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*Via electronic submission*

June 13, 2018

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: Public Notice – Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit Court’s ACA International Decision [CG Docket No. 18-152; CG Docket No. 02-278]

Dear Ms. Dortch:

The Independent Community Bankers of America (“ICBA”)<sup>1</sup> welcomes this opportunity to provide comment on the Federal Communication Commission’s (“FCC” or “Commission”) interpretation of the Telephone Consumer Protection Act (“TCPA” or “Act”) in light of the D.C. Circuit Court’s (“court” or “circuit court”) recent decision.

## **Background**

The Telephone Consumer Protection Act generally prohibits telephone calls made using an automatic telephone dialing system (“ATDS”) to wireless telephone numbers unless the caller has the prior express consent of the called party. Varying interpretations of the Act’s language and terminology have given rise to an increased number of lawsuits.

In response to several petitions seeking legal certainty regarding TCPA liability, the FCC issued a Declaratory Ruling and Order (“Order”) in 2015. In part, the Commission interpreted: (1) the

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<sup>1</sup> The Independent Community Bankers of America®, the nation’s voice for nearly 5,700 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services. With nearly 52,000 locations nationwide, community banks employ 760,000 Americans, hold \$4.9 trillion in assets, \$3.9 trillion in deposits, and \$3.3 trillion in loans to consumers, small businesses, and the agricultural community. For more information, visit ICBA’s website at [www.icba.org](http://www.icba.org).

sort of equipment that qualifies as an ATDS, (2) whether “called party” means the intended recipient of the call or the current subscriber of the telephone number, and (3) the means by which consenting parties can revoke their consent.

Several industry stakeholders, including ICBA, sought judicial review of the Commission’s Order, arguing that its interpretations were arbitrary and capricious. In March 2018, the D.C. Circuit Court set aside portions of the Commission’s Order, and upheld others. Following the March decision, the Commission now seeks comment on several of the issues raised in the court’s decision.

## ICBA Comments

### Executive Summary

It is imperative that community banks be able to confidently communicate financial information to their customers without fear of being subjected to meritless lawsuits. Accordingly, ICBA is supportive of the Commission’s effort to reinterpret its arbitrary and capricious 2015 Order. To aid in the effort, ICBA makes the recommendations noted below.

- The Commission should limit its interpretation to the plain language of the Act; no more, no less.
- The Commission should recognize that “capacity” means present capability and not some theoretical function.
- A device itself must be able to generate random or sequential numbers to be dialed in order to meet the definition of ATDS.
- The definition of ATDS should be limited to equipment that uses a random or sequential number generator to store or produce numbers and dial those numbers without human intervention.
- Only those calls made using actual ATDS capabilities should be subject to TCPA restrictions.
- The Commission should define “called party” as the party the caller intended to reach.
- A safe harbor could be an effective way for good actors to quickly and inexpensively dismiss lawsuits.
- Parties should be able to mutually agree on a means for revoking consent.
- Opt-out attempts that deviate from prescribed procedures are unreasonable and should not constitute an effective revocation.
- The Commission should establish several examples of revocation that the caller could unilaterally set as “reasonable revocation.”

## Which Devices Qualify as ATDS

The Act defines ATDS equipment as any device that “has the capacity” to “store or produce telephone numbers to be called, using a random or sequential number generator,” and “to dial such numbers.” The Commission’s 2015 Order determined that “capacity” is not limited to current functionality, but hinges on the device’s potential functionalities.

Upon review, the D.C. Circuit Court rightfully found this interpretation to be so broad as to be arbitrary and capricious. The court found that the Commission’s Order meant that all smartphones meet the statutory definition of an autodialer and are therefore “equipment” covered under the Act. The court explained that the TCPA could not be reasonably interpreted so broadly as to render every smartphone an ATDS subject to the Act. It stated, “[t]hat interpretation of the statute...is an unreasonably, and impermissibly, expansive one.” The court set aside the FCC’s interpretation of “capacity.”

The Commission also interpreted which equipment “store[s] or produce[s] numbers to be called, using a random or sequential number generator, and...to dial such numbers.” Specifically, the Commission sought to determine whether a device itself must have the ability to generate numbers to be dialed, or whether the equipment is sufficient to meet the definition if it calls from a database of telephone numbers generated elsewhere. The circuit court found that the 2015 Order contradicted itself and used both interpretations. The court stated, “[i]t might be permissible for the Commission to adopt either interpretation. But the Commission cannot...espouse both competing interpretations in the same order.” Here, too, the court set aside the Commission’s interpretation of functionality.

As the result of the court setting aside the Order’s interpretations of ATDS, the Commission is now seeking comment on what should constitute an ATDS. In particular, the FCC seeks comment on how it should interpret “capacity” and the “functions” a device must be able to perform to qualify as an ATDS.

ICBA recommends the Commission should limit its interpretation to the plain language of the Act; no more, no less. This means that the Commission should recognize that “capacity” means present capability and not some theoretical function. To interpret “capacity” otherwise invites a never-ending series of inferences that could lead to the *possibility* of future capability. Simply said, if the equipment cannot perform a function, then it does not have the capacity. This would address the court’s concern that FCC’s interpretation would deem every smartphone an ATDS subject to TCPA liability.

Regarding the functionality of a device, ICBA recommends that a device itself must be able to generate random or sequential numbers to be dialed in order to meet the definition of ATDS.

The definition should NOT include a device that merely dials numbers from a list. The statute very clearly states that ATDS equipment must “store or produce telephone numbers to be called, using a random or sequential number generator.” The second clause of that statutory line cannot be ignored and is meant to modify the first clause, i.e., equipment using a number generator.

Finally, ICBA urges the Commission to fully adopt the definition of ATDS as set out in the U.S. Chamber Institute for Legal Reform’s (“Chamber”) Petition for Declaratory Ruling, filed May 3, 2018. The Chamber proposes defining an ATDS as equipment that uses a random or sequential number generator to store or produce numbers and dial those numbers *without human intervention*. Further, only those calls made using actual ATDS capabilities should be subject to TCPA restrictions. This is a plain, reasonable, and workable definition that meets the intent of Congress.

### **Reassigned Numbers and Interpretation of “Called Party”**

In addition to defining ATDS, the 2015 Order defined “called party” when determining whether prior express consent permits an otherwise prohibited call. Under the Act, a caller is permitted to use ATDS equipment when calling a wireless number so long as the “called party” provided express consent. However, courts have been split in determining whether a caller violates the Act when it unknowingly calls a wireless number that had been reassigned from a previous subscriber that had given consent.

The 2015 Order interpreted such situations to be violations. It determined that “called party” refers to the current subscriber, regardless of the caller’s knowledge or intent. The Commission did provide for a narrow exemption. A caller who lacks knowledge of the reassigned number can avoid liability for the first call to a number following reassignment. For that first call, the caller can reasonably rely on the consent given by the previous subscriber. After that one call, the caller is liable for every subsequent call to that reassigned number, regardless of knowledge.

While the court found that the Commission could permissibly interpret “called party” to refer to the current subscriber, the court found the Commission’s “one call” safe harbor to be arbitrary. When a court invalidates a specific aspect of any agency’s action, (i.e., the “one call” safe harbor), the court only leaves related components of the agency’s action (i.e., the interpretation of “called party”) standing if it can believe without any “substantial doubt” that the agency would have adopted the severed portion on its own.

The court found that it did not believe without substantial doubt that the Commission would have embraced its interpretation of “called party” without the safe harbor. Therefore, the court invalidated and set aside the Commission’s treatment of reassigned numbers as a whole.

The Commission is now seeking comment on how it should interpret the term “called party” for reassigned numbers. It also seeks comment on whether a reassigned numbers safe harbor is still necessary, and if so, what statutory authority would provide for such safe harbor.

First, ICBA believes that the most practical way to square Congress’s intent with the court’s ruling is to define “called party” as the party the caller intended to reach. Interpreting “called party” any other way punishes good actors that are reasonably attempting to contact consumers that have given their prior express consent.

Consumers do not typically alert all parties when they permanently disconnect their telephone number. Callers may not have constructive knowledge of a reassigned number when they make a call. These are both very understandable and common situations.

If the FCC adopts ICBA’s suggested definition of “called party,” the potential liability for good actors will certainly be mitigated. However, banks would still be frustrated in their efforts to contact their customer and might not know about a reassignment without the database.<sup>2</sup> Checking the database and providing safe harbor would be welcome for community banks that seek assurances of protection from unscrupulous lawsuits that require time and money to defend against. A safe harbor could be an effective way for good actors to quickly and inexpensively dismiss such lawsuits.

Finally, as ICBA noted in response to the second further notice, the FCC has the statutory authority to establish a safe harbor. The Commission already set the precedent of a safe harbor when its 2015 Order established the “one call” provision. The Commission found its statutory authority to establish a safe harbor by interpreting a caller’s ability under the statute to rely on a recipient’s “prior express consent” to mean “reasonable reliance.” When a caller has no knowledge of a reassignment, the caller’s continued reliance on the consent is “reasonable,” and thus, no violation of TCPA. Checking the database would serve as affirmative action that would evidence lack of knowledge. However, ICBA reiterates that use of the database should not be mandatory to defend against liability under the TCPA.

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<sup>2</sup> See Michael Emancipator, *ICBA Response to Second Further Notice of Proposed Rulemaking, Advanced Methods to Target and Eliminate Unlawful Robocalls*; CG Docket No. 17-59; FCC 18-31, [http://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/18-06-07\\_fccltr.pdf?sfvrsn=0](http://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/18-06-07_fccltr.pdf?sfvrsn=0).

## Revocation of Consent

Finally, the Commission reviewed whether consenting parties could revoke prior consent, and if so, what means he or she had to revoke such consent. The FCC determined that consenting parties may indeed revoke consent, that callers may not unilaterally designate the means to revoke consent, and that “a called party may revoke consent at any time and through any reasonable means that clearly expresses a desire not to receive further messages.”

Here, the court found that the Commission’s interpretation was reasonable and did not set it aside. Though not remanded to the Commission, the FCC still seeks comment on how a party may revoke prior express consent to receive robocalls and what opt-out methods would be clearly defined and easy to use for unwanted calls.

ICBA recommends that above all else, parties should be able to mutually agree on a means for a consenting party to revoke consent. The most likely place to reach such an agreement would be at the time that the called party consents to being called.

The Commission should also acknowledge that if a caller implements an easy and reasonable opt-out procedure, then opt-out attempts that deviate from that prescribed procedure are unreasonable and should not constitute an effective revocation. Callers should not need to anticipate and account for every possible method or channel of a consumer’s revocation of consent. Nor should a caller need to litigate the “reasonableness” of every revocation method on a case-by-case basis. An agreed upon method, respected by the Commission and the courts, will provide both parties certainty and still hold callers accountable to the wishes of consenting parties.

When there is no mutually-agreed method of revocation, or when the prior consent is silent as to revocation, ICBA urges the Commission to establish several examples of revocation that the caller could unilaterally set as “reasonable revocation.” For example, in his dissent, Commissioner O’Rielly laid out several, including (1) in writing at the mailing address designated by the caller; (2) by email to the email address designated by the caller; (3) by text message sent to the caller; and/or (4) as prescribed by the Commission hereafter as needed to address emerging technology.

## Conclusion

Community banks depend on their relationships with customers and their ability to communicate with them when situations warrant. Predatory lawsuits against good actors, such as community banks, have hindered the dissemination of these important communications. ICBA greatly appreciates the Commission’s recognition of this fact, and we look forward to

seeing a more reasonable approach to determining liability when community banks unknowingly call reassigned numbers. Should you have any questions or would like to discuss anything further, please do not hesitate to contact me at [michael.emancipator@icba.org](mailto:michael.emancipator@icba.org) or at 202-659-8111.

Sincerely,

/s/

Michael Emancipator  
Assistant Vice President and Regulatory Counsel