

June 28, 2018

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

Re: Comment on the Federal Communications Commission's (FCC) Public Notice seeking 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; CG Docket No. 18-152; CG Docket No. 02-278*)

Dear Ms. Dortch:

We appreciate the opportunity to comment on the Federal Communications Commission's (FCC) Public Notice seeking comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision.

SELCO Community Credit Union is a state-chartered, credit union headquartered in Eugene, Oregon and serves nearly 130,000 members.

As comment, we adopt and respectfully submit verbatim sections II and III of the Petition for Declaratory Ruling filed May 3, 2018 by U.S. Chamber Institute for Legal Reform et al., CG Docket No. 02-278, the text of which is attached hereto.

Thank you for the opportunity to comment on this proposal. We appreciate the importance of these issues and the chance to contribute during this rule making process.

Sincerely,

/s/ Nicholas N. Sears

Nicholas N. Sears

SELCO Community Credit Union:
Excerpts from the Petition for Declaratory Ruling filed May 3, 2018 by U.S. Chamber Institute for
Legal Reform et al., offered as comment on the Federal Communications Commission's (FCC)
Public Notice seeking comment on Interpretation of the Telephone Consumer Protection Act in
Light of the D.C. Circuit's ACA International Decision.

II. 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 THOSE NUMBERS WITHOUT HUMAN INTERVENTION.

The FCC should immediately clarify that in order to be an ATDS subject to Section 227(b)'s restrictions,³⁶ dialing equipment must possess the functions referred to in the statutory definition: storing or producing numbers to be called, using a random or sequential number generator, and dialing those numbers.³⁷

The TCPA defines an ATDS as a device 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.”³⁸ A device must be able to generate numbers in either random order or in sequential order to satisfy the definition. Otherwise, the device cannot do anything “using a random or sequential number generator.”³⁹ Next, it must be able to store or produce those numbers called using that random or sequential number generator. This ability to store or produce telephone numbers to

³⁵ See *Pai Dissent*.

³⁶ The TCPA prohibits “mak[ing] any call . . . using an [ATDS]” to certain telephone numbers, including those assigned to wireless telephone services, absent an exception, such as prior express consent. 47 U.S.C. § 227(b)(1)(A).

³⁷ 47 U.S.C. § 227(a)(1).

³⁸ 47 U.S.C. § 227(a)(1)(A)-(B) (emphasis added).

³⁹ 47 U.S.C. § 227(a)(1)(A).

be called, alone, is insufficient; the clause “using a random or sequential number generator” modifies this phrase, requiring that the phone numbers stored or produced be generated using a random or sequential number generator. Finally, the device must be able to dial those numbers.

The Commission should not deviate from this straightforward language.

Devices that cannot perform these functions cannot meet the statutory definition of an ATDS. Clarifying this definition (and rejecting earlier expansions that sweep all predictive dialers into the category of “ATDS”)⁴⁰ is critical to restoring Congress’ intent for what constitutes an ATDS. Such a clarification would help businesses and other legitimate callers by confirming that both elements must be satisfied for a device to constitute an ATDS.

To further remove any confusion, the Commission should also make clear that both functions must be actually—not theoretically—present and active in a device at the time the call is made. The statute uses the present tense to limit the use of equipment that “has the capacity” to perform the ATDS function and makes no reference to potential or theoretical capabilities.⁴¹ Chairman Pai found this “present capacity” or “present ability” approach was compelled by the text and purpose of the

⁴⁰ In its 2003 TCPA Order, the Commission had determined that, while some predictive dialers cannot be programmed to generate random or sequential phone numbers, they still satisfy the statutory definition of an ATDS. 2003 Order, 18 FCC Rcd. at 14,091, ¶ 131 n.432; *id.* at 14,093 ¶ 133. But as the D.C. Circuit recognized, “at least some predictive dialers, as explained, have no capacity to generate random or sequential numbers.” *ACA Int’l*, 885 F.3d at 703.

⁴¹ 47 U.S.C. § 227(a)(1).

statute, the Commission’s earlier approaches to the TCPA, as well as common sense.⁴² This approach provides a clear, bright-line rule for callers. Callers do not need to worry about whether their calling equipment *could perhaps* one day be used as an ATDS. Instead, they can focus on what their devices *currently* do.

The FCC lacks the authority to go beyond the requirements of the clear statutory language. As Chairman Pai noted, the TCPA’s restrictions are limited in their applicability to specific equipment; “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.”⁴³ Thus, as the D.C. Circuit noted, “[t]he Commission’s capacious understanding of a device’s ‘capacity’ lies considerably beyond the agency’s zone of delegated authority for purposes of the *Chevron* framework.”⁴⁴

In clarifying which devices qualify as an ATDS, the Commission should hold that devices that require alteration to add autodialing capability are not ATDS. Rather, the capability must be inherent or built into the device for it to constitute an ATDS. To illustrate, smartphones require downloading an app or changing software code to gain autodialing capabilities. Those capabilities are not built in. By contrast,

⁴² See, e.g., Pai Dissent (“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.”)

⁴³ Pai Dissent.

⁴⁴ *ACA Int’l*, 885 F.3d at 698.

other calling equipment can become an autodialer simply by clicking a button on a drop-down menu. That function is already part of the device and requires a simple change in setting rather an alteration of the device. Devices with these inherent capabilities are an ATDS when these capabilities are in use. Adopting this distinction would significantly narrow the range of devices considered ATDS, excluding smartphones, and comport with the statutory language.

The FCC can take this opportunity to clarify that the absence of human intervention is what makes an *automatic* telephone dialing system automatic. This would clarify an issue on which the Commission has not been consistent. The Commission has stated that the basic function of an ATDS is to dial numbers without human intervention,⁴⁵ but later acknowledged that a device might qualify as an ATDS even if it cannot dial numbers without human intervention.⁴⁶ The Commission has stated that the impact of human intervention is a “case-by-case determination” based on “how the equipment functions and depends on human intervention.”⁴⁷ The FCC declined to provide additional clarity,⁴⁸ leaving callers without guidance.

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

⁴⁵ 2003 TCPA Order ¶ 132; 2008 Declaratory Ruling, ¶ 13.

⁴⁶ Omnibus Order ¶ 17.

⁴⁷ *Id.*

⁴⁸ *Id.* ¶ 20.

ATDS. This comports with the commonsense understanding of the word “automatic,” and the FCC’s original understanding of that word.⁴⁹ It also heeds the D.C. Circuit’s suggestion that the absence of human intervention is important; a logical conclusion, it found, “given that ‘auto’ in autodialer—or equivalently, ‘automatic’ in ‘automatic telephone dialing system’—would seem to envision non- manual dialing of telephone numbers.”⁵⁰ Importantly, it creates a clear rule for businesses to follow and courts to enforce, instead of a vague, case-by-case analysis of each piece of dialing equipment.

III. THE COMMISSION SHOULD FIND THAT ONLY CALLS MADE USING ACTUAL ATDS CAPABILITIES ARE SUBJECT TO THE TCPA’S RESTRICTIONS.

In the *Omnibus Order*, the FCC applied the TCPA’s prohibitions to any call using a device that *could be* an ATDS, regardless of whether the call was made using ATDS capabilities.⁵¹ In striking down this interpretation, the D.C. Circuit outlined an alternative approach, first raised by Commissioner O’Rielly in his *Omnibus Order* dissent, that was not raised by the petitioners: reinterpreting the phrase “make any call . . . using [an ATDS]” as used in the statute.⁵² The court suggested that the TCPA’s

⁴⁹ 2003 TCPA Order, ¶ 132 (“The basic function of such equipment, however, has not changed—the *capacity* to dial numbers without human intervention.”).

⁵⁰ *ACA Int’l*, 885 F.3d at 703 (citation omitted).

⁵¹ *Omnibus Order*, ¶ 19 n.70.

⁵² *Id.* at 703-04; *see also* 47 U.S.C. § 227(b)(1)(A) (“It shall be unlawful . . . to make any call . . . using any automatic telephone dialing system . . .”).

text requires a caller to use the statutorily defined functions of an ATDS to make a call for liability to attach.⁵³ It also noted that adopting this construction would “substantially diminish the practical significance of the Commission’s expansive understanding of ‘capacity’ in the autodialer definition”⁵⁴ Indeed, a device’s potential capabilities would not be relevant to determining whether it is an ATDS, because the inquiry will focus only on the functions actually used to make the call or calls in question. This interpretation would ensure that devices that are capable of gaining autodialer functions, such as smartphones, are only subject to the TCPA when used as autodialers.

The FCC should adopt the D.C. Circuit’s roadmap and clarify that the TCPA is only implicated by *the use of actual ATDS capabilities in making calls*. As the court suggested, the TCPA’s prohibitions should apply only to calls *using ATDS capabilities*.⁵⁵ Here, a proper interpretation of the TCPA requires the calling equipment “use” ATDS capabilities to make the call. Otherwise, the meaning of “using” would be vastly expanded and untethered from Congress’ goals.

Adopting this straightforward reading would ensure that liability attaches only when ATDS capabilities are used to make a call, rather than sweeping in calls made

⁵³ *ACA Int’l*, 885 F.3d at 704.

⁵⁴ *Id.*

⁵⁵ *Id.* at 703-04. *See also* 47 U.S.C. § 227(b)(1)(A) (“It shall be unlawful . . . to make any call . . . using any automatic telephone dialing system . . .”).

using smartphones, tablets, and other devices that conceivably *could* be modified to support autodialing via an ATDS. Businesses need this clear guidance, and it would help them avoid unnecessary litigation over whether they used an ATDS when placing calls to their customers. Consistent with the Court's suggestion and the plain text of the statute, the Commission should adopt this interpretation.