



June 13, 2018

Submitted Electronically at <https://www.fcc.gov/ecfs/>

Federal Communications Commission
Office of the Secretary
445 12th St, S.W.
Room TW-A325
Washington, DC 20554

Re: Comment on Interpretation of the Telephone Consumer Protection Act in Light of the DC. Circuit's *ACA International* Decision, CG Docket Nos. 18-152; DA 18-493.

The National Automobile Dealers Association ("NADA") submits the following comments to the Federal Communications Commission ("FCC" or "Commission"), via the Consumer and Governmental Affairs Bureau ("Bureau") regarding the notice and invitation to comment ("Notice")¹ on the interpretation of the Telephone Consumer Protection Act ("TCPA") in light of the recent decision in *ACA International v. FCC*² ("ACA").

NADA represents over 16,000 franchised dealers in all 50 states who market and sell new and used cars and trucks, and engage in service, repair, and parts sales to consumers and others. Our members collectively employ over 1 million people nationwide. Most of our members are small businesses as defined by the Small Business Administration. Our members routinely communicate with their customers by phone and text message and are therefore subject to the restrictions and obligations under the TCPA.

¹ See *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of D.C. Circuit's ACA International Decision*, CG Docket No. 18-152 et al. Public Notice, DA 18-493 (rel. May 14, 2018) ("TCPA Public Notice"). The TCPA Public Notice also seeks comment on a recent petition for declaratory ruling filed by the U.S. Chamber Institute for Legal Reform and 17 co-petitioners. See *U.S. Chamber Institute for Legal Reform et al. Petition for Declaratory Ruling*, CG Docket No. 02-278 (filed May 3, 2018) ("U.S. Chamber Petition").

² *ACA Int'l. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

In 2015, the FCC issued a wide-ranging Declaratory Ruling and Order (“2015 TCPA Order”)³ that interpreted several key provisions of the TCPA. The 2015 TCPA Order followed several earlier FCC interpretive orders of the TCPA, including one in 2003, that expanded the TCPA to include text messages.⁴ The 2015 TCPA Order was challenged in a variety of fora, and on March 16, 2018, a panel of judges from the U.S. Court of Appeals for the District of Columbia Circuit issued its opinion in one such case – *ACA, Int.l v. FCC* - unanimously ruling to partially uphold and partially vacate the 2015 TCPA Order.

I. The Commission Should Adopt an Interpretation that Clarifies the Requirements and Benefits Consumers

ACA represents an opportunity for the Commission to bring clarity and rationality back to the TCPA, which has become an impossible trick box for American businesses since the issuance of the overly and “impermissibly”⁵ expansive interpretations found in the 2015 TCPA Order. The 2015 TCPA Order, and other similar FCC interpretations have taken a statute that served U.S. consumers for decades and in many ways turned it against consumer interests. They have created tremendous confusion as to what is permitted, and businesses face uncertainty, increased costs, and risk any time they call or text their customers.

This confusion has also led to an explosion in abusive class action lawsuits⁶ seeking to take advantage of the uncertainty in the requirements, and to exploit technical “violations” under these expansive interpretations. These lawsuits are generally pursued against legitimate businesses seeking to comply with the TCPA requirements, for communications that are generally not abusive under a rational reading of the TCPA.⁷ This tide of lawsuits has harmed consumers by not only adding unnecessary costs to the marketplace, but also by limiting legitimate and necessary communications consumers want and need. At the same time, little to

³ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (2015 Declaratory Ruling), 30 FCC Rcd. 7961 (2015).

⁴ See *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, REPORT AND ORDER, July 3, 2003 (“2003 TCPA Order”)

⁵ See *ACA* at 700.

⁶ See *Lawsuit Abuse and the Telephone Consumer Protection Act: Hearing Before the Subcomm. On the Constitution and Civil Justice of the H. Comm. On the Judiciary*, 115th Cong. (2017) (statement of Becca Wahlquist, Partner, Snell & Wilmer, L.L.P., on behalf of the U.S. Chamber Institute for Legal Reform) (this “litigation ... is less about protecting consumers and more about driving a multi-million dollar commercial enterprise of TCPA lawsuits.”); *id.* (statement of Adonis E. Hoffman, Esq.) (“the average recovery for a consumer in a TCPA class action settlement was \$4.12. Their lawyers, by contrast, received an average of \$2.4 million. Something is wrong with this picture.”).

⁷ This is especially true for text messages, addressed *infra*.

nothing has been accomplished by these broad interpretations to curtail the true abusive telemarketing practices and actors engaged in such practices.

Businesses simply want and need clarity. They must be able to definitively determine what an Automatic Telephone Dialing System (“ATDS”) is, and what it is not. And they must be able to communicate with their customers in ordinary ways without a risk of a technical or arguable violation of the TCPA, based on an esoteric, changing, and subjective standard.

We share the concerns of many other businesses related to the TCPA and would urge the Commission to enact a rational interpretation of the TCPA that protects consumers from truly abusive and violative practices, while allowing businesses to communicate with their customers in the ways they expect and desire.

To this end, we would ask that the Commission enact an interpretation of ATDS that makes it clear that it is only the current, existing functionality of the “telephone equipment” that is relevant, and that a caller must actually use the ATDS functionality of the telephone equipment in making a telephone call for the TCPA to apply. On this question, we agree with U.S. Chamber Petition’s position that “in order to be an ATDS subject to Section 227(b)’s restrictions, 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.”⁸

II. What constitutes an “Automatic Telephone Dialing System?”

The TCPA defines an “automatic telephone dialing system” (“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.”⁹ The Bureau seeks comments on what the term “capacity” means in the context of this definition.

We agree with the court in *ACA* that the Commission’s 2015 interpretation of the term “capacity” was too broad, and we believe that for the term “capacity” to have any real meaning, it must mean “present” capacity and not “potential” capacity. In other words, it is only how the telephone equipment is currently configured and what it is capable of doing at the time the call is made, that is relevant. The current technological contours of today’s ubiquitous communication devices (such as “smart phones”) require this outcome. Otherwise, the scope of the term is simply too broad - broader than consumer expectations or desires, broader than necessary to accomplish the purposes of the TCPA, and broader than the intent of Congress in enacting the TCPA.

⁸ U.S. Chamber Petition at 21.

⁹ 47 U.S.C. § 227(a).

It should not only be interpreted to apply only to devices with the actual, current capacity to store or produce telephone numbers to be called, but also only when that the ATDS functionality of the “telephone equipment” is used to make telephone calls. As Commissioner O’Rielly observed in his statement accompanying the 2015 TCPA Order, “if the equipment [is] not used as an autodialer—for example, because the equipment lacked the present capacity or because calls were made with the aid of human intervention—then it would not meet the statutory test.”¹⁰ We would also urge the Commission to provide guidance as to the level of human intervention that will ensure that the TCPA does not apply. In our view, *any* level of human intervention takes a call outside the definition of ATDS and would therefore be enough, but whatever the level is deemed to be appropriate, we urge the Commission to provide clarity and guidance.

This interpretation is consistent with the express terms of the TCPA, in that “the basic function of an ATDS is to dial numbers without human intervention,”¹¹ and because it would place restrictions on telephone calls based on the type of “telephone equipment” “used to make” a telephone call. It would also be consistent with the goals of the TCPA in that it would continue to address the specific type of phone calls that the TCPA was enacted to address - abusive cold-call telemarketing and fax-blast spamming accomplished by dialing random or sequential numbers.¹²

Such a clarification will allow callers to be able to determine *before* making a telephone call whether they are using an ATDS. Moreover, by clarifying that the TCPA prohibition applies only when the “telephone equipment” that is configured as an ATDS is used to make the call, callers can adequately and predictably control the types of calls made, and by ensuring an adequate level of human intervention can ensure that no violative telephone calls are made.

There is no reason to believe that providing such clarity for callers would lead to an increase in abuse by those making the telephone calls. To be clear, the harm that the autodialer prohibition seeks to prevent is abusive calls placed to random or sequential numbers. If telephone equipment is configured to be able to store or produce such random or sequential numbers and to place such calls, they will be continue to be covered by the TCPA and the harm will continue to be addressed.

III. Text Messages Should be Excluded From § 227(b)

One of the areas that has caused the greatest concern for businesses, and where the Commission’s interpretations have been most harmful to consumers and contrary to Congressional intent is with respect to text message communications. In a 2003 interpretation, the Commission held that the TCPA’s ATDS restrictions “encompasses both voice calls and text calls to wireless

¹⁰ 2015 TCPA Order, Statement of Commissioner O’Rielly Dissenting in Part and Approving in Part.

¹¹ ACA at 694.

¹² See U.S. Chamber Petition at 12-14.

numbers, including for example, short message service (SMS) calls.”¹³ The overly broad interpretation of ATDS outlined above, coupled with the fact that text messages are generally sent to mobile devices has meant that virtually every text message sent to a consumer faces a risk of a TCPA claim.

This interpretation was noted by the court in *ACA*, with little to no discussion. However, it is this interpretation that has caused the most difficulty for many U.S. businesses, and represents the greatest disconnect between the purposes and intent of the TCPA and actual practice. It is contrary to both consumer expectations and common sense and we would urge the Commission – regardless of the outcome of the ATDS interpretation – to amend this interpretation to make it clear that text messages cannot be “autodialed.”

First, text messages did not even yet exist in 1991 when the TCPA was adopted – the sole focus was on telephone calls.¹⁴ As the court in *ACA* noted, “Congress enacted the TCPA in 1991 based on findings that the ‘use of the telephone to market goods and services to the home and other businesses’ had become ‘pervasive due to the increased use of cost-effective telemarketing techniques’ . . . [m]any consumers,” Congress determined, ‘are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.’”¹⁵ The TCPA was enacted to combat abusive *telephone calls*, and the same concerns simply do not exist with respect to text messages.¹⁶

¹³ See 2003 TCPA Order at 101. (“We affirm that under the TCPA, it is unlawful to make any call using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number. Both the statute and our rules prohibit these calls, with limited exceptions, “to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service, or any service for which the called party is charged.” This encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls, provided the call is made to a telephone number assigned to such service. Congress found that automated or prerecorded telephone calls were a greater nuisance and invasion of privacy than live solicitation calls. Moreover, such calls can be costly and inconvenient. The Commission has long recognized, and the record in this proceeding supports the same conclusion, that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used. Wireless subscribers who purchase a large “bucket” of minutes at a fixed rate nevertheless are charged for those minutes, and for any minutes that exceed the “bucket” allowance. This “bucket” could be exceeded more quickly if consumers receive numerous unwanted telemarketing calls. Moreover, as several commenters point out, telemarketers have no way to determine how consumers are charged for their wireless service.”)

¹⁴ The very first SMS text message was sent in 1992, after the TCPA was enacted. See <https://theweek.com/articles/469869/text-message-turns-20-brief-history-sms>

¹⁵ *ACA* at 692. (Internal citations omitted.)

¹⁶ 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).

The TCPA language should not be twisted to expand its scope to text messages. The relevant term subject to comment in this Notice is “Automatic Telephone Dialing System,” and while attention is being paid to the word “automatic,” less attention has been paid to the equally relevant terms “telephone” and “dialing.” A reasonable interpretation of these terms would exclude text message communication. That is because text messages are not generally understood to be “dialed”¹⁷ and therefore cannot be “autodialed.” In addition, 47 U.S.C. § 227 by its express terms, places “Restrictions on the Use of Telephone Equipment,” which means that the restrictions were intended apply to certain types of equipment that are used to accomplish (or “dial”) telephone calls of a certain type – those made to random or sequential numbers. The connection between this “telephone equipment” and a device that is used to compose and send a text message is so tenuous as to be virtually non-existent. In addition, the statute prohibits “mak[ing] any call...using any ATDS.”¹⁸ Again, this language clearly prohibits “making calls,” not sending text messages, and it simply does not apply to the use of a device (like a smart phone) to compose a text message and send it to another device to be read.

The disconnect is caused primarily by changes in technology that have made the old definitions obsolete and old interpretations irrelevant. It is difficult to reasonably argue that today’s “smart phone” is a telephone in the same way as a residential landline from 1991. Indeed, it is more accurately described as a camera, internet access device, gaming system, navigation system, and computer for running a variety of systems and applications, including messaging applications . . . that can also make and receive phone calls. Even then, it is difficult to explain why a text message sent from a computer to a mobile computing device¹⁹ should be treated as a telephone call for the purposes of the TCPA, or why that computer or smart phone should be treated as “telephone equipment,” the same for purposes of the TCPA.

The 2003 TCPA Order summarily deems text messages to be phone calls under the TCPA without much discussion or reasoning, and no text message-specific “abuses” have been cited, nor any reasoning provided that would support such a massive expansion of the scope of a highly

¹⁷ Relevant definitions of the verb “Dial”: . . . (a) to make a telephone call or connection. . . .; (b) To select a series of numbers on a telephone by turning a dial or pushing buttons, or to make a telephone call to a person, business, etc. Synonyms listed include: call, phone, telephone. (Merriam-Webster Dictionary Online, <https://www.merriam-webster.com/dictionary/dial> (as visited June 12, 2018)). None of the synonyms to the verb “dial” include any reference or even allusion to text messaging. (They are “buzz, call, call up, contact, get back to, get on the horn, get on the line, get someone on the horn, give a call, give a jingle, give a ring, make a call, pick up, put a call through, ring, ring up, touch base with.”)(Thesaurus Online, <http://www.thesaurus.com/browse/dial?s=t> (as visited June 12, 2018)).

¹⁸ 47 U.S.C. § 227 (b)(1)(A).

¹⁹ It is our understanding that it is technically possible to send a text message to a residential telephone, but it is difficult to do and very rarely done. That said, it may be reasonable to continue to apply the TCPA to such limited circumstances, while otherwise removing text communications from the prohibitions of 47 U.S.C. § 227 (b).

punitive federal law.²⁰ Presumably, this interpretation may have based on the argument that because a text message was generally sent to a recipient identified by their phone number, and generally viewed on a (2003-era) cellular phone, and may have included some cost the recipient, it should be treated the same as an actual telephone call.

While never expressly stated, that argument fails for several reasons. First, for the reasons outlined below, the same cost implications do not exist as they did in 2003. Second, and more fundamentally, the use of phone number is simply one way (at one point, it was the most universal way) to identify the recipient, but it has no connection to “dialing” or making a phone call.²¹ In fact many text messages are sent via apps or other systems that do not require a telephone number at all, and there is no logical reason (nor has there ever been any stated or argued reason) why a text message sent through a messaging application that does not use a telephone number (and which is outside the TCPA) should be treated any differently than a text message that is sent via a smart phone’s messaging application utilizing the recipient’s phone number (which is subject to the TCPA).

Holding that a text message is sent via an ATDS because it is sent to a phone number is, in some ways akin to an interpretation that a text message is a “pre-recorded call” because it was composed before it was sent. It stretches the language beyond the breaking point – especially given the changes in technology and consumer expectations of today.

While it can be reasonable to interpret a statute in ways that address new technologies, even those not contemplated when the statute was passed, it is also inappropriate to apply statutory language to new technologies if it is clearly incongruous, and just as “[n]othing in the TCPA countenances concluding that Congress could have contemplated the applicability of the statute’s restrictions to the most commonplace phone device [a “smart” phone] used every day by the overwhelming majority of Americans,”²² so too is there nothing in the TCPA that countenances concluding that Congress could have contemplated the applicability of the statute’s restrictions to the most commonplace communications method [text messaging] used every day by the overwhelming majority of Americans.

Text messages simply do not raise the same consumer concerns as do pre-recorded and autodialed marketing telephone calls. There are obvious, dramatic differences between the limited technology associated with residential landlines in 1991 when the TCPA was first adopted, and the sophistication of smartphones and other devices today. With the ability on most mobile operating systems to silence notifications for text messages, any theoretical intrusion from a text

²⁰ See FN 12 *supra*.

²¹ Today, text messages may be sent over an internet connection or a cellular network.

²² ACA at 699.

message would presumably result from the decision of the user to receive audible notifications of such messages. Against this backdrop, there seems to be little to no basis to conclude that text messages received today constitute an invasion of privacy in any way like residential telemarketing calls in 1991

Not only can consumers turn off sounds or indications that may be annoying or intrusive, a text message does not occupy a phone line or otherwise inconvenience the recipient like a phone call. In addition, because they are by their nature a text message that can be ignored or read at a convenient time, and not a human being interrupting another human being, text messages do not represent the same “invasion of privacy” as a telephone call.²³

Moreover, the Commission’s stated concern in the 2003 Order for including text messages was a concern about the cost to the recipient for receiving a call or text message on their cell phone. That concern is largely inapplicable today, as the vast majority of cellular telephone users no longer purchase “bucket” of minutes or texts, against which incoming calls or texts are charged.

Not only are the same abuses not present, the scope and scale of text messaging has changed dramatically since 2003, with a growing number of consumers prefer to be contacted by text message.²⁴ The current inclusion of text communications within the ATDS prohibitions of the TCPA retard and often prevent such communications. It is not only unreasonable based on the language of the statute to conclude that a text message is somehow a “telephone call” “made . . . using an automatic telephone dialing system,” it is contrary to reasonable consumer expectations and preferences.

We urge the Commission to take this opportunity to recognize the effect of the changes in technology and rectify this mistake by making it categorically clear that text messages are not subject to the “autodialer” restrictions in § 227 (b) of the TCPA because text messages are not and cannot be autodialed. As the court in *ACA* noted, “Congress need not be presumed to have intended the term [ATDS] to maintain its applicability to modern phone equipment in perpetuity, regardless of technological advances that may render the term increasingly inapplicable over time. After all, the statute also generally prohibits nonconsensual calls to numbers associated with a

²³ “The TCPA vests the Commission with responsibility to promulgate regulations implementing the Act’s requirements, (Id. § 227(b)(2)) and it also grants the Commission specific authority to fashion exemptions from the general prohibition on autodialer calls to wireless numbers, where the calls are “not charged to the called party.” Id. § 227(b)(2)(C). As Congress explained, the FCC “should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy.” Id. § 227 note, Pub. L. No. 102-243, § 2(13), 105 Stat. 2394, 2395.” *ACA* at 693.

²⁴ See, e.g., https://www.aspect.com/globalassets/2016-aspect-consumer-experience-index-survey_index-results-final.pdf. As of 2007, more text messages were sent than phone calls made. See <https://www.verizon.com/about/news/vzw/2014/06/the-evolution-of-text-messaging>.

‘paging service’ or ‘specialized mobile radio service,’ ...yet those terms have largely ceased to have practical significance.”²⁵

IV. Reassigned numbers

With respect to the request for comment on how to treat calls to reassigned wireless numbers under the TCPA, we believe that the “called party” should be deemed to be an individual that the caller reasonably believed they were going to reach. We certainly understand that a call to a reassigned number can create inconvenience to a recipient but given the tremendous penalties and the current inability for a caller to determine that a number has been reassigned, it is unreasonable to attach TCPA liability to an action that is arguably violative only because of a change that the caller is not and cannot be aware of. We also believe that the as long as a caller can demonstrate that they reasonably relied on prior express consent from a recipient at a particular number, believed they would be reaching a recipient, that they businesses should not face TCPA liability for calling that number.

Ultimately, the best outcome is to create a safe harbor based on a newly-created reassigned number database. Creation and maintenance of such a database is a necessary first step, and we fully support proposals to establish such a database. Once established, callers could be granted a safe harbor for calls made to reassigned numbers as long as such calls were not made within a certain period of time after the number appeared on the reassigned number database, perhaps 30 days.

V. Opt-Out Methods

The FCC also seeks comment on how a called party may revoke consent to receive regulated calls. The court in *ACA* upheld the FCC’s interpretation that called parties may revoke consent “through any reasonable means clearly expressing desire to receive no further messages from the caller.” We agree that it should be predictable and easy for called parties to revoke consent, but we would urge the Commission to make it predictable and straightforward for callers as well. The Commission should identify clear, user-friendly methods for revoking consent and provide callers guidance on whether such methods must be provided to called parties. This could

²⁵ *ACA* at 699. Note that paging services generally functioned by requiring a phone call made to a phone number, and a “specialized mobile radio service” is a direct voice communication system akin to a private cellular phone network. See Gartner IT glossary at <https://www.gartner.com/it-glossary/smr-specialized-mobile-radio/> (Defining “SMR (specialized mobile radio) as: A wireless communications technology in competition with analog cellular services. In an SMR system, the base station equipment supplier is the licensee of the transmitters. Users have access to the multiple channels of the network rather than the limited number of channels of a private mobile radio network. Many users share all of the available channels. Sharing is accomplished on a first-come, first-served basis. When users want to initiate a call, they activate the push-to-talk button on the handset. Assuming the portable unit (and dispatcher or other portable unit) is tuned to an available channel, a communication path is established. If channels that the sender and receiver can use are not available, the call cannot be completed, and the operator must wait for another opportunity to try again.)

include websites, interactive standardized codes (such as “*7”), or a combination of both. Useful analogs that have proven to work well exist under federal law in statutes such as CAN-SPAM, and the federal Do-Not-Call requirements. In each case, opt-out regimes exist that create certainty and predictability, which benefits callers and called parties alike.

VI Conclusion

Unwanted telephone calls are annoying, and we fully support efforts to address bad actors and limit their ability to abuse telephone technology to harass, annoy, or inconvenience consumers. Indeed, legitimate businesses are also often victimized by such activity.²⁶ However, the recent TCPA interpretations do little to address these abuses, and instead add costs and confusion for businesses and ultimately consumers, rather than protecting them. We urge the Commission to issue a balanced interpretation that actually addresses the harms that the TCPA was enacted to address, without inhibiting legitimate communications that consumers want. We believe many consumers have been harmed by the earlier ATDS interpretations, which unnecessarily raised costs and denied consumers desired and efficient access to vital information. We respectfully request that the Commission adopt a reasonable and balanced interpretation as outlined herein. Thank you for consideration of our comments.

Sincerely,

/s/

Bradley Miller
Director, Regulatory Affairs
National Automobile Dealers Association

²⁶ For example, our members, who are franchised new-car automobile dealers, often deal with consumers who are upset about receiving fraudulent calls about their “expiring automobile warranty,” or similar ploy. See <https://www.fcc.gov/consumers/guides/beware-auto-warranty-scams>. Dealers must often explain to confused and upset consumers that they did not make those calls or provide information to others to make such calls. This harms the reputation of automobile dealers and requires time and effort to educate and explain to consumers.