

# Client Update

## FCC Declaratory Rulings on TCPA Impose More Stringent Compliance Requirements

### NEW YORK

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On June 18, in response to 21 petitions filed by companies and trade associations requesting relief from and clarification of elements of the Telephone Consumer Protection Act of 1991 (“TCPA”), the Federal Communications Commission (“FCC”) adopted a package of declaratory rulings (collectively, the “Rulings”) that increase the compliance risk faced by companies that use automatic dialing technology. The Rulings, which as of this writing have not yet been made public, address several issues, clarifying, among other things: (i) the permissibility of call-block technology; (ii) revocation of consent to receive automated calls and text messages; (iii) liability for calling a reassigned telephone number; (iv) the definition of an “autodialer”; and (v) when urgent circumstances permit limited exceptions to the TCPA’s consent requirement, such as when the need arises to apprise an individual of time-sensitive information related to medical care or identity theft. While the Rulings apply to a broad range of companies, those in the healthcare, pharmacy management, Internet-based technology and financial services sectors are likely to be especially affected by the FCC’s Rulings.

Below, we describe the environment that gave rise to the Rulings and the Rulings’ key elements and implications. We also highlight some areas of uncertainty that remain.

### BACKGROUND

The TCPA is designed to protect consumers from unwanted telephone calls and text messages. Applying to both residential telephone lines and cellular phones, the TCPA strictly regulates the use of “automatic telephone dialing systems,” also called autodialers, which are defined as equipment with the capacity “to store or produce telephone numbers to be called, using a random or sequential number generator” and to dial those numbers.<sup>1</sup> Except for calls made for

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<sup>1</sup> 47 U.S.C. § 227(a)(1) (2012).

emergency purposes or with prior express consent from the person receiving the call, the TCPA bars the use of an autodialer to make a telephone call to (i) a residential telephone, if the call uses an artificial or pre-recorded voice, or (ii) a cellular telephone.

Penalties for violating the TCPA range from \$500 for unintentional violations to \$1,500 for willing or knowing violations, with each prohibited call constituting a separate violation. As there is no statutory cap on damages, TCPA litigation has the potential to result in staggering damage awards. Moreover, the possibility of high fees for plaintiffs' attorneys has contributed to a steep rise in the prosecution of individual and class-based claims.

The combination of significant litigation risk and potentially ruinous damages has led to a litany of petitions seeking to have the FCC clarify the law and exempt certain conduct from the TCPA's prohibitions. Of particular importance to the financial services industry, the American Bankers Association ("ABA") last fall filed a petition seeking exemption from the TCPA's prohibition on the use of autodialers to call cellular telephones for the purpose of providing: (i) alerts of transactions and events suggesting a risk of fraud or identity theft; (ii) notifications of possible breaches of the security of customers' personal information; (iii) descriptions of steps customers might take to prevent or mitigate harm caused by data security breaches; and (iv) information regarding the actions required to arrange for receipt of pending money transfers. In comments on the ABA's petition, the Internet Association, which represents leading Internet companies, likewise referred to the need for the increased use of automated messaging to alert customers of takeover attacks that might involve unauthorized access to customer data.

Financial institutions are in the difficult position of balancing the desire to inform customers of suspicious account activity and other time-sensitive information with the potential cost of TCPA litigation due to their use of autodialers and automated messages. Although the benefits to customers of receiving such information would seem obvious, the manner in which the FCC appears to have resolved the ABA petition along with related requests for relief appears to leave open some issues and require, at a minimum, careful analysis of the Rulings when they are ultimately published.

## KEY ELEMENTS OF THE RULINGS

Official statements and press releases indicate that the following are some of the key clarifications included in the Rulings:

- *Urgent circumstances*: “[T]ime-sensitive calls about consumer healthcare and bank accounts” are allowed without prior consent, provided they are made at no cost to the customer.<sup>2</sup> Customers retain the right to opt out from these permitted calls and text messages at any time. Additionally, such calls must be free of marketing or debt collection content. While the FCC specifically noted that calls and text messages to alert customers to possible fraud on their bank accounts are exempt from the prohibition on the use of autodialers to call cellular telephones, it remains unclear whether the other exemptions requested by the ABA have been granted by the Rulings.<sup>3</sup>
- *Reassigned numbers*: If a customer consents to receive automated calls and text messages and that customer’s phone number is later reassigned to a customer who has not consented to such calls and messages, companies may call that number only one time before facing liability for violating the TCPA. This “one strike rule” has potentially serious implications, as there is currently no centralized database tracking the estimated 100,000 telephone numbers reassigned daily, and there is no requirement that the caller know or have reason to know that the number has been reassigned before liability attaches.<sup>4</sup>

Additionally, the FCC provided the following interpretations to address uncertainties in the application of the TCPA:

- *Call-blocking technology*: There is no legal impediment to telephone service providers offering technologies to customers that block automated calls. This clarification appears to be part of the FCC’s goal of encouraging service providers to develop and implement market-based solutions to reduce unwanted calls.
- *Revocation of consent*: Customers who have consented to receive automated calls and text messages have the right to revoke their consent in any reasonable way at any time. Future clarification on what constitutes a

<sup>2</sup> Statement of Chairman Tom Wheeler, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, WC Docket No. 07-135.

<sup>3</sup> See Press Release, Federal Communications Commission, FCC Strengthens Consumer Protections Against Unwanted Calls and Texts (June 18, 2015), available at <https://www.fcc.gov/document/fcc-strengthens-consumer-protections-against-unwanted-calls-and-texts>.

<sup>4</sup> See Statement of Commissioner Michael O’Rielly, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, WC Docket No. 07-135, at 2 (dissenting).

“reasonable way” to revoke consent will be necessary to fully understand and implement this element of the Rulings.

- Several clarifications were made related to the use of applications and text messaging, including the following: (i) a customer whose name is in the contacts list of an acquaintance’s phone does not consent to receive automated calls from third-party applications downloaded by the acquaintance; (ii) a provider of messaging applications that does not have a role in determining the content of messages is not the maker of a call for TCPA purposes; (iii) equipment used to send Internet-to-phone text messages is considered an autodialer, which requires customer consent before use; and (iv) customers are entitled to the same consent-based protections for text messages as they are for voice calls to cellular telephone numbers.

## IMPLICATIONS

Although the full scope of the Rulings will be clear only when the text is released, it is apparent that they are intended to significantly strengthen consumer protection under the TCPA. In light of these developments, we recommend that clients carefully review their policies and procedures to reflect the requirements noted above and to ensure continued compliance with the TCPA. Additionally, companies that may wish to seek either judicial review or reconsideration by the FCC should note that the deadline to take such action may be as soon as 30 days after publication of the Rulings or Public Notice thereof.

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Please do not hesitate to contact us with any questions.