

## FCC Issues Controversial TCPA Declaratory Ruling

### ***New guidance expands the restrictions on business-to-customer communications under the Telephone Consumer Protection Act (TCPA).***

On July 10, 2015, the Federal Communications Commission (FCC) released a Declaratory Ruling and Order (the Order) that aims to clarify various requirements under the TCPA and the agency's implementing rules.<sup>1</sup> The Order, which was initially adopted by the FCC in June,<sup>2</sup> addresses nearly two dozen petitions seeking guidance on a range of issues, from the very specific (e.g., whether the TCPA applies to a particular feature in a mobile app) to the very broad (e.g., what constitutes an "autodialer" triggering application of the TCPA).

### **What is an autodialer?**

The TCPA and the FCC's rules impose special restrictions on calls made using "automatic telephone dialing systems," also known as "autodialers," and generally require prior express consent for any non-emergency autodialed calls to wireless numbers. The statute defines autodialer to mean equipment that has the "capacity" to "store or produce telephone numbers to be called, using a random or sequential number generator," and to "dial such numbers." Several petitioners urged the FCC to clarify that "capacity" means only "present ability," but the FCC opted for a much more expansive interpretation, announcing that even "potential ability" qualifies.<sup>3</sup> While the Order attempts to distinguish "potential ability" from merely "theoretical" ability, the line between the two categories is far from clear.<sup>4</sup> The FCC notably declined even to confirm that smartphones are not autodialers under the TCPA, and asserted instead that there is no evidence that "unwanted calls are likely to result from consumers' typical use of smartphones."<sup>5</sup> Businesses should keep a close eye on the FCC and on the courts as they continue to flesh out this distinction through case-by-case adjudication.

### **Who makes the call?**

#### **Texting and calling apps**

An issue that crops up with some frequency in TCPA lawsuits — particularly suits involving smartphone apps that disseminate messages — is whether, and in what circumstances, an app developer can be deemed the "calling party" subject to the TCPA's restrictions. The Order specifies that an app maker "does not make or initiate a text when an individual merely uses its service to set up auto-replies to incoming voicemails," or "when one of the app users sends an invitational message using its app."<sup>6</sup> However, an app maker does make or initiate a text when it "automatically sends invitational texts of its own choosing to every contact in the app user's contact list with little or no obvious control by the user."<sup>7</sup>

## **Collect call service providers**

The Order provides similar clarifications in the context of collect calls. A “collect call service provider does not make or initiate a call when a caller provides the called party’s phone number and controls the content of the call.”<sup>8</sup> Service providers may attempt to connect calls “without first obtaining prior express consent from the called party.”<sup>9</sup> However, the FCC establishes several specific conditions that such calls must satisfy in order for the exemption to apply.<sup>10</sup> For example, collect call attempt notifications cannot be charged to the person being called, and notifications must be clear, identifying the name and contact information of the service provider, without any “telemarketing, solicitation, debt collection, or advertising content.”<sup>11</sup>

## **How is consent established? How can it be revoked?**

The Order clarifies that “if any question arises as to whether prior express consent was provided by a call recipient, the burden is on the caller to prove that it obtained the necessary prior express consent.”<sup>12</sup> Affirmative consent is required: “[T]he fact that a consumer’s wireless number is in the contact list on another person’s wireless phone, standing alone, does not demonstrate consent to autodialed or pre-recorded calls, including texts.”<sup>13</sup> The Order also reaffirms that a called party “may revoke consent at any time and through any reasonable means” and that a “caller may not limit the manner in which revocation may occur.”<sup>14</sup>

## **How does the TCPA apply to calls to reassigned wireless numbers?**

In addition, the Order settles a long-running debate over the application of the TCPA to calls to reassigned wireless numbers — particularly in situations where the individual who initially had the number provided the necessary consent, but the individual to whom the number was reassigned has not provided consent. The Order first confirms that callers are responsible for obtaining the consent “not of the intended recipient of a call, but of the current subscriber (or non-subscriber customary user of the phone).”<sup>15</sup> The Order goes on to rule that “callers who make calls without knowledge of reassignment and with a reasonable basis to believe that they have valid consent to make the call should be able to initiate one call after reassignment as an additional opportunity to gain actual or constructive knowledge of the reassignment.”<sup>16</sup>

If that one additional call is unsuccessful or otherwise does not give the caller “actual knowledge of reassignment,” the FCC nevertheless will “deem the caller to have constructive knowledge of such.”<sup>17</sup> The FCC identifies a set of possible indicators that a caller has the wrong number for the intended recipient of the call, including “a tone indicating the number is no longer in service” and “a name on a voicemail greeting that is different from the name of the party the caller intended to call.”<sup>18</sup> The FCC recommends several best practices for callers to stay abreast of reassigned numbers on their call sheets, including “interactive opt-out mechanism[s] in all artificial- or pre-recorded-voice calls so that recipients may easily report a reassigned or wrong number,” or “record[ing] wrong number reports received by customer service representatives placing outbound calls.”<sup>19</sup> The FCC also recommends that callers check their call lists against available third-party databases of reassigned wireless numbers.<sup>20</sup>

## **With respect to texts**

The Order reaffirms that text messages are equally subject to the TCPA’s consent requirements, and include “Internet-to-phone text messages...sent using an interconnected text provider”.<sup>21</sup> However, “a one-time text sent in response to a consumer’s request for information does not violate the TCPA or the FCC’s rules so long as it: (1) is requested by the consumer; (2) is a one-time only message sent immediately in response to a specific consumer request; and (3) contains only the information requested by the consumer with no other marketing or advertising information.”<sup>22</sup>

## Specifically permitted by the TCPA

The FCC recognizes certain limited exemptions from the TCPA for “pro-consumer messages about time-sensitive financial and healthcare issues.”<sup>23</sup> Exempt financial calls include those concerning “transactions and events that suggest a risk of fraud or identity theft” and information on “steps consumers can take to prevent or remedy harm caused by data security breaches.”<sup>24</sup> This exemption applies only to “three calls per event, over a three-day period,” and is subject to several additional conditions.<sup>25</sup> For example, such calls or texts must state the name and contact information of the financial institution, must be concise, and may not include any “telemarketing, cross-marketing, solicitation, debt collection, or advertising content.”<sup>26</sup>

For healthcare calls, the FCC clarifies that the “provision of a phone number to a healthcare provider constitutes prior express consent for healthcare calls subject to HIPAA” for “calls within the scope of the consent given, and absent instructions to the contrary.”<sup>27</sup> The Order also exempts calls, subject to certain conditions, “for which there is exigency and that have a healthcare treatment purpose,” including “appointment and exam confirmations and reminders” and “prescription notifications.”<sup>28</sup>

## Green light for call-blocking tools

Finally, the Order “affirm[s] that nothing in the Communications Act or [the FCC’s] rules or orders prohibits carriers or VoIP providers from implementing call-blocking technology that can help consumers who choose to use such technology to stop unwanted robocalls.”<sup>29</sup> The FCC says that “while we do not at this time require carriers to offer consumers call-blocking tools, we will continue to watch the development of such tools.”<sup>30</sup>

## Conclusion

While the Order resolves nearly two dozen outstanding petitions, it does so in a way that, in many cases, significantly narrows the range of permissible communications between businesses and their customers. Businesses that interact with customers by telephone or text should keep a close eye on this area of the law as it continues to develop through industry-wide orders and case-by-case adjudications.

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## Endnotes

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- <sup>1</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135, FCC 15-72 (rel. Jul. 10, 2015) (Order).
- <sup>2</sup> Fact Sheet: Wheeler Proposal to Protect and Empower Consumers Against Unwanted Robocalls, Texts to Wireless Phones, Federal Communications Commission (May 27, 2015), <https://www.fcc.gov/document/fact-sheet-consumer-protection-proposal> .
- <sup>3</sup> Order ¶ 19.
- <sup>4</sup> *Id.* ¶ 18.
- <sup>5</sup> *Id.* ¶ 21.
- <sup>6</sup> *Id.* ¶ 25.
- <sup>7</sup> *Id.* ¶ 35.
- <sup>8</sup> *Id.* ¶ 25.
- <sup>9</sup> *Id.* ¶ 40.
- <sup>10</sup> *Id.* ¶ 45.
- <sup>11</sup> *Id.*
- <sup>12</sup> *Id.* ¶ 47.
- <sup>13</sup> *Id.*
- <sup>14</sup> *Id.*
- <sup>15</sup> *Id.* ¶ 72.
- <sup>16</sup> *Id.*
- <sup>17</sup> *Id.* ¶ 72.
- <sup>18</sup> *Id.* ¶ 82 n.293.
- <sup>19</sup> *Id.* ¶ 86.
- <sup>20</sup> *Id.*
- <sup>21</sup> *Id.* ¶ 107-108.
- <sup>22</sup> *Id.* ¶ 106.
- <sup>23</sup> *Id.* ¶ 125.
- <sup>24</sup> *Id.* ¶ 127.
- <sup>25</sup> *Id.* ¶ 135, 138.
- <sup>26</sup> *Id.* ¶ 138.
- <sup>27</sup> *Id.* ¶ 141.
- <sup>28</sup> *Id.* ¶ 146-147.
- <sup>29</sup> *Id.* ¶ 152.
- <sup>30</sup> *Id.* ¶ 163.