

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Interpretation of the Telephone Consumer	)	CG Docket No. 18-152
Protection Act	)	CG Docket No. 02-278
	)	
	)	
To: Consumer and Governmental Affairs Bureau	)	

**COMMENTS OF TECHFREEDOM**

TechFreedom, through undersigned counsel and pursuant to Sections 1.415 and 1.419 of the Commission’s rules (47 C.F.R. §§ 1.415 & 1.419), submits these Comments in the above-referenced proceedings in response to the Commission’s Public Notice of May 14, 2018.<sup>1</sup> In the *Public Notice*, the Commission seeks comment on how it should interpret the term “automatic telephone dialing system” (“ATDS”) under the Telephone Consumer Protection Act (TCPA),<sup>2</sup> in light of the D.C. Circuit’s decision in *ACA International v. FCC*.<sup>3</sup>

As discussed below, the Commission’s interpretation and application of the ATDS definition should promote, rather than discourage, the development of call delivery technologies that improve consumer communication and minimize errors and abuses. Congress invited such progress when it limited only the use of specific dialing technologies, primitive even for their

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<sup>1</sup> *Public Notice*, DA 18-493, released May 14, 2018.

<sup>2</sup> 47 U.S.C. § 227; *see also* 47 C.F.R. § 64.1200 (implementing regulations).

<sup>3</sup> *ACA Int’l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (mandate issued May 8, 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. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (*2015 TCPA Declaratory Ruling and Order*)).

time, that have since been superseded by systems that better serve the public's convenience and safety. Unfortunately, in the Commission's attempts to protect consumers from unwanted, and in some cases illegal, "robocalls," it has interpreted the ATDS definition so broadly that it has stifled the technological innovation Congress was looking for and has forced equipment manufacturers and call center operators to introduce Rube Goldberg-esque systems. These forced human interaction systems introduce calling errors which themselves result in calls that could violate the TCPA. TechFreedom welcomes the Commission's decision to revisit and correct those interpretations, and offers these comments in support of that effort.

## I. ABOUT TECHFREEDOM

TechFreedom is a non-partisan think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

## II. DISCUSSION

When Congress drafted the so-called robocall provisions of the TCPA, it sought to discourage telemarketers' misuse of a crude, inefficient, and potentially harmful technology: the random or sequential number generator, which can produce lists of telephone numbers with no common characteristics except their adherence to the format of the North American Numbering Plan.<sup>4</sup> Many numbers generated in this way will not even have been assigned to telephone

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<sup>4</sup> A random number is "one from a sequence without any detectable bias or pattern," generally achieved in a computer "by an algorithm which is a pseudo-random number generator." *Cambridge Dictionary of Science and Technology*, p. 741 (Cambridge Univ. Press 1988). A number sequence is "an ordered set of numbers derived according to a rule, each member determined directly or from the preceding terms." *Id.*, p. 802. Instructions for generating random or sequential phone number lists, including the rules for valid

carriers or their customers; many will have been assigned to emergency, medical, public safety or other services that could become unavailable for their intended purpose if inundated with telemarketing calls. When lists of numbers generated randomly or in sequence are coupled with automatic dialing devices that rapidly initiate high volumes of calls, the result is the very harms that Congress rightly identified as a threat to public safety communications.<sup>5</sup> Congress, in the TCPA addressed this threat precisely, defining an automatic telephone dialing system as equipment with the capacity to “store or produce telephone numbers to be called, using a random or sequential number generator; and . . . to dial such numbers.”<sup>6</sup>

Congress could have cast a wider net. It could have defined the ATDS category to include devices that dial from lists of numbers not generated randomly or in sequence; it could have included systems that dial a defined volume of numbers over a particular period of time; or it could simply have limited the use of devices that offer *any* efficiency advantages over manual dialing. By *not* opting for any such broader definition, Congress left open the way for better technologies that would correct the problems posed by reliance on random or sequential number generation. In this way, the TCPA encouraged innovation and marketplace dynamism.

Unfortunately, when entrepreneurs and designers of dialing equipment rose to Congress’s challenge, delivering such pro-consumer, pro-public-safety innovations, the Commission struck them down. In 2003, the Commission was first asked to classify the predictive dialer – a system

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numbers under the North American Numbering Plan, are widely available. *See* J. Zinicola, “How to Generate Random Names & Phone Numbers with PowerShell,” available at <http://www.howtogeek.com/190088/how-to-generate-random-names-phone-numbers-with-powershell.htm> (last visited Jun. 11, 2018).

<sup>5</sup> “Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers.” H.R. Rep. No. 102-317, H.R. Rep. No. 317, 102<sup>nd</sup> Cong., 1<sup>st</sup> Sess. 1991, 1991 WL 245201 (Leg. Hist.).

<sup>6</sup> 47 U.S.C. § 227(a)(1).

that corrected the principal defect of the random or sequential number generator and added other improvements as well. Predictive dialers do not initiate prerecorded “robocalls”; they assign outbound calls to live agents, using an algorithm that predicts when an agent will be available to speak to a person to whom a call has been completed.<sup>7</sup> Predictive dialers work from lists of numbers that have been assigned to individual telephone subscribers, and that can be “scrubbed” to eliminate telephone numbers of emergency services, hospital patient rooms, and other destinations and services identified in the TCPA as invested with a public interest. In short, the predictive dialer is precisely the kind of technology Congress encouraged when it adopted its narrow definition of the ATDS category.

As we hope the Commission now will recognize, this approach arbitrarily removed, rather than facilitated, the latitude Congress had given innovators to correct the deficiencies of dialing based upon random or sequential number generation. Effectively, it killed any incentive to innovate to develop technologies that would better serve consumers and protect public safety.

As Chairman Pai pointed out, in his Dissenting Statement Accompanying the *2015 TCPA*

*Declaratory Ruling and Order:*

Congress expressly targeted equipment that enables telemarketers to dial random or sequential numbers in the TCPA. If callers have abandoned that equipment, then the TCPA has accomplished the precise goal Congress set out for it. And 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.<sup>8</sup>

The Commission expanded upon its perverse approach when it pronounced various, vague criteria under which future improved technologies might be classified as ATDSs. Notably,

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<sup>7</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14091 (2003) (*2003 TCPA Order*).

<sup>8</sup> *2015 TCPA Declaratory Ruling and Order*, Dissenting Statement of Commissioner Ajit Pai, 30 FCC Rcd 7961, 8076.

the Commission opined, in 2003 and again in 2008, that the “basic function” of an ATDS is the capacity “to dial numbers without human intervention.”<sup>9</sup> This formulation, at least, suggested a safe harbor for designers and users of dialing equipment: as long as a device relied at some point on human intervention, it would (at the cost of needless inefficiency in the introduction of human error into the dialing chain) escape classification as an ATDS. Even this guidance, however, was effectively rendered useless in 2015, when the Commission announced that the absence of human intervention might not be a sufficient criterion for ATDS classification after all; and that the Commission also would consider whether a dialing system had the capacity to dial “thousands of numbers in a short period of time.”<sup>10</sup> As the D.C. Circuit Court of Appeals correctly found, this uncertain guidance left “affected parties in a significant fog of uncertainty about how to determine if a device is an ATDS,” and therefore “fail[ed] to satisfy the requirement of reasoned decisionmaking.”<sup>11</sup>

Besides its incoherence as agency decision-making, the Commission’s insistence on a vaguely-defined, but apparently unbounded, ATDS category had consequences that went beyond discouraging the deployment of predictive dialers. Instead of designing the most efficient and accurate dialing systems that advancing technology would support, manufacturers and users introduced deliberate inefficiencies that served no other purpose than to reduce the users’ exposure to TCPA class-action lawsuits.<sup>12</sup> Those inefficiencies include the obvious, such as

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<sup>9</sup> *2003 TCPA Order*, 18 FCC Rcd 14014, 14091-14902; *see also Rules and Regulations Implementing the Communications Act of 1991; Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, 23 FCC Rcd 559, 556 (2008).

<sup>10</sup> *2015 TCPA Declaratory Ruling and Order*, 30 FCC Rcd 7961, 7973.

<sup>11</sup> *ACA*, 885 F.3d at 703.

<sup>12</sup> As the Court of Appeals in *ACA International* pointed out, the TCPA’s “private right of action permit[s] aggrieved parties to recover at least \$500 for each call made (or text message sent) in violation of the statute, and up to treble damages for each ‘willful[] or knowing’ violation, . . . [with] no cap on the amount

having live agents press ten digits individually for each call (with the inevitable dialing errors, including unintended calls to the very public-safety and emergency numbers Congress intended to protect); or having agents retrieve numbers individually from a database, display them on a monitor and manually click a dialing command for each call.

But these are not the most tortured efforts the Commission's wrongheaded guidance has produced. Notably, in an attempt to include human intervention in the dialing process, some call centers require an agent to report an hour or more before other agents' shifts begin. As rapidly as can be managed, the agent then clicks a mouse button for at least an hour, manually selecting numbers to be dialed, using an application that processes and makes a record of those inputs. (Some call centers even rig a foot pedal that transmits the same input as a mouse click, in the apparent belief that a tapping foot is faster than a tapping finger.)

None of these arrangements confers any benefit on businesses or consumers. The recipients of calls neither know nor care how those calls were placed. The callers incur needless costs that inevitably are passed on to consumers. And TCPA requirements are not satisfied – indeed, it created an overbroad interpretation of the TCPA that the Court of Appeals has set aside as irrational.<sup>13</sup> The Commission should take the opportunity of this Public Notice, and the

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of recoverable damages." *ACA*, 885 F.3d at 693. Plaintiff's attorneys have exploited the Commission's overbroad interpretation of the ATDS definition to obtain damages awards that burden legitimate businesses and impose costs that are passed on to consumers. See "TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits," U.S. Chamber Institute for Legal Reform, (August, 2017), <http://www.instituteforlegalreform.com/research/tcpa-litigation-sprawl-a-study-of-the-sources-and-targets-of-recent-tcpa-lawsuits>. As the Court of Appeals also pointed out, the Commission's expansive interpretation of the autodialer definition has the potential to expose individual users of ordinary smartphones to substantial TCPA damages awards. *Id.* at 692.

<sup>13</sup> The *ACA* decision points out that under the FCC's 2015 interpretation, virtually every smartphone is an ATDS. "It cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact." *ACA*, 885 F.3d 698.

mandate from the Court of Appeals, to confirm the pro-innovation approach Congress took when it adopted the TCPA.

Finally, TechFreedom recognizes that the TCPA is above all a consumer protection statute, and that the Commission's interpretation of the TCPA, while confined by the statutory language, must be informed by awareness of the effect of its interpretation on the public interest. Recognition of the narrow scope of the TCPA's ATDS definition will further the interests of consumers. As noted earlier, a new ATDS definition that adheres to the statutory language will permit the use of dialing technologies that are more accurate (resulting in fewer calls placed in error to persons who do not wish to receive them, or to numbers associated with emergency or public safety services) and less burdensome in terms of call center costs that must be passed on to consumers.

Such a decision will leave in place *all* of the TCPA protections that Congress intended. Callers (including consumers using smartphones to make calls) that do not rely on random or sequential number generation will not be required to obtain prior express consent to send automated fraud alerts, data security breach notifications, and other communications that the Commission already has recognized to be in the public interest.<sup>14</sup> At the same time, telemarketing calls (whether automated or manual) will be subject to the regulations implementing the national do-not-call registry and requiring telemarketers to maintain company-specific do-not-call lists.<sup>15</sup> Similarly, prerecorded and artificial voice calls placed to mobile devices for any purpose, and prerecorded and artificial voice telemarketing calls placed to

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<sup>14</sup> *2015 TCPA Declaratory Ruling and Order*, 30 FCC Rcd 7961, 8023.

<sup>15</sup> 47 C.F.R. §§ 64.1200(c)-(d).

residences, will continue to require the prior express consent of the called party.<sup>16</sup> Thus, consumers will continue to enjoy the same degree of control over unwanted calls. All that will be changed is the removal of needless inefficiencies into dialing processes that pose no threat to consumers.

The FCC should also acknowledge that the Federal Trade Commission has jurisdiction to bring enforcement actions against telemarketers who violate the National Do Not Call (DNC) Registry. In March of this year, the FTC filed a complaint and then settled through a consent decree claims that a security company “called millions of consumers whose numbers are on the National Do Not Call (DNC) Registry.”<sup>17</sup> The FTC continues to enforce violations of the DNC Registry, and a proper redefinition of ATDS will not leave consumers unprotected against unwanted robocalls.

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<sup>16</sup> 47 C.F.R. §§ 64.1200(a)(2)-(a)(3).

<sup>17</sup> See <https://www.ftc.gov/news-events/press-releases/2018/03/ftc-charges-convict-telemarketer-millions-illegal-calls> (last visited June 12, 2018).<https://www.ftc.gov/news-events/press-releases/2018/03/ftc-charges-convict-telemarketer-millions-illegal-calls> (last visited June 12, 2018).<https://www.ftc.gov/news-events/press-releases/2018/03/ftc-charges-convict-telemarketer-millions-illegal-calls> (last visited June 12, 2018).<https://www.ftc.gov/news-events/press-releases/2018/03/ftc-charges-convict-telemarketer-millions-illegal-calls> (last visited June 12, 2018).



### **III. CONCLUSION**

TechFreedom welcomes the opportunity to participate in this proceeding, and hopes that its pro-technology and pro-market perspective will assist the Commission in reforming the interpretation and enforcement of the TCPA.

Respectfully submitted,

**TECHFREEDOM**

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