

Class Actions Alert

Akin Gump

STRAUSS HAUER & FELD LLP

Retail Industry Leaders Association Urges the FCC to Address Key TCPA Issues

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Key Points

- Companies across industries continue to face TCPA litigation and address compliance challenges.
- The FCC will soon be addressing key TCPA issues in the wake of the D.C. Circuit's ruling in *ACA International*.
- One important issue is the interpretation of the term "automatic telephone dialing system" or "ATDS."
- The Retail Industry Leaders Association and other groups filed comments urging the FCC to promptly act and rule that the proper definition of ATDS is consistent with the plain language of the statute, the legislative history of the TCPA and the court's ruling in *ACA International*.

On October 24, 2018, the Retail Industry Leaders Association (RILA) filed comments¹ (please click [here](#) to view) with the Federal Communications Commission (the "Commission"). These comments, which were submitted in connection with a Public Notice issued by the Commission on October 3, 2018, address a key Telephone Consumer Protection Act (TCPA) issue—specifically, the interpretation of the term "automatic telephone dialing system" (ATDS)—in light of the 9th Circuit's recent decision.²

RILA is the trade association of the world's largest and most innovative retail companies. In their most recent comments, RILA "urges the Commission to reject the reasoning in *[Marks]*, and to adopt an interpretation of ATDS that is consistent with the plain and unambiguous statutory definition, Congressional intent, and the D.C. Circuit's reasoning in *ACA International*" RILA explains that the Commission should expeditiously adopt guidance on the ATDS definition to "prevent further harm to compliance-minded businesses in the form of unnecessary, unpredictable, and abusive TCPA litigation." Specifically, RILA requests that the Commission rule that (1) whether a device qualifies as an ATDS should be determined based on that device's "present capacity" rather than its "potential" or "theoretical" capacity, and (2) in order for a particular call to have been placed by an ATDS, the call in question

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must actually have been dialed (a) using a random or sequential number generator to produce the number called and (b) without human intervention. This interpretation is based on the plain language of the statute, is consistent with the legislative history and *ACA International*, and ensures that the TCPA targets the types of communications (e.g., robocalls) it was intended to address.

There continues to be an explosion of TCPA claims in federal and state courts across the country. Many of these cases are manufactured and/or lawyer-driven and seek to exploit the TCPA's statutory damages provision of \$500 up to \$1,500 per telephone call, text message or fax. Retailers, as well as companies in the communications, financial services and insurance industries, have been disproportionately targeted by the plaintiffs' class action bar. Businesses are hopeful that Chairman Pai and the Commission will meaningfully address this critically important issue—as well as others—and be “faithful to the letter and spirit of the statute and . . . advance the shared goal of its members, the Commission, and the general public to develop reasonable, understandable, and administrable rules and prevent unwarranted and burdensome litigation.”

¹ Akin Gump Strauss Hauer & Feld LLP's cross-practice team involving class actions, appellate and communications, filed the comments on behalf of RILA.

² *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018) (“*Marks*”).