of circumstances in which a consenting party's cell number has been reassigned to another person."[31] "[T]here is no dispute that millions of wireless numbers are reassigned each year."[32] "In the event of a reassignment, the caller might initiate a phone call (or send a text message) based on a mistaken belief that the owner of the receiving number has given consent, when in fact the number has been reassigned to someone else from whom consent has not been obtained."[33] The FCC had declared that such calls or texts violated the TCPA "apart from a one-call, post-reassignment safe harbor."[34]

The court set this interpretation aside because, while the FCC had held that a caller may reasonably rely on prior express consent given by the called party, the FCC "gave no explanation of why reasonable-reliance considerations would support limiting the safe harbor to just one call or message."[35] "That is, why does a caller's reasonable reliance on a previous subscriber's consent necessarily cease to be reasonable once there has been a single, post-reassignment call?"[36] "The first call or text message, after all, might give the caller no indication whatsoever of a possible reassignment (if, for instance, there is no response to a text message, as would often be the case with or without a reassignment)."[37]

Importantly, because the FCC's "one free call" rule was held to be arbitrary and capricious, and was required to be set aside, so too was the agency's treatment of reassigned numbers generally.[38]

In the Notice, the FCC seeks "comment on how to treat calls to reassigned wireless numbers under the TCPA."[39] Specifically, the FCC seeks "comment on how to interpret the term 'called party' for calls to reassigned numbers."[40] ETA notes that, even under the *2015 Omnibus Order*, courts treated re-assigned number and "wrong" number cases in similar fashion.[41] This makes sense

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31 *ACA Int'l,* 885 F.3d at 704-05.

32 *Id.* at 705.

33 *Id.*

34 *Id.*

35 *Id.* at 707.

36 *Id.*

37 *Id.*

38 *Id.* at 708-09.

39 Notice, at 3.

40 *Id.*

41 *See, e.g., Bush v. Mid Continent Credit Servs., Inc.*, No. CIV-15-112, 2015 WL 5081688, at *3 (W.D. Okla. July 28, 2015) (under the *2015 Omnibus Order*, "calls placed by companies to 'wrong numbers' or 'reassigned numbers' are actionable").

factually and legally because both generally involve an entity calling a phone number for which it reasonably believes it has been provided consent to call.

The Commission previously has held that callers should not be held strictly liable for calling numbers for which the caller reasonably believed they had consent to call, but which number was subsequently re-assigned without any notice to the caller. Indeed, the Commission has long held that a caller may reasonably rely on consent to contact the number provided by the person that gave the consent.[42] The Commission should now take the opportunity to make it clear that the term "called party" means the intended recipient of the call, and a caller is not liable for calling a re-assigned or wrong number where the caller has no actual notice that the number called, in fact, has been re-assigned or that the number provided by the consumer is, in fact, not that consumer's phone number. This interpretation would require callers to demonstrate that they were provided consent to call the number in question in the first instance and, where it can be shown that they were provided with actual notice that the number had been re-assigned or actual notice that the number was the wrong number, liability would attach for all calls made after such actual notice. This is not unreasonable. In fact, consumers who truly do not wish to receive calls meant for someone else surely will advise the caller of the wrong or re-assigned number status. The only individuals who generally will do not so are the serial litigants who abuse the TCPA that Chairman Pai and the courts have identified.[43]

In addition, ETA supports the creation of a central, national database of re-assigned numbers that would provide a safe harbor from TCPA liability for callers who voluntarily rely upon it.

V. Revocation of Consent

The D.C. Circuit affirmed the FCC's declaratory ruling that "'a called party may revoke consent at any time and through any reasonable means' – orally or in writing – 'that clearly expresses a desire not to receive further messages.'"[44] Specifically, the court held that callers may not designate the exclusive means of revocation unilaterally, but that called parties must have the ability to use any reasonable means to revoke consent.[45] While the court noted that callers "have every incentive to avoid TCPA liability by making available clearly-defined and easy-to-use opt-out methods[,]" and that called parties who "sidestep" those options and attempt to revoke consent using "unconventional method[s]" "might well be seen as unreasonable,"[46] the fact remains that

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42 *See ACA Int'l,* 885 F.3d at 707 ("The Commission thus consistently adopted a 'reasonable reliance' approach when interpreting the TCPA's approval of calls based on 'prior express consent'....").

43 *See 2015 Omnibus Order,* 30 FCC Rcd. at 8073 (Dissenting Statement of Then-Commissioner Pai); *Morris,* 2016 WL 7115973, at *6.

44 *ACA Int'l,* 885 F.3d at 709.

45 *Id.*

46 *Id.* at 709-10.

what is "reasonable" and what is "unconventional" remains undefined and lacking in clarity, leaving legitimate callers faced with uncertainty (and potentially expensive litigation).

ETA therefore respectfully requests that the FCC expressly permit callers and called parties to bilaterally contract for reasonable methods of revocation and, where those methods are not utilized, callers should be exempt from TCPA liability. Further, the FCC should provide that where consent to be contacted is provided as part of a bilateral contract, that consent may not be unilaterally revoked. This is consistent with recent caselaw.[47] The FCC should also explicitly provide that, in instances where a caller and called party did not so contract, the caller will nonetheless be exempt from liability where it provides a reasonable, easy-to-use method to opt out or revoke consent, and the called party chooses not to use that method. Such a rule would also be consistent with recent caselaw.[48] Alternatively, the FCC should specify which methods of revocation are reasonable and similarly declare that where such methods are provided and not used, the caller is exempt from liability. For example, the FCC should expressly provide that revocation requests sent to a designated e-mail address or through a call to a toll-free telephone number that are made available and advertised to consumers constitutes a reasonable method of revocation.

Additionally, ETA respectfully requests that the FCC make it clear that consent cannot be revoked in the case of messages that arise out of a transaction of an emergency nature or involve other sensitive matters, such as a customer's account being overdrawn.

Conclusion

ETA agrees with the original intent of the TCPA – to protect consumers from illegal and unwanted telemarketing calls. The FCC must now interpret the TCPA in a straightforward, common sense, and statutorily-faithful fashion to protect law-abiding businesses from litigation abuse in order to foster healthy business-customer communication channels while simultaneously protecting consumers from the bad actors originally targeted by the statute in 1991.

ETA thanks the FCC for requesting comments on these important issues under the TCPA, and we look forward to working with the Commission to assist in its efforts.

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47 *See Reyes v. Lincoln Automotive Fin. Services*, 861 F.3d 51, 56-58 (2d Cir. 2017).

48 *See, e.g., Rando v. Edible Arrangements Int'l, Inc.,* Civ. No. 17-701, 2018 WL 1523858, at *6-*8 (D.N.J. Mar. 28, 2018); *Viggiano v. Kohl's Dept. Stores, Inc.*, Civ. No. 17-0243, 2017 WL 5668000, at *3-*4 (D.N.J. Nov. 27, 2017); *Epps v. Earth Fare, Inc.*, Civ. No. 16-08221, 2017 WL 1424637, at *5 (C.D. Cal. Feb. 27, 2017).

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Respectfully submitted,

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