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MORTGAGE BANKERS ASSOCIATION

October 24, 2018

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

Re: Comments on FCC TCPA Rulemaking, CG Docket No. 18-152

The Mortgage Bankers Association[1] appreciates the opportunity to offer comments on how the Federal Communications Commission ("FCC" or "Commission") should promulgate appropriate regulations under the Telephone Consumer Protection Act ("TCPA"). We file these reply comments in support of the comment letter filed by U.S. Chamber Institute for Legal Reform calling for TCPA regulatory reform and in support of our petition urging the FCC to define autodialer reasonably and as intended by Congress in drafting the statute.[2] The comments provided herein are in addition to the reply comment letter MBA submitted to the FCC earlier this year addressing the same topic.[3]

The TCPA was enacted by Congress to combat an abusive form of cold-call telemarketing and fax-blast spamming.[4] As Chairman Ajit Pai has observed in the past, "Congress passed the [TCPA] to crack down on intrusive telemarketers and over-the-phone scam artists."[5] The TCPA should not expose legitimate businesses to unquantifiable uncertainty and the threat of costly liability for placing legitimate informational and other non-telemarketing calls to their customers. Unfortunately, the recent wave of litigation had led to this very situation.[6]

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[1] The Mortgage Bankers Association ("MBA") is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and variety of publications. Its membership of over 2,300 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

[2] Comments of U.S. Chamber Institute for Legal Reform to the Commission's public notice seeking further comment on interpretation of the TCPA in light of the Ninth's Circuit's *Marks v. Crunch San Diego, LLC* Decision, CG Docket No. 18-152 (filed October 17, 2018). Available at
https://www.instituteforlegalreform.com/uploads/sites/1/ILR.US_Chamber_FCC_Comments_Marks_Decision.pdf.

[3] Reply comments of MBA to the Commission's public notice seeking comment on interpretation of the TCPA in light of D.C. Circuit's ACA Int'l Decision, CG Docket No. 18-152 (filed June 27, 2018). Available at
https://www.mba.org/Documents/MBA%20Comment%20Letter%20on%20TCPA%20to%20FCC%20(June-18).pdf.

[4] See S. Rep. 102-178 at 1-2 (1991) (stating that the purpose of the TCPA is to "plac[e] restrictions on unsolicited, automated telephone calls to the home" and noting complaints regarding telemarketing calls); H.R. Rep. No. 102-317 at 6-7 (1991) (citing telemarketing abuse as the primary motivator for legislative action leading to the TCPA).

[5] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Red. 7961, 8072 ("2015 Declaratory Ruling") (Dissenting Statement of then-Commissioner Ajit Pai) (Pai Dissent).

[6] *See TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits*, U.S. Chamber Institute for Legal Reform (August 2017), http://www.instituteforlegalreform.com/research/tcpa-litigation-sprawl-a-study-of-the-sources-and-targets-of-recent-tcpa-lawsuits. (Under this analysis, the number of TCPA lawsuits increased from 2,127 in the 17 months prior to the FCC's 2015 Declaratory Ruling to 3,121 in the 17 months after the Declaratory Ruling.)

This dilemma was recognized by the D.C. Circuit's recent *ACA Int'l* decision,[7] which invalidated key portions of the FCC's 2015 Declaratory Ruling on the TCPA. However, in the wake of the *ACA Int'l* decision, District Courts have begun creating a patchwork of TCPA interpretations.[8] Multiple circuit courts have also addressed the TCPA.[9] However, it is the Ninth Circuit's decision in *Marks*[10] which purportedly clouds the Commissions current efforts to address the TCPA following *ACA Int'l*. The FCC should not credit the Ninth's Circuit expansive reading of a straight forward portion of the statute. Rather, the FCC should respect Congress's statutory design and clarify that in order to be an ATDS subject to section 227(b)'s restrictions,[11] dialing equipment must possess the functions referred to in the statutory definition.[12]

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."[13] Thus, a plain reading of the statute suggests the following must be satisfied for a device to be deemed an ATDS:

1. A device must be able to generate numbers in either random order or in sequential order to satisfy this definition.
2. A device must be able to store or produce those numbers called using that random or sequential number generator.
3. The device must be able to dial those numbers.

The Commission should not—and indeed cannot[14]—deviate from this straightforward language. Devices that cannot perform *all three of these functions* cannot meet the statutory definition of an ATDS. The statute is clear: "The term [ATDS] 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."[15]

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[7] *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687 (D.C. Cir. 2018).

[8] *See, for example, Fleming v. Associated Credit Servs.*, No. 16-3382, 2018 U.S. Dist. LEXIS 163120 (D.N.J. Sep. 21, 2018); *see also Marshall v. CBE Grp., Inc.*, No. 216CV02406GMNNJK, (D. Nev. Mar. 30, 2018); *see also John Herrick v. GoDaddy.com LLC*, No. CV-16-00254-PHX-DJH, at 1 (D. Ariz. May 14, 2018); *see also Reyes v. BCA Fin. Servs., Inc.*, No. 16-24077-CIV, at 1 (S.D. Fla. May 14, 2018).

[9] *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. Jun. 2018) and *King v. Time Warner Cable, Inc.*, 849 F.3d 473 (2d Cir. Aug. 2018).

[10] *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018).

[11] 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 expressed consent. 47 U.S.C. § 227(b)(1)(A).

[12] 47 U.S.C. § 227(a)(1).

[13] 47 U.S.C. § 227(a)(1)(A)-(B).

[14] *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-843 (1984). ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

[15] *Id.*

The Ninth Circuit focuses its decision on part (A). The Court, in its own words, "struggle[es] with the statutory language."[16] Although, the Court notes it did not struggle with the unambiguity of "capacity" in a prior decision.[17] In its decision the Ninth Circuit takes the position that part (A) reads to sever "to store" from the remainder of the sentence. This is not a particularly difficult definition to construct (as demonstrated by the Court[18]) and if it were Congress' intention to do so, it would have. On the contrary, Congress drafted a single provision:

> "to store or produce telephone numbers to be called, using a random or sequential number generator,"

modified by a comma to apply the dependent clause,

> "using a random or sequential number generator,"

to the entirety of the initial sentence,

> "to store or produce telephone numbers to be called."

This straight-forward reading does not require modification of any text. Any other reading would require additional modifiers, additional text, and changes to the statutory structure as indicated by the Ninth Circuit's own construction.[19] The Commission should not deviate from the straight-forward language of the current statute which requires usage of a random or sequential number generator.

The FCC's 2015 Declaratory Ruling adopted an extremely broad interpretation of "capacity."[20] This broad interpretation rendered any device that could be modified to include autodialing capabilities, to fall under the definition of an ATDS. This interpretation encompassed any smartphone device.[21] The D.C. Circuit found this interpretation to be "incompatible" with the statute's goals and "impermissibly" expansive.[22] Inevitably, the D.C. Circuit vacated portions of the FCC's 2015 Declaratory Ruling.[23]

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[16] *Marks*, 2018 WL 4495553 at *8. The Ninth Circuit goes onto discuss the context and the structure of the statutory scheme. A notable discussion occurs when the Court cites to *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), stating that "because we infer that Congress was aware of the existing definition of ATDS, its decision not to amend the statutory definition of ATDS to overrule the FCC's interpretation suggests Congress gave the interpretation its tacit approval." However, the Ninth Circuit ignores its own precedent in *Nigg v. U.S. Postal Serv.*, 555 F.3d 781, 787 (9th Cir. 2009), wherein the Court clarified that the presumption standard in *Lorillard* ordinarily applies to situations where Congress re-enacts the same statute. Such is not the case in the amendment to the TCPA that followed the FCC's 2015 Declaratory Ruling, rather the amendment was a single section within a larger omnibus bill.

[17] *Id.* at n.6.

[18] *Id.* at *9. ("Accordingly, we read § 227(a)(1) to provide that the term automatic telephone dialing system means equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers.").

[19] *Id.*

[20] *See* 2015 Declaratory Ruling, at 15.

[21] *ACA Int'l*, 885 F.3d 687, 5.

[22] *Id.* at 23.

[23] *Id.*

While the Ninth Circuit begins its discussion accepting the vitiating effect of *ACA Int'l* on the FCC's 2015 Declaratory Ruling, its expansive definition reintroduces the very same issue the D.C. Circuit deemed unreasonable.[24] Specifically, the Ninth Circuit held "that the statutory definition of ATDS includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator." This definition encompasses *any device that stores numbers*, which would include many cellular devices and computers. As explicated by the U.S. Chamber Institute for Legal Reform, the functional result of the decision by the Ninth Circuit effectively aims to codify the 2015 Declaratory Ruling, which the D.C. Circuit held incompatible with the statute.[25]

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MBA appreciates the FCC's consideration of these comments and the Consumer and Governmental Affairs Bureau's willingness to engage with stakeholders and members of the public on this important issue. For the reasons outlined above and in our petition, MBA urges the Commission to adhere to the statutory text of the TCPA and propose rules that retain consumer protections while creating clear paths to compliance for businesses. Should you have any questions or wish to discuss any aspects of these comments, please contact me or Justin Wiseman, Associate Vice President and Managing Regulatory Counsel, at (202) 557-2854 or jwiseman@mba.org.

Sincerely,

Pete Mills
Senior Vice President
Residential Policy & Member Engagement
Mortgage Bankers Association

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[24] *ACA Int'l*, 885 F.3d 687, 19-21 (2018). ("The court found the FCC's ruling to be utterly unreasonable in the breadth of its regulatory [in]clusion.").

[25] Such a reading arguably conflicts with the Hobbs Act. 28 U.S.C. § 2342(1) (making one circuit court's decision "binding" in all other circuits).