



Submitted electronically via www.fcc.gov/ecfs/

Oct. 16, 2018

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW,
Room TW-A325
Washington, DC 20554

Re: Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's *Marks V. Crunch San Diego, LLC* Decision
DA/FCC: DA-18-1014
CG Docket No. 18-152 & 02-278

Dear Ms. Dortch:

On behalf of Wisconsin's credit unions® and their more than 3 million members, the Wisconsin Credit Union League (the League) is writing in response to the FCC's request for comments on the interpretation of the Telephone Consumer Protection Act (TCPA) in light of the Ninth Circuit's *Marks vs. Crunch San Diego, LLC* decision.

Like their counterparts nationwide, Wisconsin credit unions are all tax-exempt, not-for-profit financial cooperatives, solely owned by their members. Unique among financial institutions, credit unions enjoy a special relationship with their member-owners, who welcome and expect their credit unions to share important information and to communicate effectively.

We respect and support the rights of consumers to be free from unwanted "robocalls," but unfortunately, the TCPA has been interpreted in ways that unduly impede credit unions' ability to reach members for legitimate business purposes. That's largely because the TCPA is obsolete, lagging far behind rapidly changing communications technology. To make matters worse, the FCC's guidance on TCPA compliance has only confused the issues, and courts across the country have issued contradictory opinions on the TCPA's requirements. As a result, credit unions find the current TCPA compliance landscape so confusing, that they tell us they feel restrained from contacting members for fear of violating the rules and becoming the targets of increasingly frequent class-action litigation.

The FCC can take a big step toward resolving the problem by adopting a modern and sensible definition of an "automatic telephone dialing system," commonly known as an ATDS (or an "auto dialer"). That term should mean only equipment that has the present capability to generate random or sequential numbers and to dial those numbers without human intervention.

Background

With limited exceptions, the TCPA restricts telephone calls and text messages to cell phones using an ATDS unless the caller has the prior express consent of the "called party." The TCPA defines an ATDS as "equipment which has the

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capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”

In 2015, the FCC issued a declaratory ruling and order, rejecting the argument that a device’s capacity be measured solely by reference to its present capacity without any modification. Instead, the FCC expanded the definition to include any device with the theoretical or potential capacity to store and generate random calls, regardless whether the device’s current configuration actually allows it to do so and regardless whether they equipment is actually used in such a way. Any modern business telephone system is almost certainly an ATDS under this interpretation.

In *ACA International v. FCC*, the U.S. Court of Appeals for the District of Columbia Circuit found that the FCC’s broad interpretation exceeded the FCC’s authority. In setting aside portions of the 2015 declaratory ruling, the court held that an expansive interpretation that includes all future “capacity” was inconsistent with the legislative purposes of the TCPA, and could extend the law to reach virtually all smartphones. The D.C. Circuit found that the FCC’s interpretation provided “no meaningful guidance” on whether equipment qualifies as an ATDS.

In the wake of the *ACA* opinion, three federal circuit courts have taken up the issue. The Second and Third Circuit have adopted a narrower definition whereas the Ninth Circuit in *Marks* chose to expand the definition of an ATDS. The contradictory holdings of the various federal appellate courts have left a patchwork of interpretations that hinders businesses nationwide, including credit unions. The FCC must take action to issue a modern and sensible interpretation. It should not follow the *Marks* opinion by expanding its already unwieldy and ambiguous interpretation.

The appropriate ATDS definition

The League wholeheartedly endorses the position taken by its national counterpart, the Credit Union National Association, on the appropriate definition of an ATDS. CUNA was one of nearly 20 entities that joined with the U.S. Chamber Institute for Legal Reform in filing a Petition for Declaratory Ruling to revise the definition of an ATDS in light of the D.C. Circuit’s *ACA International* decision.

In May of 2018, responding to a prior FCC call for public comments on this issue, CUNA wrote:

An ATDS should be defined as equipment that has the present capability to generate random or sequential numbers and to dial those numbers without human intervention. Only when those essential functions of an ATDS are used to make the call should the restrictions in Section 227(b)(1) arise. This interpretation is most faithful to the statutory language and Congress’s intent.

CUNA is entirely correct. We urge the FCC to adopt this narrow ATDS definition, bearing in mind that Congress never intended the TCPA to restrict normal and expected business communications – only randomly dialed “robocalls.”¹

For all the reasons thoroughly explained in the U.S. Chamber Institute for Legal Reform’s petition, we call upon the FCC to define the functions that qualify equipment as an ATDS and to require actual use of those functions when making a call in order to trigger the TCPA’s restrictions. Specifically, the FCC should confirm that to qualify as an ATDS, the equipment must use a random or sequential number generator to store or produce numbers to be called, and then to dial

¹ The TCPA’s restriction on calls to wireless numbers and other mobile devices was not meant to apply where “the called party has provided the telephone number of such a line to the caller for use in normal business communications. The Committee does not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their customers.” H.R. REP. NO. 102-317, at 17 (1991).

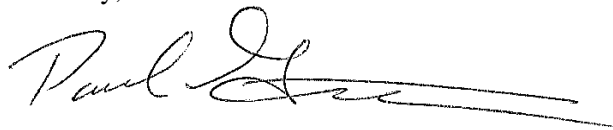
those numbers without human intervention. This functionality must be inherent in the equipment itself and must actually be used when making the call.

Conclusion

The FCC has a responsibility to American consumers, and to credit unions, to provide a modern, sensible TCPA compliance framework that balances consumers' privacy with their need for important financial information. It should adopt a modern and sensible definition of an "ATDS" as equipment that has the present capability to generate random or sequential numbers and to dial those numbers without human intervention.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul Guttormsson", with a long horizontal flourish extending to the right.

Paul Guttormsson
Vice President of Legal & Compliance Services
The Wisconsin Credit Union League