

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

In the Matter of)	
)	
Interpretation of the Telephone Consumer)	CG Docket No. 18-152
Potential Act in Light of the D.C. Circuit’s)	
ACA International)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of)	
1991)	

COMMENTS OF ACT | THE APP ASSOCIATION

ACT | The App Association (App Association) submits the following comments to provide its view of the efforts by the Federal Communications Commission (FCC or Commission) to appropriately define an “automatic telephone dialing system” (ATDS) under the Telephone Consumer Protection Act of 1991 (TCPA).¹ We support the Commission’s actions to seek public input after the D.C. Circuit invalidated the Commission’s *2015 TCPA Declaratory Ruling and Order* in its decision in *ACA Int’l, et al. v. FCC*.²

Representing approximately 5,000 small business app companies and tech firms across the country, the App Association has long been committed to combatting illegal phone robocalls. On behalf of the developer community, the App Association has engaged with government and industry stakeholders through the Commission’s Robocall Strike Force—an

¹ *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*, Public Notice, CG Docket No. 18-152; CG Docket No. 02-278 (rel. May 14, 2018) (PN). Available here: <file:///Users/joelthayer/Downloads/DA-18-493A1.pdf>.

² 885 F.3d 687 (D.C. Cir. 2018) (mandate issued May 8, 2018).

industry-led group working to develop comprehensive and coordinated solutions to prevent, detect, and filter illegal robocalls.³

As smartphones and connected mobile devices have become ubiquitous, the small business software developer community plays a critical role in empowering consumers to control the robocalls they receive. In fact, many innovative apps already play a major role in mitigating illegal robocalls.⁴ For example, App Association member Call Control⁵ developed software to prevent nuisance calling, phone phishing, and illegal robocalls from reaching consumers and enterprises. We continue encouraging developers, consumers, and industry stakeholders to explore the apps available today that can mitigate illegal robocalls.⁶

Eased and automated communications are essential to a good user experience and interface (UX/UI) design and represent a crucial feature for our members as they compete for new customers in the digital economy. Such communications utilize the cellular network and mobile telephone numbers, but many are IP-based and utilize intra-app communications, or “push notifications.” The App Association and its members take the obligations outlined in the TCPA seriously and consider the TCPA’s requirements in their UX/UI design. As it moves forward, we urge the Commission’s rules developed under the TCPA to (1) ensure innovative app services continue being available to consumers, and (2) safeguard the availability of future innovations to consumers for the purpose of illegal robocall mitigation.

³ 2017 Strike Force Report. Available at <https://www.ustelecom.org/sites/default/files/documents/Ex%20Parte-Strike-Force-Report-2017-04-28-FINAL.pdf>.

⁴ Leada Gore, *AT&T Has New Free App [sic] that Lets You Block Robocalls*, AI (Updated Dec. 28, 2016). Available at https://www.al.com/news/index.ssf/2016/12/att_has_new_free_app_that_lets.html.

⁵ Call Control Website. Available at <https://www.callcontrol.com/>.

⁶ E.g., CTIA, *How to Stop Robocalls*, Website (last checked Jun. 6, 2018). Available at <https://www.ctia.org/consumer-resources/how-to-stop-robocalls/>.

In light of the decision in *ACA Int'l, et al. v. FCC*,⁷ the App Association supports the court's holding and the Commission's subsequent efforts to reflect congressional intent to protect the public from illegal robocalls, while ensuring innovators have the ability to provide desired automated communications with consumers. To this end, we offer the following input for the Commission's consideration:

- In the years preceding the recent decision in *ACA Int'l, et al. v. FCC*, stakeholders have made dubious arguments that the TCPA covers communications beyond calls and SMS messages, such as push notifications from a smartphone app or in-app messages. This ambiguity, including on the part of the Commission, has been exploited by plaintiffs' counsels in civil suits across the country. We strongly urge the Commission's new rulemaking to provide certainty to the app developer community by clearly stating mobile apps' push notifications will not be subject to the TCPA if only delivered within the application. The App Association believes the TCPA applies only to autodialed calls or texts sent to a mobile device (i.e., those sent to a mobile telephone number using the telephone network). Aside from the clear difference between the TCPA-defined communications and in-app push notifications that do not rely on mobile numbers or cellular networks, this approach is appropriate from a public policy perspective because consumers have greater control over the push notifications they receive as a result of mobile phone operating systems and their terms of service for any consumer app.

⁷ 885 F.3d 687 (D.C. Cir. 2018) (mandate issued May 8, 2018).

- By definition, a device that sends messages to a curated group of telephone numbers cannot “store or produce telephone numbers to be called, using a random or sequential number generator” and should not qualify as an ATDS. The App Association urges the Commission to define an ATDS as a device that both possesses the capability *and* implements a “random or sequential number generator” to “store or produce telephone numbers to be called.”
- The dependence on human intervention to transmit a message prohibits that process from being categorized as “automated.” Therefore, if a device requires human intervention as a condition for “stor[ing] or produc[ing] telephone numbers to be called [and] . . . dial such numbers,” it cannot by definition qualify as an ATDS because the fundamental process is not “automated.”
- A device that can dial and transmit messages to a curated list of telephone numbers does not “store or produce telephone numbers . . . using a random or sequential number generator.” This is because the most rational interpretation of the definition is that only a device that uses a “random or sequential number generator” to “store or produce telephone numbers to be called” can qualify as an ATDS.
- An exception within the TCPA allows for calls “made with the prior express consent of the called party.” The App Association encourages the Commission to interpret “called party” as the intended recipient of the call because any narrower interpretation would contradict the purpose of the TCPA’s “prior express consent” carve out. The carve out allows calls to a “called party” that had given “prior express consent” to receive the call.

- The App Association believes permitted opt-out methods should be (1) clear and conspicuous and (2) able to be requested by a consumer with minimal effort; and that other opt-out methods should be *per se* unreasonable. We support the Commission providing additional examples of reasonable opt-out methods, which can include texting a “STOP” response to an SMS message or offering a verbal statement like “please do not call me anymore” or “put me on your do not call list.”

We appreciate the opportunity to address our foregoing concerns and hope the Commission takes them into consideration.

Sincerely,



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