

**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)	CG Docket No. 02-278
Light of the D.C. Circuit’s ACA International)	
Decision)	

COMMENTS OF INCOMPAS

INCOMPAS, by its undersigned counsel, hereby submits these comments in response to the Consumer and Governmental Affairs Bureau’s *Public Notice* seeking comment on how the Federal Communications Commission (“Commission” or “FCC”) should interpret and implement the Telephone Consumer Protection Act (“TCPA”)¹ following the U.S. Court of Appeals for the District of Columbia’s (“D.C. Circuit”) decision in *ACA International v. FCC*.²

I. INTRODUCTION & SUMMARY

INCOMPAS represents competitive communications and technology companies that are subject to the provisions of the TCPA. The D.C. Circuit’s decision, setting aside the Commission’s interpretation of an autodialer and invalidating the entirety of the agency’s reassigned numbers rule, represents a unique opportunity to reexamine important provisions that

¹*Consumer and Government Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision*, CG Docket No. 18-152, CG Docket No. 02-278, Public Notice, DA 18-493 (rel. May. 14, 2018) (“Notice”).

² *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir 2018) (mandate issued May 8, 2018) affirming in part and vacating in part *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (“2015 TCPA Declaratory Ruling and Order”).

impact our members and their ability to reach their customers. In this comment, INCOMPAS urges the Commission to narrow its interpretation of the term “automatic telephone dialing system” and provides specific recommendations for how the Commission should address other key terms related to the definition of autodialers. We also explain how the Commission should interpret the term “called party” as it relates to how to treat calls to reassigned wireless numbers under the TCPA, and discuss the impact this may have on the Commission’s proceeding on establishing a single, FCC-sponsored reassigned numbers database. Finally, INCOMPAS encourages the Commission to give callers the flexibility to develop procedures that will provide a called party with the “reasonable means” to revoke prior express consent to receive robocalls.

II. A NARROW INTERPRETATION OF “AUTOMATIC TELEPHONE DIALING SYSTEM” WILL ENSURE THE COMMISSION COMPORTS WITH THE TCPA.

With the D.C. Circuit deciding that the Commission’s 2015 TCPA Declaratory Ruling and Order provided an “unreasonably expansive interpretation” of what equipment constitutes an automatic telephone dialing system (“ATDS”),³ INCOMPAS applauds the Commission for seeking industry feedback on ways to more narrowly interpret the Act’s terms “to better comport with the congressional findings and the intended reach of the statute.”⁴ Indeed, the Commission’s 2015 decision to include the “potential ability” of a piece of equipment to become an ATDS⁵—seemingly qualifying every smartphone as an autodialer—led the court to

³ *ACA Int’l*, 885 F.3d at 692 (indicating that the Commission’s 2015 interpretation subjects “ordinary calls from any conventional smartphone to the Act’s coverage”).

⁴ Notice at 2.

⁵ 2015 TCPA Declaratory Ruling and Order at 7975.

determine that the Commission’s broad interpretation of the statute and the term “capacity” was “unreasonable, and impermissible.”⁶

Based on the decision reached by the court in *ACA International*, it is clear that a more circumscribed interpretation for ATDS is required. The TCPA defines an “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.” INCOMPAS proposes that to be considered an ATDS, technology must have the *current* ability to generate a phone number in random and sequential order and to call the number generated. Furthermore, any technology that simply dials from a pre-prepared list should not qualify as an ATDS.

With respect to the use of the term “capacity” in the ATDS definition, any device that does not “store or produce telephone numbers to be called, using a random or sequential number generator” should be excluded from being considered an ATDS. As noted above, this exclusion would appropriately apply to devices that transmit messages only to a curated list of telephone numbers. According to the most judicious reading of the definition, 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. Like the D.C. Circuit, the Commission should reject any interpretation of the statute that concerns the “potential ability” of a device to become an ATDS. The Commission should not classify a device that does not *currently* use a “random or sequential number generator to store or produce telephone numbers to be called” as an ATDS unless and until the device *actually* makes calls to numbers generated by its random and sequential number capability.

⁶ *ACA Int’l*, 885 F.3d at 703.

Next, the Commission seeks comment on the term “automatic” as well as the degree to which its dialing must be automatic to qualify a device as an ATDS. INCOMPAS contends that, after setup, an *automatic* system must dial numbers without human or manual intervention. Any device that requires manual intervention before it can “store or produce telephone numbers to be called [and] . . . dial such numbers” by definition cannot qualify as an “*automatic* telephone dialing system.” This is because automation necessarily excludes devices that require manual intervention to accomplish their core tasks. If manual intervention is required to effectuate the transmission of a message after set up, then the device does not transmit that message *automatically* and therefore should not qualify as an ATDS.

Finally, the Commission seeks comment on which interpretation of its provisions concerning a “random or sequential number generator” from its 2015 TCPA Declaratory Ruling and Order it should retain following the D.C. Circuit’s decision. Significantly, the court questioned the agency’s view that, in addition to devices that are able to generate and dial random or sequential numbers, some equipment that lacks this capacity can nonetheless be considered autodialers. A device that can dial and transmit messages only to a curated list of telephone numbers does not “store or produce telephone numbers . . . using a random or sequential number generator” and therefore must be excluded from the ATDS classification. This is because the most rational reading 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. In order to comply with the court’s directive to choose between the Order’s competing interpretations, the Commission should reject any definition of an autodialer that would cover equipment without the capacity to generate and dial random or sequential numbers.

III. A “CALLED PARTY” CAN ONLY BE INTERPRETED AS THE PERSON THE CALLER EXPECTED TO REACH OR THE “INTENDED PARTY.”

This new opportunity to interpret the TCPA following the *ACA International* decision has the potential to immediately inform several other Commission proceedings, including efforts to eliminate unwanted robocalls. The Commission is currently reviewing ways to address the problem of unwanted calls to reassigned numbers, and the Bureau’s inquiry “on how to treat calls to reassigned wireless numbers under the TCPA” and, in particular, how the Commission interprets the term “called party” will determine whether or not the agency’s proposal to make a reassigned numbers database available to callers is necessary.⁷ INCOMPAS contends that if the Commission takes the reasonable step of interpreting a “called party” under the Act as “the person a caller expected to reach,” then liability will be mitigated for good faith callers who contacted a new subscriber with a reassigned number.

In the 2015 TCPA Declaratory Ruling and Order, the Commission clarified that callers that make calls without the knowledge that a number has been reassigned and is no longer in the control of a subscriber that gave prior express consent to receive calls face TCPA liability subject to a one-call “opportunity to gain actual or constructive knowledge of the reassignment.”⁸ Based on this actual or constructive knowledge, callers were then required to “cease future calls to the new subscriber” or face liability under the Act for making a call using an autodialer without the prior express consent of the party that was reached.⁹ This approach was adopted following a debate over the statutory meaning of the term “called party,” whom callers may not

⁷ Notice at 3.

⁸ 2015 TCPA Declaratory Ruling and Order at 8000, ¶ 72.

⁹ *Id.*

contact using an autodialer or an artificial or prerecorded voice without prior express consent.¹⁰ The Commission rejected industry pleas to interpret “called party” as the “intended recipient” based on ambiguity the agency found in the TCPA as well as decisions from the Seventh and Eleventh Circuits which concluded that a “called party” was the “person subscribing to the called number at the time the call was made.”¹¹

In the *ACA International* decision, the D.C. Circuit rejected the Commission’s approach and found that the Commission’s one-call, post reassignment policy was arbitrary and capricious. While the D.C. Circuit found that the Commission’s interpretation of “called party” using the Seventh Circuit’s analysis was permissible, the court left open the opportunity for the Commission to reexamine this term. Faced with the liability that could come from making an unlawful call, our members appreciate the Commission’s revisiting the definition of “called party” for TCPA purposes. On remand, the Commission should adopt an interpretation that permits a good faith caller to make calls based on the caller’s reasonable belief that it already possesses prior express consent to contact a customer. Such an interpretation would discourage unwanted robocalls while providing callers with the certainty needed to make calls intended to provide called parties important information they have requested.

As noted previously, the TCPA allows callers to make calls using any ATDS so long as they are “made with the prior express consent of the called party.” For important practical and policy-related reasons, “called party” in this context should be interpreted as the person the caller expected to reach, or as previously contemplated by the Commission, the “intended recipient” of

¹⁰ See 47 U.S.C. § 227(b)(1).

¹¹ *Id.* at 8001-8002 (citing *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 639-40 (7th Cir. 2012); *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014)).

the call. This would appear to be the only rational interpretation as any other approach would nullify the “prior express consent” exception found in the statutory language. Indeed, the purpose of the carve-out is to permit a caller to transmit a call to the “called party”—the person the caller expected to reach—that provided “prior express consent” to receive it.

Protecting this statutory language is paramount in any interpretation of “called party” as it will ensure that good faith callers can continue to reach customers or take the appropriate measures to cease future calls to the new subscriber of a reassigned number. Furthermore, it should protect callers that have a reasonable basis to believe they have consent to make calls using automated telephone equipment from potential liability under the TCPA and alleviate the need for a reassigned numbers database. Instead, industry can rely on existing market-based solutions that are available to help callers identify reassignments.¹²

IV. CALLERS SHOULD BE AFFORDED AN OPPORTUNITY TO ESTABLISH PROCEDURES THAT PROVIDE A CALLED PARTY WITH A “REASONABLE MEANS” FOR REVOCATION OF CONSENT.

In *ACA International*, the D.C. Circuit upheld the Commission’s appropriate approach to revocation of a called party’s prior express consent to receive robocalls. The court held that a called party “may revoke her consent through *any reasonable means* clearly expressing a desire to receive no further messages from the caller.”¹³ However, as the Commission identified in its Public Notice, additional clarification on whether a revocation request meets the “reasonable means” standard from the 2015 TCPA Declaratory Ruling and Order will help callers seeking to develop clearly defined and easy-to-use opt-out methods.

¹² See *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Second Notice of Inquiry, FCC 17-90, ¶ 6 (rel. July 13, 2017) (citing to various reassigned number solutions).

¹³ *ACA Int’l*, 885 F.3d at 692 (emphasis added).

With respect to interpreting the “any reasonable means” standard, INCOMPAS recommends allowing callers to establish and follow a set of procedures for revoking consent, so long as the methods employed are not intentionally deceptive or lead to “idiosyncratic or imaginative revocation requests” that might otherwise be unreasonable.¹⁴ In this case, clear guidelines will help both the called party and caller when a client opts-out. If an opt-out method is clear and conspicuous and is easy for a called party to use, then any other opt-out methods should be *per se* unreasonable. As indicated by the court in its decision, “callers will have every incentive to avoid TCPA liability by making available clearly-defined and easy-to-use opt-out methods.”¹⁵ The Commission should place similar reliance on callers and allow them to develop revocation procedures that accommodate a consumer’s “reasonable expectation that he or she could effectively communicate his or her request” without “incurring undue burdens.”¹⁶

As to examples of reasonable opt-out methods that would qualify as clearly defined and sufficiently easy to use for unwanted calls, consumers should be able to revoke consent verbally or in writing. Companies can provide procedures for opting-out on their company websites and can provide the designated address, email address, or webpage where consumers can submit a revocation request. INCOMPAS also agrees that either a standardized code or response, such as “STOP,” to an SMS would meet these criteria. Further, verbal statements such as “do not call me anymore” or “please put me on your do not call list” delivered to a live caller would be sufficient and easily cataloged by a caller.

¹⁴ *Id.* at 729.

¹⁵ *Id.*

¹⁶ 2015 TCPA Declaratory Ruling and Order at 7996, ¶ 64 n.233 (describing the factors the Commission will assess to determine whether a revocation request meets “reasonable means” standard).

V. CONCLUSION

For the reasons stated herein, INCOMPAS urges the Commission to adopt the recommendations in its comment, as it considers the issues raised in the Public Notice.

Respectfully submitted,

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