

**ALERT**

# FCC Releases Long-Awaited TCPA Declaratory Ruling and Order

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On July 10, the Federal Communications Commission (FCC or Commission) released a Declaratory Ruling and Order which greatly expands the reach of the Telephone Consumer Protection Act of 1991 (TCPA). The Declaratory Ruling and Order was adopted at the June 18, 2015 Open Commission Meeting, and is the FCC's response to the flood of petitions it received after making its TCPA rules more stringent in 2012. The Order—which addresses 21 separate requests for FCC action—recognizes limited exemptions to the current rules, but for the most part, increases the potential for liability under the TCPA.

The FCC's action was taken over the vigorous dissents of Commissioners Pai and O'Rielly. Commissioner Pai stated that "[r]ather than focus on the illegal telemarketing calls that consumers really care about, the Order twists the law's words even further to target useful communications between legitimate businesses and their customers" and that under the new Order, "abuse of the TCPA [will be] much, much easier." Commissioner O'Rielly described the Order's stated intention to protect Americans from harassing robocalls as "a farce," claiming that it instead "penalizes businesses and institutions acting in good faith to reach their customers using modern technologies."

Specifically, the Commission disposed of two petitions for rulemaking and ruled on or clarified the following issues:

**Autodialers:** The FCC broadly interpreted the term "autodialer," and reiterated that "dialing equipment [that] generally has the capacity to store or produce, and dial random or sequential numbers" is an autodialer under the TCPA. See ¶ 10. In short, the Commission held that "capacity" includes potential ability, and therefore, equipment

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can be an autodialer even if it is not presently used for those purposes. The Commission noted that narrower interpretations would “render the TCPA’s protections largely meaningless by ensuring that little or no modern dialing equipment would fit the statutory definition of an autodialer.” See ¶ 20.

The Commission declined to detail the “exact contours” of the definition, and instead, explained that dialing equipment must be analyzed on a case-by-case basis. See ¶ 17. It did, however, give the following guidance regarding the definition’s outer limits:

- The speed dialing function is not encompassed in the definition.
- The basic functions of an autodialer are to dial thousands of numbers in a short amount of time and to dial without human intervention (although “[h]ow the human intervention element applies to a particular piece of equipment is specific to each individual piece of equipment, based on how the equipment functions and depends on human intervention”). See ¶ 17.
- The definition does not encompass “every piece of malleable and modifiable dialing equipment that conceivably could be considered to have some capacity, however small, to store and dial telephone numbers.” See ¶ 18.
- Qualifying as an autodialer requires “more than a theoretical potential that the equipment could be modified to satisfy the ‘autodialer’ definition.” See ¶ 18.

The Commission gave two examples of dialing equipment that is not an autodialer: a rotary-dial phone and smart phones (if used in a typical way). The Commission did note that atypical uses of smartphones could be encompassed in the definition.

Additionally, the Commission held that dividing ownership of dialing equipment does not allow a party to get around the TCPA’s calling restrictions. Instead, the Commission will look to the net result the voluntary combination of equipment to act like an autodialer.

**Maker of a Call:** The FCC held that application providers that play a minimal role in sending text messages are not *always* subject to TCPA liability as the maker of a call, but can be under certain factual scenarios. Specifically, the Commission will consider the totality of the facts 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.” See ¶ 30. Considering these and other factors, the FCC determined that one app was the maker of a call where its users played “no discernible role in deciding whether to send the...messages, to whom to send them, or what to say in them;” however, another app was not the maker of a call where the app user made all of the decisions. See ¶ 35. Similarly, the FCC held that collect calling service providers are not callers when they use prerecorded messages on a single call-by-call basis; rather the person who places the collect call is the caller. Therefore, collect call services do not need to obtain prior express consent to provide call set-up information, so long as they abide by the specific conditions provided in the Declaratory Ruling and Order. See ¶ 45.

**Prior Express Consent:** Under the TCPA, certain calls require prior express consent, and certain calls require prior express written consent. With this Declaratory Ruling and Order, the FCC clarified that even though prior express consent may be given through an intermediary, it cannot be assumed. Therefore, “simply being on an acquaintance’s phone contact list does not amount to consent to receive robocalls from third-party applications downloaded by the acquaintance.” See ¶ 2. Also, the Commission clarified that porting a wireline number to a wireless number does not revoke prior express consent. Additionally, the Commission clarified that giving a phone number to a healthcare provider, absent instructions to the contrary, constitutes prior express consent for healthcare calls subject to HIPAA by the HIPAA-covered entity and its business associates, so long as the calls are within the proper scope.

**Revoking Consent:** The FCC emphatically affirmed a consumer’s right to revoke consent to calls at any time and through any reasonable means. This means, among other things, that a caller may not designate the specific way in which a called party can revoke consent. A called party may revoke consent orally or in writing, through a consumer-initiated call, by visiting a caller in-store, via an automated opt-out mechanism, or by any other reasonable method. The Commission held that its finding of a right to revoke consent in this context does not conflict with the First Amendment, based on an expansion of some courts’ recognition of consumers’ freedom from unwanted speech in their homes, and its view that alternative methods exist because businesses may still contact customers through manual dialing or consented-to automated dialing.

**Reassigned Numbers:** The Commission found that “called party” means the current subscriber or non-subscriber customary user, not the intended recipient. Therefore, a caller can be liable under the TCPA if it calls a number for which it had consent from the previous subscriber, but which was since reassigned. The Commission explained that present-day marketplace solutions can help a caller determine whether a number has been reassigned, and that callers should incorporate these solutions into best practices, along with other techniques to determine if a number has been reassigned, like periodically sending emails or mail requesting that customers update their contact information. The FCC affords callers a one-additional-call opportunity to gain knowledge of reassignment: if a caller makes one call reasonably believing that it has consent to call and without knowing that the number was reassigned, the caller is saved from liability. However, after that one opportunity, the caller is liable for calling a reassigned number without consent regardless of intent.

**Prior Express Written Consent After 2012 Rule Changes:** When the Commission changed its TCPA rules in 2012 to require prior express written consent for telemarketing calls, it required that the written consents disclose to consumers that (1) calls will be made with autodialer equipment, and (2) consent to receive automated calls is not a condition of purchase. The Direct Marketing Association (DMA) and the Coalition of Mobile Engagement Providers (Coalition) requested a waiver from the rule, specifically asking the Commission to clarify that the new written consent rules that became effective October 16, 2013 did not nullify written consents obtained before that date, even if they did not contain the exact disclosures the FCC now requires. The FCC granted this waiver. DMA, Coalition, and their members (up to July 10, 2015—the date of release of this Declaratory Ruling) now have two waivers from the prior written consent rules to the extent that they had previous written consents that did not contain the exact disclosures: (1) a retroactive waiver from October 16, 2013 to July 10, 2015, and (2) a waiver from July 10, 2015 to October 7, 2015. During the waiver periods, old

written consents remain valid so that DMA, Coalition, and members can obtain the new written consents with the proper disclosures.

**One-Time, On-Demand Text Messages:** Noting that the TCPA acts to prevent unwanted calls, not wanted ones, the Commission held that one-time, on-demand text messages do not require prior express written consent. Instead, these texts—like when a consumer texts DISCOUNT to a retailer to receive a coupon via text message—only require prior express consent, which is given when the consumer initiates the text request. The Commission, finding that these texts do not constitute telemarketing, and instead are informational, only requires prior express consent so long as the texts (1) are requested by the consumer, (2) are “one-time only message[s] sent *immediately* in response to a specific consumer request,” and (3) do not contain additional marketing or advertising material beyond that requested by the called party. See ¶ 106.

**Text Messages as Calls:** The Commission reiterated that text messages are calls, and that they are subject to the exact same consumer protections as voice calls. In doing so, the FCC refused to acknowledge that “some limitations and concerns under the TCPA that are appropriate for voice calls may need to be approached differently for text messages.” See¶ 107.

**Internet-to-Phone Text Messages:** Internet-to-phone text messages, including those sent from an interconnected text messaging service provider, are sent using an “automatic telephone dialing system” and therefore require consent. The Commission reasoned that from the consumer’s perspective, Internet-to-phone messages are the same as phone-to-phone messages. Likewise, texts “sent from text messaging apps that enable entities to send text messages to all or substantially all text-capable U.S. telephone numbers, including through the use of autodialer applications downloaded or otherwise installed on mobile phones,” fall into the realm of the TCPA and require consent. See ¶ 116. The Commission also discussed the First Amendment in this context, concluding that its finding is consistent with the First Amendment in part because the TCPA creates a content-neutral time, place, and manner speech restriction and its benefits to wireless customers are significant. Here, too, the Commission reiterated that the TCPA does not ban the use of autodialers, and it leaves open alternative methods for businesses to contact customers, like manually dialing or obtaining proper consent.

**Telemarketing and Informational Calls to Wireless Numbers:** The Commission rejected the argument that TCPA protections for wireless numbers apply only to telemarketing calls, and should not apply to informational calls. It reiterated that the TCPA provides unique protections for wireless numbers.

**Free-to-End-User Call Exemption for Time-Sensitive Financial Issues:** The Commission exempted from the consumer consent requirements four types of financial calls made by financial institutions: (1) calls intended to prevent fraudulent transactions or identity theft; (2) calls to alert consumers to data security breaches; (3) calls to inform consumers about identity theft prevention following a data breach; and (4) calls regarding money transfers. To meet the exemption, these calls cannot be charged to the recipient, and must conform to a number of strict conditions, including a requirement that the call is made only to a wireless number provided by the customer of the financial institution, a requirement that the call may not include any telemarketing, cross-marketing, solicitation, debt collection, or advertising content, and a limitation of no more than three

calls per event for a three-day period.

**Free-to-End-User Call Exemption for Time-Sensitive Healthcare Issues:** Similarly, the Commission created an exemption for certain exigent healthcare calls from healthcare providers that have healthcare treatment purposes. This includes calls with appointment and exam confirmations and reminders, pre-operative instructions, and prescription notifications, but not calls regarding billing and accounts. Like the financial calls exemption, this exemption only applies to calls that are not charged to the recipient and that meet the strict conditions set forth by the FCC, including limits on content (they cannot include accounting, billing, debt-collection, or other financial content, and also cannot include telemarketing, solicitation, or advertising), length (generally the messages can only be one minute in length or 160 characters), and frequency (healthcare providers can only send one message per day, up to a maximum of three per week).

**Call-Blocking Technology:** In response to the concern of thirty-nine Attorneys General, the Commission affirmed that there is no legal barrier preventing carriers from implementing call-blocking technology and offering consumers the choice to opt-in to technologies that block individual calls or categories of calls. The FCC made clear that this green light for call-blocking solutions was for telephone carriers and interconnected and one-way VoIP providers. In giving the go-ahead for call blocking, the Commission strongly encouraged carriers and VoIP providers to develop tools to ensure that PSAP and other emergency calls are not blocked. Additionally, the Commission recognized that call blocking technology is imperfect, and may block wanted calls. To address this issue, the Commission held that call-blocking services must provide accurate disclosures to consumers at the time they sign up for the call-blocking service. The Commission concluded that these required disclosures were in line with the First Amendment.