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National Association of Federally-Insured Credit Unions

October 24, 2018

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

RE: Public Notice on Interpretation of the *Telephone Consumer Protection Act* (CG Docket No. 18-152; CG Docket No. 02-278)

Dear Ms. Dortch:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), the only national trade association focusing exclusively on federal issues affecting the nation's federally-insured credit unions, I am writing to you in regard to the *Telephone Consumer Protection Act* (TCPA) and the recent decision in *Marks v. Crunch San Diego, LLC*,[1] related to the definition of an automatic telephone dialing system (ATDS or autodialer). The United States Court of Appeals for the Ninth Circuit improperly concluded that the language of the TCPA is ambiguous and then expanded the definition of an ATDS using the same approach that was already invalidated by the United States Court of Appeals for the District of Columbia Circuit.[2] The *Marks* decision also contradicts previous Ninth Circuit decisions as well as decisions from the Second and Third Circuits. Given the confusion among courts and, consequently, the credit unions located within those jurisdictions, NAFCU urges the Federal Communications Commission (FCC) to issue an order on this important question by the end of 2018.

General Comments

With the passage of the TCPA, Congress intended to curb the scourge of telemarketing calls that, due to advances in technology, had become a nuisance for consumers across the country. The FCC was charged with interpreting the TCPA and issuing regulations regarding compliance with its provisions. This resulted in a series of interpretive orders that culminated in the July 2015 Omnibus Declaratory Ruling and Order (2015 Order) that was the subject of a lawsuit in the D.C. Circuit, titled *ACA International v. Federal Communications Commission*. The lawsuit challenged several parts of the 2015 Order, including the FCC's approach to defining what type of equipment qualifies as an autodialer. In March 2018, the D.C. Circuit rejected the FCC's approach to defining an ATDS as arbitrary and capricious, leaving only the statutory text of the TCPA intact.

[1] *Marks v. Crunch San Diego, LLC*, No. 14-56834 (9th Cir. Sept. 20, 2018).
[2] *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

The TCPA is of great importance to credit unions because it concerns the ability to communicate freely and effectively with consumers regarding their personal and often time-sensitive financial information. As not-for-profit, cooperative financial institutions, credit unions do not engage in the types of practices that were originally contemplated by Congress when it enacted the TCPA. The FCC's 2015 Order wreaked havoc across numerous industries and has primarily served to enrich plaintiffs' attorneys and so-called "TCPA trolls," who benefited from the FCC's expansive definition of autodialer, among other interpretations. The continued uncertainty surrounding the TCPA has caused significant harm to legitimate businesses attempting to contact their consumers. The *ACA International* decision confirmed that the 2015 Order exceeded the intended scope of the TCPA and directed the FCC to reinterpret what constitutes an ATDS.

In May 2018, NAFCU, along with several other groups, submitted a Petition for Declaratory Ruling to the FCC asking for a narrower interpretation of an ATDS. In the Petition, NAFCU argues the FCC should (1) clarify that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention, and (2) find that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions. NAFCU and its member credit unions maintain that the text of the TCPA is clear and unambiguous on its face and the D.C. Circuit correctly invalidated provisions of the 2015 Order.

Several months after *ACA International*, the Third Circuit issued its decision in *Dominquez v. Yahoo, Inc.* holding that, in light of the D.C. Circuit's decision, it must interpret an autodialer as it did before the 2015 Order. Accordingly, the court rejected the plaintiff's argument that "capacity" includes potential capacity to function as an autodialer.[3] The court concluded that an ATDS must have the present capacity to generate random or sequential telephone numbers and dial those numbers. Then, in *King v. Time Warner Cable, Inc.*, the Second Circuit agreed that the D.C. Circuit correctly interpreted the text of the TCPA and held "capacity" to mean the functions that equipment is currently able to perform.[4]

In September 2018, the Ninth Circuit issued its decision in *Marks v. Crunch San Diego, LLC* and essentially revived the FCC's 2015 Order, which had been invalidated by the D.C. Circuit in a decision that was later confirmed by two other circuits. The Ninth Circuit concluded that the TCPA is ambiguous on its face and held that an autodialer must be interpreted to include equipment that can automatically dial phone numbers stored on a list, regardless of whether human intervention is required. Shortly after this decision, the FCC's Consumer and Governmental Affairs Bureau issued this Public Notice requesting comment on the effect this decision has on the FCC's ability to interpret the TCPA's definition of an ATDS. Now, the FCC must act to prevent ongoing disagreement among courts and protect consumers while allowing legitimate businesses acting in good faith to contact their consumers freely without fear of a TCPA lawsuit. The FCC should work expediently to issue an order by the end of 2018 that rejects the Ninth Circuit's rogue approach to defining an ATDS.

[3] *Dominguez v. Yahoo, Inc.*, No. 17-1243 (3d Cir. June 26, 2018).
[4] *King v. Time Warner Cable, Inc.*, No. 15-2474 (2d Cir. June 29, 2018).

The Ninth Circuit decision has caused confusion for NAFCU's credit union members who are now even more uncertain as to what qualifies as an autodialer and whether their lawful and legitimate communications with members may expose them to TCPA liability. The FCC is now in the best position to use its knowledge and expertise to eliminate uncertainty, establish uniformity, and prevent the continued plague of TCPA litigation against legitimate businesses. The D.C. Circuit determined that Congress never intended the TCPA to reach as far as the FCC's 2015 Order permitted, so the FCC should refuse to accept the Ninth Circuit's unreasonable expansion as contrary to the legislative purpose behind the TCPA. NAFCU urges the FCC to issue an order defining an ATDS as soon as possible, even before addressing other important issues that were left unresolved in *ACA International*.

The Ninth's Circuit's Flawed Statutory Construction

The *Marks* court correctly held that after the D.C. Circuit's decision in *ACA International*, "only the statutory definition of ATDS as set forth by Congress in 1991 remains." The Ninth Circuit then went on to incorrectly hold that the TCPA is ambiguous on its face. This conclusion contradicts the Ninth Circuit's previous opinion in *Satterfield v. Simon & Schuster, Inc*.[5] The court goes on to improperly revive the FCC's 2015 Order, which expanded the definition of autodialer to almost any internet-connected device, including smartphones.

Based on its reading of the statute, the Ninth Circuit determined that an ATDS is a device that stores numbers to be called, regardless of whether those numbers have been generated by a random or sequential number generator and whether any human intervention is required to call those numbers. To reach this conclusion, the Ninth Circuit evaluated the text of the TCPA. The TCPA defines an ATDS as follows: "(1) 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."[6]

The Ninth Circuit adopted the plaintiff's argument that a device cannot use "a random or sequential number generator" to store telephone numbers. This interpretation divorces the word "store" from the phrase that follows the comma in the remainder of subsection (A) – "using a random or sequential number generator" – and attaches it to subsection (B). This flies in the face of the Ninth Circuit's "punctuation canon" as explained in *Yang v. Majestic Blue Fisheries, LLC*.[7] In *Yang*, the Ninth Circuit correctly concluded that "under the rule of punctuation, a modifying phrase that is set off from a series of antecedents by a comma applies to each of those antecedents."[8] Using this reasoning, both "store" and "produce" are modified by "using a random or sequential number generator." It follows that applying the phrase "using a random or sequential number generator" to modify only "produce" violates the rule against surplusage because it renders the comma superfluous. NAFCU supports the grammatically correct, common-sense reading of the TCPA that gives meaning to all of the words and punctuation used by Congress.

[5] 569 F. 3d 946, 951 (9th Cir. 2009) (holding that "the statutory text is clear and unambiguous").
[6] Pub. L. No. 102-243, § 227.
[7] 876 F. 3d 996, 1000 (9th Cir. 2017).
[8] *Id.*

Moreover, the Ninth Circuit incorrectly rejected the defendant's argument that an ATDS must be fully automatic and operate without human intervention. An ATDS is necessarily automatic, so any device that requires humans to input numbers to be dialed should not qualify as an ATDS. The Ninth Circuit's focus on the automatic dialing of numbers as sufficient to qualify a device as an ATDS is misplaced because the statutory text clearly focuses on dialing numbers stored or produced by a random or sequential number generator. Thus, if the number generator stores or produces numbers to be dialed automatically and then dials those numbers, it is an ATDS. The FCC should reject the Ninth Circuit's flawed reading of the statutory text and clarify that an ATDS is a random or sequential number generator that can either store or produce numbers to be called and then dial those numbers without human intervention.

Courts Should Defer to the FCC to Define an ATDS

Although our nation's system of checks and balances permits the courts to invalidate a federal agency's interpretation of an act of Congress, agencies are typically entitled to deference. Administrative agencies possess the necessary expertise to evaluate laws regarding issues within their designated fields and are better positioned to establish uniformity within the regulatory framework. Unlike a pure question of law, the question of what constitutes an ATDS is a factual question that is best left to the subject matter experts at the FCC. The primary jurisdiction doctrine, as announced in *Far East Conference v. United States*,[9] further confirms the D.C. Circuit's approach, which refers the issue back to the FCC and invalidates the Ninth Circuit's poorly reasoned and unnecessary expansion of the definition of an ATDS. That is not to say the FCC has exclusive jurisdiction over all TCPA issues, but that defining what is and is not an ATDS requires expertise regarding telephonic equipment unfamiliar to a judge.

Beyond deference to the FCC, the D.C. Circuit has already issued a decision that is binding on courts across the nation. Often referred to as the "second highest court in the land," the D.C. Circuit is perceived by many, including lawmakers, as having the greatest expertise in administrative law. Moreover, the Hobbs Act provides that the D.C. Circuit's decision is binding on other circuit and district courts.[10] The D.C. Circuit invalidated the FCC's previous definition of an ATDS as "an unreasonably, and impermissibly, expansive one."[11] The Ninth Circuit then adopted the very approach the D.C. Circuit already concluded is arbitrary and capricious. Not only did the Ninth Circuit dismiss the D.C. Circuit's well-reasoned decision, but it also disagreed with two other circuits to craft a decision that stretches the legislative intent to its farthest reaches and establishes a definition that sweeps in smartphones, making just about every American a potential TCPA-violator. NAFCU strongly recommends the FCC issue an order by the end of this year that rejects the Ninth Circuit's expansive definition of an ATDS in favor of a narrow reading that follows the D.C Circuit's directive in *ACA International*.

[9] 342 U.S. 570, 573-74 (1952) (noting "that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.").
[10] 28 U.S.C. 2343; 47 U.S.C. 402(a).
[11] *ACA Int'l*, 885 F. 3d at 699-700.

Conclusion

Following the D.C. Circuit's decision in *ACA International*, three circuit courts have decided questions related to what type of equipment constitutes an autodialer. The Second and Third Circuits have adopted a narrower definition whereas the Ninth Circuit chose to expand the definition of an ATDS. NAFCU and its member credit unions are troubled by this Circuit split and urge the FCC to take action and issue a rulemaking on its pending petition as soon as possible to resolve the current uncertainty surrounding the definition of an ATDS.

NAFCU greatly appreciates the FCC's work to resolve these critical TCPA issues. NAFCU would like to thank Chairman Pai and Commissioners O'Rielly, Carr, and Rosenworcel, as well as their staff, for their attention to this important issue. NAFCU looks forward to the FCC's ruling on this matter. If you have any questions or concerns, please do not hesitate to contact me at (703) 842-2212 or akossachev@nafcu.org.

Sincerely,

Ann Kossachev
Senior Regulatory Affairs Counsel