Before the
Federal Communications Commission
Washington, D.C. 20554

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

JOINT REPLY COMMENTS OF 33 SMS INDUSTRY PARTICIPANTS

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JOINT REPLY COMMENTS OF 33 SMS INDUSTRY PARTICIPANTS

The parties listed in **Appendix A** (the "SMS Industry Participants") either use text messaging to engage customers or are service providers that facilitate opt-in-only text messaging services. The SMS Industry Participants respectfully submit these Joint Reply Comments in order to join in the comments filed by Tatango, Inc., on June 13, 2018 (hereinafter called the "Tatango Comments"),[1] and compatible comments filed by other commenters. The SMS Industry Participants are fully in support of the comments Tatango filed in response to the Federal Communications Commission's ("FCC" or "Commission") Public Notice of May 14, 2018,[2] which invited comment on several issues related to the proper interpretation of the Telephone Consumer Protection Act[3] in light of the conclusions reached by the U.S. Court of

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[1] *See* Comments of Tatango, Inc. in Response to the Consumer and Governmental Affairs Bureau's Public Notice, FCC DA 18-493, CG Docket Nos. 18-152 and 02-278 (June 13, 2018) ("Tatango Comments").

[2] *In the Matter of 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, DA 18-493, CG Docket Nos. 18-152 and 02-278 (May 14, 2018) ("Public Notice").

[3] 47 U.S.C. § 227.

Appeals for the District of Columbia in *ACA International et al. v. Federal Communications Commission*.[4]

INTRODUCTION

As demonstrated by Tatango and other commenters, the D.C. Circuit's decision in *ACA International* recognized the serious flaws in the Commission's 2015 Omnibus TCPA Order[5] and struck down several of the agency's previous rulings as arbitrary and capricious. But even though the D.C. Circuit's decision was itself a step in the right direction, the confusion caused by the 2015 Omnibus TCPA Order and other various FCC rulings still remains. Indeed, since the D.C. Circuit's ruling the water has actually muddied further, as law-abiding businesses across the country, like the SMS Industry Participants, have been left with inconsistent FCC orders and contradicting court rulings with respect to several key areas of the TCPA, including controversial interpretations of what is and is not an automatic telephone dialing system ("ATDS"), unclear guidance as to what is a reasonable method of consent revocation, and no safe harbor protection for calls to reassigned numbers. But out of this confusion comes a chance for this Commission to correct the prior mistakes that created a cottage industry of TCPA litigants, and for this reason the SMS Industry Participants are pleased that the Commission has begun the process of responding to the D.C. Circuit's decision and providing clear guidance regarding the appropriate interpretation of the TCPA.

As indicated by the comments filed in this proceeding, the problems associated with the TCPA are so widespread that voice service providers, platform providers, marketers, major brands, and consumer interest organizations are all eager for the Commission to implement rules

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[4] 885 F.3d 687 (D.C. Cir. 2018).

[5] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961 (July 10, 2015) ("2015 Omnibus TCPA Order").

that will effectuate positive change. By implementing such rules, the Commission will not only protect the ability of consumers to receive the communications they desire, but also prevent the predatory and abusive TCPA litigation that the Commission's previous interpretations have encouraged. The SMS Industry Participants look forward to Commission action that appropriately balances the legitimate expectations of consumers to avoid unwanted communications, while not unfairly exposing law-abiding companies to the threats of crippling TCPA litigation. With those thoughts in mind, the SMS Industry Participants make the following recommendations to the Commission.

I. THE PROPER SCOPE OF THE DEFINITION OF "AUTOMATIC TELEPHONE DIALING SYSTEM"

Like Tatango, the SMS Industry Participants believe that, in defining what is and is not an ATDS under the TCPA, the Commission should return to an interpretation that complies with the spirit and intent of the TCPA as adopted by Congress and an interpretation that clearly informs and guides the courts in their own decision-making processes. Accordingly, the SMS Industry Participants respectfully urge the Commission to declare: (1) that an ATDS is a device that has the *present capacity*, and that is *currently being used to*, dial random or sequential numbers and (2) that a business which sends text messages to a list of numbers provided by that business's customers or that uses a predictive dialer is *not* using an ATDS.

When the TCPA was adopted, it was seen by Congress as a ban on dialing equipment that used random or sequential number generators that produced/stored the telephone numbers to be dialed.[6] Thus, Congress carefully tailored the ATDS definition to conform to this idea, defining

[6] Comments of Rep. Markey, 137 Cong. Rec. H11307-01 (Nov. 26, 1991) ("[A]utomatic dialing machines place calls randomly, meaning they sometimes call unlisted numbers, or numbers of hospitals, police and fire stations, causing public safety problems."); *id.*, Comments of Rep. Roukema ("Today, we unfortunately find that automatic dialing recorded message players are being used in record numbers to systematically solicit unsuspecting and unwilling residential and commercial telephone subscribers.").

"automatic telephone dialing system" as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers,"[7] and making it unlawful under the statute "to make any call … **using** any automatic telephone dialing system or an artificial or prerecorded voice."[8] Importantly, Congress narrowly defined the ATDS term and its application to ensure the TCPA would not prohibit using a computer to dial calls to consumers with whom a caller had an "established business relationship."[9] And while Congress understood that the Commission needed the authority to interpret the TCPA as it applied to new, post-1991 technologies, "Congress did not grant free reign on the Commission to regulate any type of computer controlled dialer,"[10] requiring any agency interpretation to fall in line with Congress's intent of addressing the problems of indiscriminate dialing using a random or sequential number generator—an obligation that the Commission itself has recognized on multiple occasions.[11]

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7 47 U.S.C. § 227(a)(1).

8 *Id.* at § 227(b)(1)(A)(iii).

9 Comments of Rep. Rinaldo, 137 Cong. Rec. H11307-01 (Nov. 26, 1991) ("In drafting this legislation, we recognized that many legitimate businesses make telephone calls, including solicitations, without annoying consumers. Thus, the bill exempts businesses that have a preestablished business relationship with a customer as well as telephone calls from nonprofit organizations."); *Id.,* Comments of Rep. Richardson ("The bill appropriately singles out calls in which there is an existing business relationship between the caller and the consumer. Different rules should apply to these types of calls. Businesses need to be able to contact customers with whom they have a prior or existing business relationship. Generally, these calls are not objectionable to the recipient; they allow the customer to take advantage of special promotions and other offers from vendors with whom they are already familiar."); Comments of Sen. Pressler, 137 Cong. Rec. S18317-01 (Nov. 26, 1991) ("We include in this bill an exemption for businesses that have an established business relationship with their customers.").

10 Comments of Noble Systems Corp., FCC DA 18-493, CG Docket Nos. 18-152 and 02-278, at 7 (June 13, 2018) ("Noble Systems Corp. Comments").

11 For example, in 2015 Chairman Pai stated:

> When the Commission first interpreted the statute in 1992, it concluded that the prohibitions on using automatic telephone dialing systems "clearly do not apply to functions like 'speed dialing,' 'call forwarding,' or public telephone delayed message services[], because the numbers called *are not generated in a random or sequential fashion*." Indeed, in that same order, the Commission made clear that calls not "dialed using a random or sequential number generator" "are not autodialer calls."
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> Confirming this interpretation (what some proponents call the "present capacity" or "present ability" approach) is the statutory definition's use of the present tense and indicative mood. An automatic telephone dialing system is "equipment which has the capacity" to dial random or sequential

However, despite Congress's intent and directives, the Commission has incrementally expanded the TCPA to apply to more and more calling devices, creating in the process a swarm of conflicting rulings and orders that have confused courts[12] and allowed the TCPA to be applied to predictive dialers and even the everyday consumer's cell phone. And while the D.C. Circuit's ruling in *ACA International* is a step in the right direction, the SMS Industry Participants believe that more can be done to better protect well-intentioned and law-abiding American companies.[13]

> numbers, meaning that system actually can dial such numbers at the time the call is made. Had Congress wanted to define automatic telephone dialing system more broadly it could have done so by adding tenses and moods, defining it as "equipment which has, has had, or could have the capacity." But it didn't. We must respect the precise contours of the statute that Congress enacted.

2015 Omnibus TCPA Order, 30 FCC Rcd. 7961, 8074 (July 10, 2015) (Dissenting Statement of Commissioner Ajit Pai); *see also* 30 FCC Rcd. at 8089 (Statement of Commissioner Michael O'Rielly Dissenting in Part and Approving in Part) ("O'Rielly Dissent").

[12] *See* Tatango Comments at 7-8 (noting that courts are uncertain whether pre-2015 FCC interpretations should be consulted in determining whether a predictive dialer is or is not an ATDS); *see also* Comments of the American Financial Services Association, FCC DA 18-493, CG Docket Nos. 18-152 and 02-278, at 6-7 (June 13, 2018) ("AFSA Comments") ("Given the D.C. Circuit's sweeping criticism of the FCC's 2015 guidance on what constitutes an ATDS … a number of courts have viewed the slate as having been wiped clean … [y]et, other courts have reached the opposite conclusion…. These courts have concluded that earlier FCC guidance may still be binding, including the finding that certain predictive dialers constitute an ATDS."); Comments of the Electronic Transactions Association, FCC DA 18-493, CG Docket Nos. 18-152 and 02-278, at 6 (June 13, 2018) ("ETA Comments") ("Since the D.C. Circuit's decision, the courts are split on whether the FCC's 2003 and 2008 predictive dialer rulings were, in effect, vacated by the D.C. Circuit."); Comments of U.S. Chamber Institute for Legal Reform, FCC DA 18-493, CG Docket Nos. 18-152 and 02-278, at 12 (June 13, 2018) ("Comments of the U.S. Chamber Institute for Legal Reform") ("The Commission should deal with the uncertainty surrounding the definition of ATDS separately and immediately…. Already, divergent caselaw is beginning to develop, causing more uncertainty for businesses and consumers. For example, in the brief time since … 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.").

[13] Indeed, as Tatango noted in its comments, "while courts now understand that the 2015 Omnibus TCPA Order's ATDS interpretation should not be referenced in determining whether a predictive dialer is or is not an ATDS, these same courts are uncertain whether pre-2015 FCC interpretations should be consulted." Tatango Comments at 7. Tatango goes on to cite various cases supporting this position. *Id.* at 7-8. But even more cases have been decided since Tatango filed its comments on June 13, 2018, that further show the problems courts are facing with respect to this issue. For example, on June 25, 2018, the United States District Court for the Northern District of Georgia held that "the D.C. Circuit clearly held that it invalidated *all* of the FCC's pronouncements as to the definition of 'capacity' as well as its descriptions of the statutory functions necessary to be an ATDS." *Sessions v. Barclays Bank Del.*, 2018 WL 3134439, at *4 (N.D. Ga. June 25, 2018). But two days later, on June 27, 2018, the United States District Court for the Middle District of Tennessee came to the opposite conclusion, holding that "[i]n the wake of *ACA International*, this Court joins the … other courts that continue to rely on the [ATDS] interpretations of § 227(a)(1) set forth in prior FCC rulings." *Ammons v. Ally Fin., Inc.*, 2018 WL 3134619, at *6 (M.D. Tenn. June 27, 2018). Clearly, there is a disconnect here among the courts, and this is causing problems for unsuspecting, good-faith businesses that lack certainty as to what FCC interpretations do and do not apply.

First and foremost, the SMS Industry Participants join Tatango and others in urging the Commission to issue prompt guidance explaining that an ATDS is a device that has the *present capacity*, and is *being used to*, dial random or sequential numbers.[14] As ACA International noted in its comments, such guidance would provide callers with a "straightforward interpretation" that "flows from the functions of an ATDS outlined in the TCPA."[15] Moreover, implementing such a definition would "go a long way toward restoring the balance Congress intended,"[16] and would ensure that the definition is interpreted in accordance with Congress's original objectives.

Furthermore, the SMS Industry Participants join Tatango and others in requesting that the Commission rescind its pre-2015 rulings and orders interpreting the ATDS definition and that it declare a business is *not* using an ATDS when that business makes calls or sends text messages using either (1) a list of numbers associated with a business's consenting customers or (2) a predictive dialer. At least eight separate commenters made note of the Commission's pre-2015 interpretations of the ATDS definition as it applies to predictive dialers and human-generated contact lists and the problems these interpretations have caused for the courts and for businesses who rely on these methods to communicate with their consumers.[17] And an even larger number

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[14] Notably, the Third Circuit just issued a ruling that concluded that this is the appropriate interpretation of ATDS. *See, e.g. Dominguez v. Yahoo, Inc.*, 2018 WL 3118056, at *4 (3d Cir. June 26, 2018) (defining "automatic telephone dialing system" as a system that has "the **present capacity** to function as an autodialer by **generating random or sequential numbers and dialing those numbers**").

[15] Comments of ACA International, FCC DA 18-493, CG Docket Nos. 18-152 and 02-278, at 6 (June 13, 2018) ("ACA International Comments").

[16] *See* Comments of ADT LLC d/b/a ADT Security Services, FCC DA 18-493, CG Docket Nos. 18-152 and 02-278, at iii (June 13, 2018) ("ADT Comments").

[17] *See* ACA International Comments at 2 ("While the overly broad interpretation of the ATDS has been a major challenge for TCPA compliance, this is only part of the problem. There are also several other … previous problematic Commission interpretations such as the determination that at least some predictive dialers may be an ATDS."); ADT Comments at 10 ("Much of the current confusion stems from the Commission's decisions to include predictive dialers within the autodialer definition."); AFSA Comments at 6-7 ("Given the D.C. Circuit's sweeping criticism of the FCC's 2015 guidance on what constitutes an ATDS … a number of courts have viewed the slate as having been wiped clean … [y]et, other courts have reached the opposite conclusion…. These courts have concluded that earlier FCC guidance may still be binding, including the finding that certain predictive dialers constitute an ATDS."); Comments of Cisco Systems, Inc., FCC DA 18-493, CG Docket Nos. 18-152 and 02-278, at

of commenters made arguments showing how predictive dialers and human-generated contact lists do not meet the TCPA's ATDS definition and do not further Congress's objectives in enacting the TCPA.[18] Businesses have gone to great lengths to comply with the TCPA, and the methods mentioned above have been a major part of that trying process. The commenters have made this clear, and the SMS Industry Participants join them in calling on the Commission to finally take notice and permit the use of these devices without facing the risk of litigation.

In sum, the Commission should respect the intentions of Congress, the TCPA's plain language, and the bounds of the FCC's authority. Thus, the SMS Industry Participants join Tatango and the other commenters in recommending and urging the Commission to issue prompt guidance explaining that (1) an ATDS is a device that has the *present capacity*, and is *being used to*, dial random or sequential numbers and (2) a business that sends text messages to a list of numbers provided by that business's customers or that uses a predictive dialer is *not* using an ATDS.

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3 (June 13, 2018) ("Cisco Comments") ("[T]he Commission has sought to expand its interpretation of this [ATDS] definition over the years – far beyond what Congress prescribed – in part to reach modern calling equipment and methods, including equipment that calls a set list of numbers."); ETA Comments at 6 ("Since the D.C. Circuit's decision, the courts are split on whether the FCC's 2003 and 2008 predictive dialer rulings were, in effect, vacated by the D.C. Circuit."); Tatango Comments at 7 ("[W]hile courts now understand that the 2015 Omnibus TCPA Order's ATDS interpretation should not be referenced in determining whether a predictive dialer is or is not an ATDS, these same courts are uncertain whether pre-2015 FCC interpretations should be consulted."); Comments of TechFreedom, FCC DA 18-493, CG Docket Nos. 18-152 and 02-278, at 3 (June 13, 2018) ("TechFreedom Comments") ("Unfortunately, when entrepreneurs and designers of dialing equipment rose to Congress's challenge, delivering such pro-consumer, pro-public-safety innovations [like the predictive dialer, the Commission struck them down."); Comments of the U.S. Chamber Institute for Legal Reform at 12 ("The Commission should deal with the uncertainty surrounding the definition of ATDS separately and immediately…. Already, divergent caselaw is beginning to develop, causing more uncertainty for businesses and consumers. For example, in the brief time since … 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.").

[18] *See* ACA International Comments at 7-8; ADT Comments at 10-12; AFSA Comments at 7-8; Comments of the A to Z Communications Coalition and the Insights Association, FCC DA 18-493, CG Docket Nos. 18-152 and 02-278, at 5-6 (June 7, 2018); Cisco Comments at 7; ETA Comments at 4-6; Comments of PRA Group, Inc., FCC DA 18-493, CG Docket Nos. 18-152 and 02-278, at 4 (June 13, 2018); Tatango Comments at 7, 11; TechFreedom Comments at 3-5; Comments of the U.S. Chamber Institute for Legal Reform at 11-13.

II. THE APPROPRIATE TREATMENT OF REASSIGNED NUMBERS UNDER THE TCPA

Furthermore, the SMS Industry Participants agree with Tatango's position that, instead of implementing further regulatory burdens via the creation of a reassigned numbers database,[19] the agency should simply return to a practical and common-sense interpretation of the term "called party" as it is used throughout the statute. Thus, the SMS Industry Participants believe that the Commission should reinterpret "called party" and define said term as "the person the caller expected to reach," rather than "the wireless number's present-day subscriber."

As Tatango and other commenters have noted in this proceeding[20] and earlier proceedings,[21] reinterpreting "called party" to mean "the person the caller expected to reach," rather than "the wireless number's present-day subscriber," would eliminate the perverse incentive individuals have to remain silent about the fact that they are not the person the caller is trying to reach and then use that willful silence to claim substantial TCPA damages when the "unwanted" calls continue. Such an interpretation would also recognize that good-faith businesses are not trying to communicate with unwilling or uninterested individuals and that they are doing their best to communicate with those consumers who they already know to be receptive to their messages.

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19 *See In the Matter of Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Further Notice of Proposed Rulemaking, FCC 17-90, CG Docket No. 17-59 (Mar. 23, 2018). In the event the Commission establishes a new reassigned number database, an interpretation of the term "called party" would likely be unnecessary, as the database would provide the safe harbor necessary to protect good-faith businesses from being sued when they call reassigned numbers. However, implementing such a database would be costly, timely, and impose further regulatory burdens on telecommunications carriers, platform providers, and individual businesses. Thus, the SMS Industry Participants believe that it would be in the best interests of all parties for the Commission to simply interpret the term "called party" to mean "the person the caller expected to reach" and to forego the implementation of a reassigned numbers database.

20 *See* Tatango Comments at 12; Comments of the U.S. Chamber Institute for Legal Reform at 13-14.

21 *See* O'Rielly Dissent, 30 FCC Rcd. at 8094 (noting that, in the 2015 proceedings, "a number of petitioners and commenters asked the FCC to interpret 'called party' to mean the 'intended recipient'").

In sum, defining the term "called party" as "the person the caller expected to reach" would best balance the risks and rewards associated with marketing campaigns, protecting individual consumers and ensuring good-faith businesses are not targeted by crafty professional plaintiffs. The SMS Industry Participants therefore join Tatango and other commenters in urging the Commission to confirm that the term "called party" is best understood as "the person the caller expected to reach," and not "the wireless number's present-day subscriber."

III. CODIFYING THE "REASONABLE" METHODS FOR CONSUMERS TO REVOKE CONSENT TO RECEIVE FUTURE TEXT MESSAGES

Finally, the SMS Industry Participants support Tatango in urging the Commission to clearly define what are the "reasonable" methods by which a consumer may revoke his or her prior express consent to be contacted or, at the very least, to declare that businesses are not prohibited from including in their SMS marketing campaign terms and conditions a contractual obligation requiring consumers to revoke their consent only via proscribed ways.[22]

As Tatango and other commenters demonstrated, determining whether a consumer has opted out from a business's text message marketing campaign under the FCC's current "reasonableness" standard has created a host of problems for calling parties, leaving them without a bright-line rule and subject to the discretion of federal courts (which in many cases have conflicting interpretations of what is considered a "reasonable" opt-out method).[23] Indeed,

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[22] *See* Tatango Comments at 13-14.

[23] *See* ADT Comments at 23 ("As we predicted, plaintiffs in fact have sought to manufacture TCPA claims by refusing to utilize clearly defined, easy-to-use opt out methods."); ETA Comments at 8-9 ("[T]he fact remains that what is 'reasonable' and what is 'unconventional' [as an opt-out method] remains undefined and lacking in clarity, leaving legitimate callers faced with uncertainty (and potentially expensive litigation)."); Comments of the Retail Industry Leaders Association, FCC DA 18-493, CG Docket Nos. 18-152 and 02-278, at 24 (June 13, 2018) ("As it stands now, the question whether a consumer has reasonably revoked consent is determined through a case-specific, fact-intensive inquiry. The need to conduct such an inquiry increases both the cost of litigation and the risk of inconsistent results."); Comments of the U.S. Chamber Institute for Legal Reform at 21 (describing the current "reasonableness" standard as creating "the potential for litigation abuse fostered by an unclear and broad right of revocation").

it would be much better for all parties involved if the Commission provided definitive guidance and clearly outlined an objective standard of what does and does not count as a consumer's reasonable revocation of consent. Accordingly, the SMS Industry Participants urge the Commission to make clear that callers that send automated text messages only have a duty to honor opt-out responses that are consistent with CTIA's Shortcode Monitoring Handbook and its universal opt-out methodology.[24]

In the alternative, and at a minimum, the SMS Industry Participants urge the Commission to make clear that there is no prohibition against a company including in its terms and conditions a contractual obligation requiring customers to utilize one the of the five universally-recognized CTIA opt-out keywords to revoke consent. As Tatango noted in its comments,[25] the Commission has itself acknowledged the possibility of a business being allowed to limit a consumer's method of opt-out via contract, but this fact was only mentioned in a footnote of the FCC's brief in *ACA International*.[26] Therefore, the Commission should emphasize this point by explicitly declaring it in its next order.

CONCLUSION

Just like Tatango and many other commenters, the SMS Industry Participants encourage the Commission to take prompt action to eliminate the scourge of opportunistic TCPA litigation

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[24] *See* CTIA, SHORTCODE MONITORING HANDBOOK, § A.2.04 (2017). The CTIA Shortcode Monitoring Handbook lists five "universal keywords" that every text message marketing campaign should accept as a consumer's revocation of consent: (1) "STOP," (2) "END," (3) "CANCEL," (4) "UNSUBSCRIBE," and (5) "QUIT." *Id.*

[25] *See* Tatango Comments at 14.

[26] 885 F.3d at 710 ("The Commission correctly concedes, however, that the ruling 'did not address whether contracting parties can select a particular revocation procedure by mutual agreement.'") (quoting FCC Br. at 64 n.16).

that has stymied legitimate businesses from communicating with their customers. Therefore, the SMS Industry Participants request that the Commission declare the following:

1. An ATDS is a device that has the *present capacity*, and is *being used to*, dial random or sequential numbers;
2. A business which sends text messages to a list of numbers provided by that business's customers or that uses a predictive dialer is *not* using an ATDS;
3. The phrase "called party" should be understood as "the person the caller expected to reach"; and
4. Business subject to the TCPA that send text messages are only required to honor "STOP," "END," "CANCEL," "UNSUBSCRIBE," and "QUIT," or, in the alternative, are not prohibited from including in their SMS marketing campaign terms and conditions a contractual obligation requiring consumers to utilize one of the five universally-recognized keywords to revoke consent.

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