

October 17, 2018

Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act (hereinafter “TCPA”) in Light of the Ninth Circuit’s *Marks v. Crunch San Diego, LLC* Decision, CG Docket No. 18-152, CG Docket No. 02-278 (Released October 3, 2018)

To whom it may concern,

Third Federal Savings and Loan appreciates the opportunity to comment on the Federal Communications Commission’s (hereinafter “Commission”) Public Notice released October 3, 2018.¹ The Public Notice seeks further comment on what constitutes an automatic telephone dialing system (hereinafter “ATDS”) under the TCPA in light of the recent holding of the Ninth Circuit in the case of *Marks v. Crunch San Diego LLC*.²

The TCPA defines an ATDS as “...equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”³ In *ACA Int’l v. FCC*,⁴ the U.S. Court of Appeals, District of Columbia Circuit set aside the Commission’s 2015 Declaratory Ruling (hereinafter “Ruling”) setting forth what calling equipment qualifies as an ATDS.⁵ The Court reasoned that the interpretation was so far-reaching that any person with a smartphone, who inadvertently dialed another cellular telephone in error, would be subjected to unlimited liability under the TCPA.⁶ The Court further correctly pointed out that under the 2015 Ruling, telephone calls made without the use of the auto dialer are still subject to unlimited liability, merely because the system has the capacity to do so.⁷ And finally, the Court pointed out that the Ruling interpreted the word “capacity” to not only mean current capacity to autodial, but also the “future possibility” to do so.⁸

¹Consumer 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 Released October 3, 2018.

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

³ 47 U.S.C. §227(a)(1).

⁴ *ACA Int’l v. Marks*, 885 F.3d 687, 695 (D.C. Cir. 2018)

⁵ *Id.*, at 91.

⁶ *Id.*

⁷ *Id.* at 695.

⁸ *Id.*



Because the Court in *ACA Int'l* struck down the 2015 Ruling, the Ninth Circuit in *Marks* held that the only definition of an ATDS left standing was contained within the statute itself.⁹ The issue in the *Marks* case was “whether, in order to be an ATDS, a device must dial numbers generated by a random or sequential number generator or if a device can be an ATDS if it merely dials numbers from a stored list.”¹⁰ The Court ultimately concluded that the statute, as written, is not subject to a single interpretation on its face.¹¹ The Court then looked at statutory scheme.¹² The Court thereafter concluded that “the statutory definition of ATDS includes “equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers.”¹³

Since both cases held that the statutory definition of ATDS is ambiguous and subject to multiple interpretations, the Commission now has the opportunity to clear up any and all ambiguities going forward as follows: First, Third Federal suggests that the Commission remove the word “capacity” from the statutory definition of an ATDS altogether. Most telephone systems or equipment, including cellular telephones, have the capacity “to store or produce telephone numbers to be called.”¹⁴ Just because systems have the capacity to store or produce telephone numbers does not mean they are always used. Under the current definition of ATDS, Third Federal could manually dial a cellular telephone number of one of its customers to disseminate important information, and yet still be subjected to liability under the TCPA simply because Third Federal has telephone equipment that has the capacity to store telephone numbers of its customers. Third Federal does not believe scenario was the intent of Congress when drafting the definition of an ATDS.

Second, Third Federal suggests that the specific portion of the definition of ATDS--“to store or produce telephone numbers to be called, using a random or sequential number generator”¹⁵ be updated to reflect the clear intent of Congress. Specifically, the new definition should not be subject to multiple, competing interpretations. Does the ATDS have to store or produce telephone numbers to be called while using a random or sequential number generator, or was the comma inserted inadvertently? Can an entity store numbers of its customers to be called for specific purposes without the fear of liability?

Third, Third Federal suggests that the intent of the telephone call should dictate liability under the TCPA. Third Federal prides itself on outstanding customer service. One of the ways we achieve that is by communication with our customers, either to disseminate important information which would be beneficial, or to warn them of potential harm to their accounts. Third Federal does not use the telephone to cross sell

⁹ *Marks, supra* *2.

¹⁰ *Id.* *7.

¹¹ *Id.* *8.

¹² *Id.*

¹³ *Id.* *7.

¹⁴ 47 U.S.C. §227(a)(1).

¹⁵ *Id.*



our customers other products, nor does Third Federal contact our customers with inappropriate or unnecessary information. Third Federal would like to proactively contact customers impacted by natural disasters with options for relief. Yet, because we have a telephone system that has the capacity to store specific telephone numbers and dial those numbers, Third Federal is subject to potential liability under the TCPA, and therefore refrains from this outreach. The full burden at a difficult time thus falls on the customer.

Third Federal does not believe that the intent of the TCPA was to prohibit communication between a Bank and its customers. Third Federal, as with most banks, has no reason to dial random or sequential telephone numbers of the population at large. Banks need to contact their actual customers, for actual reasons, without the fear of liability. Accordingly, Third Federal would like to see the TCPA specifically permit the free flow of information between Bank and customer, without fear of liability. The calling equipment used by Banks to contact their customers should not fall under the definition of an ATDS, and Third Federal does not believe Congressional intent was to exclude such communication. In addition to rewriting the definition of ATDS, the Commission should carve out additional exceptions to the TCPA to allow communications between Bank and customers, the purpose of which is to protect customers from financial harm.

Third Federal appreciates the opportunity to comment on how the Commission should address the ambiguities of the definition of ATDS within the TCPA. We welcome the opportunity to further work with the Commission to resolve these issues while facilitating communication with our customers, yet protecting the general public from unwanted telephone solicitations. I can be reached at (800) 844-7333.

Sincerely,

/s/

Judith Z. Adam
Chief Risk Officer

