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

In the Matter of	)	
	)	
Consumer and Governmental Affairs Bureau	)	CG Docket No. 18-152
Seeks Comment on Interpretation of the Telephone	)	
Consumer Protection Act in Light of the D.C.	)	
Circuit's ACA International Decision	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

COMMENTS OF ADT LLC d/b/a ADT SECURITY SERVICES

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EXECUTIVE SUMMARY

ADT provides alarm monitoring, medical alerts, and smart home technology to approximately 7.2 million customers with whom ADT regularly communicates on a variety of matters, from service reminders to collecting for unpaid bills. ADT has invested tens of millions of dollars to develop and maintain systems, policies, processes, and technology to ensure those communications are compliant with the Telephone Consumer Protection Act ("TCPA"). In addition to overseeing its own calling practices, ADT undertakes significant efforts to ensure that its third-party dealers and vendors have implemented their own policies and practices to comply with the TCPA.

Notwithstanding these substantial compliance efforts, ADT has recently been named the defendant in a number of baseless and putative class actions alleging TCPA violations. Much of this litigation has been spawned by the Commission's ambiguous, conflicting or overly expansive interpretations that have strayed far from the TCPA's language and Congress's intent. The Commission's *Public Notice* issued in light of the D.C. Circuit's decisions in *ACA International* offers the opportunity to restore the balance that Congress intended between protecting consumers from the abusive telemarking practices that drove enactment of the TCPA without interfering with legitimate business communications. To that end, ADT proposes the following actions.

Autodialer Definitions

As the D.C. Circuit rightly found, the Commission has offered "no meaningful guidance" on what constitutes an automatic telephone dialing system ("ATDS"). The Commission should return to the language Congress crafted and define an ATDS as equipment that can itself

generate random or sequential numbers and then dial those numbers. This definition would preclude most predictive dialers from the definition. The Commission also should confirm that an ATDS must dial numbers without human intervention. As have the vast majority courts, the Commission should specifically confirm that minimal human intervention, such as manually clicking on a telephone number to initiate a dialing sequence, disqualifies equipment as an ATDS. The Commission should further conclude that liability attaches only if the equipment actually uses those functions to make the calls at issue.

Reassigned Numbers

The Commission should interpret the "called party" as the intended recipient, that is, the customer that had provided consent to be reached at the number called. This is not only a permissible reading of the statute, but the reading that best effectuates the Commission's reasonable reliance approach. Reliance on prior consent is reasonable as long as the caller does not have actual knowledge that it is calling a reassigned or wrong number. The Commission should also adopt a safe harbor for callers that take reasonable steps to confirm the validity of the number. Industry and consumers also would be well served through the creation of a single, comprehensive reassigned numbers database.

Revocation

The Commission should identify reasonable methods of revocation that both industry and consumers would recognize as valid and efficacious. The current interpretation promotes gaming by aggressive plaintiffs that refuse to utilize easy and straightforward opt out methods. The commission should also confirm that a consumer may not unilaterally revoke consent that was part of a bargained-for exchange.

It is Time to Update the TCPA

Revising key TCPA terms as described above will go a long way toward restoring the balance Congress intended, but the Commission can and should do more to provide meaningful distinctions between legitimate informational consumer contacts and abusive telemarketing practices and to update the TCPA to reflect today's communications technologies. When the TCPA was enacted, cellular service was still in its infancy and wireless subscribers paid exorbitant per minute charges for each incoming call. Wireline customers paid nothing for incoming calls. Congress thus adopted additional protections where the called party was charged for the call, such as cell phone users.

Today's communications landscape could not be more different. It is estimated that 60% of consumers will have "cut the cord" by the end of this year and have only wireless services, which for that vast majority of users are provided under unlimited calling and texting plans – that is, without per minute charges. While informational calls made to landline phones may be made without consent, the same call to cell phones creates enormous litigation risk.

The Commission has authority to exempt from prior consent requirements cell phone calls that are free to the end user. It should use that authority to exempt from the prior consent requirement *informational* calls to cell phones that are, in fact, free to the end user, subject to reasonable limits on call frequency. This would provide a bright line rule on liability that forgoes requiring exacting analysis of Commission interpretations of dialing equipment, number reassignments, or methods of revocation, and it would provide a truly meaningful distinction between legitimate customer contacts and abusive telemarketing or scamming

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COMMENTS OF ADT LLC d/b/a ADT SECURITY SERVICES

ADT LLC d/b/a ADT Security Services ("ADT") submits these comments in response to the Commission's May 14, 2018 *Public Notice* requesting comments on various issues related to the interpretation of the Telephone Consumer Protection Act ("TCPA")[1] arising out of the D.C. Circuit's recent decision issued in *ACA International v. FCC*.[2] In light of the D.C. Circuit's decision and analysis in *ACA International*,[3] the Commission has the opportunity to revisit and reverse prior interpretations of the TCPA that have strayed far from the statute's language and Congressional intent. Congress intended to balance the privacy interest of consumers to be free of abusive and annoying *telemarketing* calls while also preserving the ability of businesses to communicate freely with their customers. The D.C. Circuit provided a roadmap to restore this balance, which the Commission should embrace.

[1] 47 U.S.C. § 227.
[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, CG Docket Nos. 18-152, 02-278 (rel. May 14, 2018) *(Public Notice*).
[3] *ACA Int'l. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (affirming in part and vacating in part *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd. 7961 (2015)(*2015 TCPA Order*)).

I. Background on ADT and Its TCPA Compliance Efforts

Serving approximately 7.2 million customers, ADT is the nation's largest alarm monitoring and smart home service provider. ADT also provides medical alert monitoring and an increasingly sophisticated array of security-related services. ADT's business requires it to engage in large variety of communications with its customers. For example, ADT initiates calls to customers to schedule or confirm service appointments, to inform them of the existence of conditions with customers' alarm systems that may require service, such as the existence of a "Trouble" or "Low Battery" conditions, or the loss of communication with alarm control panels, as well as calls to collect past due amounts for services rendered.

ADT has been an industry leader in telemarketing and non-telemarketing calling compliance. It has invested tens of millions of dollars to develop thorough calling policies and practices designed specifically to ensure compliance with the TCPA, the Telemarketing Sales Rule ("TSR"), and relevant state and local telemarketing laws. This investment includes hiring staff dedicated to compliance, utilizing third-party compliance vendors and databases to meet record retention legal requirements, closely overseeing dealers and telemarketers, as well as procuring appropriate dialing platforms. The company's annual call compliance spending exceeds approximately $2 million.

ADT has a substantial in-house staff dedicated to TCPA compliance, including a compliance attorney, a dedicated senior consumer contact compliance manager, a team whose sole function is to be responsible for investigating telemarketing and do not call complaints, and an information technology specialist fluent in telemarketing laws. It also proactively and regularly consults with expert outside TCPA counsel on a variety of TCPA and other telemarketing issues and best practices.

ADT's Calling Platforms and Means of Obtaining Consumer Consent

A fundamental principle guides all of ADT's calling practices: no calls – informational, transactional or telemarketing – to cell phones may be placed using any automatic telephone dialing system ("ATDS" or "autodialer") unless and until ADT has obtained and recorded the appropriate level of prior express consent. For informational and transactional calls, ADT obtains prior express consent as part of its contracts with consumers. For example, although the specific verbiage may have changed over time, ADT's contracts utilize and have utilized provisions such as:

> If I have provided or do provide ADT with a phone number, including but not limited to a cell phone number, a number that I later convert to a cell phone number, or any number that I subsequently provide for billing and other non-solicitation purposes, I agree that ADT may contact me at this/these number(s). I also agree to receive calls and messages such as pre-recorded messages, calls and text messages from automated dialing systems at the number(s) provided. I confirm that I am the registered owner of all telephone number(s) that I have or will provide to ADT to contact me.

ADT also obtains consent during recorded inbound and outbound telephone calls, and through a variety of other methods in which consumers volunteer their telephone numbers to ADT.

For telemarketing calls, ADT obtains prior express *written* consent, often via its online lead forms on which potential customers can provide contact information. These forms clearly and conspicuously disclose that, for example, by providing a phone number and clicking the submit button, the consumer "agree[s] that an ADT specialist may contact [him or her] at the phone number provided by [the consumer] using automated technology about ADT offers and consent [to be called] is not required to make a purchase."[4] ADT maintains the recorded express consent, including written consent, with its TCPA compliance service providers. In addition,

[4] *See* www.adt.com (last accessed June 3, 2018).

ADT maintains these consent records in its internal databases for expeditious mining and production in the case of a complaint.

ADT maintains through its third-party compliance vendors an up-to-date database of consumer consent. With respect to informational or transactional calls, ADT forwards lists of telephone numbers of customers to its compliance vendor on a nightly basis. The vendor then scrubs the call lists against national wireless carrier databases in order to segregate cell phone numbers from traditional landline and other non-cell telephone numbers, such as numbers associated with VoIP service. The vendor then scrubs the resulting sub-set of cell phone numbers against the consent database to further segregate cell phone numbers for which ADT has obtained customers' express consent. All call lists are then re-scrubbed the following night.

ADT has also invested in two calling platforms, LiveVox's Human Call Initiator ("HCI") and Avaya Proactive Contact 5.1 ("APC 5.1"). Which of these two platforms is used depends on the nature of the call, transactional or telemarketing, the type of number, cellular or landline, and the type of consent required, prior express consent for non-telemarketing calls and prior express written consent for telemarketing calls. Neither platform has the capacity to produce or store telephone numbers using a random or sequential generator, nor can either platform dial numbers without the degree of human intervention that has been found by the courts to be sufficient to remove equipment from the definition an ATDS. ADT spends substantial resources for these platforms, which enable it to utilize efficient dialing technologies while remaining within the legal parameters set by courts on what does and does not constitute an ATDS. Notably, if ADT engages a third party vendor to make outbound calls of any nature, ADT first vets the vendor's calling platform by requiring the vendor's technologists to discuss the architecture with ADT expert outside counsel to verify the nature of the calling platforms as an autodialer or manual

application. This is so ADT can appropriately assign calling campaign files to each platform based on whether or not express consent was captured for each telephone number.

Identifying Whether Cell Phone Numbers Have Been Reassigned

ADT also utilizes a TCPA compliance vendor to assess whether a cell phone number is still associated with the customer that initially provided the number and the consent to be called at that number. By querying various telecommunications company networks and/or mobile carrier databases, the vendor provides five levels of statistical confidence regarding the likelihood that a person is still associated with a specific cell phone number. That likelihood is shown as a confidence score (scored using letter grades "A" thru "F," with A being the most confident association and F being the least confident). ADT only will call telephone numbers using any level of automated functionality that the vendor has assigned the highest levels of confidence, those numbers having have a confidence score of an A or B.

ADT's Efforts to Ensure Compliance with Do Not Call Requests

ADT has implemented a comprehensive TCPA compliance regime that meets and in some respects exceeds the minimum standards relating to telemarketing and the national do not call list. For example, ADT has a written telemarketing policy for maintaining an internal do not call list, which is available to any consumer who requests it. It also has a robust training program on the use of its do not call lists in which all employees involved in any aspect of telemarketing must participate. In addition to the training, these employees must pass tests to demonstrate their proficiency with ADT's telemarketing procedures before engaging in outbound telemarketing activities, and they must continue to participate in refresher training courses periodically thereafter.

Further, ADT's policy and practice is to record and honor all consumer requests that a telephone number be added to its internal do not call list for telemarketing purposes within 24 hours. However, as a practical matter, do not call requests are recorded by ADT in real-time (as opposed to the 30 days permitted for such requests to be effectuated under the TCPA and TSR). ADT-specific do not call requests also extend to ADT's third-party telemarketers and lead generators. ADT requires its third-party telemarketers and lead generators to refrain from calling those consumers that have made a do not call request to ADT. Similarly do not call requests made to third-party marketers or lead generators are added to ADT's internal do not call list.

ADT also has retained two well-regarded TCPA compliance service providers to support its telemarketing compliance program and help ensure that no telemarketing calls are placed to a number contained on the National Do Not Call Registry, a state do not call list, or ADT's internal do not call list. ADT scrubs all outbound telemarketing campaign calling lists against do not call databases maintained by these vendors and removes all do not call numbers before initiating any outbound calling. ADT requires that all outbound telemarketing calls be made within 24 hours of a scrub, and call lists are re-scrubbed on a nightly basis to capture any new telephone numbers that might have been added to the National Do Not Call Registry, a state do not call list, or ADT's internal do not call list that day. ADT maintains telemarketing call records for at least six years.

ADT's Authorized Third-Party Dealer Telemarketing Guidelines and Compliance Monitoring Program

In addition to the do not call compliance efforts for ADT's calling, ADT has created an extensive set of Dealer Telemarketing Guidelines, which apply to all authorized third-party dealers of ADT's alarm services. No third-party dealer may engage in telemarketing unless it complies with these Guidelines and becomes certified as a "Telemarketing Dealer." Among

other things, the Guidelines require that all dealers – whether they telemarket or not – complete an ADT telemarketing survey, which is designed to allow ADT to understand whether the dealer telemarkets or intends to telemarket, and, if so, how such telemarketing will be done and by whom, and what policies and practices are in place to ensure that any telemarketing is compliant with all federal, state, and local telemarketing laws. In addition, ADT's Dealer Telemarketing Guidelines require telemarketing dealers to:

- Not utilize prerecorded messages;
- Not telemarket to cell phones using an autodialer without the consumers' prior express written consent;
- Comply with the requirements regarding ADT's internal do not call list;
- Retain an ADT-approved do not call compliance service provider, which, in turn, must provide ADT with a monthly do not call compliance report for that dealer;
- Identify themselves during their telemarketing calls as "[Dealer Company Name], an ADT Authorized Dealer;"
- Not use offshore telemarketers; and
- Retain records, such as consent and established business relationships, justifying any calls to telephone numbers that appear on a do not call list.

ADT continuously monitors its dealers' compliance with its Dealer Telemarketing Guidelines and applicable telemarketing laws, and investigates all consumer complaints it receives to determine whether a dealer may be violating either ADT's Guidelines or telemarketing laws more generally. It does so through a combination of monthly compliance reports (as well as quarterly activity reports), control reviews whereby ADT meets with its dealers to provide them the opportunity to demonstrate their compliance with the Dealer Telemarketing Guidelines, consumer complaint monitoring, and reports from other dealers that a dealer is not complying with ADT's Dealer Telemarketing Guidelines or applicable telemarketing law. ADT acts swiftly and appropriately in penalizing dealers who it determines may have been telemarketing in a non-compliant manner, including through hefty monetary penalties and/or termination as appropriate.

ADT constantly reviews and updates its calling policies and procedures to ensure consistency and compliance with changes and developments in the TCPA, TSR, and state and local telemarketing laws. ADT also periodically educates its employees and third-party dealers on recent developments in telemarketing law, legal rulings and opinions, and regulations promulgated by the FCC and FTC. ADT takes compliance seriously and considers all of the TCPA's provisions to be of paramount importance, both as a responsible corporate citizen and as a matter of avoiding the enormous liabilities that the TCPA imposes upon non-compliant telemarketing activities. Each of the above-described policies, practices, and procedures is designed specifically with telemarketing compliance in mind, and to set the gold standard for industry. Most importantly, however, ADT aims to ensure that it is only calling consumers who want to receive such calls and not calling those who have expressed a desire not to receive such communications.

ADT's Experience with Litigation

Notwithstanding its substantial compliance efforts, ADT recently has been named the defendant in a number of baseless individual and putative class actions alleging violations of the TCPA. ADT has settled a number of these cases for nuisance values rather than expend the substantial amounts of money and other resources necessary to defend against such claims. All of the recent lawsuits have arisen from ADT's lawful debt collection activities. Plaintiffs and their attorneys frequently misperceive ADT's use of the TCPA-compliant LiveVox HCI dialing platform to be an autodialer or they disregard that the plaintiffs had provided prior express consent either through the terms of the service contract and/or separately in a prior telephone transaction with ADT. ADT has also been sued for inadvertently placing calls to wrong or reassigned cell phone numbers.

As the Commission well knows, ADT's experience is by no means unique. Companies in virtually every line of business have found themselves subject to litigation in seeking to contact their customers, notwithstanding good faith efforts at compliance. Revising previous interpretations of key terms of the TCPA and updating rules to reflect how people communicate today, as explained in the remainder of these comments, can substantially reduce the burdens and costs of the litigation while still protecting consumers from the abuses that underlie the TCPA's purpose.

II. The Commission Should Develop A Sensible, Lawful AutoDialer Definition that Hews to the Statute and Provides Certainty for Industry.

The Commission's previous efforts to define an autodialer have led to substantial confusion and uncertainty in the industry and conflicting decisions in the courts. The D.C. Circuit correctly summarized the current regulatory state of affairs by concluding that the Commission's autodialer interpretations offer "no meaningful guidance to affected parties in material respects on whether their equipment is subject to the statute's autodialer restrictions."[5] The Commission now has an opportunity to clearly identify the functions that qualify equipment as an ATDS and to confirm that liability attaches only when those functions are actually used to make the call. The Commission need simply hew to the statutory language, as proposed by the Petition for Declaratory Ruling submitted by the U.S. Chamber Institute for Legal Reform.[6] The Commission should grant the petition.

[5] *ACA International*, 885 F.3d at 701.
[6] U.S. Chamber Institute for Legal Reform, *et al.*, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed May. 3, 2018) (*Chamber Petition*).

A. Consistent with the Language of the TCPA, the Commission Should Define an ATDS as Equipment that Itself Generates Random or Sequential Numbers, and Then Dials Those Numbers Without Human Intervention

Section 227(a)(1) of the TCPA defines the term "automatic telephone dialing system" 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."[7] The statute thus identifies the requisite functions that qualify equipment as an ATDS, the capacity to store or produce numbers using a random or sequential number generator and then dialing those numbers. As the D.C. Circuit noted in *ACA International*, a key question is "whether a device *itself* must have the ability to generate random or sequential telephone numbers to be dialed" – a question on which the Commission has taken conflicting positions.[8]

1. By Including Equipment, Such as Predictive Dialers, that Do Not Generate Random or Sequential Numbers, the Commission Strayed Beyond Its Authority

Much of the current confusion stems from the Commission's decisions to include predictive dialers within the autodialer definition, a decision reaffirmed in the *2015 TCPA Order*.[9] In so doing, the Commission expanded that statutory definition by including equipment that does not *generate* random or sequential numbers to be called but, rather, dials numbers "from a database of numbers" when software is "attached" or "paired" with the dialing equipment.[10] The D.C. Circuit understood that the Commission expressly intended to expand the

[7] 47 U.S.C. § 227(A)(1)(emphasis added).
[8] *ACA International*, 885 F.3d at 701.
[9] *2015 TCPA Order*, ¶ 10, n. 39. *See, e.g., Herrick v. GoDaddy.com LLC*, 2018 WL 2229131, at *6 (D. Ariz. May 14, 2018) ("The FCC's guidance on these [autodialer functions] queries became increasingly muddled after it determined that 'predictive dialers' should be included in the definition of an ATDS.").
[10] The Commission described a predictive dialer as "equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls. The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, from a database of numbers." *2015 TCPA Order* at n. 39 (quoting *Rules and*

autodialer definition beyond equipment that could generate random and sequential numbers, writing that "the Commission had made clear that, while some predictive dialers cannot be programmed to generate random or sequential phone numbers, they still satisfy the statutory definition of an ATDS."[11]

The Commission believed that it was furthering Congress' intent to protect consumers from harassing and annoying *telemarketing* calls by updating the statutory definition to reflect changes in technology.[12] But as both then-Commissioner Pai and the D.C. Circuit noted, that is not the Commission's job.[13] It is up to Congress to rewrite the statute if it believes that the TCPA is no longer accomplishing its goals.

The Commission further justified this rewriting of the statute by claiming that the term "capacity" is sufficiently flexible to encompass a continually expanding universe of equipment. The *2015 TCPA Order's* determination that the term "capacity" is sufficiently capacious to include smart phones as ATDS because they could be programmed through a software download was the culmination of this line of thinking. The D.C. Circuit concluded that the Commission had strayed far beyond its delegated authority.[14]

It is time for a reset. Then-Commissioner Pai had it right when he wrote "[t]he statute lays out two things that an automatic telephone dialing system must be able to do or, to use the statutory term, must have the 'capacity' to do. If a piece of equipment *cannot* do those two

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Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, CG Docket No. 02-278, 18 FCC Rcd. 14014, 14091 ¶ 131 (2003) (*2003 TCPA Order*)).

[11] *ACA International*, 885 F.3d at 702. (citing *2003 TCPA Order*, 18 FCC Rcd. at 14091,¶ 131 n. 432; *id* at 14093,¶ 133).

[12] *2003 TCPA Order*, 18 FCC Rcd. at 14092,¶ 132.

[13] *ACA International*, 885 F.3d. at 699 ("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"); *See* Dissenting Statement Of Commissioner Ajit Pai, 30 FCC Rcd. at 8076 ("Pai Dissent") ("if the FCC wishes to take action against newer technologies beyond the TCPA's bailiwick, it must get express authorization from Congress – not make up the law as it goes along.").

[14] *ACA International*, 885 F.3d at 698.

things – if it *cannot* store or produce telephone numbers to be called using a random or sequential number generator and if it *cannot* dial such numbers – then how could it possibly meet the statutory definition?"[15] To qualify as an ATDS, the equipment must itself generate the random or sequential numbers. As noted in the *Chamber Petition*, the phrase "using a random or sequential number generator" modifies the preceding clause, "storing or producing numbers to be called."[16] Requiring that the equipment itself be able to perform this key function is the most natural reading of the statute.

It also most faithfully follows Congress' intent when adopting the 1991 law. The legislative history makes clear that Congress' primary concern was with the burgeoning proliferation of indiscriminately dialed "cold calls" in telemarketing campaigns enabled by equipment that could "dial thousands of numbers in a short period of time."[17] By expanding the ATDS definition to include equipment that dials numbers from lists – predictive dialers-- the Commission turned the TCPA into a weapon against legitimate companies using efficient dialing equipment to contact their own customers and other specific consumers. Most such lists are comprised of customers that have provided their telephone numbers to the caller. That is certainly the case with ADT. Plaintiffs and plaintiff law firms incentivized by statutory damages have used this weapon to bring scores of frivolous or manufactured lawsuits.

2. ATDS Must Dial Numbers Without Any Human Intervention

The Commission also has issued conflicting statements regarding the importance of human intervention in the dialing process. In various orders, the Commission has stated that a basic function of an ATDS is to "dial numbers without human intervention" yet it declined in the

[15] Pai Dissent 30 FCC Rcd. at 8074 (emphasis in original).
[16] *Chamber Petition* at 21-22.
[17] *2015 TCPA Order*, at 7975, ¶ 17. The D.C. Circuit noted that the Commission had never clarified whether the ability to dial numbers rapidly was a necessary, sufficient, or relevant condition or what constituted a short period of time, creating yet further uncertainty. 885 F.3d at 704.

2015 TCPA Order to clarify that "a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention."[18] The Commission should confirm that equipment is not an ATDS if human intervention is used to initiate or make the call. As the D.C. Circuit noted, such an interpretation "makes sense given 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."[19] Citing the FCC's orders, courts have concluded that the lack of human intervention is the 'defining characteristic" of an ATDS.[20]

To provide further certainty, the Commission also should confirm, as a number of courts have, that minimal human intervention, such as manually clicking on a telephone number to initiate the dialing sequence, renders calling and texting platforms outside the definition of an ATDS.[21] The HCI and APC 5.1 dialing equipment utilized by ADT generally requires this level of human intervention. The Northern District of Illinois recently described HCI's characteristics and operation as follows:

> [T]he Human Call Initiator is a human initiated and human controlled dialing system that requires a TSI agent to manually initiate every call. Each call initiated from a Human Call Initiator must be initiated by a human "clicker

[18] *See ACA International*, 885 F.3d at 703.
[19] *Id*.
[20] *Jenkins v. mGage*, 2016 WL 4263937, at *6 (N.D. Ga. Aug. 12, 2016) (citing cases).
[21] *See, e.g., Maddox v. CBE Group, Inc.*, 2018 WL 2327037, at *2 (N.D.GA May 22, 2018) (finding that using a Manual Clicker Application, which requires "human intervention – a manual 'click'- to initiate a call" renders dialing equipment outside the definition of an ATDS and rejecting plaintiffs claim that "human intervention requires a person manually dial each digit of a telephone number.); *Marshall v. CBE* Group, 2018 WL 1567852, at *7(D. Nev. March 30 2018) (noting that "the overwhelming weight of authority . . . holds that 'point-and-click' dialing systems, paired with a cloud-based pass-through services, do not constitute an ATDS as a matter of law in light of the clicker agent's human intervention")(citations omitted); *Jenkins*, 2016 WL 4263937 at *6 (finding a texting platform not an ATDS where human intervention involved in multiple stages, including requiring users to upload numbers to be dialed, draft content of text messages, chose timing of when to send either by clicking send if to be delivered immediately or accessing a drop down calendar function to schedule timing); *Luna v. Shac, LLC*, 122 F. Supp.3d 936, 941 (N.D. Cal. 2015)(platform not an ATDS where "human intervention was involved in several stages of the process prior to Plaintiff's receipt of the text message, including transferring of the telephone number into the CallFire database, drafting the message, determining the timing of the message, and clicking "send" on the website to transmit the message to Plaintiff."). *But see Keim v. ADF MidAtlantic, LLC*, 2015 WL 11713593, at *6 (S.D. Fla. Nov. 10, 2015) (based on *2015 TCPA Order*, concluding lack of human intervention not a *per se* requirement for ATDS and finding equipment to be an ATDS if it has the capacity to perform without human intervention).

> agent." The clicker agent is responsible for confirming that the number to be called is the correct number, and after doing so, launching the call by physically clicking the number. When any [defendant] representative uses the Human Call Initiator system, he or she must click on a dialogue box to confirm the launching of a call to a particular telephone number. The call cannot be launched unless the clicker agent clicks on the dialogue box.[22]

The APC 5.1 platform, in turn, has two possible dialing modes – managed preview mode and predictive mode. In managed preview mode, a consumer's account information and telephone number appear on an ADT call representative's computer screen. The call representative, then, makes a decision whether to click on the telephone number to launch the call or not; no call is placed without the intervention of ADT's call representative. In predictive mode, an ADT employee logs into the APC 5.1 system and uploads lists of specific ADT customer telephone numbers. Next, an ADT employee turns the system on, selects the numbers to be called, and the system dials those numbers – and only those numbers. Calls are connected to live ADT call representatives when they are answered. In other words, there is human involvement in logging into the APC 5.1 system; the creation, uploading, and selection of the specific telephone numbers to be called; the initiation of the dialing system; and during the telephone calls themselves.

To date, the Commission has left it to the courts to decide what constitutes sufficient human intervention with respect to any particular type of equipment. This has simply resulted in

[22] *Arora v. Transworld Sys., Inc.*, 2017 WL 3620742, at *1 (N.D. Ill. Aug. 23, 2017). Every court to evaluate whether HCI is an autodialer under the TCPA of which ADT is aware has held that it is not. *See Arora*, 2017 WL 3620742, at *2-3; *Schlusselberg v. Receivables Performance Mgmt., LLC*, 2017 WL 2812884, at *4 (D.N.J. June 29, 2017) ("Defendant's HCI system is not an autodialer for purposes of the TCPA"); *Smith v. Stellar Recovery, Inc.*, 2017 WL 955128, at *6 (E.D. Mich. Mar. 13, 2017) (concluding that HCI "is characterized by one key factor that separates it from autodialers: it requires human intervention – the clicker agent – to launch an outgoing call," and, because "the basic function of an autodialer is the capacity to dial phone numbers 'without human intervention,' and the HCI system lacks that capacity, the HCI is not an autodialer."); *Pozo v. Stellar Recovery Collection Agency, Inc.*, 2016 WL 7851415, at *6 (M.D. Fla. Sept. 2, 2016) ("In sum, because Stellar's Human Call Initiator system required its representatives to manually dial all calls and was not capable of making any calls without human intervention, Stellar did not employ an autodialer. Because Stellar did not make autodialed calls, Stellar cannot be liable under the TCPA.").

further litigation as plaintiffs' attorneys attempt to split hairs regarding the sufficiency of a person's interaction with dialing platforms.[23] The Commission should settle any remaining controversy and confirm that equipment such as that described above requires sufficient human intervention to preclude their being considered an ATDS.

3. In Light of Conflicting Decisions Regarding Predictive Dialers Following *ACA International,* The Commission Should Act Quickly

The Commission should move quickly to lift the "fog of uncertainty" that its past ATDS orders have created. Although the D.C. Circuit struck down the *2015 TCPA Order's* interpretation of "capacity" and called into question the validity of the Commission's inclusion of predictive dialers, the courts addressing the issue since *ACA International* are split on whether to continue to defer to the FCC's 2003, 2008, and 2012 predictive dialer orders.[24] A definitive ruling that the better and proper reading of the TCPA is that an ATDS must itself have the capacity to generate random or sequential numbers and then to dial those numbers, rendering many predictive dialers outside the ATDS definition, could substantially reduce litigation.

B. Autodialer Functions Actually Must be Used to Make the Call.

The Commission further should clarify the uncertainty around what constitutes an ATDS by confirming that the requisite functions of generating and dialing random or sequential numbers must actually be used in making or initiating a call, as suggested by Commissioner O'Rielly in his dissent to the *2015 TCPA Order* and by the D.C. Circuit.[25] This interpretation too is entirely consistent with the statutory language, which ties the prohibited calling to the use

[23] *See Jenkins*, 2016 WL 4263937 at *6 (collecting cases).
[24] *Compare Herrick v. GoDaddy.com LLC,* 2018 WL 2229131, at *8(D. Ariz. May 14, 2018) (refusing to defer to FCC predictive dialer decisions following *ACA* decision and concluding that predictive dialers are not ATDS); *Marshall*, 2018 WL 1567852 at *7 (in light of *ACA International* plaintiff cannot rely on the FCC's definition of an ATDS to include predictive dialers) *with Reyes v. BCA Financial Services*, 2018 WL 2220417, at *11 (S.D. Fla. May 14, 2018) (although *ACA International* has given the court "considerable pause," court finds FCC predictive dialer orders remain binding).
[25] Commissioner Michael O'Rielly Dissenting In Part And Approving In Part, 30 FCC Rcd. at 8089 ("O'Rielly Dissent").

of an ATDS: "It shall be unlawful for any person … to *make any call …using any automatic telephone dialing system* … to any telephone number assigned to a …cellular telephone service."[26]

As the D.C. Circuit recognized, adopting this interpretation "would substantially diminish the practical significance of the Commission's expansive understanding of 'capacity' in the autodialer definition" because the "mere possibility of adding [autodialing functionality through downloading software] would not matter unless they were downloaded and used to make calls."[27] Requiring that the requisite ATDS functionality actually be used creates a bright line standard that should substantially reduce the prospect of abusive litigation and preserves the massive investment in new dialing technologies whose utility might otherwise be called into question based on their unused "capacity" to perform certain functions. To the extent the Commission does endeavor to interpret the term "capacity," ADT concurs with the analysis in the *Chamber Petition* that "devices that require alteration to add autodialing capability are not ATDS."[28] The requisite functionality must be an inherent capability in the equipment *and* it must have been used to make the call.

III. The Commission Should Address Reassigned Numbers Through Reasonable Interpretations of Statutory Language and Preclude Liability in the Absence of Actual Knowledge

Of the now vacated reassigned number framework adopted in the *2015 TCPA Order*, then-Commissioner Pai presciently wrote that it would "open[] the floodgates to more TCPA litigation against good-faith actors."[29] There is no question that serial plaintiffs have clogged the court system with manufactured TCPA lawsuits predicated on claims that they did not consent to

[26] *ACA International*, 885 F.3d at 704 (quoting 47 U.S.C. § 227(b)(1)(A)(iii))(emphasis added by court).
[27] *Id*.
[28] *Chamber Petition*, at 23.
[29] Pai Dissent, 30 FCC Rcd. at 8078.

calls or texts intended for a recipient whose number has been reassigned. One notorious example involved a plaintiff that had purchased at least 35 prepaid cells phones and asked for phone numbers associated with economically depressed areas in hopes of receiving debt-related calls intended for others "for the purpose of filing lawsuits" under the TCPA.[30] Although that court ultimately concluded that the plaintiff lacked standing to sue, the court felt bound by the *2015 TCPA Order's* determination that called parties have no obligation to inform callers that they are calling a wrong number and rejected the defendant's arguments that the plaintiff assumed the risk of receiving calls and acted in bad faith.[31] Other courts, however, have granted standing to plaintiffs trolling for TCPA violations, creating an inconsistent legal landscape. The Commission can help mitigate this litigation morass by defining the "called party" as the intended recipient, an interpretation that best gives effect to the Commission's reasonable reliance approach.

A. The Commission Should Define the Called Party as the Intended Recipient

The *Public Notice* seeks comment on how to interpret the term "called party" that best implements the statute in light of *ACA International*.[32] It also asks whether to maintain the reasonable reliance approach to prior consent. The Commission should retain that approach, and interpreting "called party" as the intended recipient best gives effect to the concept of reasonable reliance.

Section 227(b)(1) of the TCPA makes it unlawful for any person to "make any [nonemergency] call" using an ATDS to "any telephone number assigned to a . . . cellular telephone service" without the "prior express consent of the called party." The Commission has

[30] *Stoops v. Wells Fargo,* 197 F. Supp. 3d 782, 788 (W.D. Pa. 2016).
[31] *Id.* at 794.
[32] *ACA Public Notice*, at 3-4.

already concluded, correctly, that the phrase "called party" is ambiguous.[33] Congress, therefore, has delegated to the Commission the discretion to interpret the phrase in the first instance based on a permissible construction of the statute.[34]

Notwithstanding the D.C. Circuit's finding that the *2015 TCPA Order's* interpretation of "called party" as the current subscriber was a permissible reading of the statute, it is well within the Commission's authority to interpret that phrase as meaning the intended recipient of the call. The court's further finding that the Commission was not "*compelled"* to interpret "called party" as the intended recipient, in no way precludes such an interpretation as a reasonable construction of the statute.[35] Interpreting "called party" as the intended recipient best comports with the statute's language and its overriding policy of balancing the privacy rights of consumers with the right of companies to communicate with their customers.

Defining the called party as the intended recipient is a permissible construction of the statute. By tying the "called party" to "prior express consent," the statute's framework contemplates that a caller will have had an opportunity to obtain consent before making a call. Most commonly, such consent is obtained when a customer relationship is initiated and the customer proffers a telephone number where he or she may be reached.[36] The Commission has determined that this proffer evinces consent to be called for purposes within the scope of the consent.[37] To give meaning to the entire clause requiring the caller to obtain "prior express consent of the called party," the better reading of called party is that it refers to the party that

[33] *2015 TCPA Order* at ¶ 74.
[34] *See City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290 (2013). *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844(1984).
[35] *ACA International,* 855 F.3d at 694 (emphasis in original).
[36] *See Petition for Declaratory Ruling of the Consumer Bank Association*, CG Docket No. 02-278 at 4 (filed Sept. 19 2014) (noting that Congress appears to have equated called party with the customer and quoting House Energy and Commerce Committee report accompanying the TCPA, H.R.Rep. 102-317).
[37] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8769 (1992); *Request of ACA International for Clarification and Declaratory Ruling*, 23 FCC Rcd. 559, 564 (2008).

provided consent to be called, or the "intended recipient." If the called party is the current subscriber and the caller has no knowledge that it is dialing a reassigned number or wrong number and, thus, has no ability to obtain prior consent, the statute's emphasis on obtaining consent is rendered ineffective for a significant universe of calls.

Defining "called party" as the "intended recipient" also best comports with the Commission's determination, which it should uphold, that a caller may reasonably rely on the prior consent of the party that provided the telephone number to contact. As the D.C. Circuit noted, the result of defining the called party as the current subscriber is to "extinguish[] any consent given by the number's previous holder and expose[] the caller for liability for reaching the party that has not given consent."[38] The Commission was uncomfortable with the strict liability created by that result. To give effect to reasonable reliance on prior consent in light of its flawed interpretation of called party as the current subscriber, the Commission created the one-call safe harbor. The *ACA International* court rightly struck down this "safe harbor" as arbitrary and capricious.

Interpreting the "called party" as the intended recipient, when coupled with the concept of reasonable reliance on prior consent, creates a framework that best balances the interests of callers and consumers. Reliance on the prior consent of the intended recipient remains reasonable so long as the caller does not know that the number is no longer associated with its customer. Once the caller obtains knowledge that the number has been reassigned, it is no longer reasonable to rely on prior consent. Rather than draw arbitrary lines at some number of call attempts, the Commission should clarify that reasonable reliance is extinguished when the caller has actual knowledge that the number it is calling is no longer associated with the intended recipient. Under an actual knowledge standard, consumers should be incentivized to advise

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

callers that they have reached a wrong number, thereby precluding further calls. The previous interpretation encouraged gaming the TCPA in an attempt to generate income by letting unanswered calls accumulate.

As then-Commissioner Pai recognized in his dissent to the *2015 TCPA Order* on this issue, "the statute takes into account a caller's knowledge" and interpreting the term "called party" as the intended recipient "is by far the best reading of the statute."[39] The term's "ordinary usage," Commission precedent, and sound policy that "aligns the incentives of all parties to welcome legitimate calls and punish bad behavior," all dictate that "the called party is the person who consented to be called and the person who would ordinarily be expected to answer."[40] Commissioner O'Rielly, too, acknowledged that defining "called party" as the "intended recipient" is a "common sense approach" that allows callers "to reasonably rely on consent obtained for a particular number."[41] The Commission should now adopt the reasoning and analysis set forth in those dissents and interpret the called party as the "intended recipient."

B. The Commission Should Presume Lack of Knowledge if the Caller Makes Reasonable, Good Faith Efforts to Confirm the Number Remains Valid

As explained above, ADT undertakes substantial efforts to obtain and record consent, and utilizes available databases to determine whether the number on record remains associated with the customer that provided consent. The Commission should conclude that efforts like these render reasonable ADT's continued reliance on the prior consent provided by the customer until such time as ADT obtains actual knowledge that the number is no longer valid. Such a conclusion would be wholly consistent with the D.C. Circuit's analysis, which found no fault

[39] Pai Dissent, 30 FCC Rcd. at 8078.
[40] *Id*.
[41] O'Rielly dissent, 30 FCC Rcd. at 8094.

with the Commission's reasonable reliance approach to prior consent, only with the Commission's arbitrary and capricious implementation through the one-call "safe harbor."[42]

The Commission also should give substance to the concept of reasonable reliance by identifying the types of actions that demonstrate reliance on prior consent remains reasonable. These could include scrubbing numbers against industry databases of reassigned numbers, periodically attempting to confirm the continuing validity of contact information supplied by customers, or implementing measures to ensure firm-wide that calls stop upon being informed by the called party that the number is wrong or has been reassigned.

The Commission has recognized, however, that existing sources of information regarding number reassignment are not fool proof, and thus has initiated a proceeding to establish a single, comprehensive reassigned numbers database.[43] ADT supports this initiative, including the adoption of a safe harbor for those using the database. As noted by the D.C. Circuit, "[t]hose proposals would naturally bear on the reasonableness of calling numbers that have in fact been reassigned, and have greater potential to give full effect to the Commission's principle of reasonable reliance."[44] The Commission should follow the D.C. Circuit's suggestion and rule that companies that document use of the reassigned numbers database may continue to reasonably rely on prior consent and should be absolved of any liability for nevertheless calling a reassigned number. Aspects of the safe harbor procedures adopted for use of the National Do Not Call Registry could provide a useful template. The do not call safe harbor, for example, requires entities to establish and implement written procedures for ensuring calls are not made to

[42] *ACA International*, 855 F.3d at 707 ("no cognizable conception of 'reasonable reliance' supports the Commission's blanket, one-call-only allowance").
[43] *See In re Matter of 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). *See also* O'Rielly Dissent, 30 FCC Rcd. at 8093 ("There is simply no realistic way for a company to comprehensively determine whether a number has been reassigned.").
[44] *ACA International*, 885 F.3d at 709.

consumers who have placed their numbers on the do not call list; train personnel on these procedures; maintain records documenting the process to prevent calls to numbers on the do not call list, including downloading a version of the list at least 31 days before the call is made; and designating a person to oversee compliance.[45] Similar steps would provide an ample basis to assume reasonable reliance on prior consent and trigger safe harbor protections from liability.

IV. The Commission Should Identify Reasonable Methods to Revoke Consent

The *2015 TCPA Order*, as have the courts, incorporated the concept of revocation of consent into Section 227(b) of the statute, which itself is silent on whether consent may be revoked.[46] The D.C. Circuit affirmed this finding, or at least found it undisputed, and then upheld the Commission's gloss that a consumer may revoke consent through any reasonable means and a company may not dictate use of a burdensome process.

Then-Commissioner Pai and Commissioner O'Rielly both predicted that this open-ended method of revocation would place an impossible burden on companies attempting to identify and track whether a consumer may have communicated a "desire not to receive further messages."[47] The D.C. Circuit suggested, however, that compliance may not be as difficult as postulated, highlighting Commission language that a consumer's method of revocation must itself be reasonable based on the totality of the circumstances.[48] The D.C. Circuit also concluded that the

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[45] *See* Complying with the Telemarketing Sales Rule, https://www.ftc.gov/tips-advice/business-center/guidance/complying-telemarketing-sales-rule#safeharbor, (last visited June 6, 2018).

[46] *See*, *2015 TCPA Order* ¶ 56; *Gager v. Dell Financial Services, LLC*, 727 F.3d 265 (3rd Cir. 2013). Commissioner O'Rielly, however, sharply dissented to reading a right of revocation into this section of the TCPA through reference to common law where the statute is silent on the question. "If Congress did not address an issue," he wrote, "then the FCC should not presume to act in its stead." This is particularly true where Congress, in other parts of the TCPA specifically provided for revocation. O'Rielly Dissent, 30 FCC Rcd. at 8095.

[47] *See* Pai Dissent, 30 FCC Rcd. at 8083 (questioning how "any retail business [could] possibly comply with the provision that consumers can revoke consent orally 'at any in-store bill payment location"); O'Rielly Dissent, 30 FCC Rcd. at 8096 (noting untenable position of companies attempting to prove a negative – that a consumer had not revoked consent).

[48] *ACA International*, 885 F.3d at 709 (citing *2015 TCPA Order* at 7996 ¶ 64, n. 233.) At least one court has noted that the Commission's conclusion that a company may not infringe on a consumer's chosen method of revocation by designating an exclusive means of revocation "seems to be in some tension" with its further statement that the

"Commission's ruling absolves callers of any responsibility to adopt systems that would entail 'undue burdens' or would be 'overly burdensome to implement.'"[49] The court further opined that called parties' "efforts to sidestep" "clearly-defined and easy-to-use opt-out methods" in favor of "idiosyncratic or imaginative revocation requests" might well be found to be unreasonable.[50]

As was predicted, plaintiffs in fact have sought to manufacture TCPA claims by refusing to utilize clearly defined, easy-to-use opt out methods, such as texting "STOP" or pressing "1" on the telephone keypad, and instead have responded with the very type of "idiosyncratic or imaginative revocation requests" the D.C. Circuit imagined. Although courts ultimately have concluded that plaintiffs that failed to use an easy, clear opt-out method and instead responded with various verbose messages did not use a reasonable method of revocation, these findings were only reached after costly discovery and submission of dispositive motions.[51] In each instance, plaintiffs claimed they were in compliance with the Commissions' determination that consumers may revoke consent using any reasonable means and that the company could not dictate a method of revocation, even if that method was clear and easy. The Commission's rulings regarding revocation are but one more example of how the *2015 TCPA Order* "opens the floodgates to more TCPA litigation against good faith actors."[52]

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reasonableness of the method chosen would be determined by "totality of the facts and circumstances." *Rando v. Edible Arrangements Int'l*, 2018 WL 1523858, * 5-6 (D.N.J. Mar. 28, 2018).

[49] 885 F.3d at 709.

[50] *Id* at 710.

[51] *See e.g., Rando v. Edible Arrangements Int'l*, 2018 WL 1523858, at *7 (finding that "a reasonable person seeking to revoke consent would have tried, at least at some point during the back-and-forth, simply replying 'STOP' to cancel – as instructed, rather than ignoring Defendant's revocation method and sending ten long text messages to that effect, most of which did not include the word 'stop' at all"); *Viggiano v. Kohl's Dept. Store*, 2017 WL 5668000, at *3 (D. N. J. Nov. 27, 2017) (despite having been provided 5 one word options to stop further texts, such as STOP, CANCEL and QUIT, plaintiff sent several sentence long messages); *Epps v. Earth Fare, Inc.*, 2017 WL 1424637, at *5 (C.D. Cal. Feb. 27, 2017) (Rather than text STOP, plaintiff responded with messages such as "I would appreciate [it] if we discontinue any further texts[.]").

[52] Pai Dissent, 30 FCC Rcd. at 8077.

The *Public Notice* suggests one solution to this issue. The Commission should require consumers to utilize company designated clearly defined and easy to use opt methods.[53] The Commission should identify several revocation options that, if used by the consumer, would be sufficient to revoke prior consent. Conversely, failure to use those options would not be effective to revoke consent. Moreover, as the context in which a consumer provides consent may inform the scope of that consent, the context in which a customer utilizes an opt out method should inform the scope of the revocation. For example, a request to stop calling in the context of a collection call should halt further collection calls, but should not necessarily be considered a general revocation of consent for other types of contacts.

As recommended by Commissioner O'Rielly, the Commission also should follow the Second Circuit's reasoning in *Reyes v. Lincoln Automotive Financial Services* and conclude that a consumer may not unilaterally revoke consent "when that consent is given, not gratuitously, but as bargained-for consideration in a bilateral contract."[54] Holding consumers to their bargained for exchanges would substantially reduce abusive litigation and bring further certainty to the marketplace. This would not be unfair to consumers, particularly in the context of consumer debt, where in exchange for lending the consumer money or agreeing to periodic payments, the consumer provides contact information should repayment problems arise. Moreover, consumers are afforded other protections against harassment by statutes such as the Fair Debt Collection Practices Act.[55]

[53] *ACA Public Notice* at 4.
[54] *Reyes v. Lincoln Automotive Financial Services*, 861 F.3d 51, 56 (2nd Cir. 2017). *See* Statement of Commissioner Michael O'Rielly on D.C. Circuit TCPA Decision, March 16, 2018.
[55] Fair Debt Collections Practices Act, 15 U.S.C. § 1601 (1977).

V. The Commission Should Utilize its Regulatory Authority to Update the TCPA

The TCPA was originally intended to provide individual consumers a remedy for unsolicited telemarketing calls by bringing actions primarily in small claims court to recover statutory damages of $500 per call, or $1500 for willful violations.[56] Over the years, the statute has morphed into a litigation juggernaut with multimillion dollar class action settlements becoming routine. There are several explanations. For one, the Commission has to date refused to make meaningful distinctions in its rules between "bad actor" telemarketers or scammers that inundate consumers with millions of unwanted calls on the one hand, and legitimate businesses that undertake informational communications of the kind Congress intended to leave unimpaired, but find themselves the subject to lawsuits despite good faith compliance efforts on the other.

Additionally, with the exception of expanding the TCPA to include texting, the Commission's rules treat calls to wireless customers as if cell phone technology and wireless service plans had not advanced from the 1990s, when 2G wireless services were just being deployed to the masses,[57] and each incoming call cost subscribers 50 cents to a dollar per minute. Moreover, mobile billing was completely different from traditional landline service. Landline customers were not billed at all for incoming calls, per minute charges were only imposed on those *making* outgoing calls under the concept of calling party pays.[58] Cellular subscribers, by

[56] *See Statement of Sen. Hollings,* 137 Cong. Rec 30821-30822, (1991) (expressing preference for small claims courts where consumers would appear without counsel).

[57] In 1991, when the TCPA was enacted, roughly 3 people out of a hundred had a cell phone and these were primarily professionals using their phones for business purposes. *See Mobile Cellular Subscriptions in the U.S.* available at https://fred.stlouisfed.org/series/ITCELSETSP2USA, (last visited June 7, 2018). The Commission did not begin reporting cellular phone usage until 1992, when it reported data compiled by the then-Cellular Telecommunications Industry Association showing some 7.5 million wireless subscribers in December 1991. *See* Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, 10 FCC Rcd. 8844, 8873, Table 1 (1995) (First CRMS Competition Report).

[58] *See e.g. FCC Seeks Comment on CMRS "Calling Party Pays" Service Option*, 12 FCC Rcd. 17693 (Sept. 25, 1997) ("CMRS telephone consumers throughout the Nation typically pay on a per minute basis for all calls they initiate or receive. The main billing difference between wireline and wireless telephone service is that a wireline telephone subscriber typically does not pay any additional charges to receive telephone calls, whereas most CMRS telephone subscribers pay a per minute charge to receive calls.") The exemption being "toll free" 800 calls in which

contrast, were billed for each minute of incoming as well as outgoing calls. With cell phone subscribers facing substantially different economic consequences than traditional wireline residential subscribers when receiving incoming telemarketing calls, it is no wonder that Congress treated the two differently and focused on the charges that wireless subscribers faced. Hence Section 227(b)(1)(A)(iii) makes it unlawful, in the absence of prior consent, to use an autodialer to make any call to a "cellular telephone service . . . or any service for which the called party is charged for the call." And Section 227(b)(2)(C) of the TCPA authorizes the Commission to exempt from that prohibition calls to a "cellular telephone service that are not charged to the called party." The latter provision effectively authorizes the Commission to treat "free" incoming calls to cell phones the same as incoming calls to residential landline phones.

Today's telecommunications landscape could not be more different. The majority of consumers today do not even subscribe to landline residential phone service. Approximately 51% of U.S. subscribers only have a mobile phone and, in a recent filing, US Telecom predicts that this number will increase to 60% by the end of this year.[59] Thus, for most consumers, a call to their home will be answered on their cell phone. Moreover, more than 90% of wireless consumers are not charged for incoming calls or texts but instead have unlimited calling and texting plans.[60] The Commission treats calls or texts to cell phones under unlimited calling plans as calls that "are not charged to the called party."[61]

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the called party, typically entities seeking to offer their customers or users a free method of calling them, assumed the costs of the call.

[59] Stephen J. Blumberg and Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey*, July-December 2016, NATIONAL CENTER FOR HEALTH STATISTICS, at 1 (May 2017), www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf (last visited June 11, 2018). *See Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141, at iii (filed May 4, 2018).

[60] Josh Zagorsky, *Almost 90% of Americans have Unlimited Texting*, INSTANT CENSUS (December 8, 2015), https://instantcensus.com/blog/almost-90-of-americans-have-unlimited-texting (last visted June 7, 2018).

[61] *In the Matter of Cargo Airline Association Petition for Expedited Declaratory Ruling Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 29 FCC Rcd. 3432, 3434, ¶12 (2014).

Nevertheless, Commission rules continue to treat calls to wireless phones much differently than calls to residential landline phones. For example, under the Commission's rules, *informational* calls to residential landline phones can be made using an autodialer or pre-recorded voice without express prior consent.[62] The same informational call made to a cellphone- even when that cell phone has replaced the consumer's residential landline phone- requires prior consent, exposing callers to substantial liability notwithstanding good-faith compliance efforts. In many instances, consumers provide their cellular telephone number as their residential number without indicating the number is associated with mobile service, requiring ADT to expend resources accessing database to determine whether the number is a wireless number.

The Commission should take this opportunity to eliminate the antiquated distinction between residential landline calls and calls to cell phones where the call recipient is not charged on a per minute basis. Exercising its authority under Section 227(b)(2)(C) to, "by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party," the Commission should exempt informational "free" calls (or texts) made to cell phones. In other words, "free" informational calls may be made to cell phones without prior consent, just as is the case for residential wireline calls. Informational calls should be defined consistent with Commission's rules applicable to residential landline calls as those not made for commercial purposes or those made for a commercial purpose, *e.g.*, collection calls, that do not include an unsolicited advertisement.[63]

[62] 47 CFR § 64.1200 (a)(3)(ii) & (iii).
[63] *See, e.g.* 47 C.F.R. § 64.1200 (a)(3)(ii),(iii).

Further, consistent with Commission precedent, the Commission should define a free cellular call as one made to a subscriber of an unlimited calling or texting plan. Although a caller may not know in advance of making the call that the called party is under such a plan, the caller should be able to assert as an affirmative defense that the called party was in fact under such a plan – an easily ascertainable fact. Alternatively, the caller could enter into an arrangement with a third-party vendor of the type the Commission has previously identified that will ensure the call is free.[64] Where the vast majority of calls are in fact free, however, the called party should not be compelled to use a third party to pay for ensuring a call is free when in the vast majority of cases will in fact be free.

The statue places no limits on the extent of the Commission's authority to exempt free cellular calls from the proscriptions in Section 227(b)(1)(A)(iii), other than to permit the Commission to adopt conditions "as necessary in the interest of the privacy rights this section is intended to protect."[65] ADT recognizes that an open-ended ability to call cell phone subscribers without consent, even for informational calls, may be abused by callers and result in violating the privacy interests that the TCPA is intended to protect. ADT believes that such protections may be afforded by placing reasonable limits on the frequency of calls, which may vary depending on the nature of the call. For example calls to alert consumers of fraud may be made with more frequency over a shorter period of time than calls to collect a debt. Moreover, it would be reasonable to provide more latitude for texts than for calls. Texts are less intrusive. The Commission should also distinguish between call attempts and actual contacts. Callers also should provide a clear, easy-to-use opt out mechanism (when consent is not provided as part of a bargained-for exchange in a contract) and have processes to ensure that such requests are

[64] See *2015 TCPA Order*, 30 FCC Rcd. 8023, at ¶127.
[65] 47 USC § 227(b)(2)(C).

promptly honored. Subject to these limitations, which would act as a safe harbor, callers may make autodialed or prerecorded informational calls to cell phones without prior consent. Calls in excess of these limitations may result in liability if made without prior express consent, subject to the rules and interpretations that Commission may otherwise adopt.

Exempting "free" informational calls to cell phone users as described above draws clear lines that callers can readily understand without needing to consult Commission rules and interpretations. Previous efforts to expand or constrict TCPA liability through definitional interpretations of terms such "automatic telephone dialing systems" or "called party" have only led to uncertainty and further litigation. Revised interpretations of these terms as proposed in preceding sections of these comments and by other parties will help alleviate abusive litigation, but may not withstand efforts by creative counsel to find grounds for continuing lawsuits. The Commission thus should consider as a supplemental or alternative approach one that updates the TCPA to reflect today's vastly different telecommunications market place by eliminating antiquated distinctions between landline and wireless calls, and that draws true distinctions between "informational" and abusive telemarketing calls.

CONCLUSION

ADT respectfully requests that the Commission undertake the actions described above and develop a TCPA framework that both industry and consumers can readily understand and offers reasonable protections for all parties.

Respectfully submitted,

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