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SENATE COMMITTEE ON COMMERCE, SCIENCE & TRANSPORTATION

Subcommittee On Communications, Technology Innovation
And The Internet

Regarding

“Illegal Robocalls: Calling All to Stop the Scourge”

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On behalf of
the low-income clients of the
National Consumer Law Center

and

Consumer Federation of America
Consumer Action
National Association of Consumer Advocates
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Illegal Robocalls: Calling All to Stop the Scourge April 11, 2019

Chairman Thune, Senator Schatz, and Members of the Committee, I appreciate the opportunity to testify today on the importance of maintaining the integrity of the Telephone Consumer Protection Act (TCPA) for consumers. I provide my testimony here today on behalf of the low-income clients of the **National Consumer Law Center (NCLC)**, and on behalf of **Consumer Action, Consumer Federation of America, National Association of Consumer Advocates, Public Knowledge, and U.S.PIRG.**

I. Introduction

Americans were subjected to *5.2 billion* robocalls last month--an increase by a phenomenal 370% just since December 2015.¹ This explosion of robocalls invades our privacy, distracts us, disrupts our lives, costs us money, and undermines the utility of the American telephony system.

The explosion of robocalls is not just a problem of calls that are overt scams, such as calls made by criminals to steal identities or defraud people into making payments to avoid spurious threats. Major American corporations, many of which are household names, are a large part of the cause of the proliferation of robocalls that plague Americans every day. These corporations are the defendants in actions in the federal courts in most every state, and more tellingly, they are generally the leaders in the effort currently waging in the halls of the Federal Communications Commission (FCC) to weaken critical interpretations of the Telephone Consumer Protection Act (TCPA).² These callers are claiming to be the victims of a TCPA crisis—but it is a crisis of their own creation. The primary purpose of this testimony is to illustrate this, and ask this Congress to protect consumers, not robocallers.

The TCPA is straightforward and clear. It does not prohibit all robocalls. The law and the TCPA regulations that implement it simply require two main things with respect to robocalls and robotexts. First, a call or text can be made to a cell phone using an automatic telephone dialing system (ATDS) or a prerecorded voice only with the prior express consent of the person called, and the consent must be in writing if it is a telemarketing call. Second, prior express written consent is also required for any prerecorded telemarketing call to a residential line. (There are exceptions for

¹ See YouMail Robocall Index, available at <https://robocallindex.com/> (last accessed Apr. 4, 2019).

² 47 U.S.C. § 227.

calls relating to an emergency or to collection of a debt owed to the United States.) The elegance of this construct is that it gives us—the people *being* called-- control over our own phones.

The current problem is not with the TCPA. (It is not out-of-date as some claim.) The problem is that the callers want to make the robocalls without worrying about having that consent. And they do not want to stop calling when consumers say “stop.”

In this testimony I will first address the fact that it is major American corporations that are responsible for most of the robocalls we all deplore, and discuss why the number of calls is escalating so alarmingly. I will then discuss several particular problems in enforcing the TCPA, with recommendations for what Congress and the Federal Communications Commission (FCC) should do to resolve them.

II. Major American Corporations Are Responsible for the Majority of Robocalls.

The majority of robocalls are made by, or at the behest of, **major American corporations**. Large, respected national corporations with whom many of us do business every day are responsible for hundreds of millions of telemarketing robocalls every month. The creditors with whom we all do business regularly make an equivalent number of unwanted robocalls to collect debts. The majority of robocalls made every day to our home phones and our cell phones are not overt scam calls, but calls made by so-called “legitimate businesses.”³

Major American corporations make directly—or are responsible for—a vast number of intrusive, annoying, repeated telemarketing calls to our landlines and cell phones--selling car insurance,⁴ health insurance,⁵ car warranties,⁶ home security systems,⁷ resort vacations,⁸ and more. Some of these calls push products and services that are shoddy, overpriced, or of dubious value, and

³ Averaging the monthly totals for the different types of calls on YouMail’s Robocall Index indicates that according to their analysis, 37% of robocalls are scams. The rest of the calls are 23% debt collection calls (including payment reminders), 18% telemarketing, and 22% alerts and reminders.

⁴ See *Smith v. State Farm Mut. Auto. Ins. Co.*, 30 F. Supp. 3d 765 (N.D. Ill. 2014).

⁵ See *Sullivan v. All Web Leads, Inc.*, 2017 WL 2378079 (N.D. Ill. June 1, 2017). See also *Northrup v. Innovative Health Ins. Partners, L.L.C.*, 329 F.R.D. 443 (M.D. Fla. 2019) (text messages).

⁶ See *Mey v. Enterprise Fin. Group*, Case No. 2:15-cv-00463 (M.D. Fla. filed Aug. 3, 2015).

⁷ See *In re Monitronics Int’l Inc.*, Telephone Consumer Prot. Act. Litig., Case No. 1:13-md-02493 (N.D. W. Va. filed Feb. 28, 2014). See also *Braver v. Northstar Alarm Servs., L.L.C.*, 329 F.R.D. 320 (W.D. Okla. 2018) (regarding 75 million prerecorded voice calls to sell home security systems).

⁸ See *Glasser v. Hilton Grand Vacations Co., L.L.C.*, 341 F. Supp. 3d 1305 (M.D. Fla. 2018), *appeal to 11th Circuit pending*.

some may push real bargains, but all of these calls annoy us, interrupt us, and invade our privacy. If the rate of telemarketing calls continues at the current pace, in 2019 there will be over \$11.2 billion telemarketing robocalls made in the United States.

There are dozens of cases against corporate defendants seeking redress for tens of millions of unwanted and illegal telemarketing robocalls. Just a few of these cases holding American corporations responsible for making hundreds of millions of telemarketing calls include:

- **Insurance:** *Smith v. State Farm Mut. Auto. Ins. Co.*⁹ In this case, the court held State Farm liable for the TCPA violations of a lead-generator marketing company it had used to market its insurance products. Calls were made to over 80,000 consumers.
- **Home Security Systems:** *Mey v. Monitronics Int'l, Inc.*¹⁰ The named-plaintiff had received over 19 calls from a broker calling to sell home security services, even though she had listed her telephone number on the national Do Not Call Registry. These telemarketing calls were made by lead generators on behalf of a Monitronic's dealer. Calls were made to more than 7.7 million phone numbers. Monitronics claimed that it was not responsible for these calls made by others to sell its services.
- **Cruises:** *McCurley v. Royal Seas Cruises, Inc.*¹¹ After the cruise line claimed it was not responsible for the calls made by lead generators, who referred interested consumers to Royal Seas after telemarketing calls, the court allowed the case to proceed as a class action challenging the legality of 634 million calls¹² to the cell phones of 2.1 class members¹³ in violation of the TCPA.
- **Bank:** *Ott v. Mortgage Investors Corp. of Ohio, Inc.*¹⁴ A mortgage lender robocalled over 3.5 million people to push them into refinancing their mortgages with loans guaranteed by the U.S. Department of Veterans Affairs.
- **Film Studio:** *Golan v. Veritas Entertainment, L.L.C.*¹⁵ A film studio made over 3 million unsolicited calls as part of a six day telemarketing campaign to promote the film "Last Ounce of Courage."
- **National Cell Provider:** *Hageman v. AT&T Mobility L.L.C.*¹⁶ A large telemarketing campaign conducted by AT&T that pushed its wireless service produced a class action settlement. Many of these calls were repeat calls to the same consumers: the plaintiff received over 53 automated, prerecorded calls on his cell phone in less than two years.

⁹ 30 F.Supp.3d 765 (N.D.Ill.2014).

¹⁰ 959 F. Supp. 2d 927 (N.D. W. Va. 2013). *See also In re Monitronics Int'l, Inc.*, Telephone Consumer Prot. Act. Litig., Case No. 1:13-md-02493 (N.D. W. Va. filed Aug. 31, 2017) (settlement agreement)

¹¹ 2019 WL 1383804 (S.D. Cal. Mar. 27, 2019).

¹² *Id.* at *9.

¹³ *Id.* at *10.

¹⁴ 65 F. Supp. 3d 1046 (D. Or. 2014).

¹⁵ 2017 WL 2861671 (E.D. Mo. July 5, 2017).

¹⁶ 2015 WL 9855925 (D. Mont. Feb. 11, 2015).

- **Business Services Provider:** *Thomas v. Dun & Bradstreet Credibility Corp.*¹⁷ Repeated telemarketing calls, even after requests to stop, to advertise business services to over 1 million individuals.

In addition to telemarketers, major American corporations make an enormous number of robocalls to **collect debts**. Many of these callers repeatedly and flagrantly violate the consumer protections of the TCPA, simply paying off consumers when they are sued, and then continuing their patterns of calling. Many debt collection calls are made to people who owe money but are behind on their payments, but many others are made to people who have nothing to do with the debts.

Below are just a few examples of problematic debt collector robocallers. These cases all involve hundreds—if not thousands—of calls, and all involve multiple calls after repeated requests from the consumer to stop calling.

1. *Robertson v. Navient Solutions*.¹⁸ Shortly after Ms. Robertson acquired a Certified Nursing Assistant certificate, which she had funded with student loans, she experienced health problems, and also had to care for her dying father. She was unable to work, and applied for disability benefits. She received a forbearance on her federal student loans, but not for her private student loans. Ms. Robertson made payments when she was able. However, payments did not stop the calls. In total, Navient called Ms. Robertson a total of 667 times, and called 522 times after she told them to stop calling. Navient would call back the same day even when Ms. Robertson told the collection agent that she would not have any money to pay until the following month.
2. *Gold v. Ocwen Loan Servicing, L.L.C.*¹⁹ The plaintiff consented to being contacted about his mortgage debt, and answered several collection calls, but then asked for the calls to stop. However, the servicer called his cell phone at least 1,281 times between April 2, 2011 and March 27, 2014, despite repeated requests to stop.
3. *Montegna v. Ocwen Loan Servicing, L.L.C.*²⁰ The servicer called the plaintiff on his cell phone at least 234 times, even after he requested that the calls stop.
4. *Todd v. Citibank*.²¹ Some time in January 2016, the bank began calling the plaintiff's cell phone. The 350 calls were often made twice a day, even after repeated requests to stop calling.²²
5. *Karl Critchlow v. Sterling Jewelers Inc. (aka Jared)*.²³ The complaint alleges that Jared robocalled Mr. Critchlow more than 300 times, several times a day and on back-to-back days, even after he begged for the calls to stop, saying he simply did not have the money to pay the debt. The case was settled with a confidentiality agreement.

¹⁷ Case No. 2:15-cv-03194 (C.D. Cal. filed Apr. 28, 2015).

¹⁸ *Robertson v. Navient Solutions, Inc.*, Case No.: 8:17-cv-01077-RAL-MAP (M.D. Fla. filed May 8, 2017).

¹⁹ 2017 WL 6342575 (E.D. Mich. Dec. 12, 2017).

²⁰ 2017 WL 4680168 (S.D. Cal. Oct. 18, 2017).

²¹ 2017 WL 1502796 (D.N.J. Apr. 26, 2017).

²² *Id.* at *8.

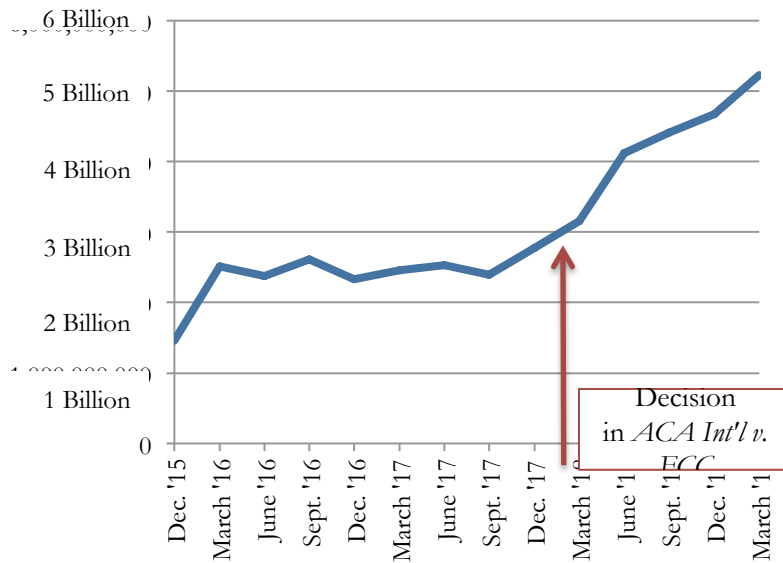
²³ Case No. 8:18-cv-00096 (M.D. Fla. filed Jan. 12, 2018).

There are hundreds of similar cases filed in courts around the nation every month. Most of these are settled, and in return for the settlement consumers are required to sign **confidentiality clauses**, which prohibit either them or their lawyers from disclosing the details of the settlements. These confidentiality settlements prevent reviewing courts from evaluating the repeated and persistent nature of the callers' behavior, and shields them from liability for systematic practices that violate the TCPA.

III. Why Are the Calls Increasing?

A significant reason for the escalation in robocalls is that many callers are anticipating a caller-friendly response to the many requests they have submitted to the FCC to *loosen* restrictions on robocalls. This is evidenced by the spike in calls that occurred right after last year's decision in March 2018 by the D.C. Circuit Court in *ACA International v. F.C.C.*²⁴ That decision set aside a 2015 FCC order on the question of what calling technology is included in the definition of an automatic telephone dialing system (ATDS),²⁵ and raised the specter that the term might be interpreted not to cover the autodialing systems that are currently used to deluge cell phones with unwanted calls.

Increase in Robocalls December 2015 through March 2019



²⁴ 885 F.3d 687 (D.C. Cir. 2018)

²⁵ 47 U.S.C. § 227(a)(1).

The calling industry's response to this decision is perfectly illustrated by the request of the U.S. Chamber Institute for Legal Reform (U.S. Chamber),²⁶ joined by sixteen major national industries,²⁷ to the FCC to *loosen* restrictions on robocalls. **It is essential to understand, that if the request of the U.S. Chamber were to be granted, the scourge of robocalls will skyrocket.**

Additionally, losing defendants in judicial actions typically seek redress from the FCC by asking for retroactive waivers for the liability they face after courts have found that they have made millions of robocalls without consent. And there are dozens of petitions currently pending at the FCC asking for special interpretations or exemptions, which seek to allow industries to ignore the basic rule of the TCPA that express consent must be provided before automated calls can be made to our cell phones. We ask you to encourage the FCC to hold the line and enforce the TCPA. Allowing waivers and exemptions undermines compliance, and leads to increased unwanted robocalls.

IV. What Should Be Done to Rein in Robocalls?

To rein in robocalls, five steps are necessary:

1. We need to be able to identify who the caller is when calls come in to our phones.
2. The TCPA's broad scope must be upheld so that it applies to the unwanted automated calls Americans receive.
3. The rules must give us the ability to limit and control the calls to our phones.
4. Sellers must not be allowed to hide behind the third parties they hire.
5. The rules must be enforceable in a way that provides a) individuals harmed with the ability to obtain redress for their harms, and b) incentives to the callers to comply with the law.

A. Identifying Who Is Calling.

To decide whether to answer the phone one must know who is calling. This requires that both the name displayed—if a name is displayed—and the phone number displayed be accurate.

²⁶ *In re* Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, U.S. Chamber Institute for Legal Reform, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed May 3, 2018), available at <https://ecfsapi.fcc.gov/file/105112489220171/18050803-5.pdf>.

²⁷ These industries include: ACA International, American Association of Healthcare Administrative Management, American Bankers Association, American Financial Services Association, Consumer Bankers Association, Consumer Mortgage Coalition, Credit Union National Association, Edison Electric Institute, Electronic Transactions Association, Financial Services Roundtable, Insights Association, Mortgage Bankers Association, National Association of Federally-Insured Credit Unions, National Association of Mutual Insurance Companies, RestaurantLaw Center, and Student Loan Servicing Alliance.

There is a new technology, which the telecom industry has been developing, known as SHAKEN/STIR, for better verifying the accuracy of caller ID information.²⁸ And the TRACED Act,²⁹ which your Committee approved last week, would expedite the implementation of this technology. NCLC joined with other consumer groups in strongly endorsing this legislation.

Even though this legislation takes an important and welcome step, it is important for us all to realize that the work will not be over, even as to rooting out spoofed calls. In its current form, as I understand it, SHAKEN/STIR would capture only phone numbers that can be reliably identified as not belonging to the caller. It will thus not catch situations in which a robocaller purchases actual numbers, perhaps in the thousands, from a legal source, and then uses those numbers to make calls that mask the robocaller's real identity. Nor is it apparent how it would, or could, capture calls originating from carriers overseas that have not implemented the technology.

Ultimately, if we can't actually identify who the real caller is, we don't have good information about whether to answer the phone.

The TCPA contains this provision:

(e) It shall be unlawful for any person within the United States, in connection with any telecommunications service or IP-enabled voice service, to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value, unless such transmission is exempted pursuant to paragraph (3)(B).³⁰

This provision makes caller ID spoofing illegal *only* if the spoofing is done with wrongful intent. This is a very difficult standard to prove. This provision does not prevent telemarketers and debt collectors from spoofing phone numbers.

Recommendations:

1) Congress should pass the TRACED Act, S. 151;

2) The TCPA should be amended specifically to prohibit the transmission of misleading or inaccurate caller ID information, except in limited circumstances necessary for law enforcement or the protection of the callers (but caller ID suppression should still be permissible); and

²⁸ See Press Release, Federal Communications Commission, Chairman Pai Calls on Industry to Adopt Anti-Spoofing Protocols to Help Consumers Combat Scam Robocalls (Nov. 5, 2018), *available at* <https://docs.fcc.gov/public/attachments/DOC-354933A1.pdf>.

²⁹ This bill, sponsored by U.S. Sens. John Thune (R-S.D.) and Ed Markey (D-Mass.), is the Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act, S. 151.

³⁰ 42 U.S.C. § 227(e)(1) (emphasis added).

3) Telephone service providers should be required to prevent the connection of calls (or texts) for which the caller-ID is not attached to a known customer, whose name and address matches the originating call provider's information for that number.

B. The TCPA Must Be Interpreted Broadly to Apply to the Calling Systems Used Today.

The TCPA is a remedial statute that must be liberally interpreted to further its purpose of protecting consumers' privacy and stopping unwanted, intrusive calls.³¹ Given this mandate, it would be a grave error to interpret the statute's definition of "automatic telephone dialing system"³² (ATDS or "autodialer") narrowly, resulting in effective nullification of the prohibition against autodialed calls to cell phones without the called party's consent. Yet that is exactly what much of corporate America is applying heavy pressure on the FCC to do.

The TCPA defines an ATDS as equipment that "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."³³ In our view, and the view of a number of courts,³⁴ this definition encompasses both systems that store numbers and dial them automatically, and systems that generate numbers and dial them automatically, and only the latter must use a random or sequential number generator. Other courts, however, take the position that a system must use "a random or sequential number generator" to qualify as a covered ATDS under the TCPA.³⁵

The issue is of great importance, because robodialing and robotexting technology are what enables so many billions of calls to be made every year. Yet many of the calling systems in use today

³¹ See, e.g., *Parchman v. SLM Corp.*, 896 F.3d 728, 738-739 (6th Cir. 2018); *Daubert v. NRA Grp., L.L.C.*, 861 F.3d 382, 390 (3d Cir. 2017); *Van Patten v. Vertical Fitness Grp.*, 847 F.3d 1037, 1047-48 (9th Cir. 2017).

³² Senators Markey, Menendez, Gillibrand, Warren, Wyden, and Cortez Masto urged the FCC to issue "a comprehensive definition of the term autodialer . . ." (June 26, 2018) available at <https://www.markey.senate.gov/imo/media/doc/autodialer%20letter.pdf>.

³³ 47 U.S.C. § 227(a)(1).

³⁴ *Marks v. Crunch San Diego, L.L.C.*, 904 F.3d 1041 (9th Cir. 2018). Accord *Evans v. Pa. Higher Educ. Assistance Agency*, 2018 WL 6262637 (N.D. Ga. Oct. 11, 2018). See also *Getz v. DirecTV, L.L.C.*, ___ F. Supp. 3d ___, 2019 WL 850254 (S.D. Fla. Feb. 20, 2019); *Adams v. Ocwen Loan Servicing, L.L.C.*, 2018 WL 6488062 (S.D. Fla. Oct. 29, 2018); *Davis v. Diversified Consultants Inc.*, 36 F. Supp. 3d 217 (D. Mass. 2014); *Echevarria v. Diversified Consultants, Inc.*, 2014 WL 929275 (S.D.N.Y. Feb. 28, 2014), adopted by 2014 WL 12783200 (S.D.N.Y. Apr. 22, 2014).

³⁵ See, e.g., *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927 (N.D. Ill. 2018). Accord *Thompson-Harbach v. USAA Fed. Sav. Bank*, 2019 WL 148711 (N.D. Iowa Jan. 9, 2019). See also *Johnson v. Yahoo!*, 346 F. Supp. 3d 1159 (N.D. Ill. Nov. 29, 2018); *Gary v. Trueblue, Inc.*, 346 F. Supp. 3d 1040 (E.D. Mich. 2018).

do not call numbers randomly. Instead, they are “predictive dialers” that generate call lists from a database of numbers, and then robodial or robotext those numbers. For example, a telemarketer may purchase a list of consumers who have proven to be easy marks in the past; a debt collector will call numbers believed to belong to debtors; or a seller may buy a list of consumers who are believed to be interested in a certain type of product. If the definition of ATDS were interpreted so narrowly that it did not apply to dialing systems that automatically dial from lists—those systems that are in use today—there would be no way to stop this onslaught.

A Ninth Circuit decision, *Marks v. Crunch San Diego, L.L.C.*,³⁶ is the leading decision for an interpretation of ATDS that encompasses the dialers used today. After a meticulous analysis of the statutory language, the Ninth Circuit determined that an ATDS includes systems that simply store and automatically dial numbers.³⁷

Robocallers have claimed that the *Marks* decision cannot be correct because its interpretation of the ATDS definition could sweep in all smartphones, triggering one of the concerns that led the D.C. Circuit, in *ACA International v. FCC*, to set aside the FCC’s interpretation of the definition. However, this is not the case.³⁸ Smartphones—just like all computers—may have the *potential* capacity

³⁶ 904 F.3d 1041 (9th Cir. 2018).

³⁷ *Id.* 904 F.3d at 1051. Among other rationales, the court pointed out that the TCPA does not prohibit all calls made with an ATDS: it allows ATDS calls to be made when a party has consented to receive them. If the definition included only systems that dial telephone numbers produced randomly or sequentially from thin air, rather than dial from a stored database of inputted numbers, the prohibition of autodialed calls to consumers who had not consented to receive them would be meaningless. Autodialed calls would always reach parties who had not consented, because the calls would go to numbers that had been generated from thin air. Callers would have consent for calls to autodialed numbers only as a matter of sheer coincidence, if ever. Only if the prohibition encompasses calls made to a stored list of numbers, for which the caller will know whether it has obtained consent, does the prohibition make sense. As the Ninth Circuit stated, “[t]o take advantage of this permitted use, an autodialer would have to dial from a list of phone numbers of persons who had consented to such calls, rather than merely dialing a block of random or sequential numbers.” *Id.*

³⁸ NCLC has filed numerous comments with the FCC on the proper interpretation of autodialer under the TCPA, as well as the more specific question raised by the various cases, and the issue of whether smart phones are covered if the *Marks* decision prevails. *See, e.g.* Comments of National Consumer Law Center on behalf of its low-income clients and forty-one other national and state public interest groups and legal services organizations, *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act and Interpretations in Light of the ACA International Decision, CG Dockets 02-278 and 18-152 (June 13, 2018) *available at* <https://ecfsapi.fcc.gov/file/106131272217474/Comments%20on%20Interpretation%20of%20TCPA%20in%20Light%20of%20ACA%20International.pdf>; Comments of National Consumer Law Center on the *Marks* decision (October 17, 2018) *available at* <https://ecfsapi.fcc.gov/file/1018245262122/NCLC%20Comments%20on%20Marks%20Decision.pdf>; *Ex Parte* on Smart Phones, (November 13, 2018) *available at* <https://ecfsapi.fcc.gov/file/11142097310498/ex%20parte%20on%20smartphones%20-%202011-13-18.pdf>.

to be part of a system that could be an ATDS. But Chairman Pai has taken the position that it is present capacity, not potential capacity, that must be shown, and smartphones are not manufactured with any inherent features that make them ATDSs. Unlike predictive dialers, they cannot make simultaneous calls to a batch of numbers automatically from a stored list, nor do they dial numbers while no human being is on the line, which creates the problem of “dead air” and abandoned calls inherent to predictive dialers.³⁹ Calls are made from a smartphone only when the caller who is going to speak to the called party scrolls through the list, chooses a number or name, and presses the call button (or when the human manually inputs the number to be called). That capability does not make the smartphone an ATDS. As Chairman Pai has noted, the Commission has already explicitly held that “speed dialing” does not fall within the definition of an ATDS.⁴⁰

The Third Circuit’s decision in *Dominguez v. Yahoo, Inc.*⁴¹ is another example of an interpretation that could undermine the scope of the TCPA. In that case, Yahoo’s completely automated text messaging system sent 27,809 unwanted text messages to a consumer.⁴² The previous owner of the number had subscribed to an email-notification service offered by Yahoo, which sent a text message to the former owner's phone number every time an email was sent to the former owner's linked Yahoo email account. The consumer tried to halt the messages by replying “stop” and “help” to some texts. When he asked Yahoo's customer service for help, he was told that the company could not stop the messages, and that, as far as Yahoo was concerned, the number would always belong to the previous owner. The consumer then sought help from the FCC. In a three-way call with the consumer and Yahoo, the FCC tried to convince Yahoo to stop the messages, but was similarly

³⁹ See *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 110, 114 (11th Cir. 2014).

⁴⁰ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8074 (F.C.C. July 2015) (Dissenting Statement of Commissioner Ajit Pai). See also *In Re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8776 (F.C.C. Oct. 16, 1992).

⁴¹ 894 F.3d 116 (3d Cir. 2018). Two other cases of uncontrolled technology resulting in a deluge of unwanted robocalls or texts are *Pagan v. Redwood Capital Group* and *Schuster v. Uber Technologies, Inc.* In *Gonzalez-Pagan v. Redwood Capital Group*, a local developer called Mr. Gonzalez-Pagan approximately 5,000 times for years, often making more than 50 calls a day on back-to-back days; even though Mr. Gonzalez-Pagan owed nothing to the developer and had no idea how it put his cell number in its robodialing campaign. The calls continued even after Mr. Gonzalez-Pagan drove to the defendant’s apartment complex and begged for the calls to stop. Over 500 calls were made even after the lawsuit was filed in federal court. In *Schuster v. Uber Technologies, Inc.*, Mr. Shuster sued Uber for sending 1,050 text messages without consent and despite repeated requests to cease.

⁴² *Dominguez v. Yahoo, Inc.*, 629 Fed. Appx. at 121 (“Ultimately, Dominguez cannot point to any evidence that creates a genuine dispute of fact as to whether the Email SMS Service had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers.” (emphasis added)).

unsuccessful. After receiving 27,809 text messages from a machine over seventeen months, the consumer brought suit under the TCPA. Only after the case was filed did the messages finally stop.⁴³ Alarming, the Third Circuit ruled that the system was not an ATDS because the consumer did not prove that it had the present capacity to generate random or sequential numbers. This ruling, if accepted by other courts or the FCC, would leave every cell phone in America vulnerable to the same deluge of unstoppable text messages.

Perhaps the most brazen attempt to evade the TCPA's protections against autodialed calls to cell phones is clicker agent calling systems. These systems are entirely automated, but insert a human "clicker agent" into the process. These human clicking agents do not participate in the calls, and simply have the job of repeatedly clicking a single computer button, which sends telephone numbers on an already-created list to an automated dialer in another locale. The seller then claims that the insertion of this human as an automaton means that the calls are not governed by the TCPA, so they can be made without consent and the called party has no way to stop them.

If this position were accepted, the result for our ability to control unwanted calls to our cell phones would be profound. For example, a single seller, Hilton Grand Vacations Co., used a clicker agent system to make *56 million calls* to cell phones to sell vacation packages, and then claimed that the TCPA did not require consent.⁴⁴ And that is just one company. Allowing clicker agent calls to evade the TCPA would amount to an invitation to every telemarketer—both those pushing overt scams and those making less shady but equally intrusive calls—to make millions of calls without consent. Clicker agent systems not only result in mass unwanted automated calls to cell phones, but also produce the same problems of dropped calls and delays after answering the phone that calls made by all autodialers produce.⁴⁵

Consumer groups have asked the FCC to rule on these evasion efforts and clarify that systems which use human clicker agents to process phone numbers that are then automatically dialed are covered by the TCPA. However, the FCC has not yet issued a response.

⁴³ *Dominguez v. Yahoo, Inc.*, 629 Fed. Appx. at 370–71.

⁴⁴ *Glasser v. Hilton Grand Vacations Co., L.L.C.*, 341 F. Supp. 3d 1305 (M.D. Fla. 2018), *appeal to 11th Circuit pending*.

⁴⁵ According to the record in the case, Hilton's documents included an illustration of the two systems side by side. Doc. 104-7, at 2. The two systems appear to be identical *except for* the addition of the superfluous clicker agent for the TCPA-covered calls.

Recommendation:

Congress should make clear to the FCC that the TCPA’s definition of ATDS is intended to encompass the automated dialing systems in use today, and to reject the evasions that callers are attempting to devise.

C. The Rules Must Give Us Control Over Calls.

The TCPA was written explicitly to protect Americans from the “scourge of robocalls” by giving consumers control over whether they receive robocalls. Congress did so by giving consumers the right to chose whether to consent—and implicitly to withhold or revoke that consent—to automated calls.

The calling industry has asked the FCC to issue a ruling that consent provided as part of a contract cannot be unilaterally revoked by the consumer.⁴⁶ Such a ruling would effectively eradicate the TCPA’s requirement for express consent for automated calls.

The D.C. Circuit’s decision in *ACA International* confirms the FCC’s conclusion in its 2015 Order⁴⁷ that consumers have the right to revoke consent.⁴⁸ However, the *ACA International* court did not take a position on whether the FCC had authority to determine that revocation of contractually provided consent might be limited by contract, because the issue was not before the court.⁴⁹

Most of the automated calls about which consumers complain are either telemarketing calls or debt collection calls.⁵⁰ For calls made by debt collectors, the FCC has explicitly allowed consent to be presumed whenever consent was provided in the original credit contract with the creditor or the seller. Those contracts are adhesion contracts, in which consumers have no bargaining power and no ability to change the terms. So it is already a stretch for the FCC to have said that consent for debt collection calls—which is required by statute to be *express*—can be *implied* when a consumer gives her telephone number to open a charge account in a store. Providing a telephone number when applying for credit hardly constitutes express consent to be contacted months or years later by a debt

⁴⁶ See, e.g., Comments of U.S. Chamber Institute for Legal Reform, *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket Nos. 02-278 and 18-152, at 21, 27 (filed June 13, 2018), available at <https://ecfsapi.fcc.gov/file/1061348977655/ILR-US%20Chamber%20TCPA%20Public%20Notice%20Comments.pdf>.

⁴⁷ See 2015 Order at 7993.

⁴⁸ *ACA International v. F.C.C.*, 885 F.3d 687, 709 (D.C. Cir. 2018).

⁴⁹ *Id.* at 710 (D.C. Cir. 2018) (emphasis added; citation omitted).

⁵⁰ See section II, *supra*, for more discussion about unwanted and unstoppable debt collection calls.

collector.⁵¹ Courts have stretched the notion of express consent even farther by holding that consent can be transferred from the original creditor to a debt buyer, and then from the debt buyer to a collector it hires.⁵²

It would be a true overextension for the FCC to take the next step down the road to unlimited automated calls and hold that, once a consumer has provided her phone number in a contract, she could never stop a debt collector's automated calls by withdrawing that consent. One Second Circuit decision, *Reyes v. Lincoln Automotive Financial Services*,⁵³ erroneously holds that the consumer's consent is irrevocable when it is part of a binding contract. However, that decision fails to give appropriate weight to the FCC's 2015 Order ruling that, "[w]here the consumer gives prior express consent, the consumer may also revoke that consent."⁵⁴ The *Reyes* decision also mistakenly holds that no other circuit had addressed the question, when in fact several other circuit court decisions had upheld the consumer's right to revoke consent that had been given in a contractual context.⁵⁵

If revocation is not permitted, robocalls will be even more abusive and unstoppable. Debt collection callers comprise *nineteen of the top twenty robocallers* in the United States.⁵⁶ As detailed above, debt collection calls are among those calls that are routinely complained about and the subject of litigation. Often, debt collectors and creditors collecting their own debts are now routinely refusing to stop calling, despite pleas from consumers, and are instead arguing that the Second Circuit's *Reyes* decision applies to them and that consent cannot be revoked. We can only imagine the nightmarish

⁵¹ "[P]ersons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 92-90, Report and Order, 7 F.C.C. Rcd. 8752, 8769 ¶ 31 (Oct. 16, 1992).

⁵² See *Selby v. LVNV Funding, L.L.C.*, 2016 WL 6677928, at *8 (S.D. Cal. June 22, 2016).

⁵³ 861 F.3d 51, 58.

⁵⁴ 2015 Order at 7996. See *Ginwright v. Exeter Fin. Corp.*, 280 F. Supp. 3d 674, 683 (D. Md. 2017) (declining to follow *Reyes*; noting its inconsistency with FCC's ruling).

⁵⁵ See *Gager v. Dell Fin. Services, L.L.C.*, 727 F.3d 265 (3d Cir. 2013) (consent provided in application for credit). See also *Schweitzer v. Comenity Bank*, 866 F.3d 1273 (11th Cir. 2017) (consent provided in credit card application can be revoked, and consumer can revoke consent in part); *Van Patten v. Vertical Fitness Grp.*, 847 F.3d 1037, 1047–49 (9th Cir. 2017) (consent provided in gym membership application); *Osorio v. State Farm Bank*, 746 F.3d 1242 (11th Cir. 2014) (consent provided in application for credit card, although the court allows that the *method* of revoking consent may be limited by the contract).

⁵⁶ See YouMail Robocall Index, available at <https://robocallindex.com/> (last accessed April 9, 2019). To verify the sources of the calls, we listened to provided-voicemail recordings and called the numbers listed to see who answered.

scenario that will impact tens of millions of people across the U.S. if the FCC rules that consent granted by contract cannot be revoked.

Recommendation:

1) Congress should a) re-emphasize to the FCC what the TCPA already says, that it is intended to ensure that consumers who have consented to received robocalls as part of a contract can revoke their consent in any reasonable manner regardless of the context in which consent was provided.

2) If the FCC fails to issue the correct interpretation of the TCPA, Congress should pass H.R. 946 (the Stopping Bad Robocalls Act), sponsored by Congressman Pallone and others in the House, which mandates the appropriate interpretations of these critical issues.

D. Sellers Must Not Be Allowed to Hide Behind the Third Parties They Hire.

Callers—particularly the “legitimate businesses” that can actually be traced and called to account for their violations—go to great lengths to devise ways to bombard us with calls without our consent yet evade liability. One strategy is to use “data brokers” to place the calls. On these calls from data brokers, once a consumer indicates an interest in the product being sold (“Press 2 now if you want to hear more about available health insurance in your area.”), the broker passes along the consumer’s information to the company selling the product.

Another strategy is to hire others to make the calls and then claim that the callers were independent contractors for whom the seller is not responsible. The seller may put a clause in its contract with the independent contractor that purports to require it to comply with the TCPA, and then claim that it can’t possibly be held liable since the independent contractor promised to obey the law.

This ploy was outlined—and strongly disapproved of—in the case of *Krakauer v. DishNetwork, L.L.C.*⁵⁷ After one prosecution by the federal and state governments had found that Dish was responsible for hundreds of millions of calls,⁵⁸ the court adjudicating a civil enforcement action found that the independent contractors were agents of DishNetwork, and that DishNetwork was vicariously liable for the calls made by the independent contractors to sell Dish products.⁵⁹ Yet it is still commonly raised by sellers in case after case as a means of avoiding liability for the illegal calls made on their behalf.

⁵⁷ 311 F.R.D. 384 (N.D.N.C. 2015)

⁵⁸ *United States v. Dish Network, LLC*, 75 F. Supp. 3d 942 (C.D. Ill. 2014).

⁵⁹ See *Krakauer v. Dish Network L.L.C.*, 2017 WL 2242952, at *3 (M.D.N.C. May 22, 2017 (“The OE Retailers collectively generated hundreds of millions of dollars a year in revenue for Dish.”)).

Recommendation: Congress should urge the FCC to strengthen its rulings about the liability of sellers who benefit from robocalls made by others (such as data brokers and independent brokers), making it even clearer that these sellers are responsible for the TCPA compliance of those callers.

E. The Rules Must Continue To Be Enforceable, with Strong Remedies that Provide a Deterrent for Serial Violators.

Rules to stop robocalls need to be privately enforceable for two reasons. First, individual consumers harmed by the invasion of privacy caused by the multitude of calls they receive need to be able to obtain redress for that harm. And, second, private enforcement is essential as a way of deterring violations. Unfortunately, FCC enforcement does not accomplish this goal. According to a recent article in the Wall Street Journal, the FCC has collected only \$6,790 in fines against violators of the TCPA.⁶⁰

The TCPA provides this redress by authorizing “an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, which is greater”⁶¹ Moreover, when the court finds “that the defendant willfully or knowingly violated this subsection . . . , the court may increase the amount of the award to an amount equal to not more than 3 times” the \$500.⁶² However, there is no authorization in the law for the recovery of attorney’s fees or of the costs of the action to be awarded, as is provided in other federal consumer protection statutes.⁶³

Individual actions are essential for providing redress to individual consumers, but because of confidentiality clauses they provide little deterrent effect on the callers. These callers simply pay up and repeat the pattern with other victims. Obviously, routinely violating the law and paying individual consumers damages is more financially beneficial than complying with the law—else these callers would not keep repeating the pattern, as they are now doing.

A classic example is callers who keep making illegal calls to new consumers even after being sued in case after case. Tampa attorney Billy Howard,⁶⁴ who represents consumers throughout Florida, has litigated hundreds of cases on behalf of consumers against creditors who are robocalling

⁶⁰ Sarah Krouse, *The FCC Has Fined Robocallers \$208 Million. It’s Collected \$6,790*, The Wall Street Journal, Mar. 28, 2019, available at <https://www.wsj.com/articles/the-fcc-has-fined-robocallers-208-million-its-collected-6-790-11553770803>. The article cites as a source for the analysis “records obtained by The Wall Street Journal through a Freedom of Information Act request.”

⁶¹ 47 U.S.C. § 227(b)(3).

⁶² Id.

⁶³ See, e.g., Truth in Lending Act, 15 U.S.C. § 1640(a)(3); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(3); Equal Credit Opportunity Act 15 U.S.C. § 1691e(d).

⁶⁴ <https://www.theconsumerprotectionfirm.com/billy-howard>

them with similar facts: hundreds of unconsented-to robocalls to collect debts. He has litigated repeat TCPA claims involving dozens or hundreds of unconsented-to robocalls to consumers with the same callers:

- 10 cases against Synchrony Bank in the past two years.
- 18 cases against Navient Solutions in the past three years.
- 24 cases against Credit One Financial/Credit One Bank in the past three years.
- 8 cases against Commenity LLC in the past three years.

This pattern of repeated calls leading to repeated cases shows that existing remedies are not enough to deter callers from continuing to make illegal calls.

Typically, consumers bring individual TCPA suits only after hundreds, or even thousands, of illegal calls interfere with work, interrupt family time, or infringe upon the consumer's solitude. Repeat violators of this forty-year-old law cry foul when forced to answer for their transgressions. Lost in the rhetoric is the fact that many of the same corporations are violating the same law while ignoring the same pleas for the calls to stop. It seems that corporations have made the business decision that ignoring the TCPA is more profitable than compliance. Even more troubling, the consumers who experienced these violations of federal law are then sworn to secrecy through confidentiality clauses and subject to liquidated damages of potentially thousands of dollars if they share their story.

Wrong number calls are a particularly maddening example of why a stronger deterrent is necessary. Many debt collection calls are made to people who never owed money to the callers, yet the callers have their number and just keep calling, ignoring pleas to stop. Litigation around reassigned number calls is caused by repeated and unstoppable calls to the wrong number, not just one or two mistaken calls. Consumers beg callers to stop the calls, and it is only when they don't that consumers seek legal advice to stop the calls and obtain legal redress. Some recent examples—from many similar cases—include:

1. *Lebo v. Navient*.⁶⁵ Zachary Lebo received 100 calls over two months from Navient for a "Justine Sulia," sometimes as many as five calls a day. He had never given permission for Navient to call him and revoked permission over the phone, yet the calls continued.
2. *Waite v. Diversified Consultants*.⁶⁶ Patricia Waite and her daughter Heather received about 166 calls from Diversified Consultants for "Marcy Rodriguez," whom neither of them knew. Diversified continued calling multiple times a day despite being told that it had a wrong number.

⁶⁵ Case No. 2:17-cv-00154 (D. Wyo. filed Sept. 15, 2017).

⁶⁶ Case No. 5:13-cv-00491 (M.D. Fla. filed Oct. 7, 2013).

3. *Goins v. Palmer Recovery Attorneys*.⁶⁷ Amber Goins received frequent calls from Palmer Recovery Attorneys seeking to collect from "Kenya Johnson." Ms. Goins told Palmer several times that she was not Kenya Johnson, and Palmer repeatedly said that it would remove her number from its calling list; however, the calls continued.
4. *Davis v. Diversified Consultants, Inc.*⁶⁸ Jamie Davis received up to three calls a day from Diversified Consultants seeking to collect on a debt owed by "Rosemary." The calls continued even after Mr. Davis told Diversified that he did not know Rosemary, and the callers said they would remove his phone number.
5. *Moseby v. Navient Solutions, Inc.*⁶⁹ Terrance Moseby received dozens of calls from Navient for a "Joshua Morris" or "Andrea." Mr. Moseby has never had any relationship with Navient or either of these people. He told Navient that it had the wrong number but the calls continued

To protect consumers, it is imperative that the pressure be maintained on callers to ensure that they are calling the correct number: the number that belongs to the consumer from whom they have consent to call. Mistakes do happen. But these lawsuits are not about a single mistake. These lawsuits are about callers who persist in calling numbers after they have been told repeatedly that the number does not belong to the person who provided consent. These cases are brought against callers who clearly did not have enough of a financial incentive to make sure that they stopped calling—and harassing—consumers with whom they had no relationship, who had not provided consent, and who begged the callers to stop the calls.

The calling industry complains incessantly about the “nuisance class actions” brought by plaintiffs’ attorneys, and uses the stories as a basis for requesting a variety of changes in interpretations of TCPA terms. However, class actions drive compliance with the law and the FCC’s rules.

Because class actions cost the calling industry money when they have failed to follow the simple requirements for obtaining consent before they make robocalls, callers are more likely to change their behavior to avoid being held liable in a class action case. As the federal district court judge noted in a telemarketing case against Dish

Network involving tens of millions of calls:

[T]he legislative intent behind the TCPA supports the view that class action is the superior method of litigation. “[I]f the goal of the TCPA is to remove a ‘scourge’ from our society, it is unlikely that ‘individual suits would deter large commercial entities as effectively as aggregated class actions and that individuals would be as motivated ... to

⁶⁷ Case No. 6:17-cv-00654 (M.D. Fla. filed Apr. 11, 2017).

⁶⁸ Case No. 1:13-cv-10875 (D. Mass. filed Apr. 12, 2013).

⁶⁹ E.D. Ark. 4:16-cv-00654.

sue in the absence of the class action vehicle.”⁷⁰

Indeed, in another opinion related to this case, the court recited the failure of the defendant to comply with its promise to government enforcers, explaining its rationale for awarding treble damages for the defendant’s willful violations of the TCPA:

The Court concludes that treble damages are appropriate here because of the need to deter Dish from future violations and the need to give appropriate weight to the scope of the violations. The evidence shows that Dish’s TCPA compliance policy was decidedly two-faced. Its contract allowed it to monitor TCPA compliance, and it told forty-six state attorneys general that it would monitor and enforce marketer compliance, but in reality it never did anything more than attempt to find out what marketer had made a complained-about call. It never investigated whether a marketer actually violated the TCPA and it never followed up to see if marketers complied with general directions concerning TCPA compliance and or with specific do-not-call instructions about individual persons. Dish characterized people who pursued TCPA lawsuits not as canaries in the coal mine, but as “harvester” plaintiffs who were illegitimately seeking money from the company. The Compliance Agreement did not cause Dish to take the TCPA seriously, so significant damages are appropriate to emphasize the seriousness of such statutory violations and to deter Dish in the future.

...

This case does not involve an inadvertent or occasional violation. It involves a sustained and ingrained practice of violating the law.

Dish did not take seriously the promises it made to forty-six state attorneys general, repeatedly overlooked TCPA violations by SSN, and allowed SSN to make many thousands of calls on its behalf that violated the TCPA. Trebled damages are therefore appropriate.⁷¹

Most of the litigation under the TCPA relates to calls to cell phones because violations trigger damages after the first call. However, these cases are costly and complex to litigate, requiring experts to opine on technical issues such as whether the caller used an ATDS, or to assist in determining the number of covered calls, as well as issues of consent. Calls to landlines are much less protected and many have said that the unrestricted number of robocalls to landlines is one of the reasons for the decrease in the use of residential landlines. Private litigation should be encouraged and facilitated by the laws governing robocalls.

Recommendation: Make it easier for victims of unwanted robocalls to bring actions against callers who violate the TCPA, by allowing courts to award plaintiffs attorney’s fees and costs of bringing the

⁷⁰ Krakauer v. Dish Network L.L.C., 311 F.R.D. 384, 400 (M.D.N.C. 2015) (emphasis added).

⁷¹ Krakauer v. Dish Network L.L.C., No. 1:14-CV-333, 2017 WL 2242952, at *12–13 (M.D.N.C. May 22, 2017) (internal citations omitted.).

action.

Thank you for considering the views of consumers. I am happy to answer any questions.

Respectfully submitted,

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