

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

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

COMMENTS OF U.S. CHAMBER INSTITUTE FOR LEGAL REFORM

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Table of Contents

- I. INTRODUCTION AND SUMMARY 1
- II. THE CURRENT TCPA LANDSCAPE HARMS CONSUMERS AND LEGITIMATE BUSINESSES..... 3
 - A. Since Its Adoption in 1991, the TCPA Has Been Broadened Unreasonably and Misinterpreted, Leading to a Deluge of Costly Litigation. 3
 - B. Abusive TCPA Litigation Has Devastating Effects on Legitimate Businesses and Stifles Modern and Desired Communications. 6
 - C. Abusive Class Action Litigation Targets Legitimate U.S. Companies that Already Have Strong Incentives To Comply with the TCPA, Failing To Address the Real Problem of Intentional Fraud and Illegal Robocalls. 9
- III. THE COMMISSION SHOULD EXPEDITIOUSLY GRANT THE U.S. CHAMBER COALITION PETITION TO ALIGN THE INTERPRETATION OF ATDS WITH THE STATUTE AND COMMON SENSE, REDUCE ABUSIVE LITIGATION, AND CREATE CLEAR EXPECTATIONS. 10
 - A. In the 2015 Omnibus Order, the Commission Unreasonably Interpreted ATDS to Include All Modern Calling Equipment, Including Smart Phones and Tablets. .. 10
 - B. The D.C. Circuit Vacated the 2015 Omnibus Order’s Interpretation of ATDS. .. 11
 - C. The FCC Should Immediately Grant the U.S. Chamber Coalition Petition To Interpret ATDS in Line with the Statute and Common Sense, as Guided by the D.C. Circuit. 11
- IV. THE COMMISSION SHOULD TAKE REASONABLE AND PRACTICAL STEPS TO ELIMINATE STRICT LIABILITY FOR CALLS TO REASSIGNED NUMBERS. 13
 - A. The 2015 Omnibus Order Created a Strict Liability Regime for Calls to Reassigned Numbers Outside of the FCC’s Limited One-Call Safe Harbor, Opening the Floodgates to Abuse. 13
 - B. The D.C. Circuit Set Aside the Commission’s Treatment of Reassigned Numbers Because the One-Call Only Safe Harbor Was Arbitrary and Capricious 14
 - C. The FCC Should Clarify Its Reasonable Reliance Approach to Reassigned Numbers, Couple Any Database or Other Tool with Safe Harbors, and Call for a Moratorium on Reassigned Numbers Litigation Until the Issue Is Resolved. 15
- V. THE COMMISSION SHOULD GIVE CLEAR GUIDANCE ABOUT REVOCATION.. 20

A.	The D.C. Circuit Affirmed that Consumers Have the Right To Revoke Consent Through Any Reasonable Means and that Callers Are Not Required To Adopt Unduly Burdensome Systems to Process Revocations.....	20
B.	The FCC Should Immediately Recognize Per Se Reasonable Opt-Out Tools.	21
VI.	CONCLUSION.....	24

I. INTRODUCTION AND SUMMARY

The U.S. Chamber of Commerce (“U.S. Chamber”) is the world’s largest business federation, representing the interests of more than three million businesses of all sizes and sectors, as well as state and local chambers and industry associations. The Chamber Technology Engagement Center (“C_TEC”) promotes the role of technology in our economy and advocates for rationale policy solutions that drive economic growth, spur innovation, and create jobs. The U.S. Chamber Institute for Legal Reform (“ILR”) is an affiliate of the Chamber that promotes civil justice reform through regulatory, legislative, judicial, and educational activities at the global, national, state, and local levels. ILR has long been involved in work to curb litigation abuse under the Telephone Consumer Protection Act (“TCPA”), which imposes substantial compliance burdens on American business, impedes how businesses communicate with their customers, and generates enormous litigation risk and expense. ILR engages in research and publishes papers analyzing the TCPA, concluding that the TCPA is a major impediment to commerce.¹ The U.S. Chamber, with a large coalition, filed a Petition for Declaratory Ruling (“U.S. Chamber Coalition Petition”)² shortly after the D.C. Circuit’s decision in *ACA*

¹ See, e.g., *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits; Engineered Liability: The Plaintiffs’ Bar’s Campaign To Expand Data Privacy and Security Litigation*, U.S. Chamber Institute for Legal Reform, at 5 (Aug. 2017), http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf.

² The U.S. Chamber Coalition that filed that Petition consists of: U.S. Chamber of Commerce, the U.S. Chamber Institute for Legal Reform, and the U.S. Chamber Technology Engagement Center (collectively “the Chamber”); ACA International; American Association of Healthcare Administrative Management; American Bankers Association; American Financial Services Association; Consumer Bankers Association; Consumer Mortgage Coalition; Credit Union National Association; Edison Electric Institute; Electronic Transactions Association; Financial Services Roundtable; Insights Association; Mortgage Bankers Association; National Association of Federally-Insured Credit Unions; National Association of Mutual Insurance Companies; Restaurant Law Center; and Student Loan Servicing Alliance.

International v. FCC.³ ILR applauds the Federal Communications Commission (“FCC” or “Commission”) for taking action to restore reason to the TCPA landscape by issuing this *TCPA Public Notice* (“Notice”).⁴

The D.C. Circuit’s decision in *ACA International* provides the Commission with an opportunity to restore reason to the TCPA, a regime that has been unreasonably broadened in scope and misinterpreted for years, harming both consumers and legitimate businesses. Current FCC leadership was appalled at the adoption of the *2015 Omnibus Order*, making impassioned arguments against expanding the reach and scope of liability of the TCPA, which was already out of control. The D.C. Circuit, by vacating the most egregious portions of the *2015 Omnibus Order*, has provided a roadmap for the current Commission to take meaningful action to restore reason to the TCPA landscape.

The FCC can take several practical steps to reduce litigation abuse and provide clear guidance for consumers and businesses in the wake of the D.C. Circuit decision.

- The Commission should expeditiously grant the U.S. Chamber Coalition Petition to interpret the term automatic telephone dialing system (“ATDS” or “autodialer”) in line with the statute and common sense, as guided by the D.C. Circuit. This should be done immediately and should not await resolution of other TCPA issues.
- The Commission should clarify its reasonable reliance approach to reassigned numbers. It can establish appropriate reassigned numbers safe harbors through which well-meaning companies can avoid the unfairness of strict liability, if the FCC decides to move forward with a reassigned numbers database or other tool. Meanwhile, the Commission should call for an immediate moratorium on reassigned numbers litigation.

³ *ACA Int’l v. FCC*, 885 F.3d 687, 698-700 (D.C. Cir. 2018).

⁴ *Interpretation of the Telephone Consumer Protection Act in Light of DC Circuit’s ACA International Decision*, Public Notice, DA 18-493 (May 14, 2018) (“*Public Notice*”).

- The Commission should provide clear guidance to businesses and consumers about revocation. It should recognize a set of *per se* reasonable free, ubiquitous, and easy-to-use opt-out tools for consumers to revoke consent. It should create a complementary presumption regarding reasonableness to protect companies that implement two or more such *per se* reasonable tools. Additionally, the Commission should create a straightforward process for companies to add to the *per se* reasonable opt-out tools. It should also clarify that parties are free to agree mutually upon a method of revocation.

II. THE CURRENT TCPA LANDSCAPE HARMS CONSUMERS AND LEGITIMATE BUSINESSES.

A. Since Its Adoption in 1991, the TCPA Has Been Broadened Unreasonably and Misinterpreted, Leading to a Deluge of Costly Litigation.

When Congress enacted the TCPA over 25 years ago, its intent was to stop “intrusive nuisance calls,”⁵ such as abusive cold-call telemarketing and fax-blast spamming.⁶ The Commission acknowledged that its rules implementing the TCPA “restrict the most abusive telemarketing practices.”⁷ But decades of interpretation and Commission action have warped the TCPA’s original focus on abusive practices and created a regime that encourages crippling lawsuits against legitimate businesses acting in good faith.

⁵ *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 370 (2012) (also citing the Preamble of the TCPA); *see also Emanuel v. Los Angeles Lakers, Inc.*, 2013 WL 1719035, at *3 (C.D. Cal. Apr. 13, 2013) (“Courts broadly recognize that not every text message or call constitutes an actionable offense; rather, the TCPA targets and seeks to prevent the proliferation of intrusive, nuisance calls.”) (internal quotations and citation omitted).

⁶ *See* S. Rep. 102-178 at 1-2 (1991) (stating that the purpose of the TCPA is to “plac[e] restrictions on unsolicited, automated telephone calls to the home” and noting complaints about telemarketing calls); H.R. Rep. No. 102-317 at 6-7 (1991) (citing telemarketing abuse as the primary motivator for legislative action leading to the TCPA). *See also* Comments of the U.S. Chamber and ILR, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 2-3 (filed Mar. 10, 2017).

⁷ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd. 8752, 8760 (n.24) (Oct. 16, 1992) (“1992 Report and Order”).

Too often, past Commissions have failed to implement the FCC’s longstanding view that the TCPA rules should “reasonably accommodate[] individuals’ rights to privacy as well as the legitimate business interests of telemarketers.”⁸ Instead, past Commissions have reached beyond their authority and the plain text of the statute to expand the reach of the law and unreasonably stifle legitimate business activity. The *2015 Omnibus Order* is a clear example of this past overreach. Over the dissents of then-Commissioner Pai and Commissioner O’Rielly, the Commission expanded the definition of an automatic telephone dialing system (“ATDS”) to include smart phones and tablets, and it essentially imposed strict liability for calls to reassigned numbers. Other Commission action, such as the approach to vicarious liability, has led to increases in frivolous litigation.⁹

The expansive interpretation and implementation of the TCPA exemplified by the *2015 Omnibus Order*, combined with the statute’s uncapped statutory damages that are not tied to actual harm, have resulted in the TCPA becoming the “poster child for lawsuit abuse.”¹⁰ In 2007,

⁸ *1992 Report and Order* at 8754 (¶ 1); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 10 FCC Rcd. 12391, 12393 (¶ 4) (Aug. 7, 1995) (“[This Order] seeks to balance the concern that consumers’ privacy be protected with the imperative that telemarketing practices not be unreasonably hindered.”); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd. 14014, 14017 (¶ 1) (July 3, 2003) (“We believe the rules the Commission adopts here strike an appropriate balance between maximizing consumer privacy protections and avoiding imposing undue burdens on telemarketers.”); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd. 1830, 1839 (¶ 24) (Feb. 15, 2012) (“[I]ndividuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals [and] permits legitimate telemarketing practices.”).

⁹ *See DISH Network, LLC*, CG Docket No. 11-50, Declaratory Ruling, 28 FCC Rcd. 6574 (Apr. 17, 2013).

¹⁰ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961, (July 10, 2015) (Pai Dissent) (“*2015*

there were only 14 TCPA litigants, but by 2016 that number had exploded to 4860.¹¹ From 2015 to 2016 alone, TCPA litigation grew by 31.8%.¹² ILR’s own study shows that the *2015 Omnibus Order* contributed to a 46% increase in TCPA litigation in the 17-month period following its issuance.¹³

Current FCC leadership and others have recognized the escalating problem of TCPA litigation abuse. In his dissent to the *2015 Omnibus Order*, then-Commissioner Pai noted that “trial lawyers have found legitimate, domestic businesses a much more profitable target” than “illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters.”¹⁴ He lamented that the *2015 Omnibus Order* would “make abuse of the TCPA much, much easier” by “twist[ing] the law’s words even further to target useful communications between legitimate businesses and their customers.”¹⁵

Commissioner O’Rielly described TCPA implementation as “[f]ar from protecting consumers” and one that “paints companies from virtually every sector of the economy as bad actors, even when they are acting in good faith to reach their customers.”¹⁶ As he explained,

Omnibus Order”); *see also* Testimony of Scott Delacourt before the Senate Comm. on Commerce, Science & Transportation, 115th Cong. (Apr. 18, 2018).

¹¹ *See 2016 Year in Review: FDCPA Down, FCRA & TCPA Up*, WebRecon LLC, <https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/> (“*2016 Year in Review*”).

¹² *See id.*

¹³ *See TCPA Litigation Sprawl*, U.S. Chamber Institute for Legal Reform at 2, http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf; *see also* Scott Delacourt before the Senate Comm. on Commerce, Science & Transportation, 115th Cong. (Apr. 18, 2018).

¹⁴ *2015 Omnibus Order* (Pai Dissent).

¹⁵ *Id.*

¹⁶ *Id.* (O’Rielly Dissent).

[P]rior decisions by the Federal Communications Commission and courts throughout the country have expanded the boundaries of TCPA far beyond what I believe Congress intended, as evidenced by the actual wording of the statute. As the scope of TCPA has increased, so too has TCPA litigation. Thousands of lawsuits are filed each year against businesses who thought they were taking the right precautions to stay within the law.¹⁷

In the words of the former Chief of Staff for Commissioner Clyburn: “[A]ll is not well. Somewhere along the line, the reasonable balance that was originally intended shifted away from business into the hands of activist plaintiffs’ lawyers, and they have taken it all the way to the bank.”¹⁸

Now is the time to meaningfully address TCPA litigation abuse by taking the practical steps detailed below that will provide clear guidance for both consumers and businesses.

B. Abusive TCPA Litigation Has Devastating Effects on Legitimate Businesses and Stifles Modern and Desired Communications.

The multi-million dollar judgments and settlements that are all-too-familiar to the TCPA landscape harm and contribute to the shuttering of legitimate businesses that contribute positively to the economy and society. Even when companies can withstand such judgments—or whether their potential—abusive TCPA litigation diverts resources and ends valuable programs.

For example, Outcome Health, a U.S. healthcare technology company, provided desired, beneficial text communications to its customers about health and well-being.¹⁹ But when a single customer complained about being unable to unsubscribe from the program due, it turned out, to

¹⁷ O’Rielly Remarks to ACA International’s Washington Insights Conference (May 4, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344718A1.pdf.

¹⁸ A. Hoffman, *Does TCPA stand for ‘total cash for plaintiffs’ attorneys’?*, The Hill (Feb. 17, 2016), <http://thehill.com/blogs/pundits-blog/technology/269656-does-tcpa-stand-for-total-cash-for-plaintiffs-attorneys>.

¹⁹ See Petition of ContextMedia, Inc. d/b/a Outcome Health for Clarification, or, in the Alternative, for Declaratory Ruling, CG Docket No. 02-278 (filed Oct. 20, 2017) (“*Outcome Health Petition*”); see also U.S. Chamber of Commerce Comments, CG Docket No. 02-278 (filed Dec. 12, 2017).

an unknown and inadvertent technical error, Outcome Health shut down the entire program. Although it shut the program down and acted quickly to fix the inadvertent technical error, Outcome Health faces a demand for \$192 million in fines under the TCPA.²⁰ In another example, Bank of America agreed to settle with a class of 7.7 million people for just over \$32 million in 2013 to settle a series of TCPA class actions. Although it conceded no violation of the statute, the bank agreed that it would not oppose any request from plaintiffs’ counsel for fees up to 25% of the settlement—or \$8 million. Had the bank not settled, it could have faced damages in the billions.

The risk of staggering TCPA liability hurts not only legitimate businesses but also their consumers. It reduces the amount of modern, timely, and desired communications between consumers and the legitimate companies with which they choose to do business, and it increases the costs of goods and services. As Commissioner O’Rielly has chronicled, consumers demand modern services and communications through text and other forms of communications on topics ranging from health care to energy to education “as long as they provide *timely* and *relevant* information.”²¹ The vast majority of consumers want to “use messaging [including SMS] to communicate with businesses,” and “be able to receive information [and] reply to businesses or engage in conversation” using messaging.²² However, fewer than half of businesses are

²⁰ *Outcome Health Petition* at 6.

²¹ *2015 Omnibus Order* (O’Rielly Dissent) (emphasis in original).

²² *See Understanding How Consumers Use Messaging: Global Mobile Messaging Consumer Report 2016*, Twilio at 6, 17 (2016), https://assets.ctfassets.net/2fcg2lkzxw1t/514ljDXMvSKkqiU64akoOW/cab0836a76d892bb4a654a4dbd16d4e6/Twilio_-_Messaging_Consumer_Survey_Report_FINAL.pdf (citing 2016 report finding that 89% of consumers would like to use messaging to communicate with businesses and 85% would like to receive information from and reply to businesses via messaging). Indeed, the Commission has acknowledged that “85 percent of consumers prefer to receive a text over a phone call or an email, at least 77 percent of text-capable 18-34 year-olds look favorably on

equipped to provide such communications.²³ When the threat of TCPA litigation deters companies from providing these in-demand communications, consumers lose. And when companies are hit with high litigation costs because of TCPA lawsuits or settlements, those costs are often passed down to consumers.

TCPA class actions provide no countervailing financial benefit to consumers. Those who reap the financial boons of such lawsuits are not consumers but a cottage industry of TCPA plaintiffs' attorneys, some of whom promise monetary rewards that do not materialize. One plaintiffs' law firm, for example, developed a free app, "Block Calls Get Cash," that consumers could use to track potentially illegal calls from telemarketers and deliver information about the calls to the law firm so that it could bring lawsuits. The app promised that users could collect up to \$1,500 per call.²⁴ In reality, however, a 2014 study showed that "the average recovery for a consumer in a TCPA class action settlement was \$4.12. Their lawyers, by contrast, received an average of \$2.4 million."²⁵

companies offering text capabilities, and more than a quarter of all voicemails already go completely ignored." See *Text-Enabled Toll Free Numbers*, WC Docket No. 18-28, FCC 18-77, ¶ 5 (June 12, 2018) (quoting comments filed by CTIA) (internal quotation marks omitted).

²³ *Id.*

²⁴ See J. O'Brien, *Law Firm's App Block Calls, Evaluates Telephone Consumer Protection Act Claims*, Legal NewsLine (Sep. 2, 2014), <https://legalnewslines.com/stories/510627611-law-firm-s-app-block-calls-evaluates-telephone-consumer-protection-act-claims>.

²⁵ Testimony of Adonis E. Hoffman, Esq. before the Subcomm. on the Constitution and Civil Justice of the House Comm. on the Judiciary, 115th Cong. (June 13, 2017), <https://judiciary.house.gov/wp-content/uploads/2017/06/Witness-Testimony-Hoffman-06.13.2017.pdf>; see also A. Hoffman, *Sorry, Wrong Number, Now Pay Up*, The Wall Street Journal – Opinion (June 15, 2015), <https://www.wsj.com/articles/sorry-wrong-number-now-pay-up-1434409610>.

C. Abusive Class Action Litigation Targets Legitimate U.S. Companies that Already Have Strong Incentives To Comply with the TCPA, Failing To Address the Real Problem of Intentional Fraud and Illegal Robocalls.

Class action TCPA lawsuits fostered by past overbroad interpretations of the TCPA do nothing to address the critical problems of intentional fraud and illegal robocalls, often performed by offshore actors. Instead, they target legitimate companies that are already motivated to develop and maintain positive relationships with consumers.

Legitimate companies have strong motivations to comply with the TCPA; these motivations reach beyond avoiding the risk of damages, settlements, or fines. Customers are the life-blood of commerce, and successful businesses avoid practices that customers revile. Legitimate businesses have no interest in engaging in abusive practices. Indeed, businesses fear the brand and customer relationship damage of being cast as an illegal and abusive robocaller.²⁶

Unlike legitimate businesses, illegal and abusive robocallers lack the reputational and brand incentives discussed above, and they are nearly impossible to find often, making them seemingly judgment-proof and unattractive targets for TCPA plaintiffs' attorneys. The Chamber agrees that illegal and abusive robocalls continue to menace consumers, and it in no way condones the conduct of the bad actors responsible for such robocalls. The Chamber applauds the Commission's work to target abusive robocallers effectively and reduce harmful, illegal robocalls. The Commission has taken several actions in its docket to target the "unacceptably high volume of illegal robocalls."²⁷ Additionally, the Chamber welcomes the Commission's support of aggressive industry efforts to reduce harmful robocalling.

²⁶ See Scott Delacourt before the Senate Comm. on Commerce, Science & Transportation, 115th Cong. (Apr. 18, 2018).

²⁷ See, e.g., *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC 9706 (Nov. 17,

III. THE COMMISSION SHOULD EXPEDITIOUSLY GRANT THE U.S. CHAMBER COALITION PETITION TO ALIGN THE INTERPRETATION OF ATDS WITH THE STATUTE AND COMMON SENSE, REDUCE ABUSIVE LITIGATION, AND CREATE CLEAR EXPECTATIONS.

A. In the 2015 Omnibus Order, the Commission Unreasonably Interpreted ATDS to Include All Modern Calling Equipment, Including Smart Phones and Tablets.

ATDS is a threshold term that defines TCPA applicability, as a caller’s use of an ATDS triggers TCPA obligations. Congress defined the term 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,”²⁸ but it did not define what it meant by “capacity.” In the *2015 Omnibus Order*, the FCC interpreted “capacity” broadly to include *potential* ability.²⁹ This broad interpretation greatly expands potential liability. “[U]nder the *Order*’s reading of the TCPA, each and every smartphone, tablet, VoIP phone, calling app, texting app—pretty much any calling device or software-enabled feature that’s not a ‘rotary-dial phone’—is an [ATDS].”³⁰

This unreasonably broad definition is problematic for U.S. companies because it pulls all modern phone communications between consumers and companies under the TCPA’s strict restrictions. Even when consumers unambiguously want and benefit from timely text communications, such as on-demand text messaging, companies must comply with complicated rules to avoid liability.³¹ The broad definition of ATDS means that the TCPA imposes strict restrictions even when calling equipment requires human intervention, as explained in the U.S.

2017) (“*Robocall Call Blocking Order*”); Robocall Strike Force Report at 1 (Oct. 26, 2016), <https://transition.fcc.gov/cgb/Robocall-Strike-Force-Final-Report.pdf>.

²⁸ 47 U.S.C. § 227(a)(1).

²⁹ *2015 Omnibus Order* at 7971-78 (¶¶ 10-24).

³⁰ *Id.* (Pai Dissent).

³¹ *See, e.g., id.* at 8015-16 (¶¶ 103-06).

Chamber Coalition Petition. The interpretation also causes confusion, which is costly to companies and does not help consumers.

B. The D.C. Circuit Vacated the 2015 Omnibus Order’s Interpretation of ATDS.

The D.C. Circuit found the Commission’s interpretation of “capacity” in the definition of ATDS to be “utterly unreasonable,” “incompatible with [the statute’s goals],” and “impermissibly” expansive.³² The court reasoned that the TCPA cannot be read to include “the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country,” and that such an interpretation was “considerably beyond the agency’s zone of delegated authority.”³³

The court also considered the Commission’s description of the functions of an ATDS, specifically the FCC’s interpretation of “using a random or sequential number generator.”³⁴ The Court found that the *2015 Omnibus Order* offered two competing descriptions of what devices satisfy the definition: encompassing both devices that can generate random or sequential numbers to be dialed, and those that cannot.³⁵ The Court held that this inconsistent interpretation fails to provide clarity and thus fails the requirement of reasoned decision making.³⁶

C. The FCC Should Immediately Grant the U.S. Chamber Coalition Petition To Interpret ATDS in Line with the Statute and Common Sense, as Guided by the D.C. Circuit.

The U.S. Chamber Coalition Petition urges the Commission to resolve the legal uncertainty surrounding the definition of ATDS and to bring common sense to the statute by adopting a construction of what constitutes an ATDS that conforms to the statutory language and

³² *ACA Int’l*, 885 F.3d at 698-700.

³³ *Id.* at 698.

³⁴ *Id.* at 701-03; *see also 2015 Omnibus Order* at 7971-74 (¶¶ 10-16).

³⁵ *ACA Int’l*, 885 F.3d at 702-03.

³⁶ *Id.* at 703.

congressional intent, as guided by the D.C. Circuit. *First*, the Commission should confirm that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention. *Second*, the Commission should find that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions. The Commission should act immediately to resolve the ATDS issue and not combine this relief with other TCPA-related issues. As is evident from the *Notice*, the Commission must address several critical issues and resolve to return common sense to the TCPA, as guided by the D.C. Circuit. And even beyond the issues considered by the D.C. Circuit, there are outstanding and pressing open issues under this complicated regime. That said, the Commission should not let those other issues delay relief on this threshold TCPA liability issue. The Commission should deal with the uncertainty surrounding the definition of ATDS separately and immediately to restore common sense and limit the risk of liability as quickly as possible.

Expedient action is needed. Already, divergent caselaw is beginning to develop, causing more uncertainty for businesses and consumers. For example, in the brief time since the U.S. Chamber Coalition Petition was filed at the beginning of May, at least two different U.S. district courts have come to two different conclusions about how the D.C. Circuit's decision impacts whether a predictive dialer is considered to be an ATDS.³⁷ The FCC must act immediately to

³⁷ The court in *Reyes v. BCA Financial Services, Reyes v. BCA Financial Services, Inc.*, 2018 WL 2220417 (S.D. Fla. May 14, 2018), found that the FCC's 2003 and 2008 predictive dialer decisions were not affected by the D.C. Circuit's decision, while the court in *Herrick v. GoDaddy.com, LLC*, 2018 WL 2229131 (D. Ariz. May 14, 2018), reached the opposite conclusion, finding that the D.C. Circuit invalidated the earlier predictive dialer decisions, in part because they left "significant uncertainty about the precise functions an [ATDS] must have the capacity to perform." 2018 WL 2229131 at *7 (D. Ariz. May 14, 2018).

clarify the definition of ATDS, as outlined in the U.S. Chamber Coalition Petition, and in doing so, must reject the interpretation—adopted in 2003 and 2008—that sweeps in all predictive dialers regardless of their actual capabilities. This action will help to reduce the continued stream of litigation and conflicting case law that defines the out-of-control TCPA landscape.

IV. THE COMMISSION SHOULD TAKE REASONABLE AND PRACTICAL STEPS TO ELIMINATE STRICT LIABILITY FOR CALLS TO REASSIGNED NUMBERS.

A. The 2015 Omnibus Order Created a Strict Liability Regime for Calls to Reassigned Numbers Outside of the FCC’s Limited One-Call Safe Harbor, Opening the Floodgates to Abuse.

ATDS and artificial or prerecorded voice calls to wireless numbers are permitted under the TCPA if the caller has the “prior express consent of the called party,”³⁸ but the statute does not define “called party.” The FCC attempted to clarify the requirement, interpreting the term “called party” to mean “not . . . the intended recipient of a call, but . . . the current subscriber (or non-subscriber customary user of the phone).”³⁹ This interpretation of the term “called party” essentially creates strict liability for automated calls to reassigned wireless numbers outside of a one-call only safe harbor.

The *2015 Omnibus Order*’s construction of the prior express consent requirement and interpretation of the term “called party” “open[] the floodgates to more TCPA litigation against good-faith actors,” as it essentially imposes strict liability against “well-intentioned and well-informed” actors who make legitimate calls without knowledge that a number has been reassigned.⁴⁰ Rather than being exposed to lawsuit roulette with every call or text to numbers for

³⁸ 47 U.S.C. § 227(b)(1)(A).

³⁹ *2015 Omnibus Order* at 7999-8000 (¶ 72).

⁴⁰ *2015 Omnibus Order* (Pai Dissent).

which they have already obtained prior express consent, companies should be able to reasonably rely on consents obtained.

B. The D.C. Circuit Set Aside the Commission’s Treatment of Reassigned Numbers Because the One-Call Only Safe Harbor Was Arbitrary and Capricious

Even though the D.C. Circuit did not find that the Commission was compelled to interpret the term “called party” in the way urged by the petitioners, it did agree that the Commission’s one-call only safe harbor was arbitrary. The Commission created the one-call only safe harbor to avoid a “severe” strict liability regime and instead to implement a reasonable reliance approach to prior express consent.⁴¹ The court noted that “[t]he Commission . . . gave no explanation of why reasonable-reliance considerations would support limiting the safe harbor to just one call or message” and found that “no cognizable conception of ‘reasonable reliance’ supports the Commission’s blanket, one-call-only allowance.”⁴²

Having invalidated the Commission’s one-call only safe harbor as arbitrary and capricious, the court went on to set aside its entire treatment of reassigned numbers.⁴³ The court noted that without the one-call only safe harbor, the Commission’s interpretation of “called party” would make a caller “strictly liable for *all* calls made to the reassigned number, even if she has no knowledge of the reassignment.”⁴⁴ Because the Commission had explicitly declined

⁴¹ See *2015 Omnibus Order* at 8009 (¶¶ 89-90 & n.312).

⁴² *ACA Int’l*, 885 F.3d at 707; see also *id.* at 708 (“Having instead embraced an interpretation of the statutory phrase ‘prior express consent’ grounded in conceptions of reasonable reliance, the Commission needed to give some reasoned (and reasonable) explanation of why its safe harbor stopped at the seemingly arbitrary point of a single call or message. The Commission did not do so.”).

⁴³ *Id.* at 708-09.

⁴⁴ *Id.* at 708 (emphasis in original).

to require such a severe result, the court found that it must set aside the FCC’s treatment of reassigned numbers as a whole.⁴⁵

C. The FCC Should Clarify Its Reasonable Reliance Approach to Reassigned Numbers, Couple Any Database or Other Tool with Safe Harbors, and Call for a Moratorium on Reassigned Numbers Litigation Until the Issue Is Resolved.

The Commission should clarify that a company’s reasonable reliance on the accuracy of customer-provided numbers should bar claims under the TCPA that a call was placed by an ATDS to a number without the required prior consent,⁴⁶ so long as a business legitimately believes that a customer-provided number still belongs to its customer (*i.e.*, it has not been informed by its customer or the new owner of the change in ownership), that the customer was the intended recipient, and the new owner of a number who actually received a call should not have standing as a “called party” to assert TCPA claims.

If the Commission decides to move forward with a reassigned numbers database option or other tool, it should include appropriate safe harbors. The Chamber proposes the following safe harbors: (1) a safe harbor that is established immediately while the Commission is formulating, constructing, and approving a database option or other tool, and (2) a safe harbor that protects well-meaning companies once the Commission’s database option or other tool has been established and operationalize.

As conveyed in the docket regarding advanced methods to target and eliminate unlawful robocalls, the Chamber has concerns about the establishment, maintenance, use, and practicality

⁴⁵ *Id.* at 709.

⁴⁶ There is no evidence or indication that Congress intended that TCPA compliance would require a company either to monitor a database of reassigned numbers or to hire third-parties to scrub existing customer lists for possible reassignments, in order to protect against potential class action liability for calls.

of a reassigned numbers database in any of the forms currently proposed, and it worries that such a database may serve to perpetuate abusive TCPA litigation.⁴⁷ If the Commission decides to move forward with structuring a reassigned numbers database option or other tool, it should: (1) be voluntary and not mandatory,⁴⁸ and (2) be accompanied by a safe harbor that shields a well-meaning company from strict liability under the TCPA for making a call to a reassigned number if the company meets two requirements. If a company (1) accesses and scrubs against a database or other tool in a reasonable timeframe, *e.g.*, quarterly, and (2) has policies and procedures (such as employee training) to ensure that customer records are updated to reflect phone number reassignments, it should be protected from strict liability.

Any safe harbor for companies using a database or other tool must be based firmly in the TCPA safe harbor model established for the Do-Not-Call (“DNC”) database, which clarifies that there can be no TCPA liability when errors occur so long as practices and procedures existed to comply with rules or guidance.⁴⁹ Creating a safe harbor based on this model will encourage companies to proactively review and update records.

If the Commission moves forward with a database option or other tool, it should immediately afford safe harbor protections to companies for using certain commercially available solutions, such as public market reassigned phone number databases, while the FCC is establishing and/or evaluating its reassigned numbers database option or other tool. Developing

⁴⁷ *See generally* CG Docket No. 17-59; *see* ILR Comments, CG Docket No. 17-59 (filed August 28, 2017); ILR Comments, CG Docket No. 17-59 (filed June 7, 2018).

⁴⁸ However, even if the database is optional state, the use or nonuse of it may, in practice, create a benchmark for reassigned numbers liability under the TCPA, rendering the database not truly optional. Additionally, the optional database may not prove to be workable. *See* ILR Comments, CG Docket No. 17-59 (filed June 7, 2018).

⁴⁹ *See* 47 C.F.R. § 64.1200(c)(2) (establishing the DNC safe harbor).

and implementing a new reassigned numbers database or other tool conceived and established by the Commission will take a significant amount of time. As a reference point, the Federal Trade Commission (“FTC”) reports that the National DNC Registry “took years to accomplish, including workshops [and] periods of robust public comment.”⁵⁰ Meanwhile, well-meaning companies reasonably relying on properly obtained prior express consents will be open to strict liability without safe harbor protection. As the Commission is well-aware, there is currently no approved means of determining when numbers have changed hands, but databases and other tools, such as Neustar’s TCPA compliance solution, which help callers verify subscribers and private market databases, are currently commercially available.⁵¹ These commercially available solutions could be individually approved by the FCC based on set criteria. This system will also help foster innovation and implementation of these solutions.

The Commission’s authority to establish a safe harbor in these circumstances is clear. The Commission has broad authority to interpret and implement the TCPA in a reasonable way; creating a safe harbor is within this broad authority. An agency’s power to administer a congressionally created program requires making rules to “fill any gap left, implicitly or explicitly, by Congress.”⁵² In 2004 for example, the Commission exercised this broad authority in the TCPA context by creating a limited safe harbor period from the prohibition on placing autodialed or prerecorded message calls to wireless numbers when such calls were made to

⁵⁰ L. Fair, *10 years of National Do Not Call: Looking back and looking ahead*, FTC Business Blog (June 24, 2013), <https://www.ftc.gov/news-events/blogs/business-blog/2013/06/10-years-national-do-not-call-looking-back-looking-ahead>.

⁵¹ See TCPA Compliance, Neustar Risk, <https://www.risk.neustar.compliance-solutions/tcpa>.

⁵² *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (internal quotation marks omitted)).

numbers recently ported from wireline to wireless service.⁵³ Despite the lack of an express statutory mandate to adopt this safe harbor, the Commission rejected arguments that it lacked the statutory authority to do so, finding that the safe harbor was “necessary to allow callers to comply with” the TCPA’s statutory provisions requiring callers “to identify immediately those numbers that have been ported from a wireline service to a wireless service provider.”⁵⁴ The Commission determined that companies would not be able to comply with the statute without this safe harbor. Here also, there is no reasonable way for a company to avoid calls to reassigned numbers completely. Without a safe harbor, therefore, companies are in an impossible situation.

The Commission has also enacted safe harbors in other contexts without an express congressional directive. For example, in 2004, the Commission adopted two safe harbors for transitioning licenses within the 2500-2690 MHz band.⁵⁵ The Commission did not cite statutory authority for the safe harbors; instead, it relied on its general authority to “encourage the provision of new technologies and services to the public ... consistent with the requirements of Section 303(y) of the Communications Act” by managing how the spectrum was transitioned.⁵⁶

⁵³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 19 FCC Rcd. 19215 (Sept. 21, 2004).

⁵⁴ *Id.* at 19218 (¶ 9).

⁵⁵ *Amendment of Parts 1, 21, 73, 74 & 101 of the Commission’s Rules to Facilitate the Provision of Fixed & Mobile Broadband Access, Educ. & Other Advanced Servs. in the 2150-2162 & 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd. 14165, 14205 (July 29, 2004). The safe harbors modified the Commission’s Transition Plan to allow for certain activities outside of the Plan’s operating parameters to be deemed reasonable in event of a dispute. *Id.* at 14204 (¶ 90).

⁵⁶ *Id.* at 14167-68 (¶ 2). Likewise, in 2013, the Commission adopted safe harbors for provider-specific and wideband signal boosters. *Amendment of Parts 1, 2, 22, 24, 27, 90 & 95 of the Commission’s Rules to Improve Wireless Coverage Through the Use of Signal Boosters*, WT Docket No. 10-4, Report and Order, 28 FCC Rcd. 1663, 1690 (Feb. 20, 2013). The Commission found that the safe harbors “appropriately balance[d] the need to protect wireless networks with the need to provide consumers with affordable signal booster options,” accepting the arguments of several commenters on the Commission’s proposal to regulate consumer-targeted signal

Other agencies have also used safe harbors without express statutory authority to do so, as part of their general authority to reasonably implement certain laws. The FTC recognizes a call abandonment safe harbor under the Telemarketing Sales Rule (“TSR”).⁵⁷ The abandoned call safe harbor states that a telemarketer will not face enforcement action for violating the call abandonment prohibition if the telemarketer abides by certain criteria.⁵⁸ The Telemarketing and Consumer Fraud and Abuse Prevention Act does not expressly empower the FTC to create a safe harbor, and the TSR does not cite authority for the safe harbor.

Finally, the Commission should declare an immediate moratorium on TCPA liability for calls to reassigned numbers until the FCC completes its reassigned numbers database proceeding and a database or other tool is established and operating, or the Commission determines that it is infeasible to do so. Together, the longstanding confusion regarding reassigned numbers and the D.C. Circuit’s decision—finding the FCC’s current reassigned numbers practices arbitrary and capricious—compel this result.⁵⁹ The FCC can send a strong signal to courts and litigants that disputes should not proceed under the prior strict liability regime while the Commission evaluates options and seeks to bring order to a chaotic TCPA landscape. This moratorium should be declared in addition to the Commission clarifying its reasonable reliance approach to

boosters that “consumer boosters that meet [the safe harbor’s] standards, if operating properly and in accordance with all of the requirements of the protection standards, will not cause harmful interference to either the serving provider or adjacent wireless networks.” *Id.* at 1684, 1690 (¶¶ 53, 71). The Commission did not cite statutory authority for adoption of the safe harbors, but it noted that it enacted the entire licensing regime—which includes the safe harbors—pursuant to Section 307(e) of the Communications Act. *Id.* at 1671-72 (¶ 23).

⁵⁷ See 16 C.F.R. § 310.4(b)(4)(iii); see also FTC Tips & Advice, Complying with the Telemarketing Sales Rule, <https://www.ftc.gov/tips-advice/business-center/guidance/complying-telemarketing-sales-rule#callabandonment>.

⁵⁸ See 16 C.F.R. § 310.4(b)(4)(iii).

⁵⁹ See *ACA Int’l*, 885 F.3d at 708-09.

reassigned numbers and establishing safe harbors to protect well-intentioned companies that meet specified requirements from strict liability for ATDS calls to reassigned numbers if the Commission moves forward with structuring a reassigned numbers database or other tool.

V. THE COMMISSION SHOULD GIVE CLEAR GUIDANCE ABOUT REVOCATION.

A. The D.C. Circuit Affirmed that Consumers Have the Right To Revoke Consent Through Any Reasonable Means and that Callers Are Not Required To Adopt Unduly Burdensome Systems to Process Revocations.

In a portion of the *2015 Omnibus Order* affirmed by the D.C. Circuit, the Commission held that “consumers may revoke consent through any reasonable means.”⁶⁰ In the Commission’s view, “‘a called party may revoke consent at any time and through any reasonable means’—orally or in writing—‘that clearly expresses a desire not to receive further messages.’”⁶¹ Callers may not “designate the exclusive means of revocation.”⁶²

The D.C. Circuit dismissed the petitioners’ concerns that the Commission’s approach to revocation was unduly uncertain and would require that businesses take “exorbitant precautions” to comply with the TCPA.⁶³ Such concerns were overstated, the court found, because “[t]he Commission’s ruling absolves callers of any responsibility to adopt systems that would entail ‘undue burdens’ or would be ‘overly burdensome to implement.’”⁶⁴ The court suggested that

⁶⁰ *2015 Omnibus Order* at 7993 (¶ 55); *see also ACA Int’l*, 885 F.3d at 709-10.

⁶¹ *ACA Int’l*, 885 F.3d at 709 (quoting *2015 Omnibus Order* at 7989-90, 7996 (¶¶ 47, 63)).

⁶² *Id.* (quoting *2015 Omnibus Order* at 7997 (¶ 66)).

⁶³ *Id.* at 709-10.

⁶⁴ *Id.* at 709; *see also 2015 Omnibus Order* at 7996 (¶ 64 & n.233) (stating that the FCC will assess the reasonableness of a means of revocation by looking to the totality of the circumstances, including “whether the consumer had a reasonable expectation that he or she could effectively communicate his or her request for revocation to the caller in that circumstance, and whether the caller could have implemented mechanisms to effectuate a requested revocation without incurring undue burdens”).

providing clearly-defined and easy-to-use opt-out methods should provide callers with assurance that consumers electing not to follow such methods risked being found unreasonable:

[C]allers will have every incentive to avoid TCPA liability by making available clearly-defined and easy-to-use opt-out methods. If recipients are afforded such options, any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable. The selection of an unconventional method of seeking revocation might also betray the absence of any “reasonable expectation” by the consumer that she could “effectively communicate” a revocation request in the chosen fashion.⁶⁵

To avoid both the uncertainty for businesses and consumers and the potential for litigation abuse fostered by an unclear and broad right of revocation, the Commission should build on this roadmap from the D.C. Circuit and recognize a set of *per-se* reasonable opt-out methods that businesses may offer that will enable them to benefit from a presumption regarding reasonableness. It should also clarify that consumers and companies may mutually agree upon a means of revocation.⁶⁶

B. The FCC Should Immediately Recognize *Per Se* Reasonable Opt-Out Tools.

The Commission should recognize a set of tools that are *per se* reasonable for revocation of consent to receiving calls. All such tools should meet three broad characteristics to ensure that they impose no undue burden on consumers—they should be (1) free, (2) ubiquitous, and (3) easy-to-use. Use of these techniques by companies should never be required; prescriptive regulation is ill-advised in this technological setting, where new and better tools are constantly

⁶⁵ *ACA Int'l*, 885 F.3d at 709-10.

⁶⁶ The D.C. Circuit made clear that the *2015 Omnibus Order* “did not address whether contracting parties can select a particular revocation procedure by mutual agreement.” *ACA Int'l*, 885 F.3d at 710 (quoting the Commission’s concession on this point). The court stated “[t]he ruling precludes unilateral imposition of revocation rules by callers; it does not address revocation rules mutually adopted by contracting parties. Nothing in the Commission’s order thus should be understood to speak to parties’ ability to agree upon revocation procedures.” *Id.*

being innovated. Rather, the list of tools that are recognized as *per se* reasonable should be purely voluntary, non-exhaustive, and illustrative for companies.

The Chamber proposes that there are several currently available revocation tools that already exist that meet the three above characteristics, and it urges the Commission to declare these tools to be *per se* reasonable:

- **“Text STOP to STOP.”** This tool is free in all but rare instances.⁶⁷ It is currently used in nearly every text campaign thanks to industry best practices including those promulgated by the Mobile Marketing Association (“MMA”) and CTIA. The tool is also simple, clearly laid out and intuitive—when consumers want something to stop, they state “stop.” Consumers are already familiar with the “Text STOP to Stop” tool because of its widespread use. The tool provides a reasonable approach to opting out of text messaging, as it uses the same channel already being used for the business and the consumer to communicate.
- **1-800 numbers.** These numbers are, by definition, free for consumers to use. 1-800 number calling is also both well-known and well-understood, thanks in part to its long history. Additionally, toll free texting is also a popular tool amongst businesses and consumers. Recognizing that “[t]oday, businesses are also using toll free numbers for text message communication with their customers,” the Commission has taken recent action to “promot[e] the innovative use of these valuable numbering resources for text messaging, or texting, purposes.”⁶⁸
- **Emailing a designated email address.** There are many email services that are free to consumers, and as a core functionality of the Internet, email is ubiquitous.⁶⁹ Emailing a designated address is simple and straightforward way of communicating that is familiar to most consumers.

⁶⁷ As of 2015, almost 90% of Americans have unlimited texting plans. The market has moved beyond selling plans with a set allowance of text messages, and towards unlimited talk and text. The TCPA and its implementation should be flexible to account for this market shift. See J. Zagorsky, *Almost 90% of Americans Have Unlimited Texting*, Instant Census Blog (Dec. 8, 2015), <https://instantcensus.com/blog/almost-90-of-americans-have-unlimited-texting>. As a result, it will be a rare occurrence when a single text message initiated by the consumer would carry a cost. In that rare instance, the fact that a company will be expected to employ two or more tools to establish the presumption, the consumer would be able to use the second free, ubiquitous, and easy-to-use tool.

⁶⁸ See *Text-Enabled Toll Free Numbers*, WC Docket No. 18-28, FCC 18-77, ¶¶ 1-2 (June 12, 2018).

⁶⁹ See, e.g., *Amendment of Section 73.1216 of the Commission’s Rules Related to Broadcast Licensee-Conducted Contests*, MB Docket No. 14-226, Report and Order, 30 FCC Rcd. 10468, 10471 (¶ 6) (Sept. 17, 2015) (pointing to the “ubiquitous nature of the Internet” as one reason to modernize the broadcast contest rules).

- ***Letters to a specified address.*** In numerous instances, such as the Fair Debt Collection Practices Act, consent may be revoked by sending a letter to a specified P.O Box address. For some consumers, this method may be preferable over the use of email.

In addition to recognizing a set of *per se* reasonable revocation tools, the Commission should create a presumption regarding reasonableness to protect companies that implement two or more such *per se* reasonable tools. In such cases, the Commission should create a presumption that a consumer attempting to opt-out of receiving calls has acted unreasonably if that consumer does not use at least one of the *per se* reasonable tools. This presumption would be consistent with the Commission’s decision not to allow callers to prescribe the means of revocation. Companies will not be dictating to consumers that they may revoke consent only through a single method. They simply will not face staggering liability if they offer two or more *per se* reasonable means of revocation. The presumption would also adhere to common sense. Any reasonable consumer wishing to opt-out of receiving text messages or calls will use the reasonable tools provided by the caller to do so.

The Commission should create a straightforward process for companies to add to the non-exhaustive list of free, ubiquitous, and easy-to-use opt-out tools that are recognized as *per se* reasonable. A process can be modeled on the FTC’s voluntary Commission approval process for methods of consent under the Children’s Online Privacy Protection Act (“COPPA”). Under that process:

[A]n interested party may file a written request for Commission approval of parental consent methods not currently enumerated [in the Commission’s non-exhaustive list]. To be considered for approval, a party must provide a detailed description of the proposed parental consent methods, together with an analysis of how the methods meet [the basic requirements]. The request shall be filed with the Commission's Office of the Secretary. The Commission will publish in the Federal Register a document seeking public comment on the request. The Commission shall issue a written determination within 120 days of the filing of the request.⁷⁰

Finally, the Commission should clarify that consumers and companies may mutually agree upon means of revocation. The D.C. Circuit noted that the *2015 Omnibus Order* “did not address whether contracting parties can select a particular revocation procedure by mutual agreement.”⁷¹ It described that “[t]he ruling precludes unilateral imposition of revocation rules by callers; it does not address revocation rules mutually adopted by contracting parties. Nothing in the Commission’s order thus should be understood to speak to a party’s ability to agree upon revocation procedures.”⁷² Following the D.C. Circuit’s roadmap, the FCC should further clarify that parties are free to contract to mutually agree upon revocation procedures.

VI. CONCLUSION

As set forth above, the Commission has a unique opportunity to clarify and rationalize the TCPA regime. The D.C. Circuit’s decision invalidating the worst portions of the *2015 Omnibus Order* provides a catalyst and roadmap for doing so. The Commission should:

- Expediently grant the Chamber Coalition Petition to interpret “ATDS” in line with the statute and common sense;

⁷⁰ 16 C.F.R. § 312.12.

⁷¹ *ACA Int’l*, 885 F.3d at 710.

⁷² *Id.*

- Clarify its reasonable reliance approach to reassigned numbers. The FCC should establish appropriate reassigned numbers safe harbors if the Commission moves forward with its reassigned numbers database proposal. These safe harbors should include an immediate safe harbor for companies that utilize commercially available tools and a safe harbor once the Commission’s reassigned numbers database or other tool is established and operationalized. The Commission should call for an immediate moratorium on reassigned numbers litigation while it develops guidance in response to the D.C. Circuit’s ruling; and
- Provide clear guidance to businesses and consumers about revocation of consent by recognizing a set of *per se* reasonable free, ubiquitous, and easy-to-use opt-out tools for consumers to revoke consent to receiving calls, allowing companies to voluntarily update that set of *per se* reasonable tools, and creating a complementary presumption regarding reasonableness to protect companies that implement two or more such *per se* reasonable tools; and clarify that consumers and companies may mutually agree upon a means of revocation.

The FCC has been doing important and productive work to address bad actors and illegal robocalling. It needs to seize this opportunity to rationalize the TCPA landscape to return it to the function Congress intended, which is to focus on particular technologies and abusive calling tactics. The practical steps identified above provide a path for the Commission to begin to rein in the sprawling reach of the TCPA and curb rampant abusive litigation under the statute.

Respectfully Submitted,



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