

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

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 DC Circuit's <i>ACA International</i> Decision	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

**COMMENTS OF CTIA**

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**COMMENTS OF CTIA**

**I. INTRODUCTION AND SUMMARY.**

CTIA<sup>1</sup> respectfully submits these comments in response to the Federal Communication Commission (FCC or Commission) Consumer & Government Affairs Bureau’s (Bureau) *Public Notice* in the above-captioned proceedings.<sup>2</sup> The *Public Notice* seeks comment on certain issues regarding the “interpretation and implementation of the Telephone Consumer Protection Act (TCPA) following the recent decision of the U.S. Court of Appeals for the District of Columbia in *ACA International v. FCC*,”<sup>3</sup> including, *inter alia*, “how to treat calls to reassigned wireless

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<sup>1</sup> CTIA® (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association’s members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry’s voluntary best practices, hosts educational events that promote the wireless industry, and co-produces the industry’s leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

<sup>2</sup> *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*).

<sup>3</sup> *Id.*; see also *ACA Int’l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

numbers under the TCPA,” and “how a called party may revoke prior express consent to receive robocalls.”<sup>4</sup>

CTIA and its member companies support the Commission’s goals of reducing unwanted robocalls to consumers and mitigating TCPA liability for callers acting in good faith. CTIA has consistently supported voluntary industry and Commission efforts to reduce unwanted robocalls from bad actors.<sup>5</sup> CTIA also recognizes that good-faith callers have faced significant legal liability and uncertainty due to the Commission’s TCPA interpretations, some of which were struck down by the D.C. Circuit’s *ACA* decision. For this reason, CTIA encourages the Commission to resolve the outstanding issues in this proceeding expeditiously.

Specifically, the Commission should confirm that: (1) “called party” means the caller’s “intended” or “expected” recipient for the call; and (2) callers may reasonably rely on the “prior express consent” provided by the “intended” or “expected” recipient, including when that recipient erroneously provides an incorrect number or when the telephone number has been reassigned to a new subscriber. Doing so would be consistent with the Commission’s past rulings regarding the scope of a caller’s “reasonable reliance” on “prior express consent.”

The Commission should also clarify when a good-faith caller has demonstrated reasonable reliance upon “prior express consent” in the context of calls to reassigned or wrong numbers. It should incentivize callers to reduce unwanted calls by creating a safe harbor for callers that utilize increasingly robust market-based TCPA compliance solutions to determine

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<sup>4</sup> *Public Notice* at 3-4.

<sup>5</sup> Comments of CTIA, CG Docket Nos. 17-59, 02-278 at 4-5 (filed Aug. 28, 2017) (describing CTIA’s past efforts to reduce unwanted calls and maintain messaging as a trusted ecosystem by consumers).

whether a number has been reassigned.<sup>6</sup> As CTIA has explained, a safe harbor approach to the reassigned telephone number issues would be consistent with the D.C. Circuit’s *ACA* decision and the Commission’s statutory authority.<sup>7</sup> The Commission should resolve the open reassigned telephone number issues in this proceeding before considering whether to mandate the creation of a costly, burdensome database of reassigned telephone numbers.

In addition, to reduce confusion and promote consumer-friendly mechanisms to revoke “prior express consent,” the Commission should clarify how a called party may reasonably opt out of receiving additional calls. Specifically, the Commission should find it reasonable for callers to enable consumers to opt out through means such as a toll-free number with an interactive mechanism, e-mail, mail, text message, website, or any other reasonable keyword-based alternative to stop receiving calls. By doing so, the Commission can provide greater certainty for when “clearly defined and easy to use” consent revocation methods are deemed reasonable.

By interpreting the TCPA’s terms consistent with these comments, the Commission will provide greater legal certainty under the TCPA for good-faith callers, incentivize efforts to thwart bad actors, and further protect consumers from unwanted calls while continuing to receive wanted calls.

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<sup>6</sup> See Comments of CTIA, CG Docket Nos. 17-59, 02-278 at 2 (filed June 7, 2018) (CTIA Reassigned Numbers *Second FNPRM* Comments).

<sup>7</sup> *Id.* at 11.

**II. TO PROVIDE GREATER LEGAL CERTAINTY AND MITIGATE UNWANTED CALLS TO REASSIGNED TELEPHONE NUMBERS, THE COMMISSION SHOULD CONFIRM THAT “CALLED PARTY” MEANS THE “INTENDED” OR “EXPECTED” RECIPIENT, AND THAT CALLERS MAY REASONABLY RELY ON THE “PRIOR EXPRESS CONSENT” THAT THEY OBTAIN.**

In the *Public Notice*, the Commission seeks comment on an appropriate framework for calls to reassigned telephone numbers, including how to interpret the term “called party,” whether to maintain a “reasonable-reliance” approach to “prior express consent,” whether a reassigned numbers safe harbor is necessary (and the Commission’s authority to adopt such a safe harbor), and the impact of the Commission’s separate reassigned numbers database proceeding.<sup>8</sup> As discussed below, CTIA encourages the Commission to confirm that “called party” means the “intended” or “expected” recipient and that callers may reasonably rely on the “prior express consent” that they obtain. The Commission should also adopt a safe harbor for callers that rely on qualifying market-based TCPA compliance solutions.

**A. The Commission Should Confirm That “Called Party” Means the “Intended” or “Expected” Recipient of the Call.**

Confirming that “called party” means the “intended” or “expected” recipient of the call is the most reasonable interpretation because it best aligns with known consumer behavior, supports continued legitimate business communications, and recognizes the technical challenges of detecting reassigned numbers with 100 percent certainty.

An “intended” or “expected” recipient standard encourages callers to stop calling when they learn about a reassignment or else risk substantial TCPA penalties. As Chairman Pai stated, “the expected-recipient approach gives legitimate businesses a clear and administrable means of complying with the law and engaging in ‘normal, expected or desired communications [with]

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<sup>8</sup> *Public Notice* at 3-4.

their customers.’’<sup>9</sup> An interpretation that “called party” means the “current subscriber,” by contrast, leaves good-faith callers guessing as to whether each call might violate the TCPA. As CTIA has explained, no solution for identifying reassigned numbers can be 100 percent foolproof,<sup>10</sup> and Congress cannot have intended full clairvoyance from callers. Consistent with these realities, the Commission and courts have recognized that federal statutes, including the TCPA, should not be construed to “demand the impossible.”<sup>11</sup> An “intended” or “expected” recipient standard would help ameliorate those challenges.

The “intended” or “expected” recipient standard would also encourage the new subscriber to notify the caller of the reassignment or inaccuracy.<sup>12</sup> Prior subscribers are unlikely to notify all companies with which they communicate that their telephone number has changed (and they may even provide the wrong number initially). Similarly, the new subscriber may not have had the opportunity to notify the caller that the number has been reassigned. Yet, as discussed, good-faith callers would not otherwise definitively know about all reassignments.

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<sup>9</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (*2015 TCPA Order*), at Dissent of then-Commissioner Pai (quoting Report of the Energy and Commerce Committee of the U.S. House of Representatives, H.R. Rep. 102-317, at 17 (1991)).

<sup>10</sup> See CTIA Reassigned Numbers *Second FNPRM* Comments at 6.

<sup>11</sup> See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 19 FCC Rcd 19215 ¶ 7 (2004) (adopting a 15-day safe harbor for wireline-wireless ports to avoid a construction of the statute that would “demand the impossible”); *McNeil v. Time Ins. Co.*, 205 F.3d 179, 187 (5th Cir. 2000) (“It is a flawed and unreasonable construction of any statute to read it in a manner that demands the impossible.”).

<sup>12</sup> It would also avoid incentivizing bad-faith parties from inviting mistaken calls to pile up for the sake of seeking TCPA damages. See *2015 TCPA Order*, at Dissent of then-Commissioner Pai (noting that “the [2015 Order’s] strict liability approach leads to perverse incentives. Most significantly, it creates a trap for law-abiding companies by giving litigious individuals a reason not to inform callers about a wrong number. This will certainly help trial lawyers update their business model for the digital age.”); *id.* at Dissent of Commissioner O’Rielly (predicting that the *2015 TCPA Order* “may have provided a new way for consumers acting in bad faith to entrap legitimate companies. A person could take a call, never let on that it’s the wrong person, and receive subsequent calls solely to trip the liability trap.”).

The Commission's TCPA framework should encourage both callers and recipients to take reasonable responsibility for avoiding calls to reassigned or wrong numbers and ensuring that consumers receive the calls they have requested. Although the D.C. Circuit suggested that "called party" may mean different things in different parts of the statute,<sup>13</sup> a reasonable interpretation of "intended" or "expected" recipient in this circumstance best incentivizes callers to obtain robust "prior express consent" and encourages recipients of the calls to notify callers that the number has been reassigned.

**B. The Commission Should Reject Strict Liability In Favor of a "Reasonable Reliance" Standard.**

The Commission should also confirm that callers may reasonably rely on the "prior express consent" that they receive from individuals, including when determining which party the caller "intended" or "expected" to reach. A reasonable-reliance standard would give good-faith callers the certainty needed to place calls that recipients have previously requested while reducing the threat of class-wide litigation exposure that may otherwise chill pro-consumer outreach related to healthcare reminders, power and utility updates, education notifications, account-related communications, and many other important services. A strict liability framework, by contrast, would continue to impede legitimate communications from callers that consumers want and expect. It would also be inconsistent with the *ACA* decision, in which the D.C. Circuit noted that to avoid being arbitrary and capricious, the FCC's interpretation of the TCPA must avoid outcomes under which "every uninvited communication from a smartphone

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<sup>13</sup> *ACA Int'l*, 885 F.3d at 706.



infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact.”<sup>14</sup>

The Commission has previously considered a caller’s reasonableness when addressing whether the caller had “prior express consent,”<sup>15</sup> and the Commission should continue to recognize that a caller’s reasonableness can be demonstrated via a variety of means, including for example whether the caller received any notification that the number has been reassigned. As a general matter, CTIA encourages the Commission to recognize that a caller does not violate the TCPA when it has reasonably demonstrated that it “intended” or “expected” to reach the subscriber who had granted consent, such as by placing a call after checking a qualifying market-based reassigned number database or after taking other reasonable actions.

The Commission should also take the additional narrow step of confirming that if a consumer consents to autodialed or prerecorded calls, but provides an incorrect number, a caller does not violate the TCPA by reasonably relying on and calling the number that the consenting consumer provided.

**C. The Commission Should Allow Callers to Demonstrate “Reasonable Reliance” By Adopting a Safe Harbor For Callers That Rely On Qualifying Market-Based TCPA Compliance Solutions.**

The Commission should also adopt a safe harbor for callers that utilize increasingly robust market-based TCPA compliance solutions. A safe harbor would establish a bright-line

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<sup>14</sup> *Id.* at 701.

<sup>15</sup> See, e.g., 2015 TCPA Order ¶ 75; *GroupMe, Inc./Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling*, Declaratory Ruling, 29 FCC Rcd 3442 ¶ 1 (2014) (clarifying circumstances under which a caller may reasonably demonstrate prior express consent when the consent was provided by an intermediary); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 27 FCC Rcd 15391 ¶¶ 1, 11 (2012) (*Soundbite Declaratory Ruling*) (clarifying the circumstances under which a caller may send a one-time, opt-out confirmation text message and providing a presumption of reasonableness for messages sent within five minutes of receiving the opt-out request).

baseline by which a caller has “reasonably relied” on the “prior express consent” it was given, though it would not be the exclusive means to establish reasonable reliance. As CTIA has noted in its recent comments in the reassigned numbers database proceeding, the Commission should establish a rule such that a caller that checks a “covered compliance solution” within a “covered period” (*e.g.*, several weeks) would not be liable for inadvertent calls to reassigned numbers.<sup>16</sup> Under this approach, the FCC’s rules would define “covered compliance solution” and state how long the “covered period” should be. Such a safe harbor would help spur more competition among solutions providers, facilitate increased database coverage and reliability, incentivize callers to subscribe to compliance solutions, and reduce further the number of unwanted calls to reassigned numbers.

The Commission has ample authority under the TCPA to adopt a safe harbor, and the safe harbor described above would be similar to other TCPA compliance frameworks that the Commission has adopted in the past. For example, the Commission has statutory authority to adopt a safe harbor as part of an interpretation of “called party,” as the D.C. Circuit’s *ACA* decision confirmed when it made clear that the term is ambiguous and susceptible to, *e.g.*, interpretations that mean “expected” or “intended” recipient.<sup>17</sup> The Commission also has statutory authority to adopt a safe harbor as an interpretation of the ambiguous phrase “prior express consent.” The Commission has repeatedly found that the term “prior express consent” is ambiguous under step one of *Chevron*, and it has previously adopted safe harbors and similar protections against liability when interpreting the term “prior express consent.”<sup>18</sup>

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<sup>16</sup> CTIA Reassigned Numbers *Second FNPRM* Comments at 10.

<sup>17</sup> *ACA Int’l*, 885 F.3d at 706-07.

<sup>18</sup> *See, e.g., 2015 TCPA Order* ¶ 75 (employing the concept of “reasonable reliance” in construing “prior express consent” when it found that a caller can rely on the consent given by a wireless number’s

Collectively, these decisions support the position that a safe harbor, grace period, or clarification would not contravene the TCPA's private right damages provisions. Even if the FCC cannot restrict the remedies for a TCPA violation, it can establish rules interpreting ambiguous provisions of the statute and prescribe what conduct may or may not rise to the level of a violation.

Finally, CTIA emphasizes that the Commission should adopt a sequenced approach to addressing reassigned numbers issues. It should first resolve the issues raised in the *Public Notice* and adopt the safe harbor mentioned above before assessing the value of any new reassigned numbers database requirements over existing voluntary, market-based solutions.<sup>19</sup>

In *ACA*, the D.C. Circuit vacated the *2015 TCPA Order* in its entirety as to reassigned numbers and the meaning of "called party."<sup>20</sup> Prior to *ACA*, however, the Commission proposed the creation of a new centralized database of reassigned telephone numbers as a potential solution to the significant liability risk created by the FCC's *2015 TCPA Order*. Because the D.C. Circuit struck down the Commission's 2015 treatment of reassigned numbers, articulating a new legal liability standard for calls to reassigned numbers should be the Commission's priority.<sup>21</sup> In short, as *ACA* previously noted, after the Commission fixes the *2015 TCPA Order*, "then the TCPA framework will be properly aligned, legitimate businesses will have a clear

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"customary user" ("such as a close relative on a subscriber's family calling plan") rather than by the subscriber herself); *Soundbite Declaratory Ruling* ¶¶ 111.

<sup>19</sup> CTIA Reassigned Numbers *Second FNPRM* Comments at 9.

<sup>20</sup> *ACA Int'l*, 885 F.3d at 708-09.

<sup>21</sup> *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Further Notice of Rulemaking, CG Docket No. 17-59 (rel. Apr. 24, 2018), at Statement of Commissioner O'Rielly ("Now that the court has tossed out the prior Commission's illogical approach, and made clear we can decide that callers are not liable unless they have actual knowledge that the number changed hands, there may be less value or need in creating a new database, at least from a legal liability perspective.").

pathway to TCPA compliance, and other ideas – like a reassigned number database – can be more meaningfully explored.”<sup>22</sup>

### **III. TO PROMOTE CONSUMER-FRIENDLY OPT-OUT MECHANISMS AND REDUCE CONFUSION, THE COMMISSION SHOULD DEEM AS REASONABLE “CLEARLY DEFINED AND EASY TO USE” CONSENT REVOCATION METHODS.**

In the *Public Notice*, the Commission seeks comment on “how a called party may revoke prior express consent to receive robocalls,” including “what opt-out methods would be sufficiently clearly defined and easy to use such that ‘any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable.’”<sup>23</sup>

CTIA encourages the Commission to provide additional clarity and guidance regarding the circumstances in which a called party’s consent revocation request will be deemed reasonable. Doing so will help protect consumers by encouraging callers to offer and promote user-friendly opt-out mechanisms. It will also help avoid confusion over whether a consumer intended to revoke his or her consent (which, given the potential for TCPA liability, could cause some callers to stop sending important, *wanted* calls out of an abundance of caution).

The Commission should confirm that providing certain “clearly defined and easy to use” consent revocation methods is deemed reasonable, meaning that if a caller provides such methods, called parties must revoke their consent using such methods.<sup>24</sup> The D.C. Circuit’s *ACA* decision indicates that the Commission has the statutory authority under *Chevron* to craft a more

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<sup>22</sup> Comments of ACA International, CG Docket No. 17-59 at 7 (Aug. 28, 2017).

<sup>23</sup> *Public Notice* at 3-4.

<sup>24</sup> In addition, the Commission should confirm that the TCPA does not require callers to offer consent revocation (or “opt out”) options for calls that do not require “prior express consent” in the first place (e.g., emergency calls, calls from wireless carriers to their own subscribers).

reasonable rule when it comes to revocation of consent.<sup>25</sup> A non-exhaustive list of the consent revocation methods that should be deemed reasonable by the Commission include, for example:

- Providing any of a centralized toll-free opt-out number, e-mail option, or postal mail option;
- Providing a website opt-out link;
- Including an interactive, opt-out mechanism on the call; or
- For text messages, providing any reasonable keyword-based alternative to stop receiving texts.

Further, the Commission should confirm that callers and called parties may otherwise agree (*e.g.*, via a contractual arrangement) to specific consent revocation methods. The Commission should also confirm that the TCPA does not require callers to offer consent revocation (or “opt out”) options for calls that do not require “prior express consent” in the first place (*e.g.*, emergency calls and calls from wireless carriers to their own subscribers).

The Commission has ample legal authority to provide more clarity and certainty for good-faith callers that have business relationships with their consumers. The D.C. Circuit’s *ACA* decision confirmed that the ruling “does not address revocation rules mutually adopted by contracting parties” and clarifies that “[n]othing in the Commission’s Order [ ] should be understood to speak to parties’ ability to agree upon revocation procedures.”<sup>26</sup>

#### **IV. CONCLUSION.**

After many years of litigation and uncertainty, the Commission now has the opportunity to fix its TCPA rules and bring much needed relief to good-faith callers that seek to communicate with consumers that have provided prior express consent. The Commission should

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<sup>25</sup> *ACA Int’l*, 885 F.3d at 709-10.

<sup>26</sup> *Id.* at 710.

confirm that: (1) “called party” means the caller’s “intended” or “expected” recipient of the call; (2) callers can “reasonably rely” on the “prior express consent”, including by relying on market-based TCPA compliance solutions for reassigned telephone numbers; and (3) callers may provide certain “clearly defined and easy to use” consent revocation methods to promote consumer-friendly opt-out mechanisms and reduce confusion. By interpreting the TCPA consistent with these comments, the Commission will provide greater legal certainty under the TCPA for good-faith callers, incentivize efforts to thwart bad actors, and further protect consumers from unwanted calls while allowing them to receive wanted calls.

Respectfully submitted,

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