

REPLY COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER to the
FEDERAL COMMUNICATIONS COMMISSION

Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA
International Decision

[DA-18-493]

June 28, 2018

The Electronic Privacy Information Center (“EPIC”) submits these reply comments in response to the Federal Communication Commission’s (“FCC”) notice.¹ Unwanted robocalls are an invasion of privacy, and the prevalence of cellphones makes unwanted robocalls even more intrusive than when the Telephone Consumer Protection Act (“TCPA”) was passed. We therefore urge action by the Commission to protect consumer privacy to ensure that the purposes of the Act are fulfilled.

EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.² EPIC contributed to the development of the TCPA and has advised Congress about emerging challenges to consumer protection law.³ EPIC

¹ FCC, 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 (May 14, 2018), <https://www.fcc.gov/document/cgb-seeks-comment-tcpa-light-dc-circuit-decision-aca-intl> (hereinafter “Notice”).

² See *About EPIC*, EPIC, <https://epic.org/epic/about.html>.

³ See, e.g., Telephone Advertising and Consumer Rights Act, H.R. 1304, Before the Subcomm. on Telecomms. and Fin. of the H. Comm. on Energy and Commerce, 102d Cong., 1st Sess. 43 (April 24, 1991) (Testimony of Marc Rotenberg), <http://www.c-span.org/video/?18726-1/telephone-solicitation>; S.1963, The Wireless 411 Privacy Act: Hearing Before the S. Comm. on Commerce, Sci., & Transp.,

submitted an amicus brief⁴ in *ACA Int'l v. FCC*, the case that was the impetus for this comment opportunity. EPIC has also submitted numerous comments to the FCC and the Federal Trade Commission concerning the implementation of the TCPA.⁵

In Part I, EPIC advises the FCC to define “automatic telephone dialing system” in order to protect consumers from technologies that attempt to serve as technical workarounds to avoid coverage by the TPCA. In Part II, EPIC advises the FCC to define “called party” under the TCPA as the number’s current subscriber to protect the privacy of consumers with reassigned numbers. In Part III, EPIC advises the FCC to require callers to facilitate the revocation of consent by called parties by (1) informing consumers of their right to revoke, (2) providing a simple means of revocation, and (3) complying with the revocation in a timely manner.

I. How to Define “Automatic Telephone Dialing System” Under the TCPA

EPIC urges the Commission to interpret the term “automatic telephone dialing system” with TCPA’s original policy goals of protecting consumers from “technologies that can be used to rapidly call and text large groups of consumers.”⁶ The Commission should not exempt from TCPA restrictions all call technology that involves even the slightest human intervention as some commenters recommended. This kind of narrow interpretation would allow callers to evade TCPA restrictions using technical workarounds and would overturn the FCC’s long-standing

108th Cong., 2d Sess. (Sept. 21, 2004), (Testimony of Marc Rotenberg discussing privacy issues raised by a proposed wireless directory for customers of wireless telephone services).

⁴ Brief of *Amici Curiae* EPIC et al., *ACA Int'l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), <https://epic.org/amicus/acaintl/EPIC-Amicus.pdf>.

⁵ See, e.g., EPIC, *Advanced Methods to Target and Eliminate Unlawful Robocalls* (July 31, 2017), <https://epic.org/apa/comments/EPIC-FCC-Robocall-ReplyComments.pdf>; EPIC, *On Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (Jan. 18, 2006), <https://epic.org/privacy/telemarketing/jfpacom11806.html>; EPIC et al., *Comments in the Matter of Telemarketing Rulemaking* (April 10, 2002), <https://epic.org/privacy/telemarketing/tsrcomments.html>; EPIC et al., *Comments in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (Dec. 9, 2002), <https://epic.org/privacy/telemarketing/tcpacomments.html>.

⁶ Letter from Sen. Amy Klobuchar et al., to FCC Chairman Ajit Pai (April 18, 2018), 2018 WL 2316908 (F.C.C.).

ruling that predictive dialers that pull from a pre-determined list are automatic telephone dialing systems that fall under the restrictions of the TCPA.⁷ Many commenters have urged the Commission to rule that a calling system falls outside the definition of ADTS if “any” human intervention is involved in the dialing or sorting of the list of numbers.⁸ The FCC should continue to interpret ATDS to cover these systems. As the National Consumer Law Center (“NCLC”) explains in its comments, an example of this system is known as a “click dialer.”⁹ Click dialers involve very slight human action, in that one group of employees pushes computer buttons to cause calls to be made and another group of employees answers the call.¹⁰ However, neither group of people makes any decisions about the particulars of the calls; rather, a computer algorithm decides the number of calls, the time of calls, and the persons who are called.¹¹ Additionally, the calls typically involve “dead air” through which consumers have to wait, because the employees cannot answer the calls at the speed at which they are made.¹² Thus, these systems generate calls that are functionally equivalent to those made by traditional autodialers, and only operate in this manner to avoid being labeled as ATDS and, consequently, to escape TCPA coverage.¹³ The FCC should not reward these deceptive tactics by immunizing those who

⁷ See *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 F.C.C.R. 559, 566–67, 2008 WL 65485, at *4.

⁸ National Automobile Dealers Association, Comment in Interpretation of the Telephone Consumer Protection Act in Light of the DC. Circuit’s ACA International Decision (June 13, 2018), https://ecfsapi.fcc.gov/file/1061312116023/TCPA%20Comments_NADA_6_13_18.pdf; American Association of Healthcare Administrative Management, Comment on Interpretation of the Telephone Consumer Protection Act in Light of the DC. Circuit’s ACA International Decision (June 12, 2018), [https://ecfsapi.fcc.gov/file/1061282690918/AAHAM%20Comments%20\(06-12-2018\).pdf](https://ecfsapi.fcc.gov/file/1061282690918/AAHAM%20Comments%20(06-12-2018).pdf).

⁹ See National Consumer Law Center (“NCLC”), Comments 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 (June 13, 2018), <https://ecfsapi.fcc.gov/file/106131272217474/Comments%20on%20Interpretation%20of%20TCPA%20in%20Light%20of%20ACA%20International.pdf> (discussing the database and safe harbor issues).

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.*

¹³ See *id.*

use these systems from TCPA liability; instead, as the NCLC put it, EPIC urges the FCC to decide that “[t]he human intervention necessary to avoid coverage as an ATDS should require a human to actually choose to dial a particular called party, and for that same human to then be waiting to speak to the called party if the call is answered.”¹⁴

II. How to Treat Calls to Reassigned Numbers Under the TCPA (Definition of “Called Party”)

The FCC should interpret “called party” to mean the “wireless number’s present-day subscriber after reassignment” rather than “the person the caller expected to reach.” The D.C. Circuit left this question open, but the court’s reasoning strongly supports the interpretation of “called party” as the current subscriber.

The FCC should not adopt the “expected to reach” or “intended recipient” standard because that would incorrectly shift the burden onto new subscribers of a reassigned number to opt-out of robocalls, which is incompatible with the statutory text of the TCPA and goes against basic privacy principles. Groups such as the Electronic Transactions Association favor this recommended opt-out regime, asserting that “consumers who truly do not wish to receive calls meant for someone else surely will advise the caller of the wrong or reassigned number status.”¹⁵ The group describes all others as potential “serial litigants.” The association’s assertion overlooks the fact that many Americans simply do not respond to calls from unknown numbers¹⁶ and even the Federal Trade Commission recommends that to avoid scammers “letting it go to

¹⁴ *Id.*

¹⁵ See Electronic Transactions Association, Comments 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 (June 12, 2018), [https://ecfsapi.fcc.gov/file/1061282690918/AAHAM%20Comments%20\(06-12-2018\).pdf](https://ecfsapi.fcc.gov/file/1061282690918/AAHAM%20Comments%20(06-12-2018).pdf).

¹⁶ See Scott Keeter *et al.*, Pew Research Center, *What Low Response Rates Mean for Telephone Surveys*, May 15, 2017, <http://www.pewresearch.org/2017/05/15/what-low-response-rates-mean-for-telephone-surveys/>.

voicemail is one option. If you do pick up and don't recognize the caller — hang up.”¹⁷ More importantly, the opt-out regime, created by the “intended recipient” standard, goes against the text of the TCPA and violates basic privacy principles.

The TCPA bars robocalls to mobile phones without “prior express consent of the called party.” The term “called party” appears seven times in the TCPA. As the court noted, four of the statutory references “unmistakably denote the current subscriber,” “one denotes whoever answers the call (usually the [current] subscriber),” and the other two are unclear.¹⁸ There is no statutory basis for understanding the term to mean “the person the caller expected to reach” or “the party the caller reasonably expected to reach.”

Creating a de facto opt-out regime for subscribers of reassigned phone numbers would cut against basic privacy principles. Meaningful consent has been described as an “opt-in” system because consumers must affirmatively choose to be subject to the business practices, rather than being forced to “opt-out” of practices that they do not want.¹⁹ In the TCPA context, meaningful consent must be obtained from the actual subscriber. It is not sufficient for a company to obtain consent from a prior subscriber and then engage in business practices that invade the privacy of the new subscriber without ever obtaining consent from that individual. Many commenters fail to account for the privacy rights of individual who have a reassigned phone number, instead focusing only on the caller's burden. An owner may consent to let a friend drive their car, but if they subsequently sell the car their friend would not still have permission to drive. The same logic applies to reassigned numbers. Furthermore, the alternative definition of “called party”

¹⁷ Emma Fletcher, Federal Trade Commission, Division of Consumer and Business Education, *That's Not Your Neighbor Calling*, Jan. 31, 2018, <https://www.consumer.ftc.gov/blog/2018/01/thats-not-your-neighbor-calling>.

¹⁸ *ACA Int'l, et al. v. FCC*, 885 F.3d 687, 706 (D.C. Cir. 2018).

¹⁹ Brief for EPIC as Amici Curiae supporting Respondent, *ACA International et al. v Federal Communications Commission*, No. 15-1211, 26 (2016), <https://epic.org/amicus/acaintl/EPIC-Amicus.pdf>.

would make other statutory consent rules incoherent. How could a current subscriber revoke consent if they never gave consent? The previous subscriber would have no reason to revoke consent for a number that is no longer theirs. The rules are only coherent if “called party” is interpreted to mean the current subscriber, which is why numerous federal courts have adopted this definition.²⁰

The Commission’s proceeding to establish a reassigned numbers database²¹ further supports the definition of “called party” as the “wireless number’s present-day subscriber after reassignment” and eliminates the need for a statutory safe harbor. Under the alternative definition, callers would have no incentive to use the reassigned numbers database, because they would rely on consent given by the previous subscriber. Without a reassigned numbers database, it can be difficult for callers to know when a number has been reassigned (and therefore they no longer have consent from the number’s current subscriber). If the FCC does decide that some sort of safe harbor is necessary, the FCC should ensure that the safe harbor is narrow. The FCC should consider suggestions that the NCLC made in its comments, such as that use of the database must be mandatory, callers must affirmatively act to correct and report mistakes, and any safe harbor cannot preclude a finding that callers made other TCPA violations.²²

Additionally, the problem of reassigned numbers itself has been vastly overstated. Citing Chairman Pai, the U.S. Chamber of Commerce noted that the FCC’s decision to interpret the

²⁰ *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637 (7th Cir. 2012); *Osorio v. State Farm Bank*, F.S.B., 746 F.3d 1242, 1250-52 (11th Cir. 2014).

²¹ FCC, *Advanced Methods To Target and Eliminate Unlawful Robocalls* (April 23, 2018), <https://www.federalregister.gov/documents/2018/04/23/2018-08376/advanced-methods-to-target-and-eliminate-unlawful-robocalls>.

²² See National Consumer Law Center (“NCLC”), Comments 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 (June 13, 2018) <https://ecfsapi.fcc.gov/file/106131272217474/Comments%20on%20Interpretation%20of%20TCPA%20in%20Light%20of%20ACA%20International.pdf> (discussing the database and safe harbor issues).

term “called party” as the “present day subscriber” opened the “floodgates to more TCPA litigation” and exposed companies to “lawsuit roulette.” However, the group does not provide evidence of any drastic uptick in litigation from consumers who received unwanted calls through reassigned numbers. Moreover, petitioners in *ACA Int’l* asserted that 37 million telephone numbers are reassigned every year, but this number was based on a misreading of the Commission’s report on aging numbers.²³ Other companies such as QuickenLoans have relied on a similar number in this proceeding.²⁴ As described in EPIC’s initial comments, the number is based on a conflation of the distinct measurements of “reassigned numbers” and “aging numbers.”²⁵ Furthermore, number portability and the increase in cellphone use have significantly reduced the number of consumers whose numbers must be reassigned.²⁶

III. How a Called Party May Revoke Prior Express Consent to Receive Robocalls

EPIC agrees with the Commission’s decision, affirmed by the D.C. Circuit, that “a party may revoke her consent through any reasonable means clearly expressing a desire to receive no further messages from the caller.”²⁷ This standard means that callers have “every incentive to avoid TCPA liability by making available clearly-defined and easy-to-use opt-out methods.”²⁸ The revocation of consent should not be limited to a single prescribed method because callers would then have the incentive to make that method as difficult as possible to increase friction. The opt-out methods suggested by the FCC—pushing a standardized code such as “*7”, saying

²³ Brief of *Amici Curiae* EPIC et al., *ACA Int’l, et al. v. FCC*, 885 F.3d 687, (D.C. Cir. 2018), at 17-21.

²⁴ QuickenLoans, Comment on Interpretation of the Telephone Consumer Protection Act in Light of the DC. Circuit’s ACA International Decision (June 13, 2018), <https://ecfsapi.fcc.gov/file/1061453724571/QLTCPAPublicNoticeComments.pdf>.

²⁵ See EPIC, Comments 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, CG Docket Nos. 18-152, 02-278 (June 13, 2018), <https://epic.org/apa/comments/EPIC-FCC-TCPA-June2018.pdf>.

²⁶ See *Id.*

²⁷ *ACA Int’l*, 885 F.3d at 692.

²⁸ *Id.* at 709.

“stop calling”, offering opt-out on a website, replying “stop” to a text message—would all be reasonable methods. And it would be useful for subscribers to be given one or two simple methods for revoking consent to robocalls. For example, the inclusion of standard text in an automated voice message “To opt-out of receiving similar calls in the future, press *7 or say ‘stop calling’ now” would make it easier for callers to adjust their preferences. When offered such simple methods, subscribers would be less likely to choose a more burdensome method such as mailing a letter. However, if a subscriber uses a different (but still reasonable) method, the caller would still be required to comply.

Additionally, the FCC should not heed the suggestion that it prevent consumers from “unilaterally revok[ing] consent ‘when that consent is given, not gratuitously, but as bargained-for consideration in a bilateral contract.’”²⁹ The Consumer Bankers Association goes

²⁹ See Credit Union National Association (“CUNA”), Comments 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 (June 13, 2018), <https://ecfsapi.fcc.gov/file/106132018813561/TCPA%20Comments.pdf> (citing *Reyes v. Lincoln Automotive Financial Services*, 861 F.3d 51, 56 (2d Cir. 2017)). See also National Association of Federally-Insured Credit Unions (NAFCU), Comments 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 (June 13, 2018), https://ecfsapi.fcc.gov/file/106130432903871/NAFCU%20Comment%20Letter_Public%20Notice%20CG%20Docket%20No.%2018-152.pdf; NCTA – The Internet & Television Association (“NCTA”), Comments 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 (June 13, 2018), <https://ecfsapi.fcc.gov/file/1061368008223/061318%2018-152%2002-278%20Comments.pdf>; CTIA, Comments 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 (June 13, 2018), <https://ecfsapi.fcc.gov/file/10613371727956/180613%20CTIA%20TCPA%20Refresh%20Remand%20Comments.pdf>; U.S. Chamber of Commerce (“U.S. Chamber”), Comments 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, CG Docket Nos. 18-152, 02-278 (June 13, 2018), <https://ecfsapi.fcc.gov/file/1061348977655/ILR-US%20Chamber%20TCPA%20Public%20Notice%20Comments.pdf>; National Council of Higher Education Resources (“NCHER”), Comments 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 (2018),

so far as to claim that the definition of “bilateral contract” should include “non-negotiated contracts and contracts of adhesion.”³⁰ As the Commission decided, and the D.C. Circuit affirmed, the ruling “precludes unilateral imposition of revocation rules by callers; it does not address revocation rules mutually adopted by contracting parties.”³¹ Thus, the ruling “did not address whether contracting parties can select a particular revocation procedure by mutual agreement.”³² Nevertheless, the FCC should follow the D.C. Circuit’s affirmance of the “Commission’s approach to revocation of consent, under which a party may revoke her consent through any reasonable means clearly expressing a desire to receive no further messages from the caller.”³³ As the Consumers Union argued in its comments, the FCC should further “clarify that consumers can revoke their consent at any time, even if that consent has been obtained as a result of a term in a contract.”³⁴ Moreover, in the case on which the commenters in favor of this proposal primarily relied, *Reyes v. Lincoln Automotive Financial Services*,³⁵ the U.S. Court of Appeals for the Second Circuit itself stated that it was “sensitive to the argument that businesses may undermine the effectiveness of the TCPA by inserting ‘consent’ clauses of the type signed

<https://ecfsapi.fcc.gov/file/10613351602723/NCHER%20Response%20to%20FCC's%20Request%20for%20Comments%20on%20Interpretation%20of%20TCPA.pdf>; Electronic Transactions Association (“ETA”), Comments 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 (June 13, 2018),

<https://ecfsapi.fcc.gov/file/1061322391453/ETA%20Comments%20in%20Response%20to%20FCC%20Notice%20on%20TCPA.pdf>.

³⁰ Consumer Bankers Association (“CBA”), Comments 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 (June 13, 2018),

<https://ecfsapi.fcc.gov/file/10613216074545/CBA%20FCC%20TCPA%20Public%20Notice%20Comments%20Final.pdf>.

³¹ *ACA Int’l*, 885 F.3d at 710 (internal citation and quotation marks omitted).

³² *Id.* (internal citation and quotation marks omitted).

³³ *Id.* at 692.

³⁴ Consumers Union, Comments 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 (June 13, 2018),

<https://ecfsapi.fcc.gov/file/10614715908175/CU%20Comment%2018-152%2002-278%20061318.pdf>.

³⁵ 861 F.3d 51 (2d Cir. 2017).

by Reyes into standard sales contracts, thereby making revocation impossible in many instances.”³⁶ However, the Second Circuit also said that this issue involves “public policy considerations” that it had no power to resolve.³⁷ Thus, the FCC should exercise its authority to reject this unwarranted interpretation of the right to revoke consent to receive these calls “through any reasonable means.”³⁸

Instead, the FCC should require callers to meet three conditions: (1) inform consumers of their right to revoke, (2) provide a simple means of revocation, and (3) comply in a timely manner. First, consumers must be informed of their right to revoke consent in every call or text. This notification could be similar to the “unsubscribe” link required for emails under the CAN-SPAM Act.³⁹ This notification should be easy to understand and should be announced early in the call (i.e., the subscriber should not have to listen to the entire robocall or select menu options to hear the notice). Second, the means of revocation must be simple, such as pushing a button or saying “stop calling.” Requiring a subscriber to navigate to a separate website would be unduly burdensome. If the call is to a landline, the subscriber would need to manually enter the address on a separate device to access the internet; and if the call is to a smartphone the subscriber would have to note the address and re-enter it into their browser once the call is completed. A reasonable revocation method should be available at the time of the call or text is received.

Third, callers must comply with a subscriber’s revocation within 24 hours. Due to the frequency

³⁶ *Id.* at 58 (internal citation omitted).

³⁷ *Id.*

³⁸ *See ACA Int’l*, 885 F.3d at 692.

³⁹ 16 U.S.C. 316.5; FTC, *CAN-SPAM Act: A Compliance Guide for Business* (Sept. 2009), <https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business> (“Your message must include a clear and conspicuous explanation of how the recipient can opt out of getting email from you in the future. Craft the notice in a way that’s easy for an ordinary person to recognize, read, and understand. Creative use of type size, color, and location can improve clarity. Give a return email address or another easy Internet-based way to allow people to communicate their choice to you. You may create a menu to allow a recipient to opt out of certain types of messages, but you must include the option to stop all commercial messages from you.”).

of some robocalls, a short compliance period is necessary to ensure that the called party's revocation of consent is honored.

Conclusion

The *ACA Int'l* decision has given the FCC an opportunity to strengthen the TCPA to better protect consumer privacy. The Commission should use this opportunity to define “automatic telephone dialing system” and “called party” so as to protect consumers with reassigned numbers and require callers to meet three conditions to simplify the revocation of consent: (1) inform consumers of their right to revoke, (2) provide a simple means of revocation, and (3) comply in a timely manner.

Sincerely,

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