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

In the Matter of	)	
	)	
Consumer and Governmental Affairs	)	CG Docket No. 18-152
Bureau Seeks Comment on Interpretation	)	CG Docket No. 02-278
of the Telephone Consumer Protection Act	)	
in Light of D.C. Circuit's *ACA*	)	
International Decision	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of	)	
1991	)	

COMMENTS OF THE RETAIL INDUSTRY LEADERS ASSOCIATION

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EXECUTIVE SUMMARY

The Retail Industry Leaders Association ("RILA") is pleased to submit these Comments to advance the shared goal of its members, the Commission, and the general public: namely, the development of reasonable, understandable, and administrable rules for telephonic interactions between retailers (and other callers) and consumers.

The proper application of the Telephone Consumer Protection Act ("TCPA") is crucial to retailers for at least two overarching reasons. First, modern consumer expectations require the timely—and often frequent—delivery of carefully curated informational and promotional messages. In an era when the only constant is the need to innovate, the ability to connect with consumers is paramount. Second, in recent years, RILA members have been increasingly subjected to abusive litigation, much of it brought by professional plaintiffs and/or by law firms that specialize in soliciting and prosecuting illegitimate, manufactured TCPA claims.

Unfortunately, several of the Commission's prior rulings have encouraged litigation while discouraging beneficial communications that consumers desire and expect—and, in RILA's view, unnecessarily so. In light of the D.C. Circuit's decision, RILA respectfully submits that the time is ripe for a return to TCPA interpretations that are grounded in the plain text of the statute and clear congressional intent. Consequently, these Comments seek changes to four of the Commission's prior TCPA decisions: (1) its elaboration of the characteristics of an autodialer; (2) its interpretation of the term "called party" and its rules regarding reassigned numbers; (3) its approach to the question of how a called party can revoke his or her prior consent to be called; and (4) its adoption of conflicting healthcare exemptions that treat important notifications such as prescription refill reminders differently based on whether the patient happens to rely on a wireless phone or a landline. Specifically, RILA respectfully requests that the Commission rule that:

Autodialer Definition

1. Whether a device qualifies as an automatic telephone dialing system ("ATDS" or "autodialer") should be determined based on that device's "present capacity" rather than its "potential" or "theoretical" capacity; and
2. In order for a particular call to be deemed to have been placed by an ATDS, the call in question must actually have been dialed (a) using a random or sequential number generator to produce the number called, and (b) without human intervention.

Reassigned Numbers

1. The term "called party" means the intended recipient of the call rather than an unintended recipient of the call in question; and
2. Principles of "reasonable reliance" require allowing callers to rely on the provision of consent until they have actual notice that a given number has or may have been reassigned.

Revocation of Consent

1. Parties to a bilateral contract may agree on specific opt-out methods or waive the ability to unilaterally revoke consent;
2. Retailers and other callers may designate clearly defined and easy-to-use methods for opting out (*e.g.*, responding to a text message with "STOP" or filling out a consent-revocation form on a website) that, if used by a consumer to opt out, will be deemed presumptively reasonable methods of revoking consent; attempts to opt out that do not use one of such methods specified by the caller will be deemed presumptively unreasonable;
3. Organizations that adopt appropriate policies governing revocation of consent are entitled to a safe-harbor defense against TCPA lawsuits; and
4. Retailers and other callers have a reasonable period of time, not to exceed thirty (30) days, to comply with opt-out requests.

Healthcare Communications

1. Prescription notifications from pharmacies are exempt from the TCPA's prior-consent requirement under the "emergency purposes" exception to that requirement.

These proposals and their justifications are discussed in detail in the body of these Comments.

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COMMENTS OF THE RETAIL INDUSTRY LEADERS ASSOCIATION

The Retail Industry Leaders Association ("RILA") submits the following Comments in response to the Commission's Public Notice seeking comments on the proper interpretation of the Telephone Consumer Protection Act ("TCPA") in light of the *ACA International* decision.[1]

I. INTRODUCTION

In 1991, Congress enacted the TCPA to "crack down on intrusive telemarketers and . . . scam artists"[2] by enabling consumers to pursue a fair measure of individual relief in small claims court without the need for a lawyer.[3] Today, however, the statute's interpretation has "strayed [so]

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1 *See ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018); *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, DA Docket No. 18-493, Public Notice (May 14, 2018) (the "Public Notice").

2 *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8072 (2015) ("2015 Omnibus Order") (Pai, dissenting).

3 *See, e.g.*, 137 Cong. Rec. S16204 (Nov. 7, 1991) (Statement of Sen. Hollings) ("[I]t is my hope that States will make it as easy as possible for consumers to bring such actions, ***preferably in small claims court***. . . . Small claims court . . . would allow the consumer to appear before the court ***without an attorney***." (emphases added)); *id.* (Statement of Sen. Hollings) ("The amount of

far from its original purpose" that it is "the poster child for lawsuit abuse."[4] Instead of protecting consumers from undesirable practices by unscrupulous actors, the TCPA chills important communications from legitimate businesses—*e.g.*, order confirmations, appointment reminders, shipping and delivery notifications, product and services notifications, prescription refill reminders, fraud alerts, satisfaction surveys, and loyalty program alerts—that are initiated via modern technology.[5]

It is no secret that TCPA litigation has exploded. The statute's application to technologies that did not exist in 1991,[6] coupled with its provision of uncapped aggregate statutory damages,[7] has led to a proliferation of putative class action lawsuits.[8] Between 2007 and 2017, the number of federal TCPA lawsuits increased by over ***31,000%***, with over 20,000 being filed in that period. For instance, whereas only 14 were filed in 2007, 4,392 were filed in 2017.[9] In recent years, roughly one-third of those actions were styled as putative class actions,[10] which can involve a risk of potentially annihilating uncapped statutory damages. As shocking as these statistics are, they

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damages . . . is set to be fair to both the consumer and the telemarketer.").

4 2015 Omnibus Order, 30 FCC Rcd. at 8073 (Pai, dissenting).

5 *Id.* at 8084 (O'Rielly, dissenting in part) (noting the "increased liability for good actors" and stating that the 2015 Order "penalizes businesses and institutions acting in good faith to reach their customers using modern technologies").

6 *See id.* at 8087 ("The TCPA was enacted in 1991—before the first text message was ever sent. The Commission should have . . . gone back to Congress for clear guidance on the issue rather than shoehorn a broken regime on a completely different technology.").

7 47 U.S.C. §§ 227(b)(3), (c)(5).

8 U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* at 3 (Aug. 2017), http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf ("The sprawl of TCPA litigation illustrates the serious problem that occurs when uncapped statutory damages and a technologically outdated statute work together to overincentivize litigation.").

9 *See* WebRecon LLC, *WebRecon Stats for Dec 2017 & Year in Review*, https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review.

10 *See TCPA Litigation Sprawl* at 3.

actually ***underrepresent*** the full extent of litigation, as they do not account for the thousands of state court actions, arbitrations, and demand letters that retailers and others face each year.[11]

The pace of new filings accelerated after the Commission issued the 2015 Omnibus Order. In fact, one study by the Institute for Legal Reform found that "after the FCC's July 2015 Order, TCPA litigation boomed—increasing by 46%."[12] A substantial portion of those lawsuits involved class claims seeking "statutory damages ranging from tens of millions to billions of dollars."[13] Rather than targeting "the kinds of cold-call telemarketing the TCPA was designed to limit," these lawsuits targeted "legitimate American companies" and "rarely involve[d] claims brought against spam telemarketers/texters or blast faxers that reach out to millions of unknown persons in an attempt to get someone to engage with them."[14]

The use of abusive litigation tactics has also proliferated, with some plaintiffs going to "ridiculous lengths" to manufacture TCPA claims based on "legitimate communications,"[15] and one even trying to publish a book about his abuse of the statute.[16] Indeed, the problem has become so pervasive that there are now vendors that offer services to scrub known, professional plaintiffs' phone numbers from dialing lists.[17]

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[11] *See, e.g.*, *In re Petition of SUMOTEXT Corp. for Expedited Clarification or, in the Alternative, Declaratory Ruling*, CG Docket No. 02-278 at 4–6 (Sept. 3, 2015) ("SUMOTEXT Petition").

[12] *TCPA Litigation Sprawl* at 2.

[13] *Id.* at 8.

[14] *Id*. at 3.

[15] 2015 Omnibus Order, 30 FCC Rcd. at 8073 (Pai, dissenting).

[16] *See* Archive of Publisher's Marketplace Post, http://web.archive.org/web/20100420075855/http://www.publishersmarketplace.com/rights/display.cgi?no=6960 (Apr. 15, 2010) (proposing book by Craig Cunningham to be called "Tales of a Debt Collection Terrorist: How I Beat the Credit Industry at Its Own Game and Made Big Money from the Beat Down").

[17] *See, e.g.*, Tatango, *Tatango Launches Professional TCPA Plaintiff Monitoring to Protect Monitors* (May 11, 2018), https://www.tatango.com/blog/tatango-launches-professional-tcpa-plaintiff-monitoring-to-protect-marketers/; Do-Not-Call Protection, *Known TCPA/FDCPA*

More to the point, overly broad interpretations of automatic telephone dialing systems ("ATDS" or "autodialer")[18], reassigned number rules, and revocation-of-consent procedures have fueled the rise of sharp litigation tactics. Take, for example, a proposed class action filed against a Chicago-based retailer. The case sought ***$18 billion*** in statutory damages based on text messages to customers who had opted in to receive promotions and discounts. The retailer moved for summary judgment based on the undisputed fact that the texting platform lacked the ability to store or produce numbers using a random or sequential number generator, and required human intervention to send texts in the first instance. Despite accepting this fact, the trial court denied summary judgment, and the Court of Appeals affirmed, on the ground that, under the 2015 Omnibus Order, "equipment need not possess the 'current capacity' or 'present ability' to use a random or sequential number generator."[19] Although the retailer ultimately prevailed on different grounds (because the plaintiff had, in fact, consented to the text messages), that victory came after ***six years*** of costly litigation, during which the defendant faced a threat of crippling classwide statutory damages.[20]

In another example, one prolific TCPA plaintiff has made a career out of collecting nearly three dozen cellphones with area codes in economically depressed regions in the hopes that she will attract debt-collection robocalls intended for other people.[21] As she testified at her deposition,

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Plaintiffs & Litigant Scrub, http://www.donotcallprotection.com/litigant-scrub-b2c.

[18] The Commission has defined the term "autodialer" as "synonymous with an automatic telephone dialing system." Public Notice at 1 n.3 (citing 47 C.F.R. § 64.1200(f)(2)).

[19] *See Blow v. Bijora, Inc.*, 855 F.3d 793, 801 (7th Cir. 2017) (citing 2015 Omnibus Order, 30 FCC Rcd. at 7972); *see also id.* at 802 ("Given the expansive definition of an autodialer adopted by the FCC, . . . summary judgment on this issue for Akira was premature.").

[20] *See id.* at 803–05. The original plaintiff who instituted the lawsuit worked for the law firm that filed the suit—a fact that was disclosed only after a class was certified. While expressing "misgivings about [class counsel]'s judgment," the Court of Appeals affirmed the trial court's order denying sanctions. *See id.* at 807.

[21] *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 798–99, 801 (W.D. Pa. 2016).

the ***only*** reason she buys these phones is to serve her "business" of filing TCPA lawsuits.[22] In the litigation landscape created by the 2015 Omnibus Order, retailers and other legitimate businesses have no way to avoid contrived claims because they are liable for calls to reassigned numbers and have no way of knowing that the numbers have been reassigned. The purpose of the TCPA is not served by imposing liability in this situation, as the purported "consumer" is not interested in avoiding unwanted calls, but rather is hoping to bait businesses into calling her so that she can claim a technical violation and extort a personal profit for herself and her counsel.

Similarly, with regard to revocation-of-consent procedures, plaintiffs coached in the art of evasion will continue to subject retailers to, or threaten them with, litigation. Many TCPA cases have centered on contrived "revocations" of consent. In those cases, the plaintiff enrolls in a company's text messaging program and then promptly purports to revoke consent to receiving text messages in a way that is carefully calculated to avoid detection by automated systems that are designed to accept revocation expressed via simple requests like "STOP" and "UNSUBSCRIBE."[23] In other words, instead of using reasonable and well-accepted words to express a desire to no longer receive text messages, these plaintiffs intentionally use vague, wordy and unconventional words in blatant attempts to try to beat the system and manufacture claims of non-compliance. While some courts have rejected such gamesmanship as unreasonable, these types of claims continue to be filed and to be the subject of demand letters threatening litigation unless the company agrees to pay out a rich settlement.

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22 *Id.* at 799.

23 *See, e.g.*, *Epps v. Gap, Inc.*, No. 17-3424, 2017 U.S. Dist. LEXIS 219772 (C.D. Cal. June 27, 2017); *Epps v. Earth Fare Inc.*, No. 16-8221, 2017 WL 1424637 (C.D. Cal. Feb. 27, 2017), *appeal docketed*, No. 17-55413 (9th Cir. Mar. 28, 2017); *Viggiano v. Kohl's Dep't Stores, Inc.*, No. 17-0243, 2017 WL 5668000 (D.N.J. Nov. 27, 2017); *Rando v. Edible Arrangements Int'l, LLC*, No. 17-0701, 2018 WL 1523858 (D.N.J. Mar. 28, 2018).

Without commonsense rules to curb this misuse of the TCPA, litigation will continue to plague compliance-oriented companies that try in good faith to communicate with their customers, and will reward serial plaintiffs who seek to profit from manufactured claims. This does not make for good law or public policy and all of this results in increased costs and decreased convenience for the very consumers that the TCPA was designed to protect. The present litigation environment is untenable and was anticipated by Chairman Pai and Commissioner O'Rielly in their vigorous dissents from the Commission's 2015 Omnibus Order. RILA therefore offers the following suggestions for new rulemaking on automatic telephone dialing systems, reassigned numbers, revocation of consent, and certain healthcare-related calls.

II. RILA AND ITS MEMBERS

RILA is the trade association of the world's largest and most innovative retail companies. Its more than 200 members include retailers, product manufacturers, and service suppliers that collectively account for more than $1.5 trillion in annual sales, millions of American jobs, and more than 100,000 retail stores, manufacturing facilities, and distribution centers around the world.

Many RILA members work hard to develop deep, meaningful, and sustained relationships with consumers. As noted above, retailers engage in important consumer outreach through a variety of informational and promotional calls and text messages. The retail industry continues to evolve in response to rapidly changing consumer preferences and technological advancements. Retailers are adapting to modern commerce through the pursuit of transformative innovation, particularly concerning the myriad ways in which they interact with consumers. The convergence of retail and technology ("(R)Tech") has caused the retail business model to change in fundamental ways, resulting in a business imperative to attract and be immediately responsive to profoundly empowered consumers. To thrive in this era of (R)Tech, retailers must prioritize the careful

delivery of informational and promotional communications that consumers have come to expect and desire. Empowering and honoring consumer choice is a key tenet of RILA's members and RILA's R(Tech) Center for Innovation, which helps retailers navigate and transform during this era of disruptive change.[24]

In sum, in recent years, RILA members have increasingly found themselves the targets of abusive litigation under the TCPA, much of it brought by professional plaintiffs and counsel who specialize in manufacturing and magnifying potential liability. Unfortunately, a number of the Commission's prior interpretations of the TCPA—including, as relevant here, (1) its interpretation of the definition of an autodialer; (2) its interpretation of the term "called party" and its associated rules regarding calls to reassigned phone numbers; (3) its standard for demonstrating revocation of consent to be called; and (4) its adoption of conflicting healthcare exemptions that treat important prescription notifications differently based on whether the patient happens to rely on a wireless phone or a landline—have enabled that tidal wave of litigation. RILA submits these Comments to urge the Commission to revisit these issues and to institute rules that are not only faithful to the letter and spirit of the TCPA but also simple and administrable—goals that would benefit callers and consumers alike.

III. DISCUSSION

A. The Commission Should Revise the Scope of the ATDS Restriction to Make It Consistent with the Text and Intent of the TCPA.

The dramatic increase in TCPA litigation has been driven in large part by Commission rulings that expanded the potential reach of the statute to new and developing communications technologies—and thus well beyond the specific technologies Congress intended to target when it

[24] Retail Industry Leaders Association, (R)Tech Center for Innovation, http://rtech.org/.

enacted the statute in 1991. As the D.C. Circuit recognized, the net effect of these rulings has been to extend the TCPA's restrictions to virtually every modern calling technology, including, but not limited to, the smartphones that are used by "nearly 80% of American adults."[25]

These difficulties were compounded by the 2015 Omnibus Order's "case-by-case" approach to determining whether equipment qualified as an ATDS. The Commission's rulings effectively blurred the lines as to the specific functionality required, so that virtually any platform might be alleged to constitute an autodialer. As two Courts of Appeals noted, the Commission's rulings in this regard were "hardly a model of clarity"[26] and left compliance-minded callers "in a significant fog of uncertainty"[27] as to whether and under what circumstances the use of a specific technology was subject to the statute's restrictions.

In light of the *ACA International* decision, the term ATDS as used in the TCPA should be interpreted as applying only to equipment with the specific functions Congress identified in 1991 as creating an actual risk of harm to recipients—*i.e.*, "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."[28] The Commission should therefore: (1) hold that a device's "present capacity"—rather than its "potential capacity"—is what matters in determining whether that device qualifies as an ATDS; and (2) require that, in order for a particular call to be deemed to have been placed by an ATDS, the call in question must actually have been dialed (a) using a random or sequential number generator to produce the number called and (b) without human intervention. The discussion that follows first canvasses the Commission's prior rules concerning

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25 *ACA Int'l*, 885 F.3d at 697.

26 *Dominguez v. Yahoo, Inc.*, 629 F. App'x. 369, 372 (3d Cir. 2015).

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

28 47 U.S.C. §§ 227(a)(1), (b)(1)(A).

autodialers, reviews the D.C. Circuit's treatment of those rules in *ACA International*, and then closes by recommending new rules that will hew more closely to the text and spirit of the TCPA.

1. Prior Commission Rulings Impermissibly Expanded and Unquestionably Confused the Scope of the Statute.

As noted above, Congress defined an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[29] In doing so, it limited the scope of the statute to equipment with automated random or sequential dialing functionality. As the congressional findings make clear, random or sequential autodialers created unique risks. Specifically, Congress found that random or sequential dialers, by reaching numbers indiscriminately, would tie up lines reserved for specialized purposes, including hospitals and police and fire departments.[30] In addition, sequential dialing functionality, if employed *en masse*, could create a "dangerous" situation wherein whole blocks of numbers were called at once, leaving no lines available for outbound calls in the event of an emergency, and limiting the provision of service to numbers within particular blocks.[31]

The Commission's initial TCPA rulings were in accord with this narrow statutory language and clear congressional intent. In its first order implementing the TCPA, the Commission ruled that equipment with features such as speed dialing, call forwarding and other functions are not autodialers, "because the numbers called are not generated in a random or sequential fashion."[32] The Commission subsequently explained that the ATDS restriction did not apply to calls directed

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[29] 47 U.S.C. § 227(a)(1).

[30] S. Rep. No. 102-178 at 2 (1991); *Telemarketing/Privacy Issues: Hearing Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce on H.R. 1304 and H.R. 1305 ("Telemarketing/Privacy Issues")*, 102d Cong., 1st Sess. 111 (Apr. 24, 1991).

[31] H. R. Rep. No. 102-317 at 10 (1991); *Telemarketing/Privacy Issues* 113.

[32] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8776 (1992).

to "[a] specifically programmed contact number" as opposed to "randomly or sequentially generated telephone numbers."[33] These rulings provided predictability to companies seeking to provide customers with desired and expected communications, while honoring Congress's intent in addressing specific technologies that had been shown to cause actual risk of harm when misused.

This approach changed dramatically starting in 2003, when the Commission issued the first in a series of rulings that expanded the scope of the autodialer definition, based on the stated goal of regulating new technologies. In a ruling that year, the Commission articulated several expansive and inconsistent criteria for what constitutes an ATDS, including whether equipment can dial "at random, in sequential order, or from a database of numbers" and whether it can dial "without human intervention."[34] The ruling expanded the Act to encompass predictive dialing technology, and also opened the door to claims that other calling technologies fell within the statute's reach. The justification for these shifting tests was to permit "the FCC, under its TCPA rulemaking authority," to "consider changes in technolog[y]."[35] As explained in a 2008 ruling, the Commission "expected such automated dialing technology to continue to develop" and believed that Congress had anticipated that it "might need to consider changes in technology."[36]

In the 2015 Omnibus Order, the Commission affirmed its prior rulings regarding ATDS functionality, and the various and conflicting tests it had announced for determining whether equipment is an autodialer. The Commission then expanded the statute's scope even further, by

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33 *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd. 12391, 12400 (1995).

34 *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14091–92 (2003).

35 *Id*. at 14092.

36 *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559, 566 (2008); *see also In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rec. 15392 n.5 (2012).

holding that the capacity of equipment included "its potential functionalities"—*i.e.*, functionalities that the device did not currently possess and that it would not possess unless and until its software were reprogrammed.[37] On that basis, the Commission declined to clarify "that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention."[38] Again, the Commission justified this further expansion of the statute's scope based on a supposed need to address evolving dialing technology, insofar as "little or no modern dialing equipment would fit the statutory definition of an autodialer."[39] The Commission defaulted to a "case-by-case" approach to determining whether any particular equipment might qualify as an autodialer.[40]

As Chairman Pai noted in dissent, these rulings, as incorporated in the 2015 Omnibus Order, did not "focus on the illegal telemarketing calls that consumers really care about," but instead "twist[ed] the law's words even further to target useful communications between legitimate businesses and their customers."[41] The two dissenting Commissioners urged that the Commission "respect the precise contours of the statute that Congress enacted," rather than transform the statute "into an unpredictable shotgun blast covering virtually all communications devices."[42]

2. The D.C. Circuit's Ruling Provides Critical Guidance for Further Autodialer Regulation.

The D.C. Circuit agreed with the dissenting Commissioners' assessment. In vacating the Commission's prior rulings as arbitrary and capricious, the court in *ACA International* confirmed

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37 2015 Omnibus Order, 30 FCC Rcd. at 7974.

38 *Id*. at 7976.

39 *Id.*

40 *Id.* at 7975.

41 *Id.* at 8073 (Pai, dissenting).

42 *Id.* at 8075 (Pai, dissenting).

several principles that, RILA respectfully submits, should guide the Commission in further regulation of ATDS devices.

First, in ascertaining congressional intent, the Commission should refrain from presuming that the 1991 statute was necessarily intended to encompass all or even most modern dialing technology, including technology that did not exist when Congress passed the statute. "Congress need not be presumed to have intended the term 'automatic telephone dialing system' to maintain its applicability to modern phone equipment in perpetuity, regardless of technological advances that may render the term increasingly inapplicable over time."[43]

Second, the Commission should not interpret "capacity" as including functionality that equipment does not presently have but which could be added through software changes or updates.[44] Given the capabilities of modern smartphones, the possibility of increased functionality through software additions would of necessity qualify every smartphone as an ATDS, making the statute's restrictions on calls and texts impermissibly "eye-popping" in scope.[45]

Third, in determining the requisite features of an autodialer, the Commission should avoid the lack of clarity that plagued its prior rulings—the "fog of uncertainty about how to determine if a device is an ATDS so as to bring into play the restrictions on unconsented calls."[46] In particular, a declaratory ruling cannot be sustained as "reasoned decisionmaking" where the feature may—or may not—be a precondition for equipment to qualify as an autodialer.[47] It follows that a "case-

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43 *ACA Int'l*, 885 F.3d at 699 (noting that the statute prohibits nonconsensual calls to pagers and specialized mobile radio service, even though "those terms have largely ceased to have practical significance").

44 *Id.* at 697–98.

45 *Id.* at 697.

46 *Id*. at 703.

47 Commissioner O'Rielly, *TCPA: It is Time to Provide Clarity*, FCC Blog (Mar. 25, 2014, 2:10 PM), https://www.fcc.gov/new-events/blog/2014/03/25/25/tcpa-it-time-provide-clarity.

by-case" approach to determining autodialer functionality should be rejected, in favor of bright-line rules that provide predictability and ease of application for all parties.

Fourth, the Commission should implement the actual statutory provisions of the TCPA, including the requirement of automated functionality in the ATDS definition, and the additional requirement that the call be made using autodialer functions.[48] As the D.C. Circuit explained, if the equipment must be used as an autodialer before the TCPA's restrictions apply, "the fact that a smartphone could be configured to function as an autodialer would not matter unless the relevant software in fact were loaded onto the phone and were used to initiate calls or send messages."[49]

3. The Commission Should Narrow Its Interpretation of ATDS Capacity and Functionality in Accord with *ACA International*.

In light of the D.C. Circuit's ruling, the Commission has appropriately identified the threshold question of "how to more narrowly interpret the word 'capacity' to better comport with the congressional findings and the intended reach of the statute."[50] In answering this question, the Commission should reject the prior ruling's adoption of a "potential capacity" test as rendering the Act's definition of ATDS so vague and elastic as to be essentially meaningless. The Commission's prior overbroad interpretation negatively impacted consumers and retailers by enmeshing compliance-minded businesses in needless class action litigation with potentially crippling consequences, and otherwise effectively prohibited desired communications between business and their customers that Congress did not intend to target.[51] Consistent with the D.C. Circuit's opinion,

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48 *ACA Int'l*, 885 F.3d at 704 (noting that Commissioner O'Rielly "read the pertinent statutory phrase, 'make any call,' to mean 'that the equipment must, in fact, be used *as an autodialer* to make the calls." (citing 2015 Omnibus Order, 30 FCC Rcd. at 8088 (O'Rielly, dissenting in part)).

49 *ACA Int'l*, 885 F.3d at 704.

50 Public Notice at 2.

51 2015 Omnibus Order, 30 FCC Rcd. at 8076 (Pai, dissenting) ("[L]awmakers did not intend to interfere with 'expected or desired communications between businesses and their customers.'" (quoting Report of the Energy and Commerce Committee of the U.S. House of Representatives,

the Commission should instead adopt a "present capacity" test. Under such a test, equipment would only be subject to TCPA restrictions if it has "present capacity" to autodial. If software updates or additions are required to add autodialer functionality, the equipment lacks the requisite present capacity, and would not be subject to the TCPA's restrictions. Any broader ruling would lead to the impermissible scenario where everyday smartphones or other equipment might be subject to the statute—and the threat of class action litigation—even where those devices lack the present capacity to function as an autodialer.

The Commission should likewise narrow the types of functionality that would make a device qualify as an ATDS. Consistent with the plain language of the TCPA and Congress's intent in enacting that language, the Commission should confirm that to be an ATDS, equipment must: (1) use a random or sequential number generator to store or produce numbers; and (2) dial those numbers without human intervention. In specific answer to the question posed by the Public Notice, RILA submits that, if "equipment cannot itself dial random or sequential numbers," that equipment cannot "be an automatic telephone dialing system."[52]

Likewise, the Commission should confirm that equipment must actually dial numbers without human intervention to constitute an autodialer.[53] As the D.C. Circuit pointed out, "[t]hat makes sense given that 'auto' in autodialer—or, equivalently, 'automatic' in 'automatic telephone dialing system,' 47 U.S.C. § 227(a)(1)—would seem to envision non-manual dialing of telephone numbers."[54] The "contrary proposition"—*i.e.*, that equipment "might qualify as an autodialer even

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H.R. Rep. 102-317 at 17 (1991))).

52 Public Notice at 3.

53 *Id*. at 2.

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

if it cannot dial numbers without human intervention"—is "difficult to square"[55] with the plain language of the Act, the Commission's initial rulings interpreting the TCPA, and any commonsense notion of the phrase "automatic," and should therefore be rejected.

In sum, a ruling confirming these two bright-line requirements—(1) that equipment use a random or sequential number generator to store or to produce numbers; and (2) that the equipment dial those numbers without human intervention—will bring much-needed clarity to the TCPA. At the same time, such a confirmatory ruling will both comport with the plain language of the Act and avoid the inherent uncertainties of the Commission's prior "case-by-case" rulings.

4. The Commission Should Find That Only Calls Made with ATDS Functions Are Subject to the TCPA's Restrictions.

In light of *ACA International*, the Commission should also revisit its prior approach to whether a call needs to be placed using a device's autodialing function in order to expose the caller to TCPA liability. In that vein, the D.C. Circuit suggested that Commissioner O'Rielly's approach, as articulated in his dissent to the 2015 Omnibus Order, would adhere to the statutory language, by requiring callers to use the autodialer functionality to make a call for liability to accrue under the TCPA. An additional benefit of adhering to the statutory requirements would be to avoid the uncertainties inherent in the phrase "capacity," insofar as the relevant inquiry would address the actual functions used to make the call, rather than the abstract and potential future capabilities of the equipment in question. This interpretation would avoid scenarios under which use of standard calling technologies might be subject to TCPA liability, because of the flexibility inherent in modern computing to upgrade or add features through software changes. At the same time, enforcing the statutory requirement would adhere to Congress's goal in enacting the statute—

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55 *Id.*

specifically, to restrict use of technologies that actually result in risk of harm to callers through use of the automated functionality.

The Commission should follow the D.C. Circuit's guidance and interpret the TCPA as providing that TCPA liability does not attach to a call unless the calling equipment that placed the call used autodialer capability to make that call. This additional clarification would provide compliance-minded businesses clear guidance that will help curtail the filing of baseless and expensive class action litigation that turns on whether unused features might turn a compliant system into a noncompliant one.

B. The Commission Should Adopt a Pragmatic, Textually Consistent Approach to Regulation of Calls to Reassigned Numbers.

The 2015 Omnibus Order interpreted the term "called party" to include unintended recipients of a call, and by doing so allowed retailers and other callers to be found liable for calling reassigned numbers even if they had no way of knowing about their reassignment.[56] That reading created an unavoidable risk of liability and an undeniable chilling effect on speech. On appeal, the D.C. Circuit "set aside the Commission's treatment of reassigned numbers as a whole" and directed it to find a solution that was not "arbitrary and capricious."[57] On remand, the Commission should confirm that "called party" means the intended recipient of a call rather than the unintended recipient of a call, and/or that a caller may continue to "reasonably rely" on the provision of consent until it has actual notice that a given number has or may have been reassigned. Only then will the Commission's approach to this issue survive scrutiny.

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56 2015 Omnibus Order, 30 FCC Rcd. at 7999; *see also id.* at 8000–03.

57 *ACA Int'l*, 885 F.3d at 709.

1. The Commission's Prior Approach to Reassigned Numbers Chilled Speech, Demanded the Impossible, and Was Stricken as Arbitrary and Capricious.

One practical problem with requiring that a caller have consent from the actual-but-unintended recipient of a call is that, if a number has been reassigned, and there is no authoritative reassigned numbers database,[58] the caller may not learn that it lacked such consent until ***after*** the call has been made—and indeed it may ***never*** learn that it lacked such consent. In fact, the Commission admitted in its 2015 Omnibus Order that, "[e]ven where the caller is taking ongoing steps reasonably designed to discover reassignments and to cease calls," such steps "may not solve the problem in its entirety" because there are no "guaranteed methods to discover all reassignments."[59] In other words, the Commission created a situation where there was literally ***nothing*** that callers could do to ensure compliance with the TCPA on this issue.

This alone warranted either reading the statute differently or declaring it unenforceable. Indeed, one of the most well-reasoned canons of construction is *lex non cogit ad impossibilia*, which means "[t]he law does not compel the doing of impossibilities."[60] That canon counsels courts to look for reasonable interpretations that do not demand the impossible and, if they cannot find one, to declare the statute void. If Congress cannot demand the impossible when it drafts a statute, it follows that an agency cannot demand the impossible when it interprets one. Here,

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58 *Comments of the Retail Industry Leaders Association* at 11–17, CG Docket No. 17-59 (June 7, 2018).

59 2015 Omnibus Order, 30 FCC Rcd. at 8006–07; *see also id.* at 8008–09 (acknowledging that callers using "best practices and available tools . . . may nevertheless not learn of reassignment before placing a call").

60 *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1530 (11th Cir. 1996); *Hall v. Admire*, 39 Ill. 251, 254 (1866) ("The law is not so unreasonable as to require the performance of impossibilities as a condition to the assertion of acknowledged rights"). As the Commission recognized when it created a safe harbor for calls to numbers that have recently been ported from wireline to wireless phones, the Commission must "ensure that callers have a reasonable opportunity to comply with our rules," lest it "demand the impossible" of callers. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd. 19215, 19215, 19219 (2004).

however, the Commission not only demanded the impossible but also imposed liability when the impossible did not happen—in essence turning the act of calling into a game of Russian roulette. The Commission's extreme interpretation provided no benefits to consumers and was not only unwise as a matter of public policy but also unenforceable as a matter of law.

The Commission could have avoided this problem entirely by interpreting "called party" as the intended recipient. Instead, it chose to exempt the first call—but ***only*** that call—from liability.[61] That, the Commission decided, was an appropriate allocation of "risk."[62] But even the Commission conceded that a one-call-only safe harbor would simply kick the can down the road, as "a single call . . . will [not] always be sufficient . . . to gain actual knowledge of the reassignment,"[63] for example if the recipient does not answer a call, disclose a reassignment, or express a lack of consent. Recognizing that it was "absolutely ludicrous" to believe that callers would learn about a reassignment merely by virtue of ***dialing a number***, the dissenting Commissioners described the safe harbor as "fake relief" that would create a "trap for law-abiding companies" and give "litigious individuals a reason ***not*** to inform callers about a wrong number."[64]

That is exactly what happened, as "[t]he problem of recycled cellphone numbers has spurred a number of [TCPA] lawsuits."[65] For example, one caller was haled into court by a

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61 2015 Omnibus Order, 30 FCC Rcd. at 8001 n.265 ("We interpret the TCPA to permit the caller to make or initiate one additional call to a reassigned number, over an unlimited period of time, where the caller does not have actual knowledge of the reassignment and can show that he had consent to make the call to the previous subscriber or customary user of the number."); *see also id.* at 8009–10.

62 *Id.* at 8007, 8010.

63 *Id.* at 8009 n.312.

64 *Id.* at 8090 (O'Rielly, dissenting in part); *id.* at 8080 (Pai, dissenting).

65 *Holt v. Facebook, Inc.*, 240 F. Supp. 3d 1021, 1025 n.1 (N.D. Cal. 2017) (citing cases); *see also, e.g.*, *Eldridge v. Cabela's Inc.*, No. 16-0536, 2017 WL 4364205 (W.D. Ky. Sept. 29, 2017); *Glick v. Performant Fin. Corp.*, No. 16-5461, 2017 WL 786293 (N.D. Cal. Feb. 27, 2017); *Sliwa v. Bright House Networks, LLC*, No. 16-0235, 2016 WL 3901378 (M.D. Fla. July 19, 2016); *Nunes v. Twitter, Inc.*, 194 F. Supp. 3d 959 (N.D. Cal. 2016); *Jones v. A.D. Astra Recovery Servs., Inc.*, No. 16-1013, 2016 WL 3145072 (D. Kan. June 6, 2016); *Molnar v. NCO Fin. Sys., Inc.*, No. 13-

plaintiff who never—during ***seventeen*** separate calls—reported the reassignment or objected to the calls.[66] Notwithstanding the fact that the caller had no way of knowing about the reassignment and took immediate measures to stop calling once it learned of the reassignment, it was held liable for making calls without the consent of the "called party." Another plaintiff went to even more "ridiculous lengths" to monetize reassigned numbers,[67] going so far as to buy at least ***35 different cellphones*** with area codes in economically depressed areas in order to attract debt-collection calls that were intended for others.[68] Although one of her cases was dismissed because the court found that her alleged "harms" had been manufactured,[69] in others defendants made the decision to settle in order to avoid the uncertainty and potential expense of litigation.

In *ACA International*, the D.C. Circuit found that the Commission had not done enough to enable good-faith callers to avoid accidental reassigned-number liability. Specifically, it "set aside the Commission's interpretation on the ground that the one-call safe harbor is arbitrary and capricious."[70] The court reasoned that, although the Commission had purportedly premised the safe harbor on a "reasonable reliance" standard, the Commission could not justify limiting the safe harbor to one and only one call:

> The Commission . . . gave no explanation of why reasonable-reliance considerations would support limiting the safe harbor to just one call or message.

0131, 2015 WL 1906346 (S.D. Cal. Apr. 20, 2015); *Sterling v. Mercantile Adjustment Bureau, LLC*, No. 11-0639, 2014 WL 1224604 (W.D.N.Y. Mar. 25, 2014).

66 *Sterling*, 2014 WL 1224604, at *2.

67 *Stoops*, 197 F. Supp. 3d 782.

68 *Id.* at 798–99, 801 ("Q. Why do you have so many cell phone numbers? A. I have a business suing offenders of the TCPA . . . [i]t's what I do. Q. So you're specifically buying these cell phones in order to manufacture a TCPA [lawsuit]? In order to bring a TCPA lawsuit? A. Yeah. . . . Q. Okay. So you're—what do you mean by there's a depression in Florida? Why are you selecting a Florida number? A. I knew that people had hardships in Florida, that they would be usually defaulting on their loans or their credit cards. . . . Q. So is there another purpose that you use these cell phones for . . . . A. No.").

69 *Id.* at 798–99, 801.

70 885 F.3d at 705.

> That is, 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).[71]

In light of the Commission's "concession that the first call may give no notice of a reassignment" and its "disavowal of any expectation that a caller should 'divine from the called consumer's mere silence the current status of a telephone number,'" the court found that "no cognizable conception of 'reasonable reliance' support[ed] the Commission's blanket, one-call-only allowance."[72]

Although the court went on to note that the term "called party" could conceivably be read as referring to an unintended recipient,[73] it "set aside the Commission's treatment of reassigned numbers as a whole."[74] It did so because, after excising the one-call-only safe harbor, it could not "be certain that the [Commission] would have adopted" the same interpretation of "called party" in the absence of that safe harbor, given that that interpretation would result in a "severe . . . strict-liability regime."[75] If anything, it was certain that the Commission would ***not*** have adopted that reading of "called party" without a one-call safe harbor, as the Commission previously had rejected as "too severe" a proposed "'zero call' approach under which no allowance would have been given for the robocaller to learn of the reassignment."[76] The court then invited the Commission to go

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71 *Id.* at 707; *see also id.* ("The Commission outlined a number of measures callers could undertake 'that, over time, may permit them to learn of reassigned numbers.' But the Commission acknowledged that callers 'may nevertheless not learn of reassignment before placing a call to a new subscriber,' and that the first post-reassignment call likewise might give no reason to suspect a reassignment. In that event, a caller's reasonable reliance on the previous subscriber's consent would be just as reasonable for a second call." (internal citations omitted)).

72 *Id.* (citation omitted).

73 *Id.* at 706.

74 *Id.* at 709.

75 *Id.* at 708–09.

76 2015 Omnibus Order, 30 FCC Rcd. at 8009 n.312.

back to the drawing board and "desig[n] a regime to avoid the problems of the 2015 ruling's one-call safe harbor."[77]

2. New Reassigned-Number Rules Should Reflect Both the Text of the Statute and the Realities of Telephone Number Reassignment.

RILA lauds the Commission for looking to craft a workable rule that benefits consumers and scrupulous businesses and that "give[s] full effect to the Commission's principle of reasonable reliance."[78] As the D.C. Circuit observed with respect to the proceedings regarding a proposed reassigned numbers database,[79] the Commission "is already on its way to designing a regime to avoid the problems of the 2015 ruling's one-call safe harbor."[80] RILA has submitted comments in that proceeding, which concerns both the potential creation of a "comprehensive repository of information about reassigned wireless numbers" and a potential "safe harbor for callers that inadvertently reach reassigned numbers after consulting the most recently updated information."[81] RILA strongly supports those efforts.[82]

RILA respectfully submits that, in addition to those efforts, the Commission should hold that the term "called party" is best understood as the expected or intended recipient of the call, and that "reasonable reliance" is best understood as allowing the caller to rely on the provision of consent until it has actual notice that a given number has or may have been reassigned.

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77 *ACA Int'l*, 885 F.3d at 709.

78 *See id.*

79 *In re Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Second Further Notice of Proposed Rulemaking (released Mar. 23, 2018).

80 *ACA Int'l*, 885 F.3d at 709.

81 *In re Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Second Further Notice of Proposed Rulemaking (released Mar. 23, 2018).

82 *See generally Comments of the Retail Industry Leaders Association*, CG Docket No. 17-59 (June 7, 2018).

As for the interpretation of the term "called party," the most natural reading of that term is as the intended recipient of a call. Chairman Pai's dissent provided a clear example of exactly why that is:

> Start with an example of ordinary usage. Your uncle writes down his telephone number for you and asks you to give him a call (what the TCPA terms "prior express consent"). If you dial that number, whom would you say you are calling? Your uncle, of course.
>
> No one would say that the answer depends on who actually answers the phone. If your uncle's friend picks up, you'd say you were calling your uncle. So too if the phone is picked up by the passenger in your uncle's vehicle or your uncle's houseguest. Nor would your answer change if your uncle wrote down the wrong number, or he lost his phone and someone else answered it. Who is the called party in each and every one of these situations? It's obviously the person you expected to call (your uncle), not the person who actually answers the phone.[83]

Indeed, interpreting "called party" as including unintended recipients of calls would render principles of "consent" all but meaningless.[84]

As Chairman Pai also explained in his dissent, interpreting "called party" as the intended recipient of a call is the only reading that will avoid unconstitutionally chilling protected speech.[85] Indeed, the doctrine of constitutional avoidance makes the choice a clear one: Faced with two plausible constructions of a statute, one of which raises serious constitutional questions and one of which does not, it should be assumed that Congress intended the non-suspect meaning.[86] Here,

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83 2015 Omnibus Order, 30 FCC Rcd. at 8078-79 (Pai, dissenting).

84 *Id.* at 7999; *see also id.* at 8000–03.

85 *See, e.g.*, *id.* at 8080 (Pai, dissenting) ("[T[he Order's strict liability interpretation chills such communications by threatening a company with crippling liability even if it reasonably expects to reach a consenting consumer when making a call. It is difficult to see how chilling desired communications in this manner is 'narrowly tailored to serve the government's legitimate, content-neutral interests.'").

86 Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, 62 Fed. Reg. 16093, 16095 (Apr. 4, 1997) ("Although decisions about the constitutionality of congressional enactments are generally outside the jurisdiction of administrative agencies, we have an obligation under Supreme Court precedent to construe a statute where fairly possible to avoid substantial constitutional questions and not to impute to Congress an intent to pass legislation that is inconsistent with the Constitution as

even if both interpretations of "called party" (*i.e.*, intended recipient and unintended recipient) were plausible, the intended-recipient reading is the only one that would avoid this chilling effect. It would also protect the privacy of consumers, since those who do not wish to be called can convey that to the caller and, should the calls not cease, bring a claim. That inability in turn chills callers from engaging in unobjectionable—and, more importantly, constitutionally protected—speech. RILA therefore respectfully requests that the Commission confirm that the term "called party" refers only to the intended recipient of a call.

Alternatively, the Commission should confirm that a safe harbor should be based not on the number of calls, but rather on the knowledge of the caller. Basing a safe harbor on the number of calls is, as the D.C. Circuit found, the very definition of arbitrary. For a safe harbor to be consistent with concepts of "reasonable reliance," it must take into account whether the caller actually knows that a number has been reassigned. It follows that, should the Commission continue to interpret "called party" as including unintended recipients, it should confirm that callers can nevertheless continue to reasonably rely on the provision of consent until they have actual knowledge that a given number has or may have been reassigned.

C. The Commission's Regulation of Revocation of Consent Should Provide Clear, Pragmatic, and Easily Executable Rules for Callers and Consumers Alike.

Retailers support consumers' rights to grant and revoke consent to receive calls and texts. Moreover, although RILA members appreciate that the intent of the Commission was to empower consumers by allowing them to revoke consent at "any time and through any reasonable means,"[87] the fact remains that the 2015 Omnibus Order has had serious (but unintended) consequences for compliance-minded callers. In his dissent from that ruling, current Chairman Pai predicted—quite

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construed by the [Supreme Court]." (internal quotations omitted)).

87 2015 Omnibus Order, 30 FCC Rcd. at 7965.

rightly—that allowing consumers to revoke their consent through "any reasonable method" would "make abuse of the TCPA much much easier."[88] Manipulation of revocation of consent by a cottage industry of TCPA plaintiffs and lawyers has been used to wage an all-out assault on legitimate businesses, including thousands of American retailers. Although the D.C. Circuit declined to overturn that rule as arbitrary and capricious, the court left it to the Commission to further consider "clearly-defined and easy-to-use opt out methods."[89]

The Commission's request for comment on that issue is very timely, as certain plaintiffs have seized upon the lack of clarity to pursue absurd revocation claims, especially against retailers. As it stands now, the question whether a consumer has reasonably revoked consent is determined through a case-specific, fact-intensive inquiry. The need to conduct such an inquiry increases both the cost of litigation and the risk of inconsistent results. For example, some plaintiffs have disingenuously enrolled in retailers' text message programs only for the purpose of manufacturing TCPA claims, as evidenced by the fact that they seek to "revoke" their consent (1) immediately after enrolling; and (2) in ways that are carefully constructed to avoid detection by automated systems programmed to recognize familiar, standardized cease-and-desist requests such as "STOP" and "UNSUBSCRIBE." Others have alleged oral revocations of consent to drive their cases past 12(b)(6) motions only to have their claims dismissed at the summary judgment stage based on a total lack of evidence of any such revocation attempt.[90]

Importantly, the further requirement that a revocation request be implemented instantaneously without giving callers a reasonable amount of time to receive and process such

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88 *Id*. at 8073 (Pai, dissenting).

89 *ACA Int'l*, 885 F.3d at 709.

90 *See, e.g.*, *Self-Forbes v. Advanced Call Center Techs., LLC*, No. 16-1088, 2017 WL 1364206, at *7 (D. Nev. Apr. 12, 2017), *appeal docketed*, No. 17-15804 (9th Cir. Apr. 21, 2017).

requests has also led to "gotcha" litigation against retailers that have robust TCPA compliance programs in place. And, some plaintiffs have deliberately tried to revoke consent through a manner outside of the parties' agreed-upon opt-out methods and have then filed suit even though the caller ceased contacting the plaintiff a few days after receiving notice.[91] Furthermore, as the D.C. Circuit noted, the 2015 Omnibus Order did "not address revocation rules mutually adopted by contracting parties. Nothing in the Commission's order thus should be understood to speak to the parties' ability to agree upon revocation procedures."[92]

The Commission should address these issues by: (1) recognizing that parties to a bilateral contract may agree on specific opt-out methods or waive the ability to unilaterally revoke consent; (2) establishing clearly defined and easy-to-use opt-out methods; and (3) affording callers (a) a reasonable period of time, not to exceed 30 days, for complying with an opt-out request, and (b) a safe harbor from revocation-related liability if they have adopted appropriate policies governing revocation of consent. We discuss these three issues in turn below.

1. Consumers Can Waive Their Opt-Out Right or Agree to Particular Opt-Out Procedures in a Bilateral Contract.

In 2017, the Second Circuit, citing the Restatement (Second) of Contracts, explained that "[i]t is black-letter law that one party may not alter a bilateral contract by revoking a term without the consent of a counterparty."[93] Surveying the text of the TCPA, the Second Circuit found no clear indication that Congress sought to displace that default rule.[94] Given the clear common-law

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91 *See Martin v. Comcast Corp.*, No. 12-6421 (N.D. Ill. Dec. 8, 2014), ECF No. 98 (Memorandum in Support of Motion for Summary Judgment).

92 *ACA Int'l*, 885 F.3d at 710.

93 *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 57 (2d Cir. 2017) (noting that plaintiff's consent to be called was included as an express provision of a contract, and holding that "[u]nder such circumstances, 'consent,' as that term is used in the TCPA, is not revocable").

94 *Id.* at 58 ("Absent express statutory language to the contrary, we cannot conclude that Congress intended to alter the common law of contracts.").

rule and lack of congressional displacement, the Second Circuit had no trouble concluding that the TCPA "does not permit a consumer to revoke its consent to be called when that consent forms part of a bargained-for exchange."[95] Acknowledging that the TCPA is silent as to whether a consumer can revoke her consent, the court concluded that, "[a]bsent express statutory language to the contrary, we cannot conclude that Congress intended to alter the common law of contracts."[96]

That ruling is unquestionably correct. As other courts and this Commission have recognized, the TCPA is built on—and incorporates—fundamental principles of the common law, including those of agency[97] and (most importantly for present purposes) consent.[98] When borrowing from the common law, Congress "presumably knows and adopts the cluster of ideas that were attached to each borrowed word."[99] Consequently, "the TCPA's silence regarding the means of providing or revoking consent [indicates] that Congress sought to incorporate 'the common law concept of consent.'"[100]

Notwithstanding *Reyes*'s straightforward analysis, courts and Commission stakeholders have been far from uniform in adopting its approach.[101] In light of that continued confusion, RILA

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95 *Id.* at 53.

96 *Id.* at 58.

97 *In re Joint Petition Filed by Dish Network, LLC, the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, Declaratory Ruling, 28 FCC Rcd. 6574, 6584 (2013).

98 2015 Omnibus Order, 30 FCC Rcd. at 7994 ("Congress intended for broad common law concepts of consent and revocation of consent to apply.").

99 *Morissette v. United States*, 342 U.S. 246, 263 (1952).

100 *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1255 (11th Cir. 2014) (quoting *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 270 (3d Cir. 2013)).

101 *Compare Barton v. Credit One Fin.*, No. 16-2652, 2018 WL 2012876, at *4 (N.D. Ohio Apr. 30, 2018) (holding that a consumer could not "unilaterally alter the terms of the agreement to claim that his oral revocation of consent was valid," where his agreement required any revocation to be in writing), *and* FCC, *Statement of Commissioner Michael O'Rielly on D.C. Circuit TCPA Decision* (Mar. 16, 2018), *available at* https://docs.fcc.gov/public/attachments/DOC-349770A1.pdf ("I believe there is an opportunity here for further review in order to square it with

respectfully requests that the Commission definitively rule that a consumer may not unilaterally reject or alter the terms or methods of revocation that are set forth in a bilateral contract.

Because there will be no bilateral agreement in many cases, RILA also provides comments 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.'"[102]

2. Retailers' Existing Methods to Satisfy Consumers' Opt-Out Requests Are Clearly Defined and Easy to Use.

Since the Commission's 2015 Omnibus Order, retailers have been forced to defend cases brought by litigious consumers who have tried to manufacture TCPA claims after purportedly "revoking" consent by, for example, providing a reply text using a laundry list of words and phrases different from those specified. One frequent litigant deliberately ignored one retailer's clear text message to "Text STOP to end" and instead sent "unrecognized" texts such as:

> (1) "I would appreciate [it] if we discontinue any further texts;" (2) "Thank you but I would like the text messages to stop can we make this happen;" (3) "I'm simply asking for texts to stop. I would appreciate that. Thanks;" (4) "As I requested earlier I asked that the text would stop, I would greatly appreciate it. Thank you;" and (5) "I'm simply asking for texts to stop. I would appreciate that. Thanks."[103]

This type of practice is not isolated or limited to this particular litigant. In *Rando*, when presented with the directive "Reply HELP for help. STOP to cancel," the plaintiff artfully replied

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the Second Circuit's more appropriate approach."), *with Ginwright v. Exeter Fin. Corp.*, 280 F. Supp. 3d 674, 683 (D. Md. 2017) (declining to adopt prohibition on revocation in *Reyes* finding that it would be inconsistent with FCC guidance and the remedial purposes of the TCPA), *and McBride v. Ally Fin., Inc.*, No. 15-0867, 2017 WL 3873615, at *2 n.4 (W.D. Pa. Sept. 5, 2017) (declining to apply *Reyes*, but noting "it is difficult to predict whether the Court of Appeals for the Third Circuit would, or would not, find *Reyes* convincing").

102 Public Notice at 4 (quoting *ACA Int'l*, 885 F.3d at 710).

103 *Epps v. Earth Fare, Inc.*, 2017 WL 1424637, at *5. While both this case and *Epps v. The Gap, Inc.*, 2017 U.S. Dist. LEXIS 219772, another case involving the same plaintiff under a similar set of circumstances were dismissed, *Epps v. Earth Fare, Inc.* is currently pending on appeal before the Ninth Circuit Court of Appeals.

with texts that included everything other than "STOP" despite receiving the same directive with each text message she received.[104] In another instance, a retailer supplied five single-word commands that a customer could text to opt out of receiving messages, but the customer instead sent sentence-long messages allegedly to "opt out."[105] Inexplicably, the plaintiff continued to send verbose text messages despite receiving automated texts in reply, each of which stated "Sorry we don't understand the request! Text SAVE to join mobile alerts . . . Reply HELP for help, STOP to cancel."[106] While the lower courts have disposed of these manufactured cases, plaintiffs continue to push the boundaries in their attempts to trap retailers and other legitimate callers, and the Commission's assistance is needed in order to stem this tide of expensive and abusive litigation.

Indeed, businesses' and consumers' interests are aligned on this issue. No responsible business wants to call or text a previously consenting customer after he or she revokes that consent, and consumers benefit from having simple, standardized ways of opting out of calls and texts. Both are benefitted by retailers avoiding expensive, frivolous litigation that results only in higher costs for consumers. Retailers provide consumers with numerous reasonable methods to stop receiving texts and autodialed or prerecorded calls. For example, when retailers send an automated text message, the message typically contains simple instructions on how to avoid additional messages, *e.g.*, "Reply STOP to stop receiving text messages."

The automated systems that allow consumers to receive the information they want by text "must be pre-programmed to recognize certain words as an opt-out request."[107] Senders of

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104 2018 WL 1523858, at *7.

105 *Viggiano*, 2017 WL 5668000, at *3.

106 *Id*.

107 *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Letter from Jennifer Bagg, Counsel to Vibes Media, LLC, to Marlene H. Dortch at 3 (June 10, 2015) ("Vibes Media Notice"), https://ecfsapi.fcc.gov/file/60001077660.pdf.

commercial texts have therefore programmed them to recognize and respond to keywords like "STOP," "STOPALL," "CANCEL," "UNSUBSCRIBE," "QUIT," and "END."[108] Retailers inform recipients that they may respond with specific keywords to opt out of future messages. It is reasonable, easy, and not a burden to expect a consumer who wishes to stop receiving texts to respond with one of those clearly specified words—rather than try to revoke consent in some other way. As set forth below, RILA submits that (1) transmitting any one of these key words to a texting party (or any other word(s) designated by the texting party) should be deemed sufficient to revoke consent to receive text messages; and that (2) a consumer's use of any other words in a text message-based attempt to opt out of future text messages be deemed presumptively unreasonable.

Likewise, when retailers make a pre-recorded or artificial voice call, those messages generally include instructions regarding how to revoke consent for future calls, such as through the simple step of pressing a number on the telephone key pad. And customer service representatives are typically trained to respond appropriately to requests to stop future calls.

RILA suggests that callers be permitted to designate one or more clearly defined and easy-to-use opt-out methods, including, without limitation, those specified below, and that opt-out requests submitted via the method(s) designated by the caller be deemed presumptively reasonable. RILA further submits that opt-out requests submitted via a method ***other than*** those that are clearly defined, easy to use, and designated by the caller be deemed presumptively unreasonable. The following is an illustrative list of reasonable, clearly defined and easy-to-use opt-out methods that could be adopted by callers:

(1) through an automated process like pressing a number (*e.g.*, *7) pursuant to directions provided during a pre-recorded or artificial voice call;

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108 *Id.*

(2) texting "STOP," "CANCEL," "UNSUBSCRIBE," "QUIT," "END," or "STOPALL" in response to a text that designates one of those terms as the method for opting out;

(3) submitting a request via a form established for that purpose on the caller's website;

(4) orally after calling a phone number designated by the caller to receive such requests;

(5) submitting a request to designated and clearly defined in-store customer service personnel; or

(6) in writing at the mailing or email address designated by the caller.

RILA anticipates that there are and will be additional clearly defined and easy-to-use methods of processing opt-out requests that callers could adopt that would likewise be deemed presumptively reasonable. Callers should be free to choose the particular method(s) that work best for their business and need not adopt all possible permissible methods. Importantly, if the method(s) designated by the caller are not followed, any attempted opt-out request should be deemed presumptively unreasonable.

Clear lines regarding acceptable methods of opting out are necessary for several reasons. For example, automated text-messaging systems can respond only to specifically identified combinations of characters. It would be entirely unrealistic and unreasonable to expect them to process the entire range of revocation requests that a consumer attempts to make.[109] Many retailers have thousands of stores around the country that collectively employ tens or hundreds of thousands of full- and part-time employees. The staff at many retail locations tend to turn over relatively quickly. Under such circumstances, retailers have no practical means to develop a system to train all of their (tens or hundreds of thousands of) employees to (1) recognize that a customer is asking to withdraw consent for automated phone calls, (2) understand what information is required for

[109] *See* Vibes Media Notice at 3.

withdrawal and accurately collect it, and (3) transmit that information to the correct internal department for processing, so that (4) future calls can be stopped in a timely manner.[110]

The impracticability of an open-ended approach is compounded by the need to accurately make records of all customer–staff interactions so that a retailer can have some hope of proving the absence of a revocation when faced with the inevitable lawsuit.[111] Indeed, it is not far-fetched to imagine (as Chairman Pai posited) a dedicated TCPA plaintiff giving consent, purporting to revoke it in a conversation with a cashier at a retailer, and then filing suit after accumulating enough calls or texts to seek significant damages. In such a situation, the retailer will have limited ability to prove that the oral request did not happen.

To be sure, some courts have concluded and might continue to conclude that such attempts at revocation were not reasonable (and thus not effective to revoke the consumer's prior consent). But perhaps not. Reasonableness is a fact-specific inquiry, and how courts will assess it—and at what stage of the litigation process (*i.e.*, at the pleadings stage, on summary judgment, or at a full-blown merits trial)—in any given case is difficult to predict. Even if the caller ultimately prevails, it has suffered the significant expense and distraction of undertaking discovery and defending litigation. The result will be an increase in litigation and uncertainty, and a chilling effect on legitimate businesses' ability to provide information to consumers who want it. The proposed illustrative opt-out methods set forth above will alleviate this problem by meeting the needs and expectations of legitimate businesses and their consumers.

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110 *See* 2015 Omnibus Order, 30 FCC Rcd. at 8083 (Pai, dissenting) ("Would a harried cashier at McDonald's have to be trained in the nuances of customer consent for TCPA purposes?").

111 *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Comments of American Financial Services Association in Response to Petition for Expedited Declaratory Ruling at 2 (Sept. 2, 2014), https://ecfsapi.fcc.gov/file/7521827163.pdf.

3. The Commission Should Adopt a Safe Harbor and a Reasonable Time to Honor Opt-Out Requests.

Finally, assuming the Commission establishes clear guidelines on revocation absent a bilateral agreement, RILA suggests that the Commission also establish a reasonable period of time to comply with the revocation request and a safe harbor for those callers that have established reasonable practices and procedures to honor revocation requests. The Commission has extensive experience in adopting or applying regulatory presumptions that include reasonable time periods to comply with requests and safe harbors in other contexts, some of which are substantially similar to this one. Indeed, recognizing that companies have to design or order their processes to comply with applicable regulations, the Commission specifically has endorsed safe harbors that accompany good-faith compliance activities on the part of businesses. For example, the Commission's Do-Not-Call ("DNC") regulations allow a 30-day safe harbor for businesses that have written DNC policies and that adhere to the timetables within Commission rules for honoring a DNC request.[112] Similarly, the Commission maintains a safe harbor for the porting of telephone numbers of 15 days, a time the Commission deemed to be sufficient to discover the presence of a port within the Local Number Portability database.[113]

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112 47 C.F.R. § 64.1200(c)(2).

113 47 C.F.R. § 64.1200(a)(1)(iv). In adopting this safe harbor, the Commission observed:

> We establish a limited safe harbor period in which persons will not be liable for placing autodialed or artificial or prerecorded message calls to numbers recently ported from wireline to wireless service. The majority of commenters in this proceeding support the adoption of such a safe harbor. Of the comments filed in this proceeding, most were from businesses that support a safe harbor period of 30 days or more. One consumer commenter opposes any safe harbor period, and the National Association of State Utility Consumer Advocates . . . indicates that any safe harbor should be as limited as possible to minimize harm to consumers. As discussed in greater detail below, we conclude that callers will not be considered in violation of 47 C.F.R. § 64.1200(a)(1)(iii) for autodialed or artificial or prerecorded message calls placed to a wireless number that has been ported from a wireline service within the previous 15 days, provided the number is not already on the national do-not-call registry or caller's company-specific do-not-call list. . . . We believe this safe harbor will provide a reasonable opportunity for persons, including

Thus, it is not only within the Commission's legal authority to establish reasonable safe harbors to create regulatory certainty and to reinforce compliant behavior that has public benefits, but there also are strong public policy reasons for establishing a safe harbor in connection with opt-out requests. Notably, the reason the D.C. Circuit vacated the "one-call" safe harbor was ***not*** that the agency lacked the authority to adopt a safe harbor. Rather, the particular safe harbor was deemed arbitrary because it failed to adequately address the issue of a caller's reasonable reliance, as there was no correlation between a single call to a number and the ability of the caller to have notice that the number had been reassigned.[114]

Opt-out requests are substantially similar to DNC requests, and RILA therefore suggests that the Commission treat them alike and establish a 30-day safe harbor period. When Congress enacted the TCPA, it established national and company-specific DNC liability for solicitation calls made to residences after a consumer requests not to be called.[115] In creating liability for DNC violations, Congress also established, subject to the Commission's regulations, a safe harbor for any caller who "has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection."[116] Under this safe harbor, the Commission determined that a caller will not be liable for a DNC violation if the caller can demonstrate that the violation is a result of an error and, as part of its routine business practice, the caller meets the following standards:

> small businesses, to identify numbers that have been ported from wireline to wireless service and, therefore, allow callers to comply with our rules.

In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 19 FCC Rcd. at 19218.

114 *ACA Int'l*, 885 F.3d at 707.

115 47 U.S.C. § 227(c).

116 *Id.* § 227(c)(5)(C).

A. Caller has established and implemented written procedures to comply with the national do-not-call rules;

B. Caller has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;

C. Caller has maintained and recorded a list of telephone numbers that the caller may not contact; and

D. Caller accesses the national registry no more than 31 days before calling any consumer, and maintains records documenting this process.[117]

Likewise, the Commission determined that compliance with DNC requests need not be instantaneous. Rather, it granted businesses up to 30 days to comply.[118]

Creating instant and unfettered liability for a failure to honor revocations of consent but not for DNC requests makes no logical sense and exposes scrupulous businesses to contrived claims. Many retailers have complex communication systems, plans, and processes that typically cannot be altered immediately. Just as the Commission determined in connection with analogous business-specific DNC requests, compliant businesses should be given protection and a reasonable opportunity to update their systems and notify their vendors before they are exposed to claims based on opt-outs. Specifically, callers should be afforded a reasonable period of time, not to exceed 30 days, to implement a request to revoke consent, and callers should be afforded a safe harbor from TCPA liability if, prior to placing the call in question, the caller had:

A. Established and implemented written procedures to honor valid revocation requests;

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117 47 C.F.R. § 64.1200(c)(2).

118 *See* 47 C.F.R. § 64.1200(d)(3) ("Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request.").

B. Trained its relevant personnel, and any entity assisting in its compliance, in procedures established pursuant to the Commission's forthcoming Order; and

C. Maintained and recorded a list of telephone numbers for which previously given consent has been revoked and that the caller may not contact.

In sum, the Commission should (1) recognize that parties may, via a bilateral agreement, waive or cabin their ability to opt out of receiving future messages; (2) adopt simple, streamlined, and reasonably limited mechanisms for revocation of consent; and (3) afford retailers and other callers (a) a reasonable period of time (not to exceed 30 days) to implement consumers' opt-out requests; and (b) a safe harbor for organizations that have implemented appropriate protocols to implement consumer opt-outs. Adopting such rules would go a long way toward stemming the tide of lawsuit abuse that has so burdened retailers and the consuming public in recent years.

D. The Commission Should Create a Coherent Regulatory Framework That Encourages Prescription Reminders and Other Important Healthcare Notifications.

Finally, the Commission should reconsider its treatment of healthcare communications, particularly prescription reminders.[119] The Commission has repeatedly recognized that such communications benefit the healthcare system, while not unduly intruding on consumer privacy. Yet the Commission has struggled to develop a coherent regulatory framework that will properly

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[119] RILA endorses the comments submitted by the National Association of Chain Drug Stores ("NACDS") in response to the Public Notice. NACDS, whose members fill more than three ***billion*** prescriptions each year, points out that "[o]ne of the increasingly critical tools in the pharmacist toolbox is the ability to quickly and efficiently contact patients on their cell phones to alert them to information related to their prescriptions," such as "notifications that the patient's supply of a maintenance medication is about to run out and is due under the doctor's orders to be refilled or that flu season has arrived and it is time for an updated vaccination." *Comments of National Association of Chain Drug Stores* at 2, CG Docket Nos. 18-152, 02-278 (June 12, 2018). RILA agrees with NACDS that the Commission should interpret the TCPA "to minimize the burden on pharmacy healthcare communications to their patients and to avoid the potentially negative consequences to patient health." *Id.*

protect pharmacies from vexatious litigation.[120] The result is that critical communications are discouraged, to the detriment of patients and the national healthcare system.

In *ACA International*, the D.C. Circuit held that it was not arbitrary and capricious for the Commission to limit its healthcare-related exemption from the TCPA's consent requirement (the "2015 Healthcare Exemption") to only certain, "exigent," healthcare calls to wireless phones.[121] Nothing in that ruling, however, suggests that the limits drawn by the 2015 Healthcare Exemption represent sound public policy. They do not. Indeed, although its appeal was rejected, Rite Aid expressed the frustration of many pharmacies that instead of providing clarity, "the Commission adopted a patchwork of standards for healthcare communications that will sow confusion, fuel more litigation against providers, and chill communications uniformly recognized to improve clinical outcomes and public health."[122]

The Commission can create a coherent regulatory framework for important healthcare messages such as prescription reminder calls by pharmacies to their patients' wireless phones by recognizing that such calls fall within the "emergency purposes" exception to the TCPA.[123] The Emergency Purposes Exception declares that communications "affecting the health and safety of consumers" should not be subject to the restrictions of the TCPA.[124] As some courts have already

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120 As the Commission is likely aware, pharmacies are frequent targets of TCPA lawsuits. *See, e.g.*, *Lindenbaum v. CVS Health Corp.*, No. 17-1863 (N.D. Ohio filed Sept. 5, 2017); *Roberts v. Medco Health Sols., Inc.*, No. 15-1368 (E.D. Mo. filed Sept. 2, 2015); *Brady v. CVS Pharmacy, Inc.*, No. 15-0529 (M.D. La. filed Aug. 11, 2015); *Ondo v. Wal-Mart Stores, Inc.*, No. 15-1003 (M.D. Fla. filed June 18, 2015); *Zani v. Rite Aid Headquarters Corp.*, No. 14-9701 (S.D.N.Y. filed Dec. 9, 2014); *Rooney v. Rite Aid Headquarters Corp.*, No. 14-1249 (S.D. Cal. filed May 20, 2014); *Kolinek v. Walgreen Co.*, No. 13-4806 (N.D. Ill. filed July 3, 2013).

121 885 F.3d at 711.

122 Brief for Pet'r Rite Aid Headquarters Corp. at 2, *ACA Int'l v. FCC*, No. 15-1211 (D.C. Cir. Nov. 25, 2015).

123 *See* 47 U.S.C. § 227(b)(1)(A)(iii).

124 *See* 47 C.F.R. § 64.1200(f)(4) ("The term emergency purposes means calls made necessary in ***any situation affecting the health*** and safety of consumers." (emphasis added)).

held, prescription notifications by pharmacies clearly satisfy that standard.[125] To cement this understanding, the Commission should issue a declaratory ruling that the Emergency Purposes Exception applies to such calls.

1. Prescription Notifications Improve Patient Health and the Healthcare System.

Pharmacies provide several types of prescription notifications. Pharmacies call patients to remind them when their prescriptions are due to be refilled under doctors' orders, to remind them to pick up prescriptions they previously asked the pharmacy to fill, to alert them to potential safety issues associated with their prescriptions (such as drug recalls or drug interactions), to provide them with directions as to the proper use of their medications, and to remind them when it is time to get vaccinations, such as annual flu shots. As used in these Comments, the term "prescription notifications" refers to all of these types of calls. Such calls provide critical health information to patients in a time-sensitive and cost-effective manner.

Prescription notifications address a major healthcare problem. Studies have demonstrated that patients' failure to take their medications in accordance with their doctors' prescriptions, known as medication nonadherence, harms patient health, leads to preventable medical complications, causes increased hospitalizations, and increases healthcare costs by billions of dollars each year.[126] Indeed, one review estimates that medication nonadherence causes more than

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125 *See Lindenbaum v. CVS Health Corp.*, No. 17-1863, 2018 U.S. Dist. LEXIS 10052, at *4–6 (N.D. Ohio Jan. 22, 2018); *Roberts v. Medco Health Sols.*, No. 15-1368, 2016 U.S. Dist. LEXIS 97177, at *8 (E.D. Mo. July 26, 2016).

126 Aurel O. Iuga & Maura J. McGuire, *Adherence and Health Care Costs*, Risk Management and Health Care Policy at 35 (2014), *available at* http://ncbi.nlm.nih.gov/pmc/articles/PMC3934668/pdf/rmhp-7-035.pdf. The study notes, "Patient nonadherence to prescribed medications is associated with poor therapeutic outcomes, progression of disease, and an estimated burden of billions per year in avoidable direct health care costs."

125,000 unnecessary deaths per year, causes at least ten percent of all hospitalizations, and costs the U.S. healthcare system between $100 billion and $289 billion annually.[127]

Telephonic prescription notifications help address medication nonadherence, and by doing so they improve health, reduce healthcare costs, and quite literally save lives. Numerous studies demonstrate this.[128] Indeed, federal healthcare regulators encourage pharmacies to provide prescription reminder calls to patients. For example, HHS exempted "refill reminders" from HIPAA's general prohibition on using patient health information for "marketing" without the patient's prior written authorization.[129] HHS did so in order "to ensure that essential healthcare communications are not impeded."[130] An HHS agency even provides a call script for pharmacies to use in making automated prescription reminder calls.[131]

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127 Meera Viswanathan, Ph.D., et al., *Interventions to Improve Adherence to Self-Administered Medications for Chronic Diseases in the United States: A Systematic Review*, Annals of Internal Medicine (2012), *available at* http://annals.org/article.aspx?articleid=1357338.

128 *See, e.g.*, HHS Health Resources and Services Admin., *Using Health Text Messages to Improve Consumer Health, Knowledge, Behaviors and Outcomes: An Environmental Scan* at 1, 27 (May 2014), *available at* https://www.hrsa.gov/sites/default/files/archive/healthit/txt4tots/environmentalscan.pdf (U.S. Dept. of Health and Human Services review of more than 100 studies found "encouraging evidence related to the use of health text messaging to improve health promotion, disease prevention, and disease management."); William M. Vollmer et al., *Improving Adherence to Cardiovascular Disease Medications With Information Technology*, AJMC Managed Markets Network (2014), *available at* http://www.ajmc.com/journals/issue/2014/2014-11-vol20-sp/improving-adherence-to-cardiovascular-disease-medications-with-information-technology (automated prescription refill reminder calls were associated with significantly increased adherence to statins and lower cholesterol levels among at-risk patients with diabetes or cardiovascular disease).

129 *See* 45 C.F.R. § 164.501 (HIPAA's definition of "marketing" "does not include a communication made . . . [t]o provide refill reminders or otherwise communicate about a drug or biologic that is currently being prescribed for the individual").

130 *See* HHS Office of Civil Rights, *The HIPAA Privacy Rule and Refill Reminders and Other Communications About a Drug or Biologic Currently Being Prescribed for the Individual*, (Nov. 2015), *available at* http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/marketingrefillreminder.html.

131 *See Automated Telephone Reminders: A Tool to Help Refill Medicines On Time*, AHRQ Pub. No. 08-M017-EF (2008), *available at* http://archive.ahrq.gov/research/findings/factsheets/tools/callscript/pharmacy-call-scripts.html (guide published by the HHS Agency for Healthcare Research and Quality notes that "non-adherence to prescription medications is a documented public health problem," particularly in "patient populations with a high prevalence of chronic

2. The Patchwork of Regulations Undermines National Healthcare Policy.

The Commission's TCPA regulations, unfortunately, fail to protect pharmacies providing automated prescription notifications from TCPA class action suits and thus have the unintended effect of undermining rather than supporting national healthcare policy.

The 2012 Healthcare Exemption. In 2012, the Commission created an exemption to the TCPA for certain healthcare calls covered by HIPAA (the "2012 Healthcare Exemption").[132] The 2012 Healthcare Exemption covers calls that "delive[r] a 'health care' message made by, or on behalf of, a 'covered entity' or its 'business associate,' as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103."[133] The Commission adopted this exemption because calls delivering a healthcare message, including prescription notifications, "***serve a public interest purpose: to ensure continued consumer access to health care-related information***."[134] The Commission found that such calls "do not tread heavily upon the consumer privacy interests because these calls are placed by the consumer's healthcare provider to the consumer and concern the consumer's health."[135] The Commission also found that HIPAA's "existing protections" "already safeguard consumer privacy," thus making application of the TCPA to such calls unnecessary.[136]

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conditions," concludes that "telephone reminders to refill or pick up prescriptions improve medication adherence," and provides a suggested call script for use by pharmacies to provide automated refill reminder calls to patients).

132 *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* Report & Order, 27 FCC Rcd. 1830, 1852, 1855 (2012) ("2012 Order").

133 47 C.F.R. §§ 64.1200(a)(2) & (a)(3)(v).

134 2012 Order, 27 FCC Rcd. at 1854 (emphasis added).

135 *Id.* at 1855.

136 *Id.* at 1854.

In adopting the exemption, the Commission affirmatively sought to harmonize its regulations with those of the FTC, which had exempted pharmacy healthcare calls from the prior written consent requirement for recorded telemarketing calls under the Telemarketing Sales Rule ("TSR").[137] The FTC had found that such calls improve patient outcomes and realized that requiring prior consent could "jeopardize the improved medical outcomes that such calls have made possible," especially among patients who pay the "least attention to their healthcare" and therefore are most in need of reminder calls but "least likely to get around to responding to requests for authorization to receive such calls."[138] The Commission considered the findings made by the FTC in that regard and stated, "our record affirmatively supports adopting the FTC's approach" and "we agree with the FTC approach."[139]

Importantly, however, the 2012 Healthcare Exemption treats calls delivering the same healthcare message differently based on whether the calls go to residential landlines or to wireless phones. Calls to residential landlines are free of any consent requirement.[140] In contrast, calls to wireless phones are exempted only from the requirement for *written* consent that the Commission imposed for telemarketing calls; such calls still require the prior express consent of the called party.[141] Because at least half of all households no longer have residential landline phones,[142] the current regime incentivizes pharmacies to avoid making calls to phone numbers they know or

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137 *Id.* at 1853–54.

138 TSR, 73 Fed. Reg. 51,164, 51,191 (Aug. 29, 2008) (codified at 16 C.F.R. § 310.1, *et seq.*).

139 2012 Order, 27 FCC Rcd. at 1853, 1856.

140 47 C.F.R. § 64.1200(a)(3)(v).

141 47 C.F.R. § 64.1200(a)(2).

142 *See* Stephen J. Blumberg and Julian V. Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2016*, National Center for Health Statistics, *available at* https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf (finding that more than half of all adults and more than 60% of all children live in households with only wireless telephones).

suspect may be associated with a mobile phone—or to avoid making the calls at all due to the uncertainty as to whether the phone number has been ported to wireless service. That structure is both irrational and a threat to the health and welfare of the ***half*** of the population that no longer utilizes a landline telephone and this threat is growing as ever-greater numbers of households eschew landline phones. Such a result is clearly contrary to public interest and national healthcare policy.

The 2015 Healthcare Exemption. In the 2015 Omnibus Order, the Commission used its authority under Section 227(b)(2)(C) of the TCPA (to exempt calls to cellphones that are "not charged to the called party") to establish the 2015 Healthcare Exemption. The Commission created an exemption from the TCPA's consent requirement for certain specific categories of calls to wireless numbers, including prescription refill reminders, "for which there is exigency and that have a healthcare treatment purpose," if the call is free to the end-user.[143] But the 2015 Healthcare Exemption is quite restrictive. The requirement that the calls not be charged to the called party, which bars calls and texts that count against the called party's cell phone plan minutes,[144] effectively precludes pharmacies from relying on the 2015 Healthcare Exemption. Because pharmacies cannot be sure in advance whether a particular call will be charged to the patient, pharmacies are put to the Hobbesian choice of either making the calls and risking TCPA suits or refraining from making the calls altogether.

Moreover, unlike the 2012 Healthcare Exemption, which broadly applies to calls that "deliver a healthcare message" (but treats the calls differently based on whether the patient relies on a residential landline or a wireless phone), the 2015 Healthcare Exemption applies to only eight

143 2015 Omnibus Order, 30 FCC Rcd. at 8031.

144 *Id.* at 8032.

specific categories of healthcare calls.[145] The 2015 Healthcare Exemption also restricts the content, length, frequency and number of calls,[146] regardless of the health needs of the patient, resulting in the bureaucratic micromanagement of issues that should be left to the professional judgment of pharmacists and doctors.

3. The Commission Should Recognize That Prescription Notifications Are Covered by the Emergency Purposes Exception.

The Commission may have believed itself constrained to limit the 2015 Healthcare Exemption to calls that are not charged to the called party because Section 227(b)(2)(C), which provided the authority under which the Commission adopted the exemption, allows the Commission to exempt cell phone calls where the calls "are not charged to the called party."[147] For the same reason, the Commission may have believed that it was required to construct the 2012 Healthcare Exemption to treat calls to residential landlines differently from calls to wireless phones, exempting the former from any consent requirement and the latter only from the written consent requirement created by the Commission itself.

Although it is beyond dispute that Congress created a statutory framework giving the Commission broader authority to exempt landline calls than wireless calls from statutory requirements (a vestige of the very different communications ecosphere when the TCPA was enacted in 1991), the Emergency Purposes Exception provides a mechanism for rationalizing that

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145 The exemption covers only (i) appointment and exam confirmations and reminders; (ii) wellness checkups; (iii) hospital pre-registration instructions; (iv) pre-operative instructions; (v) lab results; (vi) post-discharge follow-up intended to prevent readmission; (vii) prescription notifications; and (viii) home healthcare instructions. *Id.* at 8031.

146 For calls to qualify for the exemption, the Commission requires that the calls, among other things, be free to the end user; be concise, "generally" one minute or less for voice calls; and be limited to one message per day, up to a maximum of three combined per week, from a specific provider. These restrictions may hamper the ability of a pharmacy to provide adequate healthcare information to patients.

147 47 U.S.C. § 227(b)(2)(C).

disparity. Recognizing—as at least two federal courts have already done[148]—that prescription notifications come within the Emergency Purposes Exception would allow the Commission to further national healthcare policy by treating calls that deliver critical healthcare notifications the same, regardless of whether the patient relies on a cell phone or a landline to receive the calls.[149]

The Commission has recognized that Congress intended the Emergency Purposes Exception to be interpreted broadly rather than narrowly.[150] "In keeping with the legislative history and the intent of the TCPA," the Commission "interpret[s] 'emergency' to include situations in which it is in the ***public interest*** to convey information to consumers concerning health or safety."[151] In adopting the 2012 Healthcare Exemption, the Commission has already found that calls delivering a healthcare message, including specifically prescription refill reminders, "serve a ***public interest*** purpose: to ensure continued consumer access to healthcare-related information."[152] The Commission should now recognize that prescription notifications categorically come within the Emergency Purposes Exception, allowing development of a coherent regulatory framework under which these critical healthcare communications are encouraged regardless of whether the patient elects to receive them by a wireless or a landline phone.[153]

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148 *See Lindenbaum v. CVS Health Corp.*, No. 17-1863, 2018 U.S. Dist. LEXIS 10052, at *4–6 (N.D. Ohio Jan. 22, 2018); *Roberts v. Medco Health Sols.*, No. 15-1368, 2016 U.S. Dist. LEXIS 97177, at *8 (E.D. Mo. July 26, 2016).

149 47 U.S.C. § 227(b)(1)(A)(iii) (providing that the TCPA's restrictions on calls to wireless phones do not apply to calls "made for emergency purposes").

150 *See In re the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, 7 FCC Rcd. 2736, 2738 (1992) ("The legislative history of the TCPA indicates a congressional intent to interpret the term 'emergency' broadly rather than narrowly.").

151 *Id.* (emphasis added).

152 2012 Order, 27 FCC Rcd. at 1854 (emphasis added).

153 Issuing such a ruling would also obviate the need to continue litigating the applicability of the Emergency Purposes Exception to prescription notifications in courts across the country—a litigation campaign that not only is costly for the pharmacies forced to defend those suits but which

IV. CONCLUSION

For the foregoing reasons, RILA respectfully requests that the Commission revisit its ATDS, reassigned-number, revocation-of-consent, and prescription-related messaging rules and issue rulings that align more closely to the text and spirit of the TCPA, as set forth above.

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also would perpetuate the chilling effect (and its attendant costs for individuals' health) engendered by the current regime.