

October 17, 2018

Federal Communication Commission Secretary
FCC Headquarters
445 12th St., SW, Room TW-A325
Washington, DC 20554

Docket No. CG Docket No. 18-152; CG Docket No. 02-278

On behalf of the 2.2 million credit union members we represent, the Heartland Credit Union Association (HCUA) appreciates the opportunity to submit comments in response to the *Marks Public Notice*. In *Marks v. Crunch San Diego, LLC*, the Ninth Circuit misinterpreted the Telephone Consumer Protection Act's ("TCPA") definition of an "automatic telephone dialing system" ("ATDS"), concluding that an ATDS need only have the capacity to dial stored numbers.

The Ninth Circuit's conclusion disregards the statutory text of the TCPA, Congress's intent, and the D.C. Circuit's *ACA v. FCC* decision. The Commission, therefore, should correct the Ninth Circuit's erroneous interpretation and confirm that equipment qualifies as an ATDS only if it actually possesses the functions expressly stated in the ATDS definition, namely (i) storing or producing numbers to be called, *using a random or sequential number generator*, and (ii) dialing those numbers. Additionally, the Commission should confirm that equipment qualifies as an ATDS only if it can perform these functions without human intervention, and that the TCPA only applies to calls that are made using the autodialing functionality. Properly defining an ATDS—according to the TCPA's text and Congressional intent—will substantially reduce uncertainty and help mitigate the onslaught of TCPA litigation. The Commission should also take this opportunity to update antiquated distinctions between wireless and landline calls when companies make informational calls to their customers or members.

The Ninth Circuit ignores the Commission's pre-2003 guidance on the definition of an ATDS. In analyzing the statute's text, the *Marks* court also disregards well-established canons of statutory construction. The court also uses the TCPA's legislative history to attempt to buttress a contextual analysis of two provisions of the TCPA—the exception for prior consent and Congress's 2015 TCPA amendment exempting federal debt collection calls—that it maintains support the definition of ATDS to include equipment that calls from lists. By failing to recognize the Commission's earlier guidance, failing to undertake any textual analysis, and misreading the legislative history and context of the TCPA, the Ninth Circuit adopts an erroneous interpretation of an ATDS.

Congress's restrictions on the use of ATDS were designed to address specific problems with random and sequential dialing, not to address general privacy concerns with automated artificial and recorded voice calls. Despite the Ninth Circuit's contrary interpretation, the textual conclusion that an ATDS must have the capacity to randomly or sequentially dial numbers is consistent with TCPA's legislative history and the context in which the term ATDS is used.

The Ninth Circuit bases its narrow reading of human intervention on its belief that Congress intended to target equipment that could engage in automatic *dialing*, rather than equipment that operated without any human oversight or control. HCUA believes that congress was not concerned with automatic dialing generally. Instead, it was concerned specifically with automatic dialing of randomly or sequentially generated numbers. In other words, Congress was concerned with calls resulting from automatically generated numbers, and not necessarily automatically dialed numbers. Therefore, the Ninth Circuit's focus on the dialing stage in evaluating the level of human intervention is misguided.

The Commission should take this opportunity to both confirm that human intervention removes equipment from the definition of ATDS and, clarify the degree of human intervention required. The Commissions should confirm, as a number of courts have, that minimal human intervention preceding the dialing function—such as manually clicking on a telephone number to initiate the dialing sequence—removes a telephony device from the definition of an ATDS.

As always, we appreciate the opportunity to review this issue. We will be happy to respond to any questions regarding these comments.

Sincerely,

A handwritten signature in black ink that reads "Bradley D. Douglas". The signature is written in a cursive, flowing style.

Brad Douglas
President/CEO