



October 8, 2018

FCC SEEKS ADDITIONAL COMMENTS ON THE MEANING OF AUTODIALERS AFTER MARKS

On October 3rd, the Federal Communications Commission ("FCC") issued a notice asking for public comments on how the FCC should interpret the meaning of "automatic telephone dialing system" ("ATDS") under the Telephone Consumer Protection Act ("TCPA") in light of the U.S. Court of Appeals for the Ninth Circuit's controversial ruling in *Marks v. Crunch San Diego, LLC*. See the ALERT of Sept. 27, 2018 for a summary of the ruling.

In *Marks*, the Ninth Circuit interpreted the statutory definition of ATDS broadly to include devices with the capacity to store numbers and to dial stored numbers automatically. In *ACA International v. FCC*, the D.C. Circuit court held that the TCPA unambiguously foreclosed on any interpretation that would appear to subject ordinarily calls from any conventional smartphone to the Act's coverage. See ALERT of Mar. 21, 2018 for a summary of *ACA International*. The FCC indicated that the two rulings appear to conflict to the extent that smartphones can store numbers and dial stored numbers automatically.

The FCC asked for guidance on how to interpret and apply the statutory definition of ATDS, including the phrase "using a random or sequential number generator," in light of *Marks* and *ACA International*. Specifically, the FCC posed the following questions:

- To the extent that the definition of ATDS is ambiguous, how should the FCC exercise its discretion to interpret such ambiguities?
- Does the interpretation of the *Marks* court mean that any device with the capacity to dial stored numbers automatically is an ATDS?
- What devices have the capacity to store numbers? Do smartphones have such capacity?
- What devices that can store numbers also have the capacity to automatically dial such numbers? Do smartphones have such capacity?

The FCC is also welcomes comments regarding any other issues addressed in *Marks* that relates to interpreting the definition of ATDS.

Comments are due to the FCC by October 17th. These comments will be used to supplement response to a prior public

notice issued by the FCC seeking comments on the interpretation of the TCPA after *ACA International*.

We have analyzed the definition of ATDS and have thoughts on how the statutory definition should be interpreted. Considering how much money has been spent interpreting the ambiguous definition of ATDS over the years, this issue illustrates the importance of thoughtful and careful legislative drafting. We frequently review and comment on proposed bills. Let us know how we can be of any assistance to you in analyzing and drafting legislation affecting your business. ☐

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