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Via electronic submission

October 24, 2018

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

Re: Public Notice – Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit Court's *Marks V. Crunch San Diego, LLC* Decision [CG Docket No. 18-152]

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 [CG Docket No. 02-278]

Dear Ms. Dortch:

The Independent Community Bankers of America ("ICBA")[1] welcomes this opportunity to provide reply comments on the Federal Communication Commission's ("FCC" or "Commission") interpretation of the Telephone Consumer Protection Act ("TCPA" or "Act"). These comments serve as a supplement to the comments previously made to the Commission, in letters dated June 7 and 13, 2018. As discussed in those letters, ICBA once again urges the Commission to issue a common-sense interpretation of the TCPA. The recent U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit Court" or "Ninth Circuit") decision in *Marks V. Crunch San Diego, LLC* ("Marks case") serves as evidence demonstrating the urgency of this matter.

[1] The Independent Bankers of America® creates and promotes an environment where community banks flourish. With more than 52,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 760,000 Americans and are the only physical banking presence in one in five U.S. counties. Holding more than $4.9 trillion in assets, $3.9 trillion in deposits, and $3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.

Background

The TCPA generally prohibits telephone calls made using an automatic telephone dialing system ("ATDS") to wireless telephone numbers unless the caller has the prior express consent of the called party. Of late, varying interpretations of the definition of ATDS have created industry uncertainty and confusion.

In response to several petitions seeking legal certainty regarding TCPA liability, the FCC issued a Declaratory Ruling and Order ("Order") in 2015. In part, the Commission interpreted the sort of equipment that qualifies as an ATDS. However, the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit Court" or "D.C. Circuit") set aside portions of the Commission's Order in March 2018. Following the March decision, the Commission sought stakeholder comment in June 2018.

Given that the Commission has yet to issue a revised interpretive order, the Ninth Circuit Court recently made its own ruling on how the ATDS definition should be interpreted. The Commission now seeks stakeholder comment on the Ninth Circuit ruling as a supplement to its June 2018 solicitation. Particularly, the Commission is seeking comment on how the Ninth Circuit ruling should be accounted for in a revised definition of an ATDS.

ICBA Comments

Executive Summary

It is imperative that community banks be able to confidently communicate financial information to their customers without fear of being subjected to meritless lawsuits. Accordingly, ICBA is supportive of the Commission's overall effort to reinterpret its arbitrary and capricious 2015 Order and define a more practical interpretation of an ATDS.

As the Commission moves to reinterpret the Act within the parameters set forth by the D.C. Circuit Court's decision, and in light of the Ninth Circuit's decision, ICBA recommends the following to the Commission:

- reject the Ninth Circuit Court's interpretation of an ATDS;
- limit the interpretation of an ATDS to the plain and reasonable language of the Act;
- issue a revised interpretation as soon as possible;
- tamp down on bad business practices that use technology to call and market to random individuals that have no ongoing relationship with a caller; and
- focus the definition and proscriptions on the generation of random or sequentially generated numbers.

The TCPA Cannot Reasonably be Interpreted in a Manner that Would Classify Every Smartphone an ATDS

The TCPA defines 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." This definition has given rise to numerous lawsuits as different interpretations can be inferred.

One such recent interpretation was espoused in the Commission's 2015 Order, which interpreted "capacity" to mean any future, theoretical possibility, not limited to current functionality. Simply put, if a phone merely has the *potential* to receive a software update to *become* an autodialer, then that phone has the "capacity" to be an autodialer and be covered-equipment under the TCPA.

Thankfully, the D.C. Circuit found that this interpretation overly broad. In setting it aside, the D.C. Circuit explained that all smartphones would qualify as autodialers under the Commission's interpretation. The D.C. Circuit stated, "[i]t cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact."

Although the *Marks* case hinges on a different question – whether the clause "using a random or sequential number generator" modifies both "store" and "produce" – the same underlying logic of the D.C. Circuit Court should apply. Here too, the Commission should find the Ninth Circuit's *Marks* decision to be unreasonably and impermissibly expansive.

The Ninth Circuit Court interpreted the rule expansively so that any device that merely "stores" telephone numbers meets the definition of ATDS, regardless of whether those numbers have been generated by a random or sequential number generator. Under the *Marks* court's logic, every smartphone meets the statutory definition of ATDS covered under the Act since every smartphone has the capacity to store numbers. Indeed, under the Ninth Circuit's theory, every speed-dial or redial function would render a standard touchtone telephone an ATDS. This cannot be, and is not, what Congress intended when passing the TCPA.

Arguably, the Ninth Circuit's interpretation captures even more devices than what the D.C. Circuit found to be unreasonable. Just as the D.C. Circuit Court explained that the TCPA could not be reasonably interpreted so broadly as to render every smartphone an ATDS subject to the Act, the Commission should not interpret the Act in a manner that would be even *more* expansive than a standard that the D.C. Circuit found to be prohibitively broad. ICBA urges the Commission to reject the Ninth Circuit's interpretation of an ATDS.

ICBA urges the Commission to limit its interpretation of ATDS to the plain and reasonable language of the Act. The definition should NOT include a device that merely dials numbers from a stored list, regardless of whether it was randomly generated.

The Commission Should Speedily Issue a Revised Interpretation of ATDS

Given the potential for additional courts in the Ninth Circuit to rely on the Appeal Court's faulty decision, ICBA urges the Commission to issue a revised interpretation as soon as possible. In reinterpreting the definition of an ATDS, the Commission should consider how a device is used, rather than focus solely on the esoteric nature of technology and what future developments may hold. Specifically, the Commission should tamp down on business practices that use technology to call and market random individuals that have no ongoing relationship with a caller. The TCPA's focus should be on the random or sequentially generated numbers, i.e., numbers that were acquired not by an established business relationship, but numbers that had no nexus to a legitimate business need.

Community banks depend on their relationships with customers and their ability to communicate with them when situations warrant it. Predatory lawsuits against responsible firms, such as community banks, have hindered the dissemination of these important communications. Should you have any questions or would like to discuss anything further, please do not hesitate to contact me at michael.emancipator@icba.org or at 202-659-8111.

Sincerely,

/s/

Michael Emancipator
Assistant Vice President and Regulatory Counsel