

**Outline of Presentation  
to Bureau of Consumer and Governmental Affairs  
FCC  
August 16, 2018**

**First Meeting – ATDS Definition**

1. Necessity to cover debt collection and other non-telemarketing calls
  - a. Sheer numbers and horror stories
  - b. No other law covers
  - c. Look at who is requesting relief
  - d. No reason to believe TCPA does not cover these calls (it is not limited to scam calls)
2. Definition of ATDS -- Intro
  - a. Congress's intention to cover evolving technologies
  - b. Must cover technologies actually being used
  - c. Must not be capable of being easily evaded (consumer protection statutes, etc.)
  - d. Must prevent unwanted calls and texts
3. Necessity to cover text messages
  - a. Sheer numbers and horror stories – invasive and pervasive, getting worse
  - b. No other law covers
  - c. Explicitly accepted by US Supreme Court (Campbell-Ewald)
4. Definition of ATDS should be broad:
  - a. With a carve-out for the ordinary use of a smart phone. Carve out should be based on the “ordinary use” of the phone:

Equipment which otherwise meets the definition of an “automatic telephone dialing system” for purposes of section 227(b)(1)(A) does not include equipment that the caller shows is not customarily used by the caller to make large numbers of automated calls in short periods of time.

- b. An interpretation of the statute that does not achieve the explicit intent of Congress to restrict unwanted calls that invade consumers' privacy is arbitrary and capricious. The Chamber's proposed definition of an ATDS covers no equipment.
5. Test for appropriate definition must comply with the statutory construct allowing automated calls to be made *with* consent.
  - a. The statute permits calls using either a) prerecorded voice, b) artificial voice, or c) an ATDS, to be made if consent has been provided. If Congress intended that calls made with an ATDS were to be outlawed, or only permitted for emergencies, the statute would have been constructed differently.
  - b. The statute limits the calls using these mechanisms; it does not prohibit them. And it treats ATDS, prerecorded and artificial voice calls the same.
  - c. This means that any definition for an ATDS must provide for a mechanism that would allow calls to be made using the defined autodialer *with* consent. The only

way that this can be done is for the caller to have created a *list* of numbers for which it has consent to call.

6. Meaning of “sequential.” A critical issue is how the phrase “using a random or sequential number generator” applies to a system.
  - a. If the word “sequential” is interpreted to mean only numbers in a numerical order, than applying the phrase to any part of the definition other than “produce” means that no system would ever include numbers for which there was consent.
  - b. Alternatively, interpreting “sequential” to mean numbers to be “in a sequence” or a “defined order,” would permit the phrase to be applied and the system to make calls for which there is consent (see Paths 2 and 3).
7. Path 1. Simplest read is that the phrase using a random or sequential number generator” applies only to “produce,” not to “store.” Thus a dialer that “store[s] ... numbers to be called ... and dials such numbers” is an autodialer. “Store” is an alternative requirement to “produce” in the statute.
  - a. Generate means produce,
  - b. “Using a random or sequential number generator” only modifies produce.
8. Path 2. Alternatively, “using a random or sequential number generator” could be argued to modify “dial.”
  - a. This would mean that numbers are dialed from a *stored* list in a random or sequential order.
  - b. Applying test:
    - i. If numbers must be dialed randomly from those on a list, that would allow only numbers for which there was consent to be called to be put into the list.
    - ii. But, if the numbers on the list were never called randomly, but only “sequentially” then the question is what does “sequentially” mean.
    - iii. If the numbers are stored on a list and dialed in the order the list dictates, this is sequentially (the sequence is established by the list). This would mean the term “sequential” is not limited to a numerical sequence.
9. Path 3. Some have argued that the numbers could be generated “using a random or sequential number generator” and then stored (we do not agree that this is a reasonable interpretation of the statute, because generated and stored are conflicting activities).
  - a. This would require that numbers stored (as well as produced) had been generated in a random or sequential way.
  - b. Applying test:
    - i. If the numbers were generated randomly, and then stored, none would ever have consent.
    - ii. If the numbers were generated in numerical order (1, 2, 3) and then stored, none would ever have consent.
    - iii. However, if the numbers were generated in an order set by the system (non-numerical) but in a sequence, the system could include numbers for which there was consent.
10. Path 4. Capacity: Continue to use a broad definition of “capacity” that includes reasonable potential functionalities.

- a. The breadth of the definition of “capacity” remains open: ACA International held that “it might be permissible” for the FCC to adopt either a broad or narrow interpretation of the term “capacity.”
  - b. If a broad definition of “capacity” is coupled with an explicit carve-out for the ordinary use of a smart phone, it will resolve the D.C. Circuit’s concerns.
11. In sum: four ways to provide a comprehensive definition that covers existing equipment and matches statutory construct for which there must be some way for calls made using an ATDS to have consent:
  - a. To define ATDS simply based on “store” and “dial”; or
  - b. To interpret the word “sequential” to mean calling in a prescribed order, or sequence, rather just numerical and apply the language “using a random or sequential generator” to the dialing of the numbers stored previously stored;
  - c. To interpret the word “sequential” to mean calling in a prescribed order or sequence, rather just “numerical” and to apply the language “using a random or sequential generator” to the dialing of the numbers stored previously.
  - d. Any system that has the reasonable potential functionality (i.e. the capacity) to be a system described in a, b or c.
12. In support of Path 1—simply requiring store and dial: note that “store” is an alternative requirement to “produce” in the statute.
  - a. Generate means produce, and “using a random or sequential number generator” modifies produce.
  - b. Last antecedent rule.
  - c. In sync with the FCC’s 2003, 2008 and 2012 orders.
13. Human intervention is an FCC term; and it is has been confused by the courts.
  - a. Some courts have held that any creation of a list is sufficient human intervention to defeat a finding of ATDS. The industry uses the concept to create dialing systems which are clearly automated but have some human involvement in the dialing process as a way of evading coverage. The cases are all over the place (see # 3).
  - b. The FCC should articulate that deliberate efforts to evade the statute (such as click dialing – with 2 humans involved) are not sufficient human intervention to avoid coverage.
  - c. The test for avoiding coverage based on human intervention should be whether one human agent is both dialing (or pressing the dial/connect button) and directly engaging with the called party.
14. The statutory prohibition is against making calls using ATDS equipment, not against making calls using the equipment's autodialing feature
  - a. Industry’s position requiring that the statute only covers calls using the ATDS functionality of the system to make the call cannot be reconciled with statutory construction.
  - b. Impossible to prove how a call was made—which undermines the clear intent of Congress to make this statute privately enforceable.

## Second Meeting

### 1. Reassigned numbers

- a. We strongly support the reassigned number database – as it will allow law-abiding callers to avoid calling the wrong parties.
- b. But, allowing intended recipient to be considered the called party would mean that called parties could never stop calls.
- c. For reassigned number calls to be stopped, there must be incentives to use database. If called party is considered intended recipient, no reason to use the database.
- d. Safe harbor for database
  - i. Must be narrowly tailored to only be allowed if the database made a mistake, and caller otherwise complied with the TCPA.
  - ii. What is the statutory justification for safe harbor.
- e. Reasonable reliance standard does not change these dynamics—
  - i. If database is available and not used, or not used correctly, then reliance is not reasonable.
  - ii. What is the statutory justification for reasonable reliance standard

### 2. Revocation of consent

- a. *Most consents are provided in a contractual context*
- b. If the FCC does not reaffirm right to revoke consent when consent granted in a contract, consent becomes meaningless.
- c. Methods must be reasonable – but FCC can define, can set the standard.

### 3. Debt Collection rules

- a. Huge area of abuse (for public and private student debts)
- b. Some reasonable limits must be imposed
  - i. Either very low limits (1 or 2 calls ever) or clear right to stop calls with notice
  - ii. Simpler the better
  - iii. Something must be adopted ASAP.
- c. No expansion, of course

### 4. Broadnet

- a. Redo – clarify (as has been done previously) that the providers of the technology is not liable for TCPA violations, only the callers are (that will take care of Congressional push)
- b. Allow exceptions for FTEU calls (market will be there, technology will follow), closely limited in number, time and content, as well as right to stop future
- c. DO NOT EXPAND TO STATES.

**DECISIONS INTERPRETING MEANING OF ATDS  
SINCE *ACA INTERNATIONAL***

August 16, 2018

**1. Most courts hold held that the FCC’s earlier orders (2003, 2008, and 2012) remain in effect:**

Somogyi v. Freedom Mortgage Corp., 2018 WL 3656158, at \*5 (D.N.J. Aug. 2, 2018); Reyes v. BCA Fin. Servs., Inc., 2018 WL 2220417, at \*11 (S.D. Fla. May 14, 2018); Maddox v. CBE Grp., Inc., 2018 WL 2327037, at \*4 (N.D. Ga. May 22, 2018); McMillion v. Rash Curtis & Assocs., 2018 WL 3023449, at \*3 (N.D. Cal. June 18, 2018); O’Shea v. Am. Solar Sol., Inc., 2018 WL 3217735 (S.D. Cal. July 2, 2018); Pieterston v. Wells Fargo Bank, 2018 WL 3241069, at \*3 (N.D. Cal. July 2, 2018); Swaney v. Regions Bank, 2018 WL 2316452, at \*1 (N.D. Ala. May 22, 2018). *But see* Pinkus v. Sirius XM Radio, Inc., 2018 WL 3586186, at \*6 (N.D. Ill. July 26, 2018); Sessions v. Barclays Bank, 2018 WL 3134439, at \*2 (N.D. Ga. June 25, 2018); Herrick v. GoDaddy.com L.L.C., 2018 WL 2229131, at \*7–\*8 (D. Ariz. May 14, 2018).

The two Circuit decisions so far, King v. Time Warner Cable, Inc., 894 F.3d 473, 481 (2d Cir. 2018) and Dominguez v. Yahoo, Inc., 894 F.3d 116 (3d Cir. 2018), do not mention the earlier orders or address whether they are still in effect.

**2. Since the earlier orders remain in effect, several courts hold that the definition of ATDS encompasses predictive dialers ...**

Patterson v. Ally Fin., Inc., 2018 WL 647438, at \*2 (M.D. Fla. Jan. 31, 2018); Ammons v. Ally Fin., Inc., 2018 WL 3134619 (M.D. Tenn. June 27, 2018); Reyes v. BCA Fin. Servs., Inc., 2018 WL 2220417, at \*11 (S.D. Fla. May 14, 2018); O’Shea v. Am. Solar Sol., Inc., 2018 WL 3217735 (S.D. Cal. July 2, 2018); France v. Ditech Fin., L.L.C., 2018 WL 1695405 (M.D. Fla. Apr. 6, 2018) (relying on 11th Circuit decision that relied on FCC’s 2003 order).

**3. ... as well as any device that dials numbers without human intervention:**

Swaney v. Regions Bank, 2015 WL 12751706 (N.D. Ala. July 13, 2015) (text message sending system); Zeidel v. A&M (2015) L.L.C., 2017 WL 1178150 (N.D. Ill. Mar. 30, 2017) (device that sends text messages *en masse*); Legg v. Voice Media Grp., Inc., 20 F. Supp. 3d 1370, 1374 (S.D. Fla. 2014) (relying on 2003 order to define ATDS as one that dials numbers without human intervention, but such a device was not used here). *Cf.* Marshall v. CBE Grp., Inc., 2018 WL 1567852 (D. Nev. Mar. 30, 2018) (even if FCC’s 2003 order is still in effect, human intervention is integral to initiating call through point-and-click system, so it is not an ATDS); Maddox v. CBE Grp., Inc., 2018 WL 2327037, at \*4 (N.D. Ga. May 22, 2018) (same).

**4. Most courts hold that the definition of “capacity” remains an open question:**

Ammons v. Ally Fin., Inc., 2018 WL 3134619, at \*6 (M.D. Tenn. June 27, 2018); Reyes v. BCA Fin. Servs., Inc., 2018 WL 2220417, at \*9, \*12 (S.D. Fla. May 14, 2018); Sessions v. Barclays Bank, 2018 WL 3134439, at \*3 (N.D. Ga. June 25, 2018); McMillion v. Rash Curtis & Assocs., 2018 WL 3023449 (N.D. Cal. June 18, 2018). *But see* Lord v. Kisling, Nestico & Redick, L.L.C., 2018 WL 3391941 (N.D. Ohio July 12, 2018) (misinterpreting *ACA International* as “rejecting the ‘capacity’ or ‘potential functionality’ test”; finding plaintiff’s ATDS allegations insufficient).

**5. The Second and Third Circuits interpret “capacity” to mean only present capacity (but including easily activated functionalities):**

King v. Time Warner Cable, Inc., 894 F.3d 473, 481 (2d Cir. 2018) (debt collection calls made automatically from a list); Dominguez v. Yahoo, Inc., 894 F.3d 116 (3d Cir. 2018) (automatic alert-sending system is not an ATDS).

**6. One court rejects the argument that “using a random or sequential number generator” modifies only the word “store” (but does not answer the question how numbers can be stored using a random or sequential number generator):**

Pinkus v. Sirius XM Radio, Inc., 2018 WL 3586186 (N.D. Ill. July 26, 2018).

**7. Two courts hold that a predictive dialer is an ATDS if it selects the next number to be called randomly from a stored list:**

Somogyi v. Freedom Mortgage Corp., 2018 WL 3656158 (D.N.J. Aug. 2, 2018); Sieleman v. Freedom Mortgage Corp., 2018 WL 3656159, at \*5 (D.N.J. Aug. 2, 2018).

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