Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit'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

COMMENTS OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION AND THE CONSUMER MORTGAGE COALITION

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TABLE OF CONTENTS

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	)	
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I. INTRODUCTION AND SUMMARY

The American Financial Services Association ("AFSA") and Consumer Mortgage Coalition ("CMC") (collectively "the Associations") respectfully submit these comments in response to the Public Notice released by the Federal Communications Commission ("FCC" or "Commission") Consumer and Governmental Affairs Bureau ("Bureau") in the above-captioned proceedings.[1] The *Public Notice* seeks comment on a recent Ninth Circuit Court of Appeals panel decision in *Marks v. Crunch San Diego, LLC* interpreting the definition of an automatic telephone dialing system ("ATDS") under the Telephone Consumer Protection Act of 1991 ("TCPA" or "Act").[2]

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[1] *Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's* Marks v. Crunch San Diego, LLC *Decision*, Public Notice, CG Docket Nos. 18-152 and 02-278, DA 18-1014 (rel. Oct. 3, 2018) ("*Public Notice*").

[2] *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495533 (9th Cir. Sept. 20, 2018).

The Associations support the Commission's efforts to help protect consumers from scammers, fraudsters, and other bad actors, and to provide clarity to good faith-callers such as the Associations' members and others who must contact consumers with important, time-sensitive information. As it seeks to address the key unsettled issues under the TCPA such as the meaning of ATDS, the Commission should ensure that its regulatory framework and policies are consistent with the TCPA's statutory language, Congressional intent, and modern communications technologies, and that they facilitate legitimate, pro-consumer business practices.[3]

In *Marks*, the Ninth Circuit panel found that the statutory definition of ATDS in the TCPA is "not susceptible to a straightforward interpretation based on the plain language alone" but rather is "ambiguous on its face."[4] Based on this purported ambiguity, the court found that "[a]lthough Congress focused on regulating the use of equipment that dialed blocks of sequential or randomly generated numbers—a common technology at that time—language in the statute indicates that equipment that made automatic calls from lists of recipients was also covered by the TCPA."[5]

As discussed in more detail below, the Associations disagree with the analysis in *Marks* in several material respects. First, the Associations disagree that the TCPA's definition of ATDS is ambiguous on its face as to the question of whether the phrase "using a random or sequential number generator" modifies both "store" and "produce." Congress's use of punctuation and

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[3] *See, e.g.*, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, 8754 ¶ 3, n.1 (1992) ("*1992 TCPA Order*") ("The President signed the bill into law because it gives the Commission 'ample authority to preserve legitimate business practices.'").

[4] *Marks*, 2018 WL 4495533 at *8.

[5] *Id.*

syntax confirms that, to fall within the scope of an ATDS, equipment must have and use a random or sequential number generator to store or produce numbers and to dial those numbers without human intervention. Only equipment that possesses such functionality at the time the call is made, and that actually uses the functionality to make the call(s) in question, should be considered an ATDS. This interpretation finds support, *e.g.*, in the plain language and legislative history of the Act, as well as the D.C. Circuit's *ACA International* decision.[6] The Associations therefore encourage the FCC to provide stakeholders with regulatory certainty by interpreting ATDS consistent with *ACA International* and the Associations' prior advocacy in this proceeding. The Commission should also reject arguments by the *Marks* court that the TCPA's "prior express consent" exception and 2015 federal debts exception suggest a different result.

II. ABOUT AFSA AND CMC

Since 1916, AFSA members have provided consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance. AFSA members aim to shape the financial industry's direction and positions on a broad range of policy issues to benefit consumers, competition, and innovation. AFSA believes in a collaborative regulatory process between agencies like the FCC and the parties directly affected by the agency's proposed regulations.

CMC is a trade association of national mortgage lenders and servicers focused on ensuring that consumers are protected and well-served by a set of streamlined rules and regulations. CMC's mission is to provide a forum for national mortgage lenders and servicers to discuss and develop policy on ongoing public policy issues that impact their businesses and to develop and support a plan for the long-term restructuring of the mortgage finance industry.

[6] *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

The Associations have participated in numerous prior FCC TCPA proceedings. Most recently, they joined with 17 other industry leaders, business groups, and trade associations to ask the FCC to clarify the definition of an ATDS under the TCPA[7] and submitted comments in the Commission's proceeding responding to *ACA International*.[8]

III. THE ATDS DEFINITION REQUIRES THAT EQUIPMENT STORE OR PRODUCE NUMBERS TO BE CALLED USING A RANDOM OR SEQUENTIAL NUMBER GENERATOR

In the *Public Notice*, the Bureau seeks comment on how to interpret and apply the statutory definition of ATDS, including the phrase "using a random or sequential number generator," in light of the recent decisions in *Marks* and *ACA International*.[9] The TCPA defines an ATDS as follows:

> [E]quipment 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.[10]

In subsection (A), the phrase "using a random or sequential number generator" is best understood as an absolute phrase. As explained in *The Little, Brown Handbook*, a definitive

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[7] *See* Petition for Declaratory Ruling of the U.S. Chamber of Commerce, *et al*., CG Docket No. 02-278 (filed May 3, 2018) ("ATDS Petition").

[8] *See* Comments of the American Financial Services Association, CG Docket Nos. 02-278, 18-152 (filed June 13, 2018); *Ex Parte* Letter from Anne C. Canfield, Executive Director, CMC and Edward J. DeMarco, President, Housing Policy Council, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 18-152 & 02-278 (filed June 13, 2018). The Associations have engaged on other TCPA-related issues as well. *See, e.g.*, *Ex Parte* Letter from Bill Himpler, Executive Vice President, AFSA, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 17-97 (filed Aug. 14, 2017); *Ex Parte* Letter from Bill Himpler, Executive Vice President, AFSA, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 17-59 (filed July 31, 2017); *Ex Parte* Letter from Anne C. Canfield, Executive Director, CMC, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 17-59 (filed June 7, 2018).

[9] *See Public Notice* at 2.

[10] 47 U.S.C. § 227(a)(1).

source on American grammar and writing, "[a]n absolute phrase modifies a whole main clause rather than any word in the clause . . . . Absolute phrases occur at almost any point in the sentence, and they are always set off by a comma or commas."[11] Thus, in the clause of the ATDS definition, "equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator," the absolute phrase, "using a random or sequential number generator" modifies both "store" and "produce."

Crunch Fitness advanced this interpretation in *Marks*.[12] The court disagreed, and instead found the definition ambiguous on its face.[13] However, in crafting legislation, Congress is presumed to follow accepted punctuation standards[14] and thus, its placement of the comma in the ATDS definition is assumed to be meaningful.[15] The court's decision in *Marks* fails to adequately address Supreme Court precedent on this grammatical canon of statutory construction. Moreover, the *Marks* court's expansive reading of the ATDS definition to cover any equipment that can dial numbers automatically from a list would potentially encapsulate all sorts of technologies, including smartphones, in direct contradiction to the warning issued by the D.C. Circuit in *ACA International*, which held that the TCPA unambiguously foreclosed any interpretation that "would appear to subject ordinary calls from any conventional smartphone to the Act's coverage."[16] Thus, the *Marks* court's reading is untenable.

As the D.C. Circuit explained in *ACA International*, the TCPA's reference to "random or sequential number[s]" cannot simply mean dialing from a set list of numbers, because "[a]nytime

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[11] H. RAMSEY FOWLER ET AL., THE LITTLE, BROWN HANDBOOK § 28d (8th ed. 2001).

[12] *Marks*, 2018 WL 4495533 at *8.

[13] *Id.*

[14] *See, e.g.*, *United States v. Ron Pair Enters.*, 489 U.S. 253, 241-42 (1989).

[15] *Id.*

[16] *ACA Int'l*, 885 F.3d at 692.

phone numbers are dialed from a set list, the database of numbers must be called in *some* order—either in a random or some other sequence."[17] In a footnote, the *Marks* decision raises a purported "linguistic problem" in the TCPA that "it is unclear how a number can be *stored* (as opposed to *produced*) using a random or sequential number generator."[18] But several other courts considering this issue have already addressed this argument, and concluded that "[n]othing in the TCPA indicates that Congress intended a narrow definition of the storage concept that would limit the statute's application to technology that stores telephone numbers for an extended period of time."[19] Moreover, the phrase "store or produce . . . using a random or sequential number generator" acknowledges that randomly or sequentially generated numbers might be produced for immediate dialing or stored for later dialing – and that telemarketers cannot evade the TCPA solely by storing random or sequential numbers instead of placing the calls immediately. A contrary reading would be inconsistent with the consumer protection goals of the TCPA.

IV. TO THE EXTENT THAT THE FCC FINDS THE ATDS DEFINITION TO BE AMBIGUOUS, IT SHOULD ADOPT A REASONABLE INTERPRETATION THAT IS CONSISTENT WITH THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE TCPA.

As discussed above, the FCC can end its ATDS analysis based on the plain language of the TCPA, contrary to the *Marks* decision. If, however, the agency determines that the definition of ATDS is ambiguous, then it would be well within its reasoned decision-making authority

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[17] *Id.* at 702.

[18] *Marks*, 2018 WL 4495533 at *9, n.8 (*quoting Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 372 n.1 (3d Cir. 2015)).

[19] *Heard v. Nationstar Mortg. LLC*, No. 2:16-cv-00694-MHH, 2018 U.S. Dist. LEXIS 143175 at * 15 (N.D. Ala. Aug. 23, 2018); *see also Lardner v. Diversified Consultants, Inc.*, 17 F. Supp. 3d 1215, 1221 (S.D. Fla. 2014) ("The [TCPA] has no requirement on how long a telephone number is stored.").

under the TCPA to interpret the definition as requiring that the equipment have and use a random or sequential number generator to store or produce numbers and to dial those numbers without human intervention.[20] The Commission should also interpret "capacity" to mean only the "present ability" of the equipment at the time of the call and confirm that only calls made using such abilities are subject to the TCPA's restrictions. In doing so, the Commission should reject the *Marks* court's assertions that the TCPA's "prior express consent" exception and Congress's 2015 federal debts exemption amendments suggest a different outcome.

A. In Passing the TCPA's Autodialer Restriction, Congress Sought to Limit Random or Sequential Dialing

Congress, in adopting the TCPA, sought to remedy the growing problem of telemarketing and fax-blast calls made "without incurring the normal cost of human intervention."[21] The FCC acknowledged the TCPA's goal of "restrict[ing] the most abusive telemarketing practices" when promulgating its initial rules implementing the Act.[22] At the time of adoption, Congress did not intend to interfere with "expected or desired communications between businesses and their customers."[23] Moreover, in floor debate over the House's passage of the TCPA, Congressman John Wiley Bryant confirmed that "existing and emerging technologies and services that are beneficial to the public should not be prohibited by [the TCPA]."[24]

Random and sequential dialing was a key component of the harm sought to be remedied by the TCPA. As the Ninth Circuit panel acknowledge in *Marks*, "[t]he volume of automated

[20] 47 U.S.C. § 227(a); 47 C.F.R. §§ 64.1200(a)(1), 64.1200(f)(2).

[21] H.R. REP. NO. 102-317, at 6 (1991).

[22] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, ¶ 14, n.24 (1992).

[23] H.R. REP. NO. 102-317, at 17 (1991).

[24] 137 CONG. REC. H11312 (daily ed. Nov. 26, 1991) (statement of Rep. Bryant).

telemarketing calls was not only an annoyance but also posed dangers to public safety. Due to advances in autodialer technology, the machines could be programmed to call numbers in large sequential blocks or dial random 10-digit strings of numbers."[25] Such activity interfered with consumers' ability to make or receive vital calls. As the *Marks* court recognized, the type of "large sequential block" or "random 10-digit" dialing "resulted in calls hitting hospitals and emergency care providers and 'sequentially delivering a recorded message to all telephone lines.'"[26] Moreover, "because some autodialers would 'not release [the line] until the prerecorded message is played . . . there was a danger that the autodialers could 'seize' emergency or medical assistance telephone lines, rendering them inoperable, and 'dangerously preventing those lines from being utilized to receive calls from those needing emergency services.'"[27]

Calls made from a predetermined list of specific telephone numbers—and not through a random or sequential number generator—do not implicate the important policy goals identified above that motivated Congress to pass the TCPA and limit random or sequential calling. As then Commissioner Pai has previously explained:

> When the Commission first interpreted the statute in 1992, it concluded that the prohibitions on using automatic telephone dialing systems "clearly do not apply to functions like 'speed dialing,' 'call forwarding,' or public telephone delayed message services, because the numbers called *are not generated in a random or sequential fashion.*" Indeed, in that same order, the Commission made clear that calls not "dialed using a random or sequential number generator" "are not autodialer calls."[28]

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[25] *Marks*, 2018 WL 4495533 at *2 (internal citation omitted).

[26] *Id.* (citation omitted).

[27] *Id.* (citation omitted).

[28] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 199, et al*, Declaratory Ruling and Order, 30 FCC Rcd 7961, 8075 (dissenting statement of then-Commissioner Ajit Pai) (citations omitted).

To align with the Congressional intent of the TCPA, the Commission should interpret ATDS to mean equipment that has and uses a random or sequential number generator to store or produce numbers and dials those numbers, using that functionality, without human intervention.

One issue that the *Marks* court did not reach is whether equipment needs to have the current ability to perform the required ATDS functions or just the "potential capacity" to do so.[29] Chairman Pai and Commissioner O'Rielly have each contributed to a logical reading that is consistent with *ACA International*: that ATDS functionality must be (1) present and active in a device at the time the call is made; and (2) actually used to make the call(s) to implicate the TCPA's ATDS requirement.

Other courts that have considered this question have agreed with this reading of the TCPA. For example, in *Dominguez v. Yahoo!, Inc.*, the Third Circuit found that a device must randomly or sequentially generate numbers order to be an autodialer.[30] Three days later, the Second Circuit held that calling equipment has the "capacity" required of an ATDS only if its "current functions" perform the functions of an autodialer, "absent any modifications to the device's hardware or software."[31] The Associations have advocated for this interpretation previously,[32] and do so again here.

B. The *Marks* Court Misconstrued the Effect of the Prior Express Consent and Federal Debts Exceptions

To further support its conclusion, the *Marks* court uses two aspects of the TCPA – the "prior express consent" exception to the ATDS and prerecorded or artificial voice call restrictions and Congress's 2015 Bipartisan Budget Act ("BBA") amendments to the TCPA.

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[29] *Marks*, 2018 WL 4495533 at *9, n.9.

[30] *Dominguez v. Yahoo!, Inc.*, 894 F.3d 116, 120-21 (3d Cir. 2018).

[31] *King v. Time Warner Cable, Inc.*, 894 F.3d 473, 481 (2d. Cir. 2018).

[32] ATDS Petition at 21-27.

The *Marks* court argues that these two pieces of legislation envision that an ATDS can call selected numbers from a list of consumers, which means that the TCPA not only restricts equipment that uses a random or sequential number generator, but also restricts equipment that merely calls a list of phone numbers automatically. However, the court's reasoning is illogical, and the Commission should not follow that approach.

With respect to the "prior express consent" exception, the TCPA prohibits, *inter alia*, "any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any [ATDS] **or an artificial or prerecorded voice**" to proscribed telephone numbers (including wireless numbers).[33] According to the *Marks* court, to take advantage of the "prior express consent" exception, "an autodialer would have to dial from a list of phone numbers of persons who had consented to such calls, rather than merely dialing a block of random or sequential numbers."[34] With this reading, the Ninth Circuit panel improperly assumes that dialing from a set list of numbers cannot be in some specific order. Indeed, as articulated earlier, the D.C. Circuit recognized in *ACA International* that the TCPA's reference to "random or sequential number[s]" cannot simply mean dialing from a set list because the database of numbers must be called in *some* order – either in a random or some other sequence. Thus, even for calls to persons who have provided consent, those numbers could be dialed randomly or through some other sequence.

Moreover, the *Marks* court erred by ignoring the references to artificial or prerecorded voice calls in the "prior express consent" exception. A better reading of the TCPA is that Congress included the "prior express consent" exception to allow artificial or prerecorded voice calls made using any type of calling equipment, regardless of whether or not it qualifies as an

[33] 47 U.S.C. § 227(b)(1) (emphasis added).

[34] *Marks*, 2018 WL 4495533 at *8.

ATDS. Indeed, the *Marks* court's interpretation of section 227(b)(1) effectively reads the artificial or prerecorded voice limitations out of the statute, which, at a minimum, ignores a significant part of the legislation.

Congress's 2015 BBA amendments to the TCPA similarly can be read in context to undermine the *Marks* court's analysis. After the FCC issued its 2015 *Omnibus Declaratory Ruling*, Congress added language to the TCPA exempting the use of an ATDS to make calls solely to collect a debt owed to or guaranteed by the United States. The *Marks* court argues that like the "prior express consent" exception, this debt collection exception "demonstrates that equipment that dials from a list of individuals who owe a debt to the United States is still an ATDS but is exempted from the TCPA's strictures."[35] However, this analysis is also flawed because it once again fails to recognize that dialing from a set list of numbers does not foreclose the possibility that numbers must be called in some order – either randomly or by some other sequence.

C. Congress Did Not Tacitly Approve the FCC's 2015 ATDS Interpretation Through the 2015 BBA Amendment

The *Marks* court cites as additional support for its ATDS interpretation Congress's "decision not to amend the statutory definition" through the BBA.[36] According to the *Marks* court, Congress's failure to (further) amend the TCPA amounted to an implicit endorsement of the FCC's ATDS interpretation from the *2015 Omnibus Declaratory Ruling*, which interpreted

[35] *Marks*, 2018 WL 449533 at *2.

[36] *Marks*, 2018 WL 4495533 at *8.

ATDS broadly to encompass, *inter alia*, devices that could dial numbers from a stored list (*e.g.*, smartphones). This is not correct.[37]

The Supreme Court has warned against finding tacit approval in Congressional inaction, stating that courts "walk on quicksand when [they] try to find in the absence of corrective legislation a controlling legal principle."[38] Similarly, the Second Circuit has ruled that courts "must first ascertain whether Congress has spoken clearly enough to constitute acceptance and approval of an administrative interpretation. Mere reenactment is insufficient."[39] The court advised that in situations where the agency's interpretation is not forefront in Congress's mind (for example, where the record is devoid of Congressional discussion of the reenactment's intended scope) "the Court has reconsidered the re-enactment to be without significance.'"[40]

Here, the BBA does not include any legislative history to indicate that Congress intended to ratify the FCC's ATDS interpretation from the *2015 Omnibus Declaratory Ruling*. Instead, an equally compelling (if not more logical) view of Congress's actions is that the legislature made targeted changes to the TCPA to address the federal debts issue immediately before it, and deferred further action barring resolution of the D.C. Circuit's decision in the then-pending *ACA International* case. Indeed, if courts "'presume that when Congress amends a statute, it is

[37] In the first instance, to the extent the plain language of the TCPA unambiguously defines ATDS, the theory of congressional ratification by reenactment is moot. *See Demarest v. Manspeaker*, 498 U.S. 184, 185 (1991) ("[W]here the law is plain, subsequent reenactment does not constitute an adoption of a previous administration construction."). The discussion in this section presumes the FCC has determined that the TCPA's definition of ATDS is ambiguous.

[38] *Helvering v. Hallock*, 309 U.S. 106, 121 (1940).

[39] *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 819 (2d Cir. 2015) (internal quotations and citation omitted).

[40] *Id.* (*quoting United State v. Calamaro*, 354 U.S. 351, 359 (1957)).

knowledgeable about judicial *decisions* interpreting the prior legislation,'"[41] then Congress can presumably act with knowledge of pending judicial *appeals* as well. In any event, interested parties (including the *Marks* court) are left to speculate because Congress gave no clear indication that it intended to ratify the FCC's 2015 interpretation through the BBA.

V. CONCLUSION

The TCPA's ATDS definition requires that ATDS equipment have and use a random or sequential number generator to store or produce numbers and to dial those numbers without human intervention. Only equipment that possesses such functionality at the time the call is made, and that actually uses the functionality to make the call(s) in question, should be considered an ATDS. For the foregoing reasons, the FCC should reject the *Marks* court's assertions that the TCPA requires a different result.

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[41] *Marks*, 2018 WL 4495533 at *8 (*quoting Porter v. Bd. of Trs. of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064, 1072 (9th Cir. 2002) (emphasis added)).