

# Client Alert

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## FCC Issues Package of New Declaratory Rulings Concerning Telephone Consumer Protection Act

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On July 10, 2015, the Federal Communications Commission (FCC) released a 140-page Omnibus Declaratory Ruling and Order in response to more than two dozen petitions from businesses, attorneys general, and consumers seeking clarity on how the FCC interprets the Telephone Consumer Protection Act (TCPA). As noted in vigorous dissents by Commissioners Pai and O'Rielly, several of the rulings seem likely to increase TCPA litigation and raise a host of compliance issues for businesses engaged in telemarketing or other practices that involve calling or sending text messages to consumers.

Since the FCC issued the order, trade associations and companies have filed multiple petitions for review in courts of appeals challenging the order.<sup>1</sup> It will thus ultimately be up to the courts of appeals to decide whether the FCC's new interpretations of the TCPA are reasonable.

### WHAT IS AN "AUTOMATIC TELEPHONE DIALING SYSTEM"?

The TCPA generally prohibits certain calls to cell phones made with an Automatic Telephone Dialing System (ATDS). As defined by statute, an ATDS is "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."<sup>2</sup> In the absence of statutory or FCC guidance, some courts have construed "capacity" broadly to encompass any equipment that is capable of automatically dialing random or sequential numbers, even if it does not actually do so, or even if it must be altered to make it capable of doing so.<sup>3</sup> In light of these decisions, a number of entities asked the FCC to clarify that equipment does not qualify as an ATDS unless it has the *present* capacity to generate and dial random or sequential numbers.

In its ruling, the FCC found that an ATDS includes equipment with both the present and *potential* capacity to generate and dial random or sequential numbers, even if such potential would require modification or additional software in order to do so.<sup>4</sup> An ATDS also includes equipment with the present or potential capacity to dial numbers from a database of numbers.<sup>5</sup>

<sup>1</sup> See, e.g., *Professional Ass'n for Customer Engagement, Inc., v. FCC*, No. 15-2489 (7th Cir. Filed July 14, 2015); *Sirius XM Radio Inc. v. FCC*, No. 15-1218 (D.C. Cir. filed July 14, 2015); *ACA Int'l v. FCC*, No. 15-1211 (D.C. Cir. filed July 10, 2015).

<sup>2</sup> 47 U.S.C. § 227(a)(1).

<sup>3</sup> See, e.g., *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009) (as construed by subsequent opinions).

<sup>4</sup> Declaratory Ruling and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, ¶¶ 16-19 (June 18, 2015) (the "Rulings"), available at <https://www.fcc.gov/document/tcpa-omnibus-declaratory-ruling-and-order>.

<sup>5</sup> *Id.* at ¶ 16.

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The FCC, however, did state that “there must be more than a theoretical potential that the equipment could be modified to satisfy the [ATDS] definition.”<sup>6</sup> Per this limitation, the FCC explicitly excluded from the definition of an ATDS a “rotary-dial phone.”

## CONSENT OF THE CURRENT SUBSCRIBER OR USER

The TCPA exempts from liability calls to mobile phones “made with the prior express consent of the called party.” It does not, however, define “called party” for purposes of this provision, and courts have divided over how to construe that term. Some courts have construed it to mean the actual subscriber to the called mobile number at the time of the call, while others have construed it to mean the intended recipient of the call. The distinction is critical because consumers often give up their mobile phone numbers and those numbers are reassigned to other people, meaning that the actual subscriber and the intended recipient may not be the same person. Faced with lawsuits from owners of such reassigned numbers, a number of entities petitioned the FCC, asking it to clarify that calls to reassigned mobile numbers were not subject to TCPA liability where the caller was unaware of the reassignment, and to adopt the interpretation that “called party” means the intended recipient of the call.

In response to petitions seeking clarity on this issue, the FCC ruled that the “called party” for purposes of determining consent under the TCPA’s mobile phone provisions is “the subscriber, *i.e.*, the consumer assigned the telephone number dialed and billed for the call, or the non-subscriber customary user of a telephone number included in a family or business calling plan.”<sup>7</sup>

Consistent with its interpretation of “called party,” the FCC further ruled that where a wireless phone number has been reassigned, the caller must have the prior express consent of the current subscriber (or current non-subscriber customary user of the phone), not the previous subscriber.<sup>8</sup> Businesses, however, may have properly obtained prior express consent from the previous wireless subscriber and will not know that the number has been reassigned. The FCC thus allows a business to make one additional call to a reassigned wireless number without incurring liability, provided the business did not know the number had been reassigned and had a reasonable basis to believe the business had the intended recipient’s consent.<sup>9</sup>

## IS CONSENT REVOCABLE?

The TCPA is silent as to whether, or how, a called party can revoke his or her prior express consent to be called. Given that silence, one entity petitioned the FCC to request that the Commission clarify that prior consent to receive non-telemarketing calls and text messages was irrevocable or, in the alternative, set forth explicit methods of revocation. In response, the FCC ruled that consent is revocable (with regard to both telemarketing and non-telemarketing calls), and that such revocation may be made “in any manner that clearly expresses a desire not to receive further messages.”<sup>10</sup> Consumers may use “any reasonable method, including orally or in writing,” to communicate that revocation and callers may not designate an exclusive means of revocation.<sup>11</sup>

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<sup>6</sup> *Id.* at ¶ 18.

<sup>7</sup> Rulings at ¶ 73.

<sup>8</sup> *Id.* at ¶ 72.

<sup>9</sup> *Id.* at ¶ 85.

<sup>10</sup> *Id.* at ¶ 62.

<sup>11</sup> *Id.* at ¶ 64.

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## THE “URGENT CIRCUMSTANCES” EXEMPTION TO CONSENT REQUIREMENT

Notwithstanding the FCC’s rulings regarding prior express consent, the FCC took this opportunity to create several new exemptions to that requirement with regard to certain non-marketing calls made to cellular phones. The FCC exempted the following types of calls:<sup>12</sup>

- Calls concerning “transactions and events that suggest a risk of fraud or identity theft”;
- Calls concerning “possible breaches of the security of customers’ personal information”;
- Calls concerning “steps consumers can take to prevent or remedy harm caused by data security breaches”;
- Calls concerning “actions needed to arrange for receipt of pending money transfers”; and
- Calls “for which there is exigency and that have a healthcare treatment purpose, specifically: appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions.”

The FCC reasoned that all of the aforementioned types of calls involved urgent circumstances where quick, timely communication with a consumer was critical to prevent financial harm or provide health care treatment. Although prior express consent is not required, such calls are still subject to a number of limitations.<sup>13</sup> First and foremost, the consumer must not be charged for the calls. In addition, such calls must be limited to no more than three calls over a three-day period, must be concise (generally 1 minute or 160 characters, if sent via text message), cannot include marketing or advertising content (or financial content, in the case of healthcare calls), and must have some mechanism for customer opt-out to be provided.

## OTHER CONSENT ISSUES

In addition to the points above concerning consent, the FCC also ruled on a number of specific consent issues, described here in brief:

- **Provision of Phone Number to a Health Care Provider.** Clarifying an earlier ruling, the FCC ruled that the “provision of a phone number to a healthcare provider constitutes prior express consent for healthcare calls subject to HIPAA by a HIPAA-covered entity and business associates acting on its behalf, as defined by HIPAA, if the covered entities and business associates are making calls within the scope of the consent given, and absent instructions to the contrary.”<sup>14</sup>
- **Third-Party Consent on Behalf of Incapacitated Patients.** The FCC ruled that consent to contact an incapacitated patient may be obtained from a third-party intermediary, although such consent terminates once the patient is capable of consenting on his or her behalf.<sup>15</sup>

<sup>12</sup> *Id.* at ¶¶ 127-133, 146.

<sup>13</sup> A complete list of the requirements is set forth in Paragraphs 138 and 146 of the Rulings.

<sup>14</sup> Rulings at ¶ 141.

<sup>15</sup> *Id.* at ¶ 142.

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- **Ported Phone Numbers.** In response to a request for clarification, the FCC ruled that porting a telephone number from wireline service (i.e., a land line) to wireless service does not revoke prior express consent.<sup>16</sup>
- **Consent Obtained Prior to the Current Rules.** In response to petitions requesting relief from or clarification of the prior-express-written-consent rule that went into effect on October 16, 2013, the FCC ruled that “telemarketers should not rely on a consumer’s written consent obtained before the current rule took effect if that consent does satisfy the current rule.”<sup>17</sup>
- **Consent via Contact List.** In response to a petition concerning the use of smartphone apps to initiate calls or text messages, the FCC ruled that the mere fact that a contact may appear in a user’s contact list or address book does not establish consent to receive a message from the app platform.<sup>18</sup>
- **On Demand Text Offers.** In response to a petition concerning so-called “on demand text offers,” the FCC ruled that such messages do not violate the TCPA as long as they (1) are requested by the consumer; (2) are a one-time message sent immediately in response to that request; and (3) contain only the requested information with no other marketing information.<sup>19</sup> Under such conditions, the messages are presumed to be within the scope of the consumer’s consent.

## CALLS PLACED BY USERS OF APPS AND CALLING PLATFORMS

The FCC also addressed a number of petitions seeking guidance as to who “makes” or “initiates” a call under the TCPA (and is thus liable for TCPA violations) in a variety of scenarios involving calls or text messages made by smartphone apps and calling platforms. The FCC offered no clear rule, and instead held that to answer this question “we look to the totality of the facts and circumstances surrounding the placing of a particular call to determine: 1) who took the steps necessary to physically place the call; and 2) whether another person or entity was so involved in placing the call as to be deemed to have initiated it, considering the goals and purposes of the TCPA.”<sup>20</sup> The FCC noted that relevant factors could include “the extent to which a person willfully enables fraudulent spoofing of telephone numbers or assists telemarketers in blocking Caller ID” as well as “whether a person who offers a calling platform service for the use of others has knowingly allowed its client(s) to use that platform for unlawful purposes.”<sup>21</sup>

## AUTHORIZATION OF “DO NOT DISTURB” TECHNOLOGY

Finally, at the request of petitioning state attorneys general, the FCC affirmed that nothing in the Communications Act or FCC rules or orders prohibits telephone carriers or VoIP providers from implementing call-blocking technology to stop unwanted “robocalls.” The FCC explained that such carriers “may legally block calls or categories of calls at a consumer’s request if available technology identifies incoming calls as originating from a

<sup>16</sup> *Id.* at ¶ 54.

<sup>17</sup> *Id.* at ¶ 100. In light of ambiguity concerning the rule change, the FCC granted the petitioning entities a retroactive waiver requiring full compliance with the current consent rules within 90 days of the ruling.

<sup>18</sup> Rulings at ¶ 51.

<sup>19</sup> *Id.* at ¶¶ 103-106.

<sup>20</sup> *Id.* at ¶ 30.

<sup>21</sup> *Id.*

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source that the technology, which the consumer has selected to provide this service, has identified.”<sup>22</sup> The FCC “strongly encourage[d]” carriers to develop such technology to assist consumers.<sup>23</sup>

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<sup>22</sup> Id. at ¶ 154.

<sup>23</sup> Id. at ¶ 163.