

GOOD INTENTIONS AND THE ROAD TO REGULATORY HELL: HOW THE TCPA WENT FROM CONSUMER PROTECTION STATUTE TO LITIGATION NIGHTMARE

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Abstract

The Telephone Consumer Protection Act (TCPA) and attendant FCC regulations contain textual ambiguities that are inherent in any statute or regulation but have been exacerbated by the drastic changes in technology since the early 1990s. Those ambiguities have been exploited by the plaintiffs' bar to the outsized detriment of the business community. The purpose of this Paper is to highlight some of those ambiguities, and propose some common sense solutions to help make the TCPA achieve its original purposes as a consumer protection statute which does not incentivize frivolous and exploitative litigation.

To that end, Part II of the Paper briefly discusses the history of telemarketing and the TCPA, including Congress' and the President's express intent to curb abuses without unduly hampering business communications; Part III highlights six ambiguities in TCPA jurisprudence—the definition of "autodialer," the definition of "telemarketing" and "advertisement," the nature of "dual purpose" communications, the nature of "consent," the identity of a "called party," and the identity of the party that "initiates" the call (i.e., vicarious liability issues)—which have been exploited by the plaintiffs' bar; Part IV charts the drastic spike in TCPA litigation over the last ten years; Part V suggests some solutions to bring clarity back to the TCPA and stem the tide of abusive litigation; and Part VI concludes.

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I. INTRODUCTION

Twenty-seven years ago, when the Telephone Consumer Protection Act (TCPA) was first passed into law in 1991, America was a very different place technologically.¹ Most importantly, cell phone ownership has grown quickly and steadily, from 6% in 1993 to 20% in 1997, 65% in 2002, and 95% in 2016.² Likewise, between 2002 and 2016, smartphone ownership in the general population jumped from 35% to 77%,³ with ownership among adults aged 18–24, 25–34 and 35–44 now at 98%, 97%, and 96%, respectively.⁴ As of early 2017, for the first time in American history, a majority of households have gotten rid of their landlines altogether.⁵ Nearly three-quarters of all adults aged 25–34, and more than 70% of adults who rent their homes, are now living in wireless-only households.⁶ Similarly, computing power and affordability have been

1. *What Happened in 1991, The Year the TCPA Was Passed?*, INST. FOR LEGAL REFORM (Jan. 26, 2016), <https://www.instituteforlegalreform.com/resource/what-happened-in-1991-the-year-the-tcpa-was-passed> (“There were no smart phones, text messages, or other types of technology that we take for granted today.”).

2. Samuel Kornstein, *The Rise of Mobile Phones: 20 Years of Global Adoption*, CARTESIAN (June 29, 2015), <https://blog.cartesian.com/the-rise-of-mobile-phones-20-years-of-global-adoption>.

3. *Mobile Fact Sheet*, PEW RES. CTR. (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/mobile>.

4. *Millennials Are Top Smartphone Users*, NIELSEN (Nov. 15, 2016), <http://www.nielsen.com/us/en/insights/news/2016/millennials-are-top-smartphone-users.html>.

5. Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2017*, CTR. FOR DISEASE CONTROL & PREVENTION (NAT’L CTR. FOR HEALTH STAT.) [hereinafter CDC Study], <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201712.pdf>; see also Alina Selyukh, *The Daredevils Without Landlines—And Why Health Experts Are Tracking Them*, NPR (May 4, 2017), <https://www.npr.org/sections/alltechconsidered/2015/12/03/458225197/the-daredevils-without-landlines-and-why-health-experts-are-tracking-them> (discussing the implications of declining landline-use on the industry and personal health).

6. CDC Study, *supra* note 5, at 2 (“Households are identified as ‘wireless-only’ if they include at least one wireless family and if there are no families with landline telephone service in the household. Persons are identified as wireless-only if they live in a wireless-only household.”).

transformed since that time.⁷ For example, in 1990, the year before the TCPA was passed, the first personal computers with Intel's 486DX processor offered consumers a 25-MHz system with 4MB of RAM and a 150MB hard drive for about \$6,000.⁸ That is approximately one percent of the processing speed, and just 0.1% of the storage, in a 16 GB iPhone 6—a device which, as of the time of this writing, may be purchased online for as little as \$185.⁹

These changes have had major implications for telemarketing and other forms of business-to-consumer telephone communications.¹⁰ As a result of individuals' changing phone habits, businesses have utilized wireless numbers as a critical or even primary means of contact with greater frequency.¹¹ Likewise, changes in computing power and affordability, and increasingly sophisticated and affordable software, have drastically upped the number of lines even small and medium-sized businesses may dial in a short time.¹² Not coincidentally, something else has changed since 1991: as courts and the Federal Communications Commission (FCC or Commission), the federal agency charged with promulgating rules and regulations implementing the TCPA have struggled to adapt the TCPA's original text to these and other changes; the frequency and cost of TCPA litigation has gone through the roof.¹³

What, exactly, does the TCPA regulate? Among other things, the TCPA and attendant FCC rules require prior express consent from call recipients before making telemarketing calls using an artificial or prerecorded voice to residential telephones,¹⁴ or before making *any* non-emergency calls using an automatic telephone dialing system (an "autodialer") or an artificial or prerecorded voice (a "robocall") to a wireless telephone number.¹⁵ If a call to a wireless phone "introduces an advertisement" or "constitutes telemarketing," such prior express consent must be in writing.¹⁶ The TCPA also imposes liability for sending an

7. See Joel Santo Domingo, *30 Years of the PC: A Timeline*, PC MAG. (Aug. 12, 2011, 8:00 PM EST), <https://www.pcmag.com/article2/0,2817,2390914,00.asp>, (illustrating the development over time).

8. *Id.*

9. See *Apple iPhone 6s Specifications*, ÜBERGIZMO, http://www.ubergizmo.com/products/lang/en_us/devices/iphone-6s (last visited Oct. 11, 2018) (identifying processor speed as 1.84 GHz); *Refurbished Unlocked GSM Apple iPhone 6 16GB, Space Gray*, WALMART, <https://www.walmart.com/ip/Apple-iPhone-6-16GB-Refurbished-Smartphone-Gray/49053825> (last visited Oct. 11, 2018).

10. See Kathy Kristof, *Spam and Cam Calls Are Going Mobile*, CBS NEWS (July 21, 2017), <https://www.cbsnews.com/news/cell-phone-spam-and-scam-calls-are-spreading> (indicating how people using cell phones as a primary form of contact more frequently increased the number of telemarketing through mobile devices); see also Jennifer Jolly, *How to Stop Those Annoying, Endless, Robocalls to Your Smartphone*, USA TODAY (Apr. 16, 2017), <https://www.usatoday.com/story/tech/columnist/2017/04/16/how-to-stop-robocalls-on-iphone-smartphone-android/100474848> (explaining different methods to prevent robocalls on a smart phones).

11. Kristof, *supra* note 10.

12. In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 7970, ¶7 (2015) [hereinafter *2015 Order*] ("Calling and texting consumers *en masse* has never been easier or less expensive."); see also Monica Desai et al., *A TCPA for the 21st Century: Why TCPA Lawsuits Are On the Rise and What the FCC Should Do About It*, 8 INT'L J. MOBILE MKTG. 75, 75 (2013), <https://www.mmaglobal.com/files/vol8no1/IJMM-Summer-2013.pdf> ("So what is the cause of this explosive increase in litigation? The answer seems to be a confluence of factors: modern technology allowing companies to reach multitudes of consumers in a short amount of time . . .").

13. See *infra* Part IV (explaining critical ambiguities in statutory text).

14. 47 U.S.C. § 227(b) (2018); 47 C.F.R. § 64.1200(a)(3) (2018).

15. 47 U.S.C. § 227(b)(1)(A) (2018); 47 C.F.R. §§ 64.1200(a)(1), (a)(2) (2018).

16. 47 C.F.R. § 64.1200(a)(2) (2018).

“unsolicited advertisement” to a telephone facsimile machine.¹⁷ The FCC has explained that “[e]xcept where context requires otherwise . . . use of the term ‘call’ includes text messages.”¹⁸

Critically, the TCPA text and corresponding regulations define an “advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services,”¹⁹ and “telemarketing” as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services.”²⁰ The FCC has also explained that any call which includes an advertisement or telemarketing, even if its primary purpose is informational or otherwise not related to telemarketing—what is referred to, simplistically, as a “dual-purpose call”—such a call constitutes telemarketing for TCPA purposes.²¹

Although the TCPA and attendant FCC regulations can seem straightforward on the surface, in fact the kinds of textual ambiguities that are inherent in any statute or regulation have been exacerbated by the drastic changes in technology since the early 1990s.²² Those ambiguities have been exploited by the plaintiffs’ bar to the outsized detriment of the business community.²³ The purpose of this Paper is to highlight some of those ambiguities, and propose some commonsense solutions to help the TCPA achieve its original purposes as a consumer protection statute which does not incentivize frivolous and exploitative litigation.

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17. 47 U.S.C. § 227(b)(1)(C) (2018); *see also* *Arkin v. Innocutis Holdings, LLC*, 188 F.Supp. 3d 1304, 1306 (M.D. Fla. 2016) (“[I]f the [f]ax is not an advertisement, Plaintiff has no claim under the TCPA.”).

18. 2015 *Order*, *supra* note 12, at 7964, ¶ 1 n.3 (citing Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd. 14014, 14115, ¶ 165 (2003) [hereinafter *2003 Order*]).

19. 47 U.S.C. § 227(a)(5) (2018).

20. 47 C.F.R. §§ 64.1200(f)(12), (f)(14) (2018).

21. 2003 *Order*, *supra* note 18, at 14098, ¶ 142 (“The so-called ‘dual purpose’ calls described in the record—calls from mortgage brokers to their clients notifying them of lower interest rate, calls from phone companies to customers regarding new calling plans, or calls from credit card companies offering overdraft protection to existing customers—would, in most instances, constitute ‘unsolicited advertisements,’ regardless of the customer service element to the call.”).

22. *Desai*, *supra* note 12, at 75.

23. *Id.*

II. TELEMARKETING AND THE TCPA

Of course telemarketing itself has been around far longer than the TCPA.²⁴ The practice was first used in the 1900s, when the steel and financial services industries began using the telephone to contact current and potential customers.²⁵ It became widespread in the 1930s and 1940s, when America's largely male sales force was mobilized for war, and businesses began selling over the phone as an alternative.²⁶ Later innovations, including the Yellow Pages and automated dialing equipment, caused the practice to explode over subsequent decades.²⁷ According to the American Telemarketing Association, spending on telemarketing activities increased from \$1 billion to \$60 billion between 1981 and 1991.²⁸ This rapid increase in spending can be explained simply; from a business standpoint, it was a good investment.²⁹ In 1987, the average telemarketing sale to a consumer was worth \$61, and the average telemarketing sale to a business was worth \$1,500.³⁰ By the mid-1990s, telemarketing accounted for more than \$450 billion in annual sales.³¹

However successful telemarketing might have been, consumers' general reaction to its exponential, often unregulated growth was overwhelmingly negative.³² The House Report accompanying the TCPA in 1991 stated that "[t]he telemarketing industry labors under an extremely negative image,"³³ and the corresponding Senate Report cited survey results suggesting that 75% favored "some form of regulation of these calls," with 50% in favor of "prohibiting all unsolicited calls."³⁴ Senator Ernest Hollings (D-SC), one of the TCPA's primary drafters, referred to computerized calls as "the scourge of

24. *See id.* at 75–76 (stating "[t]he Telephone Consumer Protection Act (TCPA) was signed into law in 1991 . . ." and indicating that the TCPA was passed to address telemarketing calls).

25. *Telemarketing: Overview*, ADAGE (Sept. 15, 2003), <http://adage.com/article/adage-encyclopedia/telemarketing-overview/98900>; Howard E. Berkenblit, *Can Those Telemarketing Machines Keep Calling Me?—The Telephone Consumer Protection Act of 1991 After Moser v. FCC*, 36 B.C. L. REV. 85, 95 (1994) (citing Connie Lauerman, *Hype Tech: Now It's 'Death and Taxes . . . And Unsolicited Commercial Phone Calls'*, CHI. TRIB. (Nov. 24, 1991), <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2009&context=bclr>).

26. Berkenblit, *supra* note 25, at 95.

27. *Id.*

28. *Telemarketing*, ENCYCLOPEDIA SMALL BUS., <https://www.encyclopedia.com/social-sciences-and-law/economics-business-and-labor/economics-terms-and-concepts/telemarketing> ("This increased use of telemarketing resulted in an unexpectedly strong backlash and for telemarketing firms the landscape in the early 21st century has changed dramatically.")

29. *See* Bethan Moorcraft, *Investing in Telemarketing Could Have Huge ROI for Your Agency*, INS. BUS. AM. (July 16, 2018), <https://www.insurancebusinessmag.com/us/news/marketing/investing-in-telemarketing-could-have-huge-roi-for-your-agency-106051.aspx> (explaining investing paradigms in telemarketing).

30. JOHN McDONOUGH & KAREN EGOLF, *THE ADVERTISING AGE ENCYCLOPEDIA OF ADVERTISING 1509* (McDonough et al. eds., 2002).

31. *Telemarketing*, *supra* note 28, at 2.

32. *See, e.g.*, Farhad Manjoo, *The Day the Dinnertime Phone Calls Stopped*, SALON (July 15, 2003, 7:30 PM), https://www.salon.com/2003/07/15/do_not_call ("Even you, gentle reader, likely become an undignified boor when you receive a sales call—you yell, swear, lie and, just as the harried marketer is getting to the best part of the deal, you hang up. And you don't feel bad about it; telemarketers, society has determined, do not deserve respect."); ROGER, L. SADLER, *ELECTRONIC MEDIA LAW 357* (Margaret H. Seawell et al. eds., 1st ed. 2005) (noting that regulations regarding telemarketing offer exemptions for those who solicit charitable donations).

33. H.R. REP. NO. 102-317, at 8 (1991) (hereinafter *House Report*).

34. S. REP. NO. 102-177, at 3 (1991) (hereinafter *Senate Report*).

modern civilization.”³⁵ Not surprisingly, growth in telemarketing also contributed to the growth of call screening services and devices.³⁶ The TCPA’s drafters likewise noted the uptick in unlisted numbers as hard evidence of Americans’ displeasure with telemarketers.³⁷

Despite consumers’ frustration, the FCC deferred taking action when it first took up the question of telemarketing in 1980.³⁸ The FCC did acknowledge that the practice had become a problem, citing sources that put the number of unsolicited calls made in America at that time between approximately seven million and twelve million each business day,³⁹ and even noting a survey conducted by the Pacific Telephone Company a couple of years earlier estimating that a paltry 0.1% of California consumers “liked” receiving telemarketing calls.⁴⁰ Nevertheless, the Commission decided to dodge the question for the time being, concluding that it did not have jurisdiction to regulate intrastate calls, and interstate calls were still too small a percentage of overall telemarketing calls.⁴¹

By the late 1980s, however, the vast majority of states had passed some form of telemarketing legislation, and calls for federal regulation had grown too strong to be ignored.⁴² The legislation that finally became the TCPA actually had origins in three different bills, all introduced around the same time.⁴³ In the House, H.R. 1304, the “Telephone Consumer Rights Act,” was introduced by Representative Edward Markey (D-MA) in March of 1991.⁴⁴ In July of the same year, Senator Larry Pressley (R-SD) introduced S. 1410, the “Telephone Advertising Consumer Rights Act,” which mirrored the house bill.⁴⁵ Later that month, Senator Hollings introduced S. 1462, the “Automated Telephone Consumer Protection Act.”⁴⁶ After negotiations between the House and Senate, and incorporation of various provisions of each, S. 1462 was passed as the

35. 137 Cong. Rec. S16,205 (Daily ed. Nov. 7, 1991) (statement of Sen. Hollings) [hereinafter *Hollings Statement*].

36. BOB BATCHELOR, AMERICAN POP: POPULAR CULTURE DECADE BY DECADE VOL. 4 (1990-PRESENT) 18 (2008).

37. *House Report*, *supra* note 33, at 9.

38. In re Unsolicited Telephone Calls, 77 FCC 2d 1023, 1030 (1980) [hereinafter *1980 Report*].

39. *Id.*; see also Henry Darmstadter, *Regulation of Unsolicited Telephone Calls: An Argument For a Liability Rule*, 5 COMPUT. L.J. 393, 393 (1984) (noting that in 1978 there were at least 78 million unsolicited phone calls made each working day).

40. Field Research Corp., *The California Public’s Experience with and Attitude Towards Unsolicited Telephone Calls* 9 (Mar. 1978) [hereinafter *Field Report*] (unpublished report prepared for the Pacific Telephone Company on file with the Yale Journal on Regulation).

41. *1980 Report*, *supra* note 38, at 1024 (“[Since] only about three percent of all unsolicited telephone calls are interstate, regulatory action on our part would very likely only affect a small portion of all unsolicited calls.”).

42. *Senate Report*, *supra* note 34, at 3 (“As a result, over 40 States have enacted legislation limiting the use of [automatic dialer recorded message players] or otherwise restricting unsolicited telemarketing.”).

43. See Berkenblit, *supra* note 25, at 97–99 (showing the time frame in which legislation was introduced in the House and Senate).

44. *Id.* at 97.

45. *Id.*

46. *Id.* at 97–99.

“Telephone Consumer Protection Act” and signed into law on December 20, 1991.⁴⁷

Despite the considerable backlash against telemarketing, review of the bill’s legislative history makes clear that the TCPA was *not* designed to inhibit legitimate business-to-consumer telephone communications.⁴⁸ On the contrary, and as the FCC has acknowledged repeatedly, the aim of the TCPA was to balance “[i]ndividuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade.”⁴⁹ In fact, the Senate Report accompanying S. 1462 notes that the Direct Marketing Association,⁵⁰ along with “other groups representing companies that engage in telemarketing,” did not oppose the bill.⁵¹ Likewise, the House Report explains that the telemarketing industry was actively involved in the development of the legislation, and amenable to restricting nefarious practices:

The responsible telemarketers want to change the industry’s image. They favor placing reasonable restrictions on the industry to curb those practices the industry itself has been unable to control through voluntary programs. The Telemarketing Legislative Coalition, for example, shares the concern over the growing misuse of the telephone in direct marketing.⁵²

The telemarketing industry’s support for regulation makes sense in light of the reported massive abuses in the telemarketing industry of the 1980s and 1990s.⁵³ A *Los Angeles Times* article published in 1990, for example, forecasted that “[u]ltra-sophisticated phone scams will cost consumers more than \$10 billion a year—or more than \$1 million an hour—during this decade. And some phone scams of the 1990s will make those of the 1980s look like child’s play.”⁵⁴

47. See George Bush, *Statement on Signing the Telephone Consumer Protection Act of 1991* (Dec. 20, 1991) AM. PRESIDENCY PROJECT (The University of California, Santa Barbara) [hereinafter *Bush Statement*], <http://www.presidency.ucsb.edu/ws/?pid=20384> (arguing that during the bill’s pendency in Congress, the president feared the bill represented a congressional effort “to re-regulate the telecommunications industry.”).

48. See *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd. 1830, 1844, ¶ 24 (2012) [hereinafter *2012 Order*] (“[I]ndividuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals yet permits legitimate telemarketing practices.”); see also, *Senate Report*, *supra* note 34, at 4–6 (taking into consideration the legitimate business concerns of telemarketers while amending the bill that would become the TCPA); *House Report*, *supra* note 33, at 8 (noting the input of “responsible telemarketers” in drafting the bill that would become the TCPA).

49. *2015 Order*, *supra* note 12, at 7964, ¶ 2.

50. The Direct Marketing Association is now the “Data & Marketing Association.” See *About DMA: Data & Marketing & You*, DATA & MKTG. ASS’N., <https://thedma.org/about-us> (providing a description of the Data & Marketing Association, their leadership, and operations).

51. *Senate Report*, *supra* note 34, at 3.

52. *House Report*, *supra* note 33, at 8.

53. See *id.* (applauding the efforts of “responsible telemarketers” who support restrictions on the industry as a means of changing the industry’s image).

54. See Bruce Horovitz, *Telemarketing Scams Expected to Get Slicker: Fraud: A Consumer Coalition Warns That the Use of New Technologies by Con Artists Will Cost Victims More than \$10 Billion a Year in the 1990s*, L.A. TIMES (Jan. 25, 1990), http://articles.latimes.com/1990-01-25/business/fi-1065_1_telemarketing-scam (showing the abuses that were occurring within the telephone industry in the 1980s and 1990s).

A late 1990s FBI report estimated that telephone fraud cost American consumers between \$40 and \$50 billion each year.⁵⁵

In other words, the TCPA was not, by any stretch of the imagination, a simplistic effort to put an end to telemarketing, to say nothing of hampering (and at times freezing altogether) legitimate commercial speech.⁵⁶ President George H.W. Bush's official TCPA statement, issued on the day the legislation was signed, is worth quoting at length:

I have signed the bill because it gives the Federal Communications Commission ample authority to *preserve legitimate business practices*. These include automated calls to consumers with whom a business has preexisting business relationships, such as calls to notify consumers of the arrival of merchandise ordered from a catalog. I also understand that the Act gives the Commission flexibility to adapt its rules to changing market conditions. I fully expect that the Commission will use these authorities to ensure that the requirements of the Act are met *at the least possible cost to the economy*.⁵⁷

Contrary to President Bush's vision, the TCPA has proven to be a complex and costly web with limited apparent impact on the conduct of bad actors and significant negative impact on business and cost to the economy.⁵⁸ As discussed above, both technology and businesses' telephone practices have evolved dramatically since the TCPA was passed in 1991.⁵⁹ The TCPA's text has struggled to bend accordingly, and regulators have been either slow to adapt or ineffective at doing so.⁶⁰

This already bad situation has been made worse by the FCC's 2015 omnibus Declaratory Ruling and Order, which, among other things, imposed liability for calling reassigned numbers, provided consumers with a right to revoke consent by any "reasonable" method, and issued an impossibly expansive definition of what constitutes an autodialer that was struck down by the D.C. Circuit in March 2018.⁶¹ Although it was not the first time the Commission has

55. MCDONOUGH AND EGOLF, *supra* note 30; *A Byte Out of History: Turning the Tables on Telemarketing Fraud*, FED. BUREAU INVESTIGATION (Dec. 8, 2010), https://archives.fbi.gov/archives/news/stories/2010/december/telemarketing_120810/telemarketing_120810.

56. *See Bush Statement*, *supra* note 47 (emphasis added) (arguing that the president's earlier opposition to the TCPA was due to his fears that "the Act could also lead to unnecessary regulation or curtailment of legitimate business activities").

57. *Id.* (emphasis added).

58. *See generally TCPA Litigation Sprawl A Study of the Sources and Targets of Recent TCPA Lawsuits*, U.S. CHAMBER COM. INST. FOR LEGAL REFORM, 2-4 (Aug. 10, 2017) [hereinafter *Litigation Sprawl*] http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_final.pdf (arguing that the TCPA needs to be revised to protect businesses who, in good faith, call customer-provided phone numbers and punish cold-call telemarketers).

59. *See 2015 Order*, *supra* note 12, at 7970 (noting that recent developments in technology have made "[c]alling and texting consumers *en masse*" more feasible for businesses).

60. *See Desai*, *supra* note 12 (arguing that technological change has overtaken the TCPA and FCC regulations, causing ambiguity to abound as to how the language of the TCPA applies to modern technologies).

61. *See ACA Int'l v. FCC*, 885 F.3d 687, 700 (D.C. Cir. 2018) ("In the end, then, the Commission's order cannot reasonably be understood to support the conclusion that smartphones fall outside the TCPA's autodialer definition: any such reading would compel concluding that the agency's ruling fails arbitrary-and-capricious review."). In addition to striking down the Commission's "autodialer" definition, the court also: (1) revoked the Commission's approach in the 2015 Order to reassigned numbers and consent; (2) upheld the Commission's

issued a large volume of new TCPA rules—lengthy orders in 1992, 2003, and 2012 were also critical—the 2015 Order is arguably the most consequential, and perhaps the most questionable, TCPA order to date.⁶² Through its consent and autodialer rules in particular, the order has injected new confusion into TCPA litigation, and the plaintiffs’ bar has, of course, taken advantage.⁶³ According to the U.S. Chamber Institute for Legal Reform (ILR), in the 17 months immediately preceding the FCC’s ruling, there were 2,127 TCPA lawsuits filed nationwide, versus 3,121 over the following 17 months—a 46% increase.⁶⁴

III. FROM CONSUMER PROTECTION STATUTE TO LITIGATION NIGHTMARE

Although the TCPA does authorize state attorneys general and the FCC to enforce its rules,⁶⁵ the legislation has become synonymous with the tremendous amount of litigation under its private right of action provision, which mandates \$500 in statutory damages for each violation, and up to \$1,500 for each willful violation, with no cap on total damages.⁶⁶ Originally, observers predicted TCPA actions being litigated in small claims court,⁶⁷ and TCPA plaintiffs’ work was once thought of as a “cottage industry.”⁶⁸ Because autodialing equipment allows large numbers to be dialed inexpensively, the damages exposure to defendants in TCPA litigation can skyrocket quickly, even for small and medium-sized businesses.⁶⁹ Further weakening the position of (frequently innocent, or at least unwitting) businesses, the statute also imposes a “strict liability” standard,⁷⁰ which, when combined with the powerful “stick” of statutory damages wherein actual damages need not be proven, conveys tremendous power to the plaintiffs’ bar.⁷¹

approach to revocation of consent through any reasonable means; and (3) upheld the scope of the agency’s exemption for time-sensitive healthcare calls. *Id.* at 692.

62. See *Litigation Sprawl*, *supra* note 58, at 2 (arguing that although there is a significant ambiguity as to what conduct is actionable under the TCPA, the 2015 Order has precipitated an unprecedented uptick in TCPA litigation).

63. See generally 2015 Order, *supra* note 12 (overviewing the autodialer rules); see also *ACA Opinion*, *supra* note 61, at 693 (“The Commission has noted a surge in TCPA lawsuits (including class actions) in recent years, likely attributable in part to the ‘skyrocketing growth of mobile phone.’”) (internal citations omitted).

64. *Litigation Sprawl*, *supra* note 58, at 2.

65. See Richard P. Eckman, *The Telephone Consumer Protection Act Overview (Client Alert)*, PEPPER HAMILTON LLP (Nov. 23, 2015), <http://www.pepperlaw.com/publications/the-telephone-consumer-protection-act-overview-2015-11-23> (providing a broad overview of the TCPA with highlights of some key provisions).

66. 47 U.S.C. § 227(b)(3) (2018).

67. James G. Snell & Carlos P. Mino, *Telephone Consumer Protection Act Cases Are on the Rise*, BLOOMBERG BNA (Feb. 22, 2013), <https://www.morganlewis.com/-/media/files/docs/archive/telephone-consumer-protection-act-cases-are-on-the-rise.ashx> (“Originally, the TCPA was viewed as a statute that could be enforced through small claims actions.”).

68. *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages*, U.S. CHAMBER COM. INST. FOR LEGAL REFORM 6 (Oct. 2013) [hereinafter *Juggernaut*] https://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF.

69. See generally Ralph Wutscher et al., *Regulation of Calls under the TCPA: A Fog of Uncertainty Remains*, 70 BUS. LAW. 563, 563 (2015) (overviewing the scope of damage exposure).

70. See, e.g., *Alea London Ltd. v. Am. Home Servs., Inc.*, 638 F. 3d 768, 776 (11th Cir. 2011) (“The TCPA is essentially a strict liability statute . . .”).

71. The TCPA is one of a number of federal statutes which impose statutory damages. See, e.g., 17 U.S.C. § 504(c) (2018) (stating between \$750 and \$30,000 per infringement for copyright violations; and up to \$150,000 for willful violations); The Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681n (2018) (stating between

What was once a “cottage industry” is now one of the most lucrative areas for the plaintiffs’ bar.⁷² In 2013, Papa John’s International, Inc. settled a TCPA class action filed in 2010 for \$16.5 million.⁷³ Class actions filed in 2011 against Portfolio Recovery Assoc., LLC, Bank of America, and Interline Brands, Inc., eventually settled for \$18 million, \$32 million, and \$40 million, respectively.⁷⁴ While these numbers might have been eye-popping at the time the cases were filed, they have become less so since.⁷⁵ Among TCPA classes filed in 2010 or later, 21 have settled for \$10 million or more, 16 for \$15 million or more, and nine for \$30 million or more.⁷⁶ Cases filed in 2012 against Capital One Bank and Caribbean Cruise Line eventually settled for \$75 million and \$76 million, respectively.⁷⁷ In spite of these sizeable dollar figures, TCPA class actions are decidedly *not* lucrative for consumers.⁷⁸ As of late 2016, the average recovery for members of TCPA classes was \$4.12,⁷⁹ while the average take-home for TCPA plaintiffs’ lawyer, by contrast, was \$2.4 million.⁸⁰

As the ILR has explained, “these hefty class settlements then incentivize even more litigation, in what has become a vicious circle of litigation abuse.”⁸¹ As plaintiffs’ attorneys have chased these increasingly lucrative settlements, the rise in TCPA complaints has been dramatic.⁸² For example, there were only *fourteen* TCPA actions filed in 2007 in the U.S.⁸³ In 2011, there were 830.⁸⁴ In 2013, there were 1,904.⁸⁵ The following year there were 2,558.⁸⁶ And in 2015 there were 3,710.⁸⁷ These cases are handled by a relatively small number of law firms.⁸⁸ According to the ILR, just 44 law firms were the primary filers of more than 1,800 TCPA cases examined in 2017, or approximately 60%.⁸⁹ In fact,

\$100 and \$1,000 for willful violations); The Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692k (2018) (statutory damages up to \$1,000).

72. *Juggernaut*, *supra* note 68, at 6.

73. *Litigation Sprawl*, *supra* note 58, at 10.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Adonis Hoffman, *Sorry, Wrong Number, Now Pay Up*, WALL ST. J.: OPINION (June 15, 2015), <https://www.wsj.com/articles/sorry-wrong-number-now-pay-up-1434409610?K> (pointing out the average recovery for a consumer to be \$4.12, versus an average of \$2.4 million for plaintiffs’ attorneys).

79. Adonis Hoffman, *Does TCPA Stand for ‘Total Cash for Plaintiffs’ Attorneys’?*, THE HILL (Feb. 17, 2016), <http://thehill.com/blogs/pundits-blog/technology/269656-does-tcpa-stand-for-total-cash-for-plaintiffs-attorneys> (explaining how plaintiffs’ attorneys have extracted millions from businesses under the TCPA); *see also* Daniel S. Blynn et al., *Why the Caribbean Cruise Line Record-Breaking TCPA Settlement Could Contribute to ‘The End of the [TCPA] World As We Know It’ (and We Feel Fine)*, LEXOLOGY (Sept. 29, 2016), <https://www.lexology.com/library/detail.aspx?g=a9bd00b5-cf3b-42f1-8446-a70c32d5a2e9> (discussing how the outdated nature of the TCPA allows plaintiffs’ attorneys to achieve windfalls).

80. Hoffman, *supra* note 79.

81. *Juggernaut*, *supra* note 68, at 4.

82. *Analysis: TCPA Litigation Skyrockets Since 2007; Almost Doubles Since 2013*, U.S. CHAMBER INST. FOR LEGAL REFORM (Feb. 5, 2016), <https://www.instituteforlegalreform.com/resource/analysis-tcpa-litigation-skyrockets-since-2007-almost-doubles-since-2013> (analyzing TCPA litigation growth since 2007).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Litigation Sprawl*, *supra* note 58, at 11.

89. *Id.*

according to this same report, just *four* law firms were the primary filers for 711 of the examined cases, or approximately 23%.⁹⁰

How drastic, in sum, is the departure from 1991 represented by the litigation statistics above? When the TCPA was drafted, Senator Hollings declared that the aim of the bill was to stop “telephone terrorism.”⁹¹ It would not be a stretch to say that the TCPA is now being used for something like the opposite: whatever threat phone users face—the cost and safety concerns of fielding unwanted calls, for example, or the nuisance of interruptions—it pales in comparison to the threat to the business community posed by over-aggressive lawyers and serial TCPA plaintiffs, who hold legitimate, well-intentioned businesses hostage with the ever-present threat of litigation.⁹²

IV. CRITICAL AMBIGUITIES IN THE TEXT

While a number of factors have likely contributed to the drastic increase in TCPA litigation discussed above,⁹³ ambiguity in the actual text of the TCPA and attendant regulations, and problematic FCC guidance around those texts, have been primary factors in converting the TCPA from a well-intentioned consumer protection statute to a nightmare for legitimate, well-intentioned businesses.⁹⁴ While the following is by no means a comprehensive analysis of the multitude of ambiguities in the TCPA’s text and FCC’s guidance, the following six areas are especially salient and worthy of additional consideration.

A. *What is an “Autodialer”?*

Broadly, the TCPA requires prior express consent before making any non-emergency calls using an “automatic telephone dialing system” (or an “autodialer”) to three categories of phone lines: (1) any emergency line

90. *See id.* at 2, 12 (explaining how the total number of cases examined by the IRL was 3,121).

91. *Hollings Statement*, *supra* note 35 (“They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall It is telephone terrorism, and it has got to stop.”).

92. Hoffman, *supra* note 79.

93. In addition to the textual ambiguities and unhelpful regulatory guidance discussed in this paper, the Supreme Court’s 2012 decision to allow plaintiffs to bring TCPA actions in federal court also likely added to the TCPA boom. *See Mims v. Arrow Financial Servs., LLC*, 565 U.S. 368, 374 (2012) (holding that these actions can be brought in federal court). The rise of alternative litigation financing, which allows plaintiffs and plaintiffs’ firms access to additional funding at the outset of litigation (thereby lowering the risk of filing suit), may have been a factor also. *See, e.g., Stopping the Sale on Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation*, U.S. CHAMBER COM. INST. FOR LEGAL REFORM, 1 (2012), http://www.instituteforlegalreform.com/uploads/sites/1/TPLF_Solutions.pdf (“[Third Party Litigation Funding] investments can be expected to increase the volume of abusive litigation.”); *see also TCPA Class Action Litigation Overview*, HOLLAND & KNIGHT, <https://www.hklaw.com/practices/tcpa-class-action-litigation> (last visited Oct. 11, 2018) (“The number of class action lawsuits filed under the [TCPA] . . . has risen significantly in recent years. This is due to a variety of factors, including the explosive growth of business marketing to mobile devices[,] heightened enforcement of the TCPA[,] rules that make TCPA cases relatively easy for individuals to file[,] a requirement that plaintiffs show only that they received unsolicited communications, not that they were damaged[,] and a U.S. Supreme Court decision allowing TCPA class actions to be brought in federal as well as state courts.”).

94. *See Desai*, *supra* note 12, at 76 (“However, the major driving force behind the recent rise of TCPA lawsuits is the legal ambiguity surrounding how the language of the TCPA itself can be squared with today’s telephone software and equipment.”).

(including any “911” line); (2) “any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment[;]” or (3) “any telephone number assigned to a . . . cellular telephone service.”⁹⁵ The statute provides that “[t]he term ‘automatic telephone dialing system’ means 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.”⁹⁶

In addition to the TCPA’s text, the FCC has issued guidance on the autodialer definition a number of times in the past two decades.⁹⁷ In 2003, the Commission found, consistent with the statute’s text, that in order to be considered an autodialer the “equipment need only have the ‘capacity to store or produce telephone numbers,’”⁹⁸ and that, “even when dialing a fixed set of numbers, equipment may nevertheless meet the autodialer definition.”⁹⁹ Critically, the Commission also roped “predictive dialers” into the autodialer definition in 2003, defining a predictive dialer as “equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls,”¹⁰⁰ explaining that “[t]he hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers.”¹⁰¹

In that same 2003 Order, after noting that dialing technology had changed drastically from when the TCPA was first passed—from dialers that created and randomly dialed 10-digit numbers to technology utilizing lists of actual phone numbers—the Commission emphasized the touchstone of the autodialer definition: “The basic function of such equipment, however, has not changed—the *capacity* to dial numbers without human intervention.”¹⁰² Five years later, in its 2008 ACA Declaratory Ruling, the Commission rejected the argument that a predictive dialer is an autodialer “only when it randomly or sequentially generates telephone numbers, not when it dials numbers from customer telephone lists.”¹⁰³ In short, the Commission’s conclusion meant that a wide

95. 47 U.S.C. § 227(b)(1)(A) (2018).

96. 47 U.S.C. § 227(a) (2018).

97. 2003 Order, *supra* note 18, at 14090, ¶ 129; 2015 Order, *supra* note 12, at 7971, ¶ 10.

98. 2003 Order, 18 FCC Rcd. at 3673, ¶ 132.

99. 2015 Order, *supra* note 12, at 7961, ¶ 12 (citing 2003 Order, *supra* note 18, at 14092, ¶ 132).

100. 2003 Order, *supra* note 18, at 3673, ¶ 131.

101. *Id.* at ¶ 133.

102. *Id.* (emphasis in original). In reaching its conclusion, the Commission made an argument from Congressional intent:

The legislative history also suggests that through the TCPA, Congress was attempting to alleviate a particular problem—an increasing number of automated and prerecorded calls to emergency numbers, health care facilities, and wireless numbers. . . . Coupled with the fact that autodialers can dial thousands of numbers in a short period of time, calls to these specified categories of numbers are particularly troublesome. Therefore, to exclude from these restrictions equipment that use predictive dialing software from the definition of ‘automated telephone dialing equipment’ simply because it relies on a given set of numbers would lead to an unintended result.

Id.

103. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling, 23 FCC Rcd. 559, 566, ¶ 12 (2008) [hereinafter *ACA Declaratory Ruling*].

range of equipment, regardless of whether it was *actually* being used to autodial, could fall within the TCPA's ambit.¹⁰⁴

In ensuing years, courts struggled to apply TCPA autodialer rules subject to any meaningful limitations. In 2009, for example, the Ninth Circuit held in *Satterfield v. Simon & Schuster, Inc.*¹⁰⁵ that text messages from a publishing company promoting an upcoming novel could potentially have been sent with an autodialer, finding that the district court erred in focusing on the dialing equipment's actual use rather than its "capacity" to autodial.¹⁰⁶ After being sent back down to the district court, the case settled for \$10 million, before the district court even addressed the capacity question.¹⁰⁷ Likewise, in *Griffith v. Consumer Portfolio Serv., Inc.*,¹⁰⁸ the Northern District of Illinois—perhaps the most lucrative venue in the U.S. for TCPA litigation¹⁰⁹—found that, because the Commission had identified predictive dialers as autodialers, any call placed with a predictive dialer was subject to the TCPA's consent requirements, *regardless* of whether the predictive dialer was even capable of performing any of the functions Congress intended to address with the TCPA.¹¹⁰ In *Nelson v. Santander Consumer USA, Inc.*,¹¹¹ a district court in Wisconsin awarded more than half a million dollars to a *single plaintiff* from a debt collection agency, after determining that the question of whether the calls at issue were placed with an autodialer was a "red herring," concluding all that mattered was whether the autodialer had the capacity to autodial.¹¹²

In response to complaints and requests from the business community for clarity and reasonable limitations, the FCC revisited the autodialer issue at length in 2015.¹¹³ Unfortunately, the Commission made matters worse.¹¹⁴ In response to arguments from petitioners that "capacity" to autodial means "current capacity" or "present ability," the Commission broadened its earlier definition to include any equipment which lacks the "present capacity" but may nevertheless be *modified* to have such capacity.¹¹⁵ The Commission was cursory

104. *Id.*

105. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009).

106. *Id.* ("[A] system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it."); *see also* Desai, *supra* note 12, at 78 ("After *Satterfield*, it was clear that it would no longer be a sufficient defense in TCPA litigation to argue that a system did not actually store, produce or call randomly or sequentially generated telephone numbers.")

107. Settlement Agreement and Final Judgment and Order of Dismissal, *Satterfield v. Simon & Schuster, Inc.*, No. C06 2893 (N.D. Cal. 2010).

108. *Griffith v. Consumer Portfolio Serv., Inc.*, 838 F. Supp. 2d 723, 726 (N.D. Ill. 2011).

109. *See* *Litigation Sprawl*, *supra* note 58 (noting that of the 39 largest settlements listed, 12 were cases filed in the Northern District of Illinois, including five of the top six).

110. *Griffith*, 838 F. Supp. 2d at 726 ("According to [defendant], to fall within the FCC's interpretation of an 'automatic telephone dialing system' the equipment in question must have the technical ability to perform the now obsolete functions performed by dialers when Congress originally passed the TCPA. That is, it must be able to 'store or produce numbers using a random or sequential number generator' and 'dial numbers randomly or sequentially.' . . . [The defendant's] interpretation of the FCC's orders . . . is a transparent attempt to win through litigation a battle that other companies lost before the FCC") (internal citations omitted).

111. *Nelson v. Santander Consumer USA, Inc.*, 931 F. Supp. 2d 919, 922 (W.D. Wisc. 2013).

112. *Id.* at 926.

113. *2015 Order*, *supra* note 12, at 7972, ¶ 11.

114. *See id.* at 8074 (Pai, Ajit, dissenting) [hereinafter *Pai Dissent*] (illustrating that revisiting the issue increased confusion as to the definition of autodialer).

115. *Id.* at 7972, ¶ 11.

in dismissing the obvious counter argument that if an object has a “capacity” to serve a certain purpose so long as it may be modified to have such capacity, then the term “capacity” is rendered meaningless:

One dissent argues that our reading of “capacity” is flawed in the same way that saying an 80,000 seat stadium has the capacity to hold 104,000. But that is an inapt analogy—modern dialing equipment can often be modified remotely without the effort and cost of adding physical space to an existing structure. Indeed, adding space to accommodate 25 percent more people to a building is the type of mere “theoretical” modification that is insufficient to sweep it into our interpretation of “capacity.”¹¹⁶

In fact, and as a number of commenters have pointed out, the FCC’s autodialer definition arguably implicates almost *any* type of phone technology.¹¹⁷ While the Commission did make a superficial attempt to put outer limits on its guidance, the attempt bordered on parody, citing a “rotary-dial phone” as an example of equipment that could theoretically be modified to have the capacity to autodial, but would nevertheless not be considered an autodialer.¹¹⁸

Fortunately, in *ACA International v. FCC*, the D.C. Circuit recently recognized the absurdity of the status quo, finding the Commission’s autodialer definition to be arbitrary and capricious.¹¹⁹ In reaching this conclusion, the court raised two narrower questions: “(i) when does a device have the ‘capacity’ to perform the functions of an autodialer enumerated by the statute?; and (ii) what precisely is the content of those functions?”¹²⁰ First, the court struck down the FCC’s expansive definition of “capacity,” focusing on the fact that, under extant FCC rules, a simple smartphone constitutes an autodialer for TCPA purposes.¹²¹ Second, having concluded that the FCC’s capacity definition was overbroad, the court explained that the problems with this definition were in fact “compounded by inadequacies in the agency’s explanation of the requisite features [of an

116. *Id.* at 7974, ¶ 16, 8074 (“To use an analogy, does a one-gallon bucket have the capacity to hold two gallons of water? Of course not.”).

117. *See, e.g.*, Tiffany Cheung, *Is Your iPhone an Autodialer?* MORRISON FOERSTER (Jan. 5, 2016), <https://classdismissed.mofo.com/tcpa/is-your-iphone-an-autodialer> (explaining the Third Circuit’s endorsement of the FCC’s broad definition of “autodialer” under the TCPS); *FCC Digs In Its Heels on TCPA Autodialer Definition*, KLEIN MOYNIHAN TURCO LLP (July 20, 2015), www.kleinmoynihhan.com/fcc-digs-in-its-heels-on-tcpa-autodialer-definition (“The expansive regime labels practically every telemarketing device on the market as an autodialer”); Cheng-Yi Liu, *FCC Clarifies (?) TCPA Autodialing Requirements*, ABOVE THE LAW (Aug. 13, 2015), <https://abovethelaw.com/2015/08/fcc-clarifies-tcpa-autodialing-requirements/> (“So anything can be an autodialer if it has the ‘future ability’ to dial randomly or sequentially? Wait, hasn’t the FCC heard that ‘the future is LIMITLESS?’”).

118. *2015 Order*, *supra* note 12, at 7975, ¶ 18.

119. *See ACA Opinion*, *supra* note 61, at 23.

120. *Id.*

121. *Id.* at 15 (“If a device’s ‘capacity’ includes functions that could be added through app downloads and software additions, and if smartphone apps can introduce ATDS functionality into the device, it follows that all smartphones, under the Commission’s approach, meet the statutory definition of an autodialer.”); *id.* at 23 (noting that the court also rejected the Commission’s argument that the *2015 Order* had, in fact, left the smartphone question open: “In the end, then, the Commission’s order cannot reasonably be understood to support the conclusion that smartphones fall outside the TCPA’s autodialer definition: any such reading would compel concluding that the agency’s ruling fails arbitrary-and-capricious review.”); *see also id.* at 16 (“If every smartphone qualifies as an ATDS, the statute’s restrictions on autodialer calls assume an eye-popping sweep.”).

autodialer].”¹²² In other words, the court concluded not only that the Commission had defined “capacity” too broadly, but also that it had not even adequately explained what an autodialer should have the capacity *to do*.¹²³ In particular, the court noted that the Commission had failed to offer adequate guidance on a “basic question raised by the statutory definition[:]” namely, “whether a device must *itself* have the ability to generate random or sequential telephone numbers to be dialed,” or whether it is enough if “the device can call from a database of telephone numbers generated elsewhere.”¹²⁴ On one hand, the 2015 Order and prior rulings have suggested that a device must have the ability to generate the numbers before dialing; but on the other hand, the 2015 Order “also suggest[ed] a competing view: that equipment can meet the statutory definition even if it lacks capacity.”¹²⁵ The court then set aside the Commission’s 2015 guidance on the autodialer definition.¹²⁶

In sum, and as the *ACA International* court recognized, the Commission’s guidance to date has left courts and businesses with an impossible task: discerning where, in the massive expanse between actual autodialing equipment and rotary phones, the autodialer line falls.

1. *Solution: Put Reasonable Limits on the “Autodialer” Definition*

Ambiguities like those discussed herein have a direct effect on litigation. If FCC guidance on a particular question is unclear, and especially if different courts have interpreted that guidance in varying ways, the price of a TCPA lawsuit goes up. This is borne out by the litigation boom discussed above. By some estimates, the autodialer question alone was *already* responsible for a considerable number of new TCPA filings, even before the Commission’s 2015 Order. According to a Petition filed with the FCC in 2012, TCPA actions involving autodialers had already risen 592% over the prior three years.¹²⁷

But there are steps that could be taken, by the courts and by the FCC, that would return a measure of sanity to TCPA litigation.¹²⁸ With respect to the TCPA’s autodialer definition, the Commission could return to a commonsense definition of “capacity” which does not render the word meaningless and turn just about any piece of equipment short of a rotary phone into an autodialer.¹²⁹ As Commissioner Ajit Pai (now Chairman Pai) explained in his dissent to the 2015 Order, the fact that all types of dialing equipment can, today, quickly and easily be converted into an autodialer counsels in favor of *limiting*, not expanding, the autodialer definition:

122. *Id.* at 23.

123. *Id.*

124. *Id.* (emphasis in original).

125. *See id.* at 27 (“So which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it lacks that capacity?”).

126. *Id.* at 27.

127. *See Petition for Declaratory Ruling*, CG Docket No. 02-278, at 14–15 (filed June 7, 2012).

128. *Pai Dissent*, *supra* note 114, at 8072–83.

129. *Id.* at 8075.

It's trivial to download an app, update software, or write a few lines of code that would modify a phone to dial random or sequential numbers. So under the Order's reading of the TCPA, each and every smartphone, tablet, VoIP phone, calling app, texting app—pretty much any calling device or software-enabled feature that's not a "rotary-dial phone"—is an automatic telephone dialing system. Such a reading of the statute subjects not just businesses and telemarketers but almost all our citizens to liability for everyday communications.¹³⁰

Long gone, in other words, are the 1990s, when the question of dialing equipment's "capacity" was a simple yes or no question. The term "equipment" no longer even sounds timely.

In order to adapt to changes in technology, and stay true to the TCPA's original purposes, the Commission should define capacity as "present capacity," and in so doing make the TCPA the "statutory rifle-shot targeting specific companies that market their services through automated random or sequential dialing" it was intended to be, rather than "an unpredictable shotgun blast covering virtually all communications devices."¹³¹ In other words, the TCPA was never meant to regulate what business "might, theoretically" be doing, but to punish actual bad actors who are *actually* targeting consumers in prohibited ways.¹³²

B. What Are "Telemarketing" and "Advertisements"?

Like the type of equipment used to make a call, the purpose of the call is also crucial for TCPA liability purposes.¹³³ The TCPA requires prior express consent before making *telemarketing* calls using an artificial or prerecorded voice to residential telephones,¹³⁴ or before making any non-emergency calls using an autodialer or an artificial or prerecorded voice to a wireless telephone number.¹³⁵ In the latter case, if a call "introduces an advertisement" or "constitutes telemarketing," such prior express consent must be in writing.¹³⁶ In other words, in the landline context, telemarketing *triggers* TCPA requirements, and in the wireless context, telemarketing *heightens* consent requirements.¹³⁷

What do these critical terms mean? The TCPA text and corresponding regulations define an "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services,"¹³⁸ and "telemarketing" as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services."¹³⁹ In determining whether a communication constitutes

130. *Id.* at 8075–76.

131. *Id.* at 8075.

132. 2003 Order, *supra* note 18, ¶ 3.

133. 47 U.S.C. § 227(b) (2018).

134. 47 U.S.C. § 227(b); 47 C.F.R. § 64.1200(a)(3) (2018).

135. 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1).

136. 47 C.F.R. § 64.1200(a)(2).

137. *See generally id.* (discussing the statutory treatment of each action).

138. 47 U.S.C. § 227(a)(5).

139. 47 C.F.R. § 64.1200(f)(12).

telemarketing, or includes an advertisement, the Commission has explained that “the application of the prerecorded message rule should turn, not on the caller’s characterization of the call, but on the purpose of the message.”¹⁴⁰

Although the TCPA’s “advertisements” and “telemarketing” definitions imply, on their faces, a contemporaneousness element—that is, they clearly appear to contemplate advertising goods and services, or encouraging the purchase or rental of goods and services, *during the communication*—the Commission has ruled that certain communications which are followed by future promotion may nevertheless be advertisements under the TCPA.¹⁴¹ Aside from dual-purpose communications, discussed below, the Commission has also explained that “[o]ffers for free goods or services that are part of an overall marketing campaign to sell property, goods, or services constitute [advertisements],”¹⁴² and that, in the context of facsimile messages, “any surveys that serve as a pretext to an advertisement are subject to the TCPA’s facsimile advertising rules.”¹⁴³

Broadly, the Commission has carved out calls that are “purely informational,” and thus excluded from the telemarketing definition and exempt from the TCPA’s heightened consent requirements, including “calls by or on behalf of tax-exempt non-profit organizations, calls for political purposes, and calls for other noncommercial purposes, including those that deliver purely informational messages such as school closings,”¹⁴⁴ and “bank account balance, credit card fraud alert, [and] package delivery,” for example.¹⁴⁵ The Commission has also identified “debt collection calls, airline notification calls, . . . school and university notifications, research or survey calls, and wireless usage notifications” as informational calls.¹⁴⁶

Many of the above examples illustrate the diverse set of reasons a business might communicate with consumers, and how thin the line between “information” and “telemarketing” really can be. In fact, courts have recently begun conflating telemarketing and other non-marketing communications, based on the notion that *any* communication which bears some distant, attenuated relationship to the profit motive is presumptively a form of “telemarketing” or an “advertisement.”¹⁴⁷ For example, in *Samuel Katz v.*

140. 2003 Order, *supra* note 18, ¶ 141.

141. *Id.* ¶ 142.

142. *Id.* ¶ 140.

143. In re Rules and Regulations Implementing the Tel. Consumer Prot. Act. of 1991; Junk Fax Prevention Act of 2005, 21 FCC Rcd. 3787, 3815 ¶ 54 (2006) [hereinafter *Junk Fax Order*].

144. 2012 Order, *supra* note 48, at 1831, ¶ 3.

145. *Id.* ¶ 21.

146. *Id.* ¶ 28.

147. See Insights Ass’n & Am. Ass’n for Pub. Op. Res., Pet. for Declaratory Ruling, CG Docket 02-278, at 8–15 (filed Oct. 30, 2017) [hereinafter *Insights Petition*] (highlighting the trend of some courts conflating the distinction between telecommunications and market research conducted via phone and facsimile and, in addition to discussing the *Katz*, *Stryker Sales*, and *Boehringer* cases, the *Insights Petition* also suggests adopting, as against the Second Circuit’s position in *Boehringer*, the rationale of the Sixth Circuit in *Sandusky Wellness Ctr., LLC v. Medco Health Solutions, Inc.*; *Sandusky Wellness Ctr., LLC v. Medco Health Solutions, Inc.*, 788 F.3d 218, 225 (6th Cir. 2015) (“The fact that the sender might gain an ancillary, remote, and hypothetical economic benefit later on does not convert a noncommercial, informational communication into a commercial solicitation.”); see also *infra* Part V (further discussing this distinction).

American Honda Motor Co., Inc., a class action against Honda's North American subsidiary and J.D. Power and Associates, a California federal judge ruled that, for pleading purposes, customer service calls placed with an autodialer to the plaintiff's wireless phone were subject to the same heightened consent requirements as a telemarketing call, despite the plaintiff not alleging that the calls contained an advertisement, or even that the calls were pretexts to advertisements.¹⁴⁸ In rejecting the defendants' motion for summary judgment, the court offered only the following cursory explanation: "The evidence demonstrates the calls to Plaintiff were advertising because they were made for customer service purposes *and to increase future sales and revenue.*"¹⁴⁹

Similarly, in *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, a district court in Michigan held that a defendant's seminar invitation could be an advertisement under the TCPA.¹⁵⁰ In rejecting the parties' cross-motions for summary judgment, the court leaned, in part, on a similar theory to that put forward in *Katz*: "It stands to reason that the information referenced on the fax could have led primary care physicians to refer more patients or discuss orthopedic products more frequently, *and this in turn could stimulate demand for Defendants' products.*"¹⁵¹

Perhaps most importantly, a decision all the way up at the Circuit Court level has seemed to suggest, as the courts in *Katz* and *Stryker Sales* did, that a communication may be treated as telemarketing under the TCPA solely on the grounds that the communicating party is, ultimately, out for a profit.¹⁵² In *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.*, the Second Circuit was asked to consider whether a seminar invitation constituted an advertisement under the TCPA, even though the invitation did not advertise any products or services, or suggest products or services would be advertised at the seminar.¹⁵³ In holding that the invitation was an advertisement, the court reasoned that, "at the pleading stage, where it is alleged that a firm sent an unsolicited fax promoting a free seminar discussing a subject that relates to the firm's products or services, there is a plausible conclusion that the fax had the commercial purpose of promoting those products or services. *Businesses*

148. Order Re: Defendants' Joint Motion for Summary Judgment, *Katz v. American Honda Motor Co.*, No. 15-cv-4410-CBM-RAOx, 2017 U.S. Dist. LEXIS 114160, at *2 (C.D. Cal. May 12, 2017) [hereinafter *Katz MSJ Denial*]; see First Amended Class Action Complaint, *Samuel Katz v. American Honda Motor Co., Inc.*, No. 15-cv-4410-CBM-RAOx (C.D. Cal. Aug 19, 2016) (arguing "Honda then works with its agent, J.D. Power, to make automated telephone calls to Honda's customers and Honda dealers' customers to conduct surveys and solicit feedback with the ultimate purpose of building clientele and repeat customers").

149. *Katz MSJ Denial*, *supra* note 148, at *2 (emphasis added); see 18 FCC Rcd. ¶ 142 (describing the dual-purpose phone calls); *Insights Petition*, *supra* note 147, at 10 (finding this conclusion was in conflict with the Commission's 2003 guidance, which addressed customer service calls specifically and highlighted "(1) calls that include a phone number where a company plans to offer products and services, and (2) recruiting calls from direct sales companies," as the types of calls that might rise to the level of telemarketing).

150. 65 F.Supp.3d 482, 491 (W.D. Mich. 2014).

151. *Id.* at 493 (emphasis added); see also *Insights Petition*, *supra* note 147, at 12–13 (elaborating on how the circuit court treated communication as telemarketing when the communicating party is a for-profit party).

152. *Insights Petition*, *supra* note 147, at 12–13.

153. 847 F.3d 92, 93 (2d Cir. 2017).

*are always eager to promote their wares and usually do not fund presentations for no business purpose.*¹⁵⁴

These nebulous extrapolations from the profit-motive are decidedly at odds with the text and legislative history of the TCPA, the drafters of which were express in their intentions *not* to affect all communications from businesses.¹⁵⁵ In fact, the above-quoted language from the *Stryker Sales* court has almost unlimited applications. In almost any case where a for-profit business communicates with someone for informational purposes (by sending a fraud alert, for example, or forwarding a receipt), the communication could lead to increased discussion or consciousness of a business's products, "and this in turn could stimulate demand."¹⁵⁶

1. *Solution: Reject the "Argument from the Profit Motive"*

The Commission should recommit to a plain, common sense reading of the TCPA's "advertisement" and "telemarketing" definitions. To recap, the TCPA defines "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services,"¹⁵⁷ and "telemarketing" as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services."¹⁵⁸ Although these definitions do not expressly include a contemporaneousness requirement—that is, the text does not require that an advertisement occur during or on the four corners of a communication, or require that a caller "encourage" purchase or rent during the call—they are implied in the fairest, most straightforward reading of the text.¹⁵⁹

In that same vein, the Commission should expressly reject the "argument from the profit motive," which has no basis in the TCPA's text or the Commission's prior rulings.¹⁶⁰ In contrast with the decisions discussed in

154. *Id.* at 95–96 (emphasis added).

155. See *Insights Petition*, *supra* note 147, at 16 (discussing how this "argument from the profit motive" fails to note how inefficient market research is as a vehicle for sales and advertising in the context of market research in particular).

156. *Stryker Sales*, 65 F. Supp. 3d at 491.

157. 47 U.S.C. § 227(a)(5) (2018).

158. 47 C.F.R. §§ 64.1200(f)(12), (f)(14) (2018).

159. See *Insights Petition*, *supra* note 147, at 22 (discussing the definitions of "advertisement" and "telemarketing").

160. As explained in the *Insights Petition*:

There are very few industries in the U.S. economy that do not, at least from time to time, rely on outside market research and analytics firms, or internal market research and analytics practitioners, to learn more about their consumers. Additionally, the simplistic view of the profit motive discussed above also threatens other non-research activities, like informational communications traditionally exempted from telemarketing: communications which, in the words of former Commission Chairman Genachowski, "consumers may have come to rely on." If the simplistic view of the profit motive adopted by the Second Circuit and peddled cynically by the plaintiff's bar are allowed to become the starting point in any TCPA litigation, an already out-of-control situation will be made even worse.

Id. at 19; see also *2012 Order*, *supra* note 48, at 1876 (including remarks of Chairman Julius Genachowski ("[W]e leave unchanged our rules for robocalls that are informational and that consumers may have come to rely on. Some of these informational robocalls include automated calls that update consumers on airline flights, provide school notifications, or even warn them about fraudulent activity in their bank accounts.")).

Section III above, a few courts have recognized that the “argument from the profit motive” is boundless and a distortion of the TCPA’s intended meaning.¹⁶¹ The Commission should point other courts in their direction. In 2015, for example, the Sixth Circuit discussed the TCPA’s “advertisement” definition and its relationship to the profit motive in *Sandusky Wellness Center, LLC v. Medco Health Solutions*.¹⁶² The court’s commonsense explanation, unlike the foregoing from *Sandusky*, is consistent with the Commission’s guidance and offers a helpful framework for the Commission to suggest to other courts:

We can glean a few things from [the TCPA’s] definition. For one thing, we know the fax must advertise something. Advertising is “[t]he action of drawing the public’s attention to something to promote its sale,” or “the action of calling something (as a commodity for sale, a service offered or desired) to the attention of the public.” So material that advertises something promotes it to the public as for sale. For another thing, we know that what’s advertised—here, the “availability or quality of any property, goods, or services”—must be commercial in nature. Commercial means “of, in, or relating to commerce[;]” “from the point of view of profit: having profit as the primary aim.” It’s something that relates to “buying and selling.” So to be an ad, the fax must promote goods or services to be bought or sold¹⁶³

Rejecting the argument that any communications which bear some relationship to the profit motive are necessarily a form of marketing, the court explained that “[t]he fact that the sender might gain an ancillary, remote, and hypothetical economic benefit later on does not convert a noncommercial, informational communication into a commercial solicitation.”¹⁶⁴

Similarly, in *Dukes v. DirecTV LLC*,¹⁶⁵ the plaintiffs, customers of DirecTV, received debt collection calls without their consent, but argued for TCPA liability because the calls were also made for a more general business purpose related to sales, “contend[ing] that DirecTV solicited them because of DirecTV’s customary business practice—satellite television subscription sales.”¹⁶⁶ In rejecting the plaintiffs’ argument, the court reasoned that “§ 227(c) and § 64.1200(d) apply only to calls initiated for telemarketing purposes,” and [t]he plaintiffs did not plead that DirecTV tried to solicit business from them during the call.”¹⁶⁷ Similarly, in *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc., et al.*,¹⁶⁸ a federal court in Michigan dismissed an argument that a fax “was sent to Plaintiff with the goal of ultimately making profit,” noting that “[t]he Fax

161. *Insights Petition*, *supra* note 147, at 19.

162. *Sandusky Wellness Ctr., LLC v. Medco Health Solutions, Inc.*, 788 F.3d 218, 221 (6th Cir. 2015).

163. *Id.* at 221–22.

164. *Id.* at 225 (emphasis added).

165. *Dukes v. DirecTV LLC*, No. 3:16-CV-1418-G, 2016 U.S. Dist. LEXIS 153948, at *5–6 (N.D. Texas, Nov. 7, 2016).

166. *Id.* at *5–6.

167. *Id.* at *6; *see also Insights Petition*, *supra* note 147, at 15–17 (discussing the case in further detail).

168. *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.*, No. 16-cv-13777, 2017 WL 783499 (E.D. Mich. Mar. 1, 2017).

does not offer—or even mention—any product, good, or service to Plaintiff, nor does it not offer or solicit any product, good, or service for sale.”¹⁶⁹

These decisions, which contemplate the larger business picture without losing the focus on the purpose of the call (and what transpired during the communication), are consistent with Congress’s guidance at the TCPA’s inception, which also focuses on the actions of the caller during the call: “To come within the definition [of ‘telephone solicitation’], a caller must encourage a commercial transaction A call encouraging a purchase, rental or investment would fall within the definition, however, even though the caller purports to taking a poll or conducting a survey.”¹⁷⁰

C. What is a “Dual Purpose” Communication?

Further complicating the distinction between telemarketing purposes and “informational” (or non-telemarketing) purposes is the fact that these purposes can (and, in the eyes of the FCC, often do) coexist *vis-à-vis* a single communication, sometimes in non-obvious ways.¹⁷¹ In determining whether a communication constitutes telemarketing, or includes an advertisement, the Commission has explained that the “application of the prerecorded message rule should turn, not on the caller’s characterization of the call, but on the purpose of the message.”¹⁷² The Commission has also said that calls may be “dual-purpose”—i.e., calls which are made for both marketing and non-marketing purposes may constitute telemarketing under the TCPA.¹⁷³

The Commission’s framework, which requires asking whether a communication includes an advertisement, regardless of whether the communication is made primarily for a non-marketing purpose, is in line with the intentions of the TCPA’s drafters, who recognized that a research communication, for example, might also constitute telemarketing: “A call encouraging a purchase, rental or investment would fall within the definition [of telephone solicitation], . . . even though the caller purports to taking a poll or conducting a survey.”¹⁷⁴

Unfortunately, as with the “argument from the profit motive,” the plaintiffs’ bar and some courts have begun using a loose interpretation of the Commission’s guidance to find a second “purpose” where there is no evidence

169. *Id.* at *5.

170. *House Report*, *supra* note 33, at § 3.

171. *See Insights Petition*, *supra* note 147, at 19–23 (discussing the “dual-purpose” of calls).

172. *2003 Order*, *supra* note 18, ¶ 141.

173. *Id.* ¶ 142; *see also 2012 Order*, *supra* note 48, at 1842, ¶ 30 (referencing the meaning of “dual-purpose” calls).

174. *House Report*, *supra* note 33, at 13 (“To come within the definition [of ‘telephone solicitation’], a caller must encourage a commercial transaction”); *see also Orea v. Nielsen Audio, Inc.*, 14-CV-04235-JCS, 2015 U.S. Dist. LEXIS 54916, at *13 (N.D. Cal. Apr. 24, 2015) (stating, “[h]ere, there is nothing arbitrary, capricious, or statutorily inconsistent about the FCC’s interpretation. In fact, the FCC’s interpretation practically mirrors the House Report’s paragraph excluding market surveys from telephone solicitations absent evidence of a prohibited solicitation.”).

that such a “purpose” exists.¹⁷⁵ For example, in 2016, Comprehensive Health Care Systems Of The Palm Beaches, Inc. (Comprehensive), a chiropractic clinic West Palm Beach, Florida, filed a TCPA class action case against market research firm M3 USA Corporation (M3).¹⁷⁶ Comprehensive’s lawsuit was based on the receipt of a single survey invitation, sent by fax message, which Comprehensive alleged constituted an advertisement, even though the fax *did not* market goods or services.¹⁷⁷ Indeed, the fax stated that the recipient “will not be solicited because of your participation in this study. There are NO sales or endorsements associated with this study.”¹⁷⁸

After twice granting Comprehensive leave to amend its complaint,¹⁷⁹ the court denied M3’s motion, concluding that because M3’s terms of use and privacy policy informed respondents their information could be shared with third parties who may advertise to the respondents, the survey invitations were therefore mere “pretexts” to advertisements under the relevant FCC rules.¹⁸⁰ This was, at best, a liberal reading of the Commission’s prior rulings. In reality, these types of activities are routinely conducted by legitimate market research and analytics firms of the kind traditionally protected by the Commission.¹⁸¹ For example, surveys may include a reference to a corporate client in a survey question, or market research firms may share respondents’ information (provided that the respondents give consent) with parties who might, in the future, advertise to the respondents.¹⁸²

175. See Complaint, Comprehensive Health Care Systems of the Palm Beaches, Inc. v. M3 USA Corporation, No. 16-cv-80967 (S.D. Fla. June 10, 2016) [hereinafter *Comprehensive Complaint*] (analyzing a TCPA class action against a market research firm).

176. *Id.* The case was originally filed on May 31, 2016, captioned *Comprehensive Health Services, Inc. v. M3 USA Corporation*, No. 16-cv-80874 (S.D. Fla. June 10, 2016). On March 20, 2017, M3 filed a petition for declaratory ruling with the Commission seeking clarification on the Commission’s junk fax rules. In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Mar. 20, 2017) [hereinafter *M3 Petition*].

177. See *Comprehensive Complaint*, *supra* note 175, at 3–4, Exhibit A (discussing the nature of the fax).

178. See *id.*, Exhibit A (presenting the fax).

179. See *M3 Petition*, *supra* note 176, at 5–6 (reviewing the ACA petition); *Insights Petition*, *supra* note 146, at 21.

180. See Order on Defendants’ Motion to Dismiss and Motion to Stay, Comprehensive Health Care Sys. of the Palm Beaches, Inc. v. M3 USA Corp., 232 F. Supp. 3d 1239, 1243–44 (S.D. Fla. Jan. 11, 2017) (stating the court’s denial of M3’s motion).

181. See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd. 8752, 8774, ¶ 41 (1992) [hereinafter *1992 Order*] (stating, “[w]e find that the exemption for non-commercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, market surveys, political polling or similar activities which do not involve solicitation as defined by our rules.”); In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 17 FCC Rcd. 17459, 17478, ¶ 30 (2002) (“Therefore, the Commission determined that calls conducting research, market surveys, political polling, or similar activities which do not involve solicitation as defined by the rules are exempt from the prohibition on prerecorded messages.”); *2003 Order*, *supra* note 18, at 14089 n.414, ¶ 128 (“We again reiterate that calls that do not fall within the definition of ‘telephone solicitation’ as defined in section 227(a)(3) will not be precluded by the national do-not call list. These may include calls regarding surveys, market research, and calls involving political and religious discourse.”); *2012 Order*, *supra* note 48, at 1842, ¶ 128 (exempting “research or survey calls” from telemarketing definition); *2015 Order*, *supra* note 12, at 8038 n.543, ¶ 160 (“We recognize the concern of MRA that consumers who use blocking technology will not only block unlawful robocalls but ‘will potentially block all manner of non-telemarketing telephone calls, including calls for survey, opinion and marketing research purposes.’”).

182. *Insights Petition*, *supra* note 147, at 21–22.

Nevertheless, by allowing plaintiffs to comb through a defendant's ancillary documents and web pages for some link to advertising, the *M3* court's ruling goes a step further than anything the Commission has allowed and is another example of how the plaintiffs' bar exploits ambiguities in the TCPA.¹⁸³

1. *Solution: Reasonably Limit the Bounds of a "Communication"*

In order to better focus courts' analysis of this question, the Commission should rule that the inclusion in a communication, or some other ancillary document or webpage, of a marginal element that might somehow be considered advertising does not make the communication a "dual-purpose" communication. To this end, it would not be necessary to limit courts to the "four corners" of a communication to determine whether it constitutes telemarketing.¹⁸⁴ Although the TCPA's "advertisements" and "telemarketing" definitions imply a contemporaneousness element—that is, they appear to contemplate advertising goods and services, or encouraging the purchase or rental of goods and services, during the communication—the Commission has recognized, for example, that "[o]ffers for free goods or services that are part of an overall marketing campaign to sell property, goods, or services constitute [advertisements]," and that, in the context of facsimile messages, "any surveys that serve as a pretext to an advertisement are subject to the TCPA's facsimile advertising rules."¹⁸⁵

Nevertheless, that does not mean plaintiffs should be allowed to comb through a defendant's ancillary documents and web pages for some link to advertising, either. In that way, the *M3* court's ruling goes a step further than anything the Commission has allowed.¹⁸⁶ This kind of thinking should be corrected.

D. *What is "Consent"?*

Unlike "telemarketing" and "automatic telephone dialing system," the text of the TCPA is silent on what constitutes "prior express consent."¹⁸⁷ As discussed above, the FCC regulations include an additional requirement that, for telemarketing calls to landlines and any non-emergency calls to wireless phones, consent must be written.¹⁸⁸ Under the FCC's rules, the consent must be:

sufficient to show that the consumer: (1) received "clear and conspicuous disclosure" of the consequences of providing the requested consent, *i.e.*, that the consumer will receive future calls that

183. *See id.* at 22–23 n.73 (stating "October 6, 2017, the district court granted *M3* a stay in the above-referenced case pending the Commission's decision on the petition").

184. *See id.* at 22 (reviewing what "telemarketing" is).

185. *Junk Fax Order*, *supra* note 143, at 3814–15.

186. *See id.* (noting that the Commission does not mention documents other than the faxed messages when dealing with the facsimile advertising rules).

187. *See* 47 U.S.C. §§ 227(b)(1)(A), (B) (2018) (stating the restrictions on use of automated telephone equipment); *see also* 2012 *Order*, *supra* note 48, at 1838, ¶ 21 (stating that "[a]s an initial matter, we note that the TCPA is silent on the issue of what form of express consent—oral, written, or some other kind—is required for calls that use an automatic telephone dialing system or prerecorded voice to deliver a telemarketing message.").

188. 47 C.F.R. §§ 64.1200(a)(1), (a)(2) (2018).

deliver prerecorded messages by or on behalf of a specific seller; and (2) having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates.¹⁸⁹

In addition, the consent must be signed.¹⁹⁰ The Commission has also ruled that “the written agreement must be obtained ‘without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service,’”¹⁹¹ and that should “any question about the consent arise, the seller will bear the burden of demonstrating that a clear and conspicuous disclosure was provided and that unambiguous consent was obtained.”¹⁹² As the D.C. Circuit noted in *ACA International*, it is “undisputed” that parties are entitled to revoke any consent previously given, but “[t]he statute, however, does not elaborate on the process by which consumers may validly do so.”¹⁹³

The question of how consent may be revoked, in particular, has been troublesome, requiring considerable counsel from circuit courts prior to *ACA International*.¹⁹⁴ In *Gager v. Dell Fin. Servs., LLC*,¹⁹⁵ for example, the plaintiff argued that she had revoked her consent to receive autodialer calls to her cell phone by sending a letter, through regular mail, asking Dell to stop calling her regarding her account.¹⁹⁶ The letter did not indicate the number was for a cellular phone.¹⁹⁷ In finding for the plaintiff, the Third Circuit concluded that “the TCPA’s silence as to revocation should not be seen as limiting a consumer’s right to revoke prior express consent.”¹⁹⁸ Citing the *Gager* case, the Eleventh Circuit held in *Osorio v. State Farm Bank, F.S.B.*,¹⁹⁹ that the question of whether the plaintiff, a State Farm customer with nearly \$8,000 in overdue bills, revoked consent to receive autodialed calls “should proceed to a jury.”²⁰⁰ However, in *Reyes v. Lincoln Automotive Financial Services*,²⁰¹ the Second Circuit held that, the FCC’s guidance notwithstanding, the plaintiff could *not* revoke consent where consent “was included as an express provision of a contract.”²⁰² At least one court has rejected the FCC’s guidance on consent altogether on the grounds

189. 2012 Order, *supra* note 48, at 1845, ¶ 33.

190. *Id.*

191. *Id.* (quoting 16 C.F.R. § 310.4(b)(v)(A)(ii)). At the request of various petitioners, the FCC adopted consent rules mirroring those already adopted by the Federal Trade Commission in connection with the Telemarketing Sales Rule, which “requires telemarketers to make specific disclosures of material information; prohibits misrepresentations; sets limits on the times telemarketers may call consumers; prohibits calls to a consumer who has asked not to be called again; and sets payment restrictions for the sale of certain goods and services.” *Telemarketing Sales Rule, Rule Summary*, FED. TRADE COM., <https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/telemarketing-sales-rule>.

192. 2012 Order, *supra* note 48, at 1845, ¶ 33.

193. *ACA Int’l v. FCC*, 885 F.3d 687, 709 (D.C. Cir. 2018).

194. *See, e.g., Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014) (adopting the Third Circuit’s reasoning and holding that the plaintiff in that case, who had consented to receive calls from the defendant in an application for auto insurance, could revoke her consent). *But see Osorio*, 746 F.3d at 1261 (reversing and remanding the case back to lower court).

195. *LLC*, 727 F.3d 265 (3d Cir. 2013).

196. *Id.* at 267.

197. *Id.*

198. *Id.* at 270.

199. *Osorio*, 746 F.3d at 1252.

200. *Id.* at 1256.

201. 861 F.3d 51, 57 (2d Cir. 2017).

202. *Id.*

it conflicts with the TCPA's text.²⁰³ In *Mais v. Gulf Coast Collection Bureau, Inc.*,²⁰⁴ a Florida district court ruled that the "[d]efendants' consent argument upon which they seek summary judgment is based on the 2008 FCC Ruling[,] [a]nd because Defendants' argument, like the 2008 FCC Ruling, is *inconsistent with the statute's plain language*, the Court rejects it."²⁰⁵

This is another problematic area where the FCC's 2015 Order has only made matters worse. The Commission concluded that a consumer may revoke consent previously given to receive autodialed calls and text messages, which was a fair enough position,²⁰⁶ but rather than establishing rules for how such a revocation must be given, the Commission ruled that a consumer could do so "using any reasonable method."²⁰⁷ In other words, rather than setting clear guidelines, so that court rulings could more easily be harmonized, and businesses and litigators could have a better idea at the outset whether a TCPA suit is likely to be successful, the Commission instituted a regime whereby the only way to determine finally, for litigation purposes, whether a consumer has revoked consent using "reasonable" means is to allow the question to proceed all the way to a jury.²⁰⁸

Unfortunately, the *ACA International* court left the Commission's revocation guidance from 2015 intact, declining to find the "any reasonable means" rule arbitrary and capricious.²⁰⁹ The court began by noting that the Commission explicitly denied the petitioners' request to "clarify that callers can unilaterally prescribe the exclusive means for consumers to revoke their consent."²¹⁰ The court also expressly noted that, in assessing whether a revocation request meets the "reasonable means" standard, the Commission would consider "the totality of the facts and circumstances," including the relevant factors of "whether the caller could have implemented mechanisms to effectuate a requested revocation without incurring undue burdens," and "whether the consumer had a reasonable expectation that he or she could effectively communicate his or her request . . . in that circumstance."²¹¹ Ultimately, the court found this guidance sufficient to pass "arbitrary and capricious" review and rejected the petitioners' concerns that in the absence of

203. *Mais v. Gulf Coast Collection Bureau, Inc.*, 944 F. Supp. 2d 1226 (S.D. Fla. 2013).

204. *Id.* at 1239.

205. *Id.* 1226 (emphasis added). The district court's ruling was later overturned by the Eleventh Circuit. *See Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014) ("The district court exceeded its jurisdiction by declaring the 2008 FCC Ruling to be inconsistent with the TCPA.").

206. *2015 Order*, *supra* note 12, at 7993–94, ¶ 56.

207. *Id.* at 7996, ¶ 64.

208. *See* Joint Brief for Petitioners at 55, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (No. 15-1211) [hereinafter *ACA Brief*] (describing application of the TCPA as pure "guesswork"); *see also* *Almay, Inc. v. Califano*, 569 F.2d 674, 682–83 (D.C. Cir. 1977) (deciding that an agency's regulation is arbitrary and capricious if compliance with it would be unworkable); *see also* *Wedgewood Village Pharmacy v. DEA*, 509 F.3d 541, 552 (D.C. Cir. 2007) (rejecting agency ruling as "unworkable for veterinary practice"); *see also* *N.Y. State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 109 (2d Cir. 1996) (setting aside safety standard because it imposed a "patently unworkable burden on employers").

209. *See* *ACA Int'l v. FCC*, 885 F.3d 687, 709 (D.C. Cir. 2018) ("Allowing 'callers to designate the exclusive means of revocation,' the Commission believed, could 'materially impair' the 'right of revocation.'" (quoting *2015 Order*, *supra* note 12, at 7997, ¶ 66)).

210. *Id.* at 709.

211. *Id.* (quoting *2015 Order*, *supra* note 12, at 7996 n.233, ¶ 64).

standardized revocation procedures callers could “ward off TCPA liability only by ‘tak[ing] exorbitant precautions.’”²¹²

However, in the absence of additional guidance from the Commission beyond the vague “reasonableness” standard, businesses and courts, as illustrated by the cases above, will continue to struggle with the consent question.²¹³ As with the other ambiguities discussed herein, confusion and conflicts—not only between courts but at times, as in *Mais*, between courts and the FCC—creates uncertainty which serves to raise the price of TCPA litigation without offering any meaningful benefit to consumers.²¹⁴ As the ILR has explained, “[a] circuit court of appeals may issue a ruling on a new question [favorable to plaintiffs] . . . and suddenly new lawsuits based on that court’s interpretation follow,” but when a ruling favorable to defendants comes down, “new litigation that would be impacted by that ruling simply tends to be filed in district courts in circuits where it can be argued that the prior ruling need not be followed.”²¹⁵

1. *Solution: Issue Definitive Revocation Guidelines*

In addition to the solutions discussed above, the Commission should also proffer clear, useful guidance around the revocation of consent, rather than leaving it at a “reasonableness” standard which leaves the question for juries.²¹⁶ As discussed above, *ACA International* merely held that the Commission’s “any reasonable means” rule was not arbitrary or capricious, and indeed contrasted that rule with a situation which marks the other extreme: where each caller can unilaterally prescribe exclusive means for consumers to revoke their consent.²¹⁷ Nothing prevents the Commission from carving out a middle ground, as petitioners suggested in 2015, and promulgating standards which are both fair to consumers and provide businesses with much-needed clarity.²¹⁸ There are any number of possibilities here. For example, the Commission could require that all companies provide consumers with an online portal where they could grant and revoke consent to receive autodialed calls and text messages, mandate that any revocation of consent becomes effective within, say, seven days of a consumer’s indication of revocation on the portal, and place an affirmative obligation on companies to regularly check those lists and place calls.

212. *Id.* at 709 (citing *ACA Brief*, *supra* note 208, at 57) (“We think petitioners’ concerns are overstated. The Commission’s ruling absolves callers of any responsibility to adopt systems that would entail ‘undue burdens’ or would be ‘overly burdensome to implement.’” (quoting *2015 Order*, *supra* note 12, at 7996 n.233, ¶ 64)).

213. *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51 (2d Cir. 2017); *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014); *see Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265 (3d Cir. 2013) (providing an example of this application).

214. *See Litigation Sprawl*, *supra* note 58, at 1–4, 16 (describing the uncertainty and the “expense and burden” of TCPA litigation).

215. *Id.* at 2.

216. Lauren Maynard, *TCPA Update: The state of the law on revoking consent to call*, NIXON PEABODY (May 16, 2018), <http://web20.nixonpeabody.com/tcpa/Lists/Posts/Post.aspx?ID=184&Name=TCPA%20Update%3A%20The%20state%20of%20the%20law%20on%20revoking%20consent%20to%20call>.

217. *ACA Int’l v. FCC*, 885 F.3d 687, 709 (D.C. Cir. 2018).

218. *ACA Brief*, *supra* note 208, at 79–81.

E. Who is a “Called Party”?

The TCPA provides that “it shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the *called party*)” to the above-referenced categories of calls.²¹⁹ The critical ambiguity lurking in the foregoing text is not obvious: whether the “called party” is the *intended* recipient of a communication, or the *actual* recipient.²²⁰ However, because this question implicates not only whether the person called has given consent, but whether the intended recipient is a landline or a wireless number (thus heightening consent requirements), it is tremendously important.

As with the autodialer and consent definitions, the FCC has again gone in the wrong direction. In 2015, the Commission ruled as follows:

We find that the “called party” is the subscriber, i.e., the consumer assigned the telephone number dialed and billed for the call, or the non-subscriber customary user of a telephone number included in a family or business calling plan. Both such individuals can give prior express consent to be called at that number. Thus, with the limited exception discussed below, calls to reassigned wireless numbers violate the TCPA when a previous subscriber, not the current subscriber or customary user, provided the prior express consent on which the call is based.²²¹

In justifying this conclusion, the Commission cited the “structure” of the TCPA—specifically the fact that several of the statute’s provisions discuss as critical the party who was “charged” for the call.²²² One problem with this justification is obvious: how consumers are typically charged for wireless calls has changed dramatically since the TCPA was first passed from variable per-minute or per-message fee schedules to arrangements closer to fixed cost

219. 47 U.S.C. § 227(b)(1)(A) (2018) (emphasis added); *see also* 47 C.F.R. § 64.1200(a)(1) (2018) (“No person or entity may: (1) Except as provided in paragraph (a)(2) of this section, initiate any telephone call (other than a call made for emergency purposes or is made with the prior express consent of the *called party*)”) (emphasis added).

220. 2015 *Order*, *supra* note 12, at 8001, ¶ 74 (“As a threshold matter, we find the term ‘called party’ to be ambiguous for TCPA purposes. The statute does not define ‘called party,’ nor does it include modifiers such as ‘intended’ that would clarify its meaning in the way that Petitioners urge.”).

221. 2015 *Order*, *supra* note 12, at 8000–01, ¶ 73.

222. *Id.* at 8001, ¶ 74. The Commission explained as follows:

We find support in the structure of the TCPA, however, for interpreting “called party” as the subscriber and customary users. Specifically, the TCPA restriction on autodialed, artificial-voice, or prerecorded-voice calls to wireless numbers applies, *inter alia*, to “any service for which the called party is charged for the call.” In a separate provision, the TCPA allows the Commission to exempt calls from the consent requirement if the called party is not charged, subject to conditions to protect consumer privacy. Thus, “called party” is best understood to mean the subscriber to whom the dialed wireless number is assigned because the subscriber is “charged for the call” and, along with a non-subscriber customary user, is the person whose privacy is interrupted by unwanted calls.

Id.

structures.²²³ Indeed, one study in 2015 estimated that nearly 90% of Americans now have unlimited text messaging.²²⁴ Moreover, popular messaging services such as WhatsApp and iMessage (standard on iPhones) do not even function as standard SMS messaging systems, charging per text, but instead do not cost users unless they exceed their monthly data limits, and do not implicate a user's data plan at all if used via Wi-Fi networks.²²⁵ The upshot is that for the vast majority of consumers monthly cell phone bills do not fluctuate wildly (if at all), based on how many calls and texts are placed or received.²²⁶ Not surprisingly, the average monthly cell phone bill in the U.S. has actually *decreased* 22% since 1993.²²⁷

The Commission's guidance also oversimplifies the question of reassigned numbers.²²⁸ Despite the fact that approximately 37 million wireless numbers are reassigned in the U.S. every year, the FCC's guidance proceeds as if the matter simply requires businesses to make note that a number has been reassigned, and not make the same mistake again.²²⁹ As ACA International has argued to the D.C. Circuit, "[t]his approach prevents callers from reasonably relying on their customers' consent[,] [i]t makes an empty promise of Congress's assurance that callers may lawfully contact willing recipients, and it chills constitutionally protected expression."²³⁰ Although the Commission did, however, provide businesses with a one-call "safe harbor," whereby they can avoid liability for the first call to a reassigned wireless number,²³¹ this is cold comfort for businesses, who risk massive TCPA liability if their procedures for dealing with reassigned numbers is not airtight.²³²

223. See, e.g., Josh Zagorsky, *Almost 90% of Americans Have Unlimited Texting*, INSTANT CENSUS (Dec. 8, 2015), <https://instantcensus.com/blog/almost-90-of-americans-have-unlimited-texting> (explaining the rise in unlimited fixed-cost texting plans).

224. *Id.*

225. See, e.g., Leslie Walker, *The 10 Best Mobile Messaging Apps*, LIFEWIRE, <https://www.lifewire.com/best-mobile-messaging-apps-2654839> (last updated July 25, 2018) (explaining the variety of messaging apps available for mobile such as WhatsApp and Viber).

226. See Zagorsky, *supra* note 223 (explaining that the odds are "nearly 90% that any given U.S. cellphone number has unlimited texting.")

227. *Average Local Monthly Bill for Mobile Wireless Services in the U.S. From 1993 to 2009 (in U.S. dollars)*, STATISTA, <https://www.statista.com/statistics/184696/average-local-monthly-bill-for-mobile-wireless-services-in-the-us> (last visited Oct. 12, 2018).

228. See *ACA Brief*, *supra* note 208, at 59 (discussing liability for calling reassigned numbers).

229. See Bob Traylor, *37 Million Cells Were Reassigned Last Year—So Verify Mobile Numbers for TCPA Compliance*, DO-NOT-CALL PROTECTION (Oct. 29, 2015), <http://www.donotcallprotection.com/blog/numbers-reassigned-scrub-right-party-verification-permission-consent-calls> (discussing 37 million reassigned cell phone numbers).

230. *ACA Brief*, *supra* note 208, at 10.

231. *2015 Order*, *supra* note 12, at 8009, ¶ 89 ("We therefore agree with United that we should find a middle ground where the caller would have an opportunity to take reasonable steps to discover reassignments and cease such calling before liability attaches. We disagree, however, that callers should be permitted up to a year to discover reassignments before facing liability. We conclude that giving callers an opportunity to avoid liability for the first call to a wireless number following reassignment strikes the appropriate balance.")

232. *ACA International* explained in its brief to the D.C. Circuit as follows:

"No matter what a caller does, then, it cannot escape the probability that it will call reassigned numbers. DIRECTV, for instance, has gone to great lengths to avoid calling reassigned numbers. It requires customers to "maintain and promptly update" their contact information, and it provides a 24/7 toll-free number for them to do so. When handling changes to a customer's account, DIRECTV's representatives verify the customer's phone number, and automated programs carry any changes throughout DIRECTV's systems. And if a customer calls from an unrecognized

1. *Solution: Define “Called Party” as the “Intended” Recipient*

The Commission should define a “called party” as the intended (not actual) recipient of a communication, so that businesses are not punished for good faith, accidental calls to the wrong individuals. As Commissioner Pai rightly explained:

Interpreting the term “called party” to mean the expected recipient—that is, the party expected to answer the call—is by far the best reading of the statute. 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.²³³

As discussed above, and as the FCC has repeatedly acknowledged, the purpose of the TCPA was to balance “[i]ndividuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade.”²³⁴ This balance is only struck appropriately by punishing intentional bad behavior, rather than creating a game of “gotcha” for legitimate businesses.²³⁵

F. *Who “Initiates” a Call?*

Finally, who “initiates” a call, and the question of vicarious liability (that is, whether a party that did not *literally* initiate a call can also be liable), has also created confusion and helped convert the TCPA from a well-intentioned consumer protection statute into a cash grab tool for the plaintiffs’ bar.²³⁶ As discussed above, the TCPA regulations provide that “[n]o person or entity may . . . *initiate* any telephone call . . . using an automatic telephone dialing system or an artificial or prerecorded voice”²³⁷ to a wireless number without prior express consent, or “*initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing using an automatic telephone dialing system*”²³⁸ without the prior express written consent of the called party. Similarly, the TCPA’s do-not-call regulations prohibit “sellers” from making telephone solicitations to numbers on the Do-

number, DIRECTV’s representative asks if the customer’s number has changed. Despite these steps, DIRECTV faces multiple class-action lawsuits from individuals holding reassigned numbers, some of whom never even answered DIRECTV’s call. DIRECTV is not alone.”

ACA Brief, *supra* note 208, at *60–61 (citing comments of DIRECTV, at 6–10, and Abercrombie & Fitch Co. and Hollister Co. at 2, filed with the FCC on Mar. 10, 2014, and May 13, 2015, respectively).

233. *Pai Dissent*, *supra* note 114, at 8078.

234. *2015 Order*, *supra* note 12, at 7964, ¶ 2; *see also 2012 Order*, *supra* note 48, at 1839, ¶ 24 (“[I]ndividuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals yet permits legitimate telemarketing practices.”).

235. *Id.*

236. *See, e.g.*, 47 C.F.R. § 64.1200(a)(1) (explaining the use of the word “initiate” in the regulations.); *see also* Evershed Sutherland (US) LLP, *Who’s Calling? Standards for Third-Party Liability Under the TCPA*, LEXOLOGY (Aug. 14, 2018), <https://www.lexology.com/library/detail.aspx?g=3d7d6d7b-ddf2-4824-b221-0e3f511e175d> (“TCPA cases often implicate issues of vicarious liability when a third-party initiated the communications on behalf of another party.”).

237. 47 C.F.R. § 64.1200(a)(1) (emphasis added).

238. 47 C.F.R. § 64.1200(a)(2) (emphasis added).

Not-Call” list kept by the Federal Trade Commission (FTC).²³⁹ The FCC Rule defined a “seller” as “the person or entity *on whose behalf* a telephone call or message is initiated for the purpose of encouraging the purchase or rental of . . . goods, or services, which is transmitted to any person.”²⁴⁰

Because, in practice, businesses often hire third parties to communicate with consumers for traditional telemarketing, research, or even customer service purposes, this is another important ambiguity in the TCPA text and regulations. If the do-not-call restrictions more clearly provide for vicarious liability (that is, they expressly identify parties making calls “on behalf” of another), what about the telemarketing restrictions, which do not have such language? If a third-party, independent contractor or agent “initiates” a call, and runs afoul of the TCPA, is the business also liable? As with “consent,” the TCPA is silent on the definition of “initiate.”²⁴¹

In its 2013 *Dish Network* decision, the Commission addressed the vicarious liability question at the request of two federal courts with cases pending at the time.²⁴² In *Charvat v. EchoStar Satellite, LLC*,²⁴³ the plaintiff argued that the telemarketers had placed 30 calls to him in violation of the TCPA, attempting to sell him subscriptions to EchoStar satellite television programming.²⁴⁴ Defendant EchoStar moved for summary judgment, arguing it could not be held liable because the calls had been placed by its independent contractors.²⁴⁵ On appeal, the Sixth Circuit determined that, “[a]t the heart of this case . . . is the question whether the [TCPA] and its accompanying regulations permit Charvat to recover damages from EchoStar, an entity that did not place any illegal calls to him,”²⁴⁶ requesting guidance from the Commission.²⁴⁷ Likewise, in *United States v. DISH Network, LLC*,²⁴⁸ the plaintiff alleged that DISH Network was liable for unlawful calls placed by various of its “authorized dealers.”²⁴⁹ Denying DISH Network’s motion to dismiss, which argued that its independent dealers were not calling on its “behalf,” the court found that the motion “turn[ed] on the meaning of the phrase ‘on whose behalf’ or ‘on behalf of,’” and ordered the parties to file petitions with the FCC asking for clarity.

In response to these requests for clarity, the Commission’s 2013 *Dish Network* ruling held that “while a seller does not generally ‘initiate’ calls made through a third-party telemarketer within the meaning of the TCPA, it nonetheless may be held vicariously liable . . . for violations . . . committed by

239. 47 C.F.R. § 64.1200(c) (“No person or entity shall initiate any telephone solicitation to: . . . (2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the Federal Government.”).

240. 47 C.F.R. § 64.1200(f)(9) (emphasis added).

241. In re Joint Petition filed by Dish Network, LLC, 28 FCC Rcd. 6574, 6582, ¶ 24 (2013) [hereinafter *Dish Network Decision*] (“The statute defines neither ‘initiate,’ nor the phrase ‘on behalf of.’”).

242. *Id.* at 6577–79; see also *Insights Petition*, *supra* note 147, at 23–25.

243. 630 F.3d 459, 461–62 (6th Cir. 2010).

244. *Id.*

245. *Id.* at 465.

246. *Id.*

247. *Id.* at 468.

248. 667 F. Supp. 2d 952 (C.D. Ill. 2009).

249. *Id.* at 955.

third party telemarketers.”²⁵⁰ Specifically, the Commission reasoned that, “[w]hile section 227(b) does not contain a provision that specifically mandates or prohibits vicarious liability, we clarify that the prohibitions contained in section 227(b) incorporate the federal common law of agency and that such vicarious liability principles reasonably advance the goals of the TCPA.”²⁵¹ In other words, despite any indication that Congress intended the TCPA to extend in this way, and as with the ambiguities discussed above, the FCC has adapted to changes in business practices by extending the TCPA’s reach.

Moreover, despite the Commission’s order in *Dish Network* being clearly limited to telemarketing calls, courts have stretched this guidance and held that vicarious liability *also* extends to non-sellers and non-telemarketers. For example, in *Mey v. Venture Data, LLC*,²⁵² a West Virginia district court ruled that the Commission’s reasoning “applies equally to non-telemarketing violations of the TCPA,” noting that “the FCC never expressly limited its ruling to telemarketing calls.”²⁵³ Despite the Commission’s rejection of the view that the TCPA “necessarily provides for a single standard of third-party liability,”²⁵⁴ the court held that it would be “absurd . . . should some TCPA violators be held vicariously liable for their TCPA violations, while others skate.”²⁵⁵

1. *Solution: Limit Dish Network to Telemarketers*

In fact, far from being “absurd,” the decision in *Mey* is at odds with both the text of the *Dish Network* decision and the Commission’s prior rulings, which institute different vicarious liability regimes for different categories of entities. In 1995, the Commission stated that its “rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations. Calls placed by an agent of the *telemarketer* are treated as if the *telemarketer* itself placed the call.”²⁵⁶ The Commission reiterated this understanding in 2005: “We take this opportunity to reiterate that a company on whose behalf a telephone solicitation is made bears the responsibility for any violation of our telemarketing rules and calls placed by a third party on behalf of that company are treated as if the company itself placed the call.”²⁵⁷ Finally, addressing vicarious liability with respect to debt collectors and creditors in 2008, the Commission stated that “[c]alls placed by a third party collector on behalf of that creditor are treated as if the creditor itself placed the call.”²⁵⁸

250. *Dish Network Decision*, 28 FCC Rcd. at 6593, ¶ 48.

251. *Id.* at 6588, ¶ 35.

252. 245 F.Supp. 3d 771 (N.D. W.Va. 2017).

253. Order on Motion for Summary Judgement at *11, *Mey v. Ventura Data, LLC*, 245 F. Supp. 3d 771 (N.D. W.Va. Sept. 9, 2014) (No. 5:14-cv-123) [hereinafter *May Order*].

254. *Dish Network Decision*, 28 FCC Rcd. at 6586, ¶ 32.

255. *May Order*, *supra* note 253, at *11.

256. In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 10 FCC Rcd. 12391, 12397, ¶ 13 (1995) (emphasis added).

257. Request of State Farm Mut. Auto. Ins. Co. for Clarification and Declaratory Ruling, 20 FCC Rcd. 13664, 13667, ¶ 7.

258. *ACA Declaratory Ruling*, *supra* note 103, at 565, ¶ 10.

In each of these decisions, the Commission could have explained that vicarious liability applies to all principal-agent relationships, but the Commission declined to impose vicarious liability outside of the telemarketing and debt-collection contexts. Nevertheless, and consistent with the above ambiguities, the *Mey* decision illustrates how easily TCPA rules and regulations can be manipulated and expanded, without any discernible tether to the text or original intent of the legislation—and without any benefit which does not accrue primarily to plaintiffs’ attorneys. Accordingly, the Commission should clarify that the liability regime as articulated in *Dish Network* only applies to telemarketers.

V. OTHER SUGGESTED SOLUTIONS

A. *Refocus Enforcement Efforts on Truly “Bad” Actors*

Aside from the solutions discussed above, which focus on the various critical ambiguities in the TCPA, the FCC should more generally shift its focus from policing autodialers and robocalls generally (and in such a way that large numbers of well-intentioned, legitimate businesses are subject to the ever-present fear of TCPA liability), to truly “bad” actors who intentionally violate the TCPA, or operate off-shore or “fly-by-night” operations.

For example, by shifting focus to the Do-Not-Call registry, the FCC could better police companies with lax practices, who do not bother checking the registry, or are the kind of companies who would intentionally disregard the registry altogether.²⁵⁹ As noted by Commissioner Pai in his dissent to the 2015 Order, complaints related to the Do-Not-Call list “made up almost 40% of consumer complaints in [the FCC’s] latest report—and the number of complaints jumped dramatically last year from 19,303 in the first quarter to 34,425 in the third.”²⁶⁰ This is an area where punishing bad actors, and honoring consumer wishes, is a much more cut and dried task.²⁶¹ As Commissioner Pai rightly explained, “[t]he TCPA’s private right of action and \$500 to \$1,500 statutory damages award per call could incentivize plaintiffs to go after the illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters. However, trial lawyers have found legitimate, domestic businesses a much more profitable target.”²⁶²

Similarly, empowering the government to go after truly bad actors would be a more effective (and less costly) means of protecting consumers than granting the plaintiffs’ bar unfettered power through the TCPA’s private right of action, “strict liability” standard, and statutory damages.²⁶³ A 2015 survey of U.S. smartphone users conducted by cloud-based telecommunications company YouMail found that, “at least one-third of Americans get a spam call every day

259. *Pai Dissent*, *supra* note 114, at 8073.

260. *Id.* at 8072.

261. *Id.* at 8079.

262. *Id.* at 8072.

263. *Juggernaut*, *supra* note 68.

and nearly two-thirds waste time dealing with them.”²⁶⁴ But, many of these calls come from illegitimate, offshore companies who, because of Voice over Internet Protocol (VoIP) networks, can make robocalls so cheaply that even the most amateur high-volume calling scams can be profitable.²⁶⁵ The reality is, under the present regulatory regime, these scammers, who are largely responsible for the high volume of unwanted calls, have little fear of paying a price for their conduct.²⁶⁶ Moreover, even when such companies are sued, they often have few traceable assets to collect against.²⁶⁷ In addition to the FCC, the FTC could also be further empowered to pursue these bad actors.²⁶⁸

Relatedly, the government could fund, empower, and even partner with private companies to improve technology offerings to consumers which block unwanted autodialed calls and robocalls.²⁶⁹ Mobile applications like Robokiller, for example, not only block fraudulent numbers, they also (hilariously) turn the table on spammers by answering the phone with a robot, whose only aim is wasting the spammer’s time by tricking the scammer into a pointless conversation.²⁷⁰ Similarly, the Nomorobo system, winner of a contest funded by the FTC, intercepts calls before they reach consumer cell phones and compares the numbers with the FTC’s blacklist of robocallers.²⁷¹ Numbers on the blacklist are blocked, and those that are not are put through a CAPTCHA protocol.²⁷² Along with Nomorobo, Consumer Reports has recommended three other robocall blockers.²⁷³

264. Alex Quilici, *Time to Shut Down Robocalls*, CNBC (June 15, 2015, 1:42 PM), <https://www.cnn.com/2015/06/15/time-to-shut-down-robocalls-commentary.html>; see also *The YouMail Spam Calling Survey*, YOUMAIL, <https://blog.youmail.com/2015/04/the-youmail-spam-calling-survey> (last visited Oct. 12, 2018) (giving more descriptive results of the survey).

265. Quilici, *supra* note 264; see also Marguerite Reardon, *Why am I Getting so Many Robocalls?*, CNET (July 19, 2017, 10:45 AM), <https://www.cnet.com/news/robocalls-telemarketing-consumer-protection-fcc-do-not-call> (describing the reasons why robocalls have become an easy and attractive method for scammers); Andrew Tarantola, *How to Stop Robocalls Once and For All*, GIZMODO (Mar. 30, 2013, 11:00 AM), <https://gizmodo.com/5992682/how-to-stop-robocalls-once-and-for-all> (illustrating the commonality of robocalls).

266. See Reardon, *supra* note 265 (providing a few possible reasons why scammers continue to robocall).

267. See *Robocalls Keep Coming!*, CONSUMERSUNION, <https://consumersunion.org/end-robocalls/problems> (last visited Oct. 10, 2018) (stating that the FTC has collected less than nine percent of fines for violating the Do-Not-Call list).

268. See Harper Neidig, *FCC Approves Rules Allowing Phone Companies to Block Robocalls*, THE HILL (Nov. 16, 2017, 12:07 PM), <http://thehill.com/policy/technology/360684-fcc-approves-rules-allowing-phone-companies-to-block-robocalls> (describing how in late 2017, under the leadership of now-Chairman Pai, the FCC took a step in the right direction, allowing service providers to proactively block robocalls from fraudulent numbers).

269. See generally *Introducing Answer Bots: The Solution to (Really) Stop Unwanted Calls*, ROBOKILLER (July 20, 2017), <https://www.robokiller.com/blog/stop-unwanted-calls> (giving an example of a private company offering consumers a manner in which to block unwanted and robocalls).

270. *Id.*; see *How to Stop Unwanted Calls*, ROBOKILLER (Aug. 29, 2017), <https://www.robokiller.com/blog/how-to-stop-unwanted-calls> (stating that RoboKiller is the best solution to blocking unwanted calls).

271. Francie Diep, *Three Smart New Ways to Actually Block Robocalls*, POPULAR SCI. (Apr. 2, 2013), <https://www.popsci.com/technology/article/2013-04/three-smart-new-ways-actually-block-robocalls>.

272. *Id.*; see *CAPTCHA: Telling Humans and Computers Apart Automatically*, CARNEGIE MELLON U., <http://www.captcha.net> (“CAPTCHA” stands for “Completely Automated Public Turing Test To Tell Computers and Humans Apart.”).

273. *Robocall Blocker Review: Is There Any Way to Eliminate those Maddening Calls?*, CONSUMER REP. (Aug. 14, 2015, 2:00 PM), <https://www.consumerreports.org/cro/magazine/2015/07/robocall-blocker-review/index.htm>.

B. Proposed Amendment to the TCPA

Additionally, and as an alternative to some of the regulatory suggestions above, the text of the TCPA itself is long overdue for an update.²⁷⁴ As discussed in this article, telephone technology and the business practices of telemarketers, researchers, and others have changed drastically in the nearly thirty years since the TCPA was first passed.²⁷⁵ In 1990, the year before the TCPA was passed, it cost \$6,000 to purchase just one percent of the processing speed, and just 0.1% of the storage, that one can purchase today in a \$185 iPhone.²⁷⁶ This makes dialing massive amounts of numbers easier than ever.²⁷⁷ More importantly, the ease with which dialing systems may toggle back and forth between autodialers and non-autodialers has rendered the central concept in the TCPA's autodialer definition much less helpful; in other words, if "capacity" is not limited to "current capacity" or "present capacity," but rather, as the FCC has argued, includes all equipment that may be "modified" to have a present capacity, the term has no meaningful limits.²⁷⁸

Accordingly, Congress could pass edits like those represented below to the autodialer definition, which would refocus the statute on how dialing equipment is *actually* being used, not how it might in theory be used in the future.

47 U.S.C. § 227(a):

(a) DEFINITIONS. As used in this section—

(1) The term "automatic telephone dialing system" means equipment ~~that which has the capacity~~

*(A) ~~to store or~~ produces telephone numbers to be called, using a random or sequential number generator, **without the need for any modification, reprogramming, updating, downloading of new applications, and/or activating/engaging, disabling or bypassing of functionalities of the equipment;** and*

(B) ~~to~~ dials such numbers.

The term shall not include equipment that dials telephone numbers from a stored list or database of telephone numbers that is not generated through a random or sequential number generator.

The above amendment would also necessitate the following brief amendments to the TCPA's specific prohibitions:

274. Desai, *supra* note 12, at 82.

275. Domingo, *supra* note 7.

276. *See id.* (discussing prices in 1990); Apple iPhone Specifications, *supra* note 9 (noting iPhone specifications).

277. *2015 Order*, *supra* note 12, at 7970, ¶ 7.

278. *Id.* at 7972, ¶ 11, 7974, ¶ 16.

47 U.S.C. § 227(b):

(1) *PROHIBITIONS. It shall be unlawful for any person within the United States—*

(A) *to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using ~~any~~ the automatic telephone dialing system **functionality described in section 227(a)(1)** or using an artificial or prerecorded voice—*

...

(D) *to use ~~an~~ the automatic telephone dialing system **functionality described in section 227(a)(1)** in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.²⁷⁹*

Finally, and further to the above amendments, Congress could clarify that the TCPA's focus is indeed on the "functionalities" used to make a call, *not* on a dialer's entire phone system. In practice, businesses often have a number of different components in place for making telephone calls of the type covered by the TCPA, including servers, computers, switchboards, and other dialing equipment.

VI. CONCLUSION

In sum, it is a very different world from when the TCPA was passed in 1991.²⁸⁰ The cellular devices, and smart phones in particular, are now ubiquitous and have been fully adopted by the marketplace.²⁸¹ Moreover, the types of "equipment" used to stay in touch with consumers have evolved to a point the TCPA's drafters could barely have imagined.²⁸² Nevertheless, the text of the statute itself, and many of the regulations first passed by the FCC, are exactly as they were written over one-quarter of a century ago.²⁸³

These incredible changes, and the Commission's often inadequate efforts to help businesses and consumers navigate this new TCPA landscape, have made the TCPA a posterchild for frivolous lawsuits and a system where plaintiffs' lawyers, not consumers, reap the rewards of litigation. Much of this has to do with ambiguities which have been in the text of the TCPA from day one, and which the FCC has failed to adequately "update" for a new world.²⁸⁴

The good news is: none of the problems discussed in this article are insoluble. The better news is many of the solutions are evident by the use of

279. Strikeouts represent deletions and underlines represent additions. These proposed edits were drafted by the Insights Association's legislative coalition.

280. See, e.g., Domingo, *supra* note 7 (providing a technology timeline).

281. Kornstein, *supra* note 2.

282. See Domingo, *supra* note 7 (demonstrating thirty years of technological evolution).

283. See *supra* Part I (introducing that the FCC has struggled to adapt the TCPA's original text, resulting in the frequency and cost of litigation rising).

284. See *supra* Part III (highlighting six ambiguities in TCPA jurisprudence).

common sense, and a plain reading of the text. What is an autodialer? Equipment that has the “capacity,” at this moment, not in some hypothetical future, to autodial. What is telemarketing? An effort to encourage the purchase or rental of goods, not a communication which contains no advertisements but is nevertheless from a for-profit business, so surely a nebulous kind of marketing. What is a “dual-purpose” communication? One which is made for both a marketing and a non-marketing purpose, not one which, when factoring a business’s entire communications and other ancillary documents may arguably have some marketing purpose lurking, unseen. When has a consumer revoked his or her “consent”? As it can be a complicated question, and the stakes are so high, there should be concrete rules, not a vague “reasonableness” standard. Lastly, who is a “called party”? Obviously, the person a business was trying to call, not an accidental recipient. In addition to adopting more commonsense definitions of these critical if ambiguous terms, the Commission and courts should expressly reject the insidious “argument from the profit motive” discussed in Section III, and focus on bad actors (and offshore scammers in particular), further empowering private innovation like that discussed in Section V.

After all, the TCPA was passed after long debate, and considerable input and agreement from the business community.²⁸⁵ It was signed by a Republican President who, on the day he put down his signature, expressly stated he was only doing so because he thought the bill struck a good balance.²⁸⁶ The TCPA can be improved, but only by making it more consistent with its original intent; but for that to happen, the Frankenstein-monster that it has become must first be laid to rest once and for all.

285. See, e.g., S. REP. NO. 102-178, at 6 (1991) (describing some input from businesses during the TCPA debate).

286. *Bush Statement*, *supra* note 47.