OHIO CREDIT UNION LEAGUE

Submitted Via Electronic Filing

October 17, 2018

The Honorable Chairman Ajit Pai
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Comment on 9th Circuit's *Marks v. Crunch San Diego, LLC* Decision
CG Docket No. 18-152
CG Docket No. 02-278

Dear Chairman Pai:

On behalf of Ohio's 270 credit unions and their nearly three million members, the Ohio Credit Union League (OCUL) is responding to the Federal Communications Commission (FCC) request for comment related to the interpretation and implementation of the Telephone Consumer Protection Act (TCPA) following the recent decision of the U.S. 9th Circuit Court of Appeals in *Marks v. Crunch San Diego, LLC*[1].

Ohio credit unions are democratically operated financial cooperatives whose mission is to provide affordable, consumer-friendly products to their members. Ohio credit unions serve a wide array of members: military service personnel and their families, state employees, religious groups, individuals and families of modest means, and students, among many other groups. The average Ohio credit union is $114 million in assets and retains a staff of 28 employees. While credit union membership is increasing on a national and state level, Ohio credit unions are not immune from market consolidation. Declaratory relief from TCPA would go a long way in helping to ensure the continued success of Ohio credit unions by eliminating restrictive requirements that inhibit member communications and impede credit union operations. Not only would declaratory relief benefit credit unions, it would enhance the consumer experience in credit unions by improving communication and allowing for the transfer of more financial information to the consumer-member.

A. Marks v. Crunch San Diego, LLC

OCUL appreciates the FCC issuing a timely request for comment after the court's recent decision. Below we will address specific issues in light of the court's decision. As we have previously written the FCC[2] regarding its interpretation of various items under the 2015

[1] *Marks v. Crunch San Diego, LLC*, No-14-56834 (9th Cir. 2018).
[2] OCUL's comments to the FCC available online at https://www.ohiocreditunions.org/Advocacy/Regulatory/Pages/CommentLetters.aspx.

Omnibus Order[3], we continue to support modernized TCPA regulations which allow for flexibility in communication, especially as it pertains to legitimate, established business relationships. Most recently, OCUL wrote to the FCC regarding our support of the court's decision in *ACA Int'l v. FCC*[4].

In short, the FCC requests interested parties to submit comments pertaining to how the Commission should address two recent court decisions: *Marks* and *ACA Int'l*. These court decisions perfectly articulate what OCUL and other industry experts have been saying for years. Without clear, sound guidelines which clearly define an automated telephone dialing system (ATDS), consent, exemption mechanisms, proper opt-out methods, and other logistics, the rulemaking will remain overly-broad and cause businesses to remain beholden to the ambiguity of evolving judicial rulings. It is not feasible to achieve clarity within TCPA rulemaking if industry experts and FCC staff must weigh in after every conflicting court decision. We are optimistic that the FCC will issue an update to TCPA rules in the near future.

I. Congress Did Not Intend to Regulate Legitimate Business Relationships

Because the *Marks* court recognized that the court in *ACA Int'l* held that all prior FCC guidance was void, the 9th Circuit analyzed the original statutory language of TCPA and decided that the statute was too vague, which required the 9th Circuit to look at the Congressional intent. The *Marks* court traced the Congressional intent back to the telemarketing golden age in which "over 300,000 telemarking solicitors called more than 18 million Americans every day.[5]" The opinion articulates the "dark side[6]" of the telemarketing industry during its most concerning period. Upon reviewing the history of the telemarketing industry's actions which led to the passage of TCPA, the *Marks* court held that Congress intended to regulate automated dialing equipment. Respectfully, we disagree with the *Marks* decision.

It is our belief that Congress intended to regulate ***the telemarketing industry*** as it relates to automated dialing equipment (which at the time was predominantly used only by one industry). The historical background in the *Marks* opinion supports our position as no other industry outside of the telemarketing industry is mentioned in the opinion nor is it mentioned in the Congressional record to our knowledge.

The *Marks* court interpreted Congress's 2015 amendment of TCPA as affirming the broad definition of an ATDS. While OCUL agrees that Congress's actions and inactions can indicate intent, this is not to be viewed in a vacuum. Another interpretation of the 2015 amendment could be that Congress sought the most efficient way to continue debt collection practices which was to exempt the federal government from the TCPA. In fact, there have been recent First Amendment challenges regarding the statute and Congress's 2015 amendment as it relates to

[3] In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135, FCC 15-72 (July 10, 2015).
[4] See *id* at 2.
[5] *Marks*, No-14-56834 at 4.
[6] Marks, No-14-56834 at 5.

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government debt collection.[7] It is not unlikely that in a few years, the FCC could be issuing a request for comment based on First Amendment cases in the TCPA sphere or that a court rules the 2015 statutory amendment unconstitutional.

Should the FCC agree with the *Marks* court that the statutory definition of an ATDS is ambiguous, we urge the agency to explore historical and legislative records related to the passage of TCPA. We feel certain that the agency will come to the same conclusion: Congress intended to prohibit telemarketing calls from telemarketing sales agencies; Congress did not intend to suppress legitimate business communications.

II. The Definition of an Automatic Telephone Dial System Should Reflect Common Understanding

After reviewing the statutory language and congressional intent, the 9th Circuit determined that an ATDS is defined as 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 automatically (even if the system must be turned on or triggered by a person)."[8]

OCUL's interpretation of an ATDS is more in line with defendant's definition rather than the 9th Circuit. We agree with the defendant that "using a random or sequential number generator" modifies both store and produce (as opposed to only the latter). Thus, if the equipment cannot store numbers that are a result of a number generator (rather than a pre-created list), said equipment cannot be an ATDS.

Under the *Marks* decision, equipment which simply dials numbers from a stored list would fall within the definition of an ATDS. Equipment which can dial numbers input from a stored list (which is typically numbers accumulated through a business relationship) is fundamentally different from equipment which generates numbers randomly or sequentially that can also predict when a consumer will or will not answer the phone and when an operator or telemarketer will be available to speak with said consumer.

Further, OCUL believes "capacity" should be construed narrowly and interpreted to mean "present capacity." Any ATDS definition must make clear that the equipment must use a random or sequential number generator to store or produce numbers, and dial those numbers *without* human intervention. The FCC should not deviate from the straightforward language found in the statute. The absence of human intervention is what makes an *automatic* telephone dialing system actually automatic. If human intervention is required in generating the list of numbers to call or in making the call, then the equipment should not be defined as an auto-dialer.

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[7] *See Gallion v. Charter Communications, Inc*, Case No. 18-55667 (9th Cir); *McCall Law Firm, PLLC v. Crystal Queen, Inc.*, Case No. 4:15-cv-00737, 2018 WL 4691627 (Ed. Ark. Sept. 20, 2018); and, *Mejia et al. v. Time Warner Cable, Inc.* Case No. 1:15-cv-6445 (S.D.N.Y). Defendants have argued that TCPA and its 2015 amendment exempting government-back debt collection is an unconstitutional content-based restriction of speech.

[8] Telephone Consumer Protection Act, 47 U.S.C. §227(a)(1)

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To remove any confusion, the FCC should make clear that both functions (produce, store) must actually, not theoretically, be present and active in a device at the time the call is made. This approach provides a clear, bright-line rule, eliminating confusion and multiple interpretations. Thus, callers do not have to worry about whether their calling equipment could perhaps one day be used as or interpreted to be an automatic telephone dialing system.

III. Conclusion

Until appropriate relief is provided by the FCC, TCPA rules interpreted differently throughout various circuits will continue to inhibit communications from financial institutions which consumers rely on. At present, the *Marks* decision could encompass a smartphone or other readily available telecommunications equipment (as these are pieces of equipment that are able to store numbers and automatically dial them). This is at conflict with the *ACA Int'l* decision which stated that "The TCPA cannot reasonably be read to render every smartphone an ATDS subject to the Act's restrictions, such that every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent."[9]

Our primary concern is that present circumstances are jeopardizing consumers' unabridged and continued access to open and timely communications provided by their cooperative financial institutions. We urge the FCC to consider all comments within this letter and within the recent petition filed by Credit Union National Association, the U.S. Chamber of Commerce and other trade organizations, to account for the unique structure and ownership of credit unions, and to ensure federal agencies are working in cohesion and providing consistent, non-conflicting guidance.

In light of the court decisions in *Marks v. Crunch San Diego, LLC* and *ACA Int'l v. FCC*, we believe the FCC should take the following steps to address issues highlighted by the courts:

- Narrowly construe "capacity" to create a clear, bright-line rule;
- Re-evaluate the entire 2015 Omnibus Order;
- Exclude legitimate established business relationship calls by narrowly defining called party to exclude consumers and businesses who have entered into a relationship; and,
- Recognize and clarify the TCPA rules which currently conflict with guidance from other federal agencies.

Thank you for your careful consideration and for the opportunity to express these views to the FCC. Should you have any questions regarding our comments, please feel free to contact us at 1-800-486-2917.

Sincerely,

[9] *ACA Int'l v. FCC*, No. 15-211, at 17 (D.C. Cir. Mar. 16, 2018).

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