

July 16, 2015

On July 10, 2015, the Federal Communications Commission (FCC or Commission) released an order that purports to respond to numerous different petitions asking the agency for clarification regarding the federal Telephone Consumer Protection Act (TCPA) and the FCC's previously issued rules and orders regarding the TCPA.<sup>1</sup>

First enacted in 1991 and the subject of frequent litigation, the TCPA (among other things) regulates marketing calls (including the establishment of the federal Do Not Call list), use of automated equipment to make calls, use of automated or pre-recorded voices during calls and the means and manner of sending facsimile communications. Certain violations of the TCPA can carry statutory damages of \$500, which may be trebled in the instance of a willful or knowing violation.<sup>2</sup>

The FCC's recent order is likely of particular interest to companies that communicate with their current and prospective customers by telephone or text message and also by providers of smart phone applications (apps) that allow users to send text messages to other people. An overview of key findings follows.

## Definition of autodialer

Among other restrictions, the TCPA regulates the use of an "automatic telephone dialing system" (an autodialer or ATDS) when making calls<sup>3</sup> to "any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call," requiring that before an ATDS is used to call such a number the "called party" must provide "prior express consent" for the call.<sup>4</sup> 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 number generator; and (B) to dial such numbers."<sup>5</sup> In the July 2015 Order, the FCC "reaffirmed" that equipment meets the ATDS definition "even if it is not presently used for that purpose, including when the caller is calling a set list of consumers."<sup>6</sup>

The FCC elaborated that:

- "[T]he Commission has also long held that the basic functions of an autodialer are to 'dial numbers without human intervention' and to 'dial thousands of numbers in a short period of time.' How 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, and is therefore a case-by-case determination."<sup>7</sup>
- "[A]lthough the Commission has found that a piece of equipment can possess the requisite 'capacity' to satisfy the statutory definition of 'autodialer' even if, for example, it requires the addition of software to actually perform the functions described in the definition, there must be more than a theoretical potential that the equipment could be modified to satisfy the 'autodialer' definition. Thus, for example, it might be theoretically possible to modify a rotary-dial phone to such an extreme that it would satisfy the definition of 'autodialer,' but such a possibility is too attenuated for us to find that a rotary-dial phone has the requisite 'capacity' and therefore is an autodialer."<sup>8</sup>
- In response to certain companies' petitions, which were concerned "that a broad interpretation of 'capacity' could potentially sweep in smartphones because they may have the capacity to store telephone numbers to be called and to dial such numbers through the use of an app or other software," the FCC stated that "there is no evidence in the record that individual consumers have been sued based on typical use of smartphone technology" but that "[w]e will continue to monitor our consumer complaints and other feedback, as well as private litigation, regarding atypical uses of smartphones, and provide additional clarification if

necessary."<sup>9</sup>

- "[W]e clarify that the equipment used to send Internet-to-phone text messages ... is an autodialer under the TCPA."<sup>10</sup>

## Initiator of the call

The FCC has previously stated that liability under the TCPA attaches to a person or entity that "initiates" a call in violation of the TCPA's restrictions. In 2013, the FCC stated that "a person or entity 'initiates' a telephone call when it takes the steps necessary to physically place a telephone call, and generally does not include persons or entities, such as third-party retailers, that might merely have some role, however minor, in the causal chain that results in the making of a telephone call."<sup>11</sup>

Several smartphone app providers sought clarification from the FCC that an app provider does not initiate calls by creating an app that can send text messages to persons included in the app user's smartphone contact list.<sup>12</sup>

In response, the FCC provided the following guidance on the issue of whether a given entity "initiates" a call under the TCPA:

- The FCC stated that it is appropriate to "look to the totality of the facts and circumstances surrounding the placing of a particular call 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, considering the goals and purposes of the TCPA."<sup>13</sup> The FCC also noted "other factors" could be relevant, such as "the extent to which a person willfully enables fraudulent spoofing of telephone numbers or assists telemarketers in blocking Caller ID, by offering either functionality to clients" and "whether a person who offers a calling platform service for the use of others has knowingly allowed its client(s) to use that platform for unlawful purposes...."<sup>14</sup>
- Illustratively, the FCC found that the provider of an app that enables users to automatically send a reactive text in response to a voice message was not the entity that initiated the call where the provider "exercises no discernible involvement in deciding whether, when, or to whom an auto-reply is sent, or what such an auto reply says, nor perform[s] related functions, such as pre-setting options in the app, that physically cause auto-replies to be sent."<sup>15</sup>
- The FCC also found that an app provider was not the initiator of an invitational text (*i.e.*, a text asking persons to download its app) where "[a]n app user must: (1) tap a button that reads 'invite your friends'; (2) choose whether to 'invite all their friends or individually select contacts'; and (3) choose to send the invitational text message by selecting another button." <sup>16</sup>
- Conversely, the FCC stated that a provider of an application that "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" would "be deemed to have made or initiated" the messages.<sup>17</sup>

## Consent to receive messages, the ability to revoke consent and consent in the context of reassigned numbers

As noted earlier in the Alert, the TCPA requires "prior express consent" when calling certain types of telephone numbers using an ATDS. In its July 2015 Order, the FCC clarified several issues regarding the issue of consent:

- "[N]either the Commission's rules nor its orders require any specific method by which a caller must obtain such prior express consent.... [T]he TCPA does not prohibit a caller from obtaining a consumer's prior express consent through an intermediary."<sup>18</sup> However, "the 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 prerecorded calls, including texts."<sup>19</sup>
- "[C]onsumers have a right to revoke consent, using any reasonable method including orally or in writing."<sup>20</sup>
- "We clarify that porting a telephone number from wireline service to wireless service does not revoke prior express consent."<sup>21</sup>
- "We clarify that the TCPA requires the consent not of the intended recipient of a call, but of the current subscriber (or non-

subscriber customary user of the phone). . . . [C]allers 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 and cease future calls to the new subscriber. If this one additional call does not yield actual knowledge of reassignment, we deem the caller to have constructive knowledge of such."<sup>22</sup> Additionally, "for purposes of . . . the one-additional-call opportunity for obtaining actual or constructive knowledge of the reassignment of a wireless number, a single caller includes any company affiliates, including subsidiaries. . . . In other words, two affiliated entities may not make one call each, but rather one call in total."<sup>23</sup>

- "We find that a one-time text message sent immediately after a consumer's request for the text does not violate the TCPA and our rules."<sup>24</sup>

## Meaning of "prior express written consent"

The FCC previously adopted regulations, which took effect in October 2013, which for the first time state that when a call is made for "telemarketing" purposes and with an ATDS, "prior express *written* consent" must be obtained, not just "prior express consent."<sup>25</sup> The 2013 regulations define "prior express written consent" to mean "an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered."<sup>26</sup> Under the 2013 regulations "[t]he written agreement shall include a clear and conspicuous disclosure informing the person signing that: (A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and (B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services."<sup>27</sup>

In its recent order, the FCC clarified whether consent obtained prior to October 2013 that was in writing but that did not contain the wording of the defined terms in the new regulation would satisfy the regulations.

- When issuing the October 2013 regulations, the FCC stated: "[o]nce our written consent rules become effective . . . an entity will no longer be able to rely on non-written forms of express consent to make autodialed or prerecorded voice telemarketing calls, and thus could be liable for making such calls *absent prior written consent*."<sup>28</sup>
- In the recent Order the FCC acknowledged "that the italicized language could have reasonably been interpreted to mean that written consent obtained prior to the current rule's effective date would remain valid even if it does not satisfy the current rule."<sup>29</sup>
- As such, the FCC stated that "[w]e clarify that our prior-express-written-consent requirements apply for each call made to a wireless number . . . [and] telemarketers should not rely on a consumer's written consent obtained before the current rule took effect if that consent does satisfy the current rule."<sup>30</sup>
- However, the FCC stated that "to enable parties to obtain new consents under the new rule without running the risk of being subjected to pointless and expensive class action litigation" it was granting "Petitioners (including their members as of the release date of this Declaratory Ruling) a retroactive waiver from October 16, 2013. . . . [until] 89 days following release of this Declaratory Ruling . . . to obtain the prior express written consent required by the current rule."<sup>31</sup>

## Informational calls

The TCPA permits the FCC to exempt from the TCPA's consent requirement calls to cellular phones when the recipient is not charged for the call, "subject to conditions the Commission may prescribe 'as necessary in the interest of' consumer privacy rights."<sup>32</sup> In the July 2015 Order, the FCC exempted from the TCPA's prior express consent requirement a limited set of free-to-the-consumer, financial and health-related messages. For financial information, the FCC adopted several conditions including barring

any form of marketing or debt collection material as part of the message; limiting such messages to not more than three calls over a 3-day period; and implementing opt out mechanisms.<sup>33</sup> Similar conditions apply to a specified set of health-related messages. For example, health care providers may initiate only one message (whether by voice call or text message) per day, up to a maximum of three voice calls or text messages combined per week.<sup>34</sup>

## The bottom line—compliance review

**Companies utilizing technology to communicate with customers and other individuals should ensure that they are fully compliant with the TCPA.** Our team has a great deal of experience on the forefront of these counseling and class action litigation issues. If you would like to discuss these issues further or have questions about this *Alert*, please contact one of the attorneys listed above.

### NOTES

1. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, --- FCC Rcd ---, (July 10, 2015), ([the July 2015 Order](#)).
2. 47 U.S.C. § 227(b)(3).
3. Some courts and the FCC have found that a "call" under the TCPA includes a text message. July 2015 Order at ¶27 & fn. 93 (citing, e.g., *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009)).
4. 47 U.S.C. § 227(b)(1)(A)(iii).
5. 47 U.S.C. § 227(a)(1).
6. July 2015 Order at ¶10.
7. *Id.* at ¶17 (quoting *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14092 ¶¶ 132–33 (2003) (2003 TPCA Order)).
8. *Id.* at ¶18 (quoting 2003 TCPA Order 18 FCC Rcd at 14091–93 ¶ 2 fn. 5).
9. *Id.* at ¶21.
10. *Id.* at ¶108.
11. *Id.* at ¶27 (quoting *In the Matter of the Joint Petition Filed By Dish Network LLC, The U.S. of Am., and the States of Cal., Ill., N.C., and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, 28 FCC Rcd. 6574, 6583 ¶ 26 (2013)).
12. *Id.* at ¶28.
13. *Id.* at ¶30.
14. *Id.*
15. *Id.* at ¶31–32.
16. *Id.* at ¶36.
17. *Id.* at ¶35.
18. *Id.* at ¶49.
19. *Id.* at ¶47.
20. *Id.* at ¶64.
21. *Id.* at ¶54.

22. *Id.* at ¶72. See also *id.* at ¶95 ("Neither the TCPA nor our related rules place any affirmative obligation on the user of a wireless number to inform all potential callers when that number is relinquished or reassigned; uninvolved new users of reassigned numbers are not obligated under the TCPA or our rules to answer every call, nor are they required to contact each caller to opt out in order to stop further calls.").
23. *Id.* at ¶72 fn. 261.
24. *Id.* at ¶103.
25. 47 CFR § 64.1200(a)(2)
26. 47 C.F.R. § 64.1200(f)(8).
27. 47 CFR § 64.1200(f)(8)(i).
28. July 2015 Order at ¶101 (quoting *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1857, ¶68 (2012)).
29. *Id.*
30. *Id.* at ¶100.
31. *Id.* at ¶102.
32. *Id.* at ¶126 (quoting 47 U.S.C. § 227(b)(2)(C)).
33. *Id.* at ¶138.
34. *Id.* at ¶147.

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