

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Consumer and Government Affairs Bureau Seeks)	CG Docket No. 18-152
Comment on Interpretation of the Telephone)	
Consumer Protection Act in Light of D.C. Circuit's)	
ACA International Decision)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	

To: The Commission

COMMENTS OF CISCO SYSTEMS, INC.

Cisco Systems, Inc. ("Cisco") hereby submits these comments in response to the Public Notice seeking comment on interpreting the Telephone Consumer Protection Act ("TCPA") following the recent decision of the U.S. Court of Appeals for the District of Columbia in *ACA International v. FCC*.¹ The Commission should take this opportunity to finally bring clarity to the definition of an "automatic telephone dialing system" ("autodialer" or "ATDS") in a manner consistent with the statute and the D.C. Circuit decision.

I. INTRODUCTION AND BACKGROUND

Cisco provides market-leading unified communications products. Cisco's Unified Contact Center ("UCC") solution is a software application that provides contact center features, including agent state management, agent selection, call routing and queue control, contact center

¹ *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision*, Public Notice, DA 18-493 (rel. May 14, 2018) ("Public Notice") (citing *ACA Int'l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) ("ACA Int'l") (affirming in part and vacating in part *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) ("2015 TCPA Declaratory Ruling and Order"))).

reporting, and more. Cisco's UCC enables our customers to optimize their call center resources and more efficiently contact their customers. For instance, an optional capability available for UCC customers utilizes predictive dialing functions to screen for outbound calls that are not answered, reach voicemail or busy signals, or otherwise do not go through. These functions ensure that call center agents' time is spent actually communicating with customers rather than wasted as they wait to reach customers.

Cisco understands and supports the Commission's efforts to prevent illegal robocalls. In particular, Cisco appreciates the Commission's forward-leaning initiatives to stop malicious spoofing and block scam robocalls.² However, the Commission's TCPA interpretations over the years have expanded the statute's reach far beyond illegal robocall concerns. Instead, the Commission's overbroad approach has called into question whether solutions like the UCC – which does not enable calls to random or sequential numbers – are subject to the Act.³

Indeed, the Commission's past interpretations of the TCPA have left a persistent and insurmountable lack of clarity in their wake. Over the years, each subsequent Commission effort to address the scope of the statute has raised at least as many questions as it has answered. In turn, these Commission decisions have contributed to conflicting and inconsistent interpretations

² See, e.g., *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 9706 (2017); *Call Authentication Trust Anchor*, Notice of Inquiry, 32 FCC Rcd 5988 (2017).

³ See, e.g., Statement of Commissioner Michael O'Rielly on D.C. Circuit TCPA Decision (rel. Mar. 16, 2018) (D.C. Circuit decision "will not lead to more illegal robocalls but instead remove unnecessary and inappropriate liability concerns for legitimate companies trying to reach their customers who want to be called."). Cisco can confirm that the capability for inward-dialing customers to elect to be called back – from the first available agent or at a specific time – is now an important functionality for contact center technologies, and is an increasingly popular feature used by consumers, who do not want to endure unpredictable "hold" times or might have a specific time when it is convenient for them to engage with an enterprise.

in courts, followed then by new petitions again seeking clarification at the Commission. And so the cycle has continued until the D.C. Circuit’s recent rebuke.

This has been particularly true for the Commission’s autodialer interpretation. The statute 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,”⁴ and requires that callers obtain prior express consent before initiating a call using an autodialer to wireless numbers, unless an exception applies.⁵ The statutory definition is circumspect – it is focused on a narrow category of equipment that can produce and dial random sequential numbers, and nothing more.

Nevertheless, the Commission has sought to expand its interpretation of this definition over the years – far beyond what Congress prescribed – in part to reach modern calling equipment and methods, including equipment that calls a set list of numbers. For instance, in 2003, the Commission found that the autodialer definition encompassed predictive dialers – “equipment that dial[] numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls.”⁶ In this regard, the Commission suggested that, when paired with certain software, predictive dialers have “the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers.”⁷ But this decision confused, rather than clarified, the reach of the TCPA’s autodialer definition. ACA International sought clarification, noting that under the

⁴ 47 U.S.C. § 227(a)(1).

⁵ *Id.* § 227(b)(1)(A)(iii).

⁶ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 131 (2003).

⁷ *Id.*

Commission’s approach, “the autodialer ban applies even to telephone numbers that are neither randomly nor sequentially generated – including calls to specific numbers provided by established customers,” an interpretation for which “[t]he statute offers no support....”⁸ With regard to predictive dialers, ACA International emphasized that such dialers only meet the definition of autodialer when they randomly or sequentially generate telephone numbers, not when they dial numbers from customer telephone lists.⁹

Unfortunately, rather than provide needed clarity and restraint, the Commission doubled down and reaffirmed its prior decision.¹⁰ And in 2015, in response to yet more clarification requests, the Commission again declined to clearly define the scope of the autodialer definition,¹¹ instead interpreting it in a way that, according to the D.C. Circuit, had “the apparent effect of embracing any and all smartphones[.]”¹² To the Commission, the TCPA’s restrictions could apply even when callers used equipment to call a set list of consumers, and even when they did

⁸ ACA International’s Supplemental Submission to Petition for an Expedited Clarification and Declaratory Ruling, CG Docket No. 02-278, at 4 (filed Apr. 26, 2006).

⁹ *Id.* at 6, 10.

¹⁰ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling*, Declaratory Ruling, 23 FCC Rcd 559 ¶ 12 (2008) (“[W]e affirm that a predictive dialer constitutes an automatic telephone dialing system and is subject to the TCPA’s restrictions on the use of autodialers.”).

¹¹ *2015 TCPA Declaratory Ruling and Order* ¶ 10 (“We reaffirm our previous statements that dialing equipment has the capacity to store or produce, and dial random or sequential numbers (and thus meets the TCPA’s definition of ‘autodialer’) even if it is not presently used for that purpose, including when the caller is calling a set list of consumers. We also reiterate that predictive dialers, as previously described by the Commission, satisfy the TCPA’s definition of ‘autodialer’ for the same reason.”); *see also id.* ¶ 17 (declining to “address the exact contours of the ‘autodialer’ definition or seek to determine comprehensively each type of equipment that falls within that definition that would be administrable industry-wide”).

¹² *ACA Int’l*, 885 F.3d at 696.

not presently use the equipment to store or produce, and dial random or sequential numbers.¹³ In sum, with each successive Commission decision, clarity on the precise scope of the autodialer definition – and thus the exact reach of the TCPA – continued to elude well-meaning callers (and, by extension, the courts).

The D.C. Circuit decision, however, appears to have now broken this cycle of confusion and ever-expanding Commission interpretations. Indeed, the court has made clear that the Commission’s autodialer interpretation has strayed far from the statute in a legally impermissible manner. After years of uncertainty, the Commission must finally bring clarity to the ATDS definition in a manner consistent with the statute’s plain meaning and that provides clear guidance to the industry in a manner legally sustainable and faithful to the statute.

After all, the Commission’s job is to interpret the statute as set forth by Congress, not to rewrite it regardless of how commendable the Commission’s aims may be. As Chairman Pai (then Commissioner) recognized, “if the FCC wishes to take action against newer technologies beyond the TCPA’s bailiwick, it must get express authorization from Congress—not make up the law as it goes along.”¹⁴ The D.C. Circuit agreed. As the court described, “[n]othing in the TCPA countenances concluding that Congress could have contemplated the applicability of the statute’s restrictions to the most commonplace phone device used every day by the overwhelming majority of Americans.”¹⁵ Instead, “Congress need not be presumed to have intended the term ‘automatic telephone dialing system’ to maintain its applicability to modern phone equipment in perpetuity, regardless of the technological advances that may render the term

¹³ *2015 TCPA Declaratory Ruling and Order* ¶ 10.

¹⁴ *Id.* at 8076 (Dissenting Statement of Commissioner Ajit Pai).

¹⁵ *ACA Int’l*, 885 F.3d at 699.

increasingly inapplicable over time.”¹⁶ Accordingly, consistent with the D.C. Circuit decision, the Commission must adhere to the ATDS definition enshrined in the TCPA. To the extent such definition does not reach all types of calling equipment that, at times, have raised consumer concerns, it is a matter for Congress – and not the Commission – to address.¹⁷

II. EQUIPMENT THAT DOES NOT GENERATE, STORE, PRODUCE, AND DIAL RANDOM OR SEQUENTIAL NUMBERS ARE NOT AUTODIALERS SUBJECT TO THE TCPA

In light of the D.C. Circuit’s clear rebuke and to finally provide much-needed clarity, the Commission should confirm that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial such numbers.

The analysis starts with the clear and unambiguous language of the statute. Under the statute, a device must first be able to generate numbers in a random or sequential order. It then must be able to store or produce such numbers. And finally, it must be able to dial those numbers. If a device cannot perform each and every one of these functions, the device does not meet the definition of ATDS as set forth by Congress. In this regard, the Commission also should clarify that an autodialer must have the *current configuration* to perform the autodialer functions enumerated above. By doing so, the Commission would establish a clear, bright-line rule for callers (as well as for courts): Equipment can only meet the ATDS definition based on its current capabilities, not hypothetical or contingent configurations that could be achieved by the contact center operator at some point in the future. Importantly, such an approach would

¹⁶ *Id.*

¹⁷ Moreover, as Commissioner Michael O’Rielly has suggested, the autodialer definition impacts legitimate companies trying to reach their customers who want to be called far more than those who seek to make illegal robocalls. *See supra* note 3. Other Commission efforts, including efforts related to robocall blocking and caller ID authentication, have much greater potential to stop the illegal robocalls consumers despise. *See supra* note 2.

help to avoid an “impermissibly, expansive” interpretation, as the Commission previously proffered.¹⁸

For the same reasons, a predictive dialer is an ATDS *only if* it meets the criteria described above – *i.e.*, that it can, currently, generate, store, produce, and dial random or sequential numbers. As the D.C. Circuit recognized, “at least some predictive dialers ... have no capacity to generate random or sequential numbers.”¹⁹ Such devices do not, and cannot, meet the statutory definition of ATDS. This fact holds true regardless of whether the devices can subsequently be configured to have the necessary capacity. Accordingly, in light of the D.C. Circuit’s guidance, Cisco urges the Commission to finally eliminate the confusion past agency decisions have sowed by making clear that predictive dialers only meet the autodialer definition if they perform the autodialer functions – *i.e.*, that they can generate random or sequential numbers, and dial those numbers.

In addition, while non-de minimis human intervention certainly should disqualify equipment from being considered an autodialer,²⁰ the inverse alone is not true: The Commission cannot define the contours of an ATDS merely based on the lack of human intervention in actual

¹⁸ *ACA Int’l*, 885 F.3d at 700 (“The more straightforward understanding of the Commission’s ruling is that all smartphones qualify as autodialers because they have the inherent ‘capacity’ to gain ATDS functionality by downloading an app. That interpretation of the statute, for all the reasons explained, is an unreasonably, and impermissibly, expansive one.”); *see also Public Notice* at 2 (seeking comment on “how to more narrowly interpret the word ‘capacity’ to better comport with the congressional findings and the intended reach of the statute”).

¹⁹ *ACA Int’l*, 885 F.3d at 703.

²⁰ *See, e.g.*, U.S. Chamber Institute for Legal Reform et al., Petition for Declaratory Ruling, CG Docket No. 02-278, at 24-25 (filed May 3, 2018) (“U.S. Chamber Petition”) (“The FCC should make clear that if human intervention is required in generating the list of numbers to call or in making the call, then the equipment in use is not an ATDS. This comports with the commonsense understanding of the word ‘automatic,’ and the FCC’s original understanding of that word.”).

dialing. Doing so would again conflict with the statute’s requirement that an ATDS must have the capacity to generate and store or produce random and sequential numbers. Therefore, the Commission should make clear that calling equipment which automatically dials numbers from a set list is not an ATDS even if it can dial without additional human intervention.

In the alternative, or in addition, the Commission could clarify that the TCPA only applies to calls that are made using ATDS capabilities.²¹ As Commissioner Michael O’Rielly explained in his dissent to the *2015 TCPA Omnibus Order*, “the TCPA bars companies from using autodialers to ‘make any call’ subject to certain exceptions. This indicates that the equipment must, in fact, be used *as an autodialer* to make the calls.”²² This approach also would offer clear guidance to callers by ensuring that the TCPA’s restrictions only apply when autodialing functions (*i.e.*, generating, storing, producing, and dialing random or sequential numbers) are used.

III. CONCLUSION

The Commission must act now to provide long needed clarity with respect to the autodialer definition under the TCPA. Moreover, the Commission must act with restraint: It must finally hone its interpretation to the actual text of the statute, consistent with the direction from the D.C. Circuit. Accordingly, the Commission should now confirm that equipment,

²¹ See *Public Notice* at 3 (seeking comment on whether the TCPA’s restrictions only apply to the use of ATDS functionalities); see also U.S. Chamber Petition at 25-27 (urging FCC to find that only calls made using actual ATDS capabilities are subject to the TCPA’s restrictions).

²² *2015 TCPA Declaratory Ruling and Order* at 8088 (Dissenting Statement of Commissioner Michael O’Rielly); see also *ACA Int’l*, 885 F.3d at 704 (noting that such interpretation would diminish the practical significance of understanding “capacity” in the autodialer definition).

including predictive dialers, that do not store, produce, and dial random or sequential numbers are not autodialers, and therefore not subject to the TCPA.

Respectfully submitted,

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