



October 17, 2018

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

Re: Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's *Marks v. Crunch San Diego, LLC* Decision (CG Docket No. 18-152; CG Docket No. 02-278)

Dear Ms. Dortch,

I write on behalf of The Insurance Coalition, a group of insurance companies that share a common interest in federal regulations. In this case, we write to support the Federal Communications Commission's ("FCC") expressed interest in updating its interpretation and implementation of the Telephone Consumer Protection Act ("TCPA")¹ in light of the Ninth Circuit's *Marks v. Crunch San Diego, LLC*² decision. We agree that definitional clarity around "automatic telephone dialing system" ("ATDS") is necessary in order to provide companies, including those in the insurance industry, certainty on necessary engagements with consumers, and we appreciate the opportunity to comment on this important issue.

Summary of Insurance Coalition View

We believe the definition should reflect current technology while remaining forward-looking and mindful of technological advances and potential future technology. While we commend the *Marks* court for attempting to provide definitional clarity, we believe that the *Marks* definition of what qualifies as an ATDS is overly broad and expansive.

Specifically, we believe that the term "capacity" within the statutory definition of ATDS should be interpreted to mean "present capacity," as this ensures devices are regulated based on actual use, not hypothetical or potential use. Furthermore, in our view the *Marks* court erred in eliminating the phrase "using a random or sequential number generator" as a precondition for the required consent under law. Finally, we do not believe that Congress intended for devices that require human intervention to qualify as

¹ Federal Communications Commission, Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's *Marks v. Crunch San Diego, LLC* Decision (Oct. 3, 2018).

² *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018).



an ATDS, as the intent in the TCPA was to target “equipment that could engage in automatic dialing,”³ not equipment that is manually controlled by humans. Thus, human intervention should render a call outside the definition of ATDS and eliminate the mandate of consent.

I. The term “capacity” within the statutory definition of “Automatic Telephone Dialing System” (“ATDS”) should be interpreted to mean “present capacity.”

Pursuant to the statute, the 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.⁴ The court in *ACA International* rejected the FCC’s definition of ATDS as expansive and arbitrary⁵, and the *Marks* court confirmed that the “D.C. Circuit vacated the FCC’s interpretation of what sort of device qualified as an ATDS.”⁶ The *Marks* court also concluded that the statutory definition of an ATDS “is ambiguous on its face,”⁷ thus furthering the need for definitional clarity.

In order to avoid unintentional regulatory burdens based on theoretical use, we suggest the term “capacity” be interpreted to mean “present” capacity, as opposed to “potential” capacity. Present capacity means that the dialing system is presently storing or producing telephone numbers to be called, using a random or sequential number generator, and actually is being used to dial such numbers to reach consumers. Interpreting “capacity” to mean “potential capacity” would broadly capture a wide range of devices which are not currently being used in a manner that was intended to fall under the purview of the TCPA. FCC Chairman Pai emphasized that the “present capacity” interpretation aligns with the “precise contours of the statute that Congress enacted,” and that an ATDS system is one that “actually can dial” numbers.⁸ Interpreting “capacity” to mean “present capacity” coupled with actual use will ensure that only calls that are being made as Congress intended to capture qualify as an ATDS—i.e., calls performed by database dialers that continuously dial telephone numbers, without any human intervention.

³ 2018 WL 449555, at *23.

⁴ Telephone Consumer Protection Act § 227(a), 47 U.S.C. § 227 (1991).

⁵ *ACA Int’l, et al., v. Fed. Comm’n’s Comm’n and U.S.*, 15-1211 D.C. Cir. 1, 29 (2018).

⁶ 2018 WL 449555, at *17.

⁷ 2018 WL 449555, at *8-9.

⁸ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961. 98072 (“*Omnibus Order*”) (Dissenting Statement of current Chairman of the FCC in which he stated that “Had Congress wanted to define automatic telephone dialing system more broadly it could have done so by adding tenses and moods, defining it as ‘equipment which has, has had, or could have the capacity.’ But it didn’t.”).



II. The *Marks* court erred in eliminating the phrase “using a random or sequential number generator” as a precondition for the required consent under the law, and human intervention should render a call outside the definition of ATDS and eliminate the mandate of consent.

In response to the FCC’s request for comment on how to interpret and apply the statutory definition of ATDS, including the phrase “using a random or sequential number generator,”⁹ we believe the *Marks* court erred in eliminating the phrase as a precondition for the required consent under the TCPA. The phrase “using a random or sequential number generator” particularly singles out Congress’ concern over the automation element¹⁰ and removing the phrase creates the potential to cast an all-encompassing net over a wide range of automated devices.

The *Marks* court defines ATDS as including “a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator.”¹¹ In contrast to the *ACA International* court, this definition would essentially bring the use of “smartphones” back within the purview of the TCPA because smartphones, and in practicality any telephone, have the ability to store numbers. As the *ACA International* court stated, any definition of ATDS that captures all smartphones is “unreasonably, and impermissibly, expansive,”¹² and constitutes an “eye-popping sweep.”¹³

Contrary to the *Marks* analysis, we believe that human intervention should render a call outside the definition of an ATDS. Congress intended an auto-dialer to encompass database dialers that continuously dial numbers, without any human involvement. The definition of ATDS, as currently construed, is so broad that it captures situations where a human, even if he or she is controlling and deciding the manner in which calls are made, is using equipment that has the capacity to “store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers.”¹⁴

⁹ Federal Communications Commission, Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit’s *Marks v. Crunch San Diego, LLC* Decision, 2 (Oct. 3, 2018).

¹⁰ See Telephone Consumer Protection Act § 227(a), 47 U.S.C. § 227 (1991) (showing that by explicitly creating an exception in the preamble for calls that are consented to or are necessary in an emergency, Congress did not intend for all automated calls to be automatically captured within the TCPA).

¹¹ 2018 WL 449555, at *4

¹² *ACA Int’l, et al., v. Fed. Comm’n’s Comm’n and U.S.*, 15-1211 D.C. Cir. 23 (2018).

¹³ *Id.*, at 16.

¹⁴ Telephone Consumer Protection Act § 227(a), 47 U.S.C. § 227 (1991).



In order to adhere to Congressional intent, we recommend that the FCC specify that human intervention eliminates the mandate of consent, regardless of how many numbers are stored in a dialing or phone system. Whether it be a simple click of a button or a manual dialing of an entire phone number by a human being, this would appropriately prevent all phones with the ability to store numbers from falling under the purview of the TCPA.

Conclusion

We support the application of clear standards regarding how to communicate with consumers effectively and within the bounds of the law, while reducing unwanted communications. Recent judicial decisions have resulted in the need for definitional clarity around what devices constitute an ATDS, and we believe that interpreting "capacity" to mean "present capacity" will help provide such clarity. Furthermore, we believe that the *Marks* court erred in eliminating the phrase "using a random or sequential number generator" as a precondition for required consent, and we believe the FCC should specify that human intervention should render a call outside the definition of ATDS and eliminate the mandate of consent. We appreciate the opportunity to comment and look forward to continued dialogue as the FCC develops any subsequent proposed rulemaking.

Sincerely,

A handwritten signature in black ink, reading "Bridget Hagan". The signature is fluid and cursive, with a long horizontal line extending from the end.

Bridget Hagan
Executive Director, The Insurance Coalition