

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	CG Docket Nos. 02-278, 18-152
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	DA 18-493
	)	

**Comment of Professional Association for Customer Engagement**

**Filed June 13, 2018**

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## **I. Introduction**

The Professional Association for Customer Engagement (PACE)<sup>1</sup> submits this Comment in response to the Public Notice<sup>2</sup> issued by the Federal Communications Commission (Commission) seeking comment on several Telephone Consumer Protection Act (TCPA) issues following the recent decision in *ACA Int'l v. FCC*.<sup>3</sup> PACE respectfully requests that the Commission clarify several aspects of the TCPA. *First*, a system is not an automatic telephone dialing system (ATDS) unless it has the ability, as presently configured, to: (a) generate random or sequential telephone numbers; (b) use that random or sequential number generator to store or produce telephone numbers to be called; and (c) dial such numbers. *Second*, the TCPA only prohibits calls made using the system's ATDS functionality. *Third*, the term "called party" means the person the caller reasonably expected to reach. *Fourth*, an attempt to revoke consent is presumptively unreasonable if the party fails to use one of several clearly-defined and easy-to-use opt-out methods (meeting the requirements listed below). These interpretations give meaning to the statute's text, ensure the Commission avoids the regulatory overreach exhibited in prior orders, and represent sound public policy.

## **II. Action is Needed Against Illegal Callers**

There is universal agreement among consumers, call originators, consumer advocates, telecommunication providers, and regulatory authorities that illegal calls must be eliminated. However, despite the Commission's 2015 Order,<sup>4</sup> illegal calls continue to plague Americans. By one estimate, approximately 4.1 billion robocalls were placed in the United States in May 2018—

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<sup>1</sup> PACE is the only non-profit trade organization dedicated exclusively to the advancement of companies that use a multi-channel contact center approach to engage their customers, both business-to-business and business-to-consumer. These channels include telephone, email, chat, social media, web, and text. Our membership is made up of Fortune 500 companies, contact centers, BPOs, economic development organizations and technology suppliers that enable companies to contact or enhance contact with their customers.

<sup>2</sup> Public Notice: 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, FCC, CG Docket Nos. 02-278, 18-152, DA 18-493 (May 14, 2018).

<sup>3</sup> *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

<sup>4</sup> Declaratory Ruling and Order, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (2015) (2015 Order).

many of which were scams and other forms of illegal calls.<sup>5</sup> Just in the past two months, the Commission issued a record \$120 million forfeiture against a prolific illegal robocaller<sup>6</sup> and the Federal Trade Commission (FTC) filed a Complaint against individuals and companies that placed or facilitated billions of illegal calls.<sup>7</sup> It is clear that even an impermissibly broad interpretation of the TCPA has not stemmed the ever-increasing flow of illegal calls. Why?

Simply stated, bad actors are not concerned about TCPA liability because they use technology to hide from law enforcement and plaintiffs' attorneys. Individuals originating calls with the intent to defraud (as defined in the Truth in Caller ID Act)<sup>8</sup> are often located in foreign countries and use voice over internet protocol (VoIP) technology to place high volumes of calls that "spoof" a telephone number or calling party name to trick consumers. VoIP technology makes tracing the call originator difficult, allowing unscrupulous actors to evade authorities.<sup>9</sup> Spoofing is also used by unscrupulous telemarketers to hide their true identity as they avoid complying with state and federal do-not-call lists and registration requirements.

Meanwhile, as indicated by Chairman Pai in his Dissent to the 2015 Order, "trial lawyers have found legitimate, domestic businesses a much more profitable target."<sup>10</sup> According to statistics compiled by Web Recon LLC, TCPA litigation peaked in 2016 with 4,840 cases filed that

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<sup>5</sup> Robocall Index, YouMail, <https://robocallindex.com> (last accessed June 8, 2018).

<sup>6</sup> Forfeiture Order, *In the Matter of Adrian Abramovich, et al.*, File No.: EB-TCD-15-00020488, FCC 18-58 (May 10, 2018).

<sup>7</sup> Complaint, *FTC v. Christiano, et al.*, Case No. SA CV 18-0936 (C.D. Cal. May 31, 2018) (available at [https://www.ftc.gov/system/files/documents/cases/netdotsolutions\\_complaint.pdf?utm\\_source=govdelivery](https://www.ftc.gov/system/files/documents/cases/netdotsolutions_complaint.pdf?utm_source=govdelivery)).

<sup>8</sup> 47 U.S.C. § 227(e)(1) ("It shall be unlawful for any person within the United States, in connection with any telecommunications service or IP-enabled voice service, to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value . . .").

<sup>9</sup> See Bikram Bandy, *Your Top 5 Questions About Unwanted Calls and the National Do Not Call Registry*, FTC (Mar. 8, 2015) (available at <https://www.consumer.ftc.gov/blog/your-top-5-questions-about-unwanted-calls-and-national-do-not-call-registry>).

<sup>10</sup> Dissenting Statement of Commissioner Ajit Pai, 2015 Order at 8073 (Pai Dissent).

year representing a 585% increase over just five years earlier.<sup>11</sup> As a result, legitimate businesses must incur substantial expenses defending specious lawsuits or avoid TCPA risk by limiting the ways they interact with consumers thereby depriving such consumers of beneficial communications.<sup>12</sup> There has to be a better way to achieve the goal of eliminating illegal calls while also facilitating legal and wanted communications.

By bringing sensibility to TCPA interpretation, the Commission will enable legitimate businesses to contact consumers without depriving individuals of their privacy rights (which are still protected by the totality of the TCPA, the Telemarketing Sales Rule, the Fair Debt Collection Practices Act, and other laws and regulations). The Commission should also encourage swift adoption of the STIR/SHAKEN protocols.<sup>13</sup> STIR/SHAKEN will provide a long-term solution to caller authentication allowing consumers to make more informed choices about the calls they accept and improving law enforcement's ability to identify bad actors. When a bad actor is identified, the Commission should exercise its enforcement powers to hold that caller accountable. PACE members are prepared to assist the Commission in this effort.

One of the ways legitimate actors are coming together to fight the scourge of illegal calls is through the PACE-led Communication Protection Coalition (CPC). The CPC connects stakeholders across the entire telecommunications ecosystem, including, sellers, contact centers, technology developers, carriers, analytic companies, consumer groups, and non-profits. PACE applauds the interest shown by the Commission in the CPC's efforts to develop best

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<sup>11</sup> WebRecon Stats for Dec 2017 & Year in Review, WebRecon LLC (Jan. 26, 2018) (available at <https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review/>). TCPA cases trended slightly lower in 2017, with 4,392 filed.

<sup>12</sup> See Statement of Commissioner Michael O'Rielly Dissenting in Part and Approving in Part, 2015 Order at 8084-8086 (O'Rielly Dissent) (discussing desired communications that could trigger TCPA liability under the 2015 Order).

<sup>13</sup> Secure Telephony Identity Revisited and Signature-based Handling of Asserted Information using Tokens. STIR/SHAKEN allows a VoIP call and its associated telephone number to be authoritatively and cryptographically signed by the originating carrier. The originating carrier also assigns an attestation rating of full attestation, partial attestation, or gateway attestation (only attesting to point of entry). When the terminating carrier receives the call and number information, it uses a public decryption key to verify the information. Using the attestation rating, the terminating carrier may choose to block the call or provide a call designation (e.g., verified, likely spam) to the call recipient. See Robocall Strike Force Report (Oct. 26, 2016) at 5 (available at <https://transition.fcc.gov/cgb/Robocall-Strike-Force-Final-Report.pdf>).

practices for preventing illegal communications while permitting legal and wanted communications. Stakeholder-led efforts like the CPC offer one of the best opportunities for long-term solutions to the illegal call problem and PACE encourages the Commission to continue engaging with stakeholders through these efforts.

### **III. Definition of ATDS**

#### **A. Background**

Sensible TCPA interpretation begins with a return to the statutory definition of ATDS. The TCPA defines an ATDS as “equipment which has the capacity-- (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”<sup>14</sup> Congress narrowly tailored the statute to address concerns that “telemarketers typically used autodialing equipment that either called numbers in large sequential blocks or dialed random 10-digit strings.”<sup>15</sup> Random and sequential dialing presented public policy concerns because callers reached and tied up unlisted and specialized numbers.<sup>16</sup>

The Commission acknowledged the limited scope of the TCPA in a 1992 Order wherein it held that phone systems with speed dialing, call forwarding, and similar functionalities are not ATDSs “because the numbers called are not generated in a random or sequential fashion.”<sup>17</sup> Three years later it explained that the TCPA’s ATDS provisions do not apply to calls “directed to [a] specifically programmed contact numbe[r]” rather than “to randomly or sequentially generated telephone numbers.”<sup>18</sup>

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<sup>14</sup> 47 U.S.C. § 227(a)(1); *see also* 47 CFR 64.1200(f).

<sup>15</sup> *Dominguez v. Yahoo, Inc.*, 629 F. App’x 369, 372 (3d Cir. 2015).

<sup>16</sup> *See e.g.*, S. Rep. No. 102-178, at 2 (1991); *see also* H.R. Rep. No. 102-317, at 10 (1991).

<sup>17</sup> Report and Order, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, ¶ 47 (1992) (1992 Order).

<sup>18</sup> Memorandum Opinion & Order, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd. 12391, ¶ 19 (1995) (1995 Order).

In 2003, the Commission changed course by holding that a predictive dialer is an ATDS because it can “dial numbers without human intervention.”<sup>19</sup> This interpretation impermissibly expanded the definition of ATDS by reading the “random or sequential number generator” language out of the statute. Moreover, the 2003 Order created significant confusion because, in addition to the “human intervention” test, it suggested alternative tests to determine whether a system is an ATDS.<sup>20</sup> The Commission reaffirmed its predictive dialer ruling in orders issued in 2008, 2012 and 2015.<sup>21</sup> The Commission expanded the definition even further in the 2015 Order by concluding that the capacity of a device includes its “potential functionalities” (*i.e.*, the functionality it might have if reprogrammed or enhanced with additional software).

#### B. Capacity

“Capacity” is not defined in the TCPA; therefore, the Commission has the authority to provide an interpretive definition. The interpretation must, however, comport with the statutory language and Congressional intent.<sup>22</sup> The D.C. Circuit made clear in *ACA Int’l* that capacity cannot be interpreted so broadly that a smartphone qualifies as an ATDS. In practical terms, this means a system’s capacity cannot include the functions it would be capable of performing after downloading or updating software.<sup>23</sup> If functionality provided by software changes is out, so too is functionality provided through additional licensing or a top-to-bottom reconstruction of the system, which involve more significant modifications than trivial software changes.

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<sup>19</sup> Report and Order, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, ¶ 132 (2003) (2003 Order).

<sup>20</sup> *Id.* at ¶¶ 131-32 (referencing a system’s ability to dial from a database of numbers and/or “store or produce telephone numbers...using a random or sequential number generator”).

<sup>21</sup> Declaratory Ruling, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559, ¶¶ 12-14 (2008) (2008 Order); Declaratory Ruling, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 15391, ¶ 2 n.5 (2012) (2012 Order); 2015 Order at ¶ 16.

<sup>22</sup> *ACA Int’l*, 885 F.3d at 698-699 (holding that the interpretation of capacity adopted in the 2015 Order to be “utterly unreasonable” because the inclusion of smartphones within the definition of ATDS resulted in “a several-fold gulf” between Congressional findings and the purported scope of the statute).

<sup>23</sup> *Id.* at 696 (quoting Commissioner Pai’s dissent which noted that “it’s trivial to download an app, update software, or write a few lines of code that would modify a phone to dial random or sequential numbers”).

The most difficult fact pattern to analyze is a system that can achieve ATDS functionality by changing its configuration via system settings. The D.C. Circuit commented—through *dicta*—that a system may have the requisite capacity if it assumes ATDS functionality “merely upon touching a button on the equipment to switch it into autodialer mode.”<sup>24</sup> While that interpretation is plausible, a competing interpretation—that capacity is limited to the functionality available through the **current configuration**—is equally plausible and represents better public policy.

A “how much is required to enable the device to function as an [ATDS]” test<sup>25</sup> creates uncertainty similar to the “potential ability” test adopted in the 2015 Order. What if the caller must push two buttons or ten buttons for the system to operate as an ATDS? What if the caller must enter an administrator password to change the system’s configurations? What if the caller must reboot the system to change the configurations? There are an endless number of scenarios to consider, which makes this test difficult to implement and burdensome on callers.

Moreover, an interpretation that accounts for functionality available through alternative configurations provides no meaningful protection to call recipients. For example, the call recipient’s experience is the same regardless of whether the call is made by: (a) a system that can achieve ATDS functionality if the settings are configured differently; or (b) a system that can achieve ATDS functionality only if additional software is downloaded. From the call recipient’s standpoint, the calls are indistinguishable. The better interpretation is that a system’s capacity is limited to the functions it is capable of performing, as presently configured, at the time the call is made.<sup>26</sup> Callers should, of course, be able to substantiate the system’s configuration at the time each call is made.

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<sup>24</sup> *Id.* at 696.

<sup>25</sup> *ACA Int’l*, 885 F.3d at 696.

<sup>26</sup> Alternatively, the Commission can address this issue by clarifying what it means to “make” a call “using” an ATDS (see Section IV below).

C. Requisite Functions

The TCPA outlines, in unmistakable terms, the functions a system must have the capacity to perform for it to qualify as an ATDS. The statute, again, defines an ATDS as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”<sup>27</sup> This definition requires equipment to be capable of performing at least three tasks. *First*, the equipment must be able to generate random or sequential numbers. Otherwise, it cannot have the capacity to do anything “using a random or sequential number generator.” *Second*, the equipment must be able to use that random or sequential number generator to store or produce telephone numbers to be called. That is what it means to have the capacity “to store or produce telephone numbers . . . , using a random or sequential number generator.” *Third*, the equipment must be able to dial the numbers that were stored or produced “using a random or sequential number generator.”

A system is not an ATDS simply because it can automatically call telephone numbers from a list—a function not covered by the statute. The statute defines an ATDS as a system that has the capacity to “generat[e]” “random or sequential number[s]” “to be called”; it does **not** define an ATDS as a system that has the capacity “to dial telephone numbers from a database.” The Commission expressly recognized this in its 1992 Order (phone systems with speed dialing, call forwarding and similar functionalities are not ATDSs “because the numbers called are not generated in a random or sequential fashion.”) and 1995 Order (the TCPA’s ATDS provisions do not apply to calls “directed to [a] specifically programmed contact numbe[r]” rather than “to randomly or sequentially generated telephone numbers.”).<sup>28</sup> As pointed out by Chairman Pai and Commissioner O’Rielly, the Commission should—indeed must—adopt an interpretation of ATDS functionality that reflects the actual language of the statute.<sup>29</sup>

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<sup>27</sup> 47 U.S.C. § 227(a)(1).

<sup>28</sup> 1992 Order at ¶ 47; 1995 Order at ¶ 19.

<sup>29</sup> Pai Dissent at 8077 (“In short, we should read the TCPA to mean what it says: Equipment that cannot store, produce, or dial a random or sequential telephone number does not qualify as an [ATDS] because it does not have the capacity to store, produce or dial a random or sequential telephone number.”); O’Rielly Dissent at 8087 (“The order also impermissibly expands the statutory definition of an [ATDS] far beyond what the TCPA contemplated.”).



IV. “Making” a Call “Using” an ATDS

The Commission should also clarify that the TCPA only prohibits calls made using the statutorily-defined ATDS functions. The TCPA provides that “[i]t shall be unlawful for any person...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 [ATDS] or an artificial or prerecorded voice” to certain categories of phone numbers.<sup>30</sup> For purposes of this Comment, PACE refers to this portion of the statute as the “ATDS Prohibition.” As Commissioner O’Rielly correctly observed, the plain language of the ATDS Prohibition means that “the equipment must, in fact, be used as *an autodialer* to make the calls.”<sup>31</sup> The D.C. Circuit was receptive to this interpretation and went out of its way to note that the Commission could choose to address the issue in a future rulemaking or order.<sup>32</sup>

Commenters may point to the definition of an ATDS, which includes the word “capacity,” to support a broad interpretation of the TCPA’s applicability. This argument, however, ignores that the ATDS Prohibition and ATDS definition are two separate sections of the statute. The D.C. Circuit summarized the interplay between the sections as follows:

Two TCPA provisions work together to establish the reach of the general prohibition against making autodialer calls without prior consent. The first provision, as we have seen, defines the equipment—viz., “automatic telephone dialing system”—subject to the statutory prohibition. 47 U.S.C. § 227(a)(1). The second provision then incorporates that definition in setting out the scope of the prohibition: “It shall be unlawful for any person . . . 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 system* . . . to any telephone number assigned to a . . . cellular telephone service[.]”<sup>33</sup>

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<sup>30</sup> 47 U.S.C. § 227(b)(1)(A) (emphasis added).

<sup>31</sup> O’Rielly Dissent at 8088.

<sup>32</sup> *ACA Int’l*, 885 F.3d at 704.

<sup>33</sup> *Id.* at 703-704.

Regardless of how broadly or narrowly ATDS is defined, the statute only regulates the conduct outlined in the ATDS Prohibition (“to make any call...using any [ATDS]”). If the ATDS functionality is not used to initiate the call, the call is not made **using** an ATDS.

The TCPA’s underlying public policy goals support PACE’s interpretation. The ATDS Prohibition was adopted to address concerns that callers “typically used autodialing equipment that either called numbers in large sequential blocks or dialed random 10-digit strings”<sup>34</sup> which reached and tied-up unlisted and specialized numbers (including cell phones, which were specialized numbers in 1991).<sup>35</sup> Congress did not intend to prohibit calls made without using the requisite ATDS functionalities because such calls did not (and still do not) impose the same public policy concerns. The only conceivable rationale for adopting a broader interpretation is that a limited interpretation of the ATDS Prohibition might theoretically lead to enforcement problems. As pointed out by Commissioner O’Rielly, however, the enforcement issue can be handled as an evidentiary matter.<sup>36</sup>

The Commission can give meaning to the plain language of the statute and align its interpretation with Congressional intent and sound public policy by clarifying that the TCPA only prohibits calls made using the statutorily defined ATDS functions.

## V. Calls to Reassigned Numbers

The TCPA’s ATDS and prerecorded message prohibitions do not apply to calls “made with the prior express consent of the **called party**”.<sup>37</sup> In its 2015 Order, the Commission defined “called party” as the “current subscriber (or non-subscriber customary user of the phone)” but provided a one call safe harbor to callers who make calls “without knowledge of reassignment

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<sup>34</sup> *Dominguez*, 629 F. App’x at 372.

<sup>35</sup> *Id.*

<sup>36</sup> O’Rielly Dissent at 8089 (“If a company can provide evidence that the equipment was not functioning as an autodialer at the time a call was made, then that should end the matter. For example, a company could show that the equipment was not configured as an autodialer, that any autodialer components were independent or physically separate, that use as an autodialer would require a separate log in, or that the equipment was not otherwise used in an autodialer mode.”)

<sup>37</sup> 47 U.S.C. § 227(b)(1)(A) (emphasis added).

and with a reasonable basis to believe that they have valid consent to make the call.”<sup>38</sup> The D.C. Circuit set aside the Commission’s interpretation because the one call safe harbor was arbitrary.<sup>39</sup> Importantly, the court set aside both the one call safe harbor and the Commission’s interpretation of “called party.”<sup>40</sup> Equally as important, the court did not hold that the Commission’s interpretation of “called party” was correct—only that it was a permissible interpretation.<sup>41</sup>

PACE urges the Commission to clarify that “called party” means the person the caller reasonably expected to reach. According to Chairman Pai, “[i]nterpreting the term ‘called party’ to mean the expected recipient—that is, the party expected to answer the call—is by far the best reading of the statute.”<sup>42</sup> He argues that this approach respects Congress’s stated goal of balancing the privacy rights of individuals with the commercial speech rights of callers.<sup>43</sup> PACE agrees with this and all other arguments Chairman Pai and Commissioner O’Rielly set forth in their dissenting statements to the 2015 Order. For purposes of brevity, PACE hereby incorporates those arguments and the corresponding commentary by reference.<sup>44</sup> PACE’s recommendation differs only to the extent that it expressly (rather than implicitly) incorporates an element of reasonableness into the definition of called party.<sup>45</sup> Once an individual provides notice that the caller has the wrong number, the caller can no longer reasonably expect to reach

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<sup>38</sup> 2015 Order at ¶ 72.

<sup>39</sup> *ACA Int’l*, 885 F.3d at 706.

<sup>40</sup> *Id.* at 708 (“[T]he Commission’s failure in that regard requires setting aside not only its allowance of a one-call safe harbor, but also its treatment of reassigned numbers more generally.... If we were to excise the Commission’s one-call safe harbor alone, that would leave in place the Commission’s interpretation that ‘called party’ refers to the new subscriber. And that in turn would mean that a caller is strictly liable for *all* calls made to the reassigned number, even if she has no knowledge of the reassignment. We cannot be certain that the agency would have adopted that rule in the first instance.”).

<sup>41</sup> *See Id.* at 706 (holding that the Commission’s interpretation was not foreclosed by the statute).

<sup>42</sup> Pai Dissent at 8078.

<sup>43</sup> Pai Dissent at 8079.

<sup>44</sup> *See* Pai Dissent at 8077-8081; O’Rielly Dissent at 8094-8095.

<sup>45</sup> *See* Pai Dissent at 8079 (noting that “[o]nce an individual informs a caller that he has the wrong number, the caller can no longer expect to reach the party that consented and no longer claim to have to consent [for calls].”).

the person that provided consent. This should help alleviate concerns that callers can continue to call after learning that a number was reassigned.

The Commission should interpret notice in a manner that provides flexibility to individuals receiving reassigned number calls while providing callers with adequate protections against abusive litigation. In the context of ATDS calls, individuals should be permitted to provide actual notice (informing the caller that he/she has the wrong number) or constructive notice (making a Do Not Call request). In the context of prerecorded voice calls, individuals should be permitted to provide actual notice (by calling the phone number disclosed in the message and informing the caller that he/she has the wrong number) or constructive notice (making a Do Not Call request through any required automated, interactive opt-out mechanism). In the context of text messages, individuals should provide constructive notice by using an industry-standard opt-out request.<sup>46</sup>

If the Commission adopts an interpretation of called party that differs significantly from PACE's recommendation (*e.g.*, the "current subscriber or customary user" of the phone number), it should provide a safe harbor that mirrors the actual or constructive notice framework discussed above. For example, the Commission could provide a safe harbor for calls made with the reasonable expectation that the called party consented to be called (and has not revoked such consent). Once an individual provides actual or constructive notice that the caller has the wrong number (using one of the methods outlined above), the caller can no longer reasonably expect to reach the person who provided consent and the safe harbor would no longer apply.

## **VI. Revocation of Consent**

The D.C. Circuit agreed with the Commission that "a called party may revoke consent at any time and through any reasonable means—orally or in writing—that clearly expresses a desire

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<sup>46</sup> See *Infra* n. 51.

not to receive further messages.”<sup>47</sup> The court further explained that it thought petitioners’ concerns about such a standard were “overstated”<sup>48</sup> because:

The Commission’s ruling absolves callers of any responsibility to adopt systems that would entail undue burdens or would be overly burdensome to implement. In light of that assurance, callers would have no need to train every retail employee on the finer points of revocation. And callers will have every incentive to avoid TCPA liability by making available ***clearly-defined*** and ***easy-to-use opt-out methods***. If recipients are afforded such options, ***any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable***.<sup>49</sup>

In other words, if the caller provides and discloses a reasonable method for revoking consent, a purported revocation submitted in a different manner is presumably “unreasonable” and invalid.

PACE requests that the Commission clarify what constitutes “clearly-defined and easy-to-use opt-out methods.” PACE believes that a caller provides clearly-defined and easy-to-use opt-out methods, and should receive protection against “unreasonable” revocations, if it provides the following:

1. One or both of:
  - a. A designated phone number at which individuals may make an opt-out request during normal business hours. This phone number should be clearly and conspicuously disclosed on the caller’s website (if the caller has a website) or clearly and conspicuously disclosed when consent is obtained.
  - b. A designated email address or online preference center. This email address or online preference center should be clearly and conspicuously disclosed on the caller’s website (if the caller has a website) or clearly and conspicuously disclosed when consent is obtained.

--and--

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<sup>47</sup> *ACA Int’l*, 885 F.3d at 709 (internal quotations omitted).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 709-710 (internal citations and quotations omitted, emphasis added).

2. At the point of communication:

- a. Accept verbal opt-out requests during live calls;
- b. Accept an automated, interactive voice and/or key-press operated opt-out during a telemarketing prerecorded message;<sup>50</sup>
- c. Disclose a telephone number that the consumer may call at any time to opt-out during a non-telemarketing prerecorded message; or
- d. Permit opt-out using industry-accepted keywords during text message conversations.<sup>51</sup>

Under this framework, consumers will benefit from always having at least two easy-to-use opt-out methods: one general and one specific to the type of communication used by the caller.<sup>52</sup>

## VII. Conclusion

PACE respectfully requests that the Commission clarify several aspects of the TCPA. *First*, a device is not an ATDS unless it has the ability, as presently configured, to: (a) generate random or sequential telephone numbers; (b) use that random or sequential number generator to store or produce telephone numbers to be called; and (c) dial such numbers. *Second*, the TCPA only prohibits calls made **using** the system's ATDS functionality. *Third*, the term "called party" means the person the caller reasonably expected to reach. *Fourth*, an attempt to revoke consent is presumptively unreasonable if the party fails to use one of several clearly defined and easy-to-use opt-out methods (meeting the criteria listed above). These interpretations give meaning to the statute's text, ensure the Commission avoids the regulatory overreach exhibited in prior rulings, and represent sound public policy. PACE further requests the Commission encourage swift adoption of the STIR/SHAKEN protocols and use its enforcement powers to aggressively pursue bad actors.

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<sup>50</sup> Telemarketing prerecorded messages must already include an automated, interactive voice and/or key-press operated opt-out mechanism (47 C.F.R. § 64.1200(b)(3)).

<sup>51</sup> CTIA recognizes five opt-out keywords: STOP, END, CANCEL, UNSUBSCRIBE, and QUIT. CTIA Short Code Monitoring Handbook v 1.7 at 4 (available at: <https://www.wmcglobal.com/ctia-short-code-handbook>).

<sup>52</sup> PACE recognizes that callers may incur expenses implementing the above opt-out methods; however, for most callers, the reduced risk created by a presumption of unreasonableness for other forms of opt-outs will outweigh the implementation costs.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michele Shuster". The signature is fluid and cursive, with the first name "Michele" written in a larger, more prominent script than the last name "Shuster".

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