
FCC Expands Reach of Telephone Consumer Protection Act

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On July 10, 2015, the FCC issued the agency's long-awaited omnibus Declaratory Ruling and Order. The Ruling focuses largely on providing guidance, particularly for new and emerging technologies, with regard to what an autodialer is and when consent to use one is needed. The Ruling skews heavily on the side of protecting consumers from potentially unwanted calls while allowing some conditional exceptions for certain calls that may be beneficial to consumers. All businesses should immediately reevaluate their calling practices to ensure compliance with the new Ruling, as it is likely to escalate the continued upward trend in TCPA class action filings. Finally, the Ruling establishes that telecommunications providers can implement blocking technology. Therefore, all businesses should be alert to the potential for their calls to be blocked, including by error.

Additional Background

The TCPA makes it illegal for anyone to make any telephone call—not just telemarketing calls—to a cell phone number, if the call is made with an autodialer, unless the call is made for an emergency or the caller has the called party's prior express consent. In addition, since October 2013, the FCC's rules have required that for telemarketing calls, prior express consent must be given in writing after receiving certain disclosures. For purposes of TCPA compliance, calls include text messages. The TCPA also assigns damages of \$500 to \$1,500 per call. As a result, many businesses that do not involve telemarketing have been sued in class action lawsuits for violating the TCPA. This has included package delivery companies texting the recipients of packages of their delivery, app developers whose apps send invitational texts to users' contact lists, and a business employee text alerting platform that texted an employee's former cell phone number that had been reassigned.

The central inquiry in any TCPA case is whether a call was made using an autodialer, or Automatic Telephone Dialing System (ATDS). The TCPA defines an ATDS as “equipment which has the capacity— (A) to store or produce telephone numbers to be called, using a random or sequential generator; and (B) to dial such numbers.” In litigation, some courts took the view that equipment that had any “capacity” to be modified to randomly or sequentially dial phone numbers is an ATDS, even if it was not used to randomly or sequentially dial the phone numbers involved in the lawsuit. As a result, 21 parties, most of whom had been sued, petitioned the Commission to clarify the definition of ATDS, as well as a number of other TCPA issues. There were numerous comments by, for and against the petitioners, and the Commission itself was split on many of the issues.¹ In addition, almost immediately after the Ruling was issued, multiple parties filed appeals challenging various parts of the Ruling. Those appeals have been consolidated and are set to be heard in the U.S. Court of Appeals for the DC Circuit.

Key Elements of the Ruling

Text Messages. The Ruling confirms that text messages, including Internet-to-phone text messages, are “calls” and subject to the requirements of the TCPA.

Autodialers. The Ruling adopts an expansive definition of “autodialer,” focusing on the word “capacity” and interpreting it to mean any device that has “more than a theoretical potential” to be modified to satisfy the original definition, i.e., to dial randomly or sequentially. The Ruling also affirmatively holds that predictive dialers are included in the definition of “autodialer.” This expanded interpretation of “capacity” to mean more than the present capacity of the equipment at the time a call is made, has sparked the most controversy, with some commentators and petitioners fearing the Ruling could sweep in even commonplace smart phones.

Reassigned Numbers. The Ruling holds that, when cellphone numbers are reassigned to new individuals, callers will be liable for calls when the new subscriber or customary user of the number has not consented to receiving the call or text. Under the Ruling, it is immaterial whether the caller intended to contact the new subscriber or not. The Ruling grants callers who are unaware of the reassignment of the cellphone number a limited one-call exception from liability. However, even if the one-time call “does not yield actual knowledge of reassignment,” the caller is still deemed to have gained constructive knowledge of the reassignment and is liable for any further calls made. The Ruling states that caller best practices should help detect reassignment, and businesses concerned about liability should institute better safeguards in an effort to avoid calling a party who has not expressly consented to receiving calls or texts. Companies can contractually require their customers to notify them when they change phone numbers, which provides recourse against their own customers, but does not guarantee protection for calls made to the reassigned number.

Revoking Consent to be Called. The Ruling specifies that a called party may revoke previously given consent at any time and through any reasonable means. “Reasonable means” is construed broadly to include revocation orally, in writing, during a call or in a store, among other methods. The caller cannot mandate any particular means of revocation. Therefore, callers must have procedures in place for monitoring all the various means of revoking consent and updating their calling lists quickly.

¹ Commission Pai, who dissented, and Commissioner O’Reilly, who approved in part and dissented in part, issued scathing statements questioning the scope of the decision.

Clarifications for various industries

The Ruling also attempts to clarify certain industry-specific applications of the TCPA. In doing so, it creates certain limited exemptions to the overall prohibition against calling and texting without prior express consent.

For App Providers: Apps that enable users to send texts are not per se liable for unwanted calls if the app plays a minimal role in sending text messages. Generally, user-initiated texts or calls will not be subject to liability. For example:

- A user will not implicate an app developer by merely using a functionality of the app to set up auto-replies to voicemail.
- A user will not implicate an app developer by voluntarily sending invitational messages to others using the developer's app.
- However, apps that preset defaults to automatically text those on a user's contact list, for example, are more involved in and therefore more responsible for sending the texts, and the Ruling confirms that apps cannot assume they have consent to call a phone number merely because it is in the user's contact list.

For Financial Institutions: Some banking services are granted a limited exemption from the express prior consent requirement to send timely communications to prevent considerable financial harms (such as alerts for suspicious activity). Such financial institutions must comply with a host of conditions.

For Health Care Providers: Certain free-to-end-user texts and "calls for which there is exigency and that have a health care treatment purpose" may be made without prior express consent, subject to certain conditions. Further, the Ruling states that giving a phone number to a health care provider can constitute prior express consent for these types of calls/texts.

For Retailers: One-time text messages by retailers sent in immediate response to a consumer's request for the text do not violate the TCPA, again, subject to conditions.

For Collect Calling Service Providers: The Ruling concludes that connecting a call is typically not subject to the TCPA, since it is the user of these services that physically places the call by providing a number to the provider.

For Callers Who Previously Have Received Consent: The Ruling clarifies that whether a caller has consent to make a call is determined on a call by call basis. Thus, when the FCC changed its prior consent rules in October 2013, callers that had received written consent under the old rules were required to get new consent from those on their calling lists. The Ruling acknowledges confusion may have existed about this obligation and gives members of certain trade groups 89 days from July 10 to secure new consent or face liability for calls made without new consent thereafter.

For Telecommunications Carriers and VoIP Service Providers: The Ruling clarifies that there is no legal barrier to stop telecom carriers and providers of VoIP services from implementing call-blocking technology and offering consumers the choice, through an informed opt-in process, to use such technology to block individual calls or categories of incoming calls that may be part of a mass unsolicited calling event. Telecom carriers and VoIP providers offering the blocking service must adequately disclose to the consumer the risks of inadvertent

blocking and must avoid blocking autodialed or prerecorded calls from public safety entities, including emergency operations centers or law enforcement agencies.

Conclusion

The challenges to the Ruling, including from the Commission's own dissenting members, take issue with most of the aspects of the Ruling described above, citing due process and free speech violations, as well as FCC overreach. As it stands, the Ruling's guidance skews heavily towards consumer protection, so all businesses that call or text consumers (including their own employees) and developers of apps and software that enable calls or texts should evaluate and modify their practices as soon as possible to remain in compliance with the current interpretations of the TCPA.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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