

## US Federal Communications Commission's Recent Order Expands Potential Liability under the Telephone Consumer Protection Act for Business-to-Customer Calls and Text Messages

“This Order will make abuse of the TCPA much, much easier. And the primary beneficiaries will be trial lawyers, not the American public.” That’s what FCC Commissioner Ajit Pai had to say in his dissent from the FCC’s recent Declaratory Ruling and Order, issued on July 10, 2015. The FCC’s Order reflected the agency’s response to 21 petitions seeking guidance regarding or exemptions from various requirements under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, and its implementing regulations.

The TCPA prohibits certain fax and automated-dialing practices and authorizes recovery of up to \$1,500 per call, text message, or fax sent in willful violation of its restrictions. The TCPA has led to a tidal wave of class-action litigation, and the FCC’s recent Order may hasten that trend.

Most prominently, the FCC’s recent ruling:

- Expands the types of equipment that might qualify as an autodialer subject to the TCPA;
- Confirms that, for certain kinds of calls or text messages that are subject to the FCC’s “prior express written consent” rule that became effective in October 2013, companies cannot rely on consents given before October 2013 that do not meet the “prior express written consent” standard, although—for certain companies—the “prior express written consent” rule is waived until October 9, 2015;
- Clarifies that consumers may revoke consent to receive regulated calls or text messages through any reasonable means, and that companies cannot limit those means;
- Imposes liability for autodialed calls to reassigned or wrong numbers;
- Requires consent for Internet-to-phone text messages;
- Clarifies when providers of calling or texting platforms might be liable for unsolicited calls and messages sent by users;
- Exempts certain free, one-time text messages sent in response to a request for information from liability;
- Exempts from liability certain free, time-sensitive financial- and healthcare-related messages;
- Permits carriers and Voice over Internet Protocol (VOIP) providers to adopt call-blocking technology.

Despite the number and significance of these changes, the FCC has stated that its ruling is effective immediately. We outline the most significant changes below.

### Definition of an “Automatic Telephone Dialing System”

Many of the TCPA’s restrictions apply only to calls or text messages sent using an “automatic telephone dialing system,” which are commonly

called “autodialers.” The statute defines that term as “equipment which has the capacity” to “store or produce telephone numbers to be called, using a random or sequential number generator,” and “to dial such numbers.” 47 U.S.C. § 227(a)(1).

Several petitions had asked the FCC to clarify whether the “capacity” to call random or sequential numbers refers only to the capacity of the equipment as it is currently configured, without further modification. Other petitions asked a related question—whether equipment can be considered an autodialer when there is human intervention at work. But the FCC took an extremely expansive view of what constitutes an autodialer, concluding that the term “capacity” refers both to the equipment’s current *and potential* future functionality—including all features “that can be activated or de-activated” and any features “that can be added to the equipment’s overall functionality through software changes or updates.”

Under the FCC’s broad definition, virtually any equipment that can place calls or text messages would constitute an autodialer subject to the TCPA. For example, the FCC acknowledged criticisms that all smartphones would qualify as autodialers under its approach because users could potentially download apps that allow random or sequential dialing. (The FCC indicated, however, that it might “clarify” its definition if TCPA lawsuits begin targeting consumers using smartphones.) The FCC did state that there are “outer limits” to the definition of an autodialer; the potential that the equipment could be modified to permit random or sequential dialing must be more than “theoretical.” But the only example the FCC gave of when that possibility would be merely “theoretical” is a “rotary-dial phone.”

The FCC also specified that parties cannot circumvent the TCPA by dividing autodialing functions among separately owned systems. For example, the FCC explained, one company might store customer information and generate

messages while a second company actually transmits the message, such that neither company’s equipment acting alone could dial random or sequential numbers. The FCC explained that the equipment nonetheless constitutes an autodialer “if the net result of such voluntary combination enables the equipment to have the capacity” to call random or sequential numbers.

### Effect of Pre-October 2013 Consents

In 2012, the FCC revised its rules exempting telemarketing calls or text messages to wireless numbers from liability if they are placed with the consent of the called party. The revised rules require prior express written consent that includes certain elements: the consent must have the consumer’s physical or electronic signature and contain certain disclosures about the types of communications being authorized and the fact that consent is not required to “purchas[e] any property, goods, or services.” 47 C.F.R. § 64.1200(f)(8). Those revised rules went into effect on October 16, 2013. A number of petitions to the FCC requested clarification about the effect of the rule change on prior consents made in compliance with the old rules.

The FCC concluded that companies could not continue to rely on prior consents after the October 16, 2013 effective date of the rule change, though the FCC acknowledged that its 2012 order may have caused confusion regarding the validity of written consents obtained prior to that effective date. The FCC thus allowed certain entities until October 9, 2015 to obtain consents from their customers that satisfy the 2012 rule change.

### Revocation of Consent to be Called

A number of petitions to the FCC concerned whether and how consumers who had consented to receive autodialed calls or texts may revoke their consent. This issue arises frequently in TCPA litigation.

The FCC concluded that “consumers may revoke consent in any manner that clearly expresses a desire not to receive further messages, and that callers may not infringe on that ability by designating an exclusive means to revoke.” The FCC provided several examples of what it deemed to be “reasonable” methods of revoking consent: in “writing,” “by way of a consumer-initiated call” to the company, a request made during “a call initiated or made by the company,” an in-person request at a company store, such as “an in-store bill payment location.”

The FCC noted that permitting consumers to revoke consent orally—including in statements to store employees—could subject companies to a “he said, she said’ situation[] regarding revocation.” But the FCC stated that it “expect[s] that responsible callers” will “maintain proper business records tracking consent” because businesses have the “burden to prove that they have such consent.”

In addition, some plaintiffs in TCPA lawsuits have argued that porting a landline number to a cell phone should be deemed to be a revocation of any prior consent to place calls to that number. The FCC acknowledged that consumers who had consented to receive calls on landlines may prefer not to receive calls on cell phones because they may be charged for those calls. But the FCC concluded that porting a landline number to a cell phone should not automatically be deemed to “revoke prior express consent” to receive calls or messages at that number.

The FCC warned, however, that the caller may nonetheless face liability under the TCPA if a landline number has been ported to a wireless number. If the consent to call the landline number does not satisfy the “prior express consent requirements applicable to calls to wireless numbers”—for certain calls, that means “prior express written consent”—the caller must obtain the required consent or face liability for calling the now-wireless number.

## Calls to Reassigned or Wrong Numbers

Another issue that frequently arises in TCPA litigation occurs when a business places a call to one customer (who consented to receive such calls) but, because the phone number has been reassigned (or because of an error on the original customer’s part), the call is received by another person who now has that number. The FCC has concluded that such calls violate the TCPA. The FCC ruled that the caller must have the consent “not of the intended recipient of the call, but of the current subscriber (or non-subscriber customary user of the phone).”

A number of the petitions to the FCC pointed out the extreme difficulty that businesses would face to try to prevent these types of calls to reassigned or incorrectly provided numbers. In response, the FCC recommended that callers use “manual[] dialing” or emails to “confirm [the] identity” of the called party.”

The FCC also created a “one-call window” for autodialed calls in order to allow callers an opportunity to learn that a wireless number has been reassigned. The FCC observed that a “single call to a reassigned number” often will not be sufficient “for callers to gain actual knowledge of the reassignment.” But the FCC concluded that having placed a single call to a reassigned number suffices to treat the caller as having “constructive knowledge” of the reassignment.

The FCC also suggested that companies could—in their customer agreements—require consumers to notify the company of when they change wireless numbers. But the FCC did not expressly create a defense to liability under the TCPA if the consumer fails to comply with such an obligation. Instead, the FCC stated that the company may “seek legal remedies for violation of that agreement.”

## Internet-to-Phone SMS Text Messages

The FCC’s ruling also addressed computer-generated text messages that are sent over the

Internet to wireless numbers. These messages often originate as emails sent to an email address that includes the recipient's mobile number.

The FCC rejected requests to exclude these messages from regulation under the TCPA because they are already regulated by the CAN-SPAM Act. The FCC reasoned that these messages are the functional equivalent of SMS text messages, and that the computers used to send these messages constitute autodialers under the approach the FCC was adopting in the declaratory ruling.

### Liability for Calling and Texting Platforms

A number of app developers have been sued under the TCPA under the theory that they are the “calling party” subject to liability for calls or text messages sent by users of the app. The FCC explained that a company “does not make or initiate a text when an individual merely uses its service to set up auto-replies to incoming voicemails,” with the text chosen by the user. Nor is the company the “calling party” merely because it enables users to choose to send invitational text messages to third parties. But the FCC cautioned that the app maker is the “calling party” for purposes of the TCPA if the app “automatically sends” calls or messages “of its own choosing,” with “little or no obvious control by the user.” The specific app that the FCC addressed in its order would send text message advertisements to every contact in the user's contact list.

The FCC also indicated that a fact-specific analysis would apply to allegations that a calling platform service is “is so involved in placing the call as to be deemed to have initiated it.” The FCC stated that it would consider a number of factors, such as whether the service is offering Caller-ID blocking or phone-number-spoofing “functionality” to its customers and whether the service “knowingly allow[s] its client(s) to use that platform for unlawful purposes.”

The FCC also addressed collect-call services using prerecorded messages. The TCPA also forbids certain types of calls made using artificial or prerecorded voices. Some collect-call providers use prerecorded messages as part of the process of connecting a collect call, and so asked the FCC for clarification that the user—and not the company itself—is the “calling party” with respect to those prerecorded messages. The FCC agreed, concluding that “[i]t is the user of such services” that is the “calling party” for purposes of the TCPA.

### Safe Harbor for One-Time Text Messages Responding to Requests for Information

Another issue that has been the subject of considerable TCPA litigation is the treatment of one-time texts sent to consumers in response to a request for the text. For example, the FCC explained, “a consumer might see an advertisement” and “respond by texting ‘discount’ to the retailer, who responds by texting a coupon to the consumer.”

The FCC concluded that these messages do not constitute “telemarketing” forbidden by the TCPA. Accordingly, the senders of these messages can rely on “the consumer's initiating text” as “consent” to the “informational reply in fulfillment of the consumer request.” The FCC clarified that to be exempt from liability, these texts must: (1) be “requested by the consumer”; (2) be “one-time only messages sent *immediately* in response to a specific consumer request”; and (3) consist of only the requested information “with no other marketing or advertising information.”

### Exemptions for Calls and Texts regarding Bank Fraud and Healthcare Emergencies

The TCPA authorizes the FCC to exempt certain autodialed calls to wireless numbers from liability if the consumer is not charged for the call. *See* 47 U.S.C. § 227(b)(2)(C). In response to

requests, the FCC created exemptions for certain time-sensitive calls.

First, the FCC exempted calls to consumers from financial institutions regarding suspicious fraudulent transactions, identity theft, data-security breaches, and money transfers about steps that must be taken in order to receive funds.

Second, the FCC exempted HIPAA-regulated healthcare calls made by healthcare providers to patients, so long as the call is “closely related to the purpose for which the telephone number was originally provided.” The exemption also covers calls for which “there is exigency and that have a healthcare treatment purpose,” such as “appointment and exam confirmations and reminders” and related topics. In addition, if a patient is incapacitated, the FCC clarified that a third party may consent to the healthcare provider’s sending of HIPAA-regulated healthcare calls.

The FCC also imposed limitations on the scope of these exemptions. For example, these calls and texts must omit all “marketing or advertising” and “include information regarding how to opt out of future messages.” And the FCC limited the banking exemption to “not more than three calls over a three-day period” and the healthcare exemption to one call or text message per day (up to three calls or messages combined per week).

### Call-Blocking Technology

Finally, the FCC confirmed that nothing in the Communications Act or the FCC’s rules or orders “prohibits carriers or VoIP providers from implementing call-blocking technology” to help consumers stop unwanted “robocalls.” For example, carriers may—at a consumer’s request—block “individual calls or categories of incoming calls that may be part of a mass unsolicited calling event” or that “originat[e] from a source” identified by the consumer. But the FCC did not specifically endorse any

particular method of blocking calls. Nor did it discuss the capabilities of call-blocking technologies.

Some commentators had expressed concern that call-blocking technologies would be overinclusive. The FCC concluded that so long as consumers are given disclosures about the risk of blocking desired calls at the time they opt in for use of these services, carriers may nonetheless use potentially overinclusive call-blocking technologies.

### Conclusion

In a number of ways, the FCC’s ruling greatly expands the potential liability under the TCPA for businesses that use phone calls or text messages to communicate with consumers or employees, or that offer services that allow users to send calls or text messages. Barring a stay pending the resolution of any legal challenges to the ruling—and several petitions for review already have been filed—these new interpretations of the TCPA became effective on July 10, 2015.

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