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

In the Matter of

Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	CG Docket No. 18-152
	)	

COMMENTS OF THE INTERNATIONAL PHARMACEUTICAL & MEDICAL DEVICE PRIVACY CONSORTIUM

Peter Blenkinsop
Secretariat and Legal Counsel
International Pharmaceutical & Medical
Device Privacy Consortium
1500 K Street NW
Suite 1100
Washington, DC 20005-1209
(202) 230-5142
Peter.Blenkinsop@dbr.com

EXECUTIVE SUMMARY

The D.C. Circuit's ruling in *ACA International* provides an opportunity for a much-needed revisiting of the previous Commission's broad interpretation of the TCPA's requirements. In view of the explosion of TCPA litigation occasioned by that approach, the IPMPC urges the Commission to take this opportunity to restore regulatory certainty for consumers and callers.

First, the Commission should clarify that a device is an ATDS only when autodialing functionality is actually used to place a particular call. This common-sense approach is consistent with the text of the TCPA and offers a straightforward resolution to an unnecessarily vexing problem under the previous approach. The Commission should interpret "capacity" to mean actual present capacity to provide autodialer capabilities, not speculative future capacity. The "future capacity" standard is unworkably vague and results in confusion among callers and courts.

Further, IPMPC believes that it is crucially important to establish a safe harbor for callers who make good faith efforts to honor revocations of consent. Doing so would benefit consumers by incentivizing the development of uniform, easy to use opt-out functionalities. Such a safe harbor could be contingent on a caller's provision of at least two out of a Commission-approved list of opt-out methods, thereby providing consumers with choice and callers with greater certainty.

Finally, IPMPC urges the Commission to adopt an actual knowledge standard for liability for calls to reassigned numbers. This approach would appropriately account for the technical hurdles faced by good-faith callers attempting to comply with the TCPA rules in an environment where numbers are often reassigned without warning to the callers.

TABLE OF CONTENTS

I. INTRODUCTION

The International Pharmaceutical & Medical Device Privacy Consortium ("IPMPC") through its attorneys, hereby submits the following comments in response to the above-referenced *Public Notice*,[1] in which the Federal Communications Commission ("FCC" or "Commission") seeks comment on several issues related to the Commission's interpretation of the Telephone Consumer Protection Act ("TCPA" or "the Act") following the D.C. Circuit's recent decision in *ACA International v. FCC*[2] invalidating several of the Commission's prior interpretations of the Act.

IPMPC is comprised of chief privacy officers and other data privacy and security professionals from a number of research-based, global pharmaceutical companies and medical device manufacturers. IPMPC is the leading voice in the global pharmaceutical and medical device industries to advance innovative privacy solutions to protect patients, enhance healthcare, and support business enablement.[3]

IPMPC encourages the Commission to interpret the TCPA in a manner that provides businesses with clear guidance while also protecting consumers. The FCC historically has interpreted the TCPA in a very broad fashion, generating significant uncertainty, increasing the costs for law-abiding companies to conduct business that involves contacting their customers and preventing the communication of useful information to consumers. After the D.C. Circuit's recent decision in *ACA International*, in which the court invalidated multiple portions of the

---

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 Nos. 18-152 and 02-278, DA 18-493 (rel. May 14, 2018).

2 *ACA Int'l v. Federal Communications Commission*, 885 F.3d 687 (D.C. Cir. 2018).

3 More information about IPMPC is available at https://www.ipmpc.org/.

Commission's 2015 *Declaratory Ruling and Order*[4] implementing the TCPA, the FCC has an opportunity to interpret the Act in a manner that is more consistent with the intent of the statute and how legitimate companies operate today.

In furtherance of this objective, the FCC should take the following steps: (i) find that a party is liable for "making a[n] unlawful call" using an "automatic telephone dialing system" ("ATDS"), as used in the TCPA, *only* if ATDS functionality was actually used to place the call; (ii) interpret the term ATDS to include only those devices that (a) have the present capacity to store or generate, and dial, random or sequential numbers; and (b) can do so without human intervention; (iii) create a safe harbor for the revocation of prior express consent, pursuant to which a caller need not accept attempted revocations through other means as long as the caller offers two or more of the opt-out methods that are subject to the safe harbor; and (iv) find that a party is liable for a call made to a reassigned number for which the caller had the previous subscriber's prior express consent *only* if the caller has actual knowledge that the number has been reassigned.

Taking these steps would provide businesses and consumers alike with much-needed regulatory certainty about the TCPA's requirements, would comport with the D.C. Circuit's decision, and better ensure that consumers and businesses have reliable, efficient, and effective means to communicate with each other about unwanted calls, thereby fulfilling the underlying policy goals of the Act.

---

[4] *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) ("*Declaratory Ruling and Order*").

II. THE COMMISSION SHOULD FIND THAT A PARTY IS LIABLE UNDER THE TCPA FOR "MAKING A CALL" USING AN ATDS ONLY WHEN ATDS FUNCTIONALITY IS USED TO PLACE THE CALL.

The *Public Notice* focuses heavily on the Commission's definition of ATDS, including its interpretation of the term "capacity" as used in the statutory definition and the functionality that must be present to make a device an ATDS. Interpreting these terms in a more reasonable fashion would better serve the underlying purposes of the TCPA and address the issues identified by the court in *ACA International*, and IPMPC offers comments on these issues in Section III below. However, regardless of how these terms are interpreted, the Commission can best serve the intent of the statute by finding that a party is liable under the TCPA for using an ATDS *only* if the caller used ATDS functionality to place the call in question.

The TCPA makes it unlawful "to make any call . . . using any [ATDS]" without the called party's prior express consent, subject to certain exceptions.[5] The *Public Notice* asks whether this statutory language means that "the bar against 'making any call using' an [ATDS] appl[ies] only to calls made using the equipment's [ATDS] functionality."[6] IPMPC endorses this interpretation, which is consistent with the plain language of the statute and the position espoused by Commissioner O'Rielly in his dissenting and concurring statement in the 2015 *Declaratory Ruling and Order*.[7] Accordingly, a party should be liable under the TCPA only if it uses ATDS functionalities to place the call.

---

5 47 U.S.C. § 227(b)(1)(A).

6 *Public Notice* at 3.

7 *Declaratory Ruling and Order* at 8088 ("[T]he TCPA bars companies from using autodialers to 'make any call' subject to certain exceptions. This indicates that the equipment must, in fact, be used *as an autodialer* to make the calls.").

Interpreting the TCPA in this fashion would greatly simplify the framework for TCPA liability. Although this argument was not raised in *ACA International* petitioners' challenge to the 2015 *Declaratory Ruling and Order*, the court noted that adopting this interpretation would "diminish the practical significance of the Commission's expansive understanding of 'capacity' in the [ATDS] definition,"[8] which would enable the inquiry to be more properly focused on how a device is used. As the *Petition for Declaratory Ruling* filed by the U.S. Chamber Institute for Legal Reform and other parties ("*Chamber Petition*") explains, "[a]dopting this straightforward reading would ensure that liability attaches only when ATDS capabilities are used to make a call," which would give companies "clear guidance" that "would help them avoid unnecessary litigation over whether they used an ATDS when placing calls to their customers."[9] Accordingly, IPMPC urges the Commission to adopt this interpretation.

III. THE COMMISSION SHOULD INTERPRET THE TERM "AUTOMATIC TELEPHONE DIALING SYSTEM" CONSISTENT WITH THE DC CIRCUIT'S DECISION IN *ACA INTERNATIONAL.*

In *ACA International*, the D.C. Circuit invalidated large portions of the Commission's 2015 *Declaratory Ruling and Order* as arbitrary and capricious in violation of the Administrative Procedure Act, including the Commission's interpretations of ATDS. The court's decision provides an opportunity for the Commission to refine its definition of ATDS to focus on the present functionality of devices, thereby creating regulatory certainty for callers while maintaining consumer protections.

---

8 *ACA Int'l*, 885 F.3d at 704. The court referenced this interpretation of the statute but did not pass on the validity of the Commission's previous interpretations of the words "make any call using" an ATDS as used in the TCPA because the question was not before the court. *See id*.

9 *Chamber Petition* at 26-27.

A. The Commission should find that "capacity" as used in the statutory ATDS definition refers only to a device's present capacity to store or generate, and dial, random or sequential numbers.

The *ACA International* court first took issue with the Commission's interpretation of the term "capacity" as used in the statutory definition of ATDS, which provides that an ATDS is "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."[10] In its 2015 *Declaratory Ruling and Order*, the Commission interpreted "capacity" to refer to "potential functionalities" of a device as opposed to the device's present capabilities.[11] Under the Commission's interpretation, a device that was unable to store or produce, and dial, random or sequential numbers would be considered an ATDS as long as there was "more than a theoretical potential" that the device could be equipped with software or otherwise modified to include that functionality.[12]

The court invalidated this holding, finding that "the Commission's interpretation of the term 'capacity' in the statutory definition of an ATDS is 'utterly unreasonable in the breadth of its regulatory [in]clusion.'"[13] Because the Commission's interpretation of "capacity" would appear to sweep within its purview all smartphones, the court found that the interpretation "would extend a law originally aimed to deal with hundreds of thousands of telemarketers into one constraining hundreds of millions of everyday callers."[14] The court thus concluded that

---

10 47 U.S.C. § 227(a)(1).

11 *Declaratory Ruling and Order* ¶¶ 16-18.

12 *Id*. ¶ 18.

13 885 F.3d at 699 (alteration in original).

14 *Id*. at 698.

"[t]he Commission's capacious understanding of a device's 'capacity' lies considerably beyond the agency's zone of delegated authority for purposes of the *Chevron* framework," and accordingly invalidated the interpretation.[15]

In light of the D.C. Circuit's decision, the *Public Notice* seeks comment on "how to interpret 'capacity'" as used in the ATDS definition. IPMPC urges the Commission to interpret "capacity" such that ATDS will include only those devices that have the *present* capacity to store or generate, and dial, random or sequential numbers. As explained in the *Chamber Petition*, under this straightforward interpretation, "[autodialing] capability must be inherent or built into the device for it to constitute an ATDS," and accordingly, "devices that require alteration to add autodialing capability are not ATDS."[16]

Adopting a present capacity interpretation of the ATDS definition would be consistent with the statutory text, and would ensure that the definition is not "unreasonable in the breadth of its regulatory inclusion" in contravention of the D.C. Circuit's decision. Further, this interpretation would provide more certainty to callers about whether their equipment falls under the TCPA, and would ensure that devices with autodialing capabilities would remain subject to the Act and the consumer protections it provides.

A present capacity interpretation is also consistent with the separate statements of then-Commissioner Pai and Commissioner O'Rielly in the 2015 *Declaratory Ruling and Order*. Chairman Pai asserted in his dissenting statement that the interpretation of "capacity" adopted in the order was "flatly inconsistent with the TCPA," and that a present capacity understanding of

---

15 *Id.*

16 *Chamber Petition* at 23.

ATDS is consistent with the plain statutory text and Congressional intent.[17] Commissioner O'Rielly similarly explained in his dissenting and concurring statement that because "the TCPA defines an autodialer as equipment that 'has the capacity' to perform specific functions[,] . . . it seems obvious that the equipment must have the capacity to function as an autodialer *when the call is made*, not at some undefined future point in time."[18]

B. The Commission should find that ATDS includes only those devices that do not require human intervention to generate, store, or dial numbers.

The court in *ACA International* also set aside the FCC's interpretations of ATDS as related to device functionality, including whether the device requires human intervention to dial numbers. In its 2015 *Declaratory Ruling and Order*, the Commission affirmed that "the basic function of [an ATDS] . . . [is] the capacity to dial numbers without human intervention," but denied a petitioner's call for the FCC to "adopt a 'human intervention' test by clarifying that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention."[19] The court took issue with the inherent discrepancy in those positions, finding that because "[t]hose side-by-side propositions are difficult to square,"[20] "the Commission's ruling, in describing the functions a device must perform to qualify as an autodialer, fails to satisfy the requirement of reasoned decisionmaking" and must be set aside.[21] In so doing, the court noted that "[t]he order's lack of clarity about which functions qualify a device as an

---

17 *Declaratory Ruling and Order* at 8074-75.

18 *Id.* at 8088 (emphasis in original).

19 *Declaratory Ruling and Order* ¶¶ 14, 20.

20 *ACA Int'l*, 885 F.3d at 703.

21 *Id*.

autodialer compounds the unreasonableness of the Commission's expansive understanding of when a device has the 'capacity' to perform the necessary functions."[22]

Accordingly, the *Public Notice* seeks comment on "the functions a device must be able to perform to qualify as an [ATDS]."[23] The Commission should interpret ATDS to include only those devices that do not require human intervention to store, generate, or dial random or sequential numbers. At a minimum, the Commission should find that if human judgment is required to determine the party to be called prior to each call, the device is not an ATDS. As the *Chamber Petition* points out, a human intervention standard for ATDS would "heed[] the D.C. Circuit's suggestion that the absence of human intervention is important; a logical conclusion, it found, 'given that "auto" in autodialer—or equivalently, "automatic" in "automatic telephone dialing system"—would seem to envision nonmanual dialing of telephone numbers.'"[24]

IV. THE COMMISSION SHOULD CREATE A SAFE HARBOR FOR REASONABLE METHODS FOR REVOKING PRIOR EXPRESS CONSENT.

The Commission also should refine its approach to revocation of prior express consent. The agency has found that "[c]onsumers have a right to revoke consent, using any reasonable method including orally or in writing."[25] The Commission has further explained that, "[w]hen assessing whether any particular means of revocation used by a consumer was reasonable, [the FCC] will look to the totality of the facts and circumstances surrounding that specific situation, including, for example, 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

---

22 *Id*.

23 *Public Notice* at 2.

24 *Chamber Petition* at 25 (citing *ACA Int'l*, 885 F.3d at 703).

25 *Declaratory Ruling and Order* ¶ 64.

whether the caller could have implemented mechanisms to effectuate a requested revocation without incurring undue burdens."[26] The *Public Notice* seeks comment on "what opt-out methods would be sufficiently clearly defined and easy to use such that 'any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable.'"[27]

The FCC should adopt a safe harbor for revocation of consent, pursuant to which the Commission would establish a list of opt-out methods that it considers reasonable. A caller then would not be liable under the TCPA if it calls a recipient who has attempted to opt out in another way, such as emailing a company's CEO, as long as the caller has implemented one of two or more opt-out methods on the safe harbor list and provides information about those methods to call recipients. Approved opt-out mechanisms under the safe harbor could include, among others: (i) including "text stop to cancel" or similar wording in text messaging campaigns; (ii) providing an 800-number for revocations; and (iii) providing a specific email address for revocations.

Incentivizing the adoption of clear and effective opt-out methods through the establishment of a safe harbor will foster numerous benefits with respect to TCPA administration. First, it will benefit consumers by ensuring that they have at their disposal appropriate and effective mechanisms to opt out of unwanted calls. Second, it will provide businesses with certainty that the opt-out methods they use afford appropriate protection from liability under the statute. Third, it will minimize unnecessary litigation by consumers who otherwise would attempt to exploit unreasonable opt-out methods.

---

[26] *Id*. at n.233.

[27] *Public Notice* at 4 (citing *ACA Int'l*, 885 F.2d at 710).

V. THE COMMISSION SHOULD ADOPT AN ACTUAL KNOWLEDGE STANDARD FOR TCPA LIABILITY FOR CALLS TO REASSIGNED NUMBERS.

The *ACA International* court also invalidated as arbitrary and capricious the FCC's handling of calls intended for customers who had previously given consent to receive the calls but whose numbers were subsequently reassigned, including the Commission's "one-call safe harbor" for calls to reassigned numbers.[28] In light of the court's decision, the *Public Notice* asks whether "a reassigned numbers safe harbor [is] necessary," and whether the Commission should retain its "reasonable-reliance approach to prior express consent," pursuant to which a caller may reasonably rely on a party's prior express consent when making calls.[29]

The Commission's reasonable-reliance approach is a sound framework for evaluating calls to reassigned numbers, and the agency should retain it. However, instead of adopting a safe harbor based on the caller's attempts to contact a party, the Commission should find that a caller may reasonably rely on a party's prior express consent until that caller has actual knowledge of a number reassignment. To prevent parties from claiming that revocation of consent or notice of reassignment through an unreasonable opt-out mechanism gave a caller actual knowledge that a number was reassigned, the Commission should tie its actual knowledge standard to the revocation safe harbor discussed above: if a caller has adopted two or more of the approved opt-out methods, and has not received notice of the reassignment or the new subscriber's revocation of consent through those methods, a call recipient cannot demonstrate actual knowledge based on the recipient's use of alternative opt-out methods.

---

28 885 F.3d at 708-09.

29 *Public Notice* at 3-4.

This approach would avoid the shortfalls inherent in creating an arbitrary safe harbor based on the number of times a caller places calls to a reassigned number. As the D.C. Circuit discussed when it invalidated the Commission's one-call safe harbor, "why does a caller's reasonable reliance on a previous subscriber's consent necessarily cease to be reasonable once there has been a single, post-reassignment call? The first call or text message, after all, might give the caller no indication whatsoever of a possible reassignment (if, for instance, there is no response to a text message, as would often be the case with or without a reassignment)."[30] By contrast, a standard based on actual knowledge ensures that a party becomes liable under the TCPA only when it has become unreasonable for such party to continue to rely on the prior express consent of a customer whose number has been reassigned. This approach would be simple to administer and provide businesses with certainty about the applicability of the TCPA, without unduly burdening call recipients, who can utilize clear opt-out methods to inform callers that they no longer wish to receive their calls. As noted in the DC Circuit's opinion, the FCC is currently considering the possibility of "creating a comprehensive repository of information about reassigned wireless numbers," as well as a potential "safe harbor for callers that inadvertently reach reassigned numbers after consulting the most recently updated information." Such an approach would provide businesses with certainty regarding the applicability of the TCPA.

VI. CONCLUSION

IPMPC respectfully urges the Commission to interpret the TCPA, and conduct any future TCPA-related rulemakings, consistent with the comments provided herein.

---

30 *ACA Int'l*, 885 F.3d at 707-08.

Respectfully Submitted,

/s/ Peter Blenkinsop

Peter Blenkinsop
Secretariat and Legal Counsel
International Pharmaceutical & Medical
Device Privacy Consortium
1500 K Street NW
Suite 1100
Washington, DC 20005-1209
(202) 230-5142
Peter.Blenkinsop@dbr.com

June 13, 2018