

THE
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FCC Seeks Further Comment on the Definition of an ATDS Following the Ninth Circuit's Decision in *Marks v. Crunch San Diego, LLC*

Friday, October 5, 2018

On October 3, 2018, the FCC issued a [Public Notice](#) requesting further comment on “what constitutes an automatic telephone dialing system” under the terms of the TCPA in light of the Ninth Circuit’s recent decision in *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018).

As discussed in the Public Notice, the TCPA defines an automatic telephone dialing system (“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.” Public Notice at 1 (quoting 47 U.S.C. § 227(a)(1)). Notwithstanding this limited definition, the Ninth Circuit’s *Marks* decision found that the statute was ambiguous and ruled that an ATDS means more than the language of the statute. *Id.* (citing *Marks*, 2018 WL 4495553, at *8). The FCC noted that the *Marks* court “interpreted the statutory language expansively so that an [ATDS] is ‘not limited to devices with the capacity to call numbers produced by a random or sequential number generator, but also includes devices with the capacity to store numbers and to dial stored numbers automatically.’” *Id.* (quoting *Marks*, 2018 WL 4495553, at *9).

The FCC highlighted that the *Marks* decision clashes with the D.C. Circuit’s ruling in *ACA International v. FCC*, which “held that the TCPA unambiguously foreclosed any interpretation that ‘would appear to subject ordinary calls from any conventional smartphone to the [TCPA]’s coverage.” *Id.* (quoting *ACA Int’l v. FCC*, 885 F.3d 687, 692 (D.C. Cir. 2018)). For a comprehensive analysis of the *Marks* decision, please refer to our previous [blog post](#).

Accordingly, the FCC announced that it is seeking “further comment on how to interpret and apply the statutory definition of an [ATDS], including the phrase ‘using a random or sequential number generator,’ in light of the recent decision in *Marks*, as well as how that decision might bear on the analysis set forth in *ACA International*.” *Id.* The FCC seeks answers to the following questions:

- To the extent the statutory definition is ambiguous, how should the FCC exercise its discretion to interpret such ambiguities here?
- Does the interpretation of the *Marks* court mean that any device with the capacity to dial stored numbers automatically is an automatic telephone dialing system?
- What devices have the capacity to store numbers? And do smartphones have such capacity?
- What devices that can store numbers also have the capacity to dial such numbers automatically? And do smartphones have such capacity?
- In short, how should the FCC address these two court holdings?
- The FCC also seeks comment on any other issues addressed in the *Marks* decision that the FCC should consider in interpreting the definition of an “automatic telephone dialing system.”

Id.

Interested parties must file comments on or before October 17, 2018. The deadline for reply comments is October 24, 2018.

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