

# THE NATIONAL LAW REVIEW

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## EPIC sends epic message, NADA Delivers a Whole Lotta and Quicken and CTIA Underscore Urgency in TCPA Comments to FCC

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Monday, June 18, 2018

Greetings, TCPAlanders!

I am the Earl of TCPAland. It is my pleasure to meet you all via the interwebs. Below, I bestow upon thee my learned thoughts on four more comments to FCC Docket 18-152. Buckle in, here we go!

**Electronic Privacy Information Center (“EPIC”):** EPIC is a public interest research center that was established in 1994 “to focus public attention on emerging privacy and civil liberties issues.” That’s quite a broad mission statement, which is presumably why it includes TCPA issues. Our more avid TCPAlanders will know that EPIC submitted an amicus brief in the ACA Int’l case, so its comment submission here is not surprising. In a nutshell, EPIC advises the FCC to do two things: (1) define “called party;” and (2) require callers to “facilitate the revocation of consent by called parties.” EPIC proposes defining a “called party” as the “wireless number’s present-day subscriber after reassignment.” EPIC acknowledges that its definition of “called party” would make it “difficult for callers to know when a number has been reassigned,” so it agrees with the FCC’s proceeding to establish a reassigned numbers database. Obviously, such a massive database would also have its own issues, imperfections, complications, and functionality issues, but we can cross that bridge when we get there. With respect to EPIC’s thoughts on consumer revocation of consent, it would like the FCC to require callers to (1) notify consumers of their right to revoke consent in every call or text (and for calls, for the notification to be given in the beginning); (2) provide a means of revocation as simple as “pushing a button or saying ‘stop calling;” and (3) “comply with a subscriber’s revocation within 24 hours.”

**Quicken Loans:** Quicken’s comment is short and sweet. It simply asks the FCC to “reform regulations and provide clarity” on the more unclear provisions of the TCPA, including the definition of an ATDS, issues over reassigned numbers, and revocation of consent. Quicken proposes an ATDS definition with fidelity to the statutory language of the TCPA where “the technology must generate a phone number in random and sequential order AND call the number generated.” Alternatively, Quicken asserts that, if a human intervenes in the automated calling process or when dialing from a specific list of numbers, the rules should be clear that an ATDS was not used to make the call. Regarding the definition of a “called party,” Quicken requests the term be defined to mean “the intended recipient of a call.” Finally, on the issue of revocation of consent, Quicken correctly points out that the current option for a consumer to opt-out by “any reasonable means” creates problems – one of which is that it is “operationally impossible” for businesses to monitor every channel of customer communication in order to track whether a customer has revoked consent or not. Thus, Quicken suggests that the FCC should define “any reasonable means as (1) a company establishing easy-to-access channels for a customer to revoke consent and (2) not using intentionally deceptive options of opt out.”

**National Automobile Dealers Association (“NADA”):** Like Quicken, NADA asks the FCC to “bring clarity and rationality back to the TCPA,” (which of course assumes that the TCPA was clear and rational to begin with).



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NADA's comment addresses four requests: (1) clarity as to what an ATDS is; (2) leave text messages out of the TCPA; (3) "called party" should be the "individual that the caller reasonably believed they were going to reach;" and (4) "clear, user-friendly methods for revoking consent" and guidance for callers "on whether such methods must be provided to called parties." Regarding ATDS, NADA wants "capacity" to mean "present capacity" and not "potential capacity," otherwise, the definition is far too broad. We agree. NADA would also like clarification on exactly how much human intervention is needed in a phone call in order to "ensure that the TCPA does not apply." Further, NADA's argument with respect to text messages piqued my interest and I think it hit the proverbial nail on the head with this one sentence - "[T]ext messages did not even yet exist in 1991 when the TCPA was adopted - the sole focus was on telephone calls." I, for one, am very interested to see if and how the FCC approaches that particular issue. I guess we will have to wait and see!

**Cellular Telecommunications Industry Association ("CTIA"):** CTIA "recognizes that good-faith callers have faced significant legal liability and uncertainty due to the Commission's TCPA interpretations." I agree. Like many others in the industry, CTIA wants the FCC to define a "called party" as the intended or expected recipient of the call. It also wants clarity as to what exactly constitutes "reasonable reliance upon prior express consent" with respect to reassigned and wrong numbers and clarity and guidance as to what constitutes reasonable revocation of consent by a called party. CTIA's Comment includes a twist on the idea of a reassigned number database. It essentially proposes an idea of a market-based database as opposed to one single entity being responsible for a reassigned number database. Reassigned number database providers would be classified as a "covered compliance solution." Additionally, CTIA proposes that callers must have consulted a covered compliance solution during the "covered period" so as to avoid liability for inadvertent calls to reassigned numbers. I personally think that this quite a creative and market-friendly solution. It will be interesting to see if the FCC chooses to adopt anything resembling this model.

That is all for today. Stay tuned for additional updates as we read through and digest the comments submitted to the FCC.

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