Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Consumer and Governmental Affairs	)	CG Docket Nos. 18-152 & 02-278
Bureau Seeks Comment on Interpretation	)	
of the Telephone Consumer Protection	)	
Act in Light of the D.C. Circuit's	)	
ACA International Decision	)	

COMMENTS OF PRA GROUP, INC.

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EXECUTIVE SUMMARY

PRA Group, Inc., hereby submits these comments to urge the Commission to bring its interpretations of key provisions of the Telephone Consumer Protection Act of 1991 ("TCPA") in line both with the plain language of the statute and common sense. In particular, in light of the recent judicial rejection of earlier Commission attempts to apply the TCPA's restrictions to an overly broad class of telephone equipment, the Commission should affirm — as proposed by the U.S. Chamber Institute for Legal Reform ("Chamber") — that dialing equipment is not an "automatic telephone dialing system" ("ATDS" or "autodialer") unless it "use[s] a random or sequential number generator to store or produce numbers and dial those numbers without human intervention." The Commission also should clarify, as suggested by the U.S. Court of Appeals for the D.C. Circuit and the Chamber, that only calls placed using autodialer functions are subject to the TCPA's restrictions on the use of autodialers. In addition, the Commission should hold that when a caller attempts to contact a party whose telephone number has been reassigned without the caller's knowledge, the intended recipient is the "called party" for purposes of judging whether the call complied with applicable TCPA requirements. Finally, the Commission should clarify that when a party who previously consented to be contacted has been given clear, effective instructions on how to revoke that consent, an attempt to revoke consent by other means is unreasonable, and a caller will not be liable if it fails to honor such unreasonable requests.

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[1] PRA Group, Inc. is the publicly traded parent company of Portfolio Recovery Associates, LLC ("PRA"), a leader in the debt buying industry. PRA's employees contact consumers to inform them of their obligations and work with them to find ways to repay their debts.

[2] *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision*, Public Notice, CG Docket Nos. 18-152 & 02-278, DA 18-493 (May 14, 2018) ("*Public Notice*").

[3] *ACA International v. FCC*, 885 F.3d 687, 695 (D.C. Cir. 2018).

numbers without human intervention."[4] The Commission also should clarify, as suggested by the U.S. Court of Appeals for the D.C. Circuit and the Chamber, that only calls placed using autodialer functions are subject to the TCPA's restrictions on the use of autodialers.[5] In addition, the Commission should hold that when a caller attempts to contact a party whose telephone number has been reassigned without the caller's knowledge, the intended recipient is the "called party" for purposes of judging whether the call complied with applicable TCPA requirements. Finally, the Commission should clarify that when a party who previously consented to be contacted has been given clear, effective instructions on how to revoke that consent, an attempt to revoke consent by other means is unreasonable, and a caller will not be liable if it fails to honor such unreasonable requests.

I. DIALING EQUIPMENT IS NOT AN ATDS UNLESS ACTUALLY CAPABLE OF USING THE STATUTORILY DEFINED FUNCTIONS.

The TCPA sought to eliminate specific, abusive telemarketing practices — which Congress found to be a danger to public safety and an invasion of consumer privacy — by restricting the ability to place calls using an ATDS. The TCPA defines an ATDS as equipment with the "capacity" *both* to "store or produce telephone numbers to be called, using a random or sequential number generator" *and* to "dial such numbers."[6] However, over the years the ATDS moniker has been applied far beyond its intended scope, to equipment that neither possesses nor can possess these statutorily-required capabilities. The unintended effect of this expansion has

[4] U.S. Chamber Institute for Legal Reform *et al*., Petition for Declaratory Ruling, CG Docket 02-278, at i (filed May 3, 2018) ("the Chamber Petition"). The *Public Notice* specifically seeks comment on the Chamber Petition. *Public Notice* at 3.

[5] *See ACA International*, 885 F.3d at 704; *Public Notice* at 3; Chamber Petition at i.

[6] 47 U.S.C. § 227(a)(1).

been a surge in costly and unnecessary litigation, which hampers the ability of companies to provide valuable services, while providing no meaningful countervailing benefit to consumers.

A. The ATDS Definition Must Conform to the TCPA's Plain Language.

The Commission first departed from the statutory ATDS definition in 2003, when it held that "a predictive dialer falls within the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress," even if the equipment dials numbers only from a defined list and *does not* store, produce, or dial numbers generated randomly or sequentially.[7] The Commission's rationale, which it reaffirmed in 2008,[8] was that a predictive dialer's "hardware, *when paired with certain software*, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers."[9] This capacity, the Commission concluded, is sufficient to qualify predictive dialers as autodialers because, given the technological changes in the teleservices industry since the TCPA's passage, excluding equipment that "relies on a given set of numbers" (as opposed to numbers generated randomly or sequentially) "would lead to an unintended result" based on the Commission's view of Congress's intent.[10] In the 2015 *Omnibus Order*, the Commission took this logic to its extreme by holding explicitly that any device "can possess the requisite 'capacity' to satisfy the statutory definition of 'autodialer' even if, for example, it requires the addition of software to actually perform the functions described in the definition," so long as there is "more than a

[7] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14091-93 (2003) ("*2003 Order*").

[8] *Request of ACA International for Clarification and Declaratory Ruling*, Declaratory Ruling, 23 FCC Rcd 559, 566-67 (2008).

[9] *2003 Order* at 14091 (emphasis added).

[10] *Id*. at 14092.

theoretical potential that the equipment could be modified to satisfy the 'autodialer' definition."[11]

The D.C. Circuit definitively rejected these arguments. Indeed, the court found that the Commission's interpretation had "the apparent effect of embracing any and all smartphones," as "[i]t is undisputed that essentially any smartphone, with the addition of software, can gain the statutorily enumerated features of an autodialer and thus function as an ATDS."[12] The result of such an interpretation — combined with the *Omnibus Order*'s position that every call made with an ATDS is an autodialed call, even when no autodialer features are used — was that "the statute's restrictions on autodialer calls assume[d] an eye-popping sweep … such that every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent."[13] The court rightly concluded that such an expansive definition is "untenable" and would reach far beyond the scope Congress intended the TCPA to cover.[14] Indeed, the TCPA's legislative history confirms that Congress was focused most on "computerized," "automated," or "machine-generated" calling,[15] and in particular on calls dialed randomly or sequentially,[16] not on regulating equipment *incapable* of such use.

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[11] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7975 (2015) ("*Omnibus Order*").

[12] *ACA International*, 885 F.3d at 696.

[13] *See id*. at 697.

[14] *Id*. at 698-99.

[15] *See, e.g.*, 137 Cong. Rec. 18122-23, 35303 (1991).

[16] *See* S. Rep. No. 102-178, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969 (noting that "[h]aving an unlisted number does not prevent those telemarketers that call numbers randomly or sequentially" and that "some automatic dialers will dial numbers in sequence, thereby tying up all the lines of a business and preventing any outgoing calls"); *see also* 137 Cong. Rec. 30818, 35302, 35304 (1991).

The Commission's classification of predictive dialers as autodialers rests on the same untenable logic that would sweep in common smartphones. The *2003 Order* effectively concedes that at least some predictive dialers are incapable of generating numbers randomly or sequentially and dialing such numbers *unless* the dialer is "paired with certain software," yet the order treats *all* predictive dialers as autodialers based on the mere potential that such software might be at some point be installed. This is precisely the reasoning the D.C. Circuit rejected. The Commission may not rewrite the statutory ATDS definition by eliminating the requirement that an ATDS be capable, at the time a call is placed, of both generating random or sequential numbers and dialing such numbers. The Commission instead should clarify that equipment must be able to perform these functions to be an ATDS — and to do so without human intervention, as "the absence of human intervention is what makes an *automatic* telephone dialing system automatic."[17]

As for the Commission's earlier argument that respecting the plain statutory language would leave the Commission with "little or no modern dialing equipment" to regulate,[18] the D.C. Circuit provided a firm response: "Congress need not be presumed to have intended the term 'automatic telephone dialing system' to maintain its applicability to modern phone equipment in perpetuity, regardless of technological advances that may render the term increasingly inapplicable over time."[19] As Chairman Pai wrote in dissent to the *Omnibus Order*: "[I]f the

[17] Chamber Petition at 24.

[18] *See ACA International*, 885 F.3d at 699 (quoting *Omnibus Order*, 30 FCC Rcd at 7976).

[19] *Id*.

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."[20]

However the Commission defines an ATDS, the Commission should follow the D.C. Circuit's suggestion to clarify that a party does not "make any call" using an ATDS[21] unless the call in question *actually is placed* using autodialer features.[22] This clarification would establish a clear, bright line: only calls placed using the very random or sequential number-generation capabilities that concerned Congress would be subject to the TCPA's autodialer restrictions. This approach would avoid unduly restricting the efficiency of more targeted communications, many of which are beneficial to both callers and consumers. This bright-line approach obviates the need to determine precisely "how much user effort should be required to enable [a] device to function as an automatic telephone dialing system" before that device is considered to have the "capacity" of functioning as an ATDS.[23] By providing unambiguous guidance on when the autodialer restrictions apply — *i.e.*, when autodialer functionality actually is used — the Commission can protect the ability of businesses to provide consumers with valuable communications in an efficient and compliant manner.

B. Extending the Definition of "ATDS" to All Dialing Equipment Has Resulted in Costly and Unnecessary Litigation While Harming Businesses and Consumers.

The Commission's unwarranted extension of the definition of an ATDS has resulted in a surge of TCPA class action litigation. For instance, TCPA claims against debt

[20] *Omnibus Order*, 30 FCC Rcd at 8076 (dissent of Commissioner Pai).

[21] *See* 47 U.S.C. § 227(b)(1)(A).

[22] *See ACA International*, 885 F.3d at 704 (citing *Omnibus Order*, 30 FCC Rcd at 8088 (dissent of Commissioner O'Rielly)).

[23] *See Public Notice* at 2.

collectors alone increased 72 percent in August 2013 compared with August 2012, even as claims under the Fair Debt Collection Practices Act ("FDCPA") — the federal statute intended to protect consumers from harassing collections practices, including contacts with debtors — declined.[24] The U.S. Chamber Institute for Legal Reform found that TCPA litigation "exploded" in the wake of the *Omnibus Order*, with "TCPA lawsuits increas[ing] 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*."[25] Notably, statutory damages in FDCPA actions are capped at $1,000 for individuals and $500,000 (or one percent of the debt collector's net worth) in class actions. By contrast, statutory damages in TCPA actions have no such cap. Accordingly, TCPA defendants across a variety of industries — including not only debt collectors but also retailers, apparel manufacturers, and banks — have had to agree to settlements worth millions or tens of millions of dollars, even when they might have meritorious defenses, rather than face the prospect of defending against statutory damages claims reaching into the billions of dollars.[26]

Interpreting "ATDS" too broadly does not prevent the transmission of calls to mobile phones; it merely results in requiring such calls to be dialed manually. This does little to protect consumers and merely imposes burdensome restrictions on activities that can be done more efficiently through automated means. Although Congress may well have sought to minimize — by rendering inefficient — the transmission of automated "cold" calls to random or

[24] U.S. Chamber Institute for Legal Reform, "The Juggernaut of TCPA Litigation," at 5 (October 2013) ("Chamber 2013 Report").

[25] Chamber Petition at 15 (citing U.S. Chamber Institute for Legal Reform, "TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits" (August 2017), http://www.instituteforlegalreform.com/research/tcpa-litigation-sprawl-a-study-of-the-sources-and-targets-of-recent-tcpa-lawsuits).

[26] Chamber 2013 Report at 3.

sequential numbers, it is not plausible that Congress sought to make all automated calls to mobile phones inefficient.

The Commission has recognized that the intent of Congress was to protect consumers from practices "determined to threaten public safety and inappropriately shift marketing costs from seller to consumers."[27] Automated technologies that do not seize lines with randomly or sequentially generated calls to mobile phones fall outside of this category, particularly when the calls do not include telemarketing messages and instead are intended to communicate important information to the recipient. Indeed, the Commission has observed that informational calls to wireless devices are "highly desirable" and should not be "discourage[d]."[28] In the context of debt collection, for instance, the Commission has recognized that "[t]he use of auto dialers in debt collection increases the efficiency of the collector who no longer has to deal with unanswered calls, and is beneficial to the called party by making them aware of the company's inquiry."[29] The use of predictive dialers also benefits consumers by reducing the potential for human error; predictive dialers do not misdial programmed telephone numbers, call before or after permissible times of day, or call more frequently than intended, and they can be programmed to ensure compliance with other applicable state and federal requirements.

[27] *2003 Order*, 18 FCC Rcd at 14092.

[28] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830, 1841 (2012) ("*2012 TCPA Order*").

[29] *In the Matter of the Tel. Consumer Prot. Act of 1991*, Notice of Proposed Rulemaking, 7 FCC Rcd 2736, 2738 (1992).

II. THE COMMISSION SHOULD AFFIRM THAT A CALL'S INTENDED RECIPIENT IS THE "CALLED PARTY."

The TCPA reflects Congress's desire to avoid interfering with "expected or desired communications between businesses and their customers"[30] by permitting autodialers to transmit calls made "with the prior express consent of the called party."[31] However, when a consumer who has consented to be contacted by a business changes telephone numbers, and when that same telephone number is reassigned to another consumer. the business may have no way to determine that the consumer's previous number has changed hands. Indeed, the *Omnibus Order* conceded that "callers lack guaranteed methods to discover all reassignments immediately after they occur."[32]

Yet the *Omnibus Order* nevertheless held that in the context of a reassigned number the "called party" refers to a wireless number's current subscriber, even if a good-faith caller has no notice of the number's reassignment, and indeed even if the new subscriber *deliberately conceals* the fact that the number has been reassigned in order to increase the new subscriber's ability to demand statutory damages.[33] At the same time, however, the *Omnibus Order* held that the "called party" would continue to mean the *prior subscriber* for the first call placed by a caller after the number's reassignment, given the caller's "reasonable reliance" on the prior subscriber's consent.[34]

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[30] H.R. Rep. No. 102-317, 1st Sess., 102nd Cong. (1991) at 17.

[31] 47 C.F.R. § 227(b)(1)(A).

[32] *Omnibus Order*, 30 FCC Rcd at 8006.

[33] *ACA International*, 885 F.3d at 705.

[34] *Id*. at 705-06.

The D.C. Circuit rightly found this "one-call safe harbor" to be arbitrary.[35] Not only did the Commission fail to explain "why reasonable-reliance considerations would support limiting the safe harbor to just one call or message,"[36] the *Omnibus Order*'s treatment of reassigned numbers also contradicts its conclusion that callers may reasonably rely on consent given by a number's "customary user" rather than the actual subscriber, in recognition of the fact that the caller "cannot reasonably be expected to divine that the consenting person is not the subscriber."[37] It is equally true in many cases that a caller "cannot reasonably be expected to divine" that a wireless number has been reassigned in the time since the caller obtained consent to contact the number. As the D.C. Circuit held, having "consistently adopted a 'reasonable reliance' approach when interpreting the TCPA's approval of calls based on 'prior express consent,'" the Commission could not arbitrarily depart from that consistent approach in its treatment of reassigned numbers.[38]

The more logical, consistent approach is to recognize that when a caller has obtained prior express consent to contact a consumer at a wireless number, and the caller dials that number, the "called party" is the party the caller intends to reach. Contrary to the *Omnibus Order*'s argument,[39] this approach does not convert the TCPA to an opt-out regime; callers still must obtain opt-in consent to place any autodialed call to a wireless number. Just as a caller that obtains consent from a number's customary user may reasonably rely on that consent until it is revoked by the number's subscriber or user, a caller that obtains consent from a number's then-

[35] *Id*. at 706.

[36] *Id*. at 707.

[37] *Id*.

[38] *Id*.

[39] *Id*. at 705 (quoting *Omnibus Order*, 30 FCC Rcd at 8004).

current subscriber or user may reasonably rely on that consent until the caller is informed (or otherwise learns) that the number has been reassigned.

Businesses that contact consumers by telephone have strong incentives, independent of the TCPA, to avoid wrong party contacts to the best of their ability. Wrong party calls waste the calling party's money by incurring a range of telephony charges like those based on call volume and long distance rates. Wrong party contacts also waste employee and management payroll and add needlessly to ordinary overhead expenses. They also involve lost opportunity costs; resources mistakenly diverted to wrong party calls can more productively be spent contacting customers inclined to engage. In fact, many predictive dialers are programmed to detect certain anomalies that suggest that a dialed number may be unreliable and to automatically remove that number from the file. Businesses would welcome the creation of additional resources providing comprehensive, timely information on reassigned numbers as a means of further reducing the risk of wrong party contacts.[40] The *in terrorem* threat of incurring uncapped statutory damages when a caller nonetheless inadvertently reaches the wrong party is neither justified nor necessary to protect consumers.

III. THE COMMISSION SHOULD CLARIFY THAT IT IS UNREASONABLE FOR CALLED PARTIES TO IGNORE CLEAR, ACCESSIBLE METHODS OF REVOKING CONSENT.

As the D.C. Circuit noted, "[i]t is undisputed that consumers who have consented to receiving calls otherwise forbidden by the TCPA are entitled to revoke their consent."[41] The D.C. Circuit upheld the *Omnibus Order*'s holding that called parties may revoke consent

[40] *See Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Further Notice of Proposed Rulemaking, CG Docket No. 17-59, FCC 18-31 (rel. March 23, 2018).

[41] *ACA International*, 885 F.3d at 709.

"through any reasonable means" under "the totality of the facts and circumstances."[42] In response to challengers' concerns that this standard is "unduly uncertain," the court relied on the *Omnibus Order*'s assurance that callers would have no obligation "to adopt systems that would entail 'undue burdens' or would be 'overly burdensome to implement.'"[43] The court further noted that if callers provide "clearly-defined and easy-to-use opt-out methods … any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable."

The Commission should explicitly adopt the D.C. Circuit's principle: when a caller has provided a clearly-defined and easy-to-use method for called parties to revoke their consent to be contacted, it is unreasonable for called parties to expect to revoke their consent through other means, and the caller need not undertake the undue burden of attempting to capture such idiosyncratic revocation requests.[44] The Commission also should affirm that when a caller follows the opt-out requirements established by other applicable federal or state laws, those requirements are by definition sufficiently clearly defined and easy to use. For instance, federal law provides consumers with a right to expressly opt out of all collections communications from a debt collector.[45] Congress has determined that this is the reasonable opt-out method with respect to debt-collection communications; it is not the Commission's place to require debt collectors accept opt-out requests submitted by other means.

Finally, the D.C. Circuit recognized — and the Commission conceded in the course of the litigation — that the *Omnibus Order* does not "speak to parties' ability to agree

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[42] *Id*. (quoting *Omnibus Order*, 30 FCC Rcd at 7989-90, 7996 & n.233).

[43] *Id*. (quoting *Omnibus Order*, 30 FCC Rcd at 7996 & n.233).

[44] *See Public Notice* at 4.

[45] 15 U.S.C. § 1682c(c).

upon revocation procedures" by contract. The Commission should expressly confirm that parties are free to establish specific, required consent-revocation procedures contractually, such as in a loan agreement.

CONCLUSION

The Commission should take this opportunity to return the TCPA to its intended purpose: protecting consumers from the specific, abusive telemarketing practices Congress aimed to curb without hindering legitimate communications between businesses and consumers. The Commission can accomplish this by respecting the plain language of the TCPA's definition of an ATDS, by recognizing that callers may reasonably rely on consents they receive to contact a wireless number when the intended recipient of a call is the party who consented, and by confirming that it is reasonable to expect consumers to revoke their consent through easy-to-use opt-out methods when such methods are clearly defined by the caller, by contract, or by applicable law.

Respectfully submitted,

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